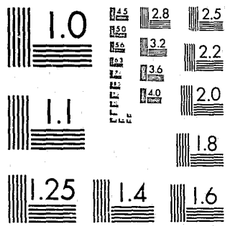

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Classification Instruments for Criminal Justice Decisions

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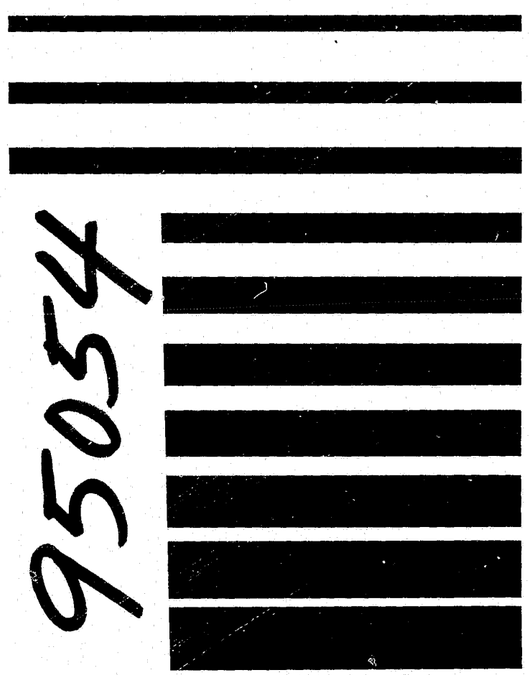

Legal Issues

LEGAL ISSUES

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LEGAL ISSUES

TABLE OF CONTENTS

LEGAL ISSUES IN CLASSIFICATION

Introduction

In the process of classification the practitioners of criminal justice, at whatever level, are continually faced with serious and far-reaching legal issues. Because the consequences of classification can be very serious, particularly for the person being classified, it is very important that the classification be done fairly, legally, and as objectively (or at least as dispassionately) as possible. Classifiers need to hold themselves as unbiased as possible. They need to be personally involved in the classification process without coloring the outcome of the process with their own personalities.

They need a formal, objective tool that will enable them to anticipate with a high degree of accuracy whether any given detainee or prisoner is an appropriate candidate for release, pre-trial diversion, specialized prosecution, probation or parole. This purpose is served, to varying degrees of success, by the various classification instruments now in use or under development. These instruments consist basically of blank forms or multiple choice questionnaires to be filled in with information regarding the residence, education, and employment background of the person being classified, his previous encounters with the criminal justice system, and other factors which the instruments' developers consider pertinent and important. The various factors are weighted according to their relative importance, and a critical score is established as a minimum objective basis for recommendation for release, diversion, probation, parole, etc.

Our goal in this volume is to examine some of the classification instruments now in use at several decision points in the criminal justice system and to provide a legal analysis of the issues involved that will be sufficiently complete and competent to be a useful guide and sufficiently concise to be a practically usable one.

Formal classification is carried out by a variety of practitioners in a variety of circumstances at a number of different times during a detainee/arrestee/defendant/convict/probationer/parolee/etc.'s progress through the criminal justice system. An individual in the process of this system might

be any or all of these, and as such be subject to classification a number of times. Since this is so, whatever classification instruments are used by the classifiers must be carefully designed, properly used, and scrupulously legal. Most policy issues that arise in classification involve legal knowledge or legal interpretation on the part of the classifier. Few, if any, classifiers are actually competent, in the technical, courtroom sense, to properly resolve these issues without considerable legal assistance.

The best--or at least most practical--such assistance readily available to many of these practitioners is a usable classification instrument that is based on practical research, standardized to the "state-of-the-law" and solidified by general acceptance in major courts and other criminal justice institutions.

Thus the task of the National Risk Assessment Survey's Legal Component was to search out existing or in-development classification instruments, examine and evaluate them, and pass on for more general use those that appear to be technically sound and legally well founded. Most of the Legal Component staff were involved in the project field research so that they could obtain a realistic and accurate legal and practical perspective on the various classification procedures used in the criminal justice systems, federal, state or local.

In order to accomplish their task the staff had to first determine the best approach to it. The traditional approach of many legal commentators was to search for new inroads into the various areas at legal issue. This approach seeks to anticipate new developments, to, as it were, expand the legal horizons. It is a very successful approach to the preparation of law review articles and other types of legal memoranda. Attorneys consider it the most exhaustive and worthy method of predicting the next legal question that is likely to be litigated.

But it tends to be more theoretical than immediately practical in its results. And most users of classification instruments are not attorneys. They are practitioners in the very practical sense of the word, and they need to know what is currently accepted as sound legal ground, not what may be well received in the future. They may be intellectually interested in an argumentative advocacy of a particular legal position, but to do their job on a day-to-day basis they need guidance from a practical, state-of-the-law perspective. This was the approach the Legal Component staff took, an overview of the law as it

stands today.

This overview attempts to give objective treatment to cases cited, addressing legal issues that have already been litigated in the classification decision area. Thus classification practitioners making use of this report are referred to useful precedents, whose questions are already settled. The practitioners can resolve their own questions reasonably comfortably and confidently in reliance on similar questions similarly resolved--and upheld by the courts.

In keeping with the practical approach geared to the needs of the practitioner rather than the more theoretical legal point of view the staff chose to concentrate primarily on the classification <u>process</u> itself. Legal issues then were discussed in detail as they arose within that context.

Another procedural point that arose in the preparation of this report was a question of balance. In some cases there was a need for a detailed treatment of similar legal issues at the discussion of each of several classification points. There was always, however, the necessity to keep the overall size of the report within usable limits. So there may be some redundancy; hopefully it is minimized. The staff did attempt to give each decision point a thorough analytical treatment, distinguishing variations in the application of the law at various stages in the criminal justice system.

The major purpose of this report, of course, is to alert practitioners engaging in formal classification activities to legal issues that may confront them as they make classification decisions. As these decision making practitioners recognize the issues and understand their ramifications they will be better able to use or adapt existing instruments or to develop new ones where new ones are needed.

Two of the most fundamental, as well as most recurrent, issues the practitioners will be faced with are "equal protection of the laws" and "due process." Since questions of equal protection and due process will come up so often and at so many different points in the criminal justice process the practitioner <u>must</u> have a solid understanding of these terms, particularly as they bear on his own task of classification.

The promise of equal protection[1] can be used as a sword to strike down governmental classifications that are discriminatory on their face or as applied to specific groups or individuals.[2] However, it is not an absolute bar to all governmental classifications which affect people differently. Instead, it requires as a minimum that classifications which affect people differently be reasonably related to a permissible governmental purpose. Governmental classifications are presumed to be reasonable. The presumption of reasonableness can be overcome, but the person challenging a governmental classification on equal protection grounds is at a definite disadvantage when the applicable standard is: Is the classification reasonably related to a legitimate governmental purpose? The government creating or maintaining the classification usually has little difficulty justifying its classification under this "rational basis" or "reasonable basis" standard. The Supreme Court has stated that "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[3]

Although the purpose of the Equal Protection Clause is to insure that "all persons similarly circumstanced shall be treated alike,"[4] the laxity of the rational basis standard accommodates governmental classifications which create or maintain inequalities.

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1. The source of the equal protection doctrine is the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment applies only to the states; it has no application to the federal government. However, the concepts of equal protection and due process run into one another at some point and become intertwined, and, consequently, the Due Process Clause of the Fifth Amendment (which is applicable to the federal government) contains the same principles of equal protection as the Equal Protection Clause of the Fourteenth Amendment. "(T)he concepts of equal protection and due process, both stemming from our American idea of fairness, are not mutually exclusive. . . (D)iscrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 74 S.Ct. 693, 694 (1954). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 96 S.Ct. 612, 670 (1976).

2. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 6 S.Ct. 1064, 1073 (1886).

3. McGowan v. Maryland, 81 S.Ct. 1101, 1105 (1961).

4. F. S. Royster Guano Co. v. Virginia, 40 S.Ct. 560, 562 (1920).

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Dandridge v. Williams, 90 S.Ct. 1153, 1161 (1970).

The rational basis test, however, is not the only test which can be applied in the equal protection context. The facts and circumstances sometimes require the application of a far more rigorous test known as the "strict scrutiny," "compelling necessity," or "compelling state interest" test. Under the rational basis test the advantage is with the government, but under the strict scrutiny test the advantage lies with the person challenging the governmental classification. The strict scrutiny standard is invoked when governmental classifications are based on a "suspect" category or when they impinge upon "fundamental" rights.

Classifications which the Supreme Court has characterized as suspect are those based on race, national ancestry, alienage, or possibly, sex. Fundamental rights include those expressly enumerated in the Constitution together with others implicitly contained therein[5] and possibly others created by legislation.[6] These fundamental rights are so crucial to a democratic society that their infringement should not be permitted except for the most compelling reasons. If the governmental classification is based upon a suspect category or impinges upon a fundamental right, it is afforded no presumption of validity and is examined with strict scrutiny by the court. For the classification to survive the government must demonstrate that the classification is necessary to further a compelling governmental interest[7] and that no less onerous means of promoting that interest is available.[8]

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5. e.g., the rights to vote, to procreate, to travel.

6. Meachum v. Fano, 96 S.Ct. 2532 (1976) and Wolff v. McDonnell, 94 S.Ct. 2963 (1974) indicate that a "fundamental right" may be created by legislation. San Antonio Ind. School District v. Rodriguez, 93 S.Ct. 1278 (1973) seems to indicate that only constitutionally protected rights invoke the strict scrutiny standard.

7. Shapiro v. Thompson, 89 S.Ct. 1322 (1969).

8. Dunn v. Blumstein, 92 S.Ct. 995 (1972).

In most cases the determination of which test to apply, rational basis or strict scrutiny, will also determine the question of whether the governmental classification violates equal protection. However, there has been some indication that there is a "newer equal protection" which demands stricter scrutiny of governmental activity under the rational basis test than traditionally has been afforded under that minimal test. The suggestion is that the rational basis test is a more flexible tool than has generally been supposed and that intensified scrutiny is possible under it. Any governmental classification which does not "substantially" further the governmental interest given as justification would fail under the intensified rational basis test. However, little conclusive case support exists for this newer equal protection concept. Therefore we submit that if the governmental interest which is given in justification of the classification is real, legitimate and articulated,[10] and if no suspect classifications or fundamental rights are involved, then the resolution of the question of whether the classification violates equal protection will continue to be determined by application of the traditional rational basis test.

The Due Process Clause of the Fifth Amendment provides that "No person shall be. . .deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment contains an identical clause. The Fifth Amendment is a limitation on federal governmental action, the Fourteenth on state governmental action. For most practitioners in the criminal justice system the due process principles which must be understood are those which guarantee the right to be heard. These principles are commonly called procedural due process. However, the concept of due process can also be used for the purpose of establishing substantive rights not specifically enumerated in the Constitution. This is the doctrine of substantive due process. During the early 1900's substantive due process was frequently used by the Supreme Court as justification for striking down legislation it disagreed with. The doctrine of substantive due

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9. The strict scrutiny test is not only strict in theory but it is also usually fatal in fact, whereas the rational basis test offers only minimal scrutiny in theory and virtually none in fact. See Gunther, Gerald, "The Supreme Court 1971 Term--Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harvard Law Review 1, 8 (1972).

10. McGinnis v. Royster, 93 S.Ct. 1055 (1973).

process has been in repose since the 1930's, but during the 1960's and 1970's the Court found a few unenumerated rights[11] which it felt worthy of special constitutional protection under a "new" substantive due process concept, e.g., the right to privacy and a woman's right to decide whether or not to terminate her pregnancy.[12] Governmental action which impinges upon these rights which the Constitution does not mention but nevertheless protects must pass the strict scrutiny test.

The paramount function of procedural due process is to afford an opportunity to be heard "at a meaningful time and in a meaningful manner" so that disputes can be resolved accurately and fairly.[13] The threshold question is: When do the due process guarantees attach? The constitutional language proscribes the deprivation of "life, liberty or property" without due process. The confines of the liberty interests and the property interests that trigger application of due process principles are difficult to draw.[14]

Liberty interests have been defined as "those privileges long recognized as essential to the orderly pursuit of happiness by free men."[15] In the most recent inquiry into the interests comprised by the concept of liberty the Supreme Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[16] Punishment prior to conviction deprives the individual who is being punished of his liberty without due process.

A property interest requires "a legitimate claim of entitlement" to a benefit. An abstract need or unilateral expectation is not enough. Board of Regents v. Roth, 92 S.Ct. 2701 (1972).

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11. Griswold v. Connecticut, 85 S.Ct. 1678 (1965).

12. Roe v. Wade, 93 S.Ct. 705 (1973).

13. Fuentes v. Shevin, 92 S.Ct. 1983 (1972).

14. "It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." Paul v. Davis, 96 S.Ct. 1155, 1165 (1976).

15. Meyer v. Nebraska, 43 S.Ct. 625 (1923).

16. Bell v. Wolfish, 99 S.Ct. 1861, 1872 (1979).

Both liberty and property interests attain constitutional status "by virtue of the fact that they have been initially recognized and protected by state law" (or federal law) or "because they are guaranteed in one of the provisions of the Bill of Rights."

Procedural due process applies whenever government "seeks to remove or significantly alter that protected status." Paul v. Davis, 96 S.Ct. 1155 (1976). It is the nature of the interest involved rather than its weight which triggers due process protection. "We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to involve the procedural protections of the Due Process Clause." Meachum v. Fano, 96 S.Ct. 2532, 2538 (1976). See also Board of Regents v. Roth, 92 S.Ct. 2701 (1972).

If a protected interest in liberty or property is involved, the question then becomes how much due process is required for that particular interest. "Once it is determined that due process applies, the question remains what process is due. It has been said by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 92 S.Ct. 2593, 2600 (1972). Some deprivations of liberty or property interests can be effected without a hearing in certain emergency situations[17] or when the losses can be characterized as "de minimis." (The Court has never clearly defined which losses are "de minimis.")

When the deprivation of a particular liberty or property interest requires "some kind of hearing" the question remains, what kind? The general proposition is that due process "calls for such procedural protections as the particular situation demands" and the type of hearing required is determined by a balancing of interests. The outcome of balancing the individual's interest against the government's interest and activities is that the deprivation of the particular protected interest invokes (1) no due process protection, (2) minimal due process protection, or (3) maximum due process protection.

An excellent illustration of a situation where deprivation of a constitutionally protected liberty interest required no due process protection is the case of Ingraham v. Wright, 97 S.Ct. 1401 (1977). In upholding the right of

17. Mitchell v. W.T. Grant Co., 94 S.Ct. 1895 (1974).

school administrators to utilize corporal punishment for disciplinary purposes the Court said:

> It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.
>
> This constitutionally protected liberty interest is at stake in this case. There is, of course, a de minimis level of imposition with which the Constitution is not concerned. But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated. 97 S.Ct., at 1414.
>
> . . .
>
> We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law. 97 S.Ct., at 1418.

An example of minimal due process is provided by the case of Goss v. Lopez, 95 S.Ct. 729 (1975). There the Court found that a ten-day suspension from school is not de minimis and may not be imposed in complete disregard of the Due Process Clause. However, all due process required in this situation was notice to the student of the charges against him and "an opportunity to present his side of the story." The Court justified its refusal to require more than minimal process in this context as follows:

> We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moveover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process. 95 S.Ct., at 740-741.

In Goldberg v. Kelly, 90 S.Ct. 1011 (1970), the Court ordered application of the maximum due process protection ever ordered outside the courtroom. In Goldberg the Court held that a welfare recipient is entitled to a full evidentiary hearing before his benefits can be terminated. Prescribed elements of the hearing include (1) timely notice detailing the reasons for the proposed termination of benefits, (2) an opportunity to confront adverse witnesses and

present evidence and arguments, (3) representation by retained counsel, if desired, (4) an impartial decisionmaker, (5) a ruling based strictly on the evidence presented at the hearing, and (6) a statement of reasons for that ruling. It should be noted that Goldberg has been narrowly confined. See Matthews v. Eldridge, 96 S.Ct. 893 (1976).

The present prevalent philosophy is to allow deprivation of constitutionally protected property or liberty interests prior to a full hearing if some minimal safeguards are afforded before the deprivation. The Goldberg Court emphasized the advantages of a full prior adversary hearing and disparaged the cost of such a hearing. The present Court does the opposite.

Important decisions must be made at several critical stages of the criminal justice process. We will discuss those decisions under six headings: Pre-trial Release; Prosecutorial Discretion; Sentencing; Institutional Custody Classification and Transfer; Parole Release; and Probation/Parole Supervision.

We will point out the principles of equal protection or due process or whatever other constitutional provision must be satisfied in making the decisions in the areas specified and will indicate whether the constitutional provision involved is likely to be infringed by the use of a classification instrument as an adjunct to making the decision.

PRE-TRIAL RELEASE

Introduction

No phase of the criminal justice process offers more support to the proposition that America has two systems of criminal justice--one for the rich and one for the poor--than does the pre-trial release phase. Although the law generally guarantees a right to release on bail except for capital offenses many people remain in jail pending trial.[1] Most are poor. Those who can make bail are released; those who can't remain in jail. Money is the sole determinant of who stays in jail and who is released under traditional money bail systems. Fortunately, alternatives[2] to traditional money bail systems have been proposed and utilized. In this part we want to focus[3] on one of these

1. In terms of the number of people affected each year, pre-trial custody accounts for more incarceration in the United States than does incarceration after sentencing. See the 1970 National Jail Census (Washington: LEAA, 1971) as quoted in National Advisory Commission, Task Force on Corrections 102 (1973).

