Journal of Criminal Law and Criminology

Volume 67 | Issue 1 Article 1

1976

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THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 67, No. 1

Printed in U.S.A.

CRIMINAL LAW

SENTENCING BY PAROLE BOARD: AN EVALUATION*

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The paroling process is now under attack on a broad front. In recent years, an increasing number of prison reformers, such as the American Friends Service Committee,[1] have given up on parole and have endorsed fixed, determinate sentences in its stead. Academic criminal lawyers have published both popular[2] and scholarly[3] attacks on parole. Criticism of the parole decision process has also been voiced by persons with more direct access to the levers of power; an influential member of Congress, the Chairman of the House Judiciary Committee's subcommittee on corrections, has co-authored an article[4] that calls into serious question the assumptions on which parole decisions are based, and the Governor of Illinois has proposed to eliminate parole from his state's correctional system.[5] The focus of all these attacks is not the after-care services provided by parole officers, inadequate as those services may often be, but rather the parole release decisions themselves, and the ignorance, pure caprice, bigotry, or other abuses of discretion that are alleged to influence those decisions.[6]

These attacks on the parole decision are an outgrowth of the same, developing skepticism that has in the past few years called into question our pursuit of the "rehabilitative ideal."[7] The parole decision, as a key element of a system premised on rehabilitation or "correction," is seen as a judgment (usually made by inadequately informed decision-makers) of whether an inmate meets some subjective, largely unarticulated standard of "reformation" or "recovery" from mental or social illness.[8] And it has,

* Mr. Senderowitz and Ms. Vance collected the data for this article while enrolled as students at the Northwestern University School of Law, from which they both received the J.D. degree in 1974. No part of this article is intended to represent the views of the United States Department of Justice nor of the State of Illinois, by whom they are now employed respectively.

This study was conducted pursuant to a grant from the CNA Foundation. The authors wish to thank the Foundation for making the research possible and to absolve the Foundation from responsibility for any of the statements made. The authors also wish to express their appreciation to Peter Bensinger, then Director of the Illinois Department of Corrections, and to David Sturges, then Acting Chairman of the Illinois Parole and Pardon Board, for their cooperation in this study and for permission to use the Board's files. We also acknowledge, with gratitude, our debt for the valuable advice and assistance of Ralph Knoohuizen, Research Director of the Chicago Law Enforcement Study Group, of William V. Kauffman, Jr., Executive Secretary of the Illinois Parole Board, and of the staff of the John Howard Association of Illinois.

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[1] *See* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

[2] *See* Schwartz, *Let's Abolish Parole*, READER'S DIGEST, Aug. 1973, at 185.

[3] N. MORRIS, THE FUTURE OF IMPRISONMENT 28–50 (1974) [hereinafter cited as MORRIS]. Morris does not argue for outright abolition of parole (in part, at least, because "the politics of penal reform strongly favor reform recommendations that make use of existing personnel," *id.* at 36), but his proposals would certainly alter radically the functions of parole boards, restricting their discretion greatly and determining the parole release date "within the first few weeks" of the inmate's imprisonment. *Id.* at 35.

[4] Representative Robert Kastenmeir, co-author of Kastenmeir & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477 (1973) [hereinafter cited as Kastenmeir & Eglit].

[5] *See* press release (mimeo), Office of the Governor, State of Illinois, release date February 18, 1975, at ad. 4 [hereinafter cited as press release].

[6] *See, e.g.*, press release, *supra* note 5, at Fact Sheet I. *See also* Foote, *The Sentencing Function*, in ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, A PROGRAM FOR PRISON REFORM 17, 24, 32 (1972); Kastenmeir & Eglit, *supra* note 4, at 481–91, for a summary of critical views of parole.

[7] *See, e.g.*, F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY 25–41 (1964) (chapter: Legal Values and the Rehabilitative Ideal); Martinson, *The Paradox of Prison Reform*, a four-part article in THE NEW REPUBLIC, Apr. 1, 1972, at 23; Apr. 8, 1972, at 13; Apr. 15, 1972, at 17; and Apr. 29, 1972, at 21.

[8] H. E. Barnes once opined:

> The diagnosis and treatment of the criminal is a highly technical medical and sociological problem for

by now, been quite well established that our efforts to predict "dangerousness"—to discriminate between the persons who will commit crimes in the future and those who will not—are woefully inaccurate, consistently erring on the side of over-prediction.[9] If, then, parole boards are unable to distinguish the inmates who have been rehabilitated from those who are likely to sin again, and if, in any event, rehabilitation is a vague, largely mythic standard that may provide the rationale for prolonged, inefficacious institutionalization, the premises on which the parole system traditionally rested[10] have been destroyed—or so the argument goes.

Thus, the policy issue on which the current literature critical of parole tends to focus is the issue of which decision-maker should exercise the sentencing discretion. Most of the parole critics suggest that the modern trend toward vesting increasing amounts of sentencing discretion in parole boards should be reversed, returning that discretion to the judiciary.[11] Some of the critics would, in the alternative or in addition, vest a more sizeable portion of the discretion in the legislature through the use of mandatory sentence statutes.[12] In addressing the issues raised by these proposals, this article attempts two separate, but related tasks. First, we examine the question of how the discretion currently vested in the parole boards has, in fact, been exercised by one of those boards, the Illinois Parole and Pardon Board—that is, we identify the factors that appear to influence Board decisions, and thus, perhaps, shed light on the allegations that the Boards "abuse" their discretion. Second, we assess the various possible alternative loci of sentencing discretion and consider the broader scientific and policy issues involved in the techniques and objectives of sentencing decisions. To anticipate our conclusion, very briefly, our analysis suggests that the popular issue of *who* should hold the sentencing discretion is less important than the question of *how* the sentencing decisions are made—not "how" in the sense of "procedural due process," the right to hearing and to counsel and the like, but rather in the sense of the nature of the evidence taken into account, the manner in which that evidence is weighed, and the nature of the values and objectives that the decisions are intended to implement.

PART I: THE PAROLING DECISION

The Existing Literature

Research pertinent to the parole decision-making process has moved in two directions. The first has focused on predicting parole outcomes; the second, on evaluations of the paroling system. Formulae designed to predict parole success have come primarily from corrections professionals. The work has had a practical orientation—trying to find a parsimonious but accurate way of deciding whom to recommend for parole—with little explicit theoretical underpinning. The major product of this concern has been various kinds of prediction tables; that is, based on examination of the success and failure of past parolees, a set of categories is organized so that one can assess the likely risk that a prisoner would violate parole. The development of prediction tables started in the 1920's, and Illinois prison officials adopted them in 1933.[13] These expectancy tables have been criticized by prison professionals as being overly technical, inapplicable to individual cases, and not valid across different populations.[14] On the other hand, they have been defended for systematizing

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which the lawyer is rarely any better fitted than a real estate agent or a plumber.
H. BARNES, THE STORY OF PUNISHMENT 265-66 (1930), quoted, *not* with approval, in M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 54 (1973) [hereinafter cited as FRANKEL]. *See also* MORRIS, *supra* note 3, at 4, 17-20; O'Leary & Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651 (1972); Comment, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 826 (1975) (hereinafter cited as YALE L.J.).

[9] *See* text accompanying notes 175-81 *infra*. For a review of the prediction literature, stressing the inaccuracy and overprediction see Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 730-40 (1972) [hereinafter cited as Von Hirsch]. Note that, as the term "dangerousness" is used in this article, it denotes the commission not only of crimes of violence but of any crime, and is thus approximately equivalent to "recidivism."

[10] *See* Kastenmeier & Eglit, *supra* note 4, at 521-25.

[11] *See, e.g.*, YALE L.J., *supra* note 8, at 895-98.

[12] This, generally, is the approach of the Walker proposals in Illinois, though those proposals would retain a reduced amount of discretion in the judiciary. *See* press release, *supra* note 5; Flat-Time—Serving Time in Prison: A New Way in Illinois, 1975, at 2-3 (Mimeographed memorandum, prepared by the staff of the Illinois Law Enforcement Commission, David Fogel, Executive Director, draft copy only).

[13] *See* A. BRUCE, A. HARNO, J. LANDESCO & E. BURGESS, THE WORKINGS OF THE INDETERMINATE SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS 246-49 (1928); Hart, *Predicting Parole Success*, 14 J. CRIM. L. & C. 405 (1923). For a brief history see Lejins, *Parole Prediction, An Introductory Statement*, 8 CRIME & DELINQUENCY 210 (1962). *See also* L. OHLIN, SELECTION FOR PAROLE (1951).

[14] *See* Evjen, *Current Thinking on Parole Prediction Tables*, 8 CRIME & DELINQUENCY 215-24 (1962).

parole recommendations, encouraging efficiency, and developing more accurate criteria for decisions.[15] The recent research on prediction tables has tried to refine the predictions for particular groups of offenders (*e.g.*, narcotic users)[16] and to make the predictions more appealing to corrections administrators by developing more conceptual and less mathematical techniques.[17] The parole prediction literature has, then, tried to isolate and give appropriate weight to various offender characteristics that are thought to be clues to future behavior. Prior criminal record, prior employment experience and age at release have been among the more accurate predictors of parole success.[18]

The prediction of parole success is, however, a step removed from concern with parole board decisions. More directly in point is the research carried out by the National Council on Crime and Delinquency in collaboration with the U.S. Board of Parole.[19] The object of that research was to determine the factors relied on in federal parole decisions so that the implicit standards or policies could be made more explicit.[20] 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.[21] A Guideline Table has now been established that utilizes two principal factors, offense severity and likelihood of success on parole (the "parole prognosis"), the two factors that the Board was found to have relied on most.[22] The offense severity measure averages the Parole Board members' subjective ratings of the gravity of typical offenses.[23] The prognosis is based on a "Salient Factor Score" that summarizes information relating to an inmate's criminal record and personal background.[24] Seven of the nine items used in computing this score are known when the inmate enters the institution.[25] All inmates are given parole hearings, but the basic decision has already been made based on the individual's score on the Guideline Table.[26] In some cases, prison personnel present at the hearing are consulted for their recommendations,[27] but the *Yale Law Journal's* observations of federal parole hearings suggest that the inmate's institutional behavior, including both disciplinary infractions and program participation, are given little importance in the release decisions.[28]

The decision-making procedures of parole boards have received relatively little systematic attention, with no conclusive findings. For example, a descriptive study of parole board decision-making in Indiana suggested the importance of board member variation in determining board outputs,[29] but Gottfredson and Ballard, using a statistical analysis, found little member variation in federal parole decisions when offender characteristics were controlled.[30] There is a considerable body of research that has evaluated parole board procedures from a policy perspective.[31] O'Leary and Nuffield interviewed parole authorities in all fifty-one U.S. jurisdictions and compared the procedures that the parole agencies reported with the statutory provisions in

[15] *See, e.g.*, D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 290-92 (1964). *See also*, Gottfredson, *Summary*, Parole Release Decision-Making Report, NCCD Research Center, 1973, p. 2.

[16] *See* Babst & Chambers, *New Dimensions for Parole Expectancy Research*, 10 CRIMINOLOGY 353 (1972) [hereinafter cited as Babst & Chambers].

[17] *See* Glaser, *Prediction Tables as Accounting Devices for Judges and Parole Boards*, 8 CRIME & DELIQUENCY 239, 254 (1962) [hereinafter cited as Glaser]. For a discussion of the use of additive scales rather than more sophisticated weighted scales due to limitations in data quality see Wilkins, *The Problem of Overlap in Experience Table Construction, Report Number Three*, Parole Decision-Making Report, NCCD Research Center, June 1973.

[18] *See, e.g.*, Baird, Parole Prediction Study, Report Number Three, May 1973 (Illinois Department of Corrections, Research Division); Babst & Chambers, *supra* note 16; Glaser, *supra* note 17.

[19] *See* Gottfredson, Hoffman, Seglir & Wilkins, *Making Paroling Policy Explicit*, 21 CRIME & DELINQUENCY 34 (1975).

[20] *See* YALE L.J., *supra* note 8, at 825.

[21] *See* Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 FED. PROBATION 7, 14-15 (1974).

[22] 28 C.F.R. § 2.20(f) (1974). For a brief description of the new parole program see Hoffman & DeGostin, *supra* note 21, at 7-15.

[23] *See* YALE L.J., *supra* note 8, at 823-24.

[24] *Id.* at 824.

[25] *Id.* Variables are: (1) record of prior convictions, (2) incarcerations, (3) age at first commitment, (4) whether commitment offense involved auto theft, (5) prior parole violations, (6) history of drug abuse, (7) high school graduate or equivalent, (8) record of steady employment or education, and (9) post release plans to live with spouse or children.

[26] *Id.* at 830 n.97.

[27] *Id.* at 831 n.98.

[28] *Id.* at 831 n.97, 841.

[29] Thomas, *An Analysis of Parole Selection*, 9 CRIME & DELINQUENCY 173 (1963).

[30] Gottfredson & Ballard, *Differences in Parole Decisions Associated with Decision Makers*, 3 J. RES. CRIME & DELINQUENCY 112 (1966).

[31] For an example and a critique of some of this literature see Comment, *The Parole System*, 120 U. PA. L. REV. 282 (1971).

effect.[32] They analyzed their findings in terms of the availability of due process and notice to the offender, taking the position that practices not meeting those standards should be changed.[33] Very few parole boards were found to have made explicit policy statements about their release criteria.[34] O'Leary and Nuffield argued that, without such an articulation of parole policy, inmates are deprived of notice and the systematic evaluation of parole board practices is made very difficult.[35] Kastenmeier and Eglit,[36] reviewing information about parole decision-making that was presented in congressional hearings, argue that parole is based on a rehabilitative model that has been discredited in much of the corrections setting.[37] Like O'Leary and Nuffield, but from a different perspective, Kastenmeier and Eglit argue for limiting the wide discretion given to parole boards.

Research Design

Research Objectives. Given the concern with the parole decision that was summarized in the introduction to this article, our review of the literature has disclosed surprisingly little systematic inquiry into the factors on which parole decisions have, in fact, been based. This relative paucity of empirical evidence on what the parole boards have been doing with the considerable discretion granted them[38] means that the current policy debate on the future of parole is little constrained by hard fact. The first objective of this article, therefore, is to provide an empirical understanding of the parole decision process.[39] To that end, we examine the influence that the various items of information contained in an inmate's file appear to have had on the Illinois Parole Board's decisions to grant or deny parole.[40] We have attempted to determine the kinds of information that are contained in the files, to isolate the kinds that appear to influence the Board's decisions, and, at least tentatively, to determine the relative influence of those different categories of information.

Description of Variables. The dependent variable in our analysis is the Board's latest release decision (parole granted or denied) on each inmate included in the sample.[41] The independent variables are the several categories of information included in the inmate's file.[42]

The information about the inmate that is available to the Board at the time of its release decision may be divided into two broad categories—those facts that were already known at the time that the judge imposed sentence, and those circumstances of the inmate that develop or become known only after sentencing. This distinction is relevant because of the policy consideration that, if the facts of greatest relevance to the parole decision are already known at the time of sentencing, additional strength is given to the argument in favor of vesting the sentencing discretion in the judiciary rather than in parole boards. Unless the parole board can be shown to

[32] *See* O'Leary & Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey,* 8 CRIM. L. BULL. 651 (1972).

[33] *Id.* at 654.

[34] *Id.* at 675.

[35] *Id.* at 677.

[36] Kastenmeier & Eglit, *supra* note 4, at 521–25.

[37] *See also* sources cited at note 7 *supra,* and press release, *supra* note 5, at ad. 1.

[38] For a discussion of the need for further research see also K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 126–33 (1971) [hereinafter cited as DAVIS]; O'Leary & Nuffield, *supra* note 8, at 675–77.

[39] Our goal is not to assess whether the Board acted in compliance with its statutory mandate. *See* ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1973). Nor were we primarily concerned with determining the goals that the Board members intended to achieve by their decisions; we did, however, interview six of the Board members. We asked them to rank in order of importance different kinds of information that might be used in making parole decisions, and also inquired about board decision-making procedures. [These interviews are hereinafter cited as interview files.] Because the informants were promised confidentiality, we do not cite to the individual interviews.

