



Criminal Justice Perspectives

Abolish Parole?

43734
copy 1



Department of Law Enforcement and Criminal Justice
Enforcement Assistant Administration
U.S. Department of Justice

The *Criminal Justice Perspectives* series presents the implications of particularly significant research on fundamental issues facing the criminal justice system. The National Institute hopes the publications will foster continuing dialogue and further insights into these important topics.

BOARD OF CONSULTANTS

The following individuals helped to guide the research reported in this publication. The conclusions presented in the report, however, are those of the authors and not the committee.

Paul Chernoff	Sheldon L. Messinger
Walter W. Cohen	Vincent O'Leary
Alan M. Dershowitz	Arthur Rosett
Don M. Gottfredson	David J. Rothman
Morris E. Lasker	Linda R. Singer

Elliot Studt

Perspectives Editorial Review Board
National Institute of Law Enforcement
and Criminal Justice

Phyllis Jo Baunach

Carolyn Burstein

Richard Linster

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Stock No. 027-000-00721-0

Abolish Parole?

Summary of Report Submitted to the
National Institute of Law Enforcement and Criminal Justice,
Law Enforcement Assistance Administration,
U.S. Department of Justice

by
Andrew von Hirsch
Kathleen J. Hanrahan

September 1978



National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
U.S. Department of Justice

National Institute of Law Enforcement
and Criminal Justice

Blair G. Ewing
Acting Director

Law Enforcement Assistance Administration

James M. H. Gregg
Acting Administrator

This report was prepared under Grant No. 76-NI-0038* from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, and administered by the Center for Policy Research, Inc., New York City. It is a summary of the analysis and conclusions of the Final Report, which was submitted to NILECJ December 1, 1977.

The points of view or opinions in this report are those of the authors and do not necessarily represent the official position or policies of NILECJ or of the U.S. Department of Justice.

Copyright © December 31, 1977, by Andrew von Hirsch.

The Law Enforcement Assistance Administration reserves the right to reproduce, publish, translate, or otherwise use, and to authorize others to publish and use all or any part of the copyrighted material contained in this publication.

Center for Policy Research, Inc.
475 Riverside Drive
New York, New York 10027
(212) 870-2180

Abstract

The theory and practice of criminal sentencing is today experiencing extensive change. One often-heard recommendation is that parole be abolished. Abolition has been advocated by persons representing a wide spectrum of political and philosophical viewpoints; parole has been eliminated or sharply curtailed in some jurisdictions, and others are contemplating similar action. This report is an effort to examine the case for and against parole.

The report concludes that parole should not be continued in its present form. The authors recommend that (1) instead of a discretionary release decision made on the basis of rehabilitative or incapacitative considerations, there should be explicit standards governing duration of confinement, and those standards should be based primarily on a "just deserts" rationale; (2) instead of deferring the release decision until well into the offender's term, the decision fixing the release date should be made early—at or shortly after sentencing; (3) instead of permitting parole revocation for releasees suspected of new criminal activity, they should be prosecuted as any other suspect; and (4) instead of routinely imposing supervision on ex-prisoners, supervision should be eliminated entirely, or if retained, should be reduced substantially in scope, sanctions for noncompliance should be decreased, and the process should be carefully examined for effectiveness and cost.

The role of the parole board as a decisionmaking body is a more complex question, however. Whatever its defects, the parole board has performed one essential function: it transforms lengthy judicial sentences into more realistic terms of actual confinement. The authors therefore urge caution in abolishing the parole board. The report describes ways in which the parole board could assist in carrying out the above-described reforms; and recommends that any effort to phase out parole release be undertaken gradually and with specified safeguards.

Table of Contents

Abstract	iii
Table of Contents	v
Foreword	vii
Preface and Acknowledgments	ix
PART I: The Problem	1
Introduction	1
Assumptions	2
PART II: Parole Release	9
The Case for an Early Time-Fix	9
The Time-Fix and Institutional Problems	14
PART III: Parole Supervision	17
Parole as a Separate Adjudicative System	17
Parole Supervision	20
Services to Parolees	25
PART IV: The Choice of Decision-Maker	29
Choosing the Standard-Setter: Single vs. Dual Time ...	29
Notes	39
The Authors	54

Foreword

Parole, once seen as a major reform, is now being challenged as unfair and ineffective. Critics claim that parole fails in its dual goals of protecting the public and helping the offender.

Because the parole concept is such an integral part of the current criminal justice system, however, any modifications necessitate careful consideration of the practical implications and potential consequences. This project was designated to provide a systematic analysis of the changes in the sentencing and correctional systems that would be required if traditional parole practices were replaced with alternative approaches.

This thought-provoking volume includes a statement of the moral assumptions underlying the analysis of parole; a thorough assessment of the elements of parole, such as who decides and who might decide the parole date and when it is or could be set (i.e. early or late in the offender's sentence); an analysis of current parole supervision practices; and recommendations for possible reform in the parole process.

Because of the significance of this topic for the criminal justice community, and the stimulating exploration of these controversial issues in this scholarly report, the Institute has elected to publish it as the first in the *Perspectives* series. The discussion generated by this document should enlarge our understanding of the conceptual and practical complexities inherent in the question of parole abolition.

Phyllis Jo Baunach, Ph.D.
Government Project Monitor

Preface and Acknowledgments

This report summarizes the analysis and conclusions of the final report of a project to investigate the case for and against parole. The full report was submitted to the National Institute of Law Enforcement and Criminal Justice on December 1, 1977. Necessarily, this summary omits some of the qualifications and discussion found in the final report. (Readers interested in a fuller statement of the analysis should consult the final report on file with the Institute. A revised version of that document will also be published by Ballinger Publishing Company in the fall of 1978.)

The authors are greatly indebted to the project's Board of Consultants, and our analysis relies heavily on the Board's guidance and advice. However, it was contemplated from the outset of the project that the final work would be that of the two authors, rather than a committee report. Thus the conclusions are our own.

The members of the Board of Consultants were: **Paul Chernoff**, Judge of the District Court of Newton, Massachusetts, and former Chairman of the Massachusetts Parole Board; **Walter W. Cohen**, Master of the Court of Common Pleas of Philadelphia, and former Chief Assistant District Attorney of Philadelphia; **Alan M. Dershowitz**, Professor of Law at Harvard Law School; **Don M. Gottfredson**, Dean of the Graduate School of Criminal Justice, Rutgers University, Newark; **Morris E. Lasker**, Judge of the United States District Court for the Southern District of New York; **Sheldon L. Messinger**, Professor of Law, Jurisprudence and Social Policy at the Law School of the University of California at Berkeley, and former Dean of the School of Criminology at that University; **Vincent O'Leary**, Acting President of the State University of New York at Albany and Dean of the School of Criminal Justice at that University; **Arthur Rosett**, Professor of Law at the University of California at Los Angeles; **David J. Rothman**, Professor of History at Columbia University, and Senior

Research Associate at the Center for Policy Research, Inc. in New York City; and **Linda R. Singer**, a partner in the law firm of Goldfarb, Singer and Austern, Washington, D.C. In addition, **Elliot Studd**, Professor of Social Welfare (emeritus) at the University of California at Los Angeles, participated in the Board's sessions on parole supervision.

We are indebted to our Project Monitor, Dr. Phyllis Jo Baunach of the National Institute of Law Enforcement and Criminal Justice, who was supportive and helpful throughout our entire effort.

Anne W. Murphy and Antonia Goldsmith served successively as the project's administrative assistant, and we thank them for their patience, cooperation and care in doing the administrative and secretarial work for the project. We also thank Deborah Koster, our research assistant, for her work in locating sources, as well as for her thoughtful comments on the drafts.

Part I: The Problem

Introduction

Parole occupies a central role in the sentencing and correctional system.¹ Once an offender is sentenced to prison, it is largely the parole board which determines when he will be released, under what conditions, and whether his conduct under supervision warrants reimprisonment.

Parole was originally introduced as a reform, and until recently it commanded a strong consensus of support. Now, it is under attack. Abolition has been urged by a number of authorities,² and adopted in some jurisdictions.³

The recent criticism of parole has been three-fold:

- The procedures of parole decisionmaking are unguided by explicit standards and by the traditional elements of due process;⁴
- The tasks which parole is supposed to perform—the accurate prediction of the offender's likelihood of recidivism, and the monitoring of rehabilitative progress—are beyond our present capacities;⁵ and,
- Aside from questions of effectiveness, it is unjust to base decisions about the severity of punishments on what the offender is expected to do in the future.⁶

These criticisms, in concert, have been said to warrant abolition of parole.⁷ However, they leave a number of questions unanswered. To what extent can parole be justified on grounds other than rehabilitation or prediction? Are the various functions of parole *all* without usefulness, or should some be retained? What alternatives to parole are available, and what problems would they pose?

This report attempts to answer these questions. Doing so necessarily involves value judgments, since the issues raised concern not only what is effective, but also what is fair. Rather than avoiding such value judgments, we try to deal with them as explicitly as we can.

Assumptions

Our analysis rests on certain general assumptions and on certain (more controversial) assumptions about the aims of punishment.

General Assumptions. First, moral assumptions. The convicted offender should retain all the rights of a free individual except those whose deprivation can affirmatively be justified by the state.⁸ A related premise is that of parsimony.⁹ Even where a given type of intrusion can be justified, its amount should be measured with stringent economy. The state has the burden of justifying why a given amount of intervention, not a lesser amount, is called for. Severe punishments bear an especially heavy burden of justification.

The basic conceptions of due process should apply to the convicted. If, for example, an offender is to be penalized for supposed new misconduct occurring after plea or verdict of guilt, there should be fair procedures for determining whether the individual did, in fact, commit that misconduct.

Minimum requirements of humane treatment should apply to all persons who become wards of the state, including convicted criminals. Cruel punishments, intolerable living conditions, and similarly severe deprivations are barred. This obligation of humane treatment should take precedence over whatever penal goals the state is assumed to be pursuing.¹⁰

Second, assumptions about controlling discretion. It was long assumed that broad, standardless discretion was necessary to allow sentences to be tailored to the particular offender's treatment needs.¹¹ But this claim does not bear analysis. Any theory of punishment, even a rehabilitatively oriented one, requires standards to insure that individual decision-makers will pursue the chosen purpose, and will do so in a reasonably consistent manner. The choice of penal philosophy concerns a different question: not whether there ought to be standards, but what their particular content should be. Thus, specific, carefully drawn standards should govern the disposition of convicted offenders. The standards should set forth the type and severity of penalties with reasonable definiteness.¹²

Third, assumptions about the severe character of imprisonment. The harshness of life in today's prisons has been too well documented to need rehearsal. Imprisonment would still be a great deprivation, even if conditions were improved—were there smaller size, better location, improved facilities, and less regimentation than is customary in prisons now.¹³

The severity of imprisonment is important, because it makes essential a careful scrutiny of each phase of the parole process. Parole release stands in need of justification, because that decision affects the duration of confinement. Parole supervision does so likewise, because (among other reasons) it may result in revocation and reimprisonment.^{14*}

Assumptions About the Aims of Punishment. One cannot examine the usefulness of parole without first asking, useful for what purpose? At least four different conceptions have been said to underlie sentencing and corrections. Three of these—rehabilitation, incapacitation, and deterrence¹⁵—have been penologists' traditional concerns and look to reduction of crime in the future. The fourth, which the present analysis emphasizes, is desert; it looks to the blameworthiness of the offender's past criminal conduct.¹⁶

In punishing the convicted, we assume, the fundamental requirement of justice is the principle of *commensurate deserts*: that the severity of the punishment must be commensurate with the seriousness of the offender's criminal conduct.¹⁷ The rationale for the principle was described in *Doing Justice*,^{18**} as follows:

The severity of the penalty carries implications of degree of reprobation. The sterner the punishment, the greater the implicit blame: sending someone away for several years connotes that he is more to be condemned than does jailing him for a few months or putting him on probation. In [setting] penalties, therefore, the crime should be sufficiently serious to merit the implicit reprobation.... Where an offender convicted of a minor offense is punished severely, the blame which so

*An obstacle to careful thinking about parole has been the notion that the offender is fortunate to be considered for release and supervision, since he otherwise would have remained in prison. Because parole was thus seen as a privilege or act of grace, the fairness of its processes was not thought to need inquiry. Our assumption about the harsh nature of imprisonment undercuts this notion. If imprisonment is as severe as we assume it is, the length sentences which judges have been accustomed to imposing are not necessarily justified—in which case earlier release is not merely a privilege.

The Supreme Court has also questioned the notion of parole as a privilege—on grounds that is has become an institutionalized part of the punishment process. In the Courts words: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted offenders."

**For a fuller discussion of the rationale of the commensurate-deserts principle, and of desert generally, see Andrew von Hirsch's *Doing Justice* and also the philosopher John Kleinig's valuable book, *Punishment and Desert*.

drastic a penalty ordinarily carries will attach to him—and unjustly so, in view of the not-so-very-wrongful character of the offense . . . [Conversely] imposing only a slight penalty for a serious offense treats the offender as *less* blameworthy than he deserves.¹⁹

To satisfy this requirement of justice, the seriousness of the criminal conduct must determine the penalty. Seriousness, in turn, is measured by (1) the harm done or risked, and (2) the culpability of the actor in engaging in the conduct.²⁰

The principle establishes the following constraints on penal policies: First, it imposes a rank-ordering on penalties. Punishments must be arranged so that their relative severity corresponds with the comparative seriousness of offenses. Secondly, the principle limits the absolute magnitude of punishments; the penalty scale must, at all points on the scale, maintain a reasonable proportion between the quantum of punishment and the gravity of the crimes involved. The scale should not, for example, be so much inflated that less-than-serious offenses receive painful sanctions (not even if serious crimes were punished still more harshly). Finally, the principle requires that criminal behavior of equal seriousness be punished with equal severity. A specific penalty level must apply to all instances of law-breaking which involve a given degree of harmfulness and culpability.²¹

The commensurate-deserts principle, as a requirement of justice, constrains all phases of a state-inflicted criminal sanction, irrespective of whether carried out in prison or in the community. Much of our inquiry will be devoted to examining whether parole satisfies or violates commensurate-desert constraints.

For our analysis of parole, two alternative conceptual models are presented. The first is the Desert Model; it is the conception of punishment which emerges when the principle of commensurate deserts is rigorously observed. The other is the "Modified Desert Model": this is a penalty scheme based primarily on desert, but permitting limited deviations from desert constraints for rehabilitative, incapacitative, or deterrent ends.

The Desert Model. Under this model, all penalties must be commensurate in severity with the seriousness of the offense. No deviation from deserved severity would be permitted for such forward-looking ends as incapacitation or rehabilitation. The salient features of such a system (as proposed in *Doing Justice*) are:

- Penalties would be graded according to the gravity of the offender's criminal conduct. (This, according to *Doing Justice*, would include both the seriousness of his present crime and the

seriousness of his past criminal record, if any.)²² For each gradation of gravity, a specific penalty would be prescribed. Variations from that specific penalty would be permitted only in unusual instances where the degree of culpability of the actor or the degree of harmfulness of his conduct are greater or less than is characteristic of that kind of criminal conduct.²³

- The severe penalty of imprisonment²⁴* would be prescribed only for crimes that are serious—e.g., crimes of actual or threatened violence and the more grievous white-collar crimes. Penalties less severe than imprisonment would be required for nonserious crimes.²⁵

It is sometimes assumed that parole must be abandoned if the rehabilitatively-oriented theory that has sustained it is no longer accepted.²⁶ But is it necessarily true that the assumptions of the Desert Model rule out parole? Even if parole were historically based on predictive-rehabilitative ideas, it is still a fair question to ask whether any of its features might be rejustified under a desert-oriented conception of sentencing.

The Modified Desert Model. This is an alternate model which gives somewhat greater scope to forward-looking considerations in deciding penalties. The commensurate deserts principle, as we noted, requires equal punishment of those whose offenses are equally serious: a specified level of severity must be selected for each level of seriousness. The Modified Desert Model permits some relaxation of this requirement. *Modest* upward or downward variation from the specific (deserved) penalty would be permitted, for the purpose of enhancing the rehabilitative, incapacitative or deterrent utility of the sentence. Large deviations from the requirements of the commensurate deserts principle still would be barred, however. In that sense, the model represents a compromise: the basic structure of the penalty system is shaped by the desert principle, but crime-control considerations are given some scope in the choice of the individual offender's sentence.

