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Parole Release Decisionmaking and the Sentencing Process

Jon O. Newman

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# Project

## Parole Release Decisionmaking

and the Sentencing Process*

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The *Journal* appreciates the generous cooperation of the United States Board of Parole and of 109 anonymous federal prisoners in permitting observation of parole release hearings. The *Journal* also thanks the federal district judges who shared their views with the Project authors by responding to questionnaires or consenting to anonymous interviews.
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Foreword

Jon O. Newman†

On November 11, 1944, a general court-martial of nine members imposed a sentence of death upon Private Eddie Slovik, the only American serviceman executed for desertion since 1864. That fateful judgment was reviewed by numerous levels of military command that were authorized to exercise clemency. None did. Long after Private Slovik’s death, the presiding officer of the original court-martial was asked about the sentencing decision. His reply captured a horrifying aspect that pervades sentencing in America: No member of the court-martial believed the sentence would be carried out.*

Out of humanitarian concerns to provide ample opportunity to mitigate the harshness of the sentencing process have come administrative mechanisms for clemency. Chief among these is parole. Until recently scant attention has been paid to the operation of state and federal parole systems, and virtually no thought has been given to the effect of the parole system upon the sentencing decision. Many have decried the fact that American judges impose average sentences higher than those of any other Western country. Has anyone realized how often the judge imposes a long sentence on the assumption that parole will be accorded at the one-third point? Many have decried disparities among sentences imposed on seemingly similar offenders for similar offenses. Has anyone realized how frequently the different sentences simply reflect the different expectations of the sentencing judges as to what proportion of the sentence the offender will serve before being paroled?

American sentencing is afflicted with the Slovik syndrome: the expectation that the sentence will not be fully carried out. Of course few defendants will serve every day of the sentence imposed. Good time credits usually provide some discount and parole at some point is likely, at least for long sentences. But even as to long sentences judges frequently underestimate the time served before parole, and with sentences of less than three years, they would be surprised to learn how often parole is denied entirely.

The Project that follows provides what is urgently needed by judges

† United States District Judge and former United States Attorney, District of Connecticut.
and the public—a fund of valuable information concerning the opera-
tion of the parole system administered by the United States Board of
Parole. Only by understanding in detail how the system works can
judges rationally determine appropriate sentence lengths. Their sen-
tencing decisions are difficult to make at best. When they act in ig-
norance of the standards and practices that determine the extent to
which their sentences will be carried out, they unwittingly fall victim
to the syndrome that condemned Private Slovik.
Introduction

Sentencing and parole release decisions share responsibility for determining length of imprisonment. A decision to parole results in conditional release prior to the expiration of the maximum term; a denial results in continued imprisonment. Although parole release decisions have been regarded as virtually autonomous from sentencing per se, parole is an integral part of the sentencing and correctional process. The parole release decision is often more important than the sentence in determining how long prisoners actually spend incarcerated. Indeed, "when minimum sentences are short or are not given (as is presently the trend) parole selection is, in reality, more of a deferred sentencing decision (a decision of when to release) than a parole/no parole decision."

Release on parole has come to be essential to the administration of post-conviction justice. American prison sentences are, comparatively


6. In the federal system parole is the most common form of release from incarceration. In fiscal year 1970, 40 percent of all first-releases of federal prisoners serving sentences longer than six months were on parole. Hearings on Corrections, Federal and State Parole Systems Before Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong., 2d Sess., ser. 15, pt. 7-A, at 397 (Chart 6) (1972) [hereinafter cited as Hearings on Parole].

Prisoners may also be freed on supervision through "good time" or mandatory release. This accounted for 23.6 percent of first releases. Id. Mandatory release is a matter of statutory right for prisoners who, through observance of institutional rules and participation in special work projects, earn and retain good time. 18 U.S.C. § 4163 (1970). Although persons mandatorily released are subject to supervision, conditions and revocation of their
reasons for parole or for failure to make a parole decision. The fact that we... believe there is some element in every... [offender]... which renders him redeemable gives rise to the need of a service like parole....

Parole is the service that aids the released prisoner to bridge the gap between the relatively abnormal environment of the prison and the environment of the community....[But] parole [also] provides a period in the life of the offender when he can be removed from society as soon as he shows indications of dangerous behavior without waiting until he commits a new crime....