[40] *See* ILL. REV. STAT. ch 38, § 1003-5-1(a) (1975), which lists several kinds of information required to be included in an inmate's file.

[41] For a description of the sample see notes 44–50 and accompanying text *infra.* In some of our analyses, we have also used the correctional sociologists' prognoses as the dependent variable. *See* Table VII and accompanying text *infra.*

[42] In each case, bivariate associations will be presented first. Since much of our data was ordinal, Kendall's Tau_c will be reported. While its maximum does not, for all practical purposes, reach $\pm$ 1.00 and it lacks a substantively meaningful interpretation, it does provide a test of significance that allows decisions to be made about whether the pattern of distribution is likely to have occurred by chance. For computation and interpretation see H. BLALOCK, SOCIAL STATISTICS 319–24 (1960). Because the sample size was too small to allow us to control for many variables by physical manipulations, we used step-wise multiple regression to determine how different combinations of variables explained the variance in parole board decisions. We realize that there are problems associated with such procedures for our data, but decided that it was important to make some effort to pull the correlations together. We can report that the tau_c's were within .05 of the simple Pearson r in all the tests that were run. For a brief description of the procedure see *id.* at 326–28. For particulars as to computation see N. NIE, STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES 345–59 (1975) [hereinafter cited as SPSS].

have superior judgment about the significance of those facts, the argument runs, we would do as well to leave undisturbed the weight given them by the judge when he imposed sentence.[43]

Certainly included in the category of facts known at the time of sentencing are those personal characteristics of the defendant that are little subject to change or, as with age, change only inevitably and in a highly predictable way. In addition to age, these personal characteristics include sex, race and I.Q. Personal circumstances and items of personal history that are known at the time of sentencing but that are subject to important modification during imprisonment include educational attainment, employment history and marital status. Inmates may participate in educational programs while in prison and may significantly upgrade their achievement, some may benefit from job training that would be useful in securing employment on the outside, and many inmates become divorced while in prison. Finally, and quite importantly, the category of factors known at the time of sentencing includes the defendant's criminal record, both the current offense and any prior record.

Factors that are determined only after sentencing include, first of all, the length of the sentence itself. If parole boards are influenced by the sentencing judge's view of the seriousness of the offense or of the intractability of the offender, then the boards might take length of sentence as an indication of the judge's sentiment. Similarly, the board might be influenced by its own previous hearings and decisions on an inmate's case. The post-sentence variable category also includes, of course, those personal circumstances mentioned above that are subject to significant modification while in prison (education, job training, and marital status) and what are referred to as the inmate's "parole plans" (whether the inmate has an offer of employment during the parole period, and whether the prospective parolee would be living alone, with friends, with relatives, or with a spouse and dependents—this is, of course, influenced by marital status). Finally, this category includes two sorts of judgments made about the inmate by officials of the institution. The first of these are judgments that the inmate has violated the prison's rules. The Parole Board has before it the institution's record of the inmate's disciplinary infractions, which are classed as either "major" or "minor," and of the penalties imposed. The second sort of institutional judgment made about the inmate is what is termed his "prognosis." These judgments, which assess the inmate's adjustment to prison and predict his likelihood of success after release, are made by two separate sets of institutional employees: "reception and diagnostic sociologists" who evaluate the offender as a part of the prison intake process, and "correctional sociologists" (and/or "counselors") who interview the inmate in the prison.

In the presentation of our findings, we first discuss the variables known at the time of sentencing and then those that are determined after sentencing. As indicated above, to the extent that the parole decisions are determined by factors known before sentencing, the parole decision process may be argued to be unnecessary. To the extent that post-sentence variables appear to influence the parole decision, and to the extent that it is thought to be just or relevant to take those variables into account in deciding when to allow an inmate to re-enter society, parole decisions would seem to have a legitimate place in the sentencing process. After presenting our findings from this perspective, their policy implications will be explored in Part II of this article.

Sample Characteristics. A professional, full-time Parole Board consisting of nine members was established by statute in Illinois in 1969.[44] Members are appointed by the Governor with Senate confirmation and must have five years of experience in the behavioral sciences related to the treatment of offenders. The length of term is six years, with the possibility of reappointment.[45] Our analysis covered three years, 1970–72; this was considered long enough to provide a sufficient sample of cases and to reflect the Board decision process that developed after the 1969 reorganization.[46]

The Master Record Files of the Illinois Department of Corrections, maintained in the Parole Board's office and used as the basis of the Board's decisions, were the source of our data. In the early 1970's, approximately 6400 adults were in prison in

[43] For a statement of the argument in favor of early fixing of the release date, either determining it at the time of sentencing or during the reception and diagnostic process see MORRIS, *supra* note 3, at 34–50.

[44] ILL. REV. STAT. ch. 38, § 1003-3-1(b) (1975). A tenth member was added in 1973; *see* Act of July 26, 1972, Pub. L. No. 77-2097, § 3-3-1, effective Jan. 1, 1973.

[45] ILL. REV. STAT. ch. 38, § 1003-3-1(c) (1975).

[46] Illinois is neither exceptionally "antiquated" nor "reformist" in its parole program. Since Illinois changed from a volunteer to a professional board in 1969, a study of Illinois allows us to evaluate the performance of these new professional boards. At the time of our study, the decision procedure consisted of reading the master file and conducting a personal interview with each offender being considered for parole. Usually, three Board members interviewed at a single institution for several days. At the end of each day, the three members got together and decided the cases reviewed that day. *See* interview files, *supra* note 39.

Illinois at any one time.[47] The Parole Board office maintained files on these persons and on 3100 parolees, as well as 2500 "dead files" (files on inmates already discharged from their sentences).[48] A sample of 294 files was drawn.[49] Forty-nine and one-half per cent of the inmates in the sample were black, 47.8 per cent white, and 2.8 per cent Spanish surnamed. Just over 95 per cent of the sample were male; 49 per cent were under twenty-eight years of age. These proportions are similar to those of the prison population as a whole.[50]

Personal Characteristics

Race. In February of 1975, Governor Walker of Illinois put forward a comprehensive package of proposals for reform of his State's correctional system.[51] The Governor's press release argued:

> Parole affords no real safeguards to the public, depends on vague rehabilitation standards for release of prisoners, results in wide variations of time served for identical offenses, [and] has tended to discriminate against blacks . . . .[52]

In examining the differences in parole rates according to race, we found that 77.1 per cent of the whites in our sample were paroled at their most recent parole hearing, while the parole rate for the eight inmates in our sample who had Spanish surnames was 75 per cent, and the rate for blacks was 66.9 per cent. As indicated in Table I, these differences in parole rates are statistically significant. The findings are not so clear cut, however, when we consider the relationship between race and other aspects of the inmates' records. Because of the interrelationships between race and several of the other, "independent" variables discussed below, especially the criminal record and the prison disciplinary record, we will defer further consideration of the possible effects of race on the parole decision until we have presented the data on these other variables.[53]

Sex. On the basis of the initial test, it appears that males and females were not treated substantially differently, but the sample included only fourteen women and conclusions about sex differences are, therefore, particularly tenuous. Consequently, a separate random sample of thirty-eight women's files was drawn in order to examine more carefully the paroling process with respect to women inmates. The group in that sample represents 13 per cent of all parole decisions made about women in 1970–72. Because of its small size, we cannot argue for the reliability of even this second sample. For what it is worth, however, the factors affecting the parole decisions do not appear to be appreciably different for males and females, with one exception. The disciplinary infraction rate at Dwight, the women's prison, was similar to the rate for the general sample for both major and minor infractions, but 21 per cent of those at Dwight had lost good time while only 2.4 per cent of those in the general sample were so severely penalized. There was, therefore, some evidence to suggest that administrative differences in the institutions might lead to more negative disciplinary records for women, which might be expected to make it more difficult for them to win release. The parole-granted rate for the special subsample of women was 84 per cent, however, as compared to 72 per cent for the men in the general sample.

Age. As shown in Table I, age appears to be a relatively important predictor of board decisions. Generally, older inmates appear to be more likely to

[47] *See* Ill. Dep't of Corrections, Division of Research & Long Range Planning, Population Analysis of the Illinois Adult Prison System, December 31, 1972; Illinois Dep't of Corrections, Division of Research & Long Range Planning, Adult Division—Population Statistics—Institutions and Parole Supervision Services (1956 thru 1972).

[48] In 1970 the Parole Board reviewed nearly 9,000 adult the juvenile cases. 1 ILL. DEP'T OF CORRECTIONS ANN. REP. 67 (1970).

[49] Every sixtieth file was selected and then, on a second run-through, starting from a different point, every 120th file. Files, stored alphabetically, were rejected where no decision was made during the period of the study. No decision would have been made if either the person was not yet eligible for parole or the person was released from his or her sentence and had not yet been removed from the active files. When a potential file showed no decision, the next file was used and the count of sixty or 120 files then began again from that new point. While we recognize that this sampling procedure will not produce a true random sample, simplicity and economy in the sampling and the difficulty in supervising and controlling the individuals pulling the files was thought to justify this sampling procedure. In any event, we know of no plausible reason to suppose that the sample would be systemtically biased in any significant way by the resulting alphabetic stratification, and the sample characteristics do seem to correspond quite closely to those of the population as a whole.

[50] For the prison population as a whole, the proportion of blacks was 55.2 per cent on December 31, 1971, and 53.0 per cent on December 31, 1972. Ninety-eight and one-tenth per cent were males during this period; 60 per cent were under thirty years old. Puerto Ricans and Mexicans appeared in the sample in such small numbers that, while they were included in the analysis to assure completeness, they will not be discussed separately. *See* Population Analysis of the Illinois Adult Prison System, *supra* note 47, at 3, 7, 12.

[51] *See* press release, *supra* note 5, at ad. 5.

[52] *Id.* at ad. 4.

[53] *See* text accompanying notes 94–104 *infra.*

TABLE I

PERSONAL CHARACTERISTICS AND BOARD DECISION[1]

Variable	Tau_c	Sig.
Age[2]	.07	.04
Sex[3]	−.01	.38
I.Q.[4]	.12	.00
Race[5]	.10	.03

Scoring:

[1] One = granted; two = denied

[2] Higher score = older (four-point scale)

[3] One = male; two = female

[4] Higher score = lower I.Q. (three-point scale)

[5] One = white; two = Spanish surname; three = black

be denied than younger ones; the relationship, however, is not linear. Those who were in our oldest category (over thirty-five years old) had a better chance of being released than any group except those under twenty-one. These findings suggest that the board was likely to parole the youngest inmates, presumably because they were expected to be more easily rehabilitated, and the oldest ones, probably because they were thought to have "burned themselves out" or "settled down."

I.Q. Those inmates whose records indicated a higher intelligence score were more likely to be granted parole. The intelligence measure was also associated with the correctional sociologist's prognosis—the higher the score, the better the prognosis.[54] We looked at the possibility, however, that I.Q. score might in fact be a measure of some other, more directly relevant factor. The intelligence measure was found to be closely associated with race; blacks in the sample were far more likely than whites to have lower I.Q. scores.[55] I.Q. was also found to be closely associated with pre-institutional education[56] and with prior offense record.[57] When we combined these variables in a multiple regression analysis, the intelligence measure explained very little additional variance.[58] It appears that the intelligence measure, therefore, may not in itself be an important criterion in the Board's decisions.[59]

Pre-Institutional Education & Employment. The amount of education that an inmate had received before entering the institution was significantly correlated with the parole decision.[60] Inmates who had from six to eight years of education had a parole rate of 68 per cent, while those who had attended high school for any length of time had a parole rate in excess of 75 per cent.

Stability in an inmate's pre-institutional employ-

[54] Tau_c = .11, sig. = .02.

[55] Tau_c = .29, sig. = .00. We do not suggest, of course, that this correlation has any validity. A considerable literature has developed indicating that serious validity problems exist with respect to the scores of blacks on the intelligence tests currently available; *see, e.g.*, R. SAMUDA, PSYCHOLOGICAL TESTING OF AMERICAN MINORITIES (1975). One problem with having I.Q. scores recorded is that they may be used as indicators of a person's "ability." The high correlation between I.Q. and Board decision may suggest that the scores influenced Board action. Further analysis indicates, however, that other considerations were more important to the Board. *See* note 58, *infra.*

[56] Tau_c = .28, sig. = .00.

[57] Tau_c = .14, sig. = .01.

[58] One-tenth of one per cent of the variance was explained. We used step-wise multiple regression to make a further assessment of the contributions made to the parole decision by various predictors. For a discussion of data analysis problems see note 42 *supra.* We were able to explain 24 per cent of the variance with the following variables:

Variable	R	R^2	F-ratio to enter or remove	Sig.
Correctional Sociologist Prognosis	.40	.16	33.50	.00
Seriousness of Current Offense	.43	.19	5.30	.02
Number of Prior Convictions	.46	.21	6.45	.01
Parole Plans-Employment	.48	.23	3.17	.08
Seriousness of Infraction Record	.48	.23	1.09	.30
Institutional Education	.49	.24	1.14	.29
I.Q.	.49	.24	.32	.57
Pre-Institutional Work Record	.49	.24	.22	.64
Race	.49	.24	.14	.71

When we tried polynomial regression tests to build in the interactions between race and various other decision criteria, we were able to improve R^2 to .31, a 7 per cent increase in the variance explained. The correctional sociologist's prognosis was still the most important predictor. Race combined with number of prior offenses ranked second, race combined with commitment offense and number of prior offenses was third, and marital status alone ranked fourth. These four were the only variables that had a significance level of .05 or better. As in the above table, the top four variables in this equation explain 23 per cent of the variance.

[59] We used .05 as a cut-off point for a significance test of the F-ratio. I.Q.'s score was .57. For statistical interpretation of step-wise multiple regression and some limitations on its use see R. WONNACOTT & I. WONNACOTT, ECONOMETRICS 309–12 (1970); *see also* SPSS, *supra* note 42.

[60] Tau_c = .09, sig. = .01. The variable used a four point scale: high school diploma or better, some high school, six to eight years of education, and five years or less. The N in this lowest category was only 16; the next smallest, however, was 63.

ment record had a highly significant correlation with the parole decision,[61] but the nature of the inmate's occupation did not.[62] Of the 241 inmates for whom the files included information on employment history, 112, or nearly half, had not held a job for more than six months; the parole rate for these inmates was 66 per cent. Those who had worked for the same employer for seven months or more had a parole rate of 79 per cent. Using a standard occupational classification including such categories as "professional," "clerical and sales," "service," "farming," "machine trades," "structural work," and so on, the pre-institutional occupations of the inmates were not significantly correlated with the release decisions.[63] Some of the rates may be of interest, however—the twelve "professionals" in our sample had a parole rate of only 50 per cent, for the twenty-three who worked in " processing" the rate was 61 per cent and for the forty-eight "structural" workers it was 65 per cent, while fifty-four "service" workers had a rate of 72 per cent and eighteen who had worked in "clerical and sales" had an 83 per cent rate.

Criminal Record

Two characteristics of the inmate's criminal record appear to have a significant influence on the Parole Board's release decisions. Those factors are the number of the inmate's prior convictions and the seriousness of the commitment offense—*i.e.*, the offense for which the inmate is currently sentenced.[64]

TABLE II

CORRELATION BETWEEN LATEST PAROLE DECISION[1] AND CRIMINAL RECORD

Variable	Tau_c	Sig.
Seriousness of Commitment Offense[2]	.11	.03
Seriousness of Last Previous Offense[2]	.01	.47
Number of Prior Convictions[3]	.28	.00

Scoring:

[1] One = granted; two = denied

[2] One = least serious; two = medium; three = most serious

[3] One = none; two = one; three = two; four = three or more

We also tested the association between the parole decision and the seriousness of the last previous offense committed by the recidivists in our sample, but found that association was not significant.[65] Of the 294 inmates in our sample, 201 had at least one prior conviction on their records. The remaining ninety-three first offenders had a parole rate of 91.4 per cent. For the fifty-three inmates with one prior offense, the rate declined sharply to 66 per cent granted parole; there was no further decline in the parole rate for the sixty-three inmates with two prior offenses (their rate was 66.7 per cent), but for the eighty-five with three or more prior offenses the rate declined to 58.8 per cent. On the seriousness of commitment offense variable, the 126 inmates whose offenses fell into the "high" seriousness category had a parole rate of 67.5 per cent. For the 133 with offenses of "medium" seriousness, the rate increased to 75.2 per cent, and for the twenty-six with offenses of only "low" seriousness the rate increased still further to 84.6 per cent granted parole.

