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## THE USE OF DISCRETION IN DETERMINING THE SEVERITY OF PUNISHMENT FOR INCARCERATED OFFENDERS

JOSEPH E. SCOTT\*

Many studies have been conducted on the decision-making processes of social control agencies. These studies have provided considerable insight into both the legal and non-legal factors which affect people who come into contact with representatives of such agencies. While substantial research has already been conducted concerning the discretionary practices of police, prosecutors, judges and juries and the effect of their practices on the legal norm-violator's contact with the law, there is one area in the criminal justice system which has been almost totally neglected. Few studies have investigated the processes which determine when, how, and why norm-violators who have been found guilty and incarcerated should be released from our penal institutions.<sup>1</sup> This situa-

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<sup>1</sup> There have been a few studies conducted on the operation of parole boards, but these have been primarily ethnographic in nature. See, e.g., R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 222-424 (1969); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. U.L.Q. 243 (1966); Gottesman & Hecker, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.L. REV. 702 (1963); Quinn, *The Parole Board's Duties of Self-Regulation*, 6 U. MICH. J.L. REFORM 131 (1972); Richardson, *Parole and the Law*, 2 CRIME AND DELINQUENCY 27 (1956); Thomas, *An Analysis of Parole Selection*, 9 CRIME AND DELINQUENCY 173 (1963); Comment, *The Parole System in Canada*, 15 CAN. J. CRIM. & CORR. 144 (1972); Address by Ramsey Clark, *The Report of the New York Task Force on Parole*, American Society of Criminology annual meeting in New York, 1973.

Other studies have outlined parole rules used by various states. See, e.g., Arluke, *A Summary of Parole Rules—Thirteen Years Later*, 15 CRIME AND DELINQUENCY 267 (1969); Gottfredson, Ballard, & O'Leary, *Uniform Parole Reports: A Feasibility Study*, 3 J. RES. CRIME & DELINQUENCY 104 (1966).

Still other studies have attempted to compare differences between parole boards with regards to parole decisions. These have been much more quantitative

tion exists despite the fact that the decision-making at this stage is not generally governed by "due process," subject to appeal, nor open to public scrutiny.

Today, in most states, the determination of the nature and the extent of an offender's sentence has become a divided task. A portion of the task is still assumed by the legislature when it sets maximum and minimum limits to the sentence which a court may impose for each offense.<sup>2</sup> The courts, in turn, perform their judicial function on a case by case basis. The parole board is in a position to exercise still further discretion. The extent of the parole board's discretion varies greatly from one jurisdiction to another.<sup>3</sup> The discretionary power of parole boards, however, has apparently increased concomitantly with the apparent shift in the ideology of the criminal justice system from an almost exclusively "retributive" basis to a more "retributive-reformative" approach. This change in ideology has resulted in more frequent use of the indefinite or indeterminate type of sentence. The increased usage of this type of sentence by the various states has transferred the primary responsibility of determining the proper length of incarceration for each defendant from the judiciary to the parole board. By simply imposing the statutory sentence passed by the legislature for the specific offense for which the defendant was found guilty, the judiciary, in many states, has left any reconciliation of the seriousness of the

studies. See, e.g., Gottfredson and Wilkins, *Parole Decision Making—A Progress Report*, NAT. CRIM. JUSTICE REFERENCE SERVICE (1973); Gottfredson, *Differences in Parole Decisions Associated with Decision Makers*, 3 J. RES. CRIME & DELINQUENCY 114 (1966); Hoffman, *Paroling Policy Feedback*, 9 J. RES. CRIME & DELINQUENCY 117 (1972).

<sup>2</sup> For an excellent analysis of the use of differing sentencing procedures, see, e.g., Vasoli, *Growth and Consequences of Judicial Discretion in Sentencing*, 40 NOTRE DAME LAWYER 404 (1965); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

<sup>3</sup> For a summary of the statute and practices of the parole agencies in the fifty states and federal parole, see Parker, *Origins, Development, Current Practices and Statutes*, NAT'L TECHNICAL INFORMATION SERVICE (1972).

crime with the severity of the sentence entirely to the discretion of the parole board. Not only does the parole board have the responsibility of determining the proper length of incarceration for each offender who is given an indefinite sentence, but, in addition, many parole boards also function as the state clemency commission. In this capacity, they have the prerogative to overrule legislatively enacted minimum sentences, or judicially imposed minimum or definite sentences, and release inmates when they feel the inmates should be released.

Because it is one of the later stages in the criminal justice system and perhaps because of the correctional ideology that release from prison before the maximum portion of the sentence has been served "is a privilege rather than a right,"<sup>4</sup> the decision-making process releasing inmates from prison has received little attention from criminologists. However, with the increasing concern for "due process," and with the curtailment and control of arbitrary use of power in administering justice, the correctional process, and, in particular, the paroling process, become likely candidates for scrutiny at this time.<sup>5</sup>

Despite the numerous constitutional procedural safeguards applicable at the pre-adjudicative decision-making stages, the need for still greater control over the discretion utilized by these social control agents is seldom denied. Lacking even such procedural safeguards in the post-adjudicative process, the innumerable parole board decisions made on the basis of administrative policy have not only lacked judicial safeguards, but have, in addition, not been subject to public scrutiny.

