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From Grace to Grids: Rethinking Due Process Protection for Parole

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FROM GRACE TO GRIDS: RETHINKING DUE PROCESS PROTECTION FOR PAROLE

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Current due process law gives little protection to prisoners at the point of parole, even though the parole decision, like sentencing, determines whether or not a person will serve more time or will go free. The doctrine regarding parole, which developed mostly in the late 1970s, was based on a judicial understanding of parole as an experimental, subjective, and largely standardless art—rooted in assessing the individual "character" of the potential parolee.

In this Article we examine the foundations of the doctrine, and conclude that the due process inquiry at the point of parole should take into account the stark changes in sentencing and parole practice over the years. Since the development of the parole due process doctrine in the 1970s, two seismic shifts have occurred. First, the constitutional protections provided at the initial sentencing have vastly increased. Second, the parole process itself has been transformed by the move to evidence-based parole guidelines and the use of actuarial risk-assessment instruments as the norm in parole decision-making.

In this Article we document the changes in this under-scrutinized area and assert that the liberty interest in parole should more closely match the present-day legal account of the liberty interest that courts afford defendants at sentencing.

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INTRODUCTION

Sentencing and parole are two sides of the same coin. Both involve figuring how much risk the individual poses to the public, and then deciding how much time the person should serve. But when it comes to the due process protections afforded to defendants at sentencing and to prisoners at parole, defendants at sentencing get modern due process rights, while prisoners at parole get barely a horse-and-buggy. The foundational law of sentencing and parole, especially the stark differences in the level of due process protections afforded at the front end versus at the back end of the criminal justice system, is a product of the time when it was developed by the U.S. Supreme Court. We think that changes in sentencing and parole since then have made the asymmetry unwieldy and anachronistic, and that a correction is called for.

To be specific, the Court set the pattern for its parole due process cases back when parole was still viewed as something new and experimental. It was a time when parole boards engaged, at least according to the lore of that era, in a fine-grained assessment of the character of the potential parolee. This narrative about the art of granting parole was instrumental in the Court's framing of the extent to which due process protections attached to parole decision-making.

In 1979, in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,[1] the Court first examined the due process protections that should be given to the parole decision.[2] In denying that there was a fundamental liberty interest in parole, the Court described the

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[1] 442 U.S. 1 (1979).

[2] *Id.* at 3.

parole decision as a "synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best"[3]—what the Court called a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become . . . ."[4]

Even at the time of *Greenholtz*, this system of broad parole discretion was coming under criticism.[5] To the extent that the Court's vision of parole was true at the time, it is not true now. Today, parole occurs in a different landscape, against a backdrop of a shift in sentencing systems, additional broad constitutional protections at sentencing itself, and a blurring of the line between sentencing and parole. Further, modern parole decisions are made with detailed guidelines and based on actuarial tables about the statistical likelihood that a person with the inmate's characteristics will reoffend.

In light of these shifts in sentencing protections and parole practice, this Article invites a re-examination of the foundations of the due process protections provided to prisoners at the point of parole, and posits an approach to the due process interest in parole that reflects these modern realities.

In Part I, we describe aspects of early parole practice and the law of due process that developed around parole. We look closely at *Greenholtz*, which specifically examined the due process interest in parole release, but we also look at the cases leading up to and following *Greenholtz*.

In Part II, we outline shifts in the due process protections provided to defendants at sentencing, particularly the increased legal and constitutional constraints placed on the sentencing process.

Taken together, Parts I and II reveal that today there are two disparate regimes—a front-end sentencing regime which gets significant constitutional scrutiny, and a back-end sentencing regime (parole) which gets little. Instead of being viewed as a unitary or overlapping process that determines how long people who commit crimes should serve, today, sentencing and parole have become disconnected, functionally and analytically.

In Part III, we describe modern parole practices, with a focus on the

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[3] *Id.* at 8.

[4] *Id.* at 10 (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

[5] *See* Anne M. Heinz et al., *Sentencing by Parole Board: An Evaluation*, 67 J. CRIM. L. & CRIMINOLOGY 1, 1 (1976) (noting criticism of parole reformers and that "an influential member of Congress" had "call[ed] into serious question the assumptions on which parole decisions are based").

decision whether or not to parole. This Part first looks at the prevalence, even in the modern sentencing era, of parole. Second, this Part examines two interrelated moves in parole practice—the use of parole guidelines and the use of risk and needs-assessment instruments. Some important points emerge. First, parole still matters. Although indeterminate sentencing may have fallen out of favor in recent decades, most prisoners are still subject to parole because that is the regime under which they were sentenced. Second, the types of parole guidelines, and the types of risk-assessment tools that parole boards use today, are quite different from the ones that were in place when the U.S. Supreme Court laid down the doctrines that contributed to the "deregulation" of parole. Today, most parole boards rely at least in part on actuarial-based studies, and not on the more subjective, nuanced predictions of human behavior that were the norm when the Supreme Court moved to a more hands-off approach to parole.

In Part IV, we advance the idea that the due process inquiry into the parole release decision should take into account the changes in the reality of sentencing and parole practice. The liberty interest in the parole release decision should more closely reflect the current legal account of the liberty interest at sentencing; a fundamental liberty interest in parole should be recognized.

I. EARLY PAROLE DEVELOPMENT AND DUE PROCESS PROTECTIONS

A. PAROLE PRACTICE

For most of the eighteenth and nineteenth centuries, parole as we know it today did not exist.[6] Criminal defendants were typically sentenced to fixed prison terms, and early release was a matter of executive clemency.[7] In the late nineteenth and twentieth centuries, penology became more scientific, and the insights of psychology began to be applied to it.[8] In the

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[6] *See* Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 307–08 (2013) (stating that parole "is a relatively modern invention that came into being in the nineteenth century along with use of a discretionary sentencing system to promote the rehabilitation of offenders"). Parole was first adopted in 1877 in New York, and fifty years later, all but three states had adopted parole. *Id.*

[7] *See generally* Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 851–52 (2016) (Clemency was "recognized in the English common law and the early days of our republic. It was used regularly during the nineteenth century and for most of the twentieth.").

[8] *See, e.g.*, STEPHEN E. BROWN ET. AL., CRIMINOLOGY: EXPLAINING CRIME AND ITS CONTEXT 193–95 (Janice Eccleston & Michael C. Braswell eds., 7th ed. 2010) (describing positivism as dominating American criminology and penology in the earlier portion of the twentieth century and tied to the belief that those who engaged in criminal behavior had a

twentieth century, to encourage good behavior and to foster rehabilitation, corrections professionals requested, and legislatures passed, new laws permitting indeterminate sentencing (with minimum and maximum terms, for example ten to fifteen years).[9] The theory was that inmates should be given the chance to earn their way to freedom.[10] Indeterminate sentencing was coupled with reward structures like good-time or disciplinary credits, which could shorten both the minimum and maximum terms of well-behaved inmates.[11]

But by far the most innovative and effective reward was release on parole.[12] Parole's main virtue was that it provided a powerful inducement

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medical illness that could be cured during an indeterminate amount of prison time and released upon successful rehabilitation).

> Parole was an integral component of the rehabilitative model that the American criminal justice system endorsed from the end of the nineteenth century until well into the twentieth. The theory was that new medical, sociological, and psychological theories and techniques could transform a prison from 'the black flower of civilized society' into the equivalent of a hospital where prisoners would be treated and reformed, rather than punished.

Larkin, *supra* note 6, at 309–10.

[9] *See, e.g.*, Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321–22 (2005) (describing the federal system before sentencing guidelines in which "federal sentences were both 'indeterminate' and heavily dependent on the discretion of district court judges. In an indeterminate sentencing system, the judge sentences a defendant either to a specified term or to a range of years, but the number of years the defendant actually serves is determined later by an administrative body like a parole board.").

[10] Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 301–02 (1974) (explaining the implications of indeterminate sentencing and how it allows the decisionmaker to "consider the defendant's conduct in prison, focusing on such factors as the prisoner's disciplinary record and his general cooperativeness as a prisoner," which are within the control of the individual prisoner); *see also* Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1251 (2011) (noting that, under an indeterminate sentencing system, the release date is set by factors including the offender's prison record).

[11] *See generally* James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982) (discussing the role of "good time" credits in indeterminate sentencing).

[12] A. Mitchell Polinsky, *Deterrence and the Optimality of Rewarding Prisoners for Good Behavior*, 44 INT'L REV. LAW & ECON, 1, 2 (2015) (unlike other reward systems, "it is *always* desirable to reward prisoners for good behavior through either positive time off or a positive period of parole"); W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395, 395 (2011).

> First, states can use parole as a population safety valve without indiscriminately endangering public safety, since parole boards can release only those prisoners least likely to reoffend. Second, indeterminate sentencing gives prisoners incentives both to behave and to rehabilitate themselves, since misbehavior and untreated risk factors will prolong their stay in prison. Parole boards are ideally situated to make prerelease assessments of a prisoner's risk because they can

for inmates to conform to social norms in order to win early release.[13] An additional virtue of parole was that it extended that inducement even beyond release, via the threat of re-incarceration for a parole violation.[14] By the second half of the twentieth century, parole was becoming a ubiquitous feature of American penal law, in both the state and federal systems.[15] By the late 1970s, parole boards exercised authority to release more than 70% of all the people leaving prison.[16]

For most of the twentieth century, parole boards maintained relatively unfettered discretion when paroling prisoners.[17] Or, as it was described in 1976, "The parole decision, as a key element of a system premised on

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do so shortly before release.

Id. See generally Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 497–98, 503 (2008).

> The name coined for the conditional release of a prisoner before completing a sentence derives from the French phrase *parole d'honneur*, loosely translated as 'word of honor.' From the outset, the concept of parole was aimed at the rehabilitated prisoner—the inmate who had exhibited model (or "honorable") behavior while incarcerated, professed to be a reformed person, and accordingly proved to be a safe candidate for discharge.

Id.

[13] Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 452–53 (2005) ("Yet, some correctional experts argue that improvements in institutional behavior and order result if the inmate believes he has something to lose by violating prison rules."); Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 FED. PROB. 3, 5 (2000) ("Inmates are led to believe that reduction in sentence length is possible through good behavior. Adjustment to prison rules and regulations is not sufficient reason for release on parole; however, it comprises a minimum requirement for parole and poor adjustment is a reason to deny parole.") (internal citations omitted).

[14] *See generally* Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 902–03 (2014) (noting that "a major proportion of offenders failing upon reentry—and returning to prison—are doing so as a result of parole violations and revocations").

[15] *See* Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIM. & JUST. 479, 489 (1999) ("By 1927, only three states (Florida, Mississippi, and Virginia) were without a parole system, and by 1942, all states and the federal government had such systems.") (internal citations omitted).

[16] JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 62 (2009) (stating that "by the late 1970s, more than 70 percent of all inmates released were released as a result of a parole board's discretionary decision"). Nevertheless, some courts still viewed parole as an innovation or experiment. *See infra* Part III.

[17] *See* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 396 (2014) (noting that historically, state parole boards were "able to make release decisions with little oversight from the courts regarding the criteria and procedures used for these decisions"); Petersilia, *supra* note 15, at 491 ("Parole boards, usually political appointees, traditionally were given broad discretion to determine when an offender was ready for release—a decision limited only by the constraints of the maximum sentence imposed by the judge.").

rehabilitation or 'correction,' is seen as a judgment (usually made by inadequately informed decisionmakers) of whether an inmate meets some subjective, largely unarticulated standard of 'reformation' or 'recovery' from mental or social illness."[18]

B. REVIEW UNDER THE DUE PROCESS CLAUSE

The due process rights of people convicted of crimes vary with the setting and have changed over time. The key case as to parole—both in terms of the Court's examination of the parole release decision under the Due Process Clause, and in terms of the Court's explanation of its understanding of parole is *Greenholtz*.[19] But the Court's parole-related decisions before and after *Greenholtz* give a fuller understanding of how the doctrine came to be what it is today.