Length of Sentence and Time Served

The length of the sentence that the judge imposes on an inmate might be taken by the parole board as an indicator of the gravity of the offense, since the judge presumably imposes sentence in light of all the facts or evidence in the particular case, in addition to the offender's prior record. Neither the maximum nor the minimum sentences of the inmates in our sample, however, were significantly associated with the parole decision.[66] Length of sentence does, of

[61] Tau_c = .12, sig. = .01. A six-point scale was used, the "best" category being more than four years on the job, and the "worst" being six months or less.

[62] Tau_c = .05, sig. = .10. Nine standard occupational categories were used.

[63] *See* note 62 *supra*. Since this was not necessarily an ordinal scale, we might report that the chi square was also not significant; sig. = .42.

[64] Offenses included in the "high" seriousness category were all homicides, forcible rape, armed robbery, and aggravated assault and battery. Those in the "medium" seriousness category were burglary, unarmed robbery, thefts (both vehicle and non-vehicle), forgery, other fraud, and sex offenses. The only offenses included in the "low" seriousness category for which persons in our sample were in fact incarcerated were the narcotics law violations. In the measure of seriousness of prior offenses, this category also included alcohol law violations. These categorizations are, of course, purely subjective or intuitive, and they might well be quarreled with. The facts of individual cases might also aggravate or mitigate the seriousness of an offense that falls within any of these legal definitions. When we rank-ordered sixteen specific offenses on a seriousness scale, the association with Board decision disappeared, suggesting that the judgment about the nature of the offense was based on some rather broad categories rather than finely tuned distinctions. Alternatively, the failure of the more refined measure may indicate that individual mitigating factors reported in the file are sufficient to blur the more narrow distinctions, and the larger number of categories meant that the number of cases in some of the categories was quite small.

[65] *See* Table II *supra*.

[66] For maximum sentence, tau_c = .06, sig. = .06 (four-point scale). For minimum sentence, tau_c = .05, sig. = .12 (three-point scale).

course, determine the point at which the inmate becomes eligible for parole. Once that point is reached, however, sentence length does not appear to exercise significant further influence upon the release decision. The length of time served by the inmate before the parole decision was also not significantly associated with the parole rate.[67] Thus, the Board apparently gives relatively little weight to the notion that lengthy incarceration may embitter the inmates and lead to increased rates of recidivism.

A related variable, which has an effect on the length of time served before release and is also widely believed to result in inmate bitterness toward the penal system, is the number of parole hearings held before the release decision. If the inmate is not released at his initial hearing, when he first becomes eligible for parole, then his case is continued for several months to a year before it is reviewed again. As with length of sentence and time served, we found no significant difference in the likelihood that parole would be granted at one stage of parole review rather than at another.[68] This finding may reflect the fact that most of the information in an inmate's file—including the number of prior offenses and the seriousness of offense, on which the Board apparently places great weight—is unchanged from review to review.[69]

Post-Release Plans

Another criterion for granting parole might be the availability of environmental circumstances after prison that are thought to make it less likely that an ex-offender will commit new crimes. Such circumstances would include a job, family commitments, or "stable" living arrangements. Table III shows the relationship between post-release plans and the Board decision. The findings indicate that the parole decision was closely associated with such plans. A promise of a job or the presence of responsibilities in a traditional family unit were likely to be associated with positive Board action.

Several Board members in interviews, however, expressed skepticism regarding the validity of the inmates' employment plans. They felt that the "jobs" were often illusory promises, made by family or friends to facilitate release. Statements by persons on the outside that they "were looking for" a job for the inmate were particularly suspect.[70]

It is possible that the availability of a job was a function of other variables and was not, in itself, an important factor. Board members, for example, expressed an awareness of the existence of racial discrimination in employment. In our study, we found that whites were more likely than blacks to have a promise of employment, and the tendency was statistically significant.[71] We also examined the relationship between job plans and criminal record. One might expect that those who had been convicted of more serious offenses would have more difficulty persuading potential employers to hire them, but this was not the case in our data.[72] Employment plans did play a central role in the Board's decisions regarding serious offenders,[73] although for those with less serious offenses the job plans were not a significant predictor. From these tests, it appears reasonable to conclude that the Board takes employment plans into account in reaching its decisions. This finding is consistent with what Board members said, though it does not reflect the reservations that some members expressed about the validity of the job plans.

The importance of family responsibilities in shaping an individual's conduct can be seen in the close association of the Board's decisions with marital status and with number of dependents. When one is

TABLE III

CORRELATIONS BETWEEN PAROLE DECISION[1] AND POST-RELEASE PLANS

Post-Release Plans	Tau_c	Sig.
Marital Status[2]	.15	.00
Living Arrangements After Release[3]	.03	.23
Employment Plans[4]	.17	.00
Dependents[5]	.10	.01

Scoring:

[1] One = granted; two = denied

[2] One = married; two = separated or divorced; three = single

[3] One = with family or friends; two = alone

[4] One = job found; two = returning to school; three = no job or education planned

[5] High score = fewer dependents (five-point scale)

[67] Tau_c = .02; sig. = .30 (seven-point scale).

[68] Tau_c = .01; sig. = .40 (three-point scale; at first hearing, after one previous hearing, two or more previous hearings).

[69] *See* text accompanying and following note 43 *supra*.

[70] *See* interview files, *supra* note 39.

[71] Tau_c = .08; sig. = .04.

[72] Tau_c = .04; sig. = .20.

[73] The association between parole decision and employment plans was tau_c = .33, sig. = .00. In the multiple regression analyses, employment plans rated high in explaining the correctional sociologists' prognosis, and in explaining the parole decision when the prognosis was not included as a predictor. Probably because of the high correlation between job plans and prognosis, job plans dropped out of the basic multiple regression model presented in note 58 *supra*.

attempting to predict the inmate's likelihood of returning to prison, attention to such personal characteristics as marital status and family responsibilities may be understandable. In interviews with the Board, however, most members said that marital status played a relatively insignificant role in their decisions. Our data suggest that, whether acknowledged or not, marital status is significant in explaining Board decisions.

Institutional Record

Education and Work Programs. Life within the institution presents few opportunities for an inmate to demonstrate a change in life-style that might suggest rehabilitation. The prison's educational and vocational training programs are among the few such opportunities that are available. All inmates, except those judged most dangerous, too old or ill (about 5 per cent), or those engaged in full-time educational programs (11 per cent), are expected to perform some work, whether in the prison or in a work release program. Slightly less than three-fifths of the inmates had performed general work at the institution (*e.g.,* kitchen or laundry), slightly less than one-fifth were employed in "correctional industries" (such as a prison farm), and about five percent were in work release programs.

The work record was significantly correlated with neither the Board decision nor the correctional sociologist's prognosis.[74] Thus, it appears that neither the Board members nor the sociologists place much faith in the rehabilitative effects of these work programs—they do not seem to believe that the job training received improves the likelihood of parole success.

Both the Board and the sociologists, however, were more impressed with evidence of a desire for self-improvement through education. Slightly more than half of the sample (54.8 per cent) had taken some kind of education course work while in the institution, and participation in these programs improved an inmate's probability of release by almost 13 per cent. Of those who had had prison schooling, 78.4 per cent were released; of those who had not, 65.9 per cent were released.[75] Educational work may be regarded as more salient than job training because Board members place special value on the benefits of education, or it may be that the Board believes that there is a higher degree of voluntariness in the inmate's decisions to participate in educational programs than there is in work assignments. Thus, enrollment in educational programs may reflect a self-selection process, and the Board may regard this self-selection as an important indication of rehabilitative commitment. Alternatively, participation in prison education programs may appear important in Board decisions because those programs attract inmates who would be likely candidates for parole in any event.

Disciplinary Infractions. Each violation of a prison rule is categorized by correctional officials as either a "major" or a "minor" infraction.[76] These infractions include a wide variety of behaviors that are unacceptable to prison officials ranging from not getting up on time and not using dining room equipment properly to insolence and fighting. Penalties are imposed at a very informal and quite brief hearing held within the institution. The length of the hearing and the degree of formality of the proceedings corresponds generally to the degree of seriousness of the infraction and of the contemplated penalty.[77] A typical penalty for a "minor" infraction might be, for example, a week's denial of recreational "privileges," such as the use of athletic facilities. Penalties for "major" infractions, by contrast, include revocation of good time, punitive segregation, and the like. Only seven of 242 inmates for whom we had information actually lost good time.[78] Almost two-thirds had minor infractions, however, and roughly half had major infractions recorded in their files.

These disciplinary actions appear to play an important part in the Board's decisions. The correlation between the disciplinary infraction record and the Board's decision to grant or deny parole was statistically significant.[79] The association indicates

[74] With Board decision, tau_c = .02, sig. = .33; with prognosis, tau_c = .00, sig. = .33.

[75] With Board decision, tau_c = .12, sig. = .00; with prognosis, tau_c = .18, sig. = .00.

[76] ILL. REV. STAT. ch. 38, § 1003-8-7 (1975) and Ill. Dept. of Corrections, Adm. Reg. §§ 803-07 (1973).

[77] *See* H. Hill, Disciplinary Hearings in the Illinois Penitentiary System, 1973 (unpublished paper prepared for Urban Criminal Justice Seminar, Northwestern University Law School).

[78] Women were, apparently, more likely to lose good time. *See* text following Table I *supra.*

[79] Tau_c = .16; sig. = .00. The summary measure of infraction record, "seriousness of infractions," has four values: no infractions, only minor infractions, only major infractions, and both major and minor infractions. This measure is appropriate as an indicator of the seriousness of the infraction record for three reasons. First, there was a high correlation between the number of major and of minor infractions (tau_c = .33, sig. = .00). Second, the distributions for major and minor infractions show that there is an underlying continuum. Two-thirds of the sample had minor infractions. One-half had major ones, and those with the

that having a record of both major and minor infractions significantly reduced the chance of being granted parole. While 77.6 per cent of the fifty-two inmates with no infractions were released, only 60.7 per cent of the one-hundred and twelve who had both major and minor infractions were paroled.[80] The few who had lost good time were least likely to be paroled; they had a parole rate of 42.9 per cent.

It appears, therefore, that the Board placed considerable weight on the judgments of misconduct made by prison officials. This may raise a procedural issue. Unless the Board members question the inmate about his disciplinary record during his parole hearing, and we are informed that they do not ordinarily do so,[81] the Board has before it only the Master Record File's listing of the inmate's infractions and the penalties imposed. Thus, the Board members making a parole decision will ordinarily not be informed of the inmate's version of the facts of the disciplinary offenses, and the parole decision may, then, constitute the imposition of two penalties for the same alleged misconduct without ever affording the inmate an adequate hearing. The first penalty, of course, is the sanction imposed by the prison officials, and the second occurs when the Board denies parole because of the inmate's disciplinary record.

One explanation for the seeming importance of the prison record may be a "bad apple" theory. It is possible that it was not the rule infractions *per se* that were determinative; rather, the prison record may be viewed by the Board as reflecting a general inability of the inmate to live by society's rules. This view would suggest that those inmates who had committed the most serious or most numerous offenses would be more likely to have broken prison rules as well. Thus, the record of prison infractions may have been seen as an additional indicator of the degree of the inmate's threat to society. In order to test this hypothesis, we looked at the association between prison infractions, Board decision, and prior record.

TABLE IV

SERIOUSNESS OF INFRACTIONS[1] CORRELATED WITH CRIMINAL RECORD, PLACE OF CONFINEMENT AND CORRECTIONAL SOCIOLOGIST PROGNOSIS

Variable	Tau_c	Sig.
Current Offense Seriousness[2]	.11	.02
Institution[3]	.24	.00
Seriousness Last Previous Offense	.08	.10
Maximum Sentence[4]	.20	.00
Number of Prior Offenses[5]	.07	.14
Correctional Sociologist Prognosis[6]	.20	.00

Scoring:

[1] High score = most serious record (four-point scale)

[2] One = least serious; two = moderate; three = most serious

[3] High score = houses most serious offenders

[4] High score = longer time (four-point scale)

[5] High score = more offenses (four-point scale)

[6] High score = most negative rating (five-point scale)

Table IV presents correlations of the disciplinary record with previous offenses and the prison evaluation process. There was a significant correlation between the nature of the commitment offense and the likelihood of having major infractions on one's record.[82] In general, those who were in prison for the more serious offenses were more likely to have records of prison violations. This finding, then, might be thought to support the "bad apple" theory. A significant correlation also exists among the place of confinement and the proportion of offenders who had records of prison infractions.[83] Since assignment to the prisons depends, to some extent, on the seriousness of the offense, the fact that the maximum security penitentiaries recorded more infractions than the minimum security institutions may not seem surprising. There is considerable variation, however, even among the maximum security institutions. For example, at Joliet, 30 per cent of the inmates in the sample had major infractions on their records, while 57 per cent of those at Stateville had such offenses. Seventy per cent of those at Pontiac had major infractions, but at Menard the figure was only 44 per

more serious infractions tended to have minor ones as well (77 per cent). On the other hand, 42 per cent of those with minor infractions had nothing more serious. Finally, the measure of association between infraction measures and parole decision was not significantly affected when dichotomies were used rather than quantities of infractions. The correlation for parole decision and number of minor infractions was .11 (sig. = .03). It was .09 (sig. = .01) when we used a dichotomous measure, "any" minor infractions *versus* "none." For major infractions, the correlation was .17 (sig. = .00) for the number of infractions, and .13 (sig. = .00) for the dichotomous measure.

[80] For additional analysis of the effect of disciplinary infractions upon the parole decision, controlling for race see note 97 and accompanying text *infra*.

[81] *See* interview files, *supra* note 39.

[82] Tau_c = .18, sig. = .00; number of major infractions correlated with seriousness of commitment offense.

[83] Tau_c = .24, sig. = .00; seriousness of infraction record correlated with institution.

cent.[84] Rules regulating prison behavior, as well as the enforcement practices, were, for the most part, under the control of the individual institutions. The variation in infraction rates might be explained in part, then, by differences among the institutions' behavior standards, as well as by differences in the behaviors themselves. Since infractions hurt one's parole chances, the person in an institution that records more infractions would seem to be more likely to be denied parole than would otherwise be the case. The parole rate, however, does not vary significantly across the institutions;[85] this may well be due to systematic variation in other characteristics of the institutions or of their populations, the combined effect of which is to mask the significance of the infractions variable. Thus, while the institution by itself was not significant, the institutional disciplinary practices do appear to have some importance in determining the board action.

An alternative explanation of the importance of infractions to the Parole Board may lie in the association between infractions and the correctional sociologists' progonoses. As shown in Table IV, the two variables are highly correlated. This association is not surprising when one considers that the prognosis is based, at least in part, on the inmate's conduct in prison. If an inmate develops a record of incorrigibility in prison, he will probably be seen as a likely failure if released. Such a prognosis makes the assumption that conduct when released may be predicted on the basis of adjustment in prison—that the social control mechanisms on the "outside" are similar to those in the institutions.[86] Labeling theorists might suggest that the offender, being expected to be a failure, is treated as such and acts, accordingly, to fulfill those expectations.[87]

The role of infractions in parole board decisions may, as has been noted, merely be to reinforce what is already known about the offender, especially his criminal record. To test the possibility that rule infractions are an independent predictor of board decisions, however, we looked at the correlation between infractions and the Board decision while controlling for the seriousness of the commitment offense. Table V shows the results of these manipulations.