The specific focus of this study is on the criteria utilized by parole boards in determining the proper amount of punishment a convicted adult felony offender should receive. Specific attention is directed to three principal factors: (1) legal, (2) institutional and (3) personal-biographical.<sup>6</sup> These three factors were selected because of their relationship to correctional ideology and criminological

theory. The legal factor is the primary consideration in determining the punishment, according to the retributive school of thought. The severity of punishment is to be determined by the seriousness of the crime. The institutional approach (factor) is closely associated with the reformative approach to corrections, which advocates the incarceration of individuals only until they are rehabilitated. Perhaps the most commonly used indicator of an individual's rehabilitation while incarcerated is his institutional behavior. Finally, the personal-biographical factor is closely associated with the conflict, or power, theory of criminology. This theory maintains that those individuals with more power in society will receive more consideration and more favorable treatment by representatives of our legal institutions.

### THE METHOD

The data for this study were gathered at three adult penal institutions for felony offenders located in the same midwestern state. The principal source of this data was information recorded in prison records, compiled and submitted to the parole boards before each inmate's parole hearing. These records provide the parole board members with their only information, on the basis of which they must decide whether the inmate is to be released.<sup>7</sup> The research sample was comprised of the records of all female inmates released from the one Midwestern state's women's prison in 1968 ( $N = 34$ ), and a 25 per cent random sample of the records of all male inmates released from that same Midwestern state's adult felony penal institutions for males during 1968 ( $N = 325$ ).<sup>8</sup> The above three mentioned institutions comprise the total prison system of this particular Midwestern state. In addition to the prison records, field observations were also conducted at each of the institutions over a six month period.

Correlation and multiple regression analysis were used to analyze the data. Contingency tables were also constructed to examine the relationship between each independent variable and the dependent variable, but are not reported here inasmuch as neither the direction of the zero order

<sup>7</sup> The parole boards which were studied did not talk to the inmate or to anyone representing him until the decision concerning parole had been made.

<sup>8</sup> The records from 1968 were used even though the study was carried out during the 1971-1972 school year. This was done to facilitate a follow-up study and for other comparative reasons. The observations were conducted during the summer and fall of 1971.

<sup>4</sup> For a review of the theoretical foundation of parole, see D. DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* (2d ed. 1967); Comment, *The Parole System*, 120 U. PA. L. REV. 282 (1971).

<sup>5</sup> This is so despite the decision in *Scarpa v. United States Board of Parole*, 468 F.2d 31 (5th Cir. 1973). Here, the court held that the actual bestowal or denial of parole need not be accompanied by a hearing, and any change in procedures must be made by the legislative branch, not the judicial.

<sup>6</sup> These three factors are similar to those examined in Green, *Sentencing Practices of Criminal Court Judges*, 22 AM. J. CORR. 32 (1966).

relationships nor their strengths is affected significantly, whether utilizing statistics based on categorized data (i.e., Tau b or Gamma), or interval data (i.e., Pearson's r). By utilizing regression analysis, it also was possible to control for numerous variables simultaneously without violating any basic assumptions of the data.<sup>9</sup> Pearson correlation coefficients provide an indication of the linearity of each independent variable's relationship to the dependent variable. By using multiple regression analysis, the effect of variations within each independent variable upon the dependent variable is provided (unstandardized b or partial regression coefficient), as is the importance of various independent variables' ability to explain variation in the dependent variable when controlling for all other independent variables (Standardized  $\beta$  or Beta). In addition, by using this type of analysis, one can examine variables categorized as legal, institutional, or social-biographical as sets, and thereby determine the relationship of each set to the dependent variable.<sup>10</sup>

The variables examined for their possible effect upon variations in the severity of punishment comprise, as mentioned, three factors:

*Legal Factor:* the seriousness of the crime (the legal minimum sentence, in months, imposed by the courts);<sup>11</sup> and the prior criminal involvement of each inmate (prior criminal involvement was quantified by weighting prior prison incarcerations, felony and misdemeanor arrests and convictions).<sup>12</sup>

<sup>9</sup> Although many of the independent variables are nominal, by using dummy variables they are treated as interval for regression analysis. See, e.g., Suits, *Use of Dummy Variables in Regression Equations*, 52 J. AM. STATISTICAL ASS'N. 548 (1957).

<sup>10</sup> See, e.g., Cohen, *Prognostic Factors in Functional Psychosis: A Study in Multivariate Methodology*, 30 TRANSACTIONS OF THE N.Y. ACADEMY OF SCI. 833 (1968); Cohen, *Multiple Regression as a General Data-Analytic System*, 70 PSYCHOLOGICAL BULL. 426 (1968).

<sup>11</sup> For those inmates originally given a death sentence, which was subsequently reduced to life, and for those given life sentences, a score of 500 was assigned. This was determined in a somewhat arbitrary manner.

<sup>12</sup> Each inmate's prior criminal record was ascertained from the F.B.I. report. From these reports, five separate indicators of prior criminal involvement were recorded:

- Total number of previous misdemeanor arrests
- Total number of previous felony arrests
- Total number of previous misdemeanor convictions
- Total number of previous felony convictions
- Total number of previous prison incarcerations

These five indicators were combined to form a prior criminal involvement scale in the following manner: First, the total number of misdemeanor arrests and the

*Institutional Factor:* disciplinary reports (the number received while incarcerated), and institutional adjustment (composed of nine separate

total number of felony arrests in the United States for 1968 were ascertained, as were the number of misdemeanor and felony convictions. These numbers were then divided by the United States population as of July 1, 1968 to get the percentage of the population arrested and/or convicted of misdemeanors and/or felonies during this period. The same procedure was followed for individuals sentenced to prison during 1968—the total number was divided by the United States population. The respective percentages were as follows:

- 0.04% of the population received by prisons in 1968
- 0.49% of the population convicted of a felony in 1968
- 1.41% of the population arrested for a felony in 1968
- 1.49% of the population convicted of a misdemeanor in 1968
- 2.58% of the population arrested for a misdemeanor in 1968

The percentage of the population received by prisons in 1968 was approximately fifty times smaller than the percentage of the population arrested for misdemeanors, thirty times smaller than the percentage convicted of a misdemeanor or arrested for a felony, and ten times smaller than the percentage convicted of a felony. Therefore, the respective weights of 50, 30, 30, 10, and 1 (corresponding to a, b, c, d and e above) were used to calculate each inmate's prior criminal involvement score. This score was computed for each individual by weighting each time he or she had been arrested, convicted, or incarcerated in prison by the above weights and summing the total for each individual.