Oddly, we start with a case that is not a parole case, but that is foundational for modern due process analysis. In *Board of Regents of State Colleges v. Roth*,[20] the plaintiff alleged violations of both due process property *and* liberty interests, in a non-criminal context.[21] *Roth* set the backdrop for the parole and sentencing cases that followed it. In *Roth*, the Court ruled against the plaintiff, but it plainly acknowledged that a due process liberty interest can extend beyond the four corners of criminal trials and sentencing.[22] In determining whether a constitutionally protected interest was at stake, the *Roth* Court first rejected the outmoded "rights versus privileges" distinction.[23] In analyzing the scope of the claimed liberty interest, the Court said the idea of "liberty" extended "beyond the

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[18] Heinz et al., *supra* note 5, at 1 (internal citations omitted). This parole story does not, of course, reflect the entire reality of parole practice. Parole practices have varied across jurisdictions, and within jurisdictions based on changes in parole boards, legislatures, and political and social concerns.

[19] 442 U.S. 1, 1 (1979).

[20] 408 U.S. 564 (1972).

[21] *Id.* at 568–69. *Roth* involved a challenge by a non-tenure-track professor alleging denial of his property and liberty interests when a state university did not renew his one-year teaching contract. *Id.* As to the property interest, the Court found none because the university never promised more than one year of employment. *Id.* at 578–79. The Court said that to have a property interest an individual must "have a legitimate claim of entitlement to it" created by state law, rule, or understanding. *Id.* at 577; *see also* Perry v. Sindermann, 408 U.S. 593, 601 (1972) (decided the same day as *Roth*, and finding a protected property interest in "continued employment" by a state junior college professor).

[22] *Roth*, 408 U.S. at 572 ("[T]he Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.").

[23] *Id.* at 571 n.9; *see also* Goldberg v. Kelly, 397 U.S. 254, 262, 266 (1970) (rejecting distinction and finding protected property interest in receipt of public welfare benefits).

sort of formal constraints imposed by the criminal process" and beyond "'mere freedom from bodily restraint.'"[24] The Court stated that a liberty interest is implicated when (1) a person's reputation, honor, integrity or good name is at stake,[25] or (2) the state has imposed a stigma or barrier to a future opportunity.[26]

The same year in 1972, in *Morrissey v. Brewer*,[27] the Court found a due process liberty interest in avoiding parole revocation.[28] Before reaching the issue of whether due process protection applied, the Court first examined the purpose and function of parole within the criminal justice system at the time.[29] The Court noted that parole before the end of a sentence "has become an integral part of the penological system."[30] The Court recognized that "parole is an established variation on imprisonment"—a process unlike the "*ad hoc* exercise of [executive] clemency."[31]

As to people facing a possible return to prison from parole, the Court noted that a parolee was someone who was living and working in the community, despite being subject to conditions of release and other behavioral restrictions.[32] The Court emphasized that a parolee was at liberty; despite the conditional nature of his freedom, he had the ability to hold a job and to be with friends and family.[33] Given the "implicit" understanding that a "parolee is entitled to retain his liberty as long as he substantially abides by the conditions of parole," the Court found a liberty interest, and therefore an entitlement to due process protections, in any decision to revoke parole.[34] The Court focused on whether the "individual will be 'condemned to suffer grievous loss,'"[35] and found return to prison from parole to be just such a loss. On the heels of *Morrissey*, the Court used the same rationale to extend similar due process protections to people

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[24] *Roth*, 408 U.S. at 572 & n.11 (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[25] *Id.* at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

[26] *Id.* at 573–74. Roth lost his liberty-interest-based claim because the state neither made charges against him that damaged his reputation nor imposed a stigma that impaired his freedom to seek other jobs. *Id.*

[27] 408 U.S. 471 (1972).

[28] *Id.* at 488–90.

[29] *Id.* at 477–80.

[30] *Id.* at 477.

[31] *Id.*

[32] *Id.* at 482.

[33] *Id.*

[34] *Morrissey*, 408 U.S. at 479, 482–85.

[35] *Id.* at 481–82 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

facing probation revocation.[36]

The Court was next faced with a related aspect of parole that challenged whether there was a protected liberty interest for someone who was not in the community and facing re-incarceration—as in *Morrissey*—but instead, facing a possible increase in the time served in prison. In *Wolff v. McDonnell*,[37] the Court addressed whether there was a protected liberty interest in prison "good time" credits, which allow a prisoner to earn deductions against his minimum (and sometimes his maximum) sentence.[38] Such credits can shorten the sentence or hasten the point at which the prisoner becomes eligible for parole; conversely, losing the credits can effectively lengthen the sentence or delay the prisoner's parole eligibility.

In *Wolff*, the Court made two analytical moves that are relevant to parole.[39] First, the Court characterized the "good time" question as one about prison discipline, focusing on the need for prison officials to be able to make practical day-to-day decisions for the security, good order, and functioning of the facility.[40] Second, the Court tweaked the nature of the due process liberty inquiry; the Court asked whether there was an inherent or fundamental liberty interest at stake, and even if there was not, if the state had effectively created a liberty interest by statute or practice.[41]

On the merits, the Court rejected the argument that prisoners have an

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[36] *See* Gagnon v. Scarpelli, 411 U.S. 778, 783–91 (1973). In *Scarpelli*, the Court also added a presumptive right to counsel in both parole and probation revocation proceedings, at least where the respondent contests the facts alleged, or there are substantial reasons which justify or mitigate the violation, or make revocation inappropriate. *Id.* at 790–91.

[37] 418 U.S. 539, 542 (1974).

[38] *Id.* at 556–57.

[39] *See generally* Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of* Sandin v. Conner, 72 FORDHAM L. REV. 785, 791–95 (2004) (examining "the Supreme Court's movement from the expansion of due process rights in *Wolff v. McDonnell*, to the contraction of these rights in *Sandin*").

[40] *Wolff*, 418 U.S. at 562 (describing prison security background to legal analysis); *see also id.* at 556 ("In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.").

[41] *See* Lee, *supra* note 39, at 791–93 (stating that "*Wolff* marks the beginning of the Supreme Court's reliance on a state-created liberty interest as the basis for a federal due process violation."); Richard J. Pierce, Jr., Essay, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1979 (1996) (in an article critical of the Court's 1970s doctrine, noting the move to state-created liberty interests and asserting that this decision and others expanded the scope of due process protections); Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 507, 510 (1984) (analyzing *Wolff* as part of Justice White's view of due process protections in which, after being convicted and given a valid sentence, "the only way in which a prisoner might have a liberty interest, and hence a procedural right in connection with his custody, is if he is given one by the state").

inherent or fundamental right to good time directly under the Constitution.[42] But the Court still found a liberty interest in good time credits because the state statute provided a right to the credits and used deprivation of the credits as a disciplinary sanction.[43] The Court surmised that the loss of good time credits did not (typically) cause an immediate or direct change in the prisoner's liberty or custody status, but only did so later and indirectly, by virtue of the delayed parole eligibility.[44] Finally, the Court noted that its determination about the nature and extent of the procedural protections required could change over time with changes in parole policy or in how the law was implemented.[45]

In *Greenholtz*, the Court finally answered the question as to whether or not there was an inherent or fundamental due process liberty interest in parole itself.[46] In examining that question, the Court described how it understood the practice of parole as it existed at the time (in 1979)—namely as a novel aspect of the state's efforts to achieve its punishment goals, grounded in a subjective, "'equity' type judgment."[47] The Court stated that "the very institution of parole is still in an experimental stage. In parole releases, . . . few certainties exist."[48] The *Greenholtz* Court viewed the deci-

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[42] *Wolff*, 418 U.S. at 555–57.

[43] *Id.* at 560–61.

[44] *Id.*

> Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty.

Id.

[45] *Id.* at 571–72.

> Our conclusion that some, but not all, of the procedures specified in *Morrissey* and *Scarpelli* must accompany the deprivation of good time by state prison authorities is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court.

Id.

[46] Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex, 442 U.S. 1, 3 (1979). In 1976, the Court in *Meachum v. Fano*, determined that a prisoner did not have a protected liberty interest in a transfer from one prison to another. 427 U.S. 215, 228–29 (1976). The Court classified the case as one dealing with "conditions of confinement" in which prison administrators needed authority to maintain order, and therefore one that was less likely to implicate a liberty interest. *Id.* at 222. As in *Wolff* and *Greenholtz*, the Court looked to whether there was a state statute or practice that mandated a certain result (like parole or transfer) if specific factors were met. *Id.* at 226.

[47] *Greenholtz*, 442 U.S. at 8.

[48] *Id. But cf.* Morrissey v. Brewer, 408 U.S. 471, 477 (1972) (describing parole as "an integral part of the penological system" and an "established variation on imprisonment").

sion to parole as highly subjective—a kind of art of personality assessment and gut instinct.[49] The Court described the parole decision as a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done."[50] It said that the decision to grant or deny parole was a "purely subjective" appraisal, in contrast to the "fact-bound" decision involved in parole revocation.[51]

Importantly, the Court noted that purpose of due process protections is to minimize "erroneous decisions."[52] This matters because under the system that the Court describes—where there is a "purely subjective" decision-making process—it is unsurprising that the Due Process Clause would not have much work to do to protect against "erroneous decisions." There can be no error to guard against in a process that is based on "discretionary assessment of a multiplicity of imponderables" about "what a man is."[53]

The Court made an additional distinction, contrasting people facing parole with those already on parole, both as to their custody status and their perceived entitlement to freedom.[54] Based on its understanding of how parole decisions were made, and on the custody status of those who were subject to parole, the Court held that prisoners do not have an inherent or fundamental liberty interest in parole based on the Constitution that would give rise to due process protections.[55]

But, as in *Wolff*, based on the specific language of the state statute, the Court reached the opposite conclusion on the question of whether or not

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[49] *Greenholtz*, 442 U.S. at 8.

> In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice. The entire inquiry is, in a sense, an "equity" type judgment that cannot always be articulated in traditional findings.

Id.

[50] *Id.* at 10 (quoting Kadish, *supra* note 4, at 813).

[51] *Id.*

[52] *Id.* at 13 ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions.").

[53] *Id*. at 10 (quoting Kadish, *supra* note 4, at 813).

[54] *Id.* at 9 (noting a crucial distinction between being deprived of a liberty one already has, as in parole, and being denied a conditional liberty that one desires).

[55] *Greenholtz*, 442 U.S. at 7.

Nebraska had created a due process right.[56] The Court found that due to the "unique structure and language" of the provision, Nebraska gave prisoners a liberty interest in parole release protected by the Due Process Clause.[57]

After *Greenholtz*, the Court's examination of whether the state created constitutional interests became the norm. A few years after *Greenholtz*, the Court was presented with nearly the same issue in *Board of Pardons v. Allen*,[58] where the state appellate court held that the parole board's broad discretion under the Montana statute at issue in *Allen* required the opposite result.[59] The Supreme Court disagreed.[60] While it acknowledged that "parole is a privilege, not a right,"[61] it easily found that the mandatory language of the statute created a liberty interest in parole if the statutory conditions were met.[62] As in *Greenholtz,* the law conferred a protectable due process right, even though the board's decision was "subjective and predictive" and required the exercise of "broad discretion."[63] In a case addressing administrative segregation, *Hewitt v. Helms*,[64] again the Court said that a legitimate entitlement to a liberty or property interest can arise

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[56] *Id.* at 11–12.