2. Three alternatives deserve special mention: First, pre-trial diversion. Strictly speaking diversion is not an alternative to bail, but a means of release for selected defendants. Second, the use of a cite and release procedure similar to the traffic ticket procedure or the use of a summons to appear in lieu of arrest. And third, the use of a court administered bail system under which a defendant may post with the court a cash bond in an amount equal to 10% of the normal bail for the offense, which will be refunded to the defendant upon disposition of the case. For a discussion of alternatives see LaFave, Wayne. "Alternatives to the Present Bail System," 1965 University of Illinois Law Forum 8.

3. The focus of this discussion is intentionally narrow. It is directed at busy practitioners with responsibilities in the pre-trial release phase of prosecution. One of the authors served as a prosecuting attorney for a number of years during which he was deluged with many fine articles dealing with salient issues of the criminal process. Most of the articles were never read; time would not permit. We believe the situation is the same for most practitioners. Therefore we have attempted to limit our discussion to only those central issues with which the practitioner must be familiar. We have attempted to deal with them in a thorough and accurate manner and in a style with which the practitioner will feel comfortable. Above all, we have attempted to do it in as few pages as possible. For those with the time and interest to explore other issues in the subject area of pre-trial release we have included several of the outstanding references in the bibliography.

alternatives, release on own recognizance (ROR), and the legal implications of utilizing risk screening instruments as an aid to the judge in making the difficult decision of whom to release and whom to detain.

The Release Decision

Both the public and the defendant benefit when the defendant is not unnecessarily detained pending trial. Pre-trial release relieves the defendant of the burden of imprisonment[4] and the public of the financial burden of keeping him imprisoned.[5] On May 14, 1979, the Supreme Court handed down its decision in Bell v. Wolfish,[6] establishing precedent on confinement conditions for pre-trial inmates.

In Wolfish the Supreme Court recognized that the Constitution affords greater protection to pre-trial detainees than to convicted inmates, but not much. Convicted inmates may be punished; pre-trial detainees may not

4. The burden of imprisonment borne by a defendant awaiting trial involves more than just loss of freedom of movement and restriction of rights. Pre-trial detention precludes the defendant from presenting his best legal defense. He will probably not have the attorney of his choice, he will not be able to assist in the investigation, he will have to rely entirely on his attorney for securing his witnesses or other evidence, he will probably not have as many pre-trial consultations with his attorney, and overall he will probably have a worse attorney-client relationship than he would have had if he had been released. In addition, in some jurisdictions he will be led to and from court by an officer and will be dressed in distinctive jail clothing. Add up all of these disabilities, and the prejudice to his defense caused by detention is obvious. Furthermore, the disadvantages stemming from pre-trial detention are not limited to the trial phase; they are equally prejudicial in the sentencing phase. The pre-trial detainee can not build a good record for probation. He can't say he has been steadily employed, he can't say he has stayed out of trouble since his arrest, he can't say he has been supporting his family, and he may no longer be able to say he has a family or a marriage.

5. The financial burden of keeping pre-trial detainees is substantial: the cost of maintaining custody plus the cost of food, lodging, medical care and other required inmate services, and often the additional cost of welfare payments to detainees' families.

6. 99 S.Ct. 1861 (1979).

be.[7] To clothe this theoretical right not to be punished with any meaningful substance in the real world of jail operations is going to be no small feat. It is difficult to understand how pre-trial detainees are not being punished by incarceration. A jail sentence is a traditional form of punishment. When pre-trial detainees and sentenced inmates are subjected to identical conditions and restrictions of confinement, either both groups are being punished or neither group is being punished. If both groups are being punished, then the Constitution is offended because pre-trial detainees are being deprived of their liberty in violation of due process. If neither group is being punished, then the sentencing judge--and the public--are offended, because the sentenced inmates have not been made to feel the "bite" of our criminal laws.

Several other concepts from Wolfish are noteworthy for practitioners in the pre-trial release phase. First, defendants detained pending trial do not enjoy the same constitutional rights as defendants who are released. "A detainee simply does not possess the full range of freedoms of an unincarcerated individual." Bell v. Wolfish, 99 S.Ct., at 1878. Second, the presumption of innocence does not apply to pre-trial phases of criminal prosecutions.[8] Third, partial justification for the results

7. Conditions or restrictions of detention which constitute punishment of pre-trial detainees are unconstitutional because they deprive the detainees of liberty without due process of law. However, in order to prove that a correctional condition or restriction amounts to punishment (in the absence of an expressed intent to punish), the detainees have the burden of establishing that the condition or restriction is not reasonably related to a legitimate governmental purpose, or they have the "heavy" burden of showing that the condition or restriction is excessive in relation to that purpose.

8. The presumption of innocence "has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun." 99 S.Ct., at 1871. Thus the Court has relegated the presumption of innocence, often referred to as the basic tenet of American criminal justice, to the lesser role of evidentiary rule or jury instruction. Traditionally the presumption has played a loftier role: "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 72 S.Ct.1, at 3 (1951).

reached in Wolfish is found in the fact that the Bail Reform Act of 1966 established a liberal policy in favor of pre-trial release. (Under this Act, ideally implemented, the only defendants remaining in jail would be those whose presumptive unreliability justified their continued detention.) With these concepts in mind we turn now to a consideration of the rights and interests that must be balanced in making the release decision.

Balancing Rights and Interests

Although no constitutional right to bail exists,[9] federal statutes[10] and the constitutions, statutes, and court rules of the states generally provide for pre-trial release. Excessive bail is prohibited in the federal court system by the Eighth Amendment and by similar prohibitions in the constitutions and statutes of the various states. "Excessive bail" is bail set at an amount higher than reasonably necessary to insure[11] the presence of the defendant at trial. However, bail is not "excessive" when it is fixed in the amount "usually fixed" for the particular crime. No individualization of the amount of bail is required unless the amount of the bail set exceeds the amount usually fixed for the charge. See Stack v. Boyle, 72 S.Ct.1 (1951).

Section 3146 of the Bail Reform Act of 1966 states the test for ROR in terms of a single consideration, i.e., will the defendant appear for trial? In U.S. v. Leathers, 412 F.2d 169 (1969), the Court of Appeals for the District of Columbia Circuit interpreted this section of the Act, making it clear that in the Federal Court System, likelihood of appearance is the sole permissible consideration and that "pre-trial detention can not be premised upon an assessment of danger to the

9. Carlson v. Landon, 72 S.Ct. 525 (1952).

10. See Bail Reform Act of 1966, 18 U.S.C.A. Sec. 3146 et seq.

11. The underlying assumption that posting a given sum of money will insure the presence of a defendant at trial if he is likely to be convicted and if he is likely to go to prison for a long time is debatable--especially when the money to be forfeited for non-appearance is put up not by the defendant, but by a bail bondsman.

public should the accused be released."[12] See 412 F.2d, at 171.

In the state court system the states are divided on the issue of whether the judicial officer charged with making the release decision may consider dangerousness in addition to probability of appearance. The trend seems to be towards adoption of the single criterion of probability of appearance. During the past ten years three prestigious organizations[13] have published and promoted model pre-trial release procedures all three of which predicate the ROR decision on the sole criterion of likelihood of appearance in court. As states revise their criminal codes and rules of criminal procedure they will no doubt borrow heavily from these three models,[14] as several states already have. Nevertheless, though the law governing release may be clear, there is always the question of whether practice actually follows the law. It is unlikely that the potential danger to the public posed by pre-trial release of certain defendants will ever be ignored regardless of what the governing law is.[15]

12. Reasons for denying ROR must be specified in writing. (Rules of Appellate Procedure, rule 9(a)) But as a practical matter, how do you keep the federal magistrates and judges from considering the risk to the public of releasing certain defendants? Can't the detention of certain presumed dangerous individuals be justified (albeit sub silentio) on the grounds that if they are likely to inflict further harm upon society through criminal conduct, they are also unlikely to appear on no more than their promise to do so? On the subject of what can be considered in making the pre-trial release decision, it is interesting to note Justice Rehnquist's comment in Wolfish that on the record, the Court had "no occasion to consider whether any other governmental objectives may constitutionally justify pre-trial detention." That almost sounds like an invitation. See 99 S.Ct., at 1861, note 15.

13. American Bar Association (ABA), National Advisory Commission on Criminal Justice Standards and Goals (NAC), and National Conference of Commissioners on Uniform State Laws (NCCUSL).

14. ABA Standards Relating to Pre-trial Release; NAC Corrections, chapter 4; and NCCUSL Uniform Rules of Criminal Procedure, rule 341.

15. The sub rosa practice of considering danger to the public and articulating the denial of release in terms of unlikelihood of appearance is difficult to deal with. It is interesting to note that the Iowa courts deny more RORs than do the Vermont courts, and yet the Vermont judges may consider danger to the public and the Iowa judges may not. See Annot., 78 A.L.R. 3d 780 (1977).

Development of a Point System

In the early 1960's the Vera Foundation in New York City pioneered an O.R. release program geared to a point system. The Foundation developed a point scale which assigned a numerical value to various aspects of a defendant's life.[16] If a defendant scored enough points he was entitled to a recommendation for an O.R. release. The interesting fact that emerged after several years of operation was that the court appearance record of defendants released O.R. was at least as good as that of those released on monetary bail.

"Vera point system" O.R. release programs have been adopted in many jurisdictions, often with modifications. Although practice varies from state to state, the procedure is typically as follows: An ROR committee (a non-law enforcement agency) contacts the new arrestee and interviews him, utilizing the point scale in order to determine whether an O.R. release can be recommended. As a part of the interview the arrestee signs an agreement by which he promises to appear when requested, if released. The information obtained during the interview is verified, if possible. The defendant's criminal history, if any, and the police report for the present charge are obtained. All of this information is summarized in an O.R. release application and submitted with the application to a judge. The judge, of course, can deny the O.R. application even though the defendant has accumulated enough points to qualify for a recommendation for release. If the judge accepts the recommendation and approves the O.R. release, he enters a release order which sets forth the conditions of the release, the defendant's duty to make all court appearances, and the consequences of violating any of the conditions of release. The defendant may also be given an instruction sheet on court appearances and be telephoned by O.R. committee staff on the eve of scheduled court appearances. Overall, these point system O.R. release programs seem to be working well, with only minor operational and legal problems.

Legality of the Point System

Few constitutional or legal objections can be leveled at the use of risk screening instruments which utilize a point system as an aid to the judge in

16. See Figure 1.

Figure 1

Original Vera Point Scale - Manhattan Bail Project

To be recommended, defendant needs:
1. A New York area address where he can be reached, and
2. A total of five points from the following categories:

Interview	Verified	
		Prior Record
1	1	No convictions.
0	0	One misdemeanor conviction.
-1	-1	Two misdemeanor or one felony convictions.
-2	-2	Three or more misdemanor or two or more felony convictions.
		Family Ties (In New York area)
3	3	Lives in established family home and visits other family members (immediate family only).
2	2	Lives in established family home (immediate family).
		Employment or School
3	3	Present job 1 year or more, steadily.
2	2	Present job 4 months or present and prior 6 months.
1	1	Has present job which is still available. OR unemployed 3 months or less and 9 months or more prior job. OR Unemployment Compensation. OR Welfare.
3	3	Presently in school, attending regularly.
2	2	Out of school less than 6 months but employed, or in training.
1	1	Out of school 3 months or less, umemployed and not in training.
		Residence (In New York area steadily)
3	3	1 year at present residence.
2	2	1 year at present or last prior residence or 6 months at present residence.
1	1	6 months at present and last prior residence or in New York City 5 years or more.
		Discretion
+1	+1	Positive, over 65, attending hospital, appeared on some previous case.
-1	0	Negative - intoxicated - intention to leave jurisdiction.

TOTAL INTERVIEW POINTS

REC. NOT REC.
INTERVIEW VERIFIED
RECOMMENDED NOT RECOMMENDED

making the release decision. The possibility of any constitutional or legal objection being sustained by the courts is remote.[17] On the contrary the law apparently[18] favors the use of such instruments. In one case, Alberti v. Sheriff of Harris County, Texas, 406 F.Supp. 649 (1975), the judge actually ordered the adoption of a point system for the purpose of recommending O.R. releases. Several reasons support our conclusion that the use of risk screening devices is neither constitutionally nor legally objectionable.

First, the release decision is a judgment call solely within the province of the judge. The use of risk screening instruments doesn't change that. The judge can detain even though the instrument recommends release, and he can release even though the instrument recommends detention. The instrument serves merely as a means of informing the judge's discretion. Given the fact that judges have broad discretion in making the release decisions, given the fact that they can follow or ignore the recommendation of the risk screening instrument, and given the fact that few excessive bail cases reach the appellate courts,[19] the use of properly drawn risk screening instruments would appear to be a safe practice.

Second, a cornerstone of our system of criminal jurisprudence is individualized justice. However, in no phase of the criminal justice process is our commitment to individualized justice probably less apparent than in the pre-trial detention phase. Information about individual defendants is the sine qua non of individualized justice at this phase.[20] The use of risk screening instruments

17. Assuming, of course, that the instrument does not discriminate on the basis of race, national origin, alienage, or sex and assuming further that the criteria utilized are compatible with those set forth in the ABA and NAC standards. One other caution warrants special mention: The criteria utilized may include convictions; they should not include arrests not resulting in conviction. See Memard v. Mitchell, 430 F.2d 486, 494 (1970).

18. We say apparently because no major cases have been reported which deal with the legality of risk screening instruments, the criteria upon which they are based, or the weight given these criteria in such instruments.

19. Because so few excessive bail cases reach the appellate courts, the self-restraint and personal ethics of the judge become the only real controls. See "A Study of the Administration of Bail in New York City," 106 University of Pennsylvania Law Review, 696,705 at note 138 (1958).

20. "Of course, the keynote to successful administration of any system of bail is the adequacy of information upon which the decisions are based." Pannell v. United States, 320 F. 2d 698,702 (D.C. Cir. 1963) (Bazelon, C.J., concurring in part and dissenting in part).

may be the impetus for obtaining information that otherwise might not be obtained.

Third, the criteria which constitute the risk screening instruments are the same factors which must be considered under 18 U.S.C.A. Sections 3146 and the ABA and NAC standards. ABA Standard 5.1 (b) states:

> In determining whether there is a substantial risk of non-appearance, the judicial officer should take into account the following factors concerning the defendant:
>
> i. the length of his residence in the community;
> ii. his employment status and history and his financial condition;
> iii. his family ties and relationships;
> iv. his reputation, character and mental condition;
> v. his prior criminal record, including any record of prior release on recognizance or bail;
> vi. the identity of responsible members of the community who would vouch for defendant's reliability;
> vii. the nature of the offense presently charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and
> viii. any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Finally, the courts have approved[21] consideration of these factors and even emphasized[22] the importance of some. Therefore, inasmuch as no absolute right to bail is guaranteed by the Eighth Amendment, and inasmuch as the presumption of innocence confers no rights or benefits prior to trial, any constitutional attack on risk screening instruments would have to take the form of an equal

21. Allen v. United States, 386 F.2d 634 (1967)(Judicial discretion sustained unless unlawfully arbitrary or capricious; prior criminal record and employment status sustained as legitimate considerations). People v. Warden, Brooklyn House of Detention, 233 N.E.2d, 265 (1967), cert. denied, 88 S.Ct. 1093 (1968)(Nature of offense, possible penalty, pecuniary and social condition of defendant, general reputation and character, and strength of case all legitimate considerations).

22. White v. United States, 412 F.2d 145 (D.C. Cir. 1968)(Demonstrating the great weight some courts place upon stable community ties).

protection argument that the criteria of residence, employment, and education unlawfully discriminate against poor defendants. The disadvantage of the poor vis-a-vis the rich has never evoked much relief from the Court in the pre-trial context. Schilb v. Kuebel, 92 S.Ct. 479 (1971).[23]

A successful equal protection attack on the use of risk screening instruments is highly unlikely. No persuasive argument can be made that the classification of detainees and releasees is based upon suspect criteria. It can be argued that the classification affects the "fundamental" rights of detainees to liberty and a fair trial. However, notwithstanding Griffin v. Illinois,[24] in order to invoke the higher standard of strict scrutiny there must be absolute deprivation,[25] not merely an impairment, of a fundamental right. In the absence of a showing of such a deprivation, the lower, almost toothless, standard of rational basis applies. We are satisfied that the use of risk screening instruments as an aid in release determination can be justified as being "reasonably related to a legitimate governmental purpose."

In this section we have been concerned primarily with pre-trial release, but we can not ignore preventive detention, even though it is allowed in only a few jurisdictions. The sole consideration for pre-trial release in the federal court system and in most state court systems is likelihood of appearance at trial. However, several jurisdictions recognize potential harm to the public as an additional consideration, and a few jurisdictions[26] do in fact authorize preventive detention. In the jurisdictions that authorize preventive detention, either pursuant to a statute or under the inherent power of the court, a defendant is denied release because of the danger he poses to the public in general or to individuals, such as witnesses, in particular.