Of the two models, the authors strongly prefer the Desert Model. Because the commensurate deserts principle is a requirement of justice, we feel that deviations from it are undesirable even when small. The Modified Desert Model is useful, however, as a heuristic device. It furnishes a more complex conceptual framework, in which both desert and forward-looking considerations have a role in deciding the particular offender's punishment. This allows an analysis of parole which is of wider scope than would

**Doing Justice* argues for retaining imprisonment as the severe penalty suited to serious crimes, but would stringently limit its duration. (The report recommends that most prison terms be kept below 3 years' actual confinement).

have been possible using only the Desert Model, with the preeminence the latter gives to the single idea of desert. Besides considering whether desert requirements are met, the Modified Desert Model requires us to inquire whether and to what extent parole does actually serve the rehabilitative and incapacitative aims that traditionally were thought to provide its rationale. Yet the model shows some concern for fairness, by making the blameworthiness of the criminal conduct the primary (although not exclusive) determinant of penalties.

Limits on Discretion. Earlier, the need for dispositional standards was noted.²⁷ Under either of these models, it is essential that there be rules governing how serious various categories of crimes are deemed to be, and how much punishment they are considered to deserve.

The Desert Model calls for a definite disposition for each gradation of gravity, in order to satisfy the principle of punishing equally serious infractions equally. A proposed method of accomplishing this is through a system of "presumptive sentences." Each seriousness-gradation would be assigned a specific penalty, and that would be the disposition applicable in the normal case. However, departures from the presumptive disposition would be permitted in unusual circumstances where mitigating or aggravating circumstances were present. The standards would define what kind of circumstances qualified as mitigating or aggravating (and, under the Desert Model, only those which affected the harm or the culpability involved in the conduct could qualify). The standards would also determine how much variation from the presumptive disposition was permitted in such cases.²⁸ Uniform treatment would thus be given to the unexceptional cases that make up the bulk of sentencers' caseloads—while still allowing variation in extraordinary cases where the harmfulness of the particular offender's conduct or the extent of his culpability is greater or less than is characteristic for that kind of offense.²⁹ *

A Modified Desert Model may require some adjustment in the manner of drafting the standards, since the model allows limited consideration of factors other than the seriousness of the offense.

*A presumptive sentencing system could be more or less detailed. The Twentieth Century Fund's report, *Fair and Certain Punishment*, recommended a highly detailed sentencing code: each major offense category would be broken down into several subcategories of distinct gravity, with a presumptive sentence assigned to each subcategory. Alternatively, one could (as *Doing Justice* suggested) devise a simpler and more flexible system: there would be a limited number of gradations of gravity (each possibly embracing several offense categories), with a presumptive sentence assigned to each gradation. A compromise between these two approaches would be to start with more general standards, and then refine them over time on the basis of experience.

In any event, a "feedback" process would be helpful. Sentencers should be required, in applying the standards, to give reasons for their decisions in the more difficult cases. These statements of reasons would then be collected and reviewed by the standard-setting agency, for the purpose of identifying areas where the standards need alteration or greater specificity.

One method would be to prescribe narrow presumptive ranges, instead of specific presumptive sentences.^{30*}

Let us emphasize that in recommending such standards, we are not presupposing that the legislature should be the agency to set them. The question of which agency—the legislature, the courts, the parole board, or a special rule-making agency—should bear the standard-setting responsibility merits a separate section (see pages 29-38). We shall be arguing, in fact, that a body other than the legislature is preferable for the task.

Prosecutorial Discretion. Albert Alschuler and others have suggested that adoption of presumptive sentencing standards is not likely successfully to limit discretion, but rather, merely to cause the location of that discretion to shift to the prosecutor.³¹ Others, such as James Q. Wilson, disagree. Standards are capable of influencing dispositions, Wilson argues, provided that the prescribed penalties are perceived as reasonable by the participants in the process. Wholesale shifts in discretion to the prosecutor will only occur “at the extremes,” when the stated penalties are viewed as excessively lenient or severe.³²

Since sentencing standards are a recent development, there is little empirical evidence to support or refute either position. Disparities will, doubtless, persist as long as there are no guidelines governing the prosecutor’s discretion; but the dimensions of the problem are unknown. The severity of penalties may, however, be important: Arthur Rosett has pointed out that the harsher the stated penalties, the greater the incentive for both prosecution and defense to bypass them through the plea-bargaining process.³³

Our view of sentencing standards is that they are a necessary first step. It would be extremely difficult to address the issue of prosecutorial discretion, without first attempting to bring some order into the formal sentencing system. Some have argued, for example, that a system of sentencing standards will also require controls on plea-bargaining decisions that are designed to help insure consistency between those decisions and the standards themselves.³⁴ But is it hard to describe what form the controls should take, until one has more fully developed the sentencing standards—and until experience provides some indication of the manner of prosecutors’ response to those standards.

*For example, a given felony category would ordinarily be deemed to deserve a presumptive range (of, say, not less than 15 nor more than 20 months). Within that range, the duration could be set on the basis of incapacitative, rehabilitative, or deterrent factors, to the extent these are knowable. This approach follows Norval Morris’ suggestion of using desert as a limit rather than a basis of choosing the specific sentence. However, to meet the Modified Desert Model’s requirement that only *modest* departures from commensurate-deserts are permissible, the presumptive ranges would have to be kept narrow.

The foregoing assumptions, both general and those concerning the aims of punishment, form the framework for our analysis: parole will be examined, in particular, against the two sentencing models. But since not all readers would subscribe to these models, we shall also describe how our conclusions might change were other philosophies of punishment adopted.

Parole, as we see it, consists of a number of separable elements: the deferral of the release decision; a composite of activities subsumed under the heading "parole supervision"; and the use of the parole board as policy-maker. Each element will be examined in turn—so that we can recommend which specific features of parole should be retained, which substantially amended, and which abolished. In the latter event, alternatives are also proposed, and the problems posed by those alternatives are discussed.

Part II: Parole Release

The Case for an Early Time-Fix

Parole typically involves the deferral of the decision on how long the prisoner will remain confined. At the time the offender is sent to prison, he ordinarily does not know what portion of his judicially-imposed sentence he will actually serve;³⁵ * that is decided at a later date by the parole board. This deferral of the duration-of-confinement decision is sometimes known as "indeterminancy" of sentence. But as that expression has been used with a variety of other connotations,³⁶ we will refer to the practice as the "deferred time-fix."

Recently, deferral has become a much criticized feature of parole. It is said to rest on outdated assumptions, and to subject prisoners to the needless cruelty of waiting for a decision. A number of penologists and study commissions have proposed moving toward an early decision on the duration of confinement.³⁷ And some jurisdictions—Maine,³⁸ California,³⁹ Indiana,⁴⁰ Oregon,⁴¹ and the Federal System⁴²—have now shifted to an early fix. **

*Even with a deferred time-fix, however, inmates in some jurisdictions can surmise how long they are likely to serve. Some parole boards have adopted guidelines which suggest the duration of confinement that should ordinarily be served for different categories of offenders. Some other boards, while not having formal guidelines, have fairly well known rules of thumb, e.g., that certain categories of offenders will ordinarily be released at first eligibility. This would enable the inmate to predict when most people in his category are likely to leave prison. But even then, he cannot predict whether his own case will follow the norm, or fall in the minority of cases where the board chooses to go outside its guidelines or its usual practices. (Some jurisdictions, also, have implemented "contract parole" programs for certain categories of offenders. While these programs generally are rehabilitative in aim, they do provide the inmate involved with a more definite idea of when he will be released.) Many states, however, have neither formulated guidelines nor adopted clear-cut practices on their release decisions. There, the inmate must rely for clues on the rumors he hears in prison and his own impressions of how the board decides other cases.

**Sometimes, this change is linked with abolition of other aspects of parole. Under the new California statute, for example, the judge's sentence determines the actual duration of confinement, subject only to prescribed reductions for satisfactory behavior in prison.

Sometimes, however, the change is made without eliminating parole. Under the new Oregon statute, release from prison continues to be decided by the parole board, but the board must adopt standards for duration of confinement and notify the offender of his expected release date shortly after his entry into prison (see discussion in pages 32-34 *infra*). The U.S. Parole Commission also has recently amended its rules to require that the release date be set within a few months after entry into prison.

For an evaluation of the relative merits of these approaches, see final section, "Choosing the Standard-Setter: Single vs. Dual Time."

To resolve whether the time-fix should be early or late, we should examine what, if anything, is learned by waiting. We must look at the items of information that are relevant to deciding the duration of confinement. If any of those items can be known only late—well after sentence is imposed—that would be reason for delaying the time-fix. If all such information is known or can be determined at the time of sentence, that would support an early fix.

What information is germane depends, of course, on the assumed goals of punishment. We therefore will consider successively (1) the Desert Model, (2) the Modified Desert Model, and (3) more strongly utilitarian assumptions. With respect to each conception, we shall ask what kinds of information would be relevant to deciding the duration of prisoners' confinement, and when that information is available.

Our conclusion is that on *any* of these assumptions the decision should occur early. We shall advocate that each prisoner should be notified, at the time he is sentenced or shortly thereafter, of when he is to be released from prison. Then, in the next section, we will consider whether this conclusion needs to be altered in order to deal with the practical problems of prison discipline and prison overcrowding.

The Time-Fix Under the Desert Model. Under the Desert Model, the duration of an individual's confinement would be based only on an assessment of the gravity of his criminal conduct, without reference to forward-looking considerations of treatment, prediction or deterrence. To decide how much imprisonment the offender deserves, the time-fix need not be delayed. The concept of desert looks to the past: to the gravity of the crime or crimes of which the offender was convicted. The seriousness of the past crime—that is, the extent of the harm done or risked, and the degree of the offender's culpability—is normally as well ascertainable at the time of conviction as at a later date. By waiting longer to fix the time in prison, one ordinarily learns nothing new.^{43*}

The Time-Fix Under the Modified Desert Model. The analysis becomes more complicated if we adopt a Modified Desert Model, for that model permits more factors to influence the penalty, and

*There would be a limited exception, however: where the perceived seriousness of a crime alters over time, and the offense is reclassified in the sentencing standards as less serious. Here, there would be a case for reducing the punishment of previously-convicted offenders, since what is in question is the justification of ever having considered such defendants as deserving of severe punishment. However, to accommodate such instances, one could still rely on the early time-fix. Each prisoner would promptly be notified of his release date, and that date could subsequently be altered only in those (probably infrequent) instances where there has been a change in the standards. This refixing of the release date should be limited to cases where the altered standards treat the offense as *less* serious. The converse should not obtain: to increase the confinement retroactively would be objectionable (as is *ex post facto* legislation) on grounds of lack of fair notice.

hence more items of information to affect the time-fixing decision. We must attempt to determine, then, whether any of these added items of information could be known only later.

Incapacitation.^{44*} The Modified Desert Model allows some room for incapacitative considerations. It thus could permit risk-of-recidivism to be taken into account to a modest extent in deciding the disposition.[†] Assuming this much scope for prediction, does it require deferral of the time-fix?

At present, there would be little reason to defer the time-fix on predictive grounds. Currently available statistical prediction methods⁴⁵ have had a limited degree of success in forecasting recidivism, if success is defined as the ability to identify the "true positives" with better than random accuracy. (They achieve this success at the expense of considerable overprediction: many of those identified as recidivists will be "false positives"—those who would not have offended again.⁴⁶) The existing prediction devices rely on *pre*-conviction information such as past criminal history, age, prior drug or alcohol abuse, and record of employment; and do not make significant use of postconviction information.⁴⁷ Prisoners' behavior inside the institution does not seem much correlated with subsequent recidivism.⁴⁸ And, while it has been suggested that offenders' behavior on furlough or partial release might be useful in assessing risk of recidivism,⁴⁹ there is little information to confirm this.^{50‡}

Rehabilitation. It was conventionally believed that rehabilitation required deferral of the time-fix. Since the sentencing judge cannot know in advance how quickly the offender will respond to treatment, the date of release (to the extent determined by rehabilitative considerations) should be set later, after observing the inmate's progress in the program. But to delay the time-fix for

*We are speaking here of the concept of incapacitation that involves (1) predicting an individual offender's likelihood of returning to crime, and (2) having that prediction influence the duration of his confinement. (In *Doing Justice*, this is referred to as "predictive restraint.") There is, however, another conception, which can be called "collective incapacitation." It is the incapacitative effect of imposing a specified period of imprisonment on *all* offenders convicted of a given crime. Since duration of confinement is determined at the outset, no deferred time-fix would be needed.

†To put it more precisely, the assumptions of the Modified Desert Model do not *per se* rule out predictive considerations entirely—since factors other than desert may affect the disposition to a limited extent. However, there may be other moral difficulties with using predictions—particularly as regards the confinement of persons who are "false positives." For fuller discussion of the latter issue, see A. von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 *Buffalo Law Review* 717 (1972).

‡It should also be noted that even if behavior in prison or on furlough or partial release were found to be related to subsequent recidivism, it would not necessarily tell the predictor anything new. The "late" information might be duplicative—i.e., predict essentially similar outcomes as information that was available earlier. To justify a delayed decision, what would be needed is evidence that the "late" information substantially improved the time-fixer's predictive capacity.

treatment presupposes that the treatment works. Reviews of treatment efforts (while some have challenged their conclusions)⁵¹ have not found much evidence of success.⁵²

Suppose, however, one were to assume that some of today's treatments were capable of succeeding at least for certainly carefully selected subgroups of prisoners. That still would not suffice to justify deferral for several reasons.

First, even if a few categories of offenders were thought amenable to treatment, the entire population of inmates certainly is not. Why, then, routinely defer the time-fix for all prisoners?

Second, a successful treatment program would not necessarily affect the duration of imprisonment. If the offender is deemed to deserve a certain period of imprisonment, it may be possible to treat him without accelerating or postponing release. The question of duration of treatment, however, has been largely ignored in existing research.

Third, even if the treatment were of approximately known length and were to require some addition or reduction in the period of imprisonment, that would not necessarily call for deferral. We still would have to ask the same kind of question as we did about incapacitation: What kind of information germane to the duration of treatment is gained by waiting? It may be that the information needed to place the offender in a suitable program and to estimate its duration is largely known at the time of sentence. Again, there has been no empirical research on the question of the usefulness of "late" information for these decisions.

General Deterrence. We doubt that the timing of the offender's time-fix would affect the deterrent effect of his punishment on the general public.

It has sometimes been suggested that deferral enhances deterrence by permitting the system, Potemkin-like, to *seem* to punish more severely than in fact it does. The usefulness of this strategy depends, however, on which segment of the public would be fooled. Persons with the greatest potential for offending may be most familiar with the actual workings of the system.

The Modified Desert Model would theoretically permit limited adjustments in duration of confinement to enhance the penalty's deterrent impact. But the technology does not now exist to calculate deterrent returns with any precision—and there is some reason to believe that crime rates are not particularly sensitive to modest variations in severity. Finally, there is little reason to expect that one will gain new information about deterrent effects by delaying the time-fix. Certainly, "late" information about what

has befallen the prisoner himself would be irrelevant, since general deterrence depends on how much others are intimidated, not on the prisoner's own responses.

Deferral of the time-fix thus is unnecessary, even when one considers the complicating factors which a Modified Desert Model introduces. The addition of these factors has made our conclusions depend somewhat on the state of empirical knowledge; but based on current knowledge, we can say that the relevant information is available early.

Why Defer?—On Other Models. Our conclusion favoring an early time-fix would appear to hold, even if one were to reject the Modified Desert Model in favor of a still more strongly utilitarian penal philosophy. Suppose, for example, that one held the view that duration of confinement should be based *primarily* on the offender's predicted likelihood of offending again. If one asks what information is needed for making such forecasts, the answer remains: information known at the time of sentence. It is true that this conclusion would depend still more on the state of empirical knowledge than under the Modified Desert Model—since predictive technology rather than desert considerations would occupy the central role. But given the current state of the art, there still would seem to be no need for delay.