[57] *Id.* at 12. The Nebraska statute said that the "Board of Parole . . . *shall* order [the prisoner's] release unless it is of the opinion that his release should be deferred . . ." for one of three specific reasons. *Id.* at 11 (citing NEB. REV. STAT. § 83-1, 114(1) (1976)) (emphasis added). The Court relied on the mandatory language of the statute to confer a liberty interest that triggers due process protection.

[58] 482 U.S. 369 (1987).

[59] *Id.* at 371.

[60] *Id.* at 381.

[61] *Id.* at 377. The Court focused on language, especially the word "shall" which seemed to create a presumption that parole release will occur. *Id.* at 374–78.

[62] *Id.* at 376. The Montana statute said that "the board *shall* release on parole . . . any person confined in the . . . state prison when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community." *Id.* (citing Mont. Code Ann. § 46–23–201 (1985) (emphasis in the Court's opinion)).

[63] *Id.* at 375–81.

[64] 459 U.S. 460, 462 (1983). In Paul v. Davis, 424 U.S. 693, 708 (1976), the Court, drawing on the analysis in *Roth*, emphasized the limited nature of due process protections and sought to ground these protections—in the context of property interests—in state laws, rules, and understandings, and focusing on the change or "alteration" of legal status that occurs at the time of the relevant decision. The Court suggested two categories of liberty interests: those "fundamental liberties" which originate in the Bill of Rights, and other liberty interests that are the creation of state law. *Id.* at 710–13. In *Vitek v. Jones*, 445 U.S. 480, 495–96 (1980), the Court found that involuntary transfer from a prison to a mental health facility was a decision in which the inmate had a protected liberty interest. In *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466–67 (1981), the Court found no inherent constitutional right and no statutorily-created right to a protected liberty interest in the decision to grant or deny a commutation. There is no actual expectation that a commutation will be granted, but only a "unilateral hope." *Id.* at 465.

from the Due Process Clause itself, or from state law or practice (as it did in *Wolff* and *Greenholtz*).[65] In *Hewitt*, the Court found that there was no constitutional right to remain in general population, but that mandatory state law and practice nevertheless conferred a liberty interest that required at least minimal due process protections for a prisoner's removal to segregation.[66]

In 1995, in *Sandin v. Conner*,[67] the Court took a big step back from the line of cases we have just described.[68] The Court self-consciously changed the inquiry for determining whether a due process liberty interest exists, stating that

> these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship[69] on the inmate in relation to the ordinary incidents of prison life.[70]

As a result, liberty interests arising directly under the Constitution will get the same protection as before (as will substantive due process rights), but liberty interests that stem from state-created law or practice will not, other than in exceptional circumstances. The Court's new test was a reaction to (1) the overemphasis on statutory and administrative evidence of a state "right" that could make almost anything a liberty interest subject to due

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[65] *Hewitt*, 450 U.S. at 466. The Court distinguished its due process cases based on the severity of the deprivation, the significance of the decision being made (that is, did it affect important rights or involve merely the "daily operations" of the prison or similar routine conditions of confinement), and the status of the plaintiff, namely whether he had already been convicted or was only a pretrial detainee. *Id.* at 474–76.

[66] *Id.* at 476. Given the wide-ranging deference accorded to prison authorities in disciplinary matters, and the modest interest of a prisoner in staying out of segregation, the Court held that the minimal non-adversarial procedural protections provided by the state were sufficient. *Id.* at 476–78.

[67] 515 U.S. 472, 472 (1995).

[68] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1668 (2003) (stating that *Sandin* was "a dramatic confirmation" of the Court's shift in due process and discussing the implications for "large-scale" inmate litigation, for example, in litigation regarding classification and conditions in supermax facilities); Pierce, Jr., *supra* note 41, at 1988–89 (stating that the "Court narrowed dramatically the scope of prisoners' 'liberty' interests protected by due process" in *Sandin*).

[69] *See generally* Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1259–61 (1998) (noting that the "lower courts that have considered procedural due process cases since *Conner* have indeed had considerable difficulty deciding who has suffered an atypical and significant deprivation," that the Court seemed to indicate fewer due process rights for prisoners, that the scope of prisoner's due process rights was not obvious from this language).

[70] *Sandin*, 515 U.S. at 484.

process protections,[71] and (2) the worry that this emphasis would actually *discourage* states from creating sensible prison and parole administrative regimes, in order to avoid having to provide burdensome or expensive procedural protections.[72]

In *Sandin*, the prisoner had challenged his misconduct sanction (disciplinary segregation) for lack of due process protections.[73] The Court found the modest sanction to be a "typical" hardship of prison life: its purpose was the "punishment of incarcerated prisoners" under a disciplinary regime imposed by prison officials.[74] The Court contrasted the case with one in which "the State's action will inevitably affect the duration of his sentence,"[75] suggesting that more protection might be required in that event.

In *Young v. Harper*,[76] the Court determined that a "pre-parole" program, where the prisoner was released into the community, but technically still under department control, was sufficiently like parole (as addressed in *Morrissey*[77]) to merit due process protections.[78] To the extent that the *Morrissey* Court tried to draw a clear line between people who were in custody and people who were in the community, subject to department of corrections supervision, *Young* slightly blurred this line and made relevant other factors.[79] At the same time, *Young* reiterated the importance of the released/non-released distinction in the Court's calculation.[80]

Most recently, in *Swarthout v. Cooke*,[81] the Court upheld the finding of

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[71] *Id.* at 481–82.

[72] *Id.* at 483 ("We believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause.").

[73] *Id.* at 475–77.

[74] *Id.* at 484–85 (protecting only against "atypical" hardships and declining to protect in this case).

[75] *Id.* at 487.

[76] 520 U.S. 143, 143 (1997).

[77] Morrissey v. Brewer, 408 U.S. 471, 477 (1972) ("The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.").

[78] *Young*, 520 U.S. at 144–45.

[79] *Id.* at 143–44.

[80] *Cf.* Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 887 (2000) (noting that the Court seems to have an in-prison versus out-of-prison distinction, under which "[i]f it is about what the prison does with a prisoner in custody, then the court is very much likely to find that *Sandin* applies, and there is no deprivation of liberty. However, if it involves the release from custody, then the court is much more likely to find that *Sandin* is distinguishable.").

[81] 562 U.S. 216, 217 (2011) (per curiam).

a liberty interest in parole, but relied, as before, on whether the state had created a liberty interest in parole.[82] In *Cooke*, two first-degree murderers challenged their denial of parole under a California law, which only required "some evidence" to support the conclusion that inmates were "unsuitable for parole" if the board found that they were "currently dangerous."[83] Although finding a liberty interest, the Court held that the state's "some evidence" rule was not a part of the federal due process requirement, and that the minimal protections provided to the prisoners were sufficient to satisfy due process.[84]

The last case that bears mention is *Kerry v. Din*,[85] not because it deals with parole, but because it exposes the continuing debate within the Court about how to frame the liberty interest for procedural due process purposes.[86] Justice Scalia, writing for a plurality, found that there was no Fifth Amendment interest at stake.[87] He said that "*no* process is due if one is not deprived of 'life, liberty, or property.'"[88] Justice Scalia accused the dissent of articulating a "novel theory of implied nonfundamental rights."[89] Justice Breyer, for the four dissenters, did not see the theory as novel at

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[82] *Id.* at 220.

[83] *Id.* at 217 (citing *In re* Lawrence, 190 P.3d 535, 539 (2008)).

[84] *Id.* at 220–22.

[85] 135 S. Ct. 2128, 2131 (2015).

[86] *Id.* at 2131. In *Din*, the Court examined a due process claim raised by the wife of a non-citizen living abroad. *Id.* She argued that she had a constitutional right to live in the United States with her spouse, and that she was denied procedural due process by the government's denial of her husband's visa application based on a statutory exemption for "terrorism." *Id.* at 2131–32. The husband had served the Taliban in an administrative capacity; the visa denial cited the "terrorism" provision but gave no further reasons. *Id.* at 2131.

[87] *Id.* at 2133. Justices Kennedy and Alito, concurring only in the judgment, said it was unnecessary to decide the liberty interest issue, because regardless of whether or not such an interest existed, the statement provided by the Government satisfied the Due Process Clause. *Id.* at 2139–40 (citing Kleindienst v. Mandel, 408 U.S. 753, 754 (1972)). The Court declined to decide professors' alleged First Amendment right to hear the views of a non-citizen Marxist whose visa was denied; the Government had provided a "facially legitimate and bona fide" reason for the visa denial, which was all that was required in the context of immigration, and therefore the existence of the underlying right did not need to be addressed. *Mandel*, 408 U.S. at 770.

[88] *Din*, 135 S. Ct. at 2132 (quoting Swarthout v. Cooke, 562 U.S. 216, 219 (2011)) (per curiam). Citing the Magna Carta, Coke, and Blackstone, Justice Scalia said that the wife "could not conceivably claim that the denial of [her husband's] visa application deprived her [or her husband] of life or property; and . . . a claim that it deprived her of liberty is equally absurd." *Id*. at 2132–33.

[89] *Id.* at 2137.

all.[90] He distinguished liberty interests arising under the Constitution which trigger procedural due process protections from fundamental rights requiring substantive due process protection.[91]

C. DUE PROCESS AT SENTENCING

Parallel to the Court's cases examining the procedural due process protections that apply within state departments of corrections, the Court has established a very different line of cases that creates an almost unquestioned right to due process at sentencing. The most significant of these is *Gardner v. Florida*,[92] a death penalty case. In *Gardner*, a plurality of the Court found that the defendant was denied due process where his sentence was imposed, at least in part, based on confidential information that was not disclosed to the defendant and that he did not have the opportunity to refute or explain.[93] The Court said that "the sentencing process," in addition to the trial, "must satisfy the requirements of the Due Process Clause."[94] While *Gardner* could

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[90] *See id.* at 2142.

[91] *Id. Compare* Wilkinson v. Austin, 545 U.S. 209, 220–22 (2005) (stating that the Due Process Clause requires compliance with fair *procedures* when the government deprives an individual of certain "liberty" or "property" interests), *with* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (stating that the Due Process Clause limits the extent to which government can *substantively* regulate certain "fundamental" rights, "no matter what process is provided"). *Cf.* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 842 n.48 (1977) (stating that liberty interests arising under the Constitution for procedural due process purposes are not the same as fundamental rights requiring substantive due process protection).

[92] 430 U.S. 349, 349 (1977). Another relevant earlier case, though not cited by the *Gardner* Court, is *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (finding that an inmate was denied due process of the law, where, without counsel, he was sentenced on the basis of assumptions concerning his criminal record that were materially false). *See also* William A. McDaniel, Jr., *Gardner v. Florida: The Application of Due Process to Sentencing Procedures*, 63 VA. L. REV. 1281, 1288–90 (1977) (noting that the cases cited by *Gardner* were generously interpreted to find a due process protection at sentencing and noting the Court's break from relying on the Eighth Amendment, despite Gardner's capital sentence). *See generally Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

[93] *Gardner*, 430 U.S. at 362.