TABLE V

CORRELATIONS OF INFRACTIONS AND PAROLE DECISION,[1] CONTROLLING FOR COMMITMENT OFFENSE

Number of Major Infractions[2]	Tau_c	Sig.
Controlling for Commitment Offense		
Most Serious, N = 126	.12	.09
Moderate, N = 132	.19	.01
Least Serious, N = 25	.10	.26
Number of Minor Infractions[3]	**Tau_c**	**Sig.**
Controlling for Commitment Offense		
Most Serious, N = 126	.12	.09
Moderate, N = 132	.13	.06
Least Serious, N = 25	.05	.38

Scoring:
[1] One = granted; two = denied
[2] High score = more infractions (four-point scale)
[3] High score = more infractions (six-point scale)

Only for those with moderately serious offenses (generally, crimes against property) did the infraction record help to explain the parole decision.[88] For those with either very serious offenses (crimes of violence) or minor offenses (mostly narcotics violations) the disciplinary record did not make an independent contribution. The pattern may be explained by the hypothesis that, for those with the most serious or with the most minor offenses, the rehabilitative model may not operate. "Reformation" may be irrelevant for the serious offender, and not "necessary" (or measurable) for the more minor offender. For the intermediate category, however, reform may be thought to be both necessary and possible, and infractions may then be used as one measure of the extent to which the inmate has "adjusted."

Institutional Predictions. Approximately one month before the Board reviews an inmate's case, a correctional sociologist goes over the record, has a brief interview with the inmate, and records a prognosis of post-prison success. The prognosis reflects the institution's assessment of the likelihood

[84] In an interview, one Board member commented that he did not put much weight on the infractions from Pontiac because guards there were more intolerant than at other places. *See* interview files, *supra* note 39. Pontiac also received more of the younger prisoners, so that one might expect greater discipline problems there because of more behavior problems among younger offenders.

[85] Tau_c = .02; sig. = .38.

[86] *See* note 123 *infra.*

[87] This is, specifically, what Lemert has called "secondary deviation." E. LEMERT, HUMAN DEVIANCE, SOCIAL PROBLEMS & SOCIAL CONTROL 40–64 (1967) (ch . 3: The Concept of Secondary Deviation). *See also, e.g.,* H. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963); E. SCHUR, LABELING DEVIANT BEHAVIOR: ITS SOCIOLOGICAL IMPLICATIONS (1971).

[88] In the regression analysis, the disciplinary infraction record explained only one per cent of the variance in the parole decision. *See* note 58 *supra.*

TABLE VI

CROSS-TABULATION OF PAROLE DECISION AND CORRECTIONAL SOCIOLOGIST PROGNOSIS: PROPORTIONS OF EACH RATING CATEGORY WHO WERE GRANTED, DENIED PAROLE

	Unfavorable	Guarded	Doubtful	Problematic	Favorable	Total
Granted (N)	(1)	(18)	(58)	(58)	(24)	(159)
%	25.0	45.0	73.4	89.2	96.0	74.6
Denied (N)	(3)	(22)	(21)	(7)	(1)	(54)
%	75.0	55.0	26.6	10.8	4.0	25.4

$Tau_c = .38$
Sig. = .00

that the inmate will violate parole. The correctional sociologist's report gives a brief description of the inmate's pre-institutional history and conduct in prison, and concludes with a paragraph stating the sociologist's own assessment of the inmate's situation and with a rating on a five-point scale of likelihood of success.

The correctional sociologist's evaluation constitutes the institution's authoritative estimate of what an inmate's prospects for success on parole would be. Our findings indicate that the Board's actions corresponded quite closely to the sociologists' prognosis. Table VI shows the distributions. A rating of "favorable" or "problematic" gave one a significantly greater chance of being paroled than a rating of "guarded" or "unfavorable." (The labels used for the prognosis categories are perhaps misleading since four of the five categories seem to imply variations on an unfavorable theme. The negative connotation of most of the labels may permit the institutional officials to "cover" themselves in the event of a parole failure.)

Even with the very high degree of correlation, however, it is difficult here to make the attribution of causality, to infer that the Parole Board's decisions are significantly influenced by the prognoses (which, of course, the Board members *do* have before them at the time that they decide whether to grant or to deny parole). It is possible that the correctional sociologists and the Board members independently reach similar conclusions because their judgments are based upon the same record. Thus, if past offenses, institutional disciplinary record, and marital status, for example, are seen by both the Board and the sociologists as the most important determinants of parole success, then their respective conclusions might be expected to be similar.

To attempt to assess whether the prognoses had an independent effect on the Board's decisions, we ran multiple regression analyses with and without the prognosis included. This procedure provided a test of whether the prognoses accounted for variation in the Board's decisions that was not explained by the other hypothesized independent variables. When the only variables included in our regression equation were those measuring information known prior to sentencing, we accounted for 12 per cent of the variance in Board decisions. When we added to these the variables dealing with prison record and release plans, but without the prognosis, we were able to account for 18 per cent. When we added the prognosis, the explained variance was 24 per cent and the prognosis became the most powerful predictor of those included in the analysis.[89] These findings suggest that the prognosis did have an independent effect on the decisions of the Board.

Given the significance of the correctional sociologist's prognoses, we might examine them somewhat more closely. Table VII shows the variables that are most closely correlated with the prognosis.[90]

An inmate who continues his or her education while in prison is likely to receive a favorable rating by the sociologist, perhaps because the sociologists have confidence in the efficacy of these "rehabilitative" programs. Regardless of academic performance, which is not recorded in the file, the act of enrolling in the courses is apparently regarded by the sociologists as demonstrating that the inmate has adopted accepted cultural values of self-improve-

[89] The prognosis had an R^2 of .16. Two other variables had F-ratios lower than .05; these were the seriousness of current offense, and the number of prior offenses.

[90] The "receiving sociologist's prognosis," included in the table, is made at the reception and diagnostic center at the time that the inmate enters the prison. Thus, these prognoses are somewhat more remote in time from the parole decision than are the correctional sociologists' prognoses, made in the prison, and we found the reception prognoses to be missing from a few more of the files. The two sets of prognoses follow the same form, and they are quite highly correlated, as indicated by the table.

TABLE VII

CORRELATES OF CORRECTIONAL SOCIOLOGIST PROGNOSIS[1]

Variable	Tau_c	Sig.
Receiving Sociologist's Prognosis[1]	.42	.00
Number of Prior Convictions[2]	.25	.00
Institution[3]	.24	.00
Seriousness of Infractions[4]	.20	.00
Institutional Education[5]	.18	.00
Pre-Institutional Work Record[6]	.17	.00
Stage at Which Last Parole Decision Made[7]	.16	.00
Seriousness of Last Previous Conviction[8]	.15	.00
Pre-Institutional Schooling[9]	.12	.01
Marital Status[10]	.11	.01
Parole Plans—Employment[11]	.10	.02
Current Offense[8]	.10	.06

Scoring:

[1] High score = most negative rating (five-point scale)

[2] High score = more convictions (four-point scale)

[3] High score = least secure (seven institutions)

[4] High score = most serious record (four-point scale)

[6] High score = least work experience (six-point scale)

[6] High Score = least work experience (six-point scale)

[7] One = first review; two = first continuance; three = second continuance or more

[8] One = least serious; two = moderate; three = most serious

[9] High score = least education (four-point scale)

[10] One = married; two = separated or divorced; three = single

[11] One = job approved; two = back to school; three = no job

ment. In contrast to the attention given by the sociologists to the educational programs, however, vocational training did not correlate significantly with the prognosis and, thus, is apparently not regarded as indicating the inmate's degree of rehabilitation.

Both the number of prior offenses and the seriousness of the last previous adult conviction make significant contributions to the prognosis. The seriousness of the present offense did not correlate with the prognosis. The prognosis, thus, appears to weigh evidence of recidivism more heavily than it does the dangerousness of the current offense. It is not surprising that a previous record would have significant weight for the sociologist's prognosis since it might well be considered evidence that the inmate was a bad risk. The inmate who has more than one conviction has already demonstrated an inability to learn his lesson—he has displayed resistance to the rehabilitative process.

The sociologist's prognosis also took into account the personal background of the inmate, probably reflecting the notion that an inmate is, to a large extent, a product of his community environment. Hence, those with solid work and educational records, or with obvious family responsibilities, were more likely to be considered good risks.[91]

The close association between the prognosis and a record of prison rule infractions shows that the sociologists were also using those rule violations as a predictor of the post-release behavior.[92] The prognosis thus depends to some extent on the standards of behavior that each prison sets up. As noted above,[93] discipline policy varies across institutions, so that an inmate who appears to be a serious discipline problem at one institution might appear more amenable in another one. We should also note that the sociologists are not making independent evaluations as neutral observers. The sociologists are employees of the Department of Corrections and might be expected to share many of the organization's goals and criteria for success. Thus, the weight given by the sociologists in their prognoses to disciplinary infractions and to institutional education might be viewed as a response to institutional norms—that is, it may reflect the institution's position on who the "good" inmates are.

Race—Reconsidered

As noted above, there was a statistically significant bivariate association between the race of the inmates and the parole release decisions. Further analysis discloses, however, that there was also a significant association between race and several of the other, "independent" variables. Table VIII summarizes the findings on some of these relationships. The interrelations between race and other significant predictors of the parole decision raise, of course, a problem in determining the independent effect, if any, of race.

One way to approach this problem is to separate the sample into homogeneous racial groups and to analyze the associations between the other variables and the parole decisions within each race. If one set

[91] The significance level of all three of these variables is .01 or better. *See* Table IX *infra*.

[92] Seriousness of infraction record was significant at the .00 level. *See* Table VII *supra*.

[93] *See* text accompanying note 84 *supra*.

TABLE VIII

CORRELATIONS OF RACE[1] WITH OFFENSE AND PRISON RECORD

Variable	Tau_c	Sig.
Commitment Offense[2]	.19	.00
Seriousness Previous Offense[2]	.10	.04
Number of Prior Convictions[3]	−.01	.40
Pre-Institutional Work Record[4]	.02	.07
Correctional Sociologist Prognosis[5]	.06	.13
Seriousness of Infraction Record[6]	.15	.00
Parole Plans—Employment[7]	.08	.04

Scoring:

[1]One = white; two = black

[2]One = least serious; two = moderate; three = most serious

[3]High score = more convictions (four-point scale)

[4]High score = least work experience (six-point scale)

[5]High score = more negative rating (five-point scale)

[6]High score = more serious record (four-point scale)

[7]One = job approved; two = back to school; three = no job found

of criteria seem to determine the parole of whites and another to control the release of blacks, then we might conclude that there was, in effect, a different paroling system for each of the two races. For the most part, we found this not to be the case; Table IX summarizes these findings. The number of prior offenses, the availability of a job upon release, and the correctional sociologists' prognoses remained significant predictors of the parole decisions within each racial group. The two exceptions are rather interesting. The variables that lose their significance when inspected within racial categories are seriousness of commitment offense for both races and the disciplinary infraction record for whites.

The finding on the relationship between the parole of white inmates and their disciplinary records is difficult to interpret; the forty white inmates with no infractions had a 75 per cent parole rate, the forty with only minor infractions had a rate of 85 per cent, and twenty-one with major infractions but no minor ones had a rate of 95 per cent. Only when we reach the poorest disciplinary record category, those with both major and minor disciplinary infractions, does the rate turn in the expected direction and decline (sharply) to 61 per cent.[94] The results for the black inmates are much more straightforward—a straight-line decrease from a parole rate of 81 per cent[95] for those with no disciplinary infractions to a rate of only

[94]The number in this category is 39.

[95]Number of cases = 26.

TABLE IX

CORRELATIONS, WITHIN RACIAL GROUPS, OF OTHER INDEPENDENT VARIABLES WITH PAROLE DECISION[1]

	Tau_c	Sig.
Number of Prior Offenses[2]		
Within whites	.22	.00
Within blacks	.34	.00
Seriousness of Commitment Offense[3]		
Within whites	.06	.21
Within blacks	.08	.16
Post-Release Plans (Employment)[4]		
Within whites	.16	.01
Within blacks	.17	.02
Disciplinary Infraction Record[5]		
Within whites	.09	.13
Within blacks	.20	.01
Correctional Sociologists' Prognoses[6]		
Within whites	.29	.00
Within blacks	.50	.00

Scoring:

[1]One = granted; two = denied

[2]High score = more offenses (four-point scale)

[3]High score = more serious (three-point scale)

[4]One = job approved; two = back to school; three = no job

[5]High score = more serious (four-point scale)

[6]High score = more negative (five-point scale)

58 per cent[96] for those with both major and minor infractions.[97]

The seriousness of the commitment offense was found to be significantly associated with the release

[96]Number of cases = 69.

[97]We can suggest some alternative hypotheses to explain the different pattern for blacks and whites. Among the whites, the associations between decision and the number of major and minor infractions were not statistically significant, as was also the case with the "seriousness of infractions" measure. The distributions suggest that, for the whites, the weight given by the Board to the infraction record was influenced by the intervention of some other variable (or variables) that has so far eluded us. We tested the hypothesis that the infraction record was associated with the nature of the current offense. We found no such association for the whites, but there was one for the blacks. Apparently, the in-prison disciplinary behavior of whites is not regarded as continuous with outside behavior, and is, therefore, not used as a primary indicator of parole readiness. (For whites, the correlation between commitment offense and seriousness of infractions was −.04, sig. = .29; for blacks, it was .17, sig. = .01.) We also tested the association between the correctional sociologists' prognoses and infractions, controlling for race. For whites, the prognosis was not associated with the infraction record, but for the blacks it was. For whites, the correlation between prognosis and seriousness of disciplinary record was .14,

decisions for the overall sample.[98] When we controlled for race, however, this association disappeared for both races.[99] The most likely explanation for this result would seem to be that the quite high degree of association between race and seriousness of commitment offense[100] confounds the analysis of the independent effect of either on the parole decision.

As further attempts to sort out these effects, we ran two additional analyses. The first of these was, in a sense, the other side of the coin of the analysis that separated our sample into homogeneous racial groups. In this analysis, we sorted the sample, instead, into groupings that were homogeneous according to each of the values of the criminal record, disciplinary infraction, and prognosis variables—*i.e.*, we sorted the inmates according to whether they had no prior offenses, one prior offense, two prior offenses or three or more prior offenses, and then according to whether the seriousness of their commitment offense was "high," "medium," or "low" and so on. We then analyzed the association between race and the parole decision within each of those category groupings. The correlation did not reach the level of statistical significance in any of the value categories.[101] The second of these further analyses was a step-wise multiple regression that included race along with a number of the other major predictor variables. In that analysis, race explained very little additional variance in the parole rate.[102]

On the basis of these analyses, it appears to us that there is very little good evidence to support the proposition that the Parole Board's decisions were racially biased.

On the other hand, it is certainly true that there are rather large differences between the parole rates of blacks and whites, even within some of the value categories. For example, if we eliminate first offenders and look only at the inmates with prior offenses on their records, we find that whites with prior offenses have a parole rate of 73 per cent, while blacks with prior offenses have a parole rate of only 56 per cent. And if we look at the "parole plans —employment" variable, we find that blacks who have no jobs promised to them on the outside have a parole rate of 59 per cent, while whites with no job have a 71 per cent rate; for those with jobs promised, the rate for blacks is 76 per cent and for whites it is 87 per cent. With a few exceptions,[103] the parole rate within the categories is consistently higher for whites than for blacks. What our statistical analyses discussed above reflect, however, is that the effect of race on the parole decision is inseparable, at least in a sample the size of ours, from the effect of differences between the records of whites and blacks.[104] As a more concrete illustration of the magnitude of those differences, consider that while 57 per cent of the blacks in our sample fell into the "high" seriousness

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sig. = .06; for blacks, it was .24, sig. = .00. Perhaps, then, the infraction record is interpreted differently for the two races. For blacks, it is taken as another indicator of the likelihood of recidivism; for the whites, the infractions may be regarded as part of a more complex, individualized prediction process, thus creating increased variability within the categories and making the correlations weaker.

An alternative hypothesis might be that the racial differences in infraction effects are a function of the distribution of criminal offenses. Accordingly, because whites as a group had better criminal records than blacks, the whites were not so needful of a good infraction record—their lesser offenses might mean that the board would be less concerned with whether the whites had become "rehabilitated."

Because of the number of cases needed to complete a four-way control (decision, infraction, offense and race), we cannot evaluate these hypotheses directly. Much of this discussion illustrates the dilemma—for both substance and method—that is presented by multicollinearity. For others' efforts see Jackman, *A Note on Intelligence, Social Class, and Political Efficacy in Children*, 32 J. POLITICS 984, 986 (1970).

[98] *See* Table II *supra*.