Changes in Empirical Knowledge. What if empirical knowledge were to change, however? Consider prediction. While existing prediction methods rely on information available at sentence, that may have been due in part to its having been more readily at hand. Were "late" information more carefully recorded than it is today, and were there a systematic effort made to explore its predictive usefulness, instances might be discovered where it did enhance prediction. To what extent would that alter our conclusions about the early time-fix?

On a Desert Model, it would make no difference—for there, prediction is not a factor in the time-fix at all. It is only on a Modified Desert Model—or other assumptions stressing prediction still more—that the question arises.

Even then, prisoners would not have to routinely be kept ignorant of when they will be released. Were new research to find instances where items of "late" information enhanced prediction, such cases could be accommodated through a limited modification in what we have recommended: namely, an early *presumptive* time-fix. Each prisoner would be informed immediately of his expected

release date, based on the seriousness of his offense and (to the extent one's assumptions permit) on his estimated risk of recidivism. That release date could be altered on the basis of "late" information *only* when there was strong evidence that the information did, in fact, alter the estimated probability of the offender's returning to crime. Imprisoned offenders would thus know, immediately after sentence, when they would be likely to leave prison. That date could change only in those special circumstances when "late" information *did* tell one something new. (And, if one assumes a Modified Desert Model, the amount of the change could not be very great since the model permits incapacitative considerations to affect the disposition only to a limited extent.)

Moreover, this suggested modification—if ever necessary—would be called for only at some possible future date, when the predictive technology has altered substantially.⁵⁷

The Time-Fix and Institutional Problems

Aside from questions of the aims of punishment, it has been asserted that the deferred time-fix has important practical uses relating to the prison itself.

Overcrowding. Overcrowding is perhaps the most serious problem facing prisons today.⁵⁸ Crowding could remain a problem, even on our assumptions. Those assumptions permit imprisonment only for serious crimes, but if the number of convictions for serious crimes grows, the prison population will also increase. Prison capacity, however, is not readily expanded, given the costs of construction and operation.⁵⁹

It is commonly believed that parole boards respond to overcrowding by releasing more prisoners as population levels climb.⁶⁰ Empirical evidence on this is scarce, and it appears that the board's responsiveness varies by jurisdiction.⁶¹

We think that it is proper to adjust prison terms to alleviate overcrowding. While we have assumed desert to be the preeminent penal aim, certain minimum constraints of a civilized society take precedence over any aim of punishment, even desert. One such constraint, mentioned in the second section, "Assumption," is that persons in the state's custody should not suffer inhumane treatment. Since overcrowding in prisons can create intolerable living conditions,⁶² the obligation to punish as deserved must give way to a still more fundamental obligation of the state not to treat its wards with brutality.

Assuming that it is proper to shorten stays in prison to alleviate overcrowding, such actions should be governed by explicit standards or guidelines. Those guidelines should define what constitutes overpopulation for various types of facilities;⁶³ and should contain provisions designed to ensure that, when crowding occurs, adjustments in terms of confinement are carried out in as evenhanded a manner as possible.

Such adjustments, when necessary, will complicate a system with an early time fix. Were it possible to predict prison population trends with reasonable accuracy, the adjustments could be made when the release date was initially set. But the techniques for projecting population levels are still quite rudimentary.⁶⁴ Until there has been a substantial improvement in projection methods, therefore, adjustments to alleviate overcrowding will have to be made at a point close to the release date. This, in turn, would mean modifying the early time-fix procedure roughly as follows:

- At or shortly after sentence, the time-fixer would set the anticipated release date, taking into account how much time in prison the offender deserves and all permitted additional factors *other* than crowding.
- The crowding issue would be dealt with later, at a time near enough to the expected release date to allow population estimates to be made more accurately. The time-fixer would determine whether there was overcrowding that was severe enough to require acceleration of the release date; and if so, would set an altered date pursuant to the guidelines on crowding.

Discipline. If the state punishes by imprisoning, there must be sanctions to preserve order in the prison. The parole system can provide such a sanction, through the threat of denying release to prisoners who do not abide by the rules.⁶⁵

There are, however, means other than parole denial for extending the terms of violent or disruptive prisoners. One method is, of course, a new criminal trial.⁶⁶ This squares better with desert: a prisoner who intentionally injures another person, for example, has committed an offense that is serious, and deserving of some added incarceration. But for obvious reasons, it is not easy to prosecute crimes in prison.

The alternative would be to adjust the duration of confinement administratively. The judgment of whether an infraction occurred would be made not through the ordinary criminal process, but in a hearing by an administrative fact finder (e.g., the parole board or a special disciplinary board). Such an administrative proceeding, however, increases the risk that some inmates will serve added time for infractions they did not commit or have valid excuses for

committing, since the strict standards of proof and the other procedural safeguards of a new trial would not be present.⁶⁷

A possible solution would be to have the stringency of the procedure depend on the amount of potential punishment. A limited amount of time could be added in an administrative hearing; but large adjustments of time-in-confinement would call for a full criminal prosecution.⁶⁸

The problem of devising standards and penalties for institutional misconducts is not unique to the early time-fix. Irrespective of when the release decision occurs, the drafters of the standards for duration of confinement will have to decide how much adjustment should be made for misbehavior in prison.

How such adjustments are to be made in a system having an early time-fix should readily be apparent. When the offender is notified of his release date at or shortly after sentence, he would also be informed that the date could be altered by specified amounts, either downward for satisfactory institutional behavior, or upward for unsatisfactory behavior.⁶⁹*

Even with these modifications, the procedure we recommend differs markedly from traditional parole release practice. Instead of a largely discretionary release decision, the time-fix would be guided by explicit standards. Instead of the decision being delayed as it is today in most jurisdictions, the decision would occur early: all prisoners would swiftly be informed of their release date. In most cases, that early decision would be final. In the exceptions just discussed, where overcrowding or disciplinary infractions are involved, it would be subject to limited subsequent alteration. But even so, prisoners would have a much more definite idea of when they would be likely to leave the institution.

*A downward adjustment is used in the new California statute: the duration of confinement, set by the judge pursuant to statutory standards, is reduced by so many days per month if the offender refrains from specified disciplinary infractions. An upward adjustment is used in the new Oregon statute. The parole board must notify the offender of his expected release date shortly after his entry into prison; however, the date may subsequently be extended if the board, after a hearing, finds he has engaged in "serious misconduct" in the institution.

Part III: Parole Supervision

Parole supervision consists of a number of analytically distinct activities. In order to examine supervision, we have divided the process into three major elements: (1) the separate adjudicative system for parolees charged with new crimes; (2) supervision *per se*, which aims at preventing further criminal activity by ex-prisoners through the imposition of parole conditions, surveillance, and, if thought necessary, revocation; and, (3) the provision of services to ex-prisoners.

Parole as a Separate Adjudicative System

It is virtually always a condition of parole that the parolee refrain from new crimes.⁷⁰ Any law violation can result in revocation of parole and reimprisonment. When a parolee is suspected of new criminal activity, rather than facing criminal prosecution, his parole may be revoked.⁷¹*

Lower Standards of Proof. A parolee charged with violating parole by having committed a new crime can be reimprisoned on less evidence than it takes to convict. The standard of proof in revocation proceedings is not that of "beyond a reasonable doubt," constitutionally mandated in criminal trials, but a lower standard.⁷² The procedures of parole revocation also lead to less rigor in requirements of proof. Instead of the unanimous (or near unanimous) jury required in criminal trials, only one or two board members or hearing officers need be persuaded in many jurisdictions.⁷³ Rights of counsel⁷⁴ and cross-examination⁷⁵ are more restricted than in a criminal trial, and evidentiary standards are less stringent.⁷⁶

*Revocation in lieu of prosecution is not the only official response to suspected criminal activity by parolees. The parolee may be prosecuted and his parole revoked; or else, the parolee may have his parole revoked for violation of one of the "technical" conditions of parole, rather than for the suspected crime.

It is true, of course, that most prosecutions do not involve an actual new trial where the state's attorney must meet traditional requirements of proof; instead a guilty plea is bargained. But at least, the defendant has some choice whether to plead guilty or demand a trial. A parolee cannot insist that there be a trial if the board prefers to pursue the revocation route. Nor can he, in cases where there is a trial, prevent the board from conducting a revocation hearing with its lower standards, and reaching its own decision as to his guilt or innocence.⁷⁷

The high standard of proof in criminal proceedings is a fundamental requirement of fairness; it is designed to keep to a minimum the risk of punishing the innocent.⁷⁸ Any lower standard of proof, while making it easier to punish the possibly guilty, entails the unacceptable moral cost of increasing the possibility that innocent persons will be punished.⁷⁹ This principle has as much applicability to persons charged with crimes who were previously convicted and imprisoned, as it does to persons accused for the first time. It is no less unfair to punish a parolee for an alleged new offense which he may, in fact, not have committed, than to punish an alleged first offender who may be innocent.

Were one to reject our assumptions about the primacy of desert and opt for a penal theory that gave more scope to predictions of dangerousness, the lower standards of proof would still be open to the charge of unfairness. Even if new criminal activity were a sign of dangerousness, it still must be established that the parolee has committed the new crime. A mistaken attribution of a new offense to the parolee will lead to an erroneous attribution of risk.⁸⁰ Lenient standards of proof increase the likelihood of such mistakes.

Standards of Disposition. The condition requiring parolees to observe the law also creates a separate system of disposition for parolees found to have committed new crimes. The parolee can have his parole revoked for any crime, irrespective of its seriousness. The maximum duration of reimprisonment, moreover, depends not on the character of the new offense, but on the amount of the parolee's unexpired sentence.⁸¹

Our assumptions would permit some differentiation between the penalties for repeat offenders and those for first offenders. On the Desert Model as described in *Doing Justice*, repetition is grounds for ascribing somewhat enhanced culpability to the offender.⁸² * On a Modified Desert Model, risk may be grounds for a modest upward adjustment in penalties—and repetition is a factor pointing toward increased risk.

*This view has been disputed by some, but it is at least an arguable position under desert theory. See, *Doing Justice*, ch. 10.

Treating a new crime as a parole violation, however, leads to results that are unacceptable under either model. The penalty could be disproportionately harsh, since even minor law violations could result in revocation and reimprisonment. Conversely, the penalty could be disproportionately lenient. If the unexpired portion of the original sentence is relatively short at the time of the violation, even a serious crime could lead, via the revocation route, to a period of reconfinement insufficient to comport with the seriousness of the crime.

Abolition of the Separate System. We thus recommend abolition of the separate system of adjudication for parolees. Any ex-prisoner who is believed to have committed a new crime should, instead, be criminally charged and prosecuted.

A major benefit of abolition would be fairer procedures. The requirement of "proof beyond a reasonable doubt," and the more stringent evidentiary requirements of a criminal trial, should reduce the risk of punishing the innocent.*

Practice could, concededly, prove less satisfactory. For what would be guaranteed is not a trial, but merely being put through the criminal process: which in most cases means plea-bargaining. We do not wish to underestimate the difficulties and abuses that plea-bargaining creates. But there is beginning to be an interest in reforming guilty plea practice;⁸⁴ and the traditions of the criminal trial, with its emphasis on the rights of the accused, at least make it easier to define abuses as such. Moreover, even with the criminal process as it is today, there will be cases where its more stringent standards would make a difference. Some parolees will be convinced they have a valid defense, will have the resources to hire competent counsel, and will be willing to risk a trial rather than plead guilty. Here, the higher standards could allow them to prevail, where they may have lost in a revocation proceeding.

Abolition of the separate system will also change the standards of disposition applicable to parolees found guilty of new offenses. The extent of that change, and its desirability would depend on what sentencing standards were in effect in the jurisdiction. Thus:

- If a jurisdiction has adopted explicit sentencing standards, the ex-prisoner, after his new conviction, would receive the punishment prescribed in the standards. Assuming the standards were based on the Desert or Modified Desert Model, the severity of

*Could the revocation process be reformed to provide higher standards of proof? The high standards in criminal trials stem not only from the formal "proof beyond a reasonable doubt" standard, but from a host of ancillary protections such as strict evidentiary standards and the requirement that a jury of the defendant's peers be convinced of his guilt. To approximate these protections, parole revocation would have to be recast so as to closely approximate the criminal process; and if so, why not be done with it and require a criminal proceeding?

the new sentence would depend on the seriousness of the new offense and, to some extent, on the number and seriousness of his prior offenses. Excessive severity or leniency would be avoided: only serious new offenses could result in reimprisonment—but where the offense *is* serious, the duration of imprisonment would not be limited to the unexpired sentence for the prior offense.

- If, on the other hand, the jurisdiction had not adopted such sentencing standards, the result would be less satisfactory. Instead of facing a discretionary revocation decision by the parole board, the ex-offender would face a similarly unstructured sentencing decision by a judge.

Eliminating the separate system could increase court caseloads. Charges against parolees can now be kept off court calendars and handled separately through revocation. With abolition, these cases will have to flow through the courts. Depending on how large the additional caseload is, this could add to pressures to bargain charges down.⁸⁵ The dimensions of this problem, however, will become known only as studies are done of the experience in jurisdictions where revocation has been eliminated or restricted.

Abolition of the separate system would have an impact on prehearing detention. Unlike the criminal defendant who is entitled to bail, parolees facing revocation are frequently denied prehearing release.⁸⁶ Were the separate system abolished, the parolee would have to be prosecuted, and thus he too would be eligible for bail.⁸⁷

Parole Supervision

Besides facing a different adjudication system if accused of a new crime, a parolee is subjected to a system of supervision which supposedly will make him more likely to lead a law-abiding life. Parole conditions regulate conduct which is not criminal in itself, but is thought linked with possible future criminality.⁸⁸ To ensure compliance with these conditions, a parole agent is assigned to and maintains contact with the parolee.⁸⁹ Violation of any condition—even in the absence of a new substantive criminal offense by the parolee—is grounds for revocation of parole and reimprisonment.

Does Supervision Work? The ostensible purpose of parole supervision is preventive; to reduce the likelihood of further law violations by the parolee. Given this purpose, there are threshold criteria concerning whether supervision works that must be satisfied before even a *prima facie* case for this device can be made.

One such criterion may be called "rationality." It requires that parole conditions be reasonably and directly related to the prevention of future crimes by the parolee.⁹⁰ If the aim is to encourage law-abiding behavior, the means—namely, the conditions and techniques of parole supervision—should be rationally suited to that aim. Before parolees may be subjected to behavior constraints not applicable to the general population, the burden should lie on the state to give specific reasons why the behavior is linked to recidivism.

Even the most rational-seeming condition may fail when tested, however. Thus a second criterion should be empirical evidence of effectiveness. If, for example, parolees are to be routinely required to seek and hold jobs,⁹¹ however plausible that may seem as an incentive for law abiding behavior, there should be empirical confirmation that former prisoners do offend at a lower rate when subjected to this condition.⁹²

The rationality criterion would call much of present day supervision practice into question. Many of the conditions of parole have little or no perceptible relevance to criminal behavior. Periodic visits between the parole agent and the parolee—the mainstay of parole supervision—customarily are brief and superficial.⁹³ Little effort is made to verify in any systematic fashion what kind of behavior in the community is, in fact, connected with future criminality⁹⁴ and to relate parole conditions to such behavior. And, treatment programs are seldom made available to parole agents who wish to refer their charges to treatment.⁹⁵

The effectiveness of parole is also open to question. A number of studies have compared the recidivism rates of parolees with those of offenders released at expiration of sentence. Some of these are inconclusive because they do not control for possible differences in the selection of the two groups.⁹⁶ (The parolees may have recidivated less often not because of any virtues of supervision, but because the parole board has selected the better risks for release on parole.) A few studies do attempt to control for such differences in selection. Of these, some report favorable results,⁹⁷ others less favorable (albeit mixed) results.⁹⁸

The research is too scanty and its results are too equivocal to warrant the inference that supervision succeeds—at least, if the burden of proving success rests on the proponents of supervision, as we think it should. Since there have been so few studies, it is possible that further empirical inquiry might show success, or at least, success among certain selected subcategories of offenders. But that is not what can be concluded now.