23. In Schilb the Court upheld the Illinois Bail Reform Statute. This statute authorizes the defendant to put up 10% of the bail fixed in order to secure release and authorizes the state to retain 1% of the bail fixed as "bail bond costs."

24. 76 S.Ct. 585 (1956). Griffin engendered great expectations of egalitarianism. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 76 S.Ct., at 591.

25. See San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278 (1973), where the Court upheld a legislative wealth classification which merely impaired the effective exercise of a fundamental right. Wealth classifications alone can not trigger strict scrutiny.

26. See Annot., 75 A.L.R. 3d 956 (1977).

As a part of President Nixon's get-tough-on-criminals campaign, Congress enacted a preventive detention statute for the District of Columbia.[27] The constitutionality of the statute was upheld in Blunt v. U.S., 322 A.2d 579 (1974). Again, given the facts of no federal constitutional right to bail, no presumption of innocence at the pre-trial stage and no state constitutional provision guaranteeing an absolute right to bail, the use of risk screening instruments in jurisdictions practicing preventive detention appears unobjectionable. Furthermore one of the major criticisms[28] leveled at the practice of preventive detention is the impossibility of predicting which defendants will be dangerous. Carefully drawn risk screening instruments which contain appropriate[29] criteria could assist judges considerably in distinguishing the dangerous from the non-dangerous.

27. D.C. Code 1973, Section 23-1322.

28. See Tribe, Lawrence. "An Ounce of Detention: Preventive Justice in the World of John Mitchell." 56 Virginia Law Review 371 (1970).

29. Appropriate criteria are essential if the risk screening instrument is going to have any value as a predictive device. Suggested appropriate criteria include the defendant's criminal history, especially the history of law violations while on conditional pre-trial release, probation, or parole, factors indicating a habitual course of misconduct in specified areas or conduct pointing to probable criminal conduct in the future, and any injury to, threats, or attempts to injure any witness or other person connected with the criminal prosecution.

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PROSECUTORIAL DISCRETION

Introduction

Citizen respect for the effectiveness of the criminal justice system may be at the lowest ebb of any time in the history of the United States. Crime rates, published periodically in the Uniform Crime Reports[1] by the Federal Bureau of Investigation, have risen steadily in recent years. The media, in their assault on the apparent inabilities of the system to prevent and control crime, have levied harsh criticism.

Recently the Institute for Law and Social Research (INSLAW) conducted a study of Superior Court cases in the District of Columbia. The results from this research (based on a review of 72,610 cases) indicated that as many as 25% of the crimes reported may have been committed by as few as 7% of all persons arrested.[2] These statistics have prompted a movement to prioritize (for specialized prosecution) the selection of individuals believed/known to have a history of serious criminal behavior. This prosecutorial selection process consists of rating defendants on offense and offender characteristics and then singling out the more serious cases for accelerated prosecution.

In 1973 the Bronx County District Attorney's Office in New York sought funds from the Law Enforcement Assistance Administration (LEAA) to establish a Major Offense Bureau (MOB) which would prosecute individuals charged with serious crimes and persons known to have long criminal histories. The objectives of the bureau were "to reduce delay in processing cases of major offenders; to increase the certainty and severity of punishment; and to restore a measure of confidence in the criminal justice system."[3] Practice under the MOB concept differs from that of jurisdictions which do not prioritize their cases for prosecution because MOB introduces specialization into the process. This specialization consists primarily of organizing the more experienced attorneys on the staff into a special bureau or division which then reviews serious cases in a systematic manner, identifying those cases that meet the

1. Uniform Crime Reports, Federal Bureau of Investigation, published by the U. S. Department of Justice, Washington, D.C. (1976).
2. The Major Offense Bureau, Bronx County District Attorney's Office NILECJ-LEAA-USDOJ (1977), page 1; Highlights of Interim Findings and Imolications, Institute for Law and Social Research NILECJ-LEAA-USDOJ (1977).
3. The Major Offense Bureau, Bronx County District Attorney's Office NILECJ-LEAA-USDOJ (1977), page 3.

MOB criteria. The lack of specialization in other jurisdictions is due in large part to crowded court dockets, a judicial system which may not facilitate speedy trial efforts, and a critical lack of resources to fund such programs. The Bronx MOB provides a good working example of the mechanics of prosecutorial discretion as it applies to case prioritization. Organizationally, the Bronx District Attorney's Office is divided into separate trial bureaus. These bureaus were established to prosecute specific types of felony (e.g., homicide, property crimes) and misdemeanor offenses. The introduction of MOB created a separate trial bureau to handle the more serious felony cases. This arrangement permits the experienced trial attorneys assigned to MOB to spend a concentrated period of time preparing a case for prosecution. Often good case preparation is dependent simply on having enough time to devote to the necessary research and investigation. The MOB concept meets this need by assigning small caseloads and providing adequate resources.

Other case prioritization programs, known commonly as Career Criminal Programs, exist in other parts of the country. In large part, they are very similar to the MOB concept. Some programs, however, alter the emphasis of the case selection process and focus more on the characteristics of the offender and his offense history, rather than give heavy emphasis to aspects of the instant offense, as recorded by the MOB. Such differences are evident in the Career Criminal Program case selection process, which does not stress the circumstances of the offense charged (victim injury, whether or not there was intimidation, whether a weapon was used or carried). Instead they simply take into account the number of prior convictions for crimes of a similar type (history of numerous burglaries, assaults, robberies, or some combination of a group of offenses).

The case prioritization programs were conceived to impact crime levels by focusing prosecution efforts on persons believed responsible for a significant portion of offenses reported. Most programs do not permit plea bargaining, though this practice was relied on heavily in past prosecution decisions, prior to initiation of the programs. These programs formalize the case selection process that prosecutors/district attorneys have used historically, while attempting to improve upon previous efforts by developing significant resources to develop specialized prosecution as a means of maximizing the conviction of serious offenders.

Diversion is another aspect of prosecutorial discretion. As commonly used by criminal justice practitioners, the term covers a variety of processes that take place prior to trial. When a police officer observes a juvenile breaking the law, often he will counsel and then release him; this has been called diversion. In addition to this practice, police departments have developed more formalized programs for diverting juveniles and adults from prosecution. Such programs may be employment oriented or may simply provide a counseling service to the offender in coping with his problems. Also, the courts now offer as a sentencing option more specialized diversion programs for drug offenders, sex offenders, etc.

Diversion programs more directly under the administration of the prosecutor come in a variety of formats in different parts of the country. Most are designed to offer lesser felony offenders and misdemeanants a treatment alternative in lieu of prosecution which could result in incarceration. Naturally, not all offenders qualify for diversion, and generally an active attempt is made to exclude persons whose personal and background characteristics are not conducive to the goals of the program.

Typical prosecutorial diversion programs do not use formal classification instruments such as were discussed in other sections of this report. Instead, eligibility is often determined simply by the offender not having been specifically excluded. Many diversion programs have adopted this practice because they have decided who they do not want to participate in treatment/training alternatives, rather than which offenders would be the best suited for rehabilitative service. However, a few programs were found that have adopted formal instruments for screening offenders.

Diversion Instruments; The Point Scale Revisited

Diversion programs that use formal instruments to determine eligibility have been found to be patterned after the point scale (see discussion in pre-trial release section). In the jurisdictions visited by this project, the diversion programs used the pre-trial release instrument as an initial screening device. If the offender (usually charged with a felony or serious misdemeanor) qualifies for ROR, he is automatically a candidate for diversion, which occurs later in the process. The criteria employed by the diversion programs for establishing initial eligibility are substantially

the same as those articulated in the pre-trial release discussion. The common elements are ones that find roots in the original Vera Foundation instrument developed in conjunction with the Manhattan Bail Project in New York. The criteria are (1) prior record, (2) family ties (i.e., living in established home or with other family members), (3) residence (i.e., number of years of steady residence within the jurisdiction), and (4) employment history. The scoring of the criteria gives credit for characteristics that are positive (such as steady employment and stable residence). Similarly, a negative point assignment is made for criminal convictions. Based on the evaluation, a score of +5 on the Vera point scale will qualify the individual for further consideration. Defendants who qualify on the scale are submitted to a second screening to determine whether there is some factor which would exclude the candidate. Common exclusionary criteria are:

- The charge being a serious felony,
- There being outstanding bench warrants,
- Another felony charge pending,
- One or more prior felony convictions,
- Current drug or alcohol use problem (except where the program specifically deals with this problem),
- Previous participation in a diversionary program.

If the defendant is not excluded by one of the above criteria, then the diversion selection and intake process begins.

Selection and Intake

Selection and intake procedures take place in conjunction with the prosecutorial decision of whether or not to seek an indictment.[4] While

4. "Pre-trial Diversion: The Thrust of Expanding Social Control," 10 Harvard Civil Rights and Civil Liberties Review 180 (Winter 1975).

diversion program staff are making the initial eligibility determination a representative from the prosecutor's office reviews the case to determine the likelihood of conviction and whether or not to proceed to trial.

Once an offender is identified as a suitable candidate for diversion, a brief interview is often held in the jail cell to secure the defendant's consent. Occasionally, for some jurisdictions, a long list of consensual endorsements is secured. The list may include the defense attorney, the victim, and the arresting police officer. When all of the preliminary approvals have been given, diversion program staff solicit the support of the prosecutor.

In some instances a jurisdiction may require the defendant to plead guilty to the offenses charged as a condition precedent to the prosecutorial consent (which results in gaining entrance to the diversion program). An admission of guilt in this instance would be viewed as the offender having accepted a "moral or personal responsibility for the alleged offense."[5]

In all jurisdictions the prosecutor has the discretion to initiate diversion as a prosecution alternative, and in some localities he has the final say as to whether diversion will be permitted. However, in the majority of jurisdictions it appears that final approval to divert rests with the judge, because such action is viewed as an official disposition of the case. Judicial permission to proceed will result in a defendant entering a diversion program where rehabilitation is the major objective.

Case Selection: Pre-trial Screening

If a case is to be prosecuted, there is still considerable room for discretion, exercised now directly or under the supervision of the prosecutor or his staff. Whether or not serious offenders are selected for specialized prosecution depends in large part on the efforts of law enforcement agencies within the jurisdiction. Once an arrest has been made, a police officer is assigned to investigate the case and to accumulate supporting evidence for the

5. Roth, Carole, Pretrial Intervention Legal Issues. American Bar Association (February, 1977).

prosecution. This investigative process involves locating witnesses and securing statements, gathering all physical evidence pertinent to the offense (e.g., location of a weapon used in a homicide), obtaining photographs of the crime scene, dusting for fingerprints, obtaining results from all laboratory tests, and so forth.

Once the investigating officer is confident that there is sufficient evidence to warrant acceptance of the case by the prosecution, he submits the case folder to his supervisor for review. When the supervisor is satisfied that the case has been adequately prepared, he sends it to an assistant district attorney for review and prosecution.

Jurisdictions that employ formal case prioritization instruments[6] as part of a Major Offense or Career Criminal Program have established special screening activities to rate cases for accelerated prosecution. In the Major Offense Program, case screening consists of an initial review by a duty clerk (non-attorney). If the case lists a serious charge (homicide, rape, robbery), the case is scored on a form developed by the National Center for Prosecution Management (see Figure 1) to determine whether it qualifies for prioritization. If the case is viewed as serious, the screeners assign points to factors related to the offense and to the characteristics of the defendant. These two information categories require a rating of attributes indicative of violent and/or numerous criminal acts. For example, points are assigned if there was a victim, an injury, intimidation, a weapon carried or used, property stolen, and so forth. Similarly, an assessment is made of prior conviction and arrest records, and the probation/parole status of the defendant at the time of arrest. Also, a defendant may be automatically referred to the MOB if the offense falls into one of the following categories:

- Forcible sexual offenses between unrelated parties,
- Arson with substantial damage or high potential for injury,
- Child abuse, child seven or under,

6. A formal case prioritization instrument refers to an evaluation form that has explicit, written criteria that are weighted and combined in a logical manner to arrive at an eligibility score.

Figure 1

BRONX CASE EVALUATION

DOCKET NO. _____ INDICTMENT NO. _____

PEOPLE v. _____ CHARGE _____ DATE _____

Please record those points which apply to your case. - Where there are multiple defendants, compute a base on the defendant with the most serious offense(s).

A. NATURE OF CASE	check if applicable	pts.
VICTIM		
one or more persons	☐	2.0
VICTIM INJURY		
received minor injury	☐	2.4
treated and released	☐	3.0
hospitalized	☐	4.2
INTIMIDATION		
one or more persons	☐	1.3
WEAPON		
defendant armed	☐	7.4
defendant fired shot or carried gun, or carried explosives	☐	15.7
STOLEN PROPERTY		
any value	☐	7.5
PRIOR RELATIONSHIP		
victim and defendant - same family	☐	−2.8
ARREST		
at scene	☐	4.6
within 24 hours	☐	2.9
EVIDENCE		
admission or statement	☐	1.4
additional witnesses	☐	3.1
IDENTIFICATION		
line-up	☐	3.3
TOTAL CASE SCORE		____

B. NATURE OF DEFENDANT		
FELONY CONVICTIONS		
one	☐	9.7
more than one	☐	18.7
MISDEMEANOR CONVICTIONS		
one	☐	3.6
more than one	☐	8.3
PRIOR ARRESTS - SAME CHARGE		
one	☐	4.5
more than	☐	7.2
PRIOR ARRESTS		
one	☐	2.2
more than one	☐	4.2
PRIOR ARREST-WEAPONS TOP CHARGE		
more than one	☐	6.4
STATUS WHEN ARRESTED		
state parole	☐	7.1
wanted	☐	4.2
TOTAL DEFENDANT SCORE		____

C. REFER TO M.O.B. IF ANY OF THE FOLLOWING CONDITIONS APPLY:
(check those applicable-offense is most serious charge)

- ☐ FORCIBLE SEXUAL OFFENSES BETWEEN UNRELATED PARTIES
- ☐ ARSON WITH SUBSTANTIAL DAMAGE OR HIGH POTENTIAL FOR INJURY
- ☐ CHILD ABUSE, CHILD SEVEN OR UNDER
- ☐ MULTIPLE ROBBERIES OR BURGLARIES

D. SUMMARY INFORMATION

NO. OF VICTIMS _____
- ☐ received minor injury
- ☐ treated and hospitalized
- ☐ hospitalized and/or permanent injury
- ☐ law officer
- ☐ attempted murder of officer

WEAPON
- ☐ gun
- ☐ knife
- ☐ bomb or explosive
- ☐ other _____

BURGLARY
- ☐ night-time
- ☐ evidence of forcible entry
- ☐ Church, School, Public Bldg.
- ☐ no. of premises burglarized

VALUE OF STOLEN PROPERTY	recovered	not
☐ under $250	☐	☐
☐ $250 to $1499	☐	☐
☐ $1500 to $25,000	☐	☐
☐ over $25,000	☐	☐

PRIOR RELATIONSHIP
- ☐ other family
- ☐ neighbor
- ☐ friend
- ☐ acquaintance
- ☐ other

IDENTIFICATION
- ☐ photograph
- ☐ on or nearby scene
- ☐ other
- ☐ no. of persons making I.D. _____
- ☐ time delay of I.D. _____

SUPPORTING EVIDENCE
- ☐ crime observed by police officer
- ☐ fingerprints recovered

E. DISTRICT ATTORNEY'S EVALUATION _____

TOTAL SCORE _____

RANKING CLERK _____

A.D.A. NOTICED yes☐ no☐

ACTION BY A.D.A.:
- ☐ accepted ☐ furthered
- ☐ rejected ☐ referred to M.O.B.

reasons: _____

- Multiple robberies or burglaries.

If the defendant scores 15 points or more, the case is then reviewed by an assistant district attorney, who examines it in more detail to determine whether its elements can be proven by the evidence available. Naturally, this determination will be subjective and requires a heavy reliance on past experience.

If the case qualifies for accelerated prosecution and is to be pursued, arrangements are made for a grand jury hearing, often within 24 to 72 hours of arrest. Final acceptance of the case is contingent on a record check. If the case is accepted, then the assistant district attorney assigned will appear at criminal court to direct the filing process and preliminary arraignment.

The Career Criminal Programs follow substantially the same process, although using slightly different criteria for case acceptance. For example, one jurisdiction determines eligibility if (1) a defendant has been charged with five or more offenses with convictions on at least three, and (2) if two of the offenses committed have been felonies. A defendant with these characteristics qualifies for specialized prosecution and will become the subject of a case prioritization program.

Prosecutorial Discretion

Although judicial controls over prosecutorial discretion[7] are minimal, non-judicial advice is plentiful. The American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals have suggested solutions for abuses of prosecutorial discretion in their respective standards, and the academicians have offered their advice in countless law review articles. Even the President's Commission on Law Enforcement and Administration of Justice has offered some advice:

7. Professor LaFave has suggested that the discretion vested in a prosecutor was appropriately defined by Professor Davis as follows: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." See LaFave, Wayne R., "The Prosecutor's Discretion in the United States," 18 American Journal of Comparative Law 532 (1970).