[94] *Id.* at 358. The *Gardner* Court cites Mempa v. Rhay, 389 U.S. 128, 131, 137 (1967) (finding that the criminally accused 17-year-old petitioner was deprived of due process where he was not afforded the assistance of counsel at a combined probation revocation and sentencing hearing); Specht v. Patterson, 386 U.S. 605, 610–11 (reversing the convictions of the petitioner because the Sex Offenders Act, under which he was sentenced, failed to provide procedural safeguards, such as the presence of counsel and opportunity to be heard at sentencing); and Witherspoon v. Illinois, 391 U.S. 510, 521–23 (holding that a defendant cannot constitutionally be put to death by a jury selected by purposely excluding all potential jurors opposed to the death penalty during jury selection).

have been limited to death penalty cases, it has not been.[95] To the contrary, *Gardner* is widely cited for the proposition that criminal defendants have a robust right to procedural due process protections in all aspects of sentencing.[96]

Most recently, in *Johnson v. United States*,[97] the Court examined whether a sentencing enhancement provision of the Armed Career Criminal Act was unconstitutionally vague, in violation of the Due Process Clause.[98] The Court took it as an uncontroversial point of law that constitutional prohibitions on vague statutes "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."[99] The Court held that increasing the defendant's sentence under the challenged provision denied due process of law.[100]

These judge-sentencing cases exist with little reference to the U.S. Supreme Court's other due process cases, including other cases addressing liberty interests after conviction. Scholars, likewise, have not largely given sustained attention to this connection.[101]

II. CHANGES IN CONSTITUTIONAL PROTECTIONS AT SENTENCING

In the last quarter of the twentieth century, as more "get-tough-on-crime" policies took hold, the length of prison sentences sharply

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[95] *See, e.g.*, Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1638 (1980) (noting that the defendant's sentencing interest in *Gardner* was a "life and death situation").

[96] *See, e.g.*, United States v. Lee, 818 F.2d 1052, 1055 (2d Cir. 1987) (citing Gardner v. Florida, 430 U.S. 349, 358 (1977); *see also* Mempa v. Rhay, 389 U.S. 128, 128 (1967); Townsend v. Burke, 334 U.S. 736, 741 (1948)).

[97] 135 S. Ct. 2551 (2015).

[98] *Id.* at 2555–57.

[99] *Id.* at 2557 (citing United States v. Batchelder, 442 U.S. 114, 123 (1979)). There was no additional discussion about whether due process protections applied at the sentencing phase or what "right" gives rise to due process requirements at sentencing.

[100] *Id.* ("We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.").

[101] As a rare example, see Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 585–86 (1994) (discussing a "nexus between sentencing and parole" in due process); *see also* McDaniel, Jr., *supra* note 92, at 1289–90 (drawing comparisons to *Morrissey v. Brewer* and stating that a defendant at sentencing has a "stronger position because no authority yet has found it necessary to incarcerate him"); Fennell and Hall, *supra* note 95, at 1638–39 (using *Morrissey v. Brewer* and *Wolff v. McDonnell* to advocate for additional due process protections at sentencing).

increased.[102] Many factors contributed to the longer sentences: prosecutors' charging practices, mandatory minimums, habitual offender provisions, and "truth in sentencing" laws.[103] While policy and statutory changes resulted in the imposition of longer sentences at the front end, the use of parole and how it is implemented contributed to longer prison terms at the back end.[104]

A. SIXTH AMENDMENT PROTECTION FOR FACTS THAT INCREASE A DEFENDANT'S SENTENCE

One sentencing trend that took hold was a move away from indeterminate sentencing, like ten to fifteen years, toward determinate sentencing—like a flat twelve-year sentence.[105] Further, to calculate the determinate sentence, jurisdictions passed sentencing guidelines, which gave judges "ranges" for appropriate sentencing.[106] These guidelines

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[102] The PEW Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* (2012), http://www.pewtrusts.org/~/media/assets/2012/06/6/time_served_report.pdf (reviewing state trends in time served data from 1990–2009). This data showed that inmates in 2009 served an average of 2.9 years in custody, an increase of nine months (or 36%) over inmates in 1990. *Id.* at 2–3. The average length of stay varied state to state, with Michigan having the longest average time served. *Id*. at 13.

[103] *Id.* at 23–24 (noting the variety of policies influencing length of stay, and differing importance from state to state); *see also* Rachel E. Barkow, *Federalism and the Politics of Sentencing,* 105 COLUM. L. REV. 1276, 1280–83 (2005) (noting the general public's willingness to elect politicians who proposed longer prison sentences in an effort to appear "tough on crime", the imbalance in the media's portrayal of typical prison lengths skewing the public's perception, interest group peer pressures from groups such as the National Rifle Association supporting tougher sentences rather than tougher gun ownership restrictions, and prosecutors' desires to have "longer sentences on the book" as contributing factors).

[104] The PEW Center on the States, *supra* note 102, at 23, 25.

[105] *See* WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT 5–6 (Michael Tonry eds., 2011) (explaining that from 1870–1950, though the prevailing punishment theories had utilitarian roots supporting indeterminate sentencing, by 1980 the utilitarian ideals had "imploded" and the "virtue and value of retributive ideas seemed self-evident" from the writings of many penal theorists, such retributivist ideas favoring determinate sentencing); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 63–64 (1993) (describing moves by state legislatures, following California's lead in 1976, to structured sentencing and to guidelines created by sentencing commissions, and stating that "[d]eterminate sentencing's principal goal has been the elimination of unwarranted disparity, with legislatures seeking proportional punishment for different offenses and consistent punishment for similar crimes"); *see also* Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1235–36 (2005) (noting concerns about arbitrariness in criminal justice decision-making, unwarranted sentencing disparities attributed to racial discrimination, the ripening of the due process revolution beginning with *Goldberg v. Kelly*, and the Warren Court's criminal procedure jurisprudence as factors contributing to a shift away from indeterminate sentencing).

[106] *See* Chanenson, *supra* note 13, at 395–96 (describing the move to sentencing

systems were developed for several reasons, including concerns about disparity within jurisdictions, across different jurisdictions, and in sentences correlated with race and gender for otherwise similarly-situated cases.[107] While the federal sentencing guidelines were prominently litigated and discussed, many states also developed sentencing guidelines that either bound judge's discretion within the guidelines ranges or were strongly suggestive of the appropriate sentence for a given set of offense variables and offender characteristics.[108] Concurrent with the shift to sentencing guidelines was a move to decrease or eliminate the power of parole boards.[109] These shifts have had important implications for sentencing and

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guidelines and the "enduring challenge" of developing guidelines "with an acceptable amount of judicial discretion").

[107] *See* Koon v. United States, 518 U.S. 81, 113 (1996) ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system."); *see also* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 250 (1993) (discussing the use of "personal characteristics" to determine sentencing and noting the requirement that "the commission's 'guidelines and policy statements [be] entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders'"); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guideline*s, 41 S.C. L. REV. 495, 495–96 (1990) (stating that a "major goal" of the Sentencing Reform Act was "to reduce disparity in sentencing through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences" in addition to eliminating parole). *But see* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 916–17 (1991) (noting that researchers "who have proclaimed sentencing guidelines successful in reducing disparity have missed this point" and that the guidelines have not necessarily reduced disparity; they have merely been shown to have accomplished giving similar sentences to those that are defined to have committed similar offenses).

[108] *Cf.* Tonry, *supra* note 105, at 1245 (describing state efforts in the early 1980s to eliminate parole release, set specified lengths of sentences, and implement sentencing guidelines). See also Rachel Konforty, *Efforts to Control Judicial Discretion: The Problem of AIDS and Sentencing*, 1998 ANN. SURV. OF AM. L. 49, 59–61 (1998) for a discussion of the distinctions between state and federal sentencing guidelines systems; and Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines Profile and Continuum*, NATIONAL CENTER FOR STATE COURTS, https://www.ncsc.org/~/media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx (2008) for statistics on states with sentencing guidelines. *See also* Mistretta v. United States, 488 U.S. 361, 384 (1981) (upholding the federal guidelines against separation of powers challenge).

[109] Lowenthal, *supra* note 105, at 61 ("Two developments in the last twenty years have transformed felony sentencing in the United States. First, most jurisdictions have adopted determinate sentencing schemes that narrow the range of sanctions available to trial courts and reduce or eliminate the broad discretion previously exercised by corrections administrators and parole boards.").

parole.[110]

A common procedure in these sentencing hearings was for the judge to engage in fact-finding about the offense and the offender, and then use those facts (usually found by a preponderance of the evidence) to help calculate the sentence to be imposed, whether under formal or informal sentencing guidelines.[111] A significant question that arose in guidelines-based determinate sentencing systems was whether such judicial fact-finding violated the Sixth Amendment right to a jury trial.[112]

Over the past fifteen years, the U.S. Supreme Court has interpreted the Sixth Amendment to cover nearly all facts that increase the actual punishment that a defendant is subjected to at sentencing.[113] This line of cases is based on the underlying Constitutional protections "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged,"[114] and that a criminal defendant has "the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."[115]

The watershed case was *Apprendi v. New Jersey*,[116] where the Court reviewed a statute that permitted an increase in the maximum punishment if the crime was shown to be a "hate crime."[117] The enhancement provision increased the defendant's sentence on the charge from a possible five to ten years to a twelve-year term without any jury determination of the

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[110] *See* Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 48–49 (2005) (arguing that the transition away from parole board toward determinate sentencing based on the federal guidelines created problems, including judges' perception that sentences were too harsh and based on "mechanical" and "rigid" calculations that left little room for consideration of factors that most practitioners considered relevant).

[111] *See, e.g.*, Jones v. United States, 526 U.S. 227, 228 (1999) (expressing doubts, in the year before *Apprendi*, about the constitutionality of judge findings by a preponderance that enhance the penalty, but not ruling on the issue).

[112] *See, e.g.*, Blakely v. Washington, 542 U.S. 296 (2004).

[113] *But see* Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998) (finding that fact of a prior conviction is not a separate crime that must be charged or determined by a jury).

[114] *In re* Winship, 397 U.S. 358, 364 (1970).

[115] United States v. Gaudin, 515 U.S. 506, 511 (1995); *see also* United States v. Booker, 543 U.S. 220, 230 (2005).

[116] 530 U.S. 466 (2000).

[117] *Id.* at 495–97. The year before, the Court read a federal carjacking statute provision that gave harsher penalties if the defendant caused more harm as defining elements of the offense rather than as a sentencing provision, in part to avoid relegating the jury's role to "the relative importance of low-level gatekeeping" and to avoid the constitutional question of whether a judge could engage in this fact-finding. *Jones*, 526 U.S. 227, 243–34 (1999).

question.[118] The Court found the enhancement to be a violation of the right to jury trial and due process, and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[119]

In *Blakely v. Washington*,[120] the Court applied *Apprendi* to state sentencing guidelines.[121] In *Blakely*, the judge-found facts were used to depart upward from the guidelines range, and increased the sentence the defendant actually received.[122] The Court determined that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[123] A year later, in *United States v. Booker*,[124] the Court applied *Blakely* to the federal sentencing guidelines[125] and made the guidelines advisory to remedy the constitutional violation.[126] The *Booker* Court read *Blakely* broadly, holding that the Sixth Amendment requires a jury to find beyond a reasonable doubt any fact that the law makes "essential to the [defendant's] punishment."[127]

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[118] *Apprendi*, 530 U.S. at 470–72.

[119] *Id.* at 490.

[120] 542 U.S. 296 (2004).

[121] *Id.* at 301.