Although the weights utilized in constructing this prior criminal involvement scale were derived in a somewhat crude, albeit nonarbitrary manner, the prior criminal involvement scale was calculated in a number of other ways in an attempt to ascertain the effect of weighting indicators differently. A second scale was constructed by squaring each of the weights used in the first scale. The weights 2,500, 900, 900, 100, and 1 were then utilized to multiply each individual's raw score on each of the indicators. A third scale was constructed by simply assigning Likert scores of 5, 4, 3, 2, and 1 to each of the indicators. Those weights were then used to multiply the raw score of each individual, and then summed for the five indicators. Finally, a fourth scale was calculated by assigning a weight of 1 to all of the five indicators and multiplying each individual raw score and summing. The correlation between the original scale and the second scale was .98; between the original scale and the third, .98; and between the original scale and the fourth, .89. This appears to indicate that the weights assigned the various indicators have little overall influence on the scale score. Others have already argued this same point quite convincingly. See, e.g., Stanley & Wand, *Weighting Test Items and Test Item Options: An Overview of the Analytical and Empirical Literature*, 30 EDUCATIONAL AND PSYCHOLOGICAL MEASUREMENTS 21 (1970).

For an even more detailed explanation of how prior criminal involvement was quantified, see J. Scott, *An Examination of the Factors Utilized by Parole Boards in Determining the Severity of Punishment 57-59* (Unpublished Ph.D. dissertation, Department of Sociology, Indiana University, 1972).

indicators from which a scale was constructed by item analysis Cronback's Alpha = .621).<sup>13</sup> The nine indicators are as follows:

- 1) Inmate's Overall Progress
- 2) Inmate's Overall Cooperation
- 3) Inmate's Overall Attitude
- 4) Inmate's Participation in Institutional Programs and/or Clubs (Number)
- 5) Inmate's Religious Involvement
- 6) Inmate's Work Reports
- 7) Inmate's Housing Reports
- 8) Inmate's Participation in Vocational Training
- 9) Inmate's Participation in School Program

*Personal-Biographical Factor:* age (at time of release); education (number of years of school completed at the time of being sentenced to prison); I.Q. (as determined by the Revised Beta Examination administered shortly after an inmate's admittance to prison); marital status (single, separated, widowed, divorced, or married at the time of inmate's appearance before the parole board); race (white and other); residence (resident of state or not); sex, and socioeconomic status (as measured by Hollingshead's Occupational Status Scale on the basis of each inmate's self-reported occupation).<sup>14</sup>

The dependent variable (severity of punishment) was simply the number of months an inmate was incarcerated.<sup>15</sup>

<sup>13</sup> See Cronbach, *Coefficient Alpha and the Internal Structure of Tests*, 16 *PSYCHOMETRIKA* 297 (1951); Cronbach & Meehle, *Construction Validity and Psychological Tests*, 52 *PSYCHOLOGICAL BULL.* 281 (1955). Alpha was calculated using computer program TESTAT, which is part of the EDSTAT-V series developed by Donald J. Veldman. This statistic reflects the degree of reliability among items of a scale in terms of overlapping variance. The formula used in computing alpha is a generalization of the Kuder-Richardson formula for dichotomous items:

$$\alpha = \frac{K}{K-1} \left[ \frac{\frac{K}{\sigma T^2} - \sigma I^2}{\sigma T^2} \right]$$

Where  $K$  = the number of items in the scale

$I$  = the item

$T$  = the total (or subscale total)

See D. VELDMAN, *FORTAN PROGRAMMING FOR THE BEHAVIORAL SCIENCES* 173 (1967).

<sup>14</sup> An inmate's self-reported occupation was recorded upon his admission to prison. The order of occupations was reversed for better conceptual clarity. Therefore, an occupation scored 5 is the highest, and one scored 1 is the lowest, just the opposite of the way in which Hollingshead constructed the scale. See, A. HOLLINGSHEAD, *TWO FACTOR INDEX OF SOCIAL POSITION* (1965).

<sup>15</sup> This number includes possible jail time served by an inmate for the same offense either before trial or

## FINDINGS

### LEGAL FACTOR

*Seriousness of Crime:* The seriousness of crime for which inmates were convicted was the best indicator of the severity of punishment, both before and after controlling for other variables ( $r = .84$  and  $\beta = .64$ ). As the seriousness of crime increases, the severity of punishment also rises. The partial regression coefficient of .31 indicates that a unit change in the seriousness of crime will be associated with 0.31 unit changes in the severity of punishment when the other independent variables are controlled. This means that each month of an inmate's minimum sentence extends the number of months he will actually be incarcerated by approximately one-third month when other variables are controlled. Parole board members appear to believe that an inmate is not ready for parole until he has suffered commensurately for the crime he has committed.