> Prosecutors should endeavor to make discriminating charge decisions, assuring that offenders who merit criminal sanctions are not released and that other offenders are either released or diverted to non-criminal methods of treatment and control by:
>
> > Establishment of explicit policies for the dismissal or informal disposition of the cases of certain marginal offenders.
> >
> > Early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required.[8]

Prosecutorial discretion, although much maligned,[9] remains substantially intact and unchecked. Several reasons justify retention of broad discretionary powers by prosecutors, state and federal. First, legislative "over-criminalization": Legislators tend to make criminal everything the people are against without regard to practicality of enforcement (e.g., the law against adultery, which is unenforced because we want to continue our conduct and unrepealed because we want to preserve our morals.[10]). Second, limited resources: No prosecutor has sufficient resources to prosecute all the crimes brought to his attention and therefore must be free to utilize his limited resources in order to pursue prosecutions that will best serve the public interest. Third, the American goal of individualized justice: In processing cases through our criminal courts we consider many factors in arriving at a just disposition. Primary consideration is given to the offense and the offender, but also considered are the objectives of criminal law enforcement. No practitioner in the criminal justice system is in a better position to "tailor" justice than the prosecutor, and consequently he enjoys practically unfettered discretion. The courts have dealt with several issues arising from the exercise of prosecutorial discretion which should be of interest to the practitioners who utilize or are contemplating the use of risk screening instruments in making their charging and diverting decisions.

Prosecutors have had their prosecutorial discretion challenged both for declining prosecutions and for initiating prosecutions. The prosecutor's decision not to prosecute even though evidence sufficient for conviction is available is not subject to serious challenge. See Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (1973) and Pugach v. Klein, 193 F.Supp. 630 (S.D.N.Y. 1961). Nor is the prosecutor's decision to prosecute often successfully questioned. See Oyler v. Boles, 82 S.Ct. 501 (1962). Only when he selects a particular individual for prosecution for a crime that normally goes unprosecuted does the prosecutor tread on thin ice. Otherwise his decisions--to file or not to file, what charge or how many charges, and when to file[11]--are not likely to be interfered with. See Bordenkircher v. Hayes, 98 S.Ct. 663 (1978) and United States v. Cox, 342 F.2d 167 (5th Cir.) cert. den. 85 S.Ct. 1767 (1965).

In Oyler the Court stated that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." The Court added that in order to invoke the protection of the Equal Protection Clause there must be an allegation "that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 82 S.Ct. at 506. In U.S. v. Falk, 479 F.2d 616 (1973) the Court of Appeals for the Seventh Circuit placed the burden of proving non-discriminatory enforcement on the government even though the normal presumption is that prosecutions for violations of the criminal laws are undertaken in good faith and in a non-discriminatory fashion for the purpose of fulfilling the duty to bring violators to justice.

However, the factual context which supported the decision in Falk also delimits the availability of its holding as authority. It is quite apparent that the Court of Appeals felt that Falk was a "political" trial rather than a criminal prosecution and that the Government's action impinged upon Falk's fundamental rights under the First Amendment. The facts clearly indicated that the prosecution was initiated not for the purpose of bringing an offender to justice, but rather for the purpose of punishing Falk for promoting ideas with which the administration disagreed. In Falk the facts were sufficient to establish a prima facie case of selective prosecution.

When the facts are more equivocal than they were in Falk, the defendant has a heavy burden to bear. In United States v. Berrios, 501 F.2d 1207 (1974), the Court of Appeals for the Second Circuit set forth the burden the defendant

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8. The Challenge of Crime in a Free Society 134 (1967).

9. Davis, Kenneth, Culp, Discretionary Justice (1969).

10. Arnold, Thurman Wesley, The Symbols of Government 160 (1935).

11. To prosecute a defendant following good-faith investigative delay does not deprive him of due process even if his defense might have been somewhat prejudiced by the lapse of time. See United States v. Lovasco, 97 S.Ct. 2044 (1977).

must bear:

> To support a defense of selective or discriminatory prosecution a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination." 501 F.2d, at 1211.

Although a claim of denial of equal protection because of selective prosecution offers the defendant the best chance of invoking judicial review and possible control over prosecutorial discretion, the courts have been extremely reluctant to open their doors more than a crack to even these high sounding claims.[12]

Few defendants are able to meet the burden imposed by U.S. v. Berrios. Fewer still are able to make the factual showing necessary to bring their cases under the Falk decision. Therefore, the prosecutor is generally free to select major offenders and habitual criminals for specialized attention. Furthermore, if he chooses to utilize a risk screening instrument as a part of his charging process for these special offenders he will probably not be challenged for doing so because use of such an instrument satisfies some of the criticism leveled at prosecutorial discretion.

The President's Commission on Law Enforcement and Administration of Justice pointed out that essential to the charging decision was detailed background information so that the prosecutor could know whether he was dealing with a dangerous or only a marginal offender.[13] A properly drawn instrument such as the one developed by the National Center for Prosecution Management meets this need for more information.

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12. Courts, state and federal, are busy enough without opening the "floodgates of litigation" by entertaining denial of equal protection claims from every person who is charged with a crime. Considerations of federalism also make federal courts hesitant to intervene in state criminal prosecutions.

13. The Challenge of Crime in a Free Society 133 (1967).

In making the charging decision most prosecutors consider a number of factors:[14]

1. The nature of the offense itself,
2. Prior treatment of similar situations,
3. The status of the victim,
4. Case load demands,
5. Anticipated public reactions,
6. Personal characteristics of the defendant,
7. Recommendations of other criminal justice agencies,
8. The prosecutor's concern for his conviction rate,
9. The effect on law enforcement,
10. The prosecutor's opinion of the guilt or innocence of the defendant,
11. The likelihood of conviction.

Notwithstanding the comprehensiveness of the factors the prosecutor considers in making the charging decision, a major criticism of prosecutorial discretion is that the worst abuses occur in connection with those offenses that are not taken too seriously. Such criticism, if valid for prosecutions in general, is not applicable to specialized prosecutions of major offenders or habitual criminals. It is highly unlikely that a specialized prosecution would be based upon an offense that is not taken too seriously. The risk screening instrument in addition to assisting the prosecutor in making the charging decision in cases of specialized prosecution also serves as documentation that the discretion was wisely exercised.

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14. Thomas, Charles W. and Fitch, Anthony W., "Prosecutorial Decision Making," 13 American Criminal Law Review 507, 514-515 (1976).

Concomitant with the prosecutor's power[15] to initiate criminal prosecutions is his power to suspend them. Suspension of formal criminal proceedings before conviction on the condition that the defendant will participate in some type of rehabilitative program is commonly referred to as diversion. Diversionary programs[16] as alternatives to prosecution take many forms: first offender programs, drug and narcotic offender programs, and juvenile offender programs. The decision to divert, like the decision to prosecute, is relatively safe from constitutional attack. Since most diversion programs are of short duration (24 months or less), few problems arise because of the Sixth Amendment's guarantee of a speedy trial or the states' statutes of limitation. Moreover, diversion programs usually require a waiver of the speedy trial right as a condition of acceptance. Although some commentators have indicated that the Fifth Amendment guarantee against coerced self incrimination precludes conditioning admission on submission of a written confession or guilty plea by the defendant, it is unlikely that the Supreme Court would agree. However, there are two areas where the diversionary process and the Constitution could clash, i.e., equal protection and due process.

15. We have drafted our discussion in terms of the "prosecutor's power" although we recognize that in some jurisdictions the court shares the authority to suspend, dismiss or divert. For example, in California the prosecutor is authorized to make the preliminary determination of eligibility for diversion to a narcotics offender program, but the court has the final word. See Sledge v. Superior Court of San Diego County, 520 P.2d 412 (1974) and People v. Superior Court of San Mateo County, 520 P.2d 405 (1974). In the latter case the California Supreme Court held that a statutory provision giving the prosecutor the power to veto the trial judge's decision to divert a narcotics offender into a pretrial program of treatment and rehabilitation violated the constitutional doctrine of separation of powers. But see State v. Leonardis, 375 A.2d 607 (1977).

16. A discussion of the various diversion programs and whether they are accomplishing their objectives, i.e., rehabilitation of defendants without the stigmatization of conviction and relief of congested criminal calendars through expeditious disposition of cases, is beyond the scope of this document. Our focus is on the restraints, if any, which the law places on the prosecutor's discretion to divert. We will discuss only those issues involved with the initial decision to divert. No mention will be made of the issues concerning termination of unsuccessful participants. Readers interested in information on diversion programs are referred to the bibliography. Additional information is available from the National District Attorneys' Association, 666 N. Lake Shore Drive, Chicago, Illinois 60611.

During the early 1970's diversionary programs operated without authorization or regulation from either the legislatures or the courts. This left the prosecutor free to select or reject candidates for diversion in the unfettered exercise of his discretion. Today formal guidelines in the form of legislation or court rules or both govern the operation of diversionary programs. This means that the eligibility criteria may be subject to an equal protection attack if they are discriminatory on their face or if they are discriminatorily applied in order to reject an otherwise eligible candidate. It also means that the defendant refused admission to a diversionary program may have some due process due.

Most diversionary programs have eligibility criteria that make perpetrators of violent crimes and recidivists (anyone previously convicted of a felony) ineligible. In Marshall v. United States, 94 S.Ct. 700 (1974) the defendant challenged the exclusion of the Narcotic Addict Rehabilitation Act of 1966, which made any defendant with two or more felony convictions ineligible for treatment under the Act. The Court said:

> It should be recognized that the classification selected by Congress is not one which is directed "against" any individual or category of persons, but rather it represents a policy choice in an experimental program made by that branch of Government vested with the power to make such choices. The Court has frequently noted that legislative classifications need not be perfect or ideal. The line drawn by Congress at two felonies, for example, might, with as much soundness, have been drawn instead at one, but this was for legislative, not judicial choice. 93 S.Ct., at 707.

The Court went on to hold that the Act's two-felony-exclusion did not constitute a denial of due process or equal protection. The "rational basis" for the statutory distinction was the legislative intent to restrict eligibility to those most likely to respond to treatment.

Since most diversionary programs operate on limited funds, and since a legitimate governmental objective[17] is to limit participation in those programs to those defendants most likely to benefit thereby, any screening instrument utilizing eligibility criteria designed to further this permissible

17. Another legitimate governmental objective justifying restrictive provisions is the objective of keeping the "dangerous" defendant away from society longer because of the potential danger he poses on early release via a diversionary program. See Marshall v. United States, 94 S.Ct. 700 (1974).

governmental objective should not be vulnerable to Constitutional challenge.[18]

Although little authority exists, it appears from what does that the defendant whose application for diversion is rejected by the prosecutor has little hope of overturning that decision on equal protection grounds.[19] The New Jersey Supreme Court has been extremely active in defining the role of the prosecutor in that state's Pretrial Intervention Program (diversionary program). New Jersey's leading case, State v. Leonardis, 375 A.2d 607 (1977) (Leonardis II), is frequently cited by other state appellate courts as they deal with the role of the prosecutor in their respective diversionary programs. In Leonardis, the New Jersey Supreme Court laid down the following principles: Judicial review of the prosecutor's decision should be narrowly limited. 375 A.2d at 617. To prevail, the defendant must sustain a "heavy burden." 375 A.2d at 618. He must "clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of his discretion. . ." 375 A.2d at 618. In reviewing the record, the court should give "great deference" to the prosecutor's determination not to consent to diversion. 375 A.2d, at 618. His refusal to consent may, "where appropriate," be based solely on the nature of the offense charged (375 A.2d, at 618), and it is expected that his decision rarely will be overturned." 375 A.2d, at 617 n. 10. Review should be available "to check only the most egregious examples of injustice and unfairness." 375 A.2d, at 619.

As previously indicated, not all courts defer to the prosecutor in the exercise of his discretion in the area of diversion as does the New Jersey Supreme Court. The guidelines for the program, be they legislative or judicial in nature, may compel different results. However, given the history of judicial reluctance to interfere with the prosecutor's exercise of discretion in charging,

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18. The applicable test is the lenient "rational basis" test; however, should the eligibility criteria be such as to constitute a "suspect" classification or should they impinge on a "fundamental" right, the more rigid "strict scrutiny" test would come into play:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. New Orleans v. Dukes, 96 S.Ct. 2513, 2516-2517 (1976).

19. See State v. Eash, 367 So.2d 661 (Fla. App. 1979).

it is not unreasonable to expect that as various states struggle with the question of defining the role of the prosecutors vis-a-vis their respective diversionary programs many will opt to follow State v. Leonardis.

The final question of what process is due the defendant refused admittance to a diversionary program by the prosecutor was answered in State v. Leonardis, 363 A.2d 321 (1976) (Leonardis I). There the court suggested that a trial-type proceeding was not necessary, but that the defendant should be accorded an informal hearing before the court at every stage of his association with a diversionary program at which his admission, rejection or continuation in the program is put in question. The court suggested further that he be given a statement of reasons after each determination of his admission, rejection, or continuation in the program. 363 A.2d, at 340-341.

Although the defendant has a "heavy burden to bear" in challenging his rejection from diversion, he has adequate opportunity to challenge that rejection in New Jersey. It seems a bit incongruous to afford such minimal substantive protection and then to wrap the rejected defendant in so much procedural protection. We suspect that other jurisdictions will probably follow the principle set out above from Leonardis II but not pick up on the procedural protection set forth in Leonardis I, especially in light of recent United States Supreme Court decisions. In sum, we find much to recommend the use of risk screening instruments by the prosecutor as an aid in exercising his prosecutorial discretion and little to discourage their use. Furthermore, we find practically no difficulty in those exceptional situations where the prosecutor decides to ignore the recommendation of the instrument and exercise his discretion guided by his subjective judgment alone.

Summary

Diversion and case prioritization seem to be well within the bounds of prosecutorial discretion. From the standpoint of equal protection, formal efforts by prosecutors to screen defendants for diversion have generally been held valid by the courts so long as they were not based on arbitrary or invidious classification and so long as a rational state purpose could be shown.

Prosecutorial case prioritization has rarely been challenged. When litigation has been initiated, the issue has usually been a charge that selective prosecution is a violation of equal protection. But the courts have

held that the prosecutor must have broad powers, and unless the defendant can show an evil intent on the part of the prosecutor to treat persons differently, the prosecutor will be upheld.

An added consideration is the issue of whether or not the prosecutor can use the power of his office to defer indictment in the interest of preparing a better case. It seems clear that the court still sanctions such actions whenever there is a reasonable basis for delay and whenever the actions will not be construed as an infringement on the defendant's right to a speedy trial.

As for other rights of the defendant, except in New York, the courts generally have held that he has a right to counsel only after indictment. So most diversion decisions can be made without the defendant entering formal legal arguments against the process or its result.

Finally, on the subject of the power to grant diversion, it seems fairly clear that unless the jurisdiction has decided that diversion (as a quasi-administrative power) is solely within the purview of the prosecutor, the final decision to grant or deny diversion in lieu of a trial on the merits of the case rests with the trial judge.

Some legal commentators believe that the development of formal objective screening devices will be helpful in systematizing, rapidly processing, and balancing many complex factors in screening decisions.

If the case is to come to trial, the prosecutor's case prioritization practices, whether formal and objective or informal and subjective, are subject to legal challenge and judicial review. But the courts have held that prosecutors require broad discretion in the charging decision and, unless that power is abused, such decisions will not be questioned.

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SENTENCING

Introduction

Sentencing guidelines are a recent innovation in the area of judicial reform. The guideline approach was adopted as a result of the apparent success of parole guidelines at the federal level. The purpose of sentencing guidelines, as articulated by Wilkins, Kress and others, is to provide: (1) a workable sentencing information system, (2) a system that will assist judges, rather than just criticizing them, and (3) a rational method for reducing sentencing disparity, without eliminating judicial discretion.[1] Furthermore, it was hoped that a set of comprehensive guidelines could be developed which would place limits or controls on judicial discretion and which would make sentencing policies more consistent and humane.[2]

Sentencing guidelines programs have evolved essentially out of test situations. After having spent several years developing parole guidelines, researchers at the Criminal Justice Research Center in Albany, New York, recognized the applicability of such an approach to the sentencing area. Programs were experimented with in a group of jurisdictions, including Essex County (Newark), New Jersey; Maricopa County (Phoenix), Arizona; Chicago, Illinois; Denver, Colorado; the State of Vermont; Polk County (Des Moines), Iowa; and Philadelphia, Pennsylvania.

Sentencing guidelines should, however, be distinguished from other sentencing reform proposals. Many states are experiencing legislative attempts to structure decision making through (1) sentencing commission,[3] (2) flat-time,[4] (3) mandatory-minimum,[5] (4) determinate,[6] and (5) presumptive sentencing proposals.[7] All of the legislative efforts, with the exception of sentencing commissions, have attempted to limit judicial discretion by requiring that sentences fall within a narrow range of statutorily specified years. This approach limits judicial latitude and constrains the extent to which a judge may individualize each sentence. Sentencing guidelines have been experimented with administratively by the jurisdictions listed above. Judges, though hesitant in many cases to accept such a program at first glance, have apparently been persuaded to develop sentencing policies for their jurisdictions through a guidelines approach.

There have been additional efforts at the federal level to adopt a sentencing guidelines program for federal trial courts, as evidenced by Senate Bills 1437 and 204. However, specific legislation has not yet been enacted.