Were further research to yield positive results, empirical data on what specific components of the supervision accounted for the outcome would also be necessary. It is possible, for example, that any successes are due to the lower standard of proof in revocation proceedings: e.g., parolees may be more reluctant to risk new crimes because they can be reimprisoned more easily. This would be a troublesome result because, as we pointed out in the previous section, a low standard of proof—whatever its usefulness as an inducement to law abiding behavior—entails greater danger of penalizing the innocent.

Is Supervision Just?—Desert Constraints. Can supervision be squared with the requirements of desert? Although preventive in aim, supervision is unpleasant, and so we must ask whether it enhances the severity of the punishment in ways prohibited by the commensurate-deserts principle.

In assessing supervision, one should distinguish between (1) the contribution of supervision *per se* to severity, and (2) the contribution of the revocation sanction. Supervision may not (depending upon its content) enhance severity by much; and any such enhancement in severity could, in any event, be offset by appropriately scaling down the duration of the original confinement. Revocation, on the other hand, presents the following, more serious difficulty.

Revocation can result in substantial periods of reimprisonment, although no new criminal act has been committed. (Not all revocations result in lengthy terms, of course. But the potential exists, since the parolee can be reconfined, at the board's discretion, until his sentence expires.)⁹⁹ As a result of revocation, offenders sentenced for the same original crime and serving initial terms of the same duration ultimately may serve very disparate terms of confinement, depending on whether or not they are reimprisoned for parole violations that are not in themselves criminal acts. And the additional confinement can render the total punishment inflicted disproportionately severe in relation to the seriousness of the original crime. This objection holds not only under the strict Desert Model, but under the Modified Desert Model as well. The latter, as we saw, permits a limited amount of variation from deserved severity for crime-control ends, and this could conceivably allow a modest amount of added confinement. But revocation could involve a *large* amount of extra imprisonment.

We have spoken only of whether the revocation sanction can be justified as deserved for the original offense. But might not the sanction be defended instead as a penalty deserved for the parole violation itself? If a parole condition is imposed as part of one's

punishment for a crime, why shouldn't the flouting of that requirement be deserving of extra punishment? There are two reasons why this argument will not sustain parole revocation:

- Standards of liability and proof. A willful refusal to abide by the terms of supervision might, perhaps, be defined as a new crime, as escape is now declared a crime. But then, the parolee would be entitled to demand a full trial, in which proof beyond a reasonable doubt and other procedural safeguards would apply. These safeguards are missing when a parolee is reimprisoned through a revocation hearing.¹⁰⁰
- Severity of the revocation penalty. Even were parole violations declared crimes, they would not deserve severe punishment unless they can be shown to be serious. Yet how reprehensible are technical parole violations? There is no immediate injury to others, such as occurs when the parolee commits most ordinary crimes. The parolee is not "getting away with" substantially less punishment than he deserves for his original crime—as occurs in prison escapes—since he has largely paid the price for that crime already, through his sojourn in prison before being released on parole. Of course, it is difficult to give a definitive rating to such conduct in the absence of a fuller theory of what constitutes seriousness.¹⁰¹ But on these common-sense grounds alone, we would be skeptical of claims that a parole violation is so blameworthy in itself as to deserve the long durations of reconfinement that parole revocation potentially entails.

Try To Reform Supervision? If the severity of the revocation sanction creates the problem, could supervision be salvaged by scaling down that sanction?¹⁰² * Would supervision, thus reformed, meet the desert requirements? And could it be effective, with such limited sanctions? The answers depend on which of the two medals—Desert or Modified Desert—one chooses.

On a Modified Desert Model: Here, modest backup sanctions would be permissible. Even if such sanctions are viewed as deviations from the amount of the deserved punishment for the original offense, this model expressly allows such deviations, provided their extent is limited.

Effectiveness could, however, become more difficult to achieve. Through the revocation sanction, parole can now operate as a method of incapacitation: parolees who seem headed for new crimes can be taken out of circulation. Using parole supervision in this manner requires only that one identify empirically which

*The new California law, in the form originally enacted in 1976, moved in this direction by limiting reimprisonment for revoked parolees to 6 months. Some proposals go even further: the Hart-Javits bill dealing with the Federal sentencing system, limits reimprisonment to 15 days.

kinds of behavior after release are indicative of enhanced risk of recidivism. If one limits the power to reconfine parole violators, however, supervision will have to change from an incapacitative to a rehabilitative technique: it will have to be capable of rendering parolees more law-abiding while they remain in the community. The task become the harder one of changing behavior, not just forecasting it.

We are, therefore, not optimistic about the prospects of success. The question of effectiveness can only be resolved, however, by empirical research. The research should examine not only the effect of supervision on recidivism rates, but also a second factor: cost. Parole supervision is unquestionably an expensive process, but little is known about how expensive it is, where the greatest costs lie, and how much money could be saved through elimination of needless procedures. Even if supervision were shown to have some effect on recidivism, it is important to consider whether those effects are sufficiently great to warrant the expense.

On a Desert Model. By requiring strict adherence to the commensurate deserts principle, this model would, in our opinion, rule out parole supervision, even with modest sanctions for parole violations.

Such sanctions could not be justified as part of the deserved punishment for the original offense, since they would impose on violators an added amount of punishment not suffered by non-violators whose original crimes were of equal seriousness. Treating the violation itself as deserving of punishment is likewise problematic—since ordinarily, only *crimes* are punishable acts.^{103*}

Keep Supervision Under Other Models? Were someone to reject our desert-oriented models of justice, how would the conclusions differ?

One could no longer object to the potentially severe revocation sanction as undeserved. A more utilitarian sentencing philosophy

*One could create a new crime of infringing conditions of parole. But requiring violators to be prosecuted would make the supervision system so cumbersome and costly as, in our view, to reduce the likelihood of its being effective to near-zero.

Alternatively, one could retain an administrative proceeding to determine guilt for the violation—on the theory that the rigorosity of the fact-finding procedure may properly vary with the severity of the penalties. When the authorized sanctions are modest, as they would be in "reformed" parole, a less formal procedure arguably might suffice. The analogy that might be drawn is that of prison discipline discussed in pages 15-16: briefly extending an inmate's stay in prison through an administrative proceeding, if he commits a disciplinary infraction.

But the analogy to prison discipline is a doubtful one. Even when potential penalties are small, why should there be fact-finding procedures less stringent than a criminal trial unless there clearly are no practical alternatives? Administratively imposed penalties for prison infractions are, arguably, a necessity in this sense: The Desert Model requires severe punishment for serious offenses; imprisonment is the only available severe punishment; and in prisons, maintaining order requires some significant penalties that can be administratively imposed, given the difficulties of prosecuting prison infractions. Parole sanctions do not fit this logic—for the measure they enforce, the supervision itself, is not a necessity under the Desert Model. There is an alternative that would dispense with the need for such sanctions: abolish the supervision.

might permit the added severity of parole revocation, if useful in reducing recidivism.*

But there remains the question of the effectiveness of conventional parole supervision. For the past 75 years, supervision has been routinely imposed, with negligible efforts to ascertain its effectiveness and cost. At least, this institution should be forced to undergo a period of rigorous testing, and should be discontinued if its utility is not demonstrated. One way this could be accomplished would be by setting a "sunset" date: existing authority to supervise would be made to expire in (say) 5 years. During that period, parole agencies would be expected to devote much of their resources to the empirical testing of supervision methods (both as to effectiveness and cost). At the end of the period, the results would be evaluated, and unless substantial positive results emerged, the authority to supervise should be terminated.

Were supervision so tested, we venture to guess that if it survives at all, it will emerge with much smaller dimensions than it has today. Conceivably, supervision could be found effective (and worth its expense) for certain carefully selected categories of offenders. But we would be surprised if this elaborate and costly process needs to be imposed on all released offenders.

During the period of testing (and afterward, to the extent supervision survives), guidelines would also be needed. They should specify such matters as the type and intensity of supervision, the types of violations warranting reimprisonment rather than lesser sanctions, and the duration of imprisonment upon revocation. This could help somewhat in reducing disparities in the handling of similarly situated parole violators.¹⁰⁴

Services to Parolees

Even if parole supervision is abolished or restricted, there remains the question of providing services to ex-prisoners. Imprisonment severs many of the prisoner's links to the outside world. When released, he will have to reestablish these links, and that will be made harder by the stigma of his criminal record.

*There could, however, be another ground for objection. In the section on "Parole as a Separate Adjudicative System" (pages 17-20), we argued against revoking and reimprisoning parolees charged with new crimes. The argument was not based on desert constraints, but on a broader principle of procedural fairness: that someone should not be punished for an alleged new crime without the state being required (if the charge is contested) to prove his guilt beyond a reasonable doubt. Someone who did not hold a desert-oriented sentencing theory might still accept this principle, since it relates not to the amount of punishment for the guilty, but to the criteria for deciding guilt. If so, he might wish to eliminate potentially severe penalties for technical violations of parole, because these can be misused so readily for the purpose of penalizing parolees thought guilty of new crimes. It is too easy, when a parolee is believed guilty of a new crime, to charge him with violating one of the numerous (and often vaguely worded) technical conditions and to use that violation as pretext for imprisoning him for the unproven crime.

Furlough and work-release programs may ease this process somewhat, by providing the prisoner a "halfway out" status for a time before he leaves prison. But it will still be a difficult transition. The problems encountered by recently released prisoners have been cataloged by a number of researchers.¹⁰⁵ Not surprisingly, most report that the most pressing needs are material: financial aid, housing, employment, and obtaining credentials.

Provision of services has been one of the supposed functions of parole supervision. However, the services tend to be rudimentary, since the parole agent seldom has any resources for assistance at his disposal. Moreover, the helping and policing functions tend to conflict.¹⁰⁶ It has thus been suggested that services could better be performed were they made the sole focus of the state's involvement after the prisoner's release.¹⁰⁷ This would, it is said, allow more resources to be put into the provision of services, by freeing those now devoted to trying to control supervisees. And it could make ex-prisoners less reluctant to accept the help offered, because assistance would be separated from enforcement.

Which Objective: Crime Control or Help? In speaking earlier of programs for offenders, we were referring to those that were rehabilitative in the conventional sense: that is, those whose objective was to reduce participants' rate of return to crime. The criterion for success was whether individuals enrolled in the program recidivated less often than similar samples of nonparticipants.

It is sometimes claimed that voluntary services would succeed better in this rehabilitative task. This claim would have to be tested empirically, but hopes for much success may be disappointed. Those volunteering for treatment programs may well be the best risks: those who might not recidivate even without programs. Moreover, it is not merely compulsion that tends to interfere with treatment, but more fundamental problems such as the lack of understanding of the causes of criminal behavior.¹⁰⁸

We think service programs should, instead, seek a different goal: helping ex-prisoners reestablish a tolerable life for themselves in the community. The criterion of success would not be recidivism control, but the programs' ability to alleviate suffering and disorientation among ex-inmates. Programs for ex-prisoners would thus be judged as social service.¹⁰⁹

Meeting the Needs. The services for releasees should include provision of financial support during the difficult first weeks after the offender leaves prison; job placement and job training services; aid in locating housing; and "status clearance" services such as assistance in obtaining credentials, and psychological counseling.¹¹⁰

When should assistance be provided? Many authorities report that the period of greatest stress for releasees is the weeks and months immediately following release.¹¹¹ Priority should be given to providing assistance during this difficult early period. More specific answers about timing depend on the particular needs involved. A few are quite short term and could be met through furlough or other prerelease programs¹¹²—status clearance being an example. Most services, however, may have to continue for a time after release.

Parole systems now have a staff of parole agents working to carry out the traditional supervision function. If the recommendations of the last section were adopted, these agents may have little or no supervision left to do. Could the agents assume the service-providing function?

At present, the parole agency has few services at its disposal. However, the services could be obtained by having the parole agency contract for them with specialized community agencies. Then the individual agent could act as a broker or "resource manager."¹¹³ He would inform his clients of the available resources, channel them to the program of choice, and followup to insure that the parolee receives the service. The agent could also act as a conduit to any programs offered to members of the community generally, such as welfare or adult education programs.

What remains to be seen is how well the parole agency and its agents would be suited to this new function. Parole agents have not been trained in locating and arranging social services and many tend to view their role as chiefly law enforcement.¹¹⁴ Whether this change of mission could successfully be accomplished, and what retraining programs and other steps would be needed for the change, can be determined only by experimenting.

Voluntary or Compulsory Services? If the ex-prisoner does not wish to accept the services, should there be any penalty for refusal? We think not, for both pragmatic and moral reasons.

One objection concerns how participation could be policed if it were made obligatory. Because offenders would be living in the community rather than in the controlled environment of a prison, procedures would have to be developed for monitoring participation, reasserting control over nonparticipants, and imposing penalties—in short, something akin to a miniature system of supervision. As such a system of enforcement expands, the agency offering the services is likely to find its energies increasingly absorbed by administering the policing system, rather than providing services.

Compulsory services are questionable on moral grounds as well. In the second section, "Assumptions" (pages 2-8), we assigned a high value to preserving the liberty of the individual. Given this goal, we think that forcing the exoffender to accept services thought beneficial only (or primarily) to himself cannot be justified.^{114a}

Our view, therefore, is that the services should be voluntary. They should be offered to any offender who needs them, but he should be free to reject them. Participation should not be made a condition of release, nor should there be penalties (even mild ones) for refusal.

Part IV: The Choice of Decision-Maker

Choosing the Standard-Setter: Single vs. Dual Time

We have explained the substance of our proposals. There should be express durational standards, which look largely to the gravity of the criminal conduct. The time-fix should occur early: at or shortly after imposition of sentence. Parole supervision should play a much more limited role, if it is not eliminated entirely. Now, we must consider what kind of decision-making process—and which decision-makers—are needed to implement these proposed reforms.

The Legislature as Standard-Setter. It is frequently assumed that if there are to be durational standards, the legislature must set them.^{115*} But the legislature is not necessarily the only, or the most appropriate, body that could perform this function; as pointed out in *Doing Justice*,¹¹⁶ standards could be set by a special rule-making commission, the courts, or possibly the parole board.

In a representative system of government, the legislature need not be exclusively responsible for the setting of all rules or standards. It may delegate its rule-making powers, with respect to particular subject matters, to a variety of specialized agencies. This has been common practice in the United States. Congress and States legislatures have given wide rule-making powers to regulatory agencies. No breach of the *principle* of representative government is involved when an agency other than the legislature, acting under authority granted by the latter, makes rules for a particular area. The legislature always retains the power to overrule the agency's regulations or retract the agency's rule-making authority, thus assuring the representative body's ultimate supremacy.

*Under California's newly adopted system of "determinate" sentences, for example, the legislature did set the standards.

When choosing the agency to set the durational standards, there are some reasons for preferring a body other than the legislature:

- In the past, legislatures have had little experience in sentencing issues, preferring to leave them to the courts and parole boards. Their chief involvement was the setting of statutory maximum punishments, and such maxima were usually so high as to be controlling in none but the most aggravated cases.¹¹⁷ On the less frequent occasions when legislatures also set mandatory minimum sentences, the experience was not a happy one: the minima tended to be very severe.¹¹⁸ The inclination has been, in other words, either to avoid sentencing questions as uncomfortably controversial; or else to urge draconian penalties in order to demonstrate "toughness" to the electorate.
- The setting of such standards will be a laborious, time-consuming task. Under a Desert Model, crimes will have to be categorized and assigned to the appropriate gradations of seriousness; the different gradations of seriousness will have to be assigned their presumptive penalties; and guidelines will have to be established governing aggravation and mitigation. Under a Modified Desert Model, the rules will be even more complex, since considerations other than desert enter the picture. Once established, moreover, the standards will call for continued experimentation and revision (and unanticipated situations of overcrowding might also call for supplemental rules). To make such revisions, the standard-setting agency should be capable of reviewing and adjusting its norms periodically in the light of accumulating experience. An overburdened legislative body—that must each year levy taxes, allocate a budget among conflicting constituencies, and initiate new programs—is likely to have little time, interest, or staff resources left over for the task of drafting the standards with the necessary care, or of reviewing standards that have been adopted in a previous session.
- The standard-setting task is one that deals with the rights of a minority and with the extent to which convicted persons may justly be deprived of their liberties. The legislature may wish to delegate this task, because of the difficulty of debating such questions in its own forum. Once the legislature begins to deal with punishments, responding to the public's anxieties about crime tends to become the preoccupation; there is apt to be less incentive for concern about whether the unpopular (and often disenfranchised) prisoners are being punished fairly and deservedly.