*Prior Criminal Involvement:* The data from inmates' records indicate that there is only a very weak relationship between prior criminal record and severity of punishment ( $r = -.02$  and  $\beta = -.06$ ). The coefficients do indicate that when all other variables are taken into consideration, inmates with more extensive criminal involvement are actually punished less, although the relationship is extremely weak and only statistically significant when all variables are controlled. This is rather surprising inasmuch as the most useful guide to prediction of parole violation behavior is past criminal behavior.<sup>16</sup> It is also very doubtful

sentencing, if so recorded in the summary report. The Midwestern state in which these parole boards were studied had the policy of counting time served in jail on the same offense in determining when the inmate was eligible for a parole hearing.

<sup>16</sup> See, e.g., BRUCE, BURGESS & HARROW, *THE WORKING OF THE INDETERMINATE SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS* 205-49 (1928); D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* (1964); S. GLUECK & E. GLUECK, *500 CRIMINAL CAREERS* (1930); D. GOTTFREDSON & K. BALLAD, JR., *THE VALIDITY OF TWO PAROLE PREDICTION SCALES: AN EIGHT YEAR FOLLOW-UP STUDY* (1967); H. MANHEIM & T. WILKINS, *PREDICTION METHODS IN RELATION TO BORSTAL TRAINING* (1955); L. OHLIN, *SELECTION FOR PAROLE: A MANUAL OF PAROLE PREDICTION* (1951); R. SCHIEDT, *EIN BERTRAG ZUM PROBLEM DER RUCKFALLSPROGNOSE* (1936); H. TRUNK, *SOCIALE PROGNOSEN STRAFGEFANGENEN* (1937); Caldwell, *Preview of a New Type of Probation Study Made in Alabama*, 15 *FED. PROBATION* 1 (1951); Gottfredson, *Assessment and Prediction Methods in Crime and Delinquency*, TASK FORCE REPORT: JUVENILE DELINQUENCY, APPENDIX K, PRESIDENT'S COMMISSION ON LAW EN-

TABLE I  
REGRESSION ANALYSIS FOR TWELVE VARIABLES IN RELATION TO SEVERITY OF PUNISHMENT

Independent Variables <sup>w</sup>	Dependent Variable				
	Pearsonian		Regression Coefficient <i>b</i>	Beta Coefficient $\beta$	N
	<i>r</i>	<i>r</i> <sup>2</sup>			
Legal factor <sup>x</sup>					
Seriousness of Crime	.84*	.71*	.31*	.64*	359
Prior Criminal Involvement	-.02	.00	-.02	-.06*	359
Institutional factor <sup>y</sup>					
Disciplinary Reports	.24*	.06*	3.37*	.18*	338
Institutional Adjustment	-.10	.01	.33	.05	175
Socio-biographical factor <sup>z</sup>					
Age	.59*	.35*	1.58*	.31*	354
Education	-.27*	.07*	-.04	.00	357
I.Q.	-.16*	.03*	-.10	-.02	321
Marital Status	.03	.00	7.15*	.08*	357
Race	.13	.02	-.54	.00	359
Residence	.02	.00	.24	.00	359
Sex	-.16*	.03*	-33.91*	-.17*	359
Socioeconomic Status	-.01	.00	-5.85*	-.10*	359

\* Significant at or beyond the .05 level of probability.

d Dichotomously coded:

	R	R <sup>2</sup>
w Multiple Correlation Coefficient all Independent Variables:	.89	.79
x Multiple Correlation Coefficient Legal Factor:	.84	.70
y Multiple Correlation Coefficient Institutional Factor:	.28	.08
z Multiple Correlation Coefficient Socio-Biographical Factor:	.67	.45

that prior criminal involvement affected the legal seriousness of the crime (minimum sentence), inasmuch as 97 per cent of the inmates were serving indefinite sentences, *i.e.*, the judge simply imposed the minimum and maximum penalties as prescribed by law for the particular offense. The other 3 per cent of the inmates were serving definite sentences (certain offenses required the judge to impose a definite sentence at the dispositional hearing).

Inasmuch as 100 to 150 parole hearings are often held in the course of a typical day (five or six hours of parole board hearing time), much of the information available to the parole board is seldom used. The inmate's prior criminal record is one such item that appears to be used very little in the decision-making process.

The inverse relationship between prior criminal involvement and severity of punishment can also be partially explained by the policy of paroling

inmates early who have detainers filed against them. Such inmates often have more extensive records than their counterparts, thus accounting for the spurious inverse relationship between prior criminal involvement and severity of punishment.

The author's field observation revealed that if a parole board member called to the attention of other board members that the inmate whose case was being considered had a lengthy record, the inmate might well be denied parole on that ground. On the other hand, if a parole board member indicated the inmate had a detainer filed against him, the fact that he had a lengthy record, even if noticed, was generally considered irrelevant, and a parole to the detainer was usually granted. An example of the latter case is given below:

The inmate, a former resident of New York, had been sentenced to serve ten to twenty-five years in prison. This thirty-seven year old inmate had recently been granted clemency and had his minimum reduced to three years which was the exact amount of time he had served. He had a long crim-

inal record, thirty-two previous arrests (eighteen for felonies), and this was his third time in prison. He admitted committing forty-three armed robberies in a three month period prior to this arrest, conviction, and incarceration. Seven of these robberies were committed in \_\_\_\_\_(state) and, before being arrested, he had been in a gun battle with the police, seriously wounding an officer. New York and Wisconsin both had filed detainers against him for armed robberies he had admitted committing prior to his arrest in \_\_\_\_\_(state). He had received seven disciplinary reports in the three years he had been incarcerated and had twice attempted to escape from prison. The board voted to parole and discharge him to either one of the detainers.

In the case illustrated above, the researcher inquired as to the possibility of the inmate "beating" the armed robbery charges, now three or four years old, for which the inmate had not yet been tried. A member of the board responded: "Oh, well, he'll be their problem then and not ours. There's no need for us to keep paying his room and board if New York or Wisconsin will."