Scoring and Grids

In any jurisdiction the primary thrust of the sentencing guidelines concept is to develop a sentencing policy that is based on the sentencing practices of judges within the jurisdiction. These sentencing guidelines are usually predicated on past local sentencing outcomes. Assuming that the judge follows the guidelines recommendations, offenders with similar backgrounds who commit similar offenses under similar circumstances should, in theory, receive comparable sentences.

When sentencing grids are constructed, the research staff usually analyzes recent judicial decisions. At that time numerous variables are coded which characterize the offender and offense. These variables are correlated with sentencing outcomes. The variables that prove to be the most closely related to outcome are then used to construct both scoring sheets and sentencing grids for use in the guidelines program.

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1. Wilkins, Leslie, Kress, Jack and others. Sentencing Guidelines: Structuring Judicial Discretion. NILECJ-LEAA-USDOJ (February 1978) at page 7.

2. Id.

3. Zalman, Marvin, "A Commission Model of Sentencing" 53 Notre Dame Lawyer 266, Vol. 2, (1977).

4. McAneny, P.D., and Merritt, F.S., "Illinois Reconsiders Flat Time: An Analysis of the Impact of the Justice Model," 52 Chicago--Kent Law Review 621 (1976).

5. "Mandatory-Minimum Sentencing, The Concept and a Controversial New Michigan Statute", 1976, Detroit College Law Review 575 (1976).

6. Oppenheim, M.H., "Computing a Determinate Sentence. . .New Math Hits the Courts", 51 U.C. Santa Barbara Law Review 604 (1976).

7. Alschuler, Albert W., "Sentencing Reform and Prosecutorial Powers: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing" 126 Univ. of Pa. Law Review 550 (January 1978).

A scoring sheet developed in Denver, Colorado, for use in the district court is illustrated in Figure 1. The first section of the scoring sheet deals with attributes associated with the offense that is alleged to have been committed. Part A, intra-class rank, relates to a point assignment that has been made based on the seriousness of the offense within a class or category of offenses. Judges in Denver were previously asked to rank the seriousness of crimes, establishing higher rank scores for the more serious offenses. There are four intra-class ranks for each class of crime; rank 4 is assigned for the more serious offenses and lower ranks are assigned for less serious offenses. Part B of the offense score assigns extra points for attributes that aggravate the circumstances of the offense. Obviously, the injury or death of a victim would make an offense more serious, but there is also a point assignment for use of a weapon or a sale of drugs. Finally, Part C of the offense score involves the use of a victim modifier, which subtracts points if the perpetrator is known to the victim. Cases in which the perpetrator and victim are acquainted are considered less serious than cases in which they are strangers. Thus, point assignments for the offense range from one to six.

The second section of the scoring sheet deals with characteristics of the offender. For example, Part A scores the offender's current legal status. If the offender is on probation/parole or is an escapee, he scores one point. Similarly, in Parts B, C, and D the number of prior convictions is taken into account for (1) juvenile, (2) adult misdemeanor, and (3) adult felony convictions. Two points are assigned if there were four or more juvenile or adult misdemeanor adjudications, and three points for two or more adult felony convictions. Finally, points are assigned in Parts E and F for probation/parole revocations and for adult incarcerations. The offender score ranges from 0 to 13.

Once the offense and offender scores have been obtained, they are plotted on a grid usually based on the past judicial decisions in the local court. Denver, like other jurisdictions that use sentencing guidelines, has developed numerous grids, depending on the crime type. There are felony, misdemeanor, and even drug grids in use. For the sake of simplicity, we will deal with a felony grid only, as other grids are similarly used.

Figure 2 represents one of the grids used to determine sentence length. It is read much like an automobile mileage chart locating the appropriate position in each division and then reading the value where the row and column

FIGURE 1

SENTENCING SCORING SHEET

JUDGE _____ DATE _____

OFFENSE(S) CONVICTED OF _____

_____

_____

OFFENSE CLASS (MOST SERIOUS OFFENSE)

OFFENSE SCORE

A INTRA-CLASS RANK _____ +

B SERIOUSNESS MODIFIER _____ +

0 • NO INJURY 0 • NO WEAPON 0 • NO SALE OF DRUGS
1 • INJURY 1 • WEAPON 1 • SALE OF DRUGS
2 • DEATH

C VICTIM MODIFIER (CRIME AGAINST PERSON) _____ +

0 • UNKNOWN VICTIM
-1 • KNOWN VICTIM

OFFENSE CLASS

OFFENDER SCORE

A CURRENT LEGAL STATUS _____ +

0 • NOT ON PROBATION/PAROLE, ESCAPE
1 • ON PROBATION/PAROLE, ESCAPE

B PRIOR JUVENILE CONVICTIONS _____ +

0 • NO CONVICTIONS
1 • 1-3 CONVICTIONS
2 • 4 OR MORE CONVICTIONS

C PRIOR ADULT MISDEMEANOR CONVICTIONS _____ +

0 • NO CONVICTIONS
1 • 1-3 CONVICTIONS
2 • 4 OR MORE CONVICTIONS

D. PRIOR ADULT FELONY CONVICTIONS _____ +

0 • NO CONVICTIONS
1 • 1 CONVICTION
3 • 2 OR MORE CONVICTIONS

E. PRIOR ADULT PROBATION/PAROLE REVOCATIONS _____ +

0 • NONE
2 • ONE OR MORE REVOCATIONS

F. PRIOR ADULT INCARCERATIONS (OVER 30 DAYS) _____ =

0 • NONE
1 • 1 INCARCERATION
3 • 2 OR MORE INCARCERATIONS

OFFENSE SCORE

OFFENDER SCORE

GUIDELINE SENTENCE _____

ACTUAL SENTENCE _____

REASONS (IF ACTUAL SENTENCE DOES NOT FALL WITHIN GUIDELINE RANGE):

FIGURE 2

SENTENCING GRID

OFFENSE SCORE	OFFENDER SCORE 0-1	2	3	4-5	6-7	8	9-10	11-13
4-6	INDETERM. MINIMUM 8-10 YRS. MAXIMUM	INDETERM. MINIMUM 8-10 YRS. MAXIMUM	INDETERM. MINIMUM 8-10 YRS. MAXIMUM	INDETERM MINIMUM 8-10 YRS. MAXIMUM	INDETERM. MINIMUM 8-10 YRS MAXIMUM	INDETERM MINIMUM 8-10 YRS MAXIMUM	INDETERM MINIMUM 8-10YRS MAXIMUM	INDETERM. MINIMUM 8-10YRS MAXIMUM
3	OUT*	INDETERM. MINIMUM 3-5 YRS. MAXIMUM	INDETERM. MINIMUM 3-5 YRS. MAXIMUM	INDETERM MINIMUM 3-5 YRS MAXIMUM	INDETERM MINIMUM 5-7 YRS MAXIMUM	[redacted]	INDETERM MINIMUM 8-10 YRS MAXIMUM	INDETERM. MINIMUM 8-10 YRS MAXIMUM
2	OUT	OUT*	INDETERM MINIMUM 3-5 YRS. MAXIMUM	INDETERM MINIMUM 3-5 YRS MAXIMUM	INDETERM MINIMUM 5-7 YRS. MAXIMUM	INDETERM MINIMUM 8-10 YRS MAXIMUM	INDETERM MINIMUM 8-10 YRS MAXIMUM	INDETERM MINIMUM 8-10 YRS MAXIMUM
1	OUT	OUT	OUT*	INDETERM MINIMUM 3-5 YRS MAXIMUM	INDETERM MINIMUM 3-5 YRS MAXIMUM	INDETERM MINIMUM 3-5 YRS MAXIMUM	INDETERM MINIMUM 5-7 YRS MAXIMUM	INDETERM MINIMUM 6-10 YRS MAXIMUM

* POTENTIAL CANDIDATE FOR WORK PROJECT OR COMMUNITY CORRECTIONS

intersect. Obviously, a judge has the option of either sentencing the convicted offender "in" to incarceration or "out" to probation. Offense scores are listed on the vertical axis and the offender score is on the horizontal axis. Once the guidelines scores have been calculated they are plotted on this grid to determine an appropriate sentence.

Assuming that the offense score was three and the offender score was eight, the sentence length would be a maximum of 8 to 10 years with an indeterminate minimum as provided by Colorado state law, in 1977 when the survey was conducted. The appropriate cell has been highlighted for this case; thus, with minimum study the procedure for use of this grid should be clear.

Sentencing Process

The sentencing process that judges engage in from jurisdiction to jurisdiction is much the same. Upon conviction the trial judge is faced with deciding whether or not to incarcerate the defendant. If there is a decision not to incarcerate, the defendant most likely will be placed on probation or sentenced to some type of diversion program. If, however, the decision is to incarcerate, then the judge must decide how long the individual should spend in jail.

To aid the judge in sentencing, the probation officer assigned to prepare the pre-sentence report fills out the sentencing scoring sheet. At that time virtually all of the information required is close at hand. In Phoenix and Denver this scoring is done after the pre-sentence report has been written, so as not to bias the officer preparing an independent sentencing recommendation. The "guideline sentence" is then written at the bottom of the score sheet, which is sent with the pre-sentence report to the judge. Finally, the judge uses the two recommendations in any way he sees fit in arriving at the sentence. Thus, three sets of information are employed in arriving at a sentencing decision.

Since sentencing guidelines are intended to be advisory only, the judge may or may not sentence on the basis of the recommendations. However, when a judge sentences "outside" the guidelines he is asked to give reasons as to why this was done. It is hoped that the sentencing disparity prevalent before the implementation of guidelines will diminish.

Problem of Sentencing Disparity

There is little disagreement among legal commentators over the need for sentencing reform. Some critics, however, are more vehement in their indictment of the judicial system than others. For instance, Norval Morris claims that "Our present sentencing practices are so arbitrary, discriminatory, and unprincipled that it is impossible to build a rational and humane prison system upon them."[8] Comments such as these are often based on sentencing practices which are brought dramatically to the public eye. For example, in Ray v. State[9] three co-defendants were charged with beating to death William James Wells. Upon conviction, the trial court sentenced one defendant to 90 years in prison, the second to 10 years, and the third to only one year. The appellate court in its opinion indicated that the apparent disparity in the assignment of sentences was a matter that should be raised with the pardon and parole board of the state, as it was a matter now within their discretion. The court refused to question the discretion of the trial court judge.

Sentencing guidelines advocates, on the other hand, take a different approach to outlining the problem of sentencing disparity. This approach reminds the public that individuality in sentencing is desirable and necessary as each case has its own peculiar circumstances. Furthermore, in order to accomplish effectively this individualized treatment the trial judge must be permitted to exercise discretion. Finally, it should be kept in mind that:

> . . .no two offenses or offenders are identical; the labeling of variation as disparity necessarily involves a value judgment--what is disparity to one person may simply be justified variation in another. It is only when such variation takes the form of differing sentences for similar offenders committing similar offenses that it can be considered disparate.[10]

8. Morris, Norval, The Future of Imprisonment, University of Chicago Press, 1974.

9. 288 So.2d 801 (Ala. 1974).

10. Wilkins, Leslie, Kress, Jack and others, Sentencing Guidelines: Structuring Judicial Discretion, NILECJ-LEAA-USDOJ (February 1978) at page 7.

This approach is viewed as a compromise between unrestricted judicial discretion and the type of legislatively mandated limits that have emerged from determinate sentencing efforts. Sentencing guidelines programs attempt to curb disparity by encouraging the judiciary to impose self-restraining measures. This has been accomplished by the monitoring of local sentencing practices in the development of guidelines.

Classification and Disparity

Sentencing, like other decision points discussed in this volume, involves a classification procedure. The assignment of a sentence to a convicted defendant represents the penalty that type of offender should receive. It seems fairly clear that the key to reducing sentence disparity is to introduce some type of judicial standard that will encourage more consistent categorization of offenders. Presumably, the recent legislative trend toward introducing determinate sentencing laws as a means of limiting judicial discretion was prompted by the apparent inability of the judiciary to solve the problem of sentencing disparity.

Recently, as outlined in the preceding sections, a judicial attempt to curb disparity has emerged through the sentencing guidelines concept. This program is hailed by many to be the long awaited solution to the sentence disparity dilemma.

Judicial Discretion

The sophistication of the method by which a sentence is fixed is usually lost on the defendant who receives the sentence. He is usually unimpressed with an explanation that a sentence is "tailored" to the offender as well as the offense. If his sentence is more severe than sentences received by others for similar offenses, he is likely to claim denial of equal protection. However, successful equal protection or other constitutional attacks on sentencing practices are extremely rare.

Although the reduction or elimination of excessive or disparate sentences is a major goal in reforming our criminal justice system, the appellate courts, state and federal, have consistently declined to intervene in the sentencing

process.[11] In 1968 the ABA Project on Minimum Standards for Criminal Justice reported that appellate review of the merits of a sentence was available in theory in only 21 states, and practically in only 15, but was "steadily growing."[12] The principal reasons given for not providing appellate review of sentences were summarized by the ABA as follows:

> The two major objections to appellate review of sentences stem from a matter of principle on the one hand and a practical point on the other. On principle, it is argued that sentencing is a discretionary matter involving a judgment, not a question of law such as appellate courts are used to handling. In practice, permitting review of the sentence would inundate appellate courts with frivolous appeals caused by the fact that the defendant would have nothing to lose by taking an appeal, particularly if the appellate court lacked the authority to increase the sentence. Standards Relating to the Appellate Review of Sentences 5 (Approved Draft, 1968).

The ABA has launched an intensive promotional campaign to foster implementation of its standards by the states.

The state appellate courts are not alone in their reluctance to review sentences. The federal judiciary has long been committed to the general rule of non-review. "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility,. . . these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. . . This Court has no such power." Gore v. U.S., 78 S.Ct. 1280, 1285 (1958).

If the Criminal Code Reform Bill (S.1437) ever makes it through both houses of Congress all that will change. Both the Senate draft and the House draft of the bill are designed to reduce disparities in sentencing by creating classes of crimes, assigning maximum penalties according to the class and establishing guidelines for judges to use in sentencing. Both drafts provide for sentence

11. "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." Dorszynski v. U.S., 94 S.Ct. 3042, 3051 (1974).

12. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to the Appellate Review of Sentences, 13 (Approved Draft, 1968).

review[13] and require the judge to state on the record the reasons why he is imposing the particular sentence.[14]

Although both the House and Senate versions provide for development of sentencing guidelines, they differ on who should develop the guidelines and what consequences should follow deviation from the guidelines. Under the Senate draft the President would appoint and the Senate confirm a seven-member commission to issue the guidelines. Four of the members would have to come from a list of seven judges submitted by the U.S. Judicial Conference. The Senate draft directs the commission to consider the following variables in establishing categories of defendants for use in the guidelines:

1. age,
2. education,
3. vocational skills,
4. mental and emotional condition to the extent that condition mitigates the defendant's culpability or is otherwise plainly relevant,
5. physical condition, including drug dependence,
6. previous employment record,
7. family ties and responsibilities,
8. community ties,
9. role in the offense,
10. criminal history,[15]
11. degree of dependence upon criminal activity for livelihood.

13. The Senate version contains the novel provision authorizing the Government to appeal the sentence.

14. ABA Standard 2.3 (c), Standards Relating to the Appellate Review of Sentences 11 (Approved Draft, 1968), recommends this requirement, but at present neither federal legislation nor the Constitution imposes such a requirement. See Dorszynski v. U.S., 94 S.Ct. 3042 (1974).

15. One issue sure to receive much attention is judicial consideration of arrests not resulting in conviction.

Under the Senate version judges could depart from the commission's guidelines but would have to explain their reasons for doing so, and the sentence would be subject to appeal because it did not conform to the guidelines.

Under the House draft a seven-member commission on sentencing would be created within the Judicial Conference. The Judicial Conference would appoint the commission members, four of whom would have to be judges. Under the House version the guidelines would not be mandatory but would be advisory for the judges "to use in determining the appropriate sentences." A judge would have to state why he deviated from the guidelines in sentencing, but there would be no sentence review simply because he deviated from the guidelines. (The defendant could appeal an erroneous application of the sentencing guidelines.)

Although the general rule in both the state and federal court systems has been non-review, certain cases have been reviewed. When the ABA coaxes the states into adopting their "minimum" standards and when Congress passes the Criminal Code Reform Bill, many cases are going to be up for review. Therefore, it should be beneficial to look at some of the cases that have been reviewed by the appellate courts in an attempt to distill out the principles that govern the outcome in such cases. Likewise, as the states and federal government move toward adoption of sentencing guidelines in an effort to objectify sentencing, it should be helpful to consider the possible constitutional challenges to the use of such guidelines and the probable outcome of these challenges.

The trial court is permitted broad latitude in discharging its duty of imposing the proper sentence.[16] Exercise of this broad discretion is subject

16. This is the general rule in states that have not "reformed" their sentencing provisions and are still operating under indeterminate sentencing statutes.