[122] *Id.* at 299–301.

[123] *Id.* at 303 (emphasis in original). The Court said that the ability of the judge to depart from the guidelines range for "substantial and compelling reasons" did not change the Sixth Amendment analysis. *Id.* at 299.

[124] 543 U.S. 220 (2005).

[125] *Id.* at 243–44. The Federal Sentencing Guidelines, prior to *Booker*, required judges to determine the guideline range and (largely) to impose a sentence within the range prescribed by the guidelines. *See* 18 U.S.C. § 3553(b)(1) (2000 & Supp. IV) ("[T]he court *shall* impose a sentence of the kind, and within the [Guidelines] range."); 18 U.S.C. § 3553(b)(1) (2000 & Supp. IV) (permitting departures from the prescribed range when the judge "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described"). The Court rejected the argument that the fact that the guidelines were promulgated by the Sentencing Commission instead of a legislature changed the constitutional analysis. *Booker*, 543 U.S. at 237–38.

[126] *Id.* at 245.

[127] *Id.* at 232 (describing Blakely v. Washington, 542 U.S. 296, 301 (2004)). Post-*Booker* the Court decided a series of cases that clarify how much deference can be given to the federal sentencing guidelines. For example, the Court said that although a sentencing judge must "give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'" Kimbrough v. United States, 552 U.S. 85, 101 (2007) (quoting *Booker*, 542 U.S. at 245–46); *see also, e.g.*, Gall v. United States, 552 U.S. 38, 49–51 (2007) (The Guidelines serve as "the starting point and the initial

In subsequent decisions, the Court applied this line of cases to factual findings that exposed defendants to a potential death sentence,[128] as well as extending the Sixth Amendment protection to mandatory minimum sentences.[129]

The Court has somewhat limited the proceedings in which these Sixth Amendment rights apply. The protections apply at sentencing and at resentencing if the sentence has been vacated on appeal. But they do not apply at "sentence-modification proceedings" (under 18 U.S.C. § 3582(c)(2)), because modification proceedings "do not implicate the [jury-based factfinding] interests identified in *Booker*."[130]

At least one scholar, however, has noted that the import of *Apprendi* fits within our practice of parole. Professor W. David Ball advocates for a functional reading of *Apprendi* and argues that this body of law "should apply any time the jury power is infringed, including during the substantial percentage of American sentences that terminate in a parole board's discretionary release decision."[131]

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benchmark," but judges may impose sentences anywhere within the statutory range.); Rita v. United States, 551 U.S. 338, 347 (2007) (On appeal, the federal sentencing guidelines are subject to review for "reasonableness," and a sentence within the guidelines range is subject to a non-binding presumption of reasonableness.).

[128] Hurst v. Florida, 136 S. Ct. 616, 619, 622 (2016) (finding a Sixth Amendment violation in the ability of a jury to issue an "advisory" opinion to judge, but where the judge was the ultimate finder of fact in death penalty cases); Ring v. Arizona, 536 U.S. 584, 609 (2002) (finding a Sixth Amendment violation where trial judge sentenced the defendant to death without jurors, determining aggravating circumstances that qualified the defendant for the death penalty).

[129] Alleyne v. United States, 133 S. Ct. 2151, 2155, 2163–64 (2013) (finding that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt").

[130] Dillon v. United States, 560 U.S. 817, 828 (2010); *see also* Pepper v. United States, 562 U.S. 476, 481 (2011) (holding that the defendant's post-incarceration conduct could be taken into account on re-sentencing and could support a downward departure from the advisory guidelines).

[131] W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009) (viewing *Apprendi* as rooted in controlling punishment, as defined by the deprivation of liberty, and applying to parole); *see also id*. at 952–56 (analyzing in the context of the California parole statute); *cf.* Nancy J. King & Brynne E. Applebaum, *Alleyne on the Ground: Factfinding that Limits Eligibility for Probation or Parole Release*, 26(5) FED. SENT'G. REP. 287 (2014) (noting the likely application of *Alleyne* to state sentencing provisions that extend the sentence that must be served prior to eligibility for parole or probation); *see also id*. at 289 (stating that *Alleyne* only applies to sentencing and that "delays in release eligibility that result from the decisions of corrections officials made after initial sentencing, even when such decisions depend upon findings of fact, are not affected by *Alleyne*").

B. EIGHTH AMENDMENT PROTECTIONS

In addition to shifts in Sixth Amendment doctrine, another sentencing trend worth mentioning is the application of greater Eighth Amendment scrutiny to sentences given to juveniles. In *Roper v. Simmons*,[132] *Graham v. Florida*,[133] and *Miller v. Alabama*,[134] the Court set limits on the severity of sentences that can be handed down to juveniles. While these cases affect a narrow set of defendants, they are significant for our purposes because, first, they illustrate the Court's interest in front-end sentencing beyond the narrow area of the death penalty, and, more importantly, they show how the Court has, in one context, incorporated considerations of parole release into constitutional sentencing doctrine and imposed requirements for meaningful back-end sentencing review as well, as part of the parole regime.

In *Roper*, the Court held that the Eighth Amendment barred the imposition of the death penalty on youthful offenders (those under eighteen at the time of the offense).[135] In reversing the Court's earlier contrary decision in *Stanford v. Kentucky*,[136] the Court determined that persons under eighteen are categorically less deserving of the most severe sanction due to their impetuosity, lack of maturity, susceptibility to peer influences, and underdeveloped character.[137]

In *Graham*, the Court was faced with an Eighth Amendment challenge to a life without parole sentence for a juvenile who "[did] not kill, intend to kill, or foresee that life [would] be taken."[138] The Court found that such persons—who had "twice diminished moral culpability" by virtue of their youth and their lack of heightened mens rea—could not be sentenced to life without parole.[139] Instead, they were entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[140]

In *Miller*, the Court went a step further, and held that the Eighth Amendment barred the *mandatory* imposition of a sentence of life without parole on persons under age eighteen at the time of their offense.[141] If a life without parole sentence is possible, then the sentencing court must hold an individualized hearing, at which the judge considers age and the "hallmark

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132 543 U.S. 551, 578–79 (2005).
133 560 U.S. 48, 82 (2010).
134 132 S. Ct. 2455, 2475 (2012).
135 *Roper*, 543 U.S. at 574.
136 492 U.S. 361, 380 (1989).
137 *Roper*, 543 U.S. at 569–70, 574.
138 *Graham*, 560 U.S. at 48, 69.
139 *Id.* at 69.
140 *Id.* at 75.
141 Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

features" of youth, the impetuousness associated with youth, the failure to appreciate risks and consequences, the family environment from which the youth cannot extract himself, the circumstances of the offense, including the influence of family and peer pressure, and the youth's limitations in navigating the court system and fully assisting his counsel.[142] The Court allowed that a sentence of life without parole could still be given, but only in "rare" and "uncommon" situations.[143] Subsequently, in *Montgomery v. Louisiana*,[144] the Court found that *Miller* was a substantive change in the law that must be applied retroactively.[145]

The most relevant case for our purposes is *Graham*. The *Graham* Court said that the state is "not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide offense" but it must give "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[146] The *Graham* Court did not mandate *how or when* such offenders must be given a "second look" at parole, leaving the mechanism for that review up to the states.[147] But the Court surely seemed to contemplate review at a point or points in time long after the sentencing hearing. While the Court conceded that some youthful offenders may in fact spend their entire lives in prison, such a sentence will occur only if the state later determines them to be unfit for release.[148]

The *Montgomery* Court further encouraged the perception that the Court views parole, at least in this context, as similar to front-end sentencing.[149] The Court explicitly permitted that a state may choose to remedy an unconstitutional mandatory life without parole sentence through giving the juvenile access to parole review instead of resentencing.[150] The availability of parole, "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."[151]

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[142] *Id.* at 2468.

[143] *Id.* at 2469.

[144] 136 S. Ct. 718 (2016).

[145] *Id.* at 735–37.

[146] *Graham*, 560 U.S. at 75.

[147] *Id.*

[148] *Id.* ("The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.").

[149] *Montgomery*, 136 S. Ct. at 736.

[150] *Id.*

[151] *Id.*

Commentators, scholars, and legislatures have also seized upon the Court's language in *Graham*, *Miller*, and *Montgomery* as a signal of the Court's possible interest in parole review for youthful offenders.[152]

Some states responded to the U.S. Supreme Court's Eighth Amendment sentencing law by making changes to their parole review for people who committed their crimes as juveniles. For example, Connecticut amended its parole provisions for individuals sentenced to more than ten years for an offense committed while a juvenile so that the parole board takes into account a variety of youth-related criteria and whether the person has demonstrated "substantial rehabilitation."[153] In a similar vein, California also passed youth-specific parole legislation[154] in light of *Miller* that, among other things, requires the parole board to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[155]

Other states have not taken the invitation to adjust parole based on the Court's Eighth Amendment doctrine and are facing litigation. For example, in Michigan, after *Miller*, juveniles serving mandatory life without parole sued under Section 1983 to strike down the state's parole statute, which

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[152] Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1048–69 (2014). Cohen notes that

> the Supreme Court's insistence on release mechanisms for youth facing life terms should lead to further increases in the parole-eligible population. Current parole policy and practice, however, have received remarkably scant attention in legal scholarship, and virtually no consideration in the *Graham*/*Miller* literature. Without such systemic examination and, ultimately, reform, parole may well prove to be the Potemkin village of *Miller* and *Graham*—a mere façade of relief.

Id. at 1069; Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 993–1006 (2014) (analyzing the state of Washington's legislative response to *Miller* and *Graham*, specifically, a bill that sought to provide youth offenders with individualized sentencing hearings and in some cases automatic parole eligibility).

[153] *See* CONN. GEN. STAT. § 54-125a(f)(2–4) (2015). The criteria include

> correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes.

Id. at § 54-125a(f)(4).

[154] S.B. 260 (Cal. 2013) (amending CAL. PENAL CODE §§ 3041, 3046, 4801 and enacting § 3051 (2016)).

[155] CAL. PENAL CODE § 4801(c) (2016).

foreclosed parole in all first-degree murder cases, as applied to juvenile offenders.[156] The plaintiffs sought a remedy requiring not just routine parole board review, but a more robust review that would satisfy the specific requirements of *Graham* and *Miller*.[157] Initially, the federal district court granted in part, the plaintiffs' motion for summary judgment, finding that the parole statute was unconstitutional as applied to juveniles.[158] In a remedial order, the court required the parole board to decide the plaintiffs' parole eligibility in a "fair, meaningful, and realistic" way, including—contrary to its regular practice—that the board give reasons for its decisions.[159] The court also prohibited any veto of parole by the sentencing court (which was otherwise permitted by statute in cases involving life sentences).[160] The district court's decision was later reversed in light of intervening changes in U.S. Supreme Court and state law.[161] Similar litigation has been pursued in other states.[162]

III. PAROLE AS WE NOW KNOW IT

A. SENTENCE LENGTH IS STILL COMMONLY DETERMINED BY A PAROLE BOARD

In any given year, approximately half a million people are paroled.[163]

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[156] Hill v. Snyder, No. 10-14568, 2013 U.S. Dist. LEXIS 12160, at *1–2 (E.D. Mich. Jan. 30, 2013) (Opinion and Order), *rev'd* and *remanded* by 821 F.3d 763 (6th Cir. 2016), in light of intervening changes in the law.

[157] *Hill*, 2013 U.S. Dist. LEXIS 12160, at *7–9.