#### INSTITUTIONAL FACTOR

*Disciplinary Reports:* The number of disciplinary reports an inmate received was directly related to the severity of punishment ( $r = .24$ ). Those inmates receiving the most disciplinary reports were incarcerated the longest, even when the legal seriousness of the crime and all other independent variables were controlled ( $\beta = .18$ ). Disciplinary reports have a much stronger relationship with the severity of punishment than does an inmate's institutional adjustment.<sup>17</sup> The number of disciplinary reports an individual has received is already quantified for the parole board members' use, so that the condensed and more readily comprehensible information on disciplinary reports is more often relied upon for information concerning an inmate's "rehabilitation" than is his institutional adjustment. Parole board members also assume that inmates who receive disciplinary reports in prison are much more likely to get into trouble on the outside, and thus need more time to prepare for release. The partial regression coefficient ( $b = 3.37$ ) indicates that where two inmates are similar in all relevant characteristics

(legal, institutional and social-biographical), save for the fact that one had one more disciplinary report than the other, the punishment of the inmate having one more disciplinary report would predictably be nearly three and one-half months longer.

*Institutional Adjustment:* The data indicate that inmates who have good institutional adjustment receive more severe punishment than those with poor adjustment when the legal seriousness of the crime and all other independent variables are controlled ( $\beta = .05$ ). This relationship, while not statistically significant, is nevertheless rather surprising.

Even more surprising is the author's observation that inmates who are denied parole are often encouraged by parole board members to join institutional programs in order to attempt to better themselves. In fact, in interviews with the five members of one parole board, three indicated that an inmate's institutional adjustment was the next most important factor (after the seriousness of the crime) in determining whether parole should be granted. Despite such beliefs, the very manner in which decisions are made may explain why parole board members accept the ability of an inmate to avoid disciplinary reports as the best indicator of institutional behavior.

Because of the extensive workload, the parole boards generally spend very little time per case. In an effort to adequately gauge the decision time spent per case, the author spent one day recording the amount of time the board spent discussing or examining material before reaching a decision on each case. The medium time per case was eight seconds.<sup>18</sup> The time allocated to decision-making perhaps gives some indication why variables such as an inmate's institutional adjustment and prior criminal record, both of which are not quantified and which, therefore, require some time and effort to assess, have little effect on the predicted severity of punishment.

#### SOCIAL-BIOGRAPHICAL FACTOR

*Age:* The parole board punishes older offenders more severely than younger offenders ( $r = .59$

<sup>17</sup> This statement is based on the standardized regression coefficients for the two variables, controlling for all other independent variables. The Beta for disciplinary reports was .18, while the Beta for institutional adjustment was only .05.

<sup>18</sup> Parole board members are to have read and taken notes on the cases before the hearing. Thus, the eight seconds is hopefully not representative of the time devoted to each case. It does perhaps indicate that when there is disagreement, the most readily available information will be used to expedite the procedure. The range for this day was from zero to fifty-five minutes.

and  $\beta = .31$ ). The partial regression coefficient indicates that where two inmates are alike in all characteristics considered except that one is ten years older than the other, the punishment of the older inmate will be approximately sixteen months longer ( $10 \times 1.58$ ). Parole board members often viewed young offenders as being immature and as simply having made a mistake. Older offenders were generally assumed to have more control over their behavior, and, consequently, to require more extensive treatment (punishment) before being released.<sup>19</sup>

**Education:** Inmates who had completed more schooling were granted parole earlier than those with less education ( $r = -.27$ ). For example, inmates with six years or less schooling received on the average seventy-nine months punishment, while those with thirteen years or more schooling averaged only sixteen months punishment. Parole board members often counseled inmates that "... someone with your education should be able to make a good living and stay out of trouble." However, statistical analysis showed that variation in education had an insignificant effect on predicted severity of punishment when other variables were controlled ( $\beta = .00$ ).

**Intelligence Quotient:** Inmates with higher I.Q.'s were granted parole sooner than those with lower I.Q.'s ( $r = -.16$ ). Offenders with I.Q.'s between 53-89 received on the average fifty-nine months of incarceration. Those with I.Q.'s between 90-109 averaged forty-six months of incarceration. Those with I.Q.'s above 110 averaged only thirty-three months of incarceration. Again, the parole board indicated many times that an inmate with an I.Q. "that high" should be able to stay out of trouble. However, when other variables are controlled, the relationship between I.Q. and punishment is statistically insignificant ( $\beta = -.02$ ).

**Marital Status:** Inmates who were married were granted parole sooner than those with broken

marital ties. The latter, in turn, were paroled sooner than were single inmates.<sup>20</sup> This relationship was statistically significant after controlling for the seriousness of the crime and all other independent variables ( $\beta = .08$ ). The parole board often indicated that marital ties could be considered a stabilizing factor in helping a man stay out of prison, because those with marital ties could be expected to receive more support when released. The partial regression coefficient indicates that where two inmates are alike in all characteristics considered except that one is married and one is single, the punishment of the single inmate will be approximately fourteen months longer ( $2 \times 7.15 = 14.3$  months).

**Race:** The initial analysis of the data gathered from the summary reports indicated that blacks were punished more severely than whites ( $r = .13$ ). Blacks averaged sixty months of punishment, compared to forty-three months for whites. However, when the seriousness of the crime and other independent variables are controlled, this relationship is reversed (with whites receiving slightly, although not statistically, significantly more severe punishment than non-whites). The partial regression coefficient ( $b = -.54$ ) indicates whites are punished approximately one-half month more on the average than are blacks.