    Fascinating issues abound in the area of sentencing that are beyond the scope of our project. It is interesting to note that reformers once converted us to the principles of indeterminate sentencing as the enlightened method of dealing with offenders. The reformers now tell us that determinate, flat, or presumptive sentences are the way to go, especially if the sentences are short. Under the indeterminate sentencing structure great disparity was possible and judicial review generally not available. Only illegal sentences would be disturbed on appeal. Legal sentences, those within the statutory parameters, would not be interfered with, regardless of how irrational they were except in extraordinary cases. (Footnote continued on next page)

to appellate court scrutiny only under limited circumstances. Perhaps the most common abuse of discretion case is the one where the appellate court finds that the trial judge has followed a "fixed and mechanical" sentencing policy, assigning the same sentence for a specific crime to all who are convicted of committing that crime. For example, in U.S. v. Daniels, 446 F.2d 967 (6th Cir. 1971), a Selective Service case, the Court of Appeals ordered a reduced sentence because the trial judge noted on the record that he always gave a maximum sentence to draft evaders. Such an inflexible practice in sentencing contravenes the judicially approved policy of "individualizing" sentences. See also U.S. v. Wardlaw, 576 F.2d 932 (1st Cir. 1978), U.S. v. Schwarz, 500 F.2d 1350 (2d Cir. 1974), U.S. v. Hartford, 489 F.2d 652 (5th Cir. 1974), U.S. v. Baker, 487 F.2d 360 (2d Cir. 1973), and U.S. v. Townsend, 478 F.2d 1072 (3d Cir. 1973).

In addition to those situations where the trial judge has abused his discretion in sentencing by following a fixed and mechanical policy that does not take into account individual mitigating factors, there are cases where a trial judge imposes a sentence within the statutory limits that is unduly harsh because of his own attitude toward the particular crime or some aggravating factor. These sentences have been challenged on the grounds that they are so unjustifiably harsh as to violate the Eighth Amendment's prohibition against cruel and unusual punishment. In a succession of cases--Weems v. U.S., 30 S.Ct. 544 (1910), Trop v. Dulles, 78 S.Ct. 590 (1958), Robinson v. California, 82 S.Ct. 1417 (1962), Furman v. Georgia, 92 S.Ct. 2726 (1972), Gregg v. Georgia, 96 S.Ct. 2909 (1976), and Coker v. Georgia, 97 S.Ct. 2861 (1977)--the United States Supreme Court has established the principle that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. "Under Gregg, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Coker v. Georgia, 97 S.Ct., at 2865. In Coker, the Court held that "a sentence

16. (cont.) Now that we are moving back to determinate sentences, where flexibility is not possible except upon explicit findings of mitigating or aggravating circumstances, judicial review will become generally available. The process of reconciling determinate sentencing with the concept of individualized justice is going to consume great amounts of judicial time.

of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." 97 S.Ct., at 2866. A major case in this area is Rummel v. Estelle, 100 S.Ct. 1133 (1980), in which the Supreme Court decided that a mandatory life sentence for a minor offense or offenses under an habitual offender statute did not constitute cruel and unusual punishment. See also In re Lynch 503 P.2d 921 (Cal. 1972).

Additional assorted abuse of discretion situations include those where the judge relied on misinformation of a constitutional magnitude,[17] where impermissible criteria involving race or sex were used,[18] where the sentence "shocks" the appellate court,[19] and where the judge refuses to consider probation for defendants who refuse to plead guilty and insist on going to trial.[20] Undoubtedly many judges in fixing sentence consider whether the defendant has pleaded guilty or put the government to the time and expense of a trial-- especially where the defendant has no hope of acquittal. However, most judges are careful enough not to acknowledge this consideration on the record. For those judges who make such a consideration but feel guilty about doing so, we give you the case of Gollaher v. U.S., 419 F.2d 520 (9th Cir.) cert. denied, 90 S.Ct. 434 (1969) where the Ninth Circuit held that the trial court may give special credit to the defendant who forgoes trial and pleads guilty. The justification for imposing a harsh sentence as a penalty for the defendant's refusal to admit his guilt is that an admission would evidence the first step toward rehabilitation.

As previously indicated the issues of broad versus controlled discretion in sentencing and indeterminate versus determinate sentencing have been hotly debated in order to find a way of eliminating disparity in sentencing while retaining the authority to individualize sentences. The use of sentencing guidelines offers the most workable compromise approach to the dilemma. As

17. See Townsend v. Burke, 68 S.Ct. 1252 (1948), U.S. v. Weston, 448 F.2d 626 (9th Cir. 1971), and U.S. v. Tucker, 92 S.Ct. 589 (1972).

18. See U.S. v. Maples, 501 F.2d 985 (4th Cir. 1974).

19. See Woolsey v. U.S., 478 F.2d 139 (8th Cir. 1973).

20. See U.S. v. Wiley, 267 F.2d 453 (7th Cir. 1959), U.S. v. Wiley, 278 F.2d 500 (7th Cir. 1960), and U.S. v. Wiley, 184 F.Supp. 679 (N.D. Ill. 1960).

long as judicial discretion remains intact[21] and the guidelines serve merely as a means of enlightening the judge in the exercise of that discretion and are considered and weighted about the same as the pre-sentence report, we foresee little difficulty with the Constitution in using such guidelines.

In McGinnis v. Royster, 93 S.Ct. 1055 (1973) the Supreme Court dealt with an equal protection attack on sentencing/classification procedures. In holding that prisoners need not be granted credit against their sentences for pre-conviction jail time the Court said, "We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally favors some legitimate, articulated state purpose." 93 S.Ct., at 1059. Undoubtedly, properly drawn and validated sentencing guidelines could pass this rational basis test and even the intensified rational basis test discussed in the introduction. Therefore, a successful challenge would have to be based on the argument that the guidelines employ factors which involve "suspect" classification or infringe upon a "fundamental" right. The traditionally suspect classifications are narrowly defined.[22] Even the minority offender will encounter great difficulty in showing that racially neutral criteria employed in sentencing guidelines constitute the use of a suspect classification.

In Washington v. Davis, 96 S.Ct. 2040 (1976) the Court held that adverse racial impact in the use of employment tests did not amount to constitutional discrimination in the absence of proof of discriminatory intent.

The offender will have equal difficulty showing infringement of a "fundamental" right. We are presently unaware of any fundamental right that might be infringed by valid sentencing guidelines, and therefore, unless the ingenuity of the criminal mind can come up with one, the "strict scrutiny" test will be applied when equal protection attacks are made on the guidelines. Consequently, all equal protection attacks on sentencing guidelines should fail in the absence of evidence of intentional discrimination.

At present due process does not require a judge to support his sentence

21. Preservation of the institution of judicial discretion not only virtually insulates sentences from successful attack on appeal except for extraordinary sentences, but also makes the sentences which follow the guidelines less vulnerable when they are challenged as being imposed under a "fixed and mechanical" approach to sentencing.

22. See San Antonio Ind. School Dist. v. Rodriguez, 93 S.Ct. 1278 (1973) where the Court held that wealth and poverty need not be suspect classifications.

with a reasoned explanation. Dorszynski v. U.S., 94 S.Ct. 3042 (1974). However, requiring a statement of reasons from the judge is an integral part of the sentencing guidelines and appellate review. For appellate review to be effective the judge must state his reasons[23] for imposing a sentence, especially when he departs from the sentencing guidelines.

Future Considerations

In a recent article by John C. Coffee, Jr.,[24] sentencing guidelines were discussed at some length. The primary focus of the article was to explore the possibility that the use of sentencing guidelines is morally, and perhaps legally, suspect. Coffee raises three moral questions which become significant in a legal context: (1) What is really being measured by the guidelines? (2) Does the system discriminate unjustifiably against those who are either young, members of minority groups, or poor? and (3) Is it, in any event, justifiable to assign individuals to prison on the basis of morally neutral characteristics that are shared by a great number of individuals who have committed no crime?[25] The author believes that these questions are important in a moral context because sentencing guidelines as a type of "categoric risk prediction system" focus not on the likelihood of recidivism by the individual in question, but on the expectancy rate for the various groups of which he is a member. This is not consonant with the American system of "individualized" sentencing. Thus, Coffee finds the categoric technique of predicting risk to be more efficient, but unfair.

From a legal point of view Coffee argues that criteria which appear racially neutral, but which substantially overlap with racial status, constitute the use of a suspect classification and thus should be banned under the Equal Protection Clause. However, he recognizes that such an argument will probably fail, based on current case law, and calls instead for the judiciary to employ

23. A major contention on appeal will no doubt be that the real reasons for the sentence are not the reasons stated.

24. "The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice," 73 Michigan Law Review 1361, 1451 (1976).

25. Id. at 1406.

a "less drastic means" test for detecting criteria that are thought to be racially suspect (providing it does not substantially alter predictive accuracy). In this way suspect factors could be eliminated, and at the same time the state could pursue its goal of predicting high risk offenders.

Summary

The consensus of authorities seems to be that sentencing practices are in dire need of limits or controls to reduce disparity. Sentencing guidelines, as one type of sentencing reform, attempt to accomplish that task by providing discretionary sentence recommendations that are indicative of how other judges in the jurisdiction would sentence the offender.

On occasion sentences are reviewed legally by appellate courts under an equal protection theory if it can be shown that the trial judge has abused or failed to exercise judicial discretion. Most of the cases cited above are instances of judges not having exercised discretion clearly, and thus being charged with following a "fixed and mechanical" method of arriving at a sentence. The appellate courts have consistently remanded such cases for resentencing. It is doubtful that sentencing guidelines programs will be affected by either of these theories, although there has been some speculation (as noted in the preceding section -- Future Considerations) that the use of certain apparently racially neutral criteria may ultimately be suspect.

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INSTITUTIONAL CUSTODY CLASSIFICATION AND TRANSFER

Introduction

Legal contests over prison inmates' rights have become common in recent years. Accordingly, the analysis of legal issues arising out of the use of formal instruments in determination of custodial supervision levels and transfer to other institutions will be addressed herein. Generally, similar instruments are employed for both custody assignment and institutional transfer decisions; therefore, they will be analyzed and discussed as one, with exceptions noted.

The classification of inmates into various levels of custodial supervision is increasingly necessary because of overcrowding in most prisons. Overcrowding has reached epidemic proportions, thus mandating custody policies that make isolation of most prisoners and individual supervision simply impractical. To protect the general prison community maximum security levels are dictated for inmates with recognized violent tendencies. Formalized risk assessment instruments have been developed to offer more consistent decisions and to maximize state resources by identifying more inmates who can safely be placed at lower supervision levels. Some instruments also focus on specific client needs that may require immediate attention (e.g., psychiatric or medical care). At the same time, the instruments attempt to identify high risks of violence, escape, and suicide. The latter concerns are of primary importance in the institutional transfer decision process.

Design and Implementation of Individual Instruments

The use of formal instruments in the custody and transfer area has evolved in a variety of ways. In Los Angeles, the county was ordered by a local court to develop an equitable system for classification of inmates. Michigan and Iowa incorporated many of the characteristics of instruments already in use in the probation/parole release area. The Federal Bureau of Prisons completed an extensive survey of 77 Unit/Classification Teams before deciding on six classification factors which comprise its risk assessment instrument (which Los Angeles County used as a model in the design of its instrument.)

The intake procedures utilized for classifying inmates vary widely. For

instance, in the Federal Bureau of Prisons system the Community Programs Officer gathers the necessary data, including the prisoner's prior criminal record, to complete the Security/Designation Form. The inmate provides no input in the classification process itself, but may later question both the classification and the accuracy of the information used in its determination. Similarly, the state of Colorado sends all of its sentenced inmates to a central diagnostic center where a battery of computerized intelligence and personality tests are administered. A caseworker then reviews the results and makes the custody assignment decision. In contrast, Michigan and Oregon conduct face-to-face interviews with clients. Most jurisdictions have provisions for inmate appeals of classification decisions and require periodic reviews of security levels. Many departments also require supervisor approval, or at least a written specification of reasons for varying from the risk classification decision indicated by the classification instrument.

Screening for Custody

Generally, instruments are comprised of a limited number of weighted variables which are totaled to compute the risk factor. In Oregon the Corrections Division utilizes a matrix with the severity of crime plotted on the vertical axis and months under supervision plotted on the horizontal axis. Four different matrices have been developed and are used to establish the custody level. The more extensive the criminal history, the higher the level of custody.

The Federal Bureau of Prisons' instrument is representative of a number of systems throughout the country. The Security/Designation Form contains six variables, with their respective range of weights:

- History of escape or attempts to escape (0-7)
- History of violence (0-7)
- Type of detainers (0-7)
- Severity of current offense (0-7)
- Expected length (0-5)
- Type of prior commitments. (0-3)

The classification officer records the appropriate score for each variable. He then totals the various scores for each factor (he is not allowed to subjectively alter their sum) and arrives at a base classification level. The base level

determines an inmate's custody assignment, unless he fits into an exception. (He has committed an aggressive sex act or a crime of violence, or he is a person of "public notoriety.") Classifications are then reviewed every three to nine months, depending on the inmate's respective security level.

Most of the instruments surveyed rely on factors similar to those employed by the Federal Bureau of Prisons. Iowa's includes a "socio-demographic" profile which is composed of age, marital status, and occupation and educational levels. Each instrument either has a subjective override provision or provides for other exceptions which justify a different level of security than that indicated by the total score. In addition to the exceptions recognized by the Federal Bureau of Prisons, homosexuality and medical or psychiatric problems are recognized as valid reasons to override in some jurisdictions. Finally, it is interesting to note that "public notoriety" is considered a valid exception in Michigan, Colorado, and Los Angeles. In fact, Colorado explicitly determines the placement of inmates in maximum security on the likelihood of public reaction to escape or misbehavior, rather than on the probability of their misbehaving while in custody.

Legal Issues Arising in Institutional Custody and Transfer

The courts have historically displayed reluctance to interfere with the administrative processes of intake classification and transfer of inmates to other institutions. This reluctance, understandable in light of the so-called "hands off" policy of the courts, was particularly prevalent in classification and transfer cases. "This was partly due to the fact that classification of inmates and classification procedures may be mandated by state statute." Kerper and Kerper, Legal Rights of the Convicted, West Publishing Co. (1974) at 448.

However, a substantial decline in the "hands off" policy during the 1970's, leading to intense interest among the federal and state courts in prisoner rights, has coincided with efforts to attain judicial intervention in the classification and transfer procedures of prisons and jails. Three cases, Morrissey v. Brewer, 408 U.S. 471 (1972) (due process rights of parolees at revocation hearing); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process for probationers); and Wolff v. McDonnell, 418 U.S 539 (1974) (due process for prisoners in disciplinary punishment) indicated an expanding Supreme Court view of the due process rights of inmates. The Fourteenth Amendment prohibits any state from depriving a person of life, liberty or property without due process.

Wolff established specific due process requirements[1] for inmate discipline actions to protect the liberty interests of inmates and seemed to indicate emerging due process protections in classification and transfer cases, particularly transfers or classification changes which were disciplinary in nature. Wolff required due process, however, only when a "grievous loss" was suffered by the inmate. The Court in Wolff held that the inmate had a liberty interest under the Fourteenth Amendment which insured due process. "Therefore, if the transfer is discipline motivated, the state-created benefits of living in the general population should not be abrogated without due process. This is especially true when one considers most transferred prisoners can expect to spend their early days at a new prison in administrative segregation, the same deprivation that existed in Wolff." Note, "Constitutional Law--Due Process Does Not Require a Hearing in Prison Transfer Cases," 8 Texas Tech Law Review 429, 434 (1976).

The conflict concerning whether a transfer gave rise to a liberty interest was abruptly settled in the negative by the U.S. Supreme Court in Meachum v. Fano, 427 U.S 215 (1976). In the same decision, at 216, the Court further declared:

> The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events. We hold that it does not.

This decision clearly provides that while a state can create a liberty interest by statute, regulation or "practice," the liberty interest does not exist otherwise.

The Meachum Court also rejected the notion that "any grievous loss visited upon a person by the state is sufficient to invoke the procedural due process of the Due Process Clause," citing Board of Regents v. Roth, 408 U.S. 564 (1972). The Court (Meachum, at 224) also rejected the argument that "any change in the condition of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." At 225 the Meachum Court further rejected the view that protection was available to "a duly convicted prisoner against transfer from one institution to another

1. Wolff required a written 24 hour notice of pending disciplinary action to the inmate, an impartial hearing, a qualified allowance for inmates to present evidence and witnesses, provision for substitute counsel under certain circumstances, written finding and conclusions, and opportunity for appeal.

within the state prison system."

At 228, the Court allowed the disciplinary aspects of the action to stand outside the liberty interest and, in fact, justified it:

> That an inmate's conduct, in general or in specific instances, may often be a major factor in the decision of prison officials to transfer him is to be expected unless it be assumed that transfers are mindless events. A prisoner's past and anticipated future behavior will very likely be taken into account in selecting a prison in which he will be initially incarcerated or to which he will be transferred to best serve the State's penological goals.
>
> A prisoner's behavior may precipitate a transfer; and absent such behavior, perhaps transfer would not take place at all. But, as we have said, Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited to instances of serious misconduct.

Carol Leach theorizes concerning the Court's reasoning:

> Perhaps the Court's reason for the choice is explained by its concern with involving the judiciary in the day-to-day administration of prisons. The idea of a trial proceeding for the more than 90,000 transfers that occur annually is staggering. 8 Texas Tech Law Review, 429, 434-435 (1976).

The Meachum decision likewise abrogated the prisoner's liberty interest at initial classification and put aside the lowest-common-denominator type of approach in viewing the varied types of facilities and conditions a prisoner might face on entering the system. The prisoner could not expect conditions equal to the best the system had to offer. In fact, he would have no recourse if he were assigned to the least desirable, so long as the facility was not by itself unconstitutional.