[99] For blacks, tau_c = .08, sig. = .16; for whites, tau_c = .06, sig. = .21.

[100] *See* Table VIII *supra*.

[101] The statistic used here is chi square. All of these correlation matrices are simple, four cell, two-by-two tables—the parole decision, granted or denied, by race, white or black. If tau_c were used instead, the black-white difference would reach the .05 level of significance in four of the value categories: the "medium" category of commitment offense seriousness (tau_c = .12, sig. = .05; X^2 = 2.14, sig. = .14; N = 48 black, 84 white); the "one prior offense" category (tau_c = .25, sig. = .02; X^2 = 2.87, sig. = .09; N = 29 black, 23 white); the "two prior offenses" category (tau_c = .28, sig. = .02; X^2 = 2.88, sig. = .09; N = 28 black, 19 white); and the "major only" disciplinary infractions category (tau_c = .29, sig. = .01; X^2 = 3.33, sig. = .07, N = 11 black, 21 white). In the other two offense seriousness categories, the other two prior offense categories, the other three infraction categories, and all of the prognosis categories, race was not significant by either tau_c or chi square.

[102] *See* note 58 *supra*.

[103] The exceptional categories, where the parole rate is higher for blacks than for whites, are all at the "good" or "favorable" end of the scales. They are the "low" seriousness of commitment offense category, the first offender category, the category of those with no disciplinary infractions at all on their records, and the category of those with the "best" or most favorable prognoses. Thus, to be candid (if cynical), it appears that blacks who have been very, very good may be given a break by the Parole Board. (But recall that none of these differences is large enough to reach the .05 significance level.)

[104] *See* also note 97 *supra*.

of commitment offense category, only 29 per cent of the whites were in that category.

The differences in the parole rates of blacks and whites, therefore, seem less likely to reflect racial bias on the part of the Parole Board than to be due to more fundamental differences either in the behavior of blacks and whites or in the treatment of them by society at large (including, *e.g.*, employers) and by institutions and officials who control earlier stages of the criminal justice system. All of the differences in the criminal and disciplinary records of blacks and whites involve judgments made by several levels of officials, frequently with a very high degree of discretion. Since there is effectively no external review of prison disciplinary proceedings, for example, the finding that blacks are more likely to have rule infractions on their records may be as much a result of selective perception or discrimination on the part of prison officials as it is of actual differences in behavior. It may also be that police and prosecutorial discretion result in more serious charges being pressed against blacks; conversely, whites may be more likely to get their charges reduced through plea bargaining. A white accused, with more readily available or perhaps higher quality legal representation, may thus end up with a lesser charge, a shorter sentence, fewer disciplinary infractions, and consequently, a better chance at parole.

Summary of Findings

Our findings indicate that the decisions of the Illinois Parole Board are associated with the seriousness of the inmate's commitment offense,[105] with the number of prior offenses,[106] with participation in educational programs while in prison,[107] with the inmate's record of infractions of the prison's rules,[108] with his or her prospects for employment after release,[109] with marital status and number of dependents,[110] with age,[111] and (perhaps) with measures of intelligence.[112] On the other hand, we found no significant correlation of the parole decision with the seriousness of the prior offenses,[113] with the length of the sentence the inmate was serving (either maximum or minimum),[114] with the number of previous hearings on this parole decision,[115] with the inmate's prison work assignment or participation in vocational training programs,[116] nor with the sex of the inmate.[117] Whether the inmate's race has an independent effect on the parole decision is, in our opinion, highly problematic.[118] The research on the determinants of post-institutional success, as measured by recidivism or parole revocation rates, indicates that success is correlated with past record,[119] age,[120] family situation,[121] and employment prospects,[122] all of which the Board does take into account. But the parole prediction literature also indicates that institutional disciplinary infractions have little, if any, significant association with parole success,[123] and the emphasis that the Board appears

[105] *See* Table II and accompanying text *supra*.

[106] *Id.*

[107] *See* text accompanying note 75 *supra*.

[108] *See* text accompanying notes 76–87 *supra*.

[109] *See* text accompanying Table III and notes 70–73 *supra*.

[110] *See* Table III and accompanying text *supra*.

[111] *See* Table I and accompanying text *supra*.

[112] *See* Table I and text accompanying notes 54–59 *supra*.

[113] *See* Table II and text accompanying note 65 *supra*.

[114] *See* note 66 and accompanying text *supra*.

[115] *See* text accompanying notes 68–69 *supra*.

[116] *See* text accompanying note 74 *supra*.

[117] *See* Table I and accompanying text *supra*.

[118] *See* Tables I, VIII, and IX and notes 51–53, 94–104, and accompanying text *supra*.

[119] *See* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 49–51 (1964).

[120] *Id.* at 36–41.

[121] *Id.* at 379. Glaser reported that residing with a spouse is a positive factor, while residing alone is a negative one.

[122] *Id.* at 359–61. Glaser reported that employment after release is significantly associated with parole success, but that it does not further improve the success rate if the job is obtained before release from prison.

[123] *Id.* at 297–98. Glaser reported that prison "adjustment" may be a positive factor for inmates who are repeat offenders, but he noted that other investigators have generally not found this to be a significant predictor. In an influential, rather early work, Lloyd Ohlin observed: "Among criminologists it is generally recognized that the professional and more sophisticated criminal types adjust well to prison rules and regulations. On the other hand, many offenders who find it difficult to adjust to prison life retain some of the qualities most necessary to adequate adjustment in the free community." L. OHLIN, SELECTION FOR PAROLE 93 (1951). In a more recent work, O'Leary and Glaser reported data that indicate that the relationship between parole success and institutional adjustment, if any, is certainly not a simple, linear relationship. Data cited from Minnesota indicate that, while parolees with no disciplinary infractions had a violation rate of only 43 per cent, as against a 54 per cent rate for those with one or two infractions, when parolees had three or more infractions the rate *declined* again to 49 per cent. Similarly, federal data cited by O'Leary and Glaser indicate that parolees with little or no infraction on their prison records had reimprisonment rates of 30 to 34 per cent, parolees with a record of only minor infractions had a reimprisonment rate of 53 per cent, but, for those with records of assault infractions, the reimprisonment rate declined slightly to 51 per cent, and for those with records of "serious deception" infractions the rate declined much more to 44 to 45 per cent. O'Leary & Glaser, *The Assessment of Risk in Parole Decision Making*, in THE FUTURE OF PAROLE 135, 158 (D. West ed. 1972) [hereinafter cited as O'Leary & Glaser].

to place upon the institutional disciplinary record (at least for the black inmates),[124] therefore, probably serves to decrease the success rate of its parole selection process—*i.e.*, it probably means that the Board is not selecting the candidates most likely to succeed on parole.[125]

Our most striking finding, however, was the very strong association between the Parole Board's decisions and the official predictions or "prognoses" about an inmate's future behavior that are recorded by correctional sociologists within the institutions.[126] From a policy standpoint, this finding raises important issues. The weight given in parole decisions both to the sociologists' prognoses and to prison disciplinary infractions may be viewed as delegating to institutional officials or employees an important portion of the power to determine length of sentence. Thus, the effect of the Parole Board's decisions may be to legitimate and give further consequence to the labels attached to the inmate in the institutional setting. One might well question whether it is desirable for the Parole Board's discretion to be delegated to quite junior employees of the Department of Corrections, some of whom may be poorly qualified, and who make their decisions at a low level of visibility without any sort of mandatory, regularized procedures. Some of these policy issues are addressed in Part II of this article.

In each of the three categories of institutional record—education and work program participation, disciplinary infraction record, and prognosis—we found correlations with the parole decision that ranged from moderate to quite high levels of significance. This means, of course, that much of the information that the Board apparently considers relevant in making its release decisions is not known at the time of sentencing, but rather arises from the interaction between the inmate and the institution. Other post-sentence variables that appear to have significant impact on the Board's decisions are those in the "parole plans" category. Thus, we conclude that Illinois parole decisions have in fact been based, at least in important part, on variables that are not known at the time of sentencing—the most important of these, again, is quite clearly the prognosis. Whether this means that the Parole Board has a legitimate place in the sentencing process is considered further in Part II.

PART II: PAROLE AS AN ELEMENT OF SENTENCING POLICY

The Cost of Individualization

The problem with parole is not so much that parole boards cannot predict dangerousness. No one can,[127] but someone is going to be required to—judges, juries, jailers, or *someone*—so long as we continue to individualize the treatment of offenders. The more serious problem, rather, is that a system premised on the individualization of justice[128] unavoidably conflicts with a caseload that demands simple decision rules. A decision-maker with unlimited, unstructured discretion cannot handle many cases. To process their caseloads, parole boards find it necessary to develop a routine, to look for one or two or a few factors that will decide their cases for them.[129] The factor may be the seriousness of the offender's crime or the nature of his past record or some rough, subjective combination of the two. Or the board may decide, de facto, to delegate its discretion to someone else—to a diagnostic sociologist, to a warden, or to the sentencing judge.

If this routinizing or delegation of discretion does, in fact, occur, it might be preferable simply to leave the discretion, openly and clearly, with the sentencing judge. We would, then, at least know who had the discretion. We would eliminate the current diffusion of responsibility, which may lead to what has been termed the "Private Slovik effect"[130]—when responsibility is diffuse, no one has to face the full implications of his decision. Of course, this may cut either way. Norval Morris has observed that "one latent purpose of the division of power between judge and parole board is to give the possibility of some clemency while appearing in the public eye to

[124] *See* note 97 and accompanying text *supra*.

[125] After reviewing the evidence discussed in note 123, *supra*, O'Leary and Glaser concluded: "If prison conduct becomes the major factor in parole decisions, the functions of parole other than regulating conduct in prison will be sacrificed." O'Leary & Glaser, *supra* note 123, at 160. Institutional discipline may, of course, be one of the values that the parole system is intended to serve. *See* note 147, *infra*; note 39 *supra*.

[126] *See* Tables VI and VII, and notes 89–93 and accompanying text *supra*.

[127] *See* text accompanying notes 175–79 *infra*.

[128] *See* N. WALKER, SENTENCING IN A RATIONAL SOCIETY 118–19 *et seq.* (1969).

[129] James Q. Wilson reports that the twelve members of the New York State Parole Board have jurisdiction over more than twenty thousand inmates and notes the tendency of such caseloads to lead to the adoption of "rules of thumb." J. WILSON, THINKING ABOUT CRIME 171–72 (1975). *See also* DAVIS, *supra* note 38, at 127, reporting that the Federal Parole Board made about 15,000 parole decisions per year or "an average of about fifty per working day."

[130] J. Newman, *Foreword*, YALE L.J., *supra* note 8, at 812–13.

be imposing a more severe punishment."[131] As Morris goes on to acknowledge, however, it is problematic whether judges are more or less likely than parole boards to be susceptible to public or political pressure.[132]

And, in spite of the common state of judicial dockets, it may even be that judges are as likely as parole boards to be able to provide individualized justice. At least in serious felony cases (the sort of case that is likely to result in imprisonment), the trial judge, properly provided with staff to prepare presentence reports,[133] may be likely to devote as much time and serious attention as would a parole board or a correctional sociologist to the full range of the individual offender's characteristics.

In the present state of the world, however, it seems rather ingenuous to talk about "individualized" sentencing. We know that most sentences are now determined by plea bargaining between prosecutor and defense counsel.[134] To opt for "judicial" sentencing rather than parole board decisions is, therefore, to opt for sentencing by plea bargain. The standardized plea bargain, an efficient process that usually takes no more than a few minutes as it is practiced by "courthouse regulars,"[135] is, in fact, the most important method by which we now routinize sentencing discretion and circumvent the individual treatment ideal.

If we were willing to abandon the individualization of justice, as modern criminologists have now largely abandoned the rehabilitative ideal that depended upon individual treatment,[136] we might consider adopting mandatory, determinate sentences set by the legislature. That is, each type of crime would carry a definite, legislatively required sentence. Rape, for example, might be punished by eight years in the penitentiary without (at least in the purest form of the model) any possibility of probation or parole.[137] The difficulty, of course, is that giving the same sentence for all rapes would be likely to conflict with our notions of justice. It is rape if the assailant compels the victim to submit by the use of force that is violent, abusive, humiliating, and physi-

[131] MORRIS, *supra* note 3, at 48.

[132] *Id.*

[133] *See* Report of the Chicago Bar Association Commission on Administration of Criminal Justice in Cook County, Program for Action 185 (1975). This report notes that, though the Illinois Code of Corrections requires presentence reports in all felony cases unless waived (ILL. REV. STAT. ch. 38, § 1005-3-1 (1975)), the reports are in fact used in only a small percentage of Cook County felony prosecutions.

[134] The senior judge of the Criminal Division of the Cook County Circuit Court was quoted as having said in testimony before the Illinois House Judiciary Committee:

> In the event the courts are prevented from entering plea bargaining, which now disposes of 90 percent of cases, and we are compelled to try these cases, we would be confronted with utter chaos.

Statement of Hon. Richard J. Fitzgerald, Circuit Judge, Chicago Sun-Times, Sept. 24, 1975, at 58, col. 1. *See also* A. BLUMBERG, CRIMINAL JUSTICE (1967); MORRIS, *supra* note 3, at 50-51; Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice,* 46 J. CRIM. L.C. & P.S. 781 (1956). Plea bargaining is reported to be much less common and has less official sanction in the federal system than in most state systems. There is also, of course, considerable variation among the states and among localities within the states in the extent and type of plea bargaining.

[135] Nardulli, The Court Organization. An Organizational Analysis of the Felony Disposition Process in Chicago, June 1975 (unpublished Ph.D. dissertation, Northwestern University); Rosett, *The Negotiated Guilty Plea,* 374 ANNALS 71 (1967), *reprinted in* L. RADZINOWICZ & M. WOLFGANG, THE CRIMINAL IN THE ARMS OF THE LAW 436, 437 (1971); Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office,* 12 SOCIAL PROBLEMS 255, 258-64 (1965). *See also* J. EISENSTEIN & H. JACOB, FELONY JUSTICE ch. 6 (to be published 1976).

[136] *See, e.g.,* sources cited at note 7 *supra.*

[137] We should note the distinctions between some of the things that are called determinate or "flat" sentencing. The terms are sometimes used to refer to a system of fixed sentences for the individual and at other times to refer to fixed sentences for each type or category of crime. In the former system, the sentencing judge tailors the sentence to the individual offender, but it is not variable thereafter; in the latter, the legislature determines the sentence for broad categories of offenders or offenses. Since probation, parole and "good time" all give some decision-maker other than the legislature power to mitigate the individual offender's sentence, they are to that extent inconsistent with legislative sentencing; since parole and good time decisions are made subsequent to the initial imposition of sentence, they are inconsistent, as well, with the former meaning of determinancy. If the possibility of probation does not exist, the concept also then includes, of course, mandatory imprisonment.

In his June 19, 1975, message to Congress dealing generally with the subject of crime, President Ford called for mandatory imprisonment for several types of offenders and observed, in the same breath, that "it may be time to give serious study to the concept of so-called 'flat-time sentencing' in the Federal law." 121 CONG. REC. S11020 (daily ed. June 19, 1975) (remarks of President Ford).

The package of corrections proposals recently put forward by Governor Walker of Illinois would abolish parole, but would permit probation for most offenses (though it would be called "mandatory supervision," instead) and would retain and expand good time. (With abolition of parole, good time credits would assume additional importance as the prime incentive mechanism in the control of institutional discipline.) *See* press release, *supra* note 5; Illinois Law Enforcement Commission, Synopsis—Justice Model Legislation, mimeo memorandum distributed in early 1975 (describing legislation necessary to implement Walker proposals).

cally dangerous; it is also rape to have intercourse with a woman who is unable to consent because she has become unconscious or insensible through her own, voluntarily use of alcohol or drugs.[138] Both may be culpable, but one is likely to be regarded more gravely than the other. To rely on prosecutorial discretion to provide differentiation in the treatment of these very different cases would be neither safe nor principled—it would, in fact, be to admit the need to import individualized justice back into the system.