There are a number of possible explanations for this most unexpected finding concerning punishment and race. First, the presence of a black on each of the parole boards may have inhibited the white members from discriminating against blacks in granting paroles. A second possible explanation is that members of the majority group tolerate nonconformity by members of a minority as long as such nonconformity is primarily limited to the victimization of other minority group members. A third plausible explanation is that race is simply not a consideration in the parole board's decision-making. Still another possible explanation is that black inmates derive power from the growth of powerful civil rights groups, as well as receiving other organized political support unavailable to white inmates. Most important, however, is simply the fact that blacks are not being discriminated against by parole boards in their decision-making.<sup>21</sup>

<sup>20</sup> Two sets of dummy variables were used to calculate the partial regression coefficient for marital status.

<sup>19</sup> This finding was completely unexpected, not only in light of conflict theory predictions, but perhaps even more so because of the consistent finding that younger offenders are more likely to recidivate than older offenders. See D. GLASER & V. O'LEARY, *PERSONAL CHARACTERISTICS AND PAROLE OUTCOME* (1966); England, *A Study of Post-Probation Recidivism Among Five Hundred Federal Offenders*, 19 *FED. PROBATION* 11 (1965). Glaser and O'Leary argue that perhaps the most established piece of statistical knowledge about criminals is that the older a man is when released from prison, the less likely he is to be rearrested. Assuming that the likelihood of rearrest is a crucial consideration in parole decisions, the relationship found in this research is rather surprising.

<sup>21</sup> Other researchers have recently found other social control agencies which also do not discriminate on the basis of race in their handling of offenders. See A. Reiss, *Police Brutality—Answers to Key Questions*, in *THE AMBIVALENT FORCE: PERSPECTIVES ON THE*



*Residence:* Although nonresidents were found to be punished more severely than residents of the state, the relationship was not statistically significant ( $r = .02$ ), and when other independent variables are controlled, it completely vanishes ( $\beta = .00$ ). This relationship would probably have been significant and certainly much stronger if comparisons had been made exclusively for residents and nonresidents not being paroled to detainer. Inmates who had detainers filed against them were generally paroled early and discharged to the detainer, which absolves the paroling state from any parole supervision responsibility. Inmates who had detainers filed against them were most often nonresidents. Nonresidents who had not had a detainer filed against them were generally released later than residents. Parole board members expressed the opinion that nonresidents, if paroled to another state, were more expensive to return to prison if they did violate parole, and, if paroled within the state (incarcerated in), were more likely to abscond from parole. Thus, the apparent policy was to hold nonresidents in prison longer (unless they had a detainer filed against them), until they were "better prepared" for release, than was generally required for resident inmates.

*Sex:* Women are punished much less severely than are men ( $r = -.16$  and  $\beta = -.17$ ). Women on the average were punished eighteen months, compared to fifty-one months for men. The partial regression coefficient ( $b = -33.91$ ) indicates that when controlling for all other independent variables, the predicted severity of punishment for women would be thirty-four months less than for men.

It appears that a basic part of American ideology is that females should receive more consideration by legal norm enforcers than males. Prior research has indicated that females receive more lenient treatment than do males at the hands of both the police and the courts.<sup>22</sup>

POLICE (A. Niederhoffer & A. S. Blumberg eds. 1970); Green, *Sentencing Practices of Criminal Court Judges in Philadelphia*, 22 AM. J. CORR. 35 (1960). It appears, in fact, that the majority of research conducted prior to 1960 reports blacks receiving more harsh treatment than whites, while the majority of research since 1960 reports no significant differences in the handling of offenders on the basis of race. For a review of this research, see Scott, *supra* note 12, at 23-41.

<sup>22</sup> See Doleschal, *The Female Offender: A Guide to Published Materials*, 6 CRIME & DELINQUENCY 639 (1970). See also the entire issue of 8 ISSUES IN CRIMINOLOGY 1 (1973), devoted to women, crime and crimi-

*Socioeconomic Status:* Inmates with higher SES received more lenient treatment (punishment) than those with lower SES ( $r = -.01$ ). Parole board members often expressed concern with the ability of inmates to stay out of trouble when paroled, and apparently assumed that those who had better jobs would encounter fewer problems. Therefore, those who indicated prior experience with more prestigious occupations were granted parole earlier, even when all other independent variables were controlled ( $\beta = -.10$ ). The partial regression coefficient indicates that when all other variables are considered, a unit change in SES (Hollingshead's Scale) will affect the predicted severity of punishment approximately six months ( $b = -5.85$ ).

#### ANALYZING DATA CATEGORIZED AS SETS

When the variables categorized as legal, social-biographical and institutional are treated as sets and examined with regards to their independent ability to explain or account for the variation in punishment, the legal set is by far the most significant. The legal set accounts for 70 per cent of the variation in punishment ( $R = 0.8386$ ,  $R^2 = 0.7032$ ). The social-biographical, taken separately, accounts for approximately 45 per cent of the variation ( $R = 0.6735$ ,  $R^2 = 0.4536$ ). The institutional set independently accounts for only 8 per cent of that variation ( $R = 0.2754$ ,  $R^2 = 0.0758$ ).<sup>23</sup> Only an additional 9 per cent of the variation in the severity of punishment can be accounted for when using all eight social-biographical variables and both institutional variables after the two legal variables have explained all the variation they can.

Looking at the variables which comprise each of the three factors individually, one notes that very few of the variables are significant in the direction expected. Of the two variables comprising the legal factor, only the legal seriousness of the crime is statistically significant, as ex-

nology. For a review of numerous earlier empirical studies, see Scott, *supra* note 12, at 22, 40.