[158] *Id.*

[159] *Id.*

[160] *Id.* at *8.

[161] Hill v. Snyder, 821 F.3d 763, 771–72 (6th Cir. 2016).

[162] For example, an Iowa prisoner who was resentenced to life with parole under *Graham*, but who was later denied parole, sued the parole board and the state department of corrections in federal court, alleging that the "board's current policies . . . fail to take into account [the prisoner's] youth at the time of his offense and his demonstrated maturity and development." Grant Rodgers, *Iowa Officials Wonder What's Fair for Juveniles Felons*, USA TODAY (Mar. 25, 2014), http://www.usatoday.com/story/news/nation/2014/03/25/iowa-juvenile-felons-fair-sentence/6870007/ (reporting on lawsuit); *see also, e.g.*, Hayden v. Keller, 134 F.Supp.3d 1000, 1009 (E.D.N.C. Sept. 25, 2015) (stating that in a challenge to the parole review of juvenile offenders, the North Carolina parole board does not give a "meaningful opportunity" for release).

[163] Laura M. Maruschak & Thomas P. Bonczar, *Probation and Parole in the United States, 2012*, at 8 (revised Jan. 21, 2015) ("During 2012, nearly 1 million persons moved onto and off parole. About 496,100 adults entered parole, while the same estimated number exited parole."). The authors distinguish between conditional and unconditional release. *Id*. Conditional release includes traditional parole: it is a discretionary decision of the board and the individual can be returned to prison for a violation. *Id.* Unconditional release occurs

Modern parole boards often have many functions, including reviewing commutation petitions, processing automatic release decisions, setting terms of release, and deciding who returns to prison on parole violations.[164] But the prototypical decision about whether and when to parole an inmate is still the most frequent one taken up by parole authorities.[165] Imposition of an indeterminate sentence, followed by a parole board[166] release decision is, into the twenty-first century, "the most common approach to sentencing in the United States."[167]

Discretionary release by parole boards still accounts for at least one-third and possibly close to half of all prison releases.[168] Bureau of Justice Statistics data show that of the half million people paroled in 2012, 41% were released through discretionary parole board decision-making.[169]

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when the board is mandated to release at a certain point. *Id*; *see also* E. Ann Carson & Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases, 1991–2012*, at 4 (tbl. 2) (2013) (showing historical data for number of conditional and unconditional releases).

[164] *See, e.g.*, OHIO ADMIN. CODE 5120:1-1-15 (2016).

> (A) All applications for pardon, reprieve or commutation of sentence shall be made in writing to the parole board. (B) When an application for a pardon, reprieve or commutation of sentence is filed with the parole board, the parole board shall conduct such investigation as is necessary and make a recommendation to the governor.

Id.

[165] *See generally* Stefan J. Bing, *Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions*, 100 KY. L.J. 871, 872 (2012) ("Parole boards in many states function as the final step in the sentencing phase; they have the final word on the length of the prison sentence. . . . Currently, all fifty states have parole boards in some fashion. However, sixteen states have cancelled the release authority of their boards.").

[166] As an example of parole board volume, in 2006, based on survey data from 42 jurisdictions, an average 8,355 offenders per jurisdiction were considered for parole release in that year. *See* Center for Research on Youth and Social Policy, *Findings from the APAI International Survey of Releasing Authorities* 9 (tbl. 5) (2008) (hereinafter "CRYSP").

[167] Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 187 (2005) (citing MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 212 (2004)).

[168] Gail Hughes, *Parole Boards Are Worth Saving*, CORRECTIONS TODAY, August 2007, at 86 (citing APAI 2005 survey results from twenty-one states). *But see 2005 Paroling Authorities Survey*, ASS'N OF PAROLING AUTH., INT'L, (2005), http://apaintl.org/resources/documents/surveys/2005.pdf (stating, without citation, that "33% is usually quoted as the rate of discretionary parole in the US" but providing tabular data on which Hughes relied). As a historical comparison, the 2005 APAI report cites to survey data from 1997 showing that about 44% of inmates were released by discretionary parole. The number of individuals released on parole in that year was 385,835. *Id.*

[169] Maruschak & Bonczar, *supra* note 163, at 8; *see also* Carson & Golinelli, *supra* note 163, at 4 (tbl. 2) (showing that in 2012 there were *c.* 400,000 conditional releases from state prisons out of some 580,000 total releases).

Interestingly, 2012 was the first year in recent history where discretionary board release decisions (typically in indeterminate sentencing regimes) comprised a greater percentage of releases than mandatory release decisions (typically under determinate sentencing regimes).[170] While historically discretionary release was the mainstay of parole boards, this study suggests that the late-twentieth century trend toward determinate sentencing/mandatory release may have slowed and could even reverse (though it is probably too soon to know).

Another useful measure to look at is the number of states that, at least in some circumstances, have maintained parole board authority for discretionary releases. A significant number of state boards have such authority, whether those decisions are made within a system that includes indeterminate sentences, or determinate sentences, or both.[171] Joan Petersilia determined that in 2002 the parole boards in sixteen states had "full" release authority, and an additional nineteen states' boards had "limited" release authority, in the sense that the board lacked authority over one or more offenses.[172] About a dozen states did not allow any parole board input into any release decision.[173] As noted above, in some states, even where current offenders were not subject to the parole board's jurisdiction, prisoners sentenced before the statutory changes took effect were still released by the board.[174]

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[170] Maruscak & Bonczar, *supra* note 163, at 8. *See generally* The PEW Center on the States, *One in 31: The Long Reach of American Corrections* (2009).

[171] Joel M. Caplan & Susan C. Kinnevy, *National Surveys of State Paroling Authorities: Models of Service Delivery*, 74 FED. PROBATION 34, 35 (2010) (using 2008 APAI data to develop information about models of state parole boards). Of course, some states that switched from indeterminate sentencing to determinate sentencing may have done so prospectively, to avoid ex post facto issues—with the result that the parole board will remain active in release decision-making until the indeterminate population is reduced to zero, which could take decades.

[172] Petersilia, *supra* note 16, at 66–67, (tbl. 3.1). A 2005 survey of parole boards indicated that thirty states' boards still had "almost full discretion or operate with some limits," while in sixteen states the boards had been abolished either for all prisoners, or for more recently sentenced prisoners. *See* ASS'N OF PAROLING AUTH., INT'L, *supra* note 168 (providing a summary of responding states and a short description of the extent of the parole board's authority).

[173] *See* ASS'N OF PAROLING AUTH., INT'L, *supra* note 168; Petersilia, *supra* note 16, at 66–67, (tbl. 3.1) (stating that fifteen states had eliminated parole); Amy Robinson-Oost, *Evaluation as the Proper Function of the Parole Board: An Analysis of New York State's Proposed Safe Parole Act*, 16 CUNY L. REV. 129, 145 (2012) (citing Minnesota, North Carolina, and Oklahoma as jurisdictions that do not allow parole board discretion with respect to release timing and citing statutes from those three states).

[174] For example, Arizona's board has authority over individuals who committed their felony offense before January 1, 1994; Arkansas' board similarly has discretion over pre-

Some states curtailed their parole boards in the 1980s and 1990s, but that trend had slowed by the mid-1990s.[175] For example, a 2005 survey of parole boards found that "the move to completely abolish the parole boards' authority ended in 1996," although limits on the board's authority, due to truth-in-sentencing laws, mandatory minimums, and statutory exclusion of some offenses, continued.[176]

B. USE OF GUIDELINES FOR PAROLE RELEASE DECISIONS

For those parole boards that continue to make discretionary decisions about release, *how* they make their decisions has evolved since the 1960s and 1970s (back when the U.S. Supreme Court still viewed parole more as a new-fangled and instinctual process). Around the same time that the U.S. Supreme Court decided *Greenholtz*, the move away from "standardless" parole board decision-making had already begun, but not gained full steam.[177] To be sure, as early as the 1920s, there were some limited attempts to use predictive tools to determine whether or not an inmate would be likely to commit (or avoid) further crimes.[178] Momentum picked up in the 1970s to have a more uniform system of parole release decisions.[179] In 1972, the U.S. Board of Parole developed a pilot program of guidelines for parole decision-making.[180] This later developed into a

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1994 cases. *See* ASS'N OF PAROLING AUTH., INT'L, *supra* note 168 (providing a list of responding states and a short description of the extent of the parole board's authority).

[175] Hughes, *supra* note 168, at 86–87 (stating that parole boards were abolished in the 1980s to mid-1990s but after 1996, while parole board authority was circumscribed in some jurisdictions, no other boards were outright abolished).

[176] *See* ASS'N OF PAROLING AUTH. INT'L, *supra* note 168, at 12 (describing the types of limits placed on responding states' parole boards).

[177] *See* Cohen, *supra* note 152, at 1070; Ariela Gross, *History, Race, and Prediction: Comments on Harcourt's Against Prediction*, 33 LAW & SOC. INQUIRY 235, 236 (2008) ("California and the federal government adopted actuarial instruments in the 1970s, and twenty-six other states followed by 2004. This trend coincided with the relative demise of parole."); Russell L. Jones, *Bernard E. Harcourt's Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age (2006)*, 4 J.L. ECON. & POL'Y 219, 222 (2007).

> By 1961, parole boards in only two states were using predictive methods. However, in the 1970s, the actuarial approach became more widely accepted. Peter B. Hoffman, director of research, and James L. Beck, a research assistant at the United States Board of Parole developed the Salient Factor Score as an aid in predicting parole performance. The instrument was developed from the Burgess model, but it reduced the number of factors from twenty-one to nine and later to seven, and focused heavily on prior criminal history.

Id.

[178] Heinz et al., *supra* note 5, at 2 ("The development of prediction tables started in the 1920's, and Illinois prison officials adopted them in 1933.").

[179] *See* Cohen, *supra* note 152, at 1070.

[180] James R. Dillon, *Doubting Demaree: The Application of Ex Post Facto Principles to*

guideline table used by the U.S. Parole Board.[181] At least some of these guidelines were not meant to change paroling behavior or to better predict recidivism, but rather were codifications of existing practice so that decisions would be more uniform across decision-makers. The first-generation tools of prediction available at the time were criticized as inaccurate, tending to err in favor of keeping people in custody,[182] and deeply rooted in the "seriousness" of the prisoner's offense in comparison to other salient factors.[183]

Under modern practice, parole boards overwhelmingly use decision-making instruments like parole guidelines to help them to decide whom to release. In a 2008 survey of parole authorities, over 80% used written guidelines or other decision-making tools, of which 88% included a formal scoring process.[184] In raw numbers, thirty-six of the forty-four states responding to the survey used a decision-making instrument.[185] Few parole boards need outside authority for the development or use of these instruments.[186]

Parole guidelines vary from jurisdiction to jurisdiction. In some jurisdictions, the guidelines are largely suggestive or advisory—they list a number of factors that the promulgating authority believes to be relevant to the release decision. The guidelines are used to funnel the discretion of the decision-maker,[187] and to attain greater consistency from board member to

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the United States Sentencing Guidelines After United States v. Booker, 110 W. VA. L. REV. 1033, 1057–58 (2008).

[181] Heinz et al., *supra* note 5, at 3 ("In effect, the Federal Parole Board's goal was to institutionalize its own past decision-making behavior by determining by a process of induction what its decision rules had been, and then publishing those rules as 'guidelines' for future decisions.").

[182] Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1409–11 (1979) (discussing the two fundamental questions regarding the use of predictions in law—whether they are accurate and if accurate, whether they are legitimate to use).