Therefore, we seem likely to retain, through some procedure, a considerable measure of individualization in the treatment of offenders. There are additional reasons, which we have not yet noted, why this is so. As Caleb Foote has pointed out, for example, individualization makes possible an indefiniteness in sentencing that is functional because it permits the system to adjust the size of prison populations.[139] At a time when the number of crimes is increasing faster than the number of prison cells, the system wants sufficient flexibility to permit it either to punish a smaller percentage of the crimes by imprisonment or to reduce the average length of sentence. (Regardless of the amount of overcrowding that one is willing to tolerate, the capacity of every warehouse has some limit.) Parole is one of the devices used to provide this population flexibility.

For these reasons and, perhaps not least, because the parole system employs a considerable number of persons who have better than average access to the political decision-makers,[140] parole seems likely to continue to be one of the types of individualized treatment that we will retain. Given that likelihood, we might wish to consider whether parole is as much of a disaster as its critics contend.

Handling the Caseload

One of the propositions on which our conclusion rests is that caseloads are never so small nor the decision-making manpower so great that one can afford to ignore decision costs. That is, parole boards will always have an incentive to dispose of each case at minimum cost. (Decision costs, of course, include such things as time, money and energy.) To achieve this cost minimization, there are at least two strategies that we have noted that parole boards can adopt: delegation of the discretion to some other decision-maker, or the use of simple, efficient, "automatic" decision rules. Let us consider each of these strategies and its implications somewhat further.

If the parole board delegates the discretionary decision to a "correctional sociologist" or similar functionary, the individualization of treatment may be maintained—the sociologists may (or may not) arrive at their decisions or "prognoses" on an individualized basis—but delegation will almost certainly mean that the exercise of the discretion will be less visible and therefore less subject to review, that the standards used in the decision will be even more indefinite and inconsistent, that the inmate will therefore be less likely to have notice of what the standards are, and that the procedures used in reaching the decisions will be lacking in almost all the attributes of due process. Delegation to the warden and his deputies, by resting the parole decision on the inmate's institutional disciplinary record, is scarcely more satisfactory. The prison disciplinary decisions may be somewhat more visible to the inmate than are the sociologists' prognoses, but the scope of review of those decisions is also quite limited and the procedures are, at best, required to adhere to only rudimentary due process.[141] Moreover, the literature indicates that the prison disciplinary record is a relatively poor predictor of parole success or future crimes.[142] A final possibility is delegation of sentencing discretion back to the sentencing judge—either by formally divesting the parole boards of the discretion and decreeing that the judicial decision will be final,[143] or by the parole boards deferring to the sentencing judges' views as to appropriate length of sentence, whether those views are communicated by explicit statements or by informal cues. We have already discussed some of the pros and cons of an increased role for judicial sentencing, and we give below an additional reason for our conclusion that it is probably not preferable to parole board decision-making.[144] Before returning to the judges, however, let us consider the second broad type of strategy for efficiency in the disposition of cases—simple or "automatic" decision rules under which only a few variables, rather than the full panoply of the offender's characteristics, determine the outcome of the decisions.

[138] *See, e.g.*, Commonwealth v. Burke, 105 Mass. 376 (1870); ILL. REV. STAT. ch. 38, § 11-1 (a) (1) & (2) (1975).

[139] Foote, *The Sentencing Function*, in A PROGRAM FOR PRISON REFORM 17, 18, 19, 23 (1972) (final report of the Annual Chief Justice Earl Warren Conference on Advocacy, June 9-10, 1972, published by Roscoe Pound-American Trial Lawyers Foundation).

[140] *Cf.* MORRIS, *supra* note 3, at 36.

[141] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

[142] *See* note 123 *supra*.

[143] *See, e.g.*, press release, *supra* note 5; YALE L.J., *supra* note 8, at 897-98.

[144] *See* text accompanying notes 188 & 205 *infra*.

Simple decision rules obviously conflict with the desire for individualized judgments. They are the antithesis of a discretionary, subjective assessment of all the known circumstances of each individual case. Because of caseload pressures, however, such decision rules are likely to evolve, de facto, even if individual treatment is declared to be one of the formal values of the system. If this is so, we think it clearly preferable that the rules be openly declared and, thus, potentially subject to review, as are the Federal Guideline Table and Salient Factor Score.[145] Like the Salient Factor Score, these decision rules are likely to be formulae intended to predict future dangerousness. Regardless of our lack of success in the enterprise to date, the prediction of risk is, without much doubt, the most important responsibility vested in parole boards.[146] The boards are charged by statute with taking other factors into account, such as the effect of their decisions on general public respect for the law and on prison discipline and morale,[147] but these factors are even more subjective and less quantifiable than is risk, and it seems safe to assume that both the boards and the public are most concerned with discriminating among the inmates according to what is believed to be their potential for further harm to society.

What Sort of Prediction?

Now, acknowledging once again that none of our predictions of dangerousness is likely to be very good, it may yet be that some kinds of them are more prone to error than others. A distinction is sometimes drawn between two types of predictions that are relevant here.[148] The first type is based upon observation and evaluation of the personality and past behavior of an individual, taking into account an open-ended list of his personal characteristics, some of which may be quantified or quantifiable and others of which may be entirely subjective—these are termed "clinical," "case study," or "anamnestic" predictions.[149] The second type is based upon characteristics that the individual can be clearly identified as sharing with other groups or categories of persons whose record of behavior in similar circumstances is known; typically, the list of characteristics or amount of personal information taken into account in this type of prediction will not be as extensive. This sort of prediction is termed "actuarial," "categoric," or "statistical."[150]

We now reach another proposition that is essential to the argument of our conclusion—that actuarial predictions are likely to be more accurate in predicting dangerousness than are clinical predictions. This proposition, apparently, is somewhat controversial,[151] but our review of the literature leads us to conclude that it is supported by the great weight of scientific evidence.[152] This is fortunate, for actuarial predictions may be made at a smaller decision cost than clinical predictions, and actuarial predictions are thus more consonant with the need to dispose of the caseload at minimum cost. Actuarial predictions are more akin to automatic decision rules; *e.g.*, we say that persons who have been convicted for two or more crimes in the past, who have no job or stable family relationships, and who are under age twenty-five are likely to be poor risks. If the decision-maker takes into account not only these characteristics of the inmate, but also attempts to assess the inmate's attitude or "adjustment" or outlook on life, or to determine whether the inmate has reformed or become rehabilitated, or the decision-maker otherwise tries to develop a "feel" for the inmate, the evidence, we are happy to note, is that his prediction is not likely to improve. It is, instead, likely to

[145] *See* text accompanying notes 22–26 *supra*. On the importance of reviewability see generally DAVIS, *supra* note 38.

[146] One of the authoritative works in the field concludes that "the principal consideration in the decision to grant or deny parole is the probability that the inmate will violate the criminal law if he is released." R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 263 (1969).

[147] *See, e.g.*, 18 U.S.C. §§ 4202–03 (1970); ILL. REV. STAT. ch. 38, § 1003-3-5 (c)(2)&(3) (1975).

[148] A third possible type, "intuitive" predictions, need not concern us. *See* MORRIS, *supra* note 3, at 32.

[149] *Id.* at 31–34.

[150] *Id.* Though the distinction between these types of prediction is terribly vague at the margins—all the predictions are, after all, based on observation of the past behavior of the subject and of persons thought to be similar in some respect to the subject—the distinction is well-known and widely observed in the literature, and it does describe a difference in approach that is, at least as it approximates the polar types, quite real and significant. *See* Sawyer, *Measurement and Prediction, Clinical and Statistical*, 66 PSYCHOLOGICAL BULLETIN 178 (1966) [hereinafter cited as Sawyer]. *See generally* P. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION (1954) [hereinafter cited as MEEHL].

[151] *See, e.g.*, MORRIS, *supra* note 3, at 32. For a thorough review and analysis of the literature available through the early 1960's, written from a point of view favorable to the clinicians, see Gough, *Clinical versus Statistical Prediction in Psychology*, in PSYCHOLOGY IN THE MAKING 526, 562–68 (L. Postman ed. 1964).

[152] *See generally* MEEHL, *supra* note 150, at 83, 90–119 (ch. 8: Empirical Comparisons of Clinical and Actuarial Prediction); J. WIGGINS, PERSONALITY AND PREDICTION 181–222 (1973) (ch. 5; Clinical versus Statistical Prediction) [hereinafter cited as WIGGINS]; Meehl, *Seer over Sign: The First Good Example*, 1 J. EXPERIMENTAL RES. IN PERSONALITY 27 (1966); Sawyer, *supra* note 150.

become less accurate. "Happy" because, were this not so, our dilemma would be even more severe. Given the pressure to dispose of cases by simple, cheap decision methods, actuarial predictions are more likely to be used than are truly clinical predictions. It is some comfort to think that speed and ease in the disposition of cases need not be purchased at the cost of less accuracy in prediction, and therefore of less safety to the public.

But there is a substantial body of opinion, particularly in the academic community, to the effect that no prediction of dangerousness, whether actuarial or clinical, should be used as a basis for sentencing.[153] The contention, generally, is that neither sort of prediction is accurate enough to rely on without sacrificing safety and/or justice—and there should be no doubt that both safety and justice are at stake in the use of these predictions. If error in the prediction causes a harmless person to languish in prison unnecessarily, that will probably be thought to be unjust. If error in the prediction causes a dangerous man to be released from prison when he might have been held, and he then injures someone else, that is certainly "unsafe" and may also be considered unjust. But, before we confront this problem head-on, let us consider some of the social and legal realities of the context of this debate.

Suppose we abandon dangerousness as one of the criteria of sentencing—what will happen then? If we do not attempt to select from among the population of violent felons those who are deemed least likely to be dangerous in the future, what will be done with this undifferentiated mass of serious offenders? Will society demand that we let them all go, as we cannot say with certainty which of them pose a serious risk to the community? Somehow, that lacks the ring of plausability. If we do not differentiate among felons according to their potential for future harm, the public's demand is likely to be that we lock all of them away for long, incapacitating sentences—"just to be on the safe side." That is why the real alternative to indeterminate sentencing is not the short, fixed sentences that most criminologists consider "adequate." Rather, it is long, fixed sentences.

Differentiation among offenders according to their dangerousness is now an established part of legal doctrine. One of the elements of this doctrine, however, is that the differentiation must be individualized rather than categoric. A line of cases, for example, prohibits the use of "fixed and mechanical" decision rules in sentencing and requires, instead, "a careful appraisal of the variable components relevant to the sentence upon an individual basis."[154] The rationale of these cases is illustrated by the following statements of the California Supreme Court:

> The whole concept of our procedure is that special diagnosis and treatment be accorded the psychological and emotional problems of each offender so that he achieves a satisfactory adjustment. Nothing could be further from the spirit of the law than the absorption of the individual into a stereotype. A mechanized, mass treatment of offenders not only violates our deep conviction that each individual should personally obtain the protection of due process of law but also thwarts the legislative objective of providing . . . particularized treatment directed toward rehabilitation.[155]

And:

> A determination on term-fixing and parole at the outset of imprisonment which precludes . . . future consideration nullifies the Legislature's intent that prisoners—particularly "first termers"—who demonstrate a receptiveness to reform and a disposition toward rehabilitation should receive more lenient treatment. . . . The result of such a determination is that some convicted persons are *categorically* denied early release or parole notwithstanding their good conduct in prison and their efforts at self-improvement.[156]

[153] *See, e.g.*, MORRIS, *supra* note 3, at 66; Von Hirsch, *supra* note 9.

[154] United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974) (sentence vacated where trial judge refused to make a finding of whether drug offender would benefit from treatment under the Youth Corrections Act).

[155] *In re* M., 3 Cal. 3d 16, 31, 473 P.2d 737, 748, 89 Cal. Rptr. 33, 44 (1970), quoted with approval and applied to parole decisions in *In re* Minnis, 7 Cal. 3d 639, 646, 498 P.2d 997, 1002, 102 Cal. Rptr. 749, 754 (1972) (ordering correctional Authority, which had set prisoner's term at maximum and refused to consider further applications for parole, to consider future parole applications).

[156] *In re* Minnis, 7 Cal. 3d at 647-48, 498 P.2d at 1003, 102 Cal. Rptr. at 755.

One might question the justice of conditioning the severity of punishment on factors that a person is powerless to change. To do so means that the offender must carry with him all the baggage of his past life—his prior offenses and his background characteristics—and that there is nothing he can do to erase the record, there is no amount of reformation that will relieve him of the burden. In a sense, one could say that this places the offender in a status; once he has been convicted of stealing, he is forever labelled a thief, at least for the purpose of determining future punishments. And, since he is powerless to remove himself from this status, to punish him on that basis would be "cruel and unusual" within the reasoning of Robinson v. California, 370 U.S. 660 (1962). But this logic fails to distinguish statuses in which the individual is placed without his exercise of any choice from those in which he places himself by his own volitional acts. Unless one makes this distinction—and the *Robinson* majority opinion specif-

As these quotations make clear, the courts that have articulated the "fixed and mechanical" doctrine still adhere to the rehabilitative ideal (or, at least, defer to legislatures whom they believe to embrace that ideal). Given the doubt that has now been cast on the efficacy of rehabilitative treatment, that part of the doctrine would seem ripe for reconsideration.

But one might well question whether actuarial techniques like the Federal Guideline Table and Salient Factor Score run afoul of the rule against "fixed and mechanical" decisions, even as that rule presently stands. An argument can certainly be made that actuarial predictions do take into account the individual offender's characteristics, but that the several factors are merely weighted or summed in a systematic fashion; thus, the release decisions might be considered to be "individualized." On the other hand, there is the language in the courts' opinions condemning "stereotyped," "mechanized," or "categorical" decisions, and the *Yale Law Journal*[157] has concluded that, were it not for the fact that the federal regulations permit decisions contrary to the Guidelines, the federal parole prediction system might well violate the "fixed and mechanical" doctrine. Moreover, *Yale* is also concerned about the limitation that another area of doctrine places upon the use of risk predictions:

> In the face of mathematical tables purporting to predict risk, the denial of any opportunity to demonstrate that one is in fact a better risk might render the parole prognosis an 'irrebuttable presumption' of recidivism. Such an irrebuttable presumption would be an infringement of due process.[158]

In a recent, much-criticized[159] line of decisions,[160] containing an undigested mixture of elements of both due process and equal protection, the Supreme Court has declared that irrebuttable or "conclusive" presumptions are unconstitutional unless they are "necessarily or universally true in fact."[161] This standard, of course, is much more stringent than the tests

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ically noted that the status of narcotic addiction was one that could be innocently acquired (the Court did not address the *probability* of volitional addiction), 370 U.S. at 667—it would be cruel and unusual to impose a more harsh punishment on prior offenders than on first offenders. It seems to us that the important point is not that the offender is now powerless to change the sentencing variable—that is true of any event that has been completed, and there are many good reasons that make it just to punish one who has committed an act of assault even though he may have repented soon after the act and though he is, of course, now powerless to change the fact.

We believe, then, that the more relevant criterion is whether the offender has placed himself, by at least some exercise of his own choice, within the classification used in the sentencing decision. Thus, we would exclude as impermissible classifications, regardless of their predictive power, such variables as age, sex, I.Q. and race. On the other hand, it would clearly be permissible to take into consideration prior offenses or disciplinary infractions, where the classifications are premised upon the commission of culpable acts, always assuming that the classifications meet some minimum standards of reliability and validity. A more difficult case, perhaps, is a factor such as "age at first arrest," where the event on which the classification is based may be quite remote in time from the present offense. (Of course, the age at first arrest should not be less than that at which a person becomes legally responsible for his crimes—when he is no longer entitled to the defense of infancy. In Illinois, that age is thirteen. ILL. REV. STAT. ch. 38, § 6-1 (1975).) It might be possible, we suppose, to evolve a set of principles whereby factors regarded as "too remote" would be excluded from the sentencing calculus, but we would generally be willing to adhere to the proposition that classifications based upon the offender's own volitional acts are permissible.