<sup>23</sup> In analyzing data categorized as sets, one simply takes the entire variation of the dependent variable (punishment) and allows one set to explain all it can separately. Then, using the entire variation again, one allows the next set to explain all it can, etc. Thus, the percentage of variation explained may be greater than 100 per cent due to the fact that some of the same variation in the dependent variable is being accounted for by each data set, indicating perhaps some multicollinearity.

pected. Although prior criminal involvement is also statistically significant when all other variables are controlled, it is in the opposite direction, as expected (*i.e.*, those with the most extensive records receiving the least punishment). Only one of the two variables comprising the institutional factor is also significant (*i.e.*, as the number of disciplinary reports that an inmate receives goes up, so does the punishment he receives). An inmate's over-all institutional adjustment is related in the opposite direction, as expected, with punishment. The data indicate that when all variables are controlled, those inmates behaving the best while incarcerated are punished the most.

One finds little support for conflict theory predictions when examining individually the eight variables which comprise the socio-biographical factor. Conflict theory predicts that those with the least power, and those most unlike rule-makers, will be sanctioned most severely.<sup>24</sup> Only an inmate's marital status and socioeconomic status are related with punishment in a statistically significant manner, as conflict theory predicts. Of the remaining socio-biographical variables, only I.Q. is related with punishment, as predicted (although the relationship in this case is not statistically significant), when other variables are controlled. Age and sex are statistically significantly related with punishment in the direction opposite to that which conflict theory predicts (*i.e.*, older offenders are punished more severely as are men). Perhaps the major point to emphasize is that parole board decision-making appears to be based almost exclusively on one legal criterion, the seriousness of the crime, rather than on an inmate's institutional adjustment, or on an inmate's socio-biographical characteristics.

### DISCUSSION

The positivists' ideology that an inmate should be sentenced to prison until he is rehabilitated, *i.e.*, "ready" to return to society, would appear still far removed from realization. Particularly is this the case in light of the fact that an inmate's personal social-biographical characteristics are substantially better predictors of the punishment he will receive than is his entire institutional adjustment, cooperation, participation or the prison's overall evaluation of his rehabilitation. Perhaps what should be seriously questioned at this point

is the present usefulness of either indefinite sentences and/or of parole boards.

As indicated earlier, the extent of the parole boards' discretion has apparently increased concomitantly with the apparent shift in the ideology of the criminal justice system from an almost exclusively "retributive" basis to a more "retributive-reformative" approach. This change in ideology has resulted in more frequent use of the indefinite or indeterminate sentence. The increased usage of the indefinite or indeterminate type of sentences by the various states has transferred the primary responsibility of determining the proper length of incarceration for each defendant from the judiciary to the parole board. This broad power was conferred on the parole board in order to implement the "reformative" approach to corrections. The idea was for an agency or board to periodically review each inmate's case and release him at the optimum time for him to adjust and function adequately in society. The theory was that the judge, schooled in law and not in human behavior, would not be as well-qualified to determine how much treatment (punishment) specific inmates needed. Similarly, it would be difficult to predict in advance how offenders would respond to the various treatment programs provided. A solution to both of these problems was to create parole boards, composed of citizens trained in understanding human behavior, which would determine, on the basis of the offender's response to institutional treatment, his degree of readiness to return to society.

The data analyzed from one Midwestern state's prisons certainly do not demonstrate that parole boards function in the manner expected. The data suggest that parole boards base their decisions basically on one legal criterion—the legal seriousness of the crime. The variables which parole boards might use in determining the offender's adjustment and improvement while incarcerated either are not provided for their use, or, if provided, appear to be utilized very little in determining when an inmate should be released.

The parole board does not appear to be fulfilling any function that the courts could not better handle themselves, with the possible exception of keeping inmates imprisoned for shorter periods than otherwise might be the case. Whether they are even serving this function is open to question.<sup>25</sup>

<sup>24</sup> For a system of formal propositions developed around conflict theory and its application to criminology and criminological research, see Turk, *Conflict and Criminality*, 31 *AM. SOCIOLOGICAL REV.* 338 (1966).

<sup>25</sup> See Glaser, *Correction of Adult Offenders in the Community*, in *PRISONERS IN AMERICA* (L. Ohlin ed. 1973).

The innumerable parole board decisions have lacked judicial safeguards, and in addition, have not been subject to public scrutiny. Inasmuch as one of the reasons often given for prison riots is the poor and unjust parole policies,<sup>26</sup> the entire parole concept should be re-examined at this time.<sup>27</sup> If parole boards are not acting or functioning on any basis other than that available for the judiciary, it seems rather redundant, expensive and ridiculous simply to append one more agency making decision with real consequences for individual lives.

As was recently pointed out in a policy statement by the National Council on Crime and Delinquency:

... the prisoner, comparing his case to that of others who were granted parole, may see the denial as a capricious decision. He is often at a loss to understand what he has done wrong or how he can improve his performance. Parole board silence compounds his cynicism and his hostility to authority.

At the very least, unexplained parole denials obstruct rehabilitation yet they are quite common in many state and local jurisdictions.<sup>28</sup>

Given the manner in which parole boards operate, other alternatives should certainly be considered for deciding when offenders should be released. Several have been suggested, including strict administrative guidelines for parole decision-

making.<sup>29</sup> This would require parole boards to follow strict rules and regulations in making decisions and possibly grant certain rights to inmates previously unavailable, e.g., the right to examine records for their accuracy upon which decisions are based, or the right to appeal or have the decision reviewed.<sup>30</sup> Others have suggested the utilization of an independent ombudsman to intervene when injustices are observed.<sup>31</sup> Still another alternative would be to simply return the punishing power strictly to the courts.<sup>32</sup> The courts could then determine the punishment a particular offender should receive, either by returning to the utilization of more definite type sentences, or by utilizing indefinite type sentences with specific rules and

<sup>29</sup> See Palmer, *A Preliminary Inquiry Into the Exercise of Correctional Discretion*, presented at the 1973 Annual Meeting of the American Society of Criminology, New York, November 4, 1973.