Meachum was followed immediately by Montanye v. Haymes, 427 U.S. 236 (1976), which was decided with reference to Meachum. Other decisions in the wake of Meachum include: Santi v. Oregon State Penitentiary, 552 P.2d 1312 (Ore. App. 1976) (Court ruled transfer out of state and being placed in administrative segregation without notice or hearing not unconstitutional); McNamara v. Cook, 336 So.2d 677 (Fla. App. 1976) (Prisoner not entitled to habeas corpus relief when transferred without notice or hearing); Martinez v. Oswald, 425 F.Supp. 112 (W.D.N.Y. 1977) (Due process clause does not subject prison transfers to judicial oversight); Curry-Bey v. Jackson, 422 F.Supp. 926 (D.C.Cir. 1976) (Federal prisoners transferred to other states); Wallace v. Hewitt, 428 F.Supp. 38 (M.D.Pa. 1976), (Prisoner has no cause of action for being transferred from one state to another for criminal prosecution if Detainer and Extradition Acts are followed);

Girouard v. Hogan, 378 A.2d 105 (VT. 1977) (Court upheld transfer of state prisoner to federal prison out of state); and Laaman v. Perrin, 435 F. Supp. 319 (D.N.H. 1977) (Fact that inmate was voluntarily granted a transfer hearing did not obligate prison authorities to conduct such a hearing in accord with due process).

The decision in Meachum referred to "duly convicted" inmates. While it did not include pre-trial detainees under the umbrella of Meachum, neither did it explicitly exclude them. The Supreme Court's recent decision in Bell v. Wolfish, 99 S.Ct. 1861 (1979), would seem to cast light on that subject. Justice Rehnquist, writing for the majority, substantially reduced the differences between pre-trial and convicted inmates. He specifically ruled that the "presumption of innocence" theory did not apply beyond the prosecution of the criminal act and that that presumption does not apply to incarceration while awaiting trial. It is reasonable then to extend the Meachum ruling to pre-trial detainees as well as the convicted, especially if there is a "rational basis" for the classification and transfer actions taken by the jail administration and those actions do not conflict with state law.

A final issue to consider is the transfer of inmates to mental institutions and whether the courts would apply the Meachum doctrine directly to transfers to mental institutions. One important reason not to use Meachum would be the substantial body of state laws, regulations, and practices governing such transfers. However, in the recent decision in Vitek v. Jones, 100 S.Ct. 1254 (1980), the Supreme Court recognized the need for a due process hearing where an inmate is transferred involuntarily from a penal institution to a mental institution. Specific requirements under Vitek include written notice of intent to transfer hearing and safeguards; a hearing where witnesses may be presented and adverse witnesses cross-examined; an independent decisionmaker; a written statement of the facts and reasons supporting transfer; and availability of assistance (though counsel need not be provided).

Summary

Prison administrators have introduced formal instruments to the classification process in order to maximize efficiency and consistency in the assignment of inmates to different levels of security and in transfer to other institutions. This mandate suggests that the use of formal instruments will be accepted so long as there is a rational state interest for the inclusion of a specific variable.

The variables reviewed in this study appear to promote such a state interest and, thus, do not violate the Equal Protection Clause. The Eighth Amendment ban on cruel and unusual punishment does not appear to be applicable to the use of formal classification instruments; in fact, litigants in this area have requested and received court orders to implement formal classification procedures.

The rule is clear regarding the discretion allowed administrators in matters of classification and transfer. There is no liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

Pre-trail detainees, in light of Bell v. Wolfish, would likely be included under Meachum, particularly if such classification and transfer actions met the "rational basis" test of Wolfish.

The main exception to the Meachum rule would be involuntary transfer to a mental hospital. In such case, a liberty interest is recognized which signals the need for due process in making the decision to transfer.

However, all things considered, it would seem prudent for prison administrators to include minimal procedural safeguards in their respective classification processes to ensure that due process is met. This will extend to inmates those rights which seem justified and should limit the litigation in this area.

PAROLE RELEASE

Introduction

The use of formal instruments to classify inmates in the criminal justice system according to the risk that they represent to the community has increased noticeably in recent years. Nowhere is this increase more in evidence than in the parole release decision. This decision determines who will be paroled and, if so, when release will occur. Historically, intuition rather than formalized statutory or administrative criteria has guided parole release decision making. Formal instruments are now employed to offer more accurate predictions of who will succeed on parole and to provide greater consistency in decisions concerning similarly situated parole applicants.

As formal risk assessment instruments have come into more extensive use in the making of parole release decisions there has also been an increase of inmate legal challenges to the existing law as it relates to the use of such instruments. Analysis of the legal issues arising from classification by these instruments necessitates an understanding of the present constitutional guidelines and an anticipation of future constitutional attacks, and their probability of success.

Prediction Tables in Use in Parole Release

Two types of risk assessment instruments have been developed in the parole release area: experience tables and guidelines tables. California developed the Base Expectancy experience table in the early 1950's. This table, which has been used as a model for the design of instruments in many other jurisdictions, is comprised of a number of variables, each of which is assigned a weight according to its relationship to probability of success or failure on parole. The respective weights are totaled to arrive at a risk indicator. This figure is designed to predict the probability of future criminal behavior by the inmate.

Michigan is representative of jurisdictions presently employing experience tables in decisions regarding parole release. Variables reflect (1) the criminal record of the offender, (2) the offender's employment history, (3) his institutional behavior, (4) his mental stability, and (5) the existence of an inmate parole plan. In contrast to the Federal Parole Guidelines, the Michigan

experience table includes rehabilitative factors after incarceration in order to predict parole success.

A guidelines table was originally implemented by the United States Board of Parole in 1972. A brief review of that instrument, which has become the archetype for guidelines tables in other jurisdictions, will provide an understanding of such tables in general.

The Federal Parole Guidelines are characterized by a matrix which compares the dimension of offense seriousness with the dimension of risk of recidivism. Offense severity is measured by six categories on the vertical axis. On the horizontal axis are four classes of risk. The offender's risk class is determined by arriving at a "salient factor" score, which is the sum of points assigned for the seven weighted offender characteristics listed below:

Risk Factor	Possible Point Total
Number of Prior Convictions	0 - 3
Number of Prior Incarcerations	0 - 2
Age at First Commitment	0 - 2
Commitment Offense Did Not Involve Auto Theft	0 - 1
Parole Revocations	0 - 1
History of Drug Abuse	0 - 1
Recent Employment	0 - 1

Once the scores for offense severity and risk are determined, the parole hearing officer plots their intersection on the matrix to arrive at the suggested range of months to be served before parole is deemed advisable. Accordingly, unless aggravating or mitigating circumstances arise, the release date suggested by the guidelines table will be followed.

Parole Hearing Process

While parole boards are involved in the parole release determination in all jurisdictions, the degree of involvement and the method of decision may vary among jurisdictions. In Oklahoma and Texas the paroling authority shares the responsibility for parole eligibility with the governor, while in Wisconsin the Secretary of the Department of Health and Social Services is

involved. Similarly, there is variation in the method of decision making. The most common practice for determining parole is to conduct a hearing or interview. Hawaii, however, has no provision for parole hearings, while Georgia and Texas base most of their decisions merely on a review of files.[1]

In most states inmates need not apply for parole consideration; hearings are automatically docketed one to three months before the inmate's eligibility date. Parole eligibility is determined by the sentencing structure of each jurisdiction. Some states also have offense-specific sentencing codes. Convictions for certain crimes (such as murder or drug or sex offenses) can limit, delay, or preclude parole eligibility. In addition, the conduct of the inmate while incarcerated can affect his chances of parole.[2] Assuming that the inmate exhibits good behavior, however, he generally will be released in accordance with his original eligibility date.

Once a parole release determination is made, the method of notifying inmates varies from jurisdiction to jurisdiction. Under the traditional method followed by most states the inmate was informed by a staff person or letter. However, more states are now using written notifications of the decision, and some authorities recommend an explanation to the inmate of the reasons for the decision.[3]

A review of the federal parole system and its employment of guidelines tables reveals several significant differences from the typical state procedure. The United States Parole Commission provides for an inmate to have a hearing shortly after he enters prison. At an initial hearing an examiner reviews the inmate's files and prepares offense severity and salient factor ratings to arrive at a guidelines target date for parole release. Also present at the hearing is a secondary examiner who assists the principal hearing officer in questioning the inmate and who drafts a summary of the proceeding. During the hearing the examiners explain the hearing procedure and discuss with the inmate his past and present life. After the discussion ends the examiners privately reach a tentative parole decision, which will be reviewed by their superiors

1. Parole Systems in the United States, National Parole Institute and Parole Policy Seminars (Third Edition, 1976), at page 31.

2. Id. at page 32.

3. Id. at page 40.

in Washington, D.C. The inmate is recalled and informed of the examiners' decision after it is made final.

If the examiners decide to depart from the range of months recommended by the guidelines tables, they must provide written reasons for doing so. In addition, there is a review process providing for inmate appeal to the Parole Commission or to the courts.

Constitutional Considerations in the Parole Decision Making Process

Traditionally the criteria and procedures utilized by a parole board in making the parole release decision have not been scrutinized by the courts.[4] Furthermore a recent U.S. Supreme Court decision[5] virtually removes all prospect of utilizing the Constitution to attack criteria or procedures in the parole decision making process. We will look, nevertheless, at parole decision making utilizing formal risk screening instruments and consider possible conflicts with the concepts of equal protection and due process.

Courts impose a sentence of incarceration for two main purposes, to rehabilitate the offender or to deny him the opportunity for further offense. Under most sentencing statutes the actual amount of time the defendant spends in prison is within the discretion of the parole board. The parole board is to release the defendant when he is rehabilitated or when there is a reasonable probability that he will not violate the law again. Although the courts retain rehabilitation as a purpose of confinement, some parole boards are abandoning the search for the "magic moment" of rehabilitation.[6] In the early 1970's

4. "It is not the function of the courts to review the discretion of the Board in the denial of application for parole." Tarlton v. Clark, 441 F.2d 384, 385 (5th Cir.), cert. denied, 91 S.Ct. 2263 (1971).

5. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 99 S.Ct. 2100 (1979).

6. For a good discussion of the possible consequences of disregarding rehabilitation as a consideration in making parole decisions, see Geraghty v. U.S. Parole Commission, 579 F.2d 238 (3d Cir. 1978).

the U.S. Parole Commission[7] frankly acknowledged that rehabilitation cannot be predicted or assessed.[8] Therefore, instead of using rehabilitation as the standard for release on parole it adopted a two-dimensional standard consisting of the severity of the offender's crime on the one hand and his potential for recidivism on the other. A guidelines system reflecting the two-dimensional standard was developed charting on the vertical axis an offense severity rating composed of six categories and on the horizontal axis a four-category offender prognosis rating, known as the Salient Factor Score, which reflects the offender's statistical likelihood of recidivism. So far this guidelines system has withstood constitutional attack.

The most common judicial response to a challenge leveled at parole decision making is, "the courts should not override the Commission's judgment unless the Commission has abused its discretion." O'Brien v. Putnam, 591 F.2d 53, 55 (9th Cir. 1979). See also Dye v. United States Parole Commission, 558 F.2d 1376 (10th Cir. 1977); Billiteri v. United States Board of Parole, 541 F.2d 938 (2d Cir. 1976); Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), cert. denied, 97 S.Ct. 308 (1976).

We have been unable to locate any case wherein a successful attack on the use of guidelines in parole decision making has been made on equal protection grounds. Arguably, the use of criteria which are neutral on their face but have an adverse racial or economic impact could be challenged on equal protection grounds. However, the challenger would have the burden of showing discriminatory intent. See Washington v. Davis, 96 S.Ct. 2040 (1976). In sum, we think it is safe to say that as long as the factors in the guidelines relied upon to predict the offender's potential for recidivism have been adequately validated

7. In the early 1970's the federal paroling authority was called the Board of Parole. In 1976 Congress enacted the Parole Commission and Reorganization Act (PCRA). Under the PCRA the Parole Board became the United States Parole Commission, an independent federal agency, with responsibility for promulgating guidelines in the exercise of its statutory discretion concerning the granting of parole. (Guidelines to establish customary release dates for given classes of offenders had been published by the parole board in 1973.)

8. It is interesting to note that although the United States Parole Commission has discarded rehabilitation as a purpose served by the parole systems, Chief Justice Burger still considers rehabilitation as a legitimate interest furthered by parole systems. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 99 S.Ct. 2100 (1979).

equal protection is not offended.[9] Such guidelines will undoubtedly survive the rational basis test of McGinnis v. Royster, 93 S.Ct. 1055 (1973).

The vast majority of the cases decided in the parole release area deal with due process issues. On May 29, 1979, the Supreme Court cleared up several of those issues in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 99 S.Ct. 2100 (1979).

The Court first addressed the issue of whether or not due process even applies. To have an interest that cannot be taken by government without due process "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 92 S.Ct. 2701, 2709 (1972). The Court then held, "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '(G)iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'" 99 S.Ct., at 2104.

In Greenholtz, prison inmates claimed that there is a reasonable entitlement created whenever a state provides for the possibility of parole. Alternatively they claimed that Nebraska by statute had created a legitimate expectation of parole. Relying on Morrissey v. Brewer, 92 S.Ct. 2593 (1972) the inmates argued that the ultimate interest at stake both in a parole revocation decision and in a parole determination is conditional liberty and that since the underlying interest is the same, the two situations should be accorded the same constitutional protection. The Court, however, found, "There is a crucial distinction between being deprived of the liberty one has, as in parole, and being denied a conditional liberty that one desires." 99 S.Ct., at 2105. The Court went on to hold, "That the state holds out the possibility of parole provides no more than a mere hope that the benefits will be obtained." 99 S.Ct., at 2105.

Concerning the alternative contention that the Nebraska statute created an expectation of release that was entitled to some measure of constitutional

9. We see no equal protection problems even if, as some claim, it is impossible to predict whether a specific individual will revert to crime upon release.

protection the Court agreed. However, the Court cited the principles that due process "is flexible and calls for such procedural protections as the particular situation demands" and "The function of legal process as that concept is embodied in the Constitution, and in the realm of fact finding, is to minimize the risk of erroneous decisions." 99 S.Ct., at 2106. The Court went on to add, "Merely because a statutory expectation exists cannot mean that in addition to the full panoply of due process required to convict and confine there must also be repeated, adversary hearings in order to continue the confinement." 99 S.Ct., at 2107. The Court specifically held that it found "nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release."[10] 99 S.Ct., at 2108. The Court held further that the Nebraska procedure affords an opportunity to be heard and when parole is denied informs the inmate in what respect he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more." 99 S.Ct., at 2108.

Our introductory statement in this section that criteria and procedures utilized in the parole decision making process are virtually immune from constitutional attack is fortified by Chief Justice Burger's language in Greenholtz. For example, consider:

> "Like most parole statutes, it vests very broad discretion in the Board. No ideal, error-free way to make parole release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decision makers in predicting future behavior." 99 S.Ct., at 2107.

We interpret Greenholtz as a directive to the federal courts to return to a "hands off" policy with respect to the parole release procedure.

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10. In Nebraska the Board had the discretion of making available to the inmates any information that the Board felt would facilitate the parole hearing. The inmates had not complained that they were being denied access to their files and hence the issue was not before the Court..

Summary

The parole release area has undergone a great deal of change in the past few years, with much of the innovation due to the inception of the parole guidelines concept. Yet some jurisdictions have retained the base expectancy instruments for making release decisions. Regardless of the type of instrument adopted, however, it is apparent that the states and the federal government feel an abiding need to attempt to predict general recidivism.

Though parole guidelines and the base expectancy tables entail different processes, they are virtually alike in their attempt to introduce more certainty into the parole process. At the same time there is also a manifest desire to be more consistent by structuring decision making through the use of formal instruments. In light of recent Supreme Court decisions these instruments will undoubtedly survive any equal protection or due process challenge.

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PROBATION/PAROLE SUPERVISION

Introduction

This discussion will center on the legal issues involved in the use of formal instruments in classifying offenders into different levels of supervision in the probation/parole field services area. Since the classification processes for parolees and probationers employ similar procedures and instruments, they will be analyzed as a single process.

The classification of offenders in the probation/parole field services area into different levels of supervision is necessary in order to maximize the efficient deployment of available probation officers and provide the most appropriate services to clients. It is generally recognized that not every offender needs to receive maximum supervisory services. The level of supervision required for each offender is determined on the basis of an interview with his probation officer. The purpose of this classification process is to provide the best possible means of rehabilitation for each offender while continuing to oversee the protection of the general community. To meet this aim the probation officer attempts to assess the risk of recidivism of each offender and his chances for successful rehabilitation. Historically, probation and parole agents have used an intuitive method in assessing their clients' rehabilitation needs as well as their potential for future criminal behavior. An increasing disillusionment with this subjective decision making process has led some jurisdictions to the use of formal risk assessment instruments, the basic supposition being that the standard employment of such instruments within an agency will result in more accurate assessments of risk and more consistent classifications of similarly situated offenders.

Development of Specialized Instruments: Which Criteria for our Jurisdiction?