Finally, if legislative input is desired, it does not have to take the form of enacting the standards themselves. The legislature could continue to set the maximum permissible penalties for different categories of crimes, leaving another standard-setter with the further task of setting the durational standards within those limits. The legislature could also, as we will discuss more fully below, give the standard-setting agency guidance as to the rationale to be followed.

A Sentencing Commission: Single Time. A new, specialized rule-making body could be established to set the durational standards. Several bills pending in Congress and some State legislatures take this approach;¹¹⁹ they propose a commission which is empowered to set standards for sentencing.¹²⁰

The approach has several advantages. A specialized agency, having the setting of standards as its sole function, could devote some care and thought to the task, and could attract scholarly assistance in its work. It would also be well situated to modifying and refining the norms on the basis of experience.¹²¹ And such a specialized, nonelective body may be somewhat better insulated from political pressures to adopt posturing stances of "toughness."

What should happen to parole release were a sentencing commission established? One approach, taken by the Hart-Javits bill and the Senate Judiciary Committee's new proposed Federal Criminal Code, would be to eliminate it.¹²² The standards on duration of imprisonment would be set by the commission, and those standards would prescribe the *actual* time-in-confinement the offender will serve. The time-fixing decision would be made by the individual judge, pursuant to the commission's rules.

Despite its seeming simplicity and directness—the judge's sentence would inform the offender and the public how long he will *really* serve in prison—this approach presents a practical problem. It arises from the fact that it changes perceptions of time in sentencing.

There is now a dual system of reckoning time. Judges are accustomed to imposing lengthy sentences of confinement, which the participants in the process do not expect to be carried out; which could not be carried out given the limitations of prison resources; and which would be disproportionately severe if they were carried out. The parole board's function—perhaps its most important practical role—is to decide shorter, actual durations of imprisonment.

Were parole abolished, there would be a single reckoning: real time in prison. The sentence prescribed by the commission and imposed by the judge would constitute the period to be actually

served. The transition from dual to single time could easily give rise to misunderstanding, however. The appearance of a shift toward leniency can be created, even when there has been no change in the real quantum of punishment. When a 6-year purported sentence is replaced by a 2-year "real time" sentence, that is apt to be widely misunderstood as a 4-year sentence reduction even if offenders previously had, in fact, been serving only 2 years in prison before being released on parole. Explanations by the commission of why there has been no real change may well go unreported and unheeded. The commission would thus be likely to be under increased pressure to raise the levels of its sentences. And while the commission may be somewhat more insulated from political "heat" than the legislature, it could still find it difficult to withstand very strong public protest.

To help protect the commission from such pressures, it would be necessary for the legislature, when establishing the commission, to provide some kind of clear directive that the latter adjust sentence durations downward to reflect the fact that it will be dealing with real, not apparent time.¹²³ There remains, however, the problem of getting such limitations adopted. The body that creates the sentencing commission and gives it its powers and duties—the legislature—is itself accustomed to the long purported sentences of the dual system, and may not easily be convinced that it must call for shortened sentence durations in a single-time system.

Eliminating parole release creates another problem: securing compliance with the durational standards. Through parole, the responsibility for deciding actual durations of confinement in individual cases has been concentrated in a small, specialized agency, the parole board. The proposal would transfer responsibility for these individual time-fixing decisions to sentencing judges who are far more numerous and diverse, unaccustomed to having their sentencing decisions reviewed, and have time-fixing as only one of many judicial duties.¹²⁴ It will be difficult enough (even with the introduction of appellate review of sentences) to ensure that these individual decision-makers abide by the commission's standards in their "in-out" decisions (whether to imprison or grant probation). The standards concerning duration of imprisonment are apt to be still more complex and difficult to police.

It thus becomes worthwhile to consider whether there might be an alternative mechanism for our proposed reforms.

The Parole Board as Standard-Setter: Retention of "Dual Time." Dual time operates in most states through unreformed parole. But that system could be altered to achieve the substance of our earlier proposals. The judge would continue to set a purported sentence,

and the parole board would continue to release after a portion of the sentence had been served. Only now, the board would be required to set standards for its release decisions, based primarily on the seriousness of the offense; and to fix release dates early. Such a procedure, in fact, has been established in the State of Oregon.¹²⁵

The new Oregon law requires the parole board, after consulting with a joint advisory commission of judges and parole officials, to set standards that establish definite ranges of duration of imprisonment before release on parole.¹²⁶ The statute prescribes the rationale that the board must follow in setting those standards—and that rationale is oriented primarily to desert.¹²⁷ * The statute also mandates an early time fix: the offender must be informed of his release data shortly after he enters prison, subject to subsequent change only for "serious misconduct" in prison.¹²⁸

This approach, by preserving dual time, would avoid some of the difficulties just described. Parole boards have long been accustomed to dealing in actual time-in-prison; the experience of board members with prisons and prisoners should provide a sense of the severity of even a few months in confinement, and an awareness of the limitations of prison space. The task of explaining the standards to others—legislators, judges, and the public—should also be somewhat less difficult. The board would be dealing with the same decisions—parole release decisions—as always, and there would not be the problem of having to explain away an apparent time reduction where no real one had occurred.

The Oregon approach also makes it easier to ensure compliance with the durational standards since the time-fixing decisions in individual cases would still be made by parole board personnel. Because the parole board itself would have written the standards, its members and hearing examiners should be more familiar with the standards' content. The process of policing individual release decisions to determine compliance with the standards should also be less difficult, since only a few, specialized decision-makers, in frequent contact with one another, are involved.

This scheme requires, however, a board that is willing to structure its own discretion and move away from traditional theories of parole. In a jurisdiction where the board has resisted efforts to structure its discretion, the provisions of such a statute could largely be nullified through board inaction or noncooperation. In that event,

*The statute provides that the board's standards for duration of confinement be designed to achieve the following objectives: (1) punishment "which is commensurate with the seriousness of the prisoner's criminal conduct," and (2) deterrence and incapacitation—but only to the extent that pursuing those latter aims is consistent with the requirements of commensurate-deserts. The statute further specifies that the board's standards "shall give primary weight to the seriousness of the prisoner's present offense and his criminal history."

however, there is a variant of the proposal, suggested by the ABA Committee on the Legal Status of Prisoners.¹²⁹ The ABA Committee's report recommends elimination of the parole board and the creation of a new "independent releasing authority" having essentially the same responsibilities as the Oregon proposal gives the parole board. The new authority might carry less of the traditional ideological baggage than some existing parole boards, and might be more sympathetic to the standard-setting task. Yet, dual time is retained as is a small, specialized group to write and apply the standards.

Dual Time and Judicial Standards. An important question raised by this approach is what is to be done with judges' "in-out" decisions? There must be standards for these decisions; disparity cannot be alleviated by durational standards alone, if discretion in judges' decisions whether to imprison or release on a lesser sentence (probation, fine, suspended sentence) remains unrestricted.

A possible solution would be a two-agency system for setting the standards: the parole board would set the standards governing parole release, and the judiciary (or another agency) would set the standards governing judges' "in-out" decisions.^{130*} With two different standard-setters, however, one would need to develop some means of ensuring consistency between the two sets of standards. One method would be to have the legislature prescribe a common sentencing rationale, which both standard-setting agencies would be directed to follow, and require the two standard-setters to consult with each other in setting their respective norms.

Retain or Eliminate Supervision? The Oregon statute retained parole supervision, and did not change its procedures. The parole board has adopted guidelines which regulate the duration of supervision and the severity of revocation sanctions¹³¹—but the board's members have not favored abolition of supervision,¹³² as we do.

One could, however, imagine a dual-time system that restricted or eliminated supervision. The release decision would be handled by the parole board in the manner of the Oregon statute. However, provisions would be added, limiting the duration of supervision and the severity of the sanctions that may be imposed for parole violations.¹³³ Alternatively, supervision could be eliminated entirely, as the ABA's Commission on the Legal Status of Prisoners has proposed, as follows:

*The mechanism for this might vary. The trial court could formulate such sentencing standards either by consultation among its members or by establishing a special panel for that purpose: Appellate review would either affirm or modify the standards. Alternately, the appellate court might promulgate the standards. Still another possibility, which the Pennsylvania legislature is now considering, is to create a sentencing commission, but have its rule-making jurisdiction embrace only the sentencing decisions which judges now are empowered to make.

On the date of release established by the releasing authority, the prisoner should be released from confinement without further conditions or supervision. The correctional authority should provide counseling and other assistance to released prisoners on a voluntary basis for at least one year after release.¹³⁴

Gradual Transition to Single Time. Despite its practical advantages, dual time carries an important cost: it gives continued apparent legitimacy to prodigal conceptions of time. David Rothman has pointed out that our otherwise highly time conscious culture has historically thought of prison time in huge quantities—and that has made it harder to justify the more modest actual confinements that fairness and realism require.¹³⁵ As long as the system continues to impose 5-, 10-, and 15-year purported prison sentences for common felonies, this will give some credibility to thinking about time in such overlarge terms even if actual times-in-confinement are much shorter.

For that reason, we think the long-run objective should be the creation of a system that speaks in terms of modest real sentences, and banishes the long fictional terms. But the transition to single time should be undertaken gradually and carefully. The Oregon dual-time approach may be the best place to begin, because it achieves the substance of our proposed reforms at less risk.

One method of shifting to single time would be to slowly phase out the parole board. The board's standard-setting function would gradually be transferred to the sentencing commission; and its function of applying those standards in individual cases, to sentencing judges. Any such phase-out should, however, be done in such a manner as to minimize the hazards of which we have spoken. The following are possible precautions:

- When a sentencing commission is established, it may be advisable at first to empower it only to set guidelines for the decisions which sentencing judges *now* make, to wit: (1) guidelines for judges' "in-out" decisions as to whether to impose a custodial or non-custodial sentence; (2) guidelines for judges' decisions (when they opt for a custodial sentence) to set the maximum duration of permitted confinement; and (3) guidelines regarding judges' decisions to impose minimum sentences, to the extent the latter are authorized. (These are the decisions which the parole board cannot control in any event.) The sentencing commission's performance in writing those standards could then be evaluated, before

the commission is allowed to take over from the parole board the further task of setting the norms for duration of actual confinement.

- Even after the parole board ceases to prescribe the durational standards, it could still be retained for a time as the agency that applies those standards in individual cases. It would not seem advisable to transfer to sentencing judges the power to fix actual time-in-confinement, until there has been an opportunity to evaluate their performance in applying the sentencing commission's standards for the "in-out" decision.
- A shift from dual to single time may generate less misunderstanding if it is done in stages. The standard-setter (the parole board, in the first instance; then, the sentencing commission when it takes over the board's standard setting functions) could, over a period of years, shorten sentences and increase the portion of sentence served in prison before release. (One might, for example, begin with a 6-year sentence, parolable after one-third; then have a 4-year sentence, parolable after one-half; and so forth until one ends with a nonparolable 2-year sentence of actual imprisonment.) This would mean there would not, at any one time, be a very large apparent reduction in sentence, as would occur with a sudden shift from dual to single time. And it would give the public more opportunity to get used to a new way of reckoning sentencing time.

Since the submission of the full Final Report, it has been brought to the authors' attention that a single time system could be achieved without eliminating the parole board. This could be done by vesting in the parole board all power to specify the length of sentences of imprisonment. Under such a system, the judge would decide only whether the offender is to go to prison or receive some lesser sentence. When the judge has opted for imprisonment, it would then be the board's responsibility to specify the amount of the sentence.¹³⁶ The board would thus initially be required to set *two* dates: (1) the date of actual release from imprisonment (which was the board's traditional function), and (2) the date of expiration of the maximum sentence (formerly the trial judge's function, now transferred to the board). The legislation would also contain Oregon-type provisions requiring the board to adopt standards for setting those dates, based on a Desert or Modified Desert model and mandating that the dates be fixed early.

With such a system in place, the board could begin to replace dual with single time. It would do this by gradually shortening sentences and increasing the proportion of the sentence that had to be served before release—until the release date and the sentence-expiration

date merged in a single date, which would constitute both the end of the sentence and the end of the offender's stay in prison.* Thus the proposal would (1) permit a gradual phase-in of single time, while (2) retaining a small, specialized body, already familiar with dealing in actual durations of imprisonment, to draft and apply the standards.

Such a system bears superficial resemblance to the old California system—where the parole board also fixed the maximum duration of sentence as well as the release date. But the differences are major: there would be standards, a “just deserts” orientation and an early time-fix, whereas the old California system was characterized by standardlessness, a supposed rehabilitative philosophy and long delays before the fixing of release dates.¹³⁷ Legislative language could be added, moreover, directing the board to complete its phase-out of dual time over a specified period of years.

The Importance of the Particular Political Context. We emphasize that many of the foregoing choices would depend on the political realities of the particular jurisdiction. Beyond the rather elementary points we have mentioned in this section, the reformer will need a sophisticated knowledge of the bureaucratic and political constraints in his or her locality.¹³⁸

Conclusions and a Caveat. We conclude that parole should not be continued in its present form. (1) Instead of a discretionary release decision made on the basis of rehabilitative or incapacitative considerations, there should be explicit standards governing duration of confinement, and those standards should be based primarily on a “just deserts” rationale. (2) Instead of deferring the release decision until well into the offender's term, the decision fixing the release date should be made early—at or shortly after sentence. (3) Instead of permitting parole revocation for releasees suspected of new criminal activity, they should be prosecuted as any other suspect. (4) Instead of routinely imposing supervision on ex-prisoners, supervision should be eliminated entirely—or if retained, should be reduced substantially in scope, sanctions for non-compliance should be decreased, and the process should be carefully examined for effectiveness and cost.

The role of the parole board as a decisionmaking body is a more complex question, however. Whatever its defects, the parole board has performed one essential function: it transforms lengthy judicial sentences into more realistic terms of actual confinement. We have

* This assumes that supervision is abolished, as we recommended. Were supervision retained, it would be necessary to retain some form of a bifurcated sentence: a prison term and a term of supervision.

described some ways in which the parole board could assist in carrying out the above-described reforms. And we have urged that any effort to phase out parole release be undertaken with great caution, and with the safeguards we have described.

We would, finally, like to stress that our recommendations depend strongly on two major assumptions: (1) there are to be explicit standards governing duration of confinement, and (2) these standards do not prescribe lengthy confinements, except for the gravest offenses.

In systems where these assumptions do not obtain, our recommendations will not necessarily be useful—and may be positively harmful. If the time-fixer is allowed wide discretion as to how much time to prescribe, eliminating or restricting parole supervision may merely lead some time-fixers to opt for longer confinements. If a penal system routinely resorts to lengthy durations of imprisonment, requiring an early decision on the release date may merely eliminate such slim hopes for mercy as might otherwise exist.

It would, in short, be better to ignore these recommendations entirely than to accept any part of them without the emphasis on standards and on moderate durations around which all our other arguments turn.

Notes

1. Some indication of the use of parole in the United States is provided by the Uniform Parole Reports. In 1974, 61 percent of all felons released from prison were released on parole—nearly 74,000 individuals. Uniform Parole Reports, *Newsletter* (Davis, Ca.: National Council on Crime and Delinquency, March 1976), at Table 6. (The table is based on information from 49 states, the District of Columbia, Puerto Rico and the Federal government.