Even more difficult issues are presented by classifications based upon acts that are not generally regarded as culpable or upon events that are less clearly within the control of the offender. As examples, we might think of factors such as education, employment history, or marital status. Even though many persons may not approve of leaving school early, of a lack of industry, or of divorce, these are not culpable in the same sense as crimes or disciplinary infractions. One might also construct an appealing argument that these characteristics of the offender are determined not so much by his own acts as by the acts of others or by the social system generally. The great problem with such "social determinism" is that it is very difficult to know where to draw the lines. It is not a very long step from socially determined unemployment to socially determined stealing of a loaf of bread or an automobile. Generally speaking, we would be willing to assume that a complex series of the individual's own volitional decisions and actions is at least an important contributing cause of whether he is married or not, whether he stayed in school, and whether he was employed. Therefore, we do not believe that it would violate our principle of choice to use such criteria in sentencing decisions.

[157] *See* YALE L.J., *supra* note 8, at 872.

[158] *Id.* at 863 n.266.

[159] *See, e.g.*, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974) [hereinafter cited as HARV. L. REV.]; Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975). *But see* Tribe, Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles, 1974 (unpublished manuscript); Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 269, 283-89 (1975).

[160] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

[161] Vlandis v. Kline, 412 U.S. 441, 452 (1973). For such a presumption to be unconstitutional, it is also necessary that the state have available to it "reasonable alternative means of making the crucial determination." *Id.* The question remains open of what additional amount of time

usually used under either due process or equal protection.[162]

Since the real world seldom achieves perfection, the law has usually been wise enough not to demand it. To illustrate the degree of accuracy in prediction that might reasonably be required of parole decision-making, let us consider some examples of other uses of risk predictions.

The law employs many such predictive classifications, even where criminal sanctions are imposed. The Illinois Criminal Code, for example, prohibits a person from possessing a firearm while "hooded, robed, or masked in such manner as to conceal his identity."[163] Presumably, the reason behind the statute is a prediction that one who is armed and disguised is likely to be up to no good. Yet, can it be said of this prediction or "presumption" that it is "necessarily or universally true in fact"? What of the quail hunter in a remote cornfield who wears a ski mask for protection from the freezing wind? Another example from the law of firearms is the common prohibition against the possession of guns by persons previously convicted of felonies,[164] by former mental patients,[165] or by narcotics addicts.[166] These are, of course, all based upon a legislative prediction (or "presumption") of the dangerousness of such persons when armed. The categories used are typically quite broad—*e.g.*, anyone who was a patient in a mental institution within the past five years.[167] It is quite possible, of course, that the former mental patient is fully recovered and is, in fact, less dangerous than many of the untreated persons who are permitted to possess weapons, but the statute requires no inquiry into the likelihood that any individual defendant would be dangerous. It could certainly not be argued that any of these predictions is "necessarily or universally true in fact."[168]

The prediction of dangerousness enters into the criminal law's decisions with such frequency that it may almost be said to be ubiquitous. It may well be an element, for example, in arrest and prosecution decisions. In exercising their discretion to arrest or to prosecute, officials often take into account their assessment of the likelihood that an offender will sin again.[169] Juries or even judges may let such considerations influence their decisions on guilt or innocence.

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and effort may "reasonably" be required of the state in order to make this determination.

[162] *See* HARV. L. REV., *supra* note 159, at 1545–47. Not only is this standard clearly much more strict than the "rational relation" test, it would also appear to exceed the *O'Brien* four-part test used in free speech cases:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968) (draft card burning held not "symbolic speech" protected by the First Amendment). Even if the governmental interest were said to be "compelling," or the regulation to be "necessary" or essential to that interest, the presumption or prediction on which the regulation was based might, of course, still be fallible.

In two of the conclusive presumption cases, however, the Court has suggested that defining the statutory category more narrowly might suffice to avoid the due process hearing that the Court would otherwise require to determine the probability or circumstances applying to the individual party. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 n.13 (1974); Vlandis v. Kline, 412 U.S. 441, 452–53 n.9 (1973). *See* note 207 *infra*. Of course, this more narrow presumption is not likely to be so tightly drawn that it becomes "necessarily or universally true in fact"—that would often require a category that includes an "N" of one. But this hedging of the principle, together with the qualification that the state have available "reasonable alternative means" (*see* note 146 *supra*), may not put the doctrine much beyond the fourth part of the *O'Brien* test—that the restriction be "no greater than is essential"—which, however, only applies to the "specially protected" first amendment rights.

[163] ILL. REV. STAT. ch. 38. § 24–1(a)(9) (1975).

[164] *See, e.g.*, ILL. REV. STAT. ch. 38, § 24–3.1(a)(3) (1975).

[165] *Id.* § 24–3.1 (a)(5).

[166] *Id.* § 24–3.1 (a)(4).

[167] *Id.* § 24–3.1 (a)(5).

[168] *See* note 161 and accompanying text *supra*. One might not wish to see these laws enforced in either of the hypothesized circumstances, but, provided at least that such circumstances can be expected to occur relatively infrequently, their possibility is not generally thought to invalidate these prophylactic statutes. We deal with the problem, rather, by relying on presecutorial discretion or, at most, by preserving the option of declaring the statute "unconstitutional as applied" where the facts do not fit the statute's rationale.

One might also question whether the "masked gunman" statute is constitutional without a *scienter* requirement. To the best of our knowledge, its validity has not been tested. Unlike the felon registration requirement in Lambert v. California, 355 U.S. 225 (1957), however, the masked gunman statute requires affirmative acts, though those acts may be only *mala prohibita*. Given the latitude generally permitted by the courts in the mental state requirements of possession statutes, it seems likely that possession of a weapon combined with the act of masking would be held sufficient. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 144–45, 182–83, 218–22 (1972).

[169] *See, e.g.*, W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY, 23, 137–41 (1965); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 189–90, 209, 212 (1970).

It seems to us that the use of risk prediction in parole decisions is neither more nor less just, as a matter of principle, than its use in these other contexts. We would argue, however, that the degree of fairness in the use of such predictions is determined by the degree of accuracy of the predictions, and that the accuracy of the predictions used in the paroling process, where they tend to be made more systematically, more formally, and more consciously, is likely to be greater than in the other examples given. This brings us back, then, to the central criticism of the use of risk prediction.

False Positives—and True Negatives

As noted above, there are two results of error in prediction. One is that people who are, in fact, dangerous will be released; the other is that people who are not dangerous will be deprived of liberty. Because of the observed tendency to overpredict dangerousness, there are likely to be more of the second group, usually referred to as the "false positives"—*i.e.*, those falsely predicted to be dangerous.[170] Critics of the use of these predictions in sentencing pose the issue as one of whether it is fair to the false positive to keep him locked up because of the prediction. But, given the American predisposition for long sentences,[171] we might put the issue somewhat differently: What is the justification for continuing to hold in prison, beyond the minimum period required for the purpose of general deterrence, any inmate whom we believe, based upon the best evidence and the most accurate predictive techniques currently available, to pose no substantial threat of further harm to society? In attempting to answer this question, let us make two realistic assumptions, *arguendo*. The first is that most American inmates are now held in prison far longer than would be necessary to serve the purpose of general deterrence; the best of the scanty data available indicates that, while certainty of punishment may exhibit a degree of association with the crime rate, no significant association can be found with severity of punishment, alone.[172] The second assumption is that additional time in prison does not help to reform or rehabilitate the offender. Available data may or may not indicate that prisons make people worse, that they are "schools for crime," but it certainly does not suggest that it makes them better.[173] If both of these assumptions can be accepted, then why should we continue to hold an inmate whom we predict to be harmless? One possible answer is that our predictions are so abysmally inaccurate that basing such a consequential decision on them would be irresponsible and unfair. If there is too much error in the prediction, we may say that it is unjust (or even, possibly, illegal) to use it in sentencing because it discriminates among offenders on a ground that is not "principled" or that lacks a sufficient, "rational" relation to the lawful purpose—or, as Justice Stewart said of the imposition of the death penalty, it is "cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [P]etitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[174] Our notion of equal protection requires that punishment not be distributed randomly or in accordance with rules that achieve their objectives at a rate not much better than chance. Therefore, we need to examine the level of accuracy of our current predictions. Moreover, we need to understand that the justice of using the prediction depends not only on the percentage of cases that the predictor classifies correctly, but also upon the frequency or rarity with which the predicted behavior occurs in the population or tested group.[175]

To illustrate the false positives problem at its worst, let us assume that we wish to identify those members of the public who are "sexual psychopaths"

[170] In the real world, one side of this predictive failure is concealed. Since the false positives remain locked-up, we never find out who or how many they are. The false negatives do become known, of course. They are released and commit crimes, probably resulting in public demand that the cut-off point on the predictive scale be placed at a higher, even "safer" level, thus inevitably increasing the amount of concealed deprivation of liberty.

[171] American sentences are widely and frequently reported to be "the longest in the Western world." *See, e.g.*, A PROGRAM FOR PRISON REFORM, *supra* note 139, at 11, Recommendation IX; FRANKEL, *supra* note 8, at 58; Kastenmeir & Eglit, *supra* note 4, at 523 n.172. *But see* Mueller, *Imprisonment and Its Alternatives*, in A PROGRAM FOR PRISON REFORM, *supra* note 139, at 33, 34–35.

[172] *See* Antunes & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 64 J. CRIM. L. & C. 486 (1973). Antunes & Hunt did, however, identify an interaction effect suggesting that increased severity might be efficacious under conditions of high certainty. *Id.* at 492.

[173] *See* GLASER, *supra* note 119, at 303; R. HOOD & R. SPARKS, KEY ISSUES IN CRIMINOLOGY 215 *et seq.* (1970) [hereinafter cited HOOD & SPARKS]; Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 THE PUBLIC INTEREST 22, 36–38 (1974).

[174] Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

[175] *See* T. HIRSCHI & SELVIN, DELINQUENCY RESEARCH 235–56 (1967), *reprinted in* THE CRIMINAL IN CONFINEMENT 409, 412–13 (L. Radzinowicz & M. Wolfgang eds. 1971) [hereinafter cited as RADZINOWICZ & WOLFGANG]. *See also* note 177 *infra*.

and will commit acts of sexual molestation of children. Our goal, of course, is to identify these persons before they have committed any such acts so that irreparable harm to the children may be prevented, probably by incarcerating those persons determined to be psychopaths. Suppose, further, that the incidence in the population of persons who would in fact commit such acts of molestation is one in 10,000 (an assumption wildly on the high side, chosen to understate the seriousness of the false positives problem—the rarer the behavior is, the more serious the problem will be), and that we have a really good screening device for differentiating the psychopaths from the normals, a test that classifies correctly 90 per cent[176] of the time (again, an extremely conservative assumption, probably far exceeding the accuracy of any available test). Under these assumptions, the scorecard would look like this:

For Every 100,000 in the Population

Psychopaths correctly classified as psychopaths	9
Psychopaths incorrectly classified as normal	1
Normals correctly classified as normal	89,991
Normals incorrectly classified as psychopaths	9,999

The last category, of course, is the one that we call the "false positives." Presumably, this example will serve to explicate the full horror of the false positives problem. Note that, even though the prediction is functioning at a level very substantially better than chance, the results are still intolerable.[177]

Grave as the false positives problem undoubtedly is, however, it diminishes somewhat under other sets of assumptions. First, and probably most important, is the frequency point. Suppose, for example, that we wish to predict the likelihood of recidivism in a population of previously convicted property offenders, persons convicted of crimes such as auto theft, forgery, or burglary. The expected recidivism rate of such a population may well be in excess of 50 per cent.[178] For the sake of argument, assume a rate of 60 per cent, and assume that our predictive device classifies accurately 75 per cent of the time. That would produce these results:

For Every 100 Convicted Persons

"Potential" future offenders correctly classified and held	45
Future offenders incorrectly classified and released	15
Non-offenders correctly classified and released	30
Non-offenders incorrectly classified and held	10

Well, it is certainly nothing to cheer about; we still have ten false positives who continue to sit in prison when they "deserve" to be out on parole—at least, they deserve it more than the fifteen violators who have been incorrectly released. And, pending the nirvana when we achieve perfection in prediction, when our "presumptions" become "necessarily or universally true in fact,"[179] there will always be some false positives. But perhaps this is more tolerable when we are dealing with a population consisting entirely of persons who have already been convicted of a specific offense and the only issue is the length of their sentences. That is, there may be an important difference between using these predictions in deciding whether to punish someone and using them in deciding when to terminate a punishment that has already been imposed. It seems to be generally regarded as less repugnant to punish someone who has committed an offense, even if other offenders are punished less or are not punished at all, than it is to punish someone who has not committed an offense.[180] This principle is buttressed by the

[176] It is not necessarily the case, of course, that the predictor will classify both the positives and the negatives with the same degree of accuracy—indeed, most predictive devices will be likely to be more accurate in one direction than the other—but we will use the ninety per cent assumption for both, here, in order to simplify the example.

[177] It would, of course, have been much more accurate simply to predict that *none* of the people in the population were psychopaths. Since the base rate was only one in 10,000, predicting that everyone was normal would have resulted in a "success" rate of 99.99 per cent. This also demonstrates that the observed tendency to overpredict dangerousness is, in part at least, produced by the rarity of the behavior in the population. *See* note 175 *supra*.

[178] *See* GLASER, *supra* note 119, at 41-48; Glaser & O'Leary, *The Results of Parole*, in RADZINOWICZ & WOLFGANG, *supra* note 175, at 245, 256-57.

[179] *See* notes 158-62 *supra*, and note 207 *infra*.

[180] When dealing with the decision about guilt or innocence, we like to think that we are very careful (*e.g.*, the requirement that the proof of guilt be free of any "reasonable doubt"), but, when it comes to sentencing the convicted offender, the trial judge's discretion is constrained only by the broadest standards of abuse. *See, e.g.*, United States v. Willard, 445 F.2d 814, 816 (7th Cir. 1971); People *ex rel.* Ward v. Moran, 54 Ill. 2d 552, 301 N.E.2d 300 (1973); People v. Burbank, 53 Ill. 2d 261, 275, 291 N.E.2d 161, 169 (1972), *cert. denied*, 412 U.S. 951 (1973). *See also* 53 Ill. 2d at 279, 291 N.E.2d at 171 (Goldenhersh & Schaefer,

probability that the frequency of future offenses will be significantly greater among most groups of convicted offenders than among the public at large.

Now, having worried so much about equal treatment for the false positives, let us express a little concern for the true negatives, *i.e.*, those who are classified as not dangerous and who are, in fact, not dangerous. Is it fair to them to continue to keep them locked up? So long as we focus only on the issue of dangerousness—on the fact that, to the best of our knowledge and belief, this inmate will not commit another crime if released—there is a perfectly good answer to our question. We may want to continue to hold him because the criminal law has other goals or values that it may wish to implement through his incarceration. Among these other goals may be general deterrence, or channeling the victim's desire for revenge through legitimate procedures and thus regulating it, or avoiding the appearance of "depreciating the seriousness of the offense" and thus satisfying the society's demand for retribution, and so on. But when one begins to examine these other criteria that enter into sentencing decisions, one may ask whether they are more likely to promote equality of treatment, whether they are less subject to random variation in their application, than are predictions of dangerousness.

Sentencing Standards—Their Reliability and Validity

A fair amount of scientific effort has been devoted to testing both the reliability and the validity of our predictions of dangerousness, and they have been found wanting.[181] Criminologists are, therefore, uneasy about using these predictions as a basis for important legal decisions affecting individual liberty and public safety. But the legal system must continue to make sentencing decisions, and, if dangerousness is not to be one of the criteria used in those decisions, what are the alternative standards to be? Norval Morris proposes two: "parsimony," by which he means that "the least restrictive . . . sanction necessary to achieve defined social purposes should be imposed" (and the chief social purpose appears to be general deterrence),[182] and "desert," which means that "no sanction should be imposed greater than that which is 'deserved'" by the crime.[183] The problem with these alternative standards is that their reliability and validity are unknown. Insofar as they are quantifiable, data that might test the accuracy of possible measures of these criteria are either very sparse or totally lacking.[184]

JJ., dissenting). These standards remain in spite of considerable evidence that this practice results in serious disparities between the sentences given similar offenders for similar crimes. *See* DAVIS, *supra* note 38, at 133–35; Peter W. Low, Sentencing Structure for the Federal Criminal Code, at 27–36 (memorandum to the National Comm'n on Reform of the Fed. Crim. Law, 1968), *reprinted in* THE CRIMINAL IN THE ARMS OF THE LAW 525 (L. Radzinowicz & M. Wolfgang eds. 1971).