Individual instruments used by each agency are developed in a variety of ways. Some agencies have borrowed instruments from other jurisdictions, such as the Client Analysis Scale from Missouri, the California Base Expectancy Form, or the Case Classification System of Wisconsin. Other agencies have developed their instruments intuitively by selecting certain variables from other instruments which appear to be appropriate for their locality. Still others have devised their instruments through local research programs. The "United States D.C. 75,"

used by the Federal Probation/Parole Office in Washington, D.C., is an example of the latter group.

Each instrument reviewed in this study is composed of a limited number of weighted variables which are totaled to determine the level of risk presented by an individual. The primary factor in the determination of the weight to be given to a particular variable is its relation to the risk of recidivism of the offender. States such as Iowa, New York, and Wisconsin also consider a client's needs in a separate set of variables. Variables included in a selection of fifteen various risk assessment instruments are the factors listed below in order of frequency of appearance:

- Number of Priors, Arrest-free Period, etc.
- Drug/Alcohol Involvement
- Employment Status
- Education Level
- Assaultive Offense History
- Amenability (Attitude)
- Number of Prior Commitments
- Number of Recent Address Changes
- Presence of Emotional Disturbance
- Age

The discretion allowed the probation officer in scoring each variable varies from instrument to instrument. For instance, in defining drug/alcohol involvement one jurisdiction looks only at arrests for drug or alcohol abuse (and that only in

the last two years), while others allow the probation officer complete discretion in determining the extent of involvement.

All of these instruments are completed by a probation/parole officer based on official records and a personal interview with the offender. Reclassifications occur at regular intervals to determine the success of the rehabilitation process. The weighted scores for each variable are totaled, and the sum is considered in the determination of the level of supervision. The extent to which the risk indicator produces the final supervision level decision varies from department to department, but the probation officer usually retains the discretion to place the offender at a stricter level of supervision than his risk indicator suggests is appropriate. A decision of this sort is usually based on a finding of an overriding client need, such as emotional disturbance.

The Wisconsin Assessment of Client Risk

A close examination of the Wisconsin Case Classification System will illustrate the classification process and the underlying policy decisions involved in the determination of the weight to be given to each variable. The development of the Wisconsin system was mandated by the state legislature, which withheld funds for new probation officers pending the establishment of a case screening and management plan. Under the new procedures the initial classification based on a 45 minute interview with the offender is completed within the first 30 days of supervision. Reclassification interviews are required every six months.

The Wisconsin Risk Assessment Scale is composed of 11 weighted variables designed to predict the client's risk of future criminal behavior (See Figure 1). A total score of 15 or more places the client on maximum supervision, 8 to 14 on medium, and 7 and under on low. Placement on the maximum supervision level entails face-to-face contact with a probation officer every 14 days, while selection for the medium level requires this meeting every 30 days. Home visits at these levels are made "when appropriate," without consulting the client. The low level of supervision consists of in-person communication every 90 days without home visits.

Figure 1

ASSESSMENT OF CLIENT RISK

Client Name _____ (Last / First / MI) Client Number _____

Probation Control Date or
Institution Release Date _____ (Month, Day, Year) Agent Last Name _____ Number _____

Date of Evaluation _____

Select the appropriate answer and enter the associated weight in the score column.
Total all scores to arrive at the risk assessment score.

		SCORE
Number of Address Changes in Last 12 Months (Prior to incarceration for parolees)	0 None 2 One 3 Two or more	____
Percentage of Time Employed in Last 12 Months (Prior to incarceration for parolees)	0 60% or more 1 40% - 59% 2 Under 40% 0 Not applicable	____
Alcohol Usage/Problems (Prior to incarceration for parolees)	0 No apparent problems 2 Moderate problems 4 Serious problems	____
Other Drug Usage Problems (Prior to incarceration for parolees)	0 No apparent problems 1 Moderate problems 2 Serious problems	____
Attitude	0 Motivated to change, receptive to assistance 3 Dependent or unwilling to accept responsibility 5 Rationalizes behavior, negative, not motivated to change	____
Age at First Conviction (or Juvenile Adjudication)	0 24 or older 2 20 - 23 4 19 or younger	____
Number of Prior Periods of Probation/Parole Supervision (Adult or Juvenile)	0 None 4 One or more	____
Number of Prior Probation/Parole Revocations (Adult or Juvenile)	0 None 4 One or more	
Number of Prior Felony Convictions (or Juvenile Adjudications)	0 None 2 One 4 Two or more	
Convictions or Juvenile Adjudications for (Select all applicable and add for total) (Include current offense)	2 Burglary 2 Theft 2 Auto theft 2 Robbery 3 Worthless checks 3 Forgery	
Conviction or Juvenile Adjudication for Assaultive Offense (An offense which involves use or threat of weapon, physical force or the threat of force)	15 Yes 0 No	

TOTAL SCORE

Supervision of Probationers/Parolees: Legal Issues

We foresee no successful constitutional challenges to the use of formal instruments in the classification of offenders to supervision levels in the probation/parole field services area. Conceivably the civil libertarians could object to criteria which include prior criminal record, prior drug use, educational level, steady employment, and residency as inherently discriminatory against racial minorities and the poor. However, such criteria could undoubtedly pass the rational basis test of McGinnis v. Royster 93 S.Ct. 1055 (1973). Absent proof of discriminatory intent in the use of such criteria, any challenge to their use on equal protection grounds will likely fail. See Washington v. Davis, 96 S.Ct. 2040 (1976). Furthermore, the case of Marshall v. U.S., 94 S.Ct. 700 (1974) established the principle that there is no violation of equal protection in treating first offenders differently from repeat offenders where funds are limited and there is no violation in treating "dangerous" offenders differently from "non-dangerous" offenders or in giving special attention to those persons who are most likely to benefit from the program.

Successful constitutional challenges on due process grounds are unlikely. Relying on the Supreme Court's recent decision in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 99 S.Ct. 2100 (1979) we feel confident that the probationer/parolee's liberty interest in being assigned to a particular category of supervision is not of sufficient magnitude to invoke the procedural protection of the Due Process Clause. Therefore, in the absence of some fundamental right created and protected by the government, the probationer/parolee is not entitled to any due process protection in the supervision level classification process. Given the present makeup of the United States Supreme Court we would be surprised to see any successful challenge to the classification process of offenders to various supervision levels in the probation/parole area based on either equal protection or due process.

Moving from the area of classification of offenders to supervision levels in the probation/parole level area to the subject of probation/parole revocation there are constitutional issues that must be given careful consideration. In Morrissey v. Brewer, 92 S.Ct. 2593 (1972) the Supreme Court held that the liberty interest enjoyed by one on parole was of sufficient magnitude to invoke the protections of due process in the event government should attempt to deprive the parolee of that interest. In reaching its decision the Court balanced the indi-

vidual's rights against the state's interest in returning the parolee to custody if he did not abide by the conditions of his parole. The court determined that procedural safeguards are needed at two critical stages: First at the arrest and the preliminary hearing of the parolee, and second, at the revocation hearing. For the preliminary hearing the probationer or parolee must be given notice of the alleged violations of probation or parole, an opportunity to appear and present evidence in his behalf, a conditional right to confront adverse witnesses, an independent decision maker, and a written report of the hearing. For the revocation hearing the minimum due process requirements are:

> (a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking (probation or) parole. Morrissey v. Brewer, 92 S.Ct. at 2604.

The hearing must be held within a "reasonable" time after the probationer or parolee is taken into custody.

In Gagnon v. Scarpelli, 93 S.Ct. 1756 (1973) the Supreme Court considered the issue of whether the parolee or probationer is entitled to appointed counsel at the revocation hearing. The Court refused to find a constitutional right to appointed counsel at all revocation hearings.

> We. . .find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound decision by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness--the touchstone of due process--will require that the state provide at its expense counsel for indigent probationers and parolees. 93 S.Ct. at 1763.

Courts have broad discretion in setting conditions of probation, and parole boards have broad discretion in setting conditions of parole. However,

their discretion is not unbounded, and conditions have been invalidated on two grounds: first improper infringement on the constitutional rights of the probationer or parolee, and second unreasonableness.

The test of reasonableness for probation (and parole) is: "A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to possible future criminality does not serve the statutory ends of probation and is invalid." In re Mannino, 92 Cal. Rptr. 880, 883 (1971).

Judicial scrutiny of probation and parole conditions relating to constitutionally protected activities has produced no clear guidelines. Probationers or parolees may be required to submit to searches/seizures with or without warrants without violating their Fourth Amendment rights. See People v. Mason, 488 P.2d 630 (Cal. 1971) and Latta V. Fitzharris, 521 F.2d 246 (9th Cir. 1975). Likewise courts have examined other conditions which directly relate to the public interest and found that they did not unreasonably infringe upon constitutional rights. See Berrigan v. Sigler, 358 F.Supp. 130 (D.D.C. 1973) and Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974). On the other hand, courts have invalidated numerous conditions on both constitutional and non-constitutional grounds. See, e.g., State v. Velazquez, 593 P.2d 304 (Ariz. App. 1979), (a term of probation requiring the probationer to return to Mexico); Loving v. Commonwealth, 147 S.E.2d 78 (Va. 1966) (banishment from county); Sweeney v. U.S., 353 F.2d 10 (7th Cir. 1965) (ordered abstinence for alcholic offender); and People v. Higgins, 177 N.W.2d 716 (Mich. App. 1970) (preclusion of burglary offender from playing college basketball). In the area of probation and parole, as in many other areas in the criminal justice system, the decision maker is accorded broad discretion which will be interfered with by the courts only in extraordinary cases.

Summary

In recognizing that maximum probation/parole supervision can not, and probably need not, be extended to every client, authorities have established differential levels of supervision. In an effort to achieve more accurate and consistent results, the use of formal instruments as guidelines to determine supervision levels has widely increased.

Although courts have not been presented with the problem of the possible discriminatory effect of applying particular variables, decisions in other areas indicate that the generally accepted criteria are supported by a rational state interest within the meaning of equal protection. Similarly, minimal due process procedures appear to be inapplicable since the heavy administrative burden which strict enforcement of these rights would entail overshadows the slight loss of liberty involved in assignment to a higher level of supervision. The courts' almost unfettered discretion in the supervision level area can be seen in their near universal approval of probation/parole conditions so long as they are reasonable.

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SUMMARY

The Legal Component analysis of issues that arise in connection with administrative classification processes is contained within five separate papers in this volume. The decision points selected for study are consistent with those addressed on the main project of the National Risk Assessment Survey (NRAS). They are:

- Pretrial Release
- Sentencing
- Institutional Custody Classification and Transfer
- Parole Release
- Probation/Parole Supervision

Since each of the decision areas is concerned with a type of classification, the legal issues that arise are similar. Most of the challenges that have been litigated concentrate in the equal protection and due process areas, with some additional issues arising in other areas.

As each of the six risk decision areas is examined it becomes clear that defendant/offender rights are most rigorously observed prior to conviction. In fact, the courts seem most anxious to observe and scrutinize defendant rights at the pretrial stage. This is probably due to the general presumption of innocence derived from the Fifth Amendment to the United States Constitution. Then, as each subsequent decision point is examined, it becomes clear that the state's interest mounts. In case prioritization and diversion prosecutorial discretion plays a large role in justifying various types of discriminatory state actions, and in the sentencing area the judge is accorded broad discretionary powers which mitigate the effect of most discrimination.

Subsequent to conviction the offender's equal protection rights are diminished substantially. For custody/transfer, parole release, and probation/

parole supervision assignment only an arbitrary or capricious act will be found to be grounds for overturning a classification decision.

In all criminal justice decision areas it is important to recognize that the courts will sustain the use of most criteria as a legitimate basis for classification. Criteria commonly used for making release decisions focus on such offender characteristics as length of residence and employment history. Offenders tend to question such criteria on the grounds that non-residency or unstable employment is not sufficient grounds to warrant discrimination. The courts have said that only a rational state interest need be shown to sustain such a classification. The courts will not, however, permit the use of what have been termed "suspect" criteria as a basis for classification. Under the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the Supreme Court of the United States has held that criteria such as race, religion, alienage, or a criterion which may deny the exercise of a fundamental right may not be used unless a compelling state interest can be shown. The rationale is that such classifications are arbitrary in nature and therefore should be forbidden unless the state can sustain a heavy burden of proof to justify their usage.

Essentially the court administers the equal protection test in a way that balances the rights of the defendant against the interests of the state. Depending on the decision point being examined, the court will devote a different amount of attention to weighing potential inequities. For example, in the pretrial release area the courts have systematically entertained the use of different criteria in release decisions. Though most of the suits are routinely decided in favor of the state, at least the defendant challenging his detention receives full attention to his claim, whereas in the prosecutorial case prioritization, diversion, and sentencing areas, the court recognizes broad discretionary powers vested in the prosecutor and trial court judge which are not easily questioned. In the case of the prosecutor the court allows great latitude in the use of offender criteria as part of prosecution's charging power. It is only in instances where criteria are "suspect" that challenges will be entertained. Similarly, in the sentencing area judges are also accorded vast discretionary powers. Judicial sentences will not be reviewed unless it can be shown that there has been an abuse of discretionary power or a failure to exercise judicial discretion. As a practical matter, abuse of discretion cases are few and

far between, while charges that the judge failed to exercise discretion have received considerable attention. Failure to exercise judicial discretion is reviewed under what is knows as the "fixed and mechanical" doctrine. Often suits arise where it is not clear that discretion was utilized. In these cases the appellate court will hear the case and in some instances remand the case to the trial court for re-sentencing.

Few classification problems arise in the areas of institutional custody assignment or transfer. There have been cases where it was alleged that a particular prison was racially segregated. In such cases courts have held that temporary segregation of racial groups may be necessary, but that complete and permanent segregation practices could not be upheld as the court would not recognize a compelling state interest to justify such an action.

In the parole release and probation/parole supervision areas equal protection arguments have been held to a minimum. The courts here, as in other areas, are conscious of the potential for the use of suspect criteria, but such criteria are rarely, if ever, used. And as far as the use of other criteria is concerned, almost any state interest will be sufficient to justify their usage.

Due process issues in classification arise substantially in a procedural context. Procedural due process rights do not come into play in the pre-conviction stages (pretrial release, case prioritization, diversion), at sentencing, or in the assignment of supervision levels. Instead, these rights become prominent only when an offender is incarcerated. In the institutional custody/transfer area, procedural due process rights have been accorded in decisions regarding access to the most advantageous jobs, participation in rehabilitation programs, and assignment to maximum security confinement.

Similarly, in the parole release area, the courts have found in certain jurisdictions that the inmate has a right to: (1) present testimonial and documentary evidence; (2) receive a written statement which includes a recitation of the facts upon which the parole release decision is based; and (3) be represented by counsel. Procedural due process rights are granted in the spirit of according prisoners "minimum" rights. Most rights are essentially forfeited upon conviction. But certain constitutional rights are believed necessary to enhance the fairness of the criminal justice system.

Other minor issues which are important in classification processes involve the virtual ban on preventive detention at the pretrial release stage, unless authorized by statute (as in Wasnington, D.C.) or unless the court chooses to

invoke its "inherent powers" to preserve the fair administration of justice. From a procedural standpoint, it is also clear that there is a separation between the federal and state jurisdictions in terms of the type of risk that may be screened. Under the Federal Bail Reform Act the only risks that may be taken into account are those that reasonably bear on the likelihood of the defendant's appearance at trial. Some states, on the other hand, will allow factors related to dangerousness and general recidivism to be considered.

In the area of prosecutorial case prioritization the issue was raised as to whether or not it would be proper for the prosecutor to defer indictment in view of possible infringement on the defendant's right to a speedy trial. However, courts have overwhelmingly approved of most prosecutorial delays in proceeding to indictment. Though it was hypothesized by Legal Component staff that a long delay in seeking an indictment in the interest of preparing a complete case might constitute a Sixth Amendment violation, it is now apparent that such a challenge would most likely fail.

A rather serious issue arises at the diversion stage for defendants. This issue has to do with the conscious waiver of a right to a speedy trial and the right against self-incrimination, both guaranteed by the Sixth Amendment to the United States Constitution. The issue arises within the context of requiring a guilty plea from the defendant before diversion will be granted by the prosecutor. Such a practice may constitute a "chilling" of the constitutional rights of the defendant and therefore be impermissible.

In the custody/transfer area it is anticipated that inmates may raise Eighth Amendment challenges to the use of formal instruments as a means of making changes in levels of custody to more secure levels. This argument is based on the premise that movement into higher security levels results in a loss of rights due to the restrictive nature of maximum security confinement and that such a loss of liberty constitutes cruel and unusual punishment. The courts have on many occasions found numerous prison practices to be cruel and unusual, especially in relation to such concerns as overcrowding, lack of adequate health care, food service, and so forth. However, the cases reviewed have tended to support the use of formal classification procedures, and challenges based on changes in custody level alone are not likely to meet with much success.

In closing, it should be reiterated that the courts have been most receptive to equal protection challenges in the pre-conviction stages, and that such

challenges have lost force as the offender has proceeded through the criminal justice system. Also, it is apparent that the courts will sustain the use of most criteria as legitimate bases for classification, striking down only those criteria which are arbitrary or capricious in nature. Thus, in implementing formal risk classification processes, these findings can serve as guideposts for enhancing offender rights and reducing litigation to a minimum.

END