2. See, e.g., proposed Criminal Code Reform Act of 1977, introduced by Senator John L. McClellan on behalf of himself, Senator Edward M. Kennedy, and others, 95th Congress, 1st Session. S.1437 (Committee Print, August 4, 1977); Jessica Mitford, *Kind and Usual Punishment* (New York: Alfred A. Knopf, 1973), at 294; Press release, U.S. Department of Justice, "Address by Hon. Edward H. Levi before the Governors' Conference on Employment and the Prevention of Crime" (Milwaukee, Wisconsin, February 2, 1976); Statement of Hon. Griffin Bell, before the U.S. Senate Subcommittee on Criminal Laws and Procedures, on the Sentencing Provisions of S. 1437 and related bills, June 7, 1977; Richard McGee, "A New Look at Sentencing: Part I," 38 *Federal Probation* 3-8 (June 1974) and "Part II," 3-11, (September 1974); Citizen's Inquiry on Parole and Criminal Justice, *Prison Without Walls: Report on New York State Parole* (New York: Praeger, 1975); David Fogel, *We Are The Living Proof. . . : The Justice Model for Corrections* (Cincinnati: W.H. Anderson, 1975); and, David T. Stanley, *Prisoners Among Us* (Washington, D.C.: The Brookings Institution, 1976)

3. Maine abolished parole entirely. Maine Revised Statutes Annotated, Title 17-A, Chapters 45-53. Both California and Indiana have abolished parole release; the board no longer determines duration of confinement. In Indiana, the board will set periods of supervision up to a maximum of 1 year. California abolished the Adult Authority and created a "Community Release Board" to administer parole supervision (supervision for up to 1 year for most offenders was continued), administer good time credits, and advise on pardons and commutations. See, California Statutes, 1976, Chapter 1139; and Indiana Statutes, 1976, ch. 148, as amended.

4. M. Kay Harris, "Disquisition on the Need for a New Model for Criminal Sanctioning Systems," 77 *West Virginia Law Review* 263, 297 (1975).

5. *Id.* at 299-301.

6. See, e.g., Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976), ch. 15; Andrew von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 *Buffalo Law Review* 717 (1972); and Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974).

7. *Supra* notes 3 and 4.

8. *Doing Justice*, *supra* note 1, ch. 1

9. See, Morris, *supra* note 6, ch. 3; and *Doing Justice*, *supra* note 6, ch. 1.

10. The courts have not always taken this view; for an example of a case where the penal aim of the institution (in this case rehabilitation) was considered an important element in deciding whether the conditions of imprisonment constituted "cruel and unusual" punishment, see, e.g., *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976), decided with *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

11. See, e.g., Zebulon R. Brockway, "The Ideal of a True Prison System for a State," in *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, October, 1970 (Albany, Weed, Parsons, & Co., 1871), at 38.

12. They should, in other words, be more than general exhortations such as those found in the Model Penal Code—which call on the decisionmaker to consider such factors as whether there is an "undue risk" of the offender's committing a new offense, and whether the penalty would "depreciate the seriousness of the defendant's crime." American Law Institute, *Model Penal Code: Proposed Official Draft* (Philadelphia: American Law Institute, 1962), §7.01(1).

13. See, e.g., Erving Goffman, *Asylums* (Garden City, New York: Anchor Books, 1961); David Rothman, "Decarcerating Prisoners and Patients," 1 *Civil Liberties Review* 8 (1973); Gresham M. Sykes, *The Society of Captives* (Princeton University Press, 1958) Donald Clemmer, *The Prison Community* (New York: Holt, Reinhart and Winston, 1940).

14. For citation in footnote: For discussion of the "grace theory," see Note, "The Parole System," 120 *University of Pennsylvania Law Review* 282, 286-300 (1971); and Fred Cohen, *The Legal Challenge to Corrections*, A consultant's Paper prepared for the Joint Commission on Correctional Manpower and Training (Washington, D.C.: March 1969).

Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

15. We define "rehabilitation" as changing a convicted offender's character, habits or behavior patterns so as to diminish his criminal propensities. Its success is measured by the treatment's impact on recidivism rates. It includes not only traditional correctional treatments (such as psychiatric therapy, counselling and vocational training) but also more novel techniques such as behavior modification.

"Incapacitation," as we use the term, is restraining the convicted offender so he is unable to commit further crimes even if he were inclined to do so. Like rehabilitation, its success is measured by recidivism rates. Unlike the latter, however, it does not involve efforts to change the offender—but only to limit his access to potential victims.

"General deterrence" is the effect that a threat to punish has, in inducing potential offenders to desist from prohibited conduct. It seeks to alter the behavior not only of convicted criminals but also of unconvicted members of the public who otherwise might have been disposed to commit crimes. It is measured by the effects of penalties or their threat on overall crime rates—not just by recidivism rates.

Doing Justice, *supra* note 6, at 11, 19, and 38.

16. For philosophical discussions, see, e.g., J.D. Mabbott, "Punishment," 48 *Mind* 152 (1939); C.W.K. Mundle, "Punishment and Desert," 4 *Philosophical Quarterly* 216 (1954); K.G. Armstrong, "The Retributist Hits Back," 70 *Mind* 471 (1961); H.J. McCloskey, "A Non-Utilitarian Approach to Punishment," 8 *Inquiry* 249 (1965); Herbert Morris, "Persons and Punishment," 52 *The Monist* 475

(1966); H.L.A. Hart, "Prolegomenon to the Principles of Punishment," in his *Punishment and Responsibility* (New York: Oxford University Press, 1968); Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970); Claudia Card, "Retributive Penal Liability," in *Studies in Ethics*, Monograph No. 7, *American Philosophical Quarterly Monograph Series* (Oxford: Basil Blackwell, 1973); John Kleinig, *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973); Joel Kidder, "Requital and Criminal Justice," 15 *International Philosophical Quarterly* 235 (1975); and Andrew von Hirsch, *Doing Justice*, *supra* note 6.

For discussions in the literature of penology, see, Norval Morris, *supra* note 5, ch. 3; and Harris, *supra* note 4.

17. *Doing Justice*, *supra* note 6, ch. 8.

18. For citation in footnote; *Doing Justice*, *supra* note 6; and Kleinig, *supra* note 16.

19. *Doing Justice* *supra* note 6, at 71-73.

20. The measurement of both components of seriousness—i.e., harm and culpability—raises a number of yet unanswered questions. For discussion, see the text of the Final Report of the present project: *Abolish Parole?* (on file with NILECJ), at 21-23. (A revised version of that document will be published by Ballinger Publishing Company in the fall of 1978.) See also, *Doing Justice*, *supra*, note 6, ch. 9.

21. *Doing Justice*, *supra* note 6, chs. 8, 10 and 11.

For a contrasting view, that desert should only set upper and lower limits on the amount of punishment, see Morris, *supra* note 6, ch. 3.

22. *Doing Justice*, *supra* note 6, ch. 10. For contrasting views, see note 82 *infra*

23. *Id.*, on ch. 12.

24. For citation in footnote: *id.*, ch. 16.

25. *Id.*, ch. 13, 14, and 16.

26. See e.g., the *Citizen's Inquiry*, *supra* note 2, at 175.

27. See, p. 4 of text.

28. *Doing Justice*, *supra* note 6, ch. 12.

29. For citation in footnote: Twentieth Century Fund, Task Force on Criminal Sentencing, *Fair and Certain Punishment* (New York: McGraw-Hill, 1976); and *Doing Justice*, *supra* note 6, ch. 16.

Concerning "feedback" processes, the U.S. Parole Commission has developed methods of "feeding back" decisions in difficult cases, for use in reviewing its dispositional standards. While the Commission uses a conceptual model somewhat different from ours, these techniques would be worth borrowing with appropriate modifications. See, for example, Don M. Gottfredson, et al., "Making Paroling Policy Explicit," 21 *Crime and Delinquency* 31, 41 (1976).

30. For citation in footnote: Norval Morris, "Punishment Desert and Rehabilitation," Bicentennial Lecture Sponsored by U.S. Department of Justice, at University of Denver, College of Law, November 12, 1976.

31. F.E. Zimring, "Making the Punishment Fit the Crime," *Hastings Center Report* 13-7 (December 1976); and see, e.g., Albert Alschuler, "Impact of Determinate Sentencing Upon Judges, Defense Attorneys, Prosecutors." Paper for Special Conference on Determinate Sentencing, Earl Warren Legal Institute, University of California, Berkeley, June 3, 1977.

32. James Q. Wilson, "The Political Feasibility of Punishment," in J.B. Cederblom and William Blizsek, eds., *Justice and Punishment* (Cambridge, Mass.: Ballinger, 1977), at 107, 115-116.

33. Arthur Rosett, "Discretion, Severity and Legality in Criminal Justice," 46 *Southern California Law Review* 12 (1972).

34. See, e.g., *Doing Justice*, *supra* note 6, at 106.

35. For citation in footnote: Concerning the use of parole guidelines: As of the end of 1977, there were three jurisdictions—the Federal System, Oregon, and New York—which had adopted legislation requiring the parole board to develop and apply guidelines for parole release decisions. 18 U.S.C. §4203; Oregon Statutes, 1977, ch. 372; N.Y. Executive Law §259. A number of other jurisdictions are also developing or considering the use of parole guidelines—but there is, as of the moment, no national survey on the use of such guidelines that is up to date. However, the National Parole Institutes of the National Council on Crime and Delinquency has now such a survey in progress.

Concerning “rules of thumb”: The Citizens Inquiry, for example, reports that in New York at the time of their study there was “a feeling on behalf of board members that approaches a presumption, that an inmate should be paroled at his initial interview. . . . this attitude helps explain why the parole board paroled 72.2 percent of all inmates serving an indeterminate sentence who made their initial appearance before the board in 1972.” Citizens’ Inquiry, *supra* note 2, at 33.

It has also been reported that in Maine, before parole was abolished, the board had been releasing 96 percent of the inmates at their first eligibility for parole. Steven Gettinger, “Three States Adopt Flat Time; Others Wary,” *Corrections Magazine* (September 1977).

For discussion of contract parole: See, American Correctional Association, “Mutual Agreement Programming,” in Carter, Wilkins and Glaser, eds., *Correctional Institutions*, 2d ed. (New York: Lippincott, 1977) at 342; Steven Gettinger, “Parole Contracts: A New Way Out,” *Corrections Magazine* (September 1975), at 3; and James O. Finckenauer and Carol Rauh, “Contract Parole: Some Legal and Rehabilitative Issues of Mutual Agreement Programming for Parole Release,” 5 *Capital University Law Review* 175 (1976).

36. “Indeterminacy” is sometimes also used, for example, to refer to systems having both a deferred time-fix and a great deal of discretion given the time-fixer to decide the duration of confinement. Or else, the term is used more narrowly to describe systems such as California’s before the new law: where the judge, if he sentences an offender to prison, may not set the length of sentence; and the parole board decides not only the moment of parole release but also the maximum permitted duration of supervision of the offender, subject only to broad statutory limits.

37. See, e.g., Morris, *supra* note 6; McGee, *supra* note 2; Fogel, *supra* note 2; Stanley, *supra* note 2; The Citizens’ Inquiry, *supra* note 2; the A.B.A. Committee on the Legal Status of Prisoners, *supra* note 8; and the New Jersey Governor’s Adult and Juvenile Justice Advisory Committee, *Standards and Goals for the New Jersey Criminal Justice System* (Trenton, N.J.: State Law Enforcement Planning Agency, 1977), vol. 1, Standard 10, 18, at 204.

38. See, Maine Revised Statutes Annotated, Title 17-A, chs. 47-53.

39. See, California Statutes, 1976, ch. 1139.

40. See, Indiana Statutes, 1976, ch. 146, as amended.

41. See, Oregon Statutes, 1977, ch. 372.

42. See, 42 *Federal Register* No. 151 (August 5, 1977).

43. *Doing Justice*, *supra* note 6, at 101-102.

For further details regarding discussion in footnote, see, Final Report, *supra* note 20, at 42-44.

44. For citation in footnote: Concerning “predictive restraint” see, *Doing Justice*, *supra* note 6, ch. 3; concerning “collective incapacitation,” see James Q. Wilson, *Thinking About Crime* (New York: Basic Books, 1974), ch. 8 and 10, and Shlomo Shinnar and Reuel Shinnar, “The Effects of the Criminal Justice System

on the Control of Crime: A Quantitative Approach," 9 *Law and Society Review* 581 (1975).

45. We focus on statistical prediction methods, since these generally have had more success than clinical prediction methods. See, e.g., Paul E. Meehl, *Clinical vs. Statistical Prediction* (Minneapolis: University of Minnesota Press, 1954); and Harrison G. Gough, "Clinical versus Statistical Prediction in Psychology," in Postman, ed., *Psychology in the Making* (New York: Knopf, 1962).

46. For discussion of the problems of false positions, see von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," *supra* note 6.

47. See, e.g., Don M. Gottfredson, "Assessment of Prediction Methods," in Johnson, Savitz, and Wolfgang, eds., *The Sociology of Punishment and Correction*, 2d ed. (New York: John Wiley and Sons, 1970), at 758-9. See, also, Vincent O'Leary and Daniel Glaser, "The Assessment of Risk in Parole Decision Making," in West, ed., *The Future of Parole* (London: Duckworth, 1972); Daniel Glaser, *The Effectiveness of a Prison and Parole System*, abridged edition (New York: Dobbs-Merrill, 1969), at 18-29; and Roger Hood and Richard Sparks, *Key Issues in Criminology* (New York: McGraw-Hill, 1970), at 180-81.

48. For review of some of these studies, see Douglas Lipton, Robert Martinson, and Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York: Praeger Publishers, 1975), at 87; O'Leary and Glaser, *supra* note 47, at 157-59; and Stanley, *supra* note 2, at 53-5.

49. Norval Morris suggests that behavior on partial release might have predictive usefulness, although he does not advocate deciding duration-of-confinement on predictive grounds. Morris, *supra* note 6, at 41-2.

50. Most studies have been treatment rather than predictive oriented. For a review of some of these studies, see, National Institute of Mental Health, *Graduated Release*, Crime and Delinquency Topics (1971); and see, also, Lipton, Martinson and Wilks, *supra* note 48, at 269-81, 529-31; and David F. Greenberg, "The Correctional Effects of Corrections: A Survey of Evaluations," in David F. Greenberg, ed., *Corrections and Punishment* (Beverly Hills, Ca.: Sage Publications, 1977), at 111, 112-14.

For citation in footnote: for example, a Canadian study attempted to use information available *after* release to predict arrest at 6, 12, and 24 months. Use of those variables predicted marginally better than prerelease variables (a base expectancy score). The author notes:

Post release information does seem to improve predictive efficiency and is, for the most part, available within five weeks from date of release. However, our study has shown that this information is extremely difficult to obtain; unless it is collected for other reasons, then, perhaps it is not worth collecting such information for the small improvement in predictive ability alone.

Irwin Waller, *Men Released from Prison* (Toronto: University of Toronto Press, 1974), at 172.

51. See, e.g., Ted Palmer, "Martinson Revisited," 12 *Journal of Research in Crime and Delinquency* 1-3 (1975).

52. See, Lipton, Martinson, and Wilks, *supra* note 48; Robert Martinson, "What Works? Questions and Answers About Prison Reform," *The Public Interest* (Spring 1975), at 22; Greenberg, *supra* note 50; James Robison and Gerald Smith, "The Effectiveness of Correctional Programs," 17 *Crime and Delinquency* 67, 80 (1971); and see, Walter G. Bailey, "An Evaluation of 100 Studies of Correctional

Outcomes," in Johnson, Savitz, and Wolfgang, eds., *The Sociology of Punishment and Correction*, 2nd ed. (New York: John Wiley, 1970), at 783.

53. Very little research has been conducted in this area, but a study conducted in California found widespread ignorance of criminal sentences. Among the subsamples of the study, however, ignorance of the penalties was not evenly distributed: those who had been incarcerated were correct more often than the general population. Dorothy Miller, et al., "Public Knowledge of Criminal Penalties: A Research Report," in *Deterrent Effects of Criminal Sanctions, Progress Report of the Assembly Committee on Criminal Procedure* (California Legislature, Assembly 1968); and see, Berl Kutchinsky, "The Legal Consciousness: A Survey of Research on Knowledge and Opinion About Law," particularly pp. 103-108, in Adam Podogorecki, et al., *Knowledge and Opinion About Law* (S. Hackensack, N.J.: Fred B. Rothman, 1973), for review and discussion of research findings in this area, particularly research conducted outside the United States.