[183] *See* Petersilia, *supra* note 15, at 491.

[184] CRYSP, *supra* note 166, at iv, 12 (2008) (summarizing key findings of U.S. jurisdictions related to the release decision process and describing this finding).

[185] *See id.* at 13 (tbl. 10) ("Use of Decision-Making and Risk Assessment Instruments").

[186] *See id.* at 12 (stating that only three releasing authorities "need[ed] outside approval for these instruments").

[187] *See* Petersilia, *supra* note 15, at 497–98.

> Parole guidelines are usually actuarial devices that predict the risk of recidivism based on crime and offender background information. The guidelines produce a "seriousness" score for each individual by summing points assigned for various background characteristics (higher scores mean greater risk). Inmates with the least serious crime and the lowest statistical probability of reoffending would then be the first to be released. The use of such instruments helps to reduce disparity in parole release decision making and has been shown to be more accurate than release

board member or panel to panel. Other states' parole guidelines provide much more structure. In Georgia, for example, inmates are given a "risk to re-offend score" based on a numerical calculation that includes previous felony convictions, prior incarcerations, current offense, age at admission, history of drug or alcohol abuse, and employment status at the time of arrest.[188] This "score" is then combined with the "crime severity level" of the offense of conviction to generate a parole guideline recommended term of incarceration.[189] The guidelines recommendation typically takes the form of a range of months within the indeterminate sentence.[190]

Whether or not parole guidelines are statutorily binding (or boards are otherwise required to follow them), they have a significant impact on who is granted parole. For example, a change in the parole grant rate in Texas—from 29% in September 2010 to 42% in February 2012—has been attributed to changes in the state's parole guidelines that redefined risk categories.[191]

Parole guidelines typically are drafted so as not to establish a presumption of parole. This parallels most underlying statutory and regulatory parole schemes, which also tend not to create a right to parole.[192] (There is, however, an incipient movement towards presumptive parole, as states struggle to reduce their outsized prison populations in order to cut corrections costs.)[193] But states are cognizant of existing U.S. Supreme

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decisions based on the case study or individualized method.

Id.; Victoria L. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 613 (1994) ("Guidelines inform the inmates of what information would be relevant to present at the hearing. With sufficient opportunity for departure, the guideline's criteria provide a means of accomplishing uniformity, proportionality, and predictability without unduly fettering appropriate exercise of a parole board's discretion.").

188 GA. COMP. R. & REGS. 475-3-.05(8) (2012); *see* Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller v. Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 407–08 (2013) (analyzing the provisions of the Georgia Parole Board Guidelines in the context of youthful offenders).

189 *See* GA. COMP. R. & REGS. 475-3-.05(9)–(17) (detailing "Crime Severity Level" offenses and recommended sentences based on combined severity level and "risk to re-offend score").

190 *Id.*

191 The PEW Center on the States, *supra* note 102, at 25.

192 *See, e.g.*, GA. COMP. R & REGS. 475-3-.05(5) (stating that the state regime "does not create a liberty interest"); Michigan Dept. of Corrections, Policy Directive 06.05.100 at 1 (11/01/08) (stating that "a parole guideline score in the high probability range does not create a right for the prisoner to be paroled"); *see also* Robinson-Oost, *supra* note 173, at 133.

193 *See, e.g.*, H.B. 4138, 98th Leg., Reg. Sess. 2015 (Mich. 2015); MISS. CODE ANN. § 47-7-18 (2011) (creating presumptive parole if prisoner meets certain conditions).

Court precedent[194] and are careful to state that their guidelines do not create a right to parole that might be interpreted as a liberty interest enforceable under the Due Process Clause.[195]

C. USE OF RISK AND NEEDS ASSESSMENTS FOR RELEASE DECISIONS[196]

States have also adopted risk and needs assessment instruments in response to pressure to develop "evidence-based" parole systems and to improve their decision-making.[197] "Since the 1970s, parole authorities have moved away from traditional 'pen and paper' clinical evaluations conducted by correctional or parole personnel toward automated, actuarial-based risk and needs assessments, which are believed to more accurately predict recidivism."[198] These instruments rely on aggregate statistics and develop actuarial tools that examine the statistical relationship between variables about individuals and likelihood of risk outcomes.[199] But there are still value judgments at play——such as how much risk is tolerable. Further, in these judgments, some suggest that parole boards still "err on the side of severity."[200]

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[194] *Sandin*, 515 U.S. at 482 (1995).

[195] *See* GA. COMP. R & REGS. 475-3-.05(5); Michigan Dept. of Corrections, Policy Directive 06.05.100 at 1 (11/01/08).

[196] Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS AND OFFENDERS 203, 212 (2010); Memorandum from the Vera Institute of Justice's Center of Sentencing and Corrections to the Delaware Justice Reinvestment Task Force, 9–12 (October 12, 2011). https://ltgov.delaware.gov/taskforces/djrtf/DJRTF_Risk_Assessment_Memo.pdf.

[197] *See generally* Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 ARIZ. ST. L. J. 1, 9 (2015) (describing the creation and use of actuarial risk tools); Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1444 (2003) (defining actuarial risk assessment as a method "which employs empirically derived 'mechanical' rules for combining information to produce a quantitative estimate of risk").

[198] Cohen, *supra* note 152, at 1070. *See generally* Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671 (2015).

[199] *See generally* Hamilton, *supra* note 197, at 9 (describing development of actuarial tools).

[200] *See, e.g.*, YVONNE JEWKES & JAMIE BENNETT, DICTIONARY OF PRISONS AND PUNISHMENT 56 (2008) (explaining that parole boards "err on the side of caution when assessing and predicting dangerousness" because the prediction of human behavior can never be "100 percent" and the media encourages public opinions that favor imprisoning dangerous offenders for long time periods to "keep them off the streets"); *cf.* Beth Schwartzapfel, *Parole Boards: Problems and Promise*, 28 FED. SENT'G REP. 79, 79 (2015).

The growing movement for criminal justice reform has had little effect on the politics of the

The use of risk and needs assessment tools by parole authorities is significant, and increasing.[201] In recent years, several state legislatures have passed laws requiring the use of risk and needs assessments across a number of points in the criminal justice process, including at parole release.[202]

A number of reports provide distinct lenses on overall trends. A 2008 report found that thirty-two of thirty-seven responding states were using some kind of risk assessment instrument as part of the parole process.[203] Of those thirty-two states, the majority used their own risk assessment tool, developed in house.[204] Another study, which examined parole board statutes and online information, reported that twenty-four states use a risk-assessment tool in parole release decisions.[205]

There are a number of well-regarded and widely-used risk-assessment instruments from which to choose. Based on a survey of parole boards, the most commonly used risk-assessment tool for a general population of prisoners was the LSI-R, Level of Service-Revised, which was used by 12 states.[206] Another commonly used tool was the Static-99, a sex-offender-

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> country's parole boards. A months-long Marshall Project investigation revealed that parole boards remain so deeply cautious about releasing prisoners that in many states they let go only a fraction of those eligible, and almost none who are violent offenders—even those who pose little danger and whom a judge clearly intended for eventual release.

Id.; Michael Meltsner, *The Dilemmas of Excessive Sentencing: Death May Be Different But How Different?*, 7 NE. U. L.J. 5, 16 (2015) ("Parole boards, when they exist, are heavily influenced by politics and media. The idea of running prisons with rehabilitation foremost in mind has been rejected by the public and many professionals.").

[201] *See also* Pari McGarraugh, *Up or Out: Why "Sufficiently Reliable" Statistical Risk Assessment is Appropriate at Sentencing and Inappropriate at Parole*, 97 MINN. L. REV. 1079, 1081 (2013) (arguing that risk assessments should be used, as suggested by a draft Model Penal Code proposal at sentencing, and critiquing the use of risk assessments at parole, in part, because of the lack of procedural protections).

[202] *See* National Conference of State Legislatures, E-Bulletin: *Sentencing and Corrections Policy Updates*, Issue 6, at 2–4 (Jan. 2012) (stating that in 2011, at least six state legislatures required use of risk and needs assessments; describing New Hampshire, South Carolina, Kentucky, and Ohio as states where the instrument is used across stages of the criminal system, including at the parole board; and stating that Louisiana and New York require the assessments for parole); *see also* Roger K. Warren, *Evidence-Based Sentencing: Are We Up to the Task?*, 23 FED. SENT'G REP. 153, 157 (2010) (reporting that in at least ten states, sentencing judges use risk assessment instruments).

[203] CRYSP, *supra* note 166, at 12–13 (tbl. 10).

[204] *Id.* at 13 (tbl. 10) (indicating that eighteen release authorities use in-house risk assessment tools).

[205] Robinson-Oost, *supra* note 173, at 144. This study notes the difficulties of using only publicly available information and suggests that the higher numbers found in the direct survey of parole boards comes closer to the actual figure. *Id.* at 143.

[206] CRYSP, *supra* note 166, at 12 (tbl. 10).

specific tool, which was used by seventeen of the thirty-two states.[207]

The extent to which risk-assessment tools inform, or even direct, the parole board's decision varies. For example, in Nevada, the assessment tool generates a simple risk score as to the likelihood that the prisoner will commit a felony on parole: low, moderate, or high.[208] This risk score, together with a score for the severity of the underlying offense, provides "an initial assessment regarding whether to grant parole."[209] Then the parole board can look at an additional list of aggravating and mitigating factors before making a release decision.[210]

What sets such modern parole decision-making apart from the more subjective decision-making that dominated parole in the second half of the twentieth century is that the risk-assessment instruments themselves are not attempting to predict the individual prisoner's risk of re-offending,[211] a fact that is sometimes obscured or misunderstood.[212] Rather these are actuarial-based instruments that look at recidivism rates for people who share the same characteristics as the potential parolee.[213] The instruments are based

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[207] *Id.*

[208] Robinson-Oost, *supra* note 173, at 146. (citing Nevada example, but incorrectly stating—at least under present law—that the state relies exclusively on a risk assessment tool, while in fact the tool simply generates an initial assessment). *See* NEV. ADMIN. CODE § 214.514 (2014).

[209] NEV. ADMIN. CODE § 214.516 (2014).

[210] NEV. ADMIN. CODE § 213.518 (2014). Nevada does not make its risk assessment tool information public, but a look at the list of aggravating factors in NEV. ADMIN. CODE § 213.518 (2014) suggests that some aspects of an inmate's history, such as prior convictions could be "double counted" both in the assessment tool and in the additional aggravating factors. *Id.*

[211] *See* John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 905–06 (2000) ("In the past several years, the field of "violence risk assessment" has seen a dramatic shift away from studies attempting to validate the accuracy of clinical predictions, and toward studies attempting to isolate specific risk factors that are actuarially (meaning statistically) associated with violence."). *See generally* John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006) (comparing and contrasting clinical (i.e., subjective) risk assessment with actuarial-based risk assessment tools. These tools have been criticized for a number of reasons, including that some decision makers incorrectly perceive that the tools are making individualized predictions.).

[212] *E.g.*, Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 749 (2011) ("[I]t is clear that many experts and courts have erroneously interpreted the actuarial tools and their purposes. . . . The first, which is quite common among the cases, is the improper interpretation that group-based scores provide risk-assessment estimates that are individualized to specific defendants.").