And we certainly do not require that all persons who have committed an offense be prosecuted. *See, e.g.*, Smith v. United States, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967) (action under Federal Tort Claims Act for damages alleged to result from failure to prosecute intimidation of a federal juror; held that prosecutorial discretion may be based on national policy, including racial policy); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966) (mandamus to compel prosecution of a national bank and others for conspiracy); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965) (where grand jury had voted indictments, held within the discretion of the prosecutor whether to sign, and thus validate, the indictments).

[181] *See* MORRIS, *supra* note 3, at 66–73. *See generally* Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371 (1972); Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxtrom Patients: 1966–70*, 129 AM. J. PSYCHIATRY 304 (1972); Von Hirsch, *supra* note 9.

[182] MORRIS, *supra* note 3, at 59, 79.

[183] *Id.* at 60, 73–76.

[184] On the paucity of hard data about deterrence *see* HOOD & SPARKS, *supra* note 173, at 172–75; Schwartz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274 (1967); Tittle & Logan, *Sanctions and Deviance: Evidence and Remaining Questions*, 7 LAW & SOC'Y REV. 371 (1973); Tullock, *Does Punishment Deter Crime?*, 36 THE PUBLIC INTEREST 103 (1974). *See also* J. ANDENAES, PUNISHMENT AND DETERRENCE (1974); F. ZIMRING, PERSPECTIVES ON DETERRENCE (1971); F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).

As for desert, it may appear to be different in kind from either dangerousness or deterrence. Both dangerousness and deterrence are empirical standards; they are both concerned with propositions about what behaviors are likely to follow in the future as a consequence of the present sentencing decision. Desert, by contrast, sounds like purely a moral issue, a question of principle. It involves no prediction, but rather is a question of what justice or fairness requires as punishment for this crime. As such, desert may not seem to be amenable to measurement.

But this requires us to examine more closely what we mean by a concept of desert that we would wish to use as a standard for sentencing. If all we mean by it is the individual sentencer's sense of moral outrage at the crime—his feeling that mitigating circumstances make mercy appropriate or, conversely, that the repellant facts of the case call for harsh punishment—then the standard is, indeed, personal, particularistic (and, perhaps, idiosyncratic), and, therefore, unreviewable. On the other hand, if our concept of desert implies some sort of broader, societal

Compared to predictions of dangerousness, decisions about deterrence and desert are likely to be more subjective, more individualized, more particularistic, and thus less amenable to review. It may be contended that deterrence and desert are fairer standards to use precisely because they do not appear to be "scientific" and thus unassailable; they acknowledge the subjectivity of the judgments involved and thereby open them to argument. But this is no guarantee of even-handedness, of equality of treatment. The large number of judges, of disparate views, who will be making these decisions is likely to produce a high degree of variability across cases.[185] This variability will be increased by the subjectivity of the standards. Unlike the prediction of dangerousness, where the goal of the predictions and thus the appropriate measure of their performance is relatively clear, the lack of good measures of deterrence and desert serves to mask the failures of those standards, to conceal their cases of misclassification, to disguise the degree to which they distribute punishments randomly. In sum, the amount of injustice that results from the use of desert and deterrence as sentencing standards is unknown, if not unknowable.

Of course, it is not always irrational to prefer the unknown to the known, but it is necessarily risky. Who knows what evil lurks in the depths of desert? When such unreviewable standards are used, the potential for abuse is increased.[186] The more subjective the standard, the less constraint there is on the exercise of personal prejudice, on variations in judicial temperament, or on sheer caprice—which brings us back to the issue of whether it would be preferable to return all or most of the sentencing discretion to the judiciary.

One of the good reasons for having a parole board is to reduce some of the variability in sentencing by vesting at least a portion of the sentencing power in a unitary corporate body. Of course, if the board then re-delegates this power to a gaggle of correctional sociologists, this reason is frustrated. But if the board makes the decisions as a corporate body, the variability should be considerably less than if scores of individual judges exercised all of the sentencing discretion. There are some techniques, such as sentencing councils, that can be used to reduce the variability among individual judges,[187] but these are essentially half-way measures intended to make the judges' decisions more nearly approximate those of a corporate body. So long as the individual judges retain discretion and so long as there are many more judges than parole board members, board sentencing should produce less variability than judicial sentencing. And there is another reason for preferring the parole boards to the judges—parole boards seem somewhat more likely than judges to use actuarial techniques in making their decisions. Judges typically display suspicion or even hostility toward the use of statistical bases for sentencing.[188]

judgment about the amount of punishment that is appropriate for the offense, then there is, in theory at least, some consensus or body of opinion extant in the world by which any sentencing decision based on desert might be measured. Because of the virtually unlimited number of variables that might be thought to affect the amount of punishment deserved by various crimes, however, it would probably be impossible to design and execute a broadly acceptable survey of this opinion that could serve as the standard of measurement. The legislatively-imposed limits on the sentences for each type of crime may provide another sort of measure of societal judgments about desert, but the question before the judges and the parole boards is how to exercise their discretion within the rather broad limits set by most legislatures for most crimes. If, then, there is in theory some standard for measuring individual judgments of desert, but we have no way of determining or expressing that standard, the problem with desert is much like that with dangerousness or deterrence—we do not know how often the individual sentencing decisions fail to comport with their criteria, with the objectives or purposes that they are thought to serve. If one adopts the personalized, particularistic view of desert, and thus concludes that it is not even in theory measurable, the problem is obviously just as bad. Either way, there can be no assessment of the degree of even-handedness (or lack thereof) in the sentencing decisions.

Norval Morris makes it clear that he intends a community standard of desert. MORRIS, *supra* note 3, at 74.

[185] *See generally* M. FRANKEL, *supra* note 8; Motley, *"Law and Order" and the Criminal Justice System*, 64 J. CRIM. L. & C. 259 (1973). *See also* treatises cited at note 180 *supra*.

[186] *See* DAVIS, *supra* note 38.

[187] *See* FRANKEL, *supra* note 8, at 69–74. But note that the few sentencing council systems that exist always leave the ultimate decision with the individual judge. *See also*, Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109 (1975); Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, 27 FED. PROBATION 5 (June 1963).

[188] For a few years, one of the authors of this article served as a reporter at the discussions on sentencing problems of the Illinois Judicial Conference, the annual meeting of all the judges in the state. At one of those sessions, he made what he considered the rather innocuous suggestion that, when imposing sentence, the judges might find it helpful to know what sentences had recently been given by their brethren to offenders with similar characteristics, and that this might be efficiently accomplished by the use of automatic data retrieval equipment. In spite of the fact that this was clearly no more than a proposal for information gathering and communication—something that

This is not to say, of course, that parole boards now make optimal[189] use of actuarial prediction methods.[190] We have already commented on the Illinois Parole Board's apparent reliance on factors that do not predict parole success[191] and on the clinical assessments of correctional sociologists.[192] The Federal Parole Board's Salient Factor Score is a validated measure of the risk of parole violation,[193] but the federal regulations permit decisions contrary to the prediction "where circumstances warrant."[194] Subparagraph (a) states that a purpose of the guidelines is to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration." Subparagraph (b) says that the "time ranges specified by the guidelines are established specifically for the cases with good institutional adjustment and program progress," even though adjustment to the institution and program progress have been shown *not* to be significant predictors of parole success. Even worse, subparagraph (c) provides:

> Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release.

Subparagraph (d) permits deviation from the severity ratings of the offenses, and subparagraph (e) provides that the "... 'Salient Factor Score' serves as an *aid* in determining the parole prognosis," but that "*where circumstances warrant, clinical evaluation of risk may override this predictive aid.*"[195] It would be hard to imagine a broader grant of discretion. Some of this waffling may be attributable to fear of running afoul of the "fixed and mechanical rules" and "irrebuttable presumption" doctrines.[196] If that is the concern, meeting those issues head-on would probably be preferable to watering down the actuarial prediction system so much that it becomes a bog of compromise.[197]

The Case for Actuarial Prediction

There is some division of opinion as to whether it improves the accuracy of the predictions if one uses clinical evaluations as a supplement to the actuarial tables. Vincent O'Leary asserts that "most experts are convinced that the optimum system is one which uses both statistical and individual case history methods."[198] On the other hand, Barbara Wootton argues:

> The fact that in no case do statistical methods succeed in measuring all the relevant factors . . . does not . . . justify overriding them in the interests of a sentimental attachment to imponderables in cases where the latter are demonstrably less reliable prognosticators. The sensible course is to use one method or the other, according to which has proved itself the more reliable in any particular case: the mistake is to mix them.[199]

In analyzing this dispute, it is helpful to distinguish between the use of clinical judgments as the predictions, themselves, and the use of clinicians' categorizations as part of the data incorporated in an actuarial prediction.[200] In the latter case, the clinician is providing measurements of variables that may turn out to be relevant to the prediction. In the former case, where the clinical judgment is the prediction, itself, the problem is that the clinician is unlikely to combine the known variables in the optimal way—to assign to each variable its optimal weight and to account properly for the interaction

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was already being partially accomplished at greater expense and with more error by filing clerks and through hallway conversation between the judges—the suggestion brought forth from the judges loud and lengthy abuse of the unfortunate reporter. Their Honors railed about the evils of "push-button justice," about poor defendants being "folded, spindled, and mutilated," and about how the computers could never get their American Express card bills right. Were it not for the famous equanimity of the judicial temperament, the reporter dares not think how he might have been treated.

[189] For a discussion of what might be the "optimal" use of actuarial techniques see notes 198–204 *infra*.

[190] *See* Evjen, *Current Thinking on Parole Prediction Tables*, 8 CRIME & DELINQUENCY 215 (1962), *reprinted in* B. KAY & C. VEDDER, PROBATION AND PAROLE 139 (1963). Of the forty-eight jurisdictions that responded to Evjen's questions about whether they had used "prediction statistics (schedules, ratings, etc.)," forty-four answered that they "had never used prediction statistics in parole selection and are not now [1961] using them." *Id.* at 140.

[191] *See* notes 123–25 and accompanying text *supra*.

[192] *See* text accompanying Table VI *supra*.

[193] *See* YALE L.J., *supra* note 8, at 872–73 n.308.

[194] 28 C.F.R. § 2.20(e) (1975). *See* text accompanying note 195 *infra;* the intervening quotations are all from this same source.

[195] *Id.* at (a)(b)(c)(d) & (e) (emphasis added).

[196] *See* notes 154–62 and accompanying text *supra*.

[197] *See* note 207 *infra*.

[198] O'Leary, *Issues and Trends in Parole Administration in the United States*, 11 AM. CRIM. L. REV. 97, 111 (1972).

[199] B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 199 (1959).

[200] *See* WIGGINS, *supra* note 152, at 190–93; Sawyer, *supra* note 150, at 178–81.

effects among the variables.[201] In the actuarial method of prediction, a regression equation is used to compute the best combination of variables and their optimal weights. If a clinician assigns other weights to those variables, or takes into account other variables of unknown weight, error is likely to be introduced into the prediction. Human judgments are also more prone to both systematic and random error than are the mechanical devices, such as regression equations, that humans devise in their best moments—human judgments are more likely than regression equations to be subject to prejudice, to anxiety, to fatigue, and to boredom. On the other hand, if the clinical judgments are sufficiently well-defined, the categorizations made by the clinicians may be tested in the regression equation to determine if they add to its predictive power. There is some evidence that actuarial predictions incorporating both clinical data and more "objective" facts are superior to actuarial predictions that use only one type of data.[202] But the most important point is that the final prediction should be computed statistically, rather than arrived at through clinical judgment.[203] A valuable study of this issue by Sawyer concluded that "the clinician may be able to contribute most not by direct prediction, but rather by providing, in objective form, judgments to be combined mechanically."[204]

Thus, insofar as sentencing decisions are to be based on predictions of dangerousness, it would make little difference whether judges or parole boards made those decisions so long as both followed the actuarial prediction tables faithfully; either could consign the task to a computer or a clerk. It seems probable to us that, in spite of the hedging in the federal parole regulations and the Illinois Board's delegations to clinicians, parole boards would be less likely than judges to consider this to be a deprivation of their discretionary due or to be beneath their dignity.[205]

Of course, dangerousness is not likely to become the only standard for sentencing—nor do we believe that it should. Desert and deterrence will be retained as sentencing criteria both because they reflect major purposes and values of the criminal law and because they may provide some limits to the use of the dangerousness standard.[206] But it should be clear that sentencers are justified in making decisions "outside the guidelines" of the actuarial tables in order to implement values other than risk, but not in order to improve the prediction of risk itself.[207]

Policy Summary

In conclusion, it may even be possible to summarize our argument: If the prediction of dangerousness

[201] Wiggins reviews and summarizes research indicating that the performance of mechanical data combination methods is superior to clinicians' judgments even when the statistical models merely simulate the judgmental strategies of the clinicians. WIGGINS, *supra* note 152, at 216–22.

[202] *See* WIGGINS, *supra* note 152, at 197–99; Sawyer, *supra* note 150, at 192.

[203] *See* WIGGINS, *supra* note 152, at 197–98; Sawyer, *supra* note 150, at 191–92.

[204] Sawyer, *supra* note 150, at 193.

[205] At least some parole boards have been known to use some actuarial techniques some of the time; if the odd judge has done so now and again, it has escaped our notice and that of Dr. John Paul Ryan of the research department of the American Judicature Society, whom we consulted on this matter. *See also* note 188 *supra*.

[206] It may, at first, seem appealing to think that all three standards, desert, deterrence and dangerousness, might be posited as concurrent limiting principles—that is, that any given case should be required to satisfy all three of the standards before a sentence of imprisonment is imposed. But such a system would be unlikely to prove acceptable. Many of the offenses that would probably rank highest on the desert scale, *e.g.*, serious crimes of violence against persons, would have relatively low "dangerousness" ratings if dangerousness were to be measured by recidivism rates. Similarly, interpersonal violence tends to be more motivated by emotion and thus is probably less deterrable than are crimes of profit, such as embezzlement, which might rank much lower on the desert scale but be much more amenable to a rational deterrence calculus. Thus, society may well feel that the principle of desert, alone, is sufficient justification for imposing harsh punishment for murder or mayhem, while the deterrence factor and/or the recidivism rates may justify imposing imprisonment for fraud or auto theft even if those crimes are regarded as less "serious."

[207] With regard to the "other values" see notes 39 and 147, and accompanying text *supra*.

Having concluded our analysis, we might now take another brief look at Vlandis v. Kline, 412 U.S. 441 (1973), and the other "irrebuttable presumption" cases. *See* notes 159–62 *supra*. Those cases require that the individual be given an opportunity to "rebut" the presumption in a due process hearing. But all the hearing can provide, at best, is more information on which the decision-maker may then base his classification judgment, assigning the individual to one category or another. The hearing is certainly no guarantee that the classification or prediction will thereby be perfected and that there will be no more false positives (or, for that matter, false negatives). Thus, even after the hearing, the prediction/presumption cannot reasonably be expected to be "necessarily or universally true in fact." Having had the hearing, however, the decision-maker might console himself with the thought that he had done everything possible to achieve accurate (and, thus, just) classification of the individual. But, unfortunately, there is no good evidence that consideration of the individual's idiosyncratic circumstances will, in fact, improve the accuracy of most predictions; indeed, it is likely to make them worse. *See* notes 152 and 202–04 and accompanying text *supra*.

continues to play a part in sentencing decisions—and there are good reasons to think that it will—then we should recognize that some kinds of predictions are better than others. This may well be a case of settling for "the best of a bad lot," but it is important to use the most accurate predictors available. Greater accuracy in prediction obviously tends to promote the public safety. It also serves the interest of fairness to the inmate; the fairness of basing length of sentence on a prediction increases as the validity of the prediction increases. Actuarial predictions tend to be more valid than clinical predictions. Because parole boards seem more likely than judges to use actuarial predictions, and because there is likely to be less variability in corporate than in individual judicial decisions, we think it preferable to leave a significant portion of the sentencing discretion in the hands of the parole boards. But the boards should be a good deal more systematic than they are at present in following actuarial prediction tables or in departing from them only to serve explicit values other than the prediction of recidivism or parole violation.