54. See, e.g., *Doing Justice*, *supra* note 6, at 61-64; Franklin E. Zimring and Gordon Hawkins, *Deterrence* (Chicago: University of Chicago Press, 1973); David F. Greenberg, "Crime Deterrence Research and Social Policy," in Stuart S. Nagel, ed., *Modeling the Criminal Justice System* (Beverly Hills, Ca.: Sage Publications, 1977), at 281-295; Panel on Research on Deterrent and Incapacitative Effects, *Report*, in Alfred Blumstein, Jaqueline Cohen, and Daniel Nagen, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, (Washington, D.C.: National Academy of Sciences, 1978) at 19-63.

55. As Hood and Sparks note: "... the accuracy and reliability of prediction tables depend to a large extent on the identification of factors associated with reconviction. This in turn depends entirely on the quality of information which is available about offenders; and at the moment this is very low, wherever research is based on administrative records routinely kept by correctional agencies. Almost invariably such personal and social data as are available in these records are haphazardly recorded, and are thus likely to be missing or inaccurate for a high proportion of cases. . ." Hood and Sparks, *supra* note 47, at 185.

56. For discussion of this possibility, see, John Monahan, "The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus," in National Research Council, *supra* note 54.

57. It is assumed, in this discussion, that the burden of justifying any deferral of the time-fix rests on the proponents of deferral. See, discussion in full Final Report, *supra* note 20, at 55-58.

58. Two national surveys conducted by *Corrections Magazine* report increases in prison population across the country and severe overcrowding in several states. See, Steve Gettinger, "U.S. Prison Population Hits All-Time High," *Corrections Magazine* (March 1976), at 9; and Rob Wilson, "U.S. Prison Population Again Hits New High," *Corrections Magazine* (March 1977), at 3; and see, "Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis," 26 *Maryland Law Review* 182 (1976); and "Task Force of Top Officials Sees 'Crisis in Corrections' in the Southern States," *Criminal Justice Newsletter*, Vol. 7, No. 3 (Feb. 2, 1976.)

For a fuller analysis of prison populations, see, Andrew Rutherford, et al., *Prison Population and Policy Choices, Vol. I: Preliminary Report to Congress* (Cambridge, Mass.: Abt. Associates, 1977).

59. The National Advisory Commission estimates the cost of construction for an institution at \$30,000 to \$50,000 per inmate, and operating costs at from \$1,000 to more than \$12,000 per inmate per year. National Advisory Commission, *supra* note 8, at 352-3.

More recently, the mean construction cost per bed has been calculated at

\$37,117 for high-security institutions, and \$28,480 for mixed-security institutions. Neil M. Singer and Virginia B. Wright, *Cost Analysis of Correctional Standards: Institutional-Based Programs and Parole* (Washington, D.C.: American Bar Association, 1975), Vol. 1, at 4.

60. See, e.g., Keith Hawkins, "Some Consequences of a Parole System for Prison Management," in West, ed., *The Future of Parole* (London: Duckworth, 1972), at 112-113; Harris, *supra* note 4, at 305-306; and the National Advisory Commission, *supra* note 8, at 395.

61. See, Rutherford, *supra* note 58, at 50-60, 71-78, 185.

62. Evidence of the adverse effect of overcrowding on prison life is presented in a number of cases. Federal Judges have begun to view prison conditions resulting from overcrowding as constituting "cruel and unusual punishment." See, for example, *James v. Wallace* 406 F. Supp. 318 (1976), in which the court issued an order requiring the prison population in the Alabama prison system to be reduced to design capacity for each facility, and prohibited the acceptance of new inmates (except escapees and revoked parolees) until the population had been so reduced; and see, also, *Costello v. Wainwright* 525 F. 2d 1239 (1976) in which the Florida Division of Corrections was ordered to lower the inmate population to "emergency capacity" within one year of the date of the decision, and to "normal capacity" thereafter; and see, also, *Gates v. Collier* 501 F.2d 1291 (1974); *Hamilton v. Schiro* 338 F. Supp. 1016 (1970); *Finney v. Arkansas Board of Corrections* 505 F.2d 194 (1975); and *McCray v. Sullivan* 399 F. Supp. 271 (1975). See also, Gettinger, *supra* note 58; Wilson, *supra* note 58; and the *Maryland Law Review*, *supra* note 58.

63. In formulating those definitions, one could consult the recommendations on adequate prison living space that have been made by several bodies, including, e.g., the National Advisory Commission, *supra* note 8; the A.B.A.'s Committee on the Legal Status of Prisoners, *supra* note 8; and Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional Institutions* (Rockville, Md., Commission on Accreditation for Corrections, August 1977).

64. Rutherford, *et al.*, *supra* note 58, at 159-90.

65. This function of parole has been mentioned by several authorities. See, e.g., Hawkins, *supra* note 60, at 98-106; Harris *supra* note 4, at 305; S.H. Gifis, "Decision Making in a Prison Community," 1975 *Wisconsin Law Review* 349, 385 (1974); and Robert Kastenmeier and Howard Eglit, "Parole Release Decision-Making: Rehabilitation, Expertise and the Demise of Mythology," in Amos and Newman, eds., *Parole* (New York: Federal Legal Publications, 1975), at 97-99. In fact, the impact of parole on institutional discipline has been cited as one of the major reasons for the rapid spread of parole in this century. Attorney General's Survey of Release Procedures, *Parole* (1939), (reprinted, New York: Arno Press, 1974), Vol. IV, at 34. Empirical evidence—that the parole board considers institutional conduct in making release decisions—is available. See, e.g., Peter B. Hoffman, "A Paroling Policy Feedback Method," in William B. Amos and Charles L. Newman, eds., *Parole* (New York: Federal Legal Publications, 1975), at 343, 356-8; Joseph E. Scott, "The Use of Discretion in Determining the Severity of Punishment for Incarcerated Offenders," 65 *Journal of Criminal Law and Criminology* 214, 219 (1975); Anne M. Heinz, *et al.*, "Sentencing by a Parole Board: An Evaluation," 67 *Journal of Criminal Law and Criminology* 1, 10-12 (1976); and, see, the Final Report of the "Classification for Parole Decision Policy" project, Don M. Gottfredson, *et al.*, (in press).

66. The National Advisory Commission, for example, recommends that criminal conduct by inmates be dealt with through criminal prosecution. See, National Advisory Commission, *supra* note 8, §2.11 and Commentary; and also, the

Commission on Accreditation for Corrections, *supra* note 63, at §4320 (such cases should be "referred for consideration for criminal prosecution.")

67. See, *Wolff v. McDonnell*, 418 U.S. 549 (1974).

68. This proposal has been advanced elsewhere. See, *Morris*, *supra* note 6, at 40.

69. For citation in footnote: California Statutes, 1976, ch. 1139, §2930; Oregon Statutes, 1977, ch. 3722, §6(2).

70. A 1973 survey of parole conditions found that all but one jurisdiction had as a parole condition that the parolee abide by the law. The one jurisdiction without a "law abidingness" condition was New Hampshire. American Bar Association, *Survey of Parole Conditions in the United States* (Washington, D.C.: American Bar Association Resource Center on Correctional Law and Legal Services, 1973), at 12-13, 17-18.

A more recent survey of parole conditions (1975) found that four other States—Indiana, Oklahoma, Texas and West Virginia—eliminated this condition. William C. Parker, *Parole*, revised edition (College Park, Md.: American Correctional Association, 1975), at 201-204.

71. Some indication of the incidence of revocation in lieu of prosecution is provided by the Uniform Parole Reports. A 3-year followup of male parolees released in 1972 showed that 15 percent were returned to prison as parole violators: 4 percent "with new minor conviction(s) or in lieu of prosecution"; 3 percent "in lieu of prosecution of a new major offense(s)"; 8 percent with "no new conviction(s) and not in lieu of prosecution" ($N = 19,440$; these national data do not reflect all parolees released in 1972 due to incomplete data from some jurisdictions.) Uniform Parole Reports, *Newsletter* (David, Ca.: National Council on Crime and Delinquency, December 1976).

For citation in footnote: It is not uncommon for boards to conduct revocation hearings even though the parolee is being prosecuted. [Vincent O'Leary and Kathleen Hanrahan, *Parole Systems in the United States* (Hackensack, N.J.: National Council on Crime and Delinquency, 1976), compiled from 88-344.] Depending upon the policy of the board, the parolee may then have to serve his new prison sentence, plus additional time for the revocation. The United States parole board sometimes has done this, and the Supreme Court has upheld the practice. See, *Moody v. Daggett*, 429 U.S. 78 (1976). (That case involved a parolee convicted and sentenced for two crimes while on parole. The U.S. Parole Commission issued, but did not execute a parole violator warrant. Instead, the warrant was lodged as a detainer. The parolee asserted, among other contentions, that the detainer barred him from serving the new sentences and the revocation term concurrently, affected his parole eligibility on the later convictions and denied him his constitutionally protected right to a prompt revocation hearing. The Supreme Court held that no constitutionally protected right had been denied and that the Commission need not conduct the revocation hearing until the warrant was executed and the parolee was taken into custody as a parole violator.)

Concerning revocation for violation of the technical conditions of parole, see, *Stanley*, *supra* note 2, at 109; and see, Robert O. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* (Boston: Little Brown, 1969), at 3632-63, who reports that at the time of his study officials in Michigan and Wisconsin stated that most technical revocations were really cases involving a return to crime by the parolee. Similarly, the Citizen's Inquiry reported that suspected criminal activity was frequently the basis for technical violations, *Citizen's Inquiry*, *supra* note 2, at 132.

72. For a description of standards of proof in revocation proceedings, see Comment, "Does Due Process Require Clear and Convincing Proof Before Life's

Liberties May Be Lost?" 24 *Emory Law Journal* 103, 122-24 (1975).

73. A survey of parole practices found that at final revocation hearings, the hearing body consists of the full board in 14 jurisdictions; 2 members to a majority of the board in 23 jurisdictions; at least one member in 7 jurisdictions; hearing officer(s) in 6 jurisdictions, and "others" in 2 jurisdictions. O'Leary and Hanrahan, *supra* note 71, at 57. (The survey included the parole boards of the 50 states, the Federal and the District of Columbia parole boards.)

74. Right to counsel was determined by *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). A survey of parole practices found that when asked *in general* if attorneys were permitted at revocation hearings (as opposed to asking about compliance with the *Gagnon* ruling) 47 boards reported that they permitted attorneys at preliminary hearings, and 25 of those appointed attorneys for indigent inmates; at final hearings, the responses totaled to 50 and 29, respectively. O'Leary and Hanrahan, *supra* note 71, at 55, 58.

75. Cross-examination, as provided by *Morrissey*, is somewhat discretionary. At the preliminary revocation hearing, the parolee has the following right:

On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informer would be subject to risk of harm if his identity were disclosed, he need not be subject to confrontation and cross-examination.

Similarly, at the final revocation hearing, the right to confront or cross-examine adverse witnesses can be abridged if "the hearing officer specifically finds good cause for not allowing confrontation." *Morrissey v. Brewer*, 408 U.S. 471 (1972), at 487, 489.

76. In *Morrissey*, the Supreme Court specifically allowed that evidence not admissible at trial is admissible at revocation proceedings:

We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and any other material that would not be admissible in an adversary criminal trial. *Morrissey v. Brewer*, *supra* note 75, at 489.

Evidence otherwise excludible in criminal trials under the Fourth Amendment protections against unreasonable search and seizure is usually admissible in revocation proceedings. The Fourth Amendment rights of parolees are at issue in three situations: search by the police; search by the parole officer; and joint search by the police and parole officer. Case decisions have varied, but in general, evidence secured by illegal police search is not admissible at trial, but may be introduced at revocation hearings. Searches by parole officers are usually not subject to Fourth Amendment requirements; evidence gained by parole officer search is admissible at both trial and revocation. Case decisions concerning joint searches have not been uniform.

See, e.g., Case Comment: "Constitutional Law: Warrantless Parole Officer Searches—A New Rationale," 60 *Minnesota Law Review* 805 (1976); Note, "Fourth Amendment Limitations on Probation and Parole Supervision," 1976 *Duke Law Journal* 71 (1976); and Note, "Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer

Searches of Parolees and Probationers," 51 *New York University Law Review* 800 (1976).

77. In a recent case, a parolee was prosecuted for assault and acquitted. Then, his parole was revoked on the *same* evidence—and an appellate court upheld the revocation on the grounds that the applicable standard of proof was lower. [*Standlee v. Smith*, 83 Wash. 2d. 405, 518 P. 2d. 721 (1974).] The case was later overturned by the federal district court, in a habeas corpus proceeding. *Standlee v. Rhay*, No. C-75-18 (E.D. Wash. Nov. 7, 1975). However, the Court specifically limited the holding to cases where the parole board "deliberately accedes to the criminal prosecution."

A practice that helps parole boards avoid the *Standlee* problem is reported by the Citizen's Inquiry, *supra* note 2, at 132.

It is the practice of the parole board that, whenever possible, revocation should be based on at least one technical violation, even if there is a new criminal arrest also. This avoids the possibility that a court could order the revoked parolee to be released because the revocation decision was based solely on a new arrest or conviction which was later dismissed or reversed on appeal.

78. *In re Winship*, 397, U.S. 558 (1970).

79. *Id.* at 372.

80. See, Alan M. Dershowitz, "Preventive Confinement: A Suggested framework for Constitutional Analysis," 51 *Texas Law Review*, 1277, 1311-24 (1973).

81. The manner of computing the time remaining varies by jurisdiction. In the jurisdictions for which information is available (49), 32 boards report that the time spent under parole supervision; or "street time" is credited toward the sentence; 13 report that it is not; 3 that it may or may not be; and one, that street time is not credited toward the sentence if the parolee has been convicted of a new offense, but is if the parolee is revoked for a technical violation. O'Leary and Hanrahan, *supra* note 71, derived from 82-344.

82. *Doing Justice*, *supra* note 6, at 85-86 For citation in footnote: See, e.g., Harris, *supra* note 4, at 324. See also, Stephen A. Schiller, Book review of *Doing Justice*, 67 *Journal of Criminal Law and Criminology* 356, 357 (1976).

83. See, e.g., Gottfredson, *supra* note 47.

84. Albert Alschuler has recommended a ban on plea-bargaining, and the State of Alaska has recently begun to implement such a ban. Other, more modest proposals include express guidelines for prosecutors to follow in their bargaining decisions, and fuller judicial review of proposed plea bargains.

Doing Justice argued that presumptive sentencing standards would make it somewhat more difficult for the prosecutor to threaten more-than-usually-severe penalties on a given charge if the defendant refuses to bargain.

See, Alschuler, *supra* note 31; Stephen Gettinger, "Plea Bargaining: A Major Obstacle to True Reform in Sentencing," *Corrections Magazine* (September 1977), at 34-5 (Alaska's efforts to restrict plea bargaining); Note, "Restructuring the Plea Bargain," 82 *Yale Law Journal* 286 (1972) (procedures to follow in plea bargains); *Doing Justice*, *supra* note 6, at 105 (impact of presumptive sentence standards on plea-bargaining).

85. Caseload pressure is frequently assumed to be a major factor in the rate of cases that are decided via plea-bargaining. A study of caseload and plea-bargaining practice in Connecticut suggests, however, that caseload pressure may

not, in fact, be so large a part of the explanation for plea-bargaining. See, Milton Heumann, "A Note on Plea Bargaining and Case Pressure," 9 *Law and Society Review* 515 (1975).

86. See, e.g., Sol Rubin, *The Law of Criminal Corrections* (New York: West Publishing Company, 1973), at 645. For a survey of parole board practice in allowing release pending the revocation decision, see O'Leary and Hanrahan, *supra* note 71, at 49, and 82-344.

87. For further discussion of problems of bail for parolees, were the separate system abolished, see, Final Report, *supra* note 20, at 85-87.

88. For a listing of parole conditions, see, American Bar Association, *supra* note 70; and Parker, *supra* 70.

89. For a description of parole supervision, see, Stanley, *supra* note 2, chs. 5, 6, and 7; and Elliot Studt, *Surveillance and Service in Parole* (Washington, D.C.: National Institute of Corrections, 1978).