<sup>30</sup> Several district courts have recently intervened and imposed procedural safeguards on prison disciplinary hearings: See *Clutchetts v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Morris v. Travisono*, 310 F. Supp. 857 (D. R.I. 1970). For an excellent review of judicial intervention in prison discipline and, in particular, the impact of the Morris case in Rhode Island, see Harvard Center For Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L.C. & P.S. 200 (1972).

<sup>31</sup> See T. FITZHARRIS, *THE DESIRABILITY OF A CORRECTIONAL OMBUDSMAN* (1973); Badillo, *The Need For an Ombudsman*, 38 SOCIAL ACTION 24 (1972).

<sup>32</sup> See Mueller, *Correctional Law: Inmates' Rights: Legal Criteria, Reforms, and Futures* (Columbus, Ohio, Program for the Study of Crime and Delinquency, 1971: available in photocopied typescript). See also Mueller, *Punishment, Corrections and the Law*, 45 NEBRASKA L. REV. 58 (1966). It is certainly not illogical for the judiciary to take the initiative in determining when an offender should be released. However, it is not to be expected that the judge who sentenced an offender to prison is to check on him daily. A viable alternative would be an institutional judge—one whose court room and facilities would be located at each penal institution. This judge would receive complaints by inmates with respect to anything that should come to judicial attention. He would be in charge of reviewing writs of habeas corpus and requests for writs of mandamus which "flow" from our institutions today. An institutionally based judge would also handle inmates' civil problems which require adjudication, such as divorces, or child custody cases, and he could also perform marriages. In addition, he would have the authority to review inmates' sentences, and he could, if necessary, by judicial order, receive all relevant information concerning each inmate and his institutional adjustment. Such procedures would, at the very least, provide inmates additional legal rights.

The idea of having institutionally based judges is not new. Several European countries have already initiated such procedures. Such a plan is a viable alternative to the present system, which is apparently not working as expected or as desired. The use of institutional judges may provide the dignity and the concern our prisons have repeatedly demanded.

<sup>26</sup> Address by R. Wilsnack and L. Ohlin, *Preconditions for Major Prison Disturbances*, presented at the American Sociological Association annual meeting in New York, August, 1973. They reported that instability in correctional administration and the uncertainty it created was often a precondition for a major prison disturbance. The uncertainty of parole creates numerous problems and much anxiety for inmates. See Scott & Franklin, *Inmates' Evaluation of the Indeterminate Sentence*, J. CORR. ED. (1970). See also Garson, *The Disruption of Prison Administration: An Investigation of Alternative Theories of the Relationship Among Administrators, Reformers, and Involuntary Social Service Clients*, 6 LAW AND SOCIETY REV. 531 (1972); Mitford, *Kind and Usual Punishment in California*, 227 ATLANTIC MONTHLY 45 (1971).

<sup>27</sup> The courts are already doing this in several areas, having repudiated the "hands off" doctrine. They are apparently adopting a "balancing of interest" test, or a "least restrictive means" test. Behavioral scientists, it would seem, have an equal responsibility to contribute to this examination. In fact, in *Sostre v. McGinnis*, 442 F.2d 197 (2d Cir. 1971), the court indicated an unwillingness to interfere any further in prison administration because of the dearth of reliable, empirical studies on the subject of prison procedures.

<sup>28</sup> *Parole Decisions: A Policy Statement*, 19 CRIME AND DELINQUENCY 137 (1973).

regulations concerning eligibility for release from prison. This approach would at least provide "due process" to the releasing procedure, and would eliminate much of the uncertainty prevalent in prisons today.

If an inmate's institutional adjustment and development are not being used to determine the amount of punishment he needs, there would be little justification for the continued use of parole boards, and, for that matter, the continued utilization of indefinite or indeterminate type sentences. As Norval Morris recently demanded of various segments of the criminal justice system, "... practices must cease to rest on surmise and good intentions; they must be based on facts."<sup>33</sup> This is certainly applicable to parole boards. If they are not operating as expected, and not fulfilling some other unsurmised purpose, then their usefulness must be reconsidered. There is little justification for a social control agency to simply increase the

apprehension and uncertainty of offenders, unless they are providing some legitimate social function.

Research has already indicated that there is little if any relationship between institutional adjustment and recidivism.<sup>34</sup> Therefore, the continued use of parole boards and indefinite type sentences, on the assumption that parole boards can better determine than a judge when an inmate is "ready" for release, appears to be based possibly on a false assumption at the outset.

Certainly, additional research is needed on parole board decision-making. If parole boards in other states are basing their decisions almost exclusively on the legal seriousness of the crime, as the parole boards are in the Midwestern state studied, this will certainly be added justification for seeking other alternatives to utilize in determining offenders' "proper" length of incarceration.

<sup>34</sup> D. GLASER, *THE EFFECTIVENESS OF PRISON AND PAROLE SYSTEM* 293-98 (1964); S. Miller, *Post-Institutional Adjustment of 433 Consecutive TICO Releases, 1971* (unpublished Ph.D. dissertation in Department of Sociology, Ohio State University).

<sup>33</sup> Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 638 (1966).