[213] *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806–07 (2014). Starr notes that:

on numerous static factors that have been studied and refined across large populations over time.[214] For example, the STATIC-99 (used to score male sex offenders) looks at ten factors, including categories such as age, prior sex offenses, prior non-sex offenses, long-term relationships, and victims who are strangers.[215] The researchers who design these instruments have collected data over time on thousands of sex offenders for whom these categories have been charted.[216] The researchers can then analyze the data to see which factors correlate to recidivism over time, and which factors deserve more or less weight.[217] The best instruments are regularly being refined and recalibrated (and the factors changed or re-weighted), as each passing year for each sample population produces more and better data.[218] To be sure, these types of instruments have been subject to criticism, not just for the use of imperfect data, but also for concern that the factors used will have disparate results based on race and socioeconomic status, unrelated to the actual risk of future criminality posed by the individual.[219]

> [T]he instruments provide nothing close to precise predictions of individual recidivism risk. The underlying regression models may provide reasonably precise estimates of the average recidivism rates for the group of offenders sharing the defendant's characteristics, but the uncertainty about what an individual offender will do is much greater, and when it comes to predicting individual behavior, the models offer fairly modest improvements over chance. While [evidence-based sentencing] literature sometimes acknowledges this limitation, most advocates have downplayed its seriousness, and existing scholarship has not recognized its legal import.

Id.

[214] Hamilton, *supra* note 212, at 720.

> The general idea for actuarial ratings for any risk at issue is to identify those factors that are correlative to the potential occurrence of the future event at issue, and to effectively assign appropriate weights to each factor based on the observation that some factors have greater correlative abilities than others relating to the particular result. The theory is that a better model of prediction should be based not on any single risk factor, but an accumulation of relevant risk factors.

Id.

[215] *See generally,* R. Karl Hanson & David Thornton, *Static 99: Improving Actuarial Risk Assessments for Sex Offenders 1999–2002*, Sol. General Canada (1999).

[216] In re Commitment of Simons, 821 N.E.2d 1184, 1187 (Ill. 2004) ("The Static–99 is based upon a study of thousands of sex offenders from England, Canada, and the United States.").

[217] *See generally* Amy Phenix, et al., *Static–99 & Static–2002R Evaluators' Workbook* (Jan. 1, 2015), http://www.static99.org/pdfdocs/.

[218] *See e.g.*, Gregory DeClue & Denis L. Zavodny, *Forensic Use of the Static-99R: Part 4. Risk Communication*, 1 J. THREAT ASSESSMENT MGMT. 145, 146 (2014) (describing evolution of Static-99).

[219] *See, e.g.*, Starr, *supra* note 213, at 836–41 (arguing that the disparate impact of evidence-based sentencing on racial minorities and offenders of lower socioeconomic status may be a violation of the Equal Protection Clause); *see also* Janus & Prentky, *supra* note 197, at 1487.

What such instruments bring to parole boards is not predictive certainty about what any individual prisoner will do in the future, but rather scientific evidence about how prisoners with the same or similar risk-factor profiles have fared in the past, and therefore how *statistically* the prisoner under review is likely to fair in the future. The subjective "art" of parole decision-making has been criticized as being little better than flipping a coin.[220] Risk-based decision-making acknowledges that individual predictive judgments are unreliable, and relies on large-scale statistical sampling instead. Even if parole decision-making remains partially an "art" under modern practice, the science of statistics provides parole decision-makers with far more, and far better information than they had in the past.[221]

> There are three potential sources of prejudice from [actuarial risk assessment] testimony. First, there is concern that the scientific and statistical nature of actuarial assessments will unduly influence the fact-finder into giving it more weight and credibility than it deserves, and that the principle of "actuarial superiority" will exacerbate this tendency. The corollary is that the weaknesses of some ARA instruments are too complex for lay fact-finders to apprehend. Second, some worry that juries will ignore the lack of "fit" between the actuarially derived risk and the legally relevant risk, thus giving ARA too much weight. Third, in the words of Professor Tribe, the "incriminating significance" of statistical probabilities is obscure.

Id.

[220] *See* Seena Fazel, *Coin-flip Judgment of Psychopathic Prisoners' Risk*, NEW SCIENTIST, (Dec. 4, 2013), https://www.newscientist.com/article/mg22029464-800-coin-flip-judgement-of-psychopathic-prisoners-risk (highlighting the over-reliance on inherently fallible and flawed assessment tools used by officials in the U.S. and Canada to predict prisoner failure (i.e., risk of reoffending) upon parole or release, especially so for prisoners with psychopathy); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 695–97 (1974) (arguing against allowing expert testimony in commitment proceedings, challenging the presumption of the reliability and validity of psychiatric judgments, and characterizing such judgments and diagnoses as inherently unreliable, particularly predictions of a person's propensity for future violence or dangerousness).

[221] Most parole board members believe that they make better decisions as they gain experience, and that getting to know individual prisoners is important to good decision-making. Of course, investment fund managers have similar ingrained beliefs, despite studies showing that over time market-indexed funds beat nearly all stock pickers—regardless of their experience or the information they possess. *See* BURTON MALKIEL, A RANDOM WALK DOWN WALL STREET 178–86 (Norton & Company 1999 (1973)). Having the ability to exercise discretion in parole makes intuitive sense, at least at the margins. There will always be a few prisoners who score very low on recidivism metrics, but whose turnaround in prison is so apparent that the risk of release is worth taking; the reverse is also true, a few prisoners with superb guideline scores will have persistent character or behavioral deficits that make the risk of release not worth taking.

IV. HOW MODERN PAROLE AND SENTENCING PRACTICE INFORMS THE LEGAL PROTECTIONS AVAILABLE UNDER MODERN PAROLE.

We think that due process doctrine regarding parole was developed in a different era, and that today the doctrine fails to account for the sea change in both sentencing practice *and* parole practice over the years. We fail to see why the due process protections provided at the point of parole should not closely parallel the due process protections provided at sentencing, given that the practical liberty interests are identical and the decisional processes are similar in both situations. In both settings, the decision-maker must decide exactly the same questions, namely how much risk does the defendant/prisoner pose, and how long should the defendant/prisoner serve?

We take as a given—and take seriously—–that the procedural protections afforded to criminal defendants at sentencing, and prisoners at parole, regarding how long they will serve should derive organically from the realities of sentencing and parole. But where, as here, both sentencing and parole have shifted seismically since the development of the respective due process doctrines, those shifts should call into question the soundness of the doctrinal structure that was formed and erected on what today are outdated understandings of sentencing *and* parole practice. As noted earlier, the *Greenholtz* Court characterized the nature of the parole decision as "subjective," and described the purpose of due process as to minimize "erroneous decisions."[222] When the parole decision hinges on subjective insight into the character of the individual, it stands to reason that the Court would not see a fundamental liberty interest, and would only find one if the state had explicitly created one. But the near universal reliance on parole guidelines and risk assessment instruments (even if some attendant discretion remains to depart from these norms), demand, at a minimum, that the state be seen as creating a system which provides an entitlement to the fair and consistent application of this structured process, and to outcomes consistent with the outputs of the chosen metrics.

The changes in sentencing law, and the thin distinctions between the total amount of punishment, the amount of punishment imposed at sentencing by the judge, and the amount of punishment imposed by the parole board, make anachronistic the siloing of parole into a separate category that is unworthy of due process protections. The due process protections extended (or not extended) at parole should reference, if not parallel, the protections extended (or not) at sentencing. Courts assume that

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[222] Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions.").

there is a constitutionally-protected liberty interest at the imposition of a sentence because the defendant will be deprived of liberty for X time, but exactly the same decision is being made by the board at the point of parole. We think the two liberty interests are functionally indistinguishable and that a liberty interest should be recognized at the parole release decision.

We note that recognizing a liberty interest in parole is, of course, not the end of the analysis when examining whether a failure to give certain procedural protections violates due process. Once a court determines that a liberty interest is present, the question is then "What process is due?"[223] Shifting this inquiry puts the focus on the harder, but more relevant, question.[224]

We also note that such a shift would not undermine the analysis for the due process protections afforded for *conditions* of confinement. Rather we suggest that there should be a more unitary due process standard for decisions that determine the *length* of confinement.

We are not the first scholars to note the inconsistency of applying due process at sentencing, but not applying it at the point of the parole release decision. Professor Ball notes:

> [I]t seems absurd to hold that due process obtains during the sentencing process, which governs the prospective duration of restrained liberty, but that [at parole] it is no restraint on the actual length of time those *in* prison will spend there. Nor does it make sense to hold that a parolee enjoys due process protections once she has been conditionally released, but that she has no protections during the hearing that determines whether or when she will be granted that conditional release. An offender cannot have inherent due process interests in both of these stages but not in parole suitability itself.[225]

Nor is our view of linking the punishment imposed at sentencing with the punishment later imposed at parole without precedent. The draft of the Model Penal Code, currently under consideration, moves in its own way to erase the line between initial sentencing and parole release.[226] One of the proposed Model Penal Code sections on sentencing provides principles for a new regime of "second look" sentencing, which would be conducted by

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[223] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 571–72 (1974).

[224] Instead of, for example, encouraging gamesmanship about statutory wording, see, e.g., Sandin v. Conner, 515 U.S. 472, 483 (1995) ("[W]e believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause.").

[225] Ball, *supra* note 131, at 957.

[226] Kevin R. Reitz, Modification of Long-Term Prison Sentences; Principles for Legislation, MODEL PENAL CODE § 305.6, sentencing (Tentative Draft No. 2 2011) at 75–77 (providing principals for "second look" sentencing); *cf. id.* at § 6.06(4) and (5) (determinate sentencing).

judges after the defendant has served fifteen or more years in prison.[227] The proposals, in tandem, recommend the prospective elimination of parole board release.[228]

CONCLUSION

Context matters. The U.S. Supreme Court's choice to provide little to no independent due process protections for parole release decisions was based, in part, on a view of parole as an art of standard-less discretion, and at a time when the criminal justice system provided very little constitutional protection or structure even for front-end sentencing decisions. This world no longer exists. Now, constitutional sentencing doctrine is a robust area of law that, in some instances, acknowledges the relationship between sentencing after conviction and parole release decisions. Those parole release decisions, once based on gut intuition about "what a man is," are now based on parole guidelines and actuarial risk and needs assessments. If the purpose of due process protection is, as *Greenholtz* asserted, to minimize "erroneous decisions,"[229] these shifts in context call for a change in our understanding of the extent of due process protection for the parole release decision.

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[227] *See id.* § 305.6, at 75–77; Margaret Colgate Love & Cecilia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 873 (2011).

> As the commentary to proposed Section 305.6 explains, the purpose of this "second look" provision is twofold. First, it recognizes that the United States makes "heavy use of lengthy prison terms—dramatically more so than other Western democracies." Although the provision has sparked some difference of opinion among Institute members, in terms of both sentencing theory and institutional competence, there now appears to be consensus that courts must have some power to reexamine a lengthy sentence after a period of years, particularly if the public mood that produced a particularly harsh sentence has mellowed or the overall legal environment has changed. The second motivation is normative, and focuses more on the circumstances of the particular prisoner than on the external environment.

Id.

[228] *See* Reitz, *supra* note 226, at Appendix B, Reporter's Study: The Question of Parole-Release Authority (eliminating parole board release authority). We applaud the creativity of the Model Penal Code proposals, but we also strike a note of caution. Although eliminating parole board authority could support a "second-look" sentencing system, based on our own experience in Michigan, when (elected) judges are empowered years after the initial sentencing to revisit, modify, or resentence long-term prisoners, we have not seen the kind of fair, uniform, transparent, and consistent results that professional parole boards can strive to produce.

[229] Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex, 442 U.S. 1, 13 (1979).