90. The notion that parole conditions should be reasonably related to criminality has been advanced elsewhere. See, for example, the Model Penal Code: parole conditions "should be of a nature clearly relevant to the parolee's conformity to the requirements of the criminal law." American Law Institute, *Model Penal Code, Tentative Drafts, Nos. 5, 6, and 7, Commentary to Section 305.17* (Philadelphia: American Law Institute, 1955); and the Commission on Accreditation for Corrections, "Parole conditions. . . should be clearly relevant to the specific parolee's compliance with the requirements of the criminal law. . . [and] should be tested directly against the probability of serious criminal behavior by the individual parolee." Commission on Accreditation for Corrections, *Manual of Standards for Adult Parole Authorities, Commentary to Standard 10.8* (Rockville, Md.: Commission on Accreditation for Corrections, 1976).

91. In 1975, that condition was reported in 33 jurisdictions. Parker, *supra* note 70, at 202-204.

92. For discussion of the link between employment and recidivism, see John Monahan and Linda Costa Monahan, "Prediction Research and the Role of Psychologists in Correctional Institutions," 14 *San Diego Law Review* 1028 (1977).

93. See, Stanley, *supra* note 2, at 95-101.

94. One notable exception is a Canadian study. See, Waller, *supra* note 50. (Relating those findings to parole conditions is rare, however.)

95. See, Studt, *supra* note 89, chs. 4 and 7.

96. Robert Martinson and Judith Wilks, "Save Parole Supervision," *Federal Probation* (September 1977), report positive findings for supervision; James Robison, however, presents information that suggests dischargees are *less* often returned to prison than parolees. And, he summarizes the findings of another study in which dischargees had slightly more favorable disposition outcomes than did parolees for about 2 years, but by 3 years, the outcomes were virtually the same. James O. Robison, "The California Prison Parole and Probation System: It's Time to Stop Counting," *Technical Supplement No. 2; A Special Report to the Assembly* (April 1969), at 72-74.

97. One study reported by Gottfredson, which did control for risk, found that Federal parolees perform better than inmates discharged without supervision at expiration of sentence. See, Don M. Gottfredson, "Some Positive Changes in the Parole Process." Paper presented at the panel on "Successes and Failures of Parole," at the American Society of Criminology meeting, November 1, 1975, Toronto, Canada, at 10-14. Another found that misdemeanants released on parole did better than those discharged. See, Mark Jay Lerner, "The Effectiveness of a Definite Sentence Parole Program," 15 *Criminology* 211 (1977); and in addi-

tion, one study not yet available has apparently found positive results for parole supervision. The study, conducted by Howard R. Sacks of the University of Connecticut School of Law and Charles Logan of the Department of Sociology at that university, is expected to be available early in 1978. *News Release*, Department of Correction (Hartford, Connecticut, n.d.), released October 1977.

98. A Canadian study, conducted by Irwin Waller, compared the arrest rates of parolees and dischargees (after controlling for risk) at 6, 12, and 24 months. Some difference was found at 6 months, but none at 12 and 24. The author concludes:

The effectiveness of parole in terms of reducing recidivism within 12 and 24 months, or in the long run generally, is an illusion. First, those selected for parole are no less likely to be rearrested than predicted. . . though parole is, however, granted in the first place to those with lower probabilities. . . it does appear that parole delays the arrest of a parolee from the first 6 months to a later period within 24 months. . .

Waller, *supra* note 50, at 190.

Preliminary findings of another study—of juvenile offenders, conducted by the California Youth Authority—found there were no difference in arrest rates for parolees and dischargees. The groups did however, differ in types of offenses for both the first and most serious arrest; dischargees were more likely to be arrested for crimes against the person and drug and alcohol offenses, while parolees were more likely to be arrested for property offenses. "Bay Area Discharge Study: Preliminary summary of Findings," (Sacramento: Department of Youth Authority, Research Division, 1977).

99. Information on duration of imprisonment for revoked parolees is scarce.

The following table represents the amount of unexpired parole periods for New York parolees revoked in 1975:

Parole Violators From New York State Correctional Facilities Declared Delinquent During 1976—Unexpired Parole Period:

Unexpired Parole Period	Total	Percent
Total:	2,036	100.00
Less than 3 months	23	1.1
3 months but less than 6 months	151	7.4
6 months but less than 9 months	254	12.5
9 months but less than 1 year	298	14.7
1 year but less than 1-1/2 years	503	24.7
1-1/2 years but less than 2 years	245	12.0
2 years but less than 2-1/2 years	180	8.9
2-1/2 years but less than 3 years	82	4.0
3 years but less than 4 years	80	3.9
4 years but less than 5 years	39	1.9
5 years and over	158	7.8
Life	23	1.1

Source: State of New York, Department of Correctional Services, *Annual Statistical Report: 1975 Data, Inmate and Parole Populations* (Albany, New York: Division of Program Planning, Evaluation and Research, n.d.), at Table D-10, p. 90.

In Oregon, the parole board has issued guidelines concerning duration of reimprisonment for technical violations—according to which the duration of reconfinement before re-release is to be 4-6 months, or 6-10 months, depending on the seriousness of the offender's original offense. The U.S. Parole Commission is somewhat more severe: its guidelines provide for reconfinement from 8 to 16 months in the event the parolee is found to have "a negative employment/school record during supervision" or "lack of positive efforts to cooperate with parole plan," or if the violation occurred less than 8 months after release. The majority of States have no such guidelines, and there is little data available on their durations of reconfinement. Oregon Administrative Rules, Board of Parole, Sec. 254-70-042 (1977). U.S. Parole Commission, *Regulations* §2.21, 42 *Federal Register* No. 151 (Friday, August 5, 1977).

100. See, discussion in pages 17-20 of this report; and, in more detail, see the Final Report, *supra* note 20, ch. 6.

101. See, note 20, *supra*.

102. For citation in footnote: California Statutes, 1976, ch. 1139, §3057; S. 204, proposed "Federal Sentencing Standards Act of 1977" introduced by Senators Hart and Javits, 95th Congress, 1st Session (January 12, 1977), §11(a) (2) (B).

103. For citation in footnote: Concerning the necessity of imprisonment, see, *Doing Justice*, *supra* note 6, ch. 13.

104. The Oregon parole board has implemented guidelines for duration of "active" parole supervision, and for duration of reimprisonment upon revocation. See, Oregon Administrative Rules, Board of Parole, §§254-90-005, 254-70-042; and note 99, *supra*.

105. See, e.g., Citizen's Inquiry, *supra* note 2; Studt, *supra* note 89; Rosemary J. Erickson, Wayman J. Crow, Louis A. Zurcher and Archie V. Connett, *Paroled But Not Free: Ex-Offenders Look at What They Need to Make It Outside* (New York: Behavioral Publications, 1973); John Irwin, *The Felon* (Englewood Cliffs, N.J.: Prentice-Hall, 1970); Daniel Glaser, *The Effectiveness of A Prison and Parole System* (New York: Bobbs-Merrill, 1969); and see, Robert Horowitz, *Back on the Street—From Prison to Poverty* (Washington, D.C.: American Bar Association, Transitional Aid Research Project for Ex-Offenders, Commission on Correctional Facilities and Services, June 1976.)

106. See, Elliot Studt, *supra* note 89.

107. See, e.g., Stanley, *supra* note 2, at 190-91.

108. *Doing Justice*, *supra* note 6, at 16.

109. This social service aim, rather than crime control, is also urged in the Citizen's Inquiry report, *supra* note 2, at 179.

110. For "status clearance," see, Studt, *supra* note 89; for services generally, see, *supra* note 105.

111. See, e.g., Studt, *supra* note 89; Irwin, *supra* note 105, at Ch. 5; American Bar Association, *supra* note 8, Commentary to §9.6; A. Verne McArthur, *Coming Out Cold: Community Reentry from a State Reformatory* (Lexington, Mass.: D.C. Heath, 1974), at ch. 6; but see, Marc Rensema, "Success and Failure Among Parolees as a Function of Perceived Stress and Coping Styles," where he reports that the parolees in his study had problems "in abundance" but apparently little psychological stress, in Hans Toch, *Interventions for Inmate Survival*, Final Report submitted to LEAA, August 1976.

112. These programs are already in existence in many jurisdictions. For example, California has a furlough program which is restricted to inmates who are within 90 days of release. A description of that program as implemented in one correctional facility found that inmates leave on furlough with a few fairly

specific objectives (e.g., finding housing). See, Norman Holt, "Temporary Prison Release," in Carter, Glaser, and Wilkins, eds., *Correctional Institutions*, 2d ed. (New York: J.B. Lippincott, 1977).

113. This role for parole agents was recommended by the National Advisory Commission, *supra* note 8, at 410-11. There is evidence that the service of locating sources of assistance might be useful, since ex-prisoners tend to be unaware of the available helping resources. A study of county jail releasees found both awareness and use of "the more prominent aftercare agencies" fairly low. See, Peter C. Buffum, "The Philadelphia Aftercare Survey: A Summary Report," 56 *Prison Journal* 3, 12-15 (1976) Furthermore, Studt reports that community social service agencies are reluctant to accept parolees as clients. Studt, *supra* note 89, at 131-32.

114. See, Studt, *supra* note 89; and the Citizen's Inquiry, *supra* note 2; but see, Robert C. Prus, *Revocation Related Decision-Making: A Labeling Approach* (Ann Arbor, Mich.: University Microfilms, 1974: Dissertation, University of Iowa, 1973).

114a. See, Gerald Dworkin, "Paternalism," in Joel Feinberg and Hyman Gross, *The Philosophy of Law* (Encino, Ca.: Dickenson, 1975), at 123. For further information, see full Final Report, *supra* note 20, at 118-20.

115. For citation in footnote: California Statutes, 1976, ch. 1139.

116. *Doing Justice*, *supra* note 6, at 103-4.

117. See, American Bar Association, Project on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures* (New York: American Bar Association, Official Draft, 1968), Commentary to Standard 2.1, at 56-61.

118. See, e.g., *id.*, at Commentary to Standard 3.2(b).

119. See, e.g., 95th Congress, 1st Session, S. 204, proposed "Federal Sentencing Standards Act of 1977," introduced by Senators Gary Hart and Jacob Javits on January 12, 1977 [hereafter referred to as the "Hart-Javits bill"]; 95th Congress, 1st Session, S. 1437, proposed "Criminal Code Reform Act of 1977," introduced by Senators John L. McClellan and Edward M. Kennedy, as amended and reported by the Senate Judiciary Committee, Report No. 95-605, November 15, 1977 [hereafter referred to as the "Senate Judiciary Committee bill"]; and General Assembly of Pennsylvania, 1977 Session, House Bill No. 953, introduced by rep. Anthony Sirica, as amended and reported by the House Judiciary Committee, October 4, 1977 [hereafter referred to as "Pennsylvania House Judiciary Committee bill"].

120. The idea of a sentencing commission was first suggested by U.S. District Judge Marvin Frankel. See, Marvin E. Frankel, *Criminal Sentences* (New York: Hill and Wang, 1972), at 118-23.

121. Several of the pending bills require the sentencing commission to collect information about how judges apply its standards, and call upon the commission to revise the standards periodically on the basis of such information. See, e.g., Hart-Javits bill, *supra* note 119, §5; Senate Judiciary Committee Bill, *supra* note 119, §§994(m); 995(a)(16).

122. Hart-Javits bill, *supra* note 119, §11(b); Senate Judiciary Committee Bill, *supra* 119, §994(b)(2). Under the latter bill, early release on parole is authorized in unusual cases, but there is a strong presumption in favor of non-parolable "real time" sentences.

123. The Hart-Javits bill, in order to ensure that the sentencing commission reduces sentence durations to reflect the fact that it will be dealing with real time, sets stringent limits on length of sentences: imprisonments in excess of 5 years may be resorted to only for specified crimes of the most heinous nature

Hart-Javits bill, *supra* note 119, §8. The Senate Judiciary Committee bill, however, does not contain such stringent requirements. See full Final Report, *supra*, note 20, at 135.

124. Moreover, one observer has suggested that the courts are suspicious of sentencing accountability and appellate review, as demonstrated by their resistance to the proposals for written statements of the reasons for particular sentences. See, Gerald D. Robin, "Judicial Resistance to Sentencing Accountability," 21 *Crime and Delinquency* 201 (1975).

125. Oregon Statutes, 1977, ch. 372 [hereafter called "Oregon Parole Reform Law"]. This legislation was originally drafted by the state legislature's interim Judiciary Committee, and substantially influenced by Ira Blalock, the chairman of the State parole board. The senior author of the present report and Dr. Peter Hoffman of the U.S. Parole Commission also assisted in the drafting.

126. *Id.*, §§1 and 2(1).

127. For citation in footnote: *Id.*, §2(2).

128. *Id.*, §5(1) and 6.

129. American Bar Association Committee on the Legal Status of Prisoners, *supra*, note 8, at 589-97.

130. For citation in footnote: Judicially prescribed sentencing guidelines, derived from past decisionmaking practice, are now in operation in Denver; and this procedure is being extended to Newark, Philadelphia, and Chicago. Jack M. Kress, Leslie T. Wilkins and Don M. Gottfredson, "Is the End of Judicial Sentencing in Sight?," 60 *Judicature* 216 (1976); Leslie T. Wilkins, et al., *Sentencing Guidelines: Structuring Judicial Discretion*, Final Report of the Feasibility Study (Albany, N.Y.: Criminal Justice Research Center, Inc., (1976); the last suggested approach—a sentencing commission whose standards concern only judicial sentencing decisions—was proposed in a bill recently approved by the House Judiciary Committee in Pennsylvania. See, Pennsylvania House Judiciary Committee bill, *supra*, note 119.

131. Oregon Administrative Rules, Board of Parole, §§254-90-005, 254-70-042. The board's normal practice is to discharge parolees after they have served a period of supervision equal to their term of imprisonment. The board's revocation guidelines are described in note 99, *supra*.

132. This statement is based on conversations between the senior author and members of the board.

133. These could be similar to the California Law or the Hart-Javits bill. See, footnote to text at note 102, *supra*.

134. American Bar Association Committee on the Legal Status of Prisoners, *supra* note 8, Standard 9.6 at 60.

135. David Rothman, "Doing Time: Days, Months, and Years in the Criminal Justice System," Pinkerton Lecture delivered at the School of Criminal Justice, State University of New York at Albany, March 6, 1974 (unpublished).

136. As of the end of 1977, the Chairman of the U.S. Parole Commission was considering submitting a similar proposal to the Congress. (This statement is based on conversations between Andrew von Hirsch and Dr. Peter B. Hoffman, Research Director of the U.S. Parole Commission.)

137. For a description of the California parole board's procedures under the old law, see, e.g., Caleb Foote, "The Sentencing Function," in Annual Chief Justice Earl Warren Conference on Advocacy, June 1972, *A Program for Prison Reform* (Cambridge, Mass.: Roscoe Pound—American Trial Lawyers Foundation, 1972), at 17-32.

138. For a discussion of some of the hazards involved in abolishing the parole board in California, for example, see, Caleb Foote, "Deceptive Determinate Sentencing," Paper for the Special Conference on Determinate Sentencing, Earl Warren Legal Institute, University of California, Berkeley, June 3, 1977.

The Authors

Andrew von Hirsch, the principal investigator of this project, is Associate Professor at the Graduate School of Criminal Justice, Rutgers University, Newark; and Senior Research Associate at the Center for Policy Research, Inc., in New York City. He was author of *Doing Justice: The Choice of Punishments*, published in 1976, which proposed a "deserts" rationale for sentencing. He was a member of the Twentieth Century Fund's Task Force on Criminal Sentencing, whose report, *Fair and Certain Punishment*, was also published in 1976. He is a graduate of Harvard College, and Harvard Law School, and a member of the New York bar.

Kathleen J. Hanrahan, assistant director of the project, is Research Associate at the Center for Policy Research, Inc., New York City. She is co-author of *Parole Systems in the United States*. She holds a master's degree from the School of Criminal Justice, State University of New York at Albany.

END