10. Kastenmeier & Eglit, supra note 1, at 503.

with unstructured discretion; even those minimal due process safeguards required when earned “good time” is forfeited in disciplinary proceedings, or when parole is revoked after the inmate has been conditionally released, have not been applied to the parole release decision. The apparent arbitrariness of parole release decisionmaking has been much criticized, especially as the parole process has been shown to be ineffective in rehabilitating inmates and reducing crime.

This unsupervised freedom and immunity from judicial or administrative review has also left parole boards free to develop innovative techniques and standards for decisionmaking. Although few parole boards have taken advantage of this opportunity, the United States Board of Parole is now the exception to this general pattern. The Board has implemented major changes in response to prior criticism of their unstructured and unreviewable exercise of discretionary power. Among these innovations are improvements in the parole release hearing and the introduction of an explicit, detailed Guideline Table that determines in most cases how long an inmate must serve prior to release. Many state jurisdictions may soon follow the federal lead.

This Project analyzes the innovations adopted by the Parole Board. Part I details the basic features of the federal parole system and criticisms of past procedures. The actual operation of the Board’s recent reforms in the parole hearing is evaluated on the basis of empirical observations. Part II considers the minimum constitutional and statutory procedural requirements applicable to parole release hearings, and then suggests those procedures that are best designed to in-

15. Compare Brancato, Diagnostic Techniques in Aid of Sentencing, 23 Law & Contemporary Prob. 442, 456-60 (1958); Giardini, supra note 9; and Hayner, supra note 1, at 493-94; with Kastenmeier & Eglit, supra note 1, at 494-510.
17. Interview with P. Hoffman, Research Criminologist, U.S. Bd. of Parole, Nov. 11, 1974, in New Haven, Conn. An NCCD “follow-up” project, directed by D. Gottfredson and L. Wilkins and funded by the Justice Department's Law Enforcement Assistance Administration, inquired, by letter, whether any state parole systems would be interested in assistance in adopting criteria similar to the federal Guidelines. Over 30 parole systems responded that they were definitely interested in adopting guidelines modeled on the federal system. Id.
18. The empirical focus of this Project is on the federal system of parole and, where relevant, sentencing. However, many of the implications, conclusions and recommendations may be useful for various state parole systems.
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sure fairness and accuracy in the parole decision. Part III examines the legality of the Parole Guidelines' substantive criteria for decision-making. Part IV discusses the implications of present parole release decisionmaking for the sentencing process and for the larger criminal justice system. In particular, judicial beliefs and attitudes about parole and sentencing are explored on the basis of a questionnaire survey of sentencing judges. Part V summarizes the Project's recommendations and conclusions.

I. Parole Release Decisionmaking

A. The United States Board of Parole

The United States Board of Parole, an independent agency located in the Department of Justice, is composed of eight members appointed by the President with the advice and consent of the Senate. The members, one of whom is designated as chairman by the Attorney General, serve staggered terms of six years. By statute, the Board has the responsibility for making federal parole release decisions, setting the conditions of that release, issuing warrants for the arrest of parolees who have allegedly violated the conditions of their release, and determining whether release conditions have in fact been violated and, if so, whether parole should be revoked, modified, or continued. The Board has jurisdiction over all eligible federal offenders, regardless of where the sentence is served.


21. 18 U.S.C. § 4203 (1970), as amended, (Supp. II, 1972); 28 C.F.R. §§ 0.125(a), (e), 0.127(b)(5), 2.18 (1974); see id. §§ 0.129-2, 2.23 (delegation of authority to hearing examiners).


23. 18 U.S.C. § 4203 (1970); 28 C.F.R. §§ 0.125(c), 0.127(b)(7) (1974); see id. §§ 2.49-2.53.

24. 18 U.S.C. § 4207 (1970); see 28 C.F.R. §§ 0.125(a), (d), 0.127(b)(5) (1974); see id. §§ 2.54-2.56.


26. 18 U.S.C. § 4202 (1970). In 1948, this section was amended to include adult offenders serving federal sentences but not incarcerated in a federal institution. Act of June
on parole are subject to Board supervision, as are those individuals "mandatorily released" as a result of accumulated "good time."

B. Parole Eligibility

Under the federal sentencing scheme, the judge chooses among several types of sentences for adult offenders and thereby determines parole eligibility. Under the statutory provisions of the "Regular Adult" sentence, the most commonly used of these alternatives, an inmate becomes eligible for parole only after serving one-third of his or her full sentence. Alternatively, the judge may impose an "(a)(2)" sentence, in which case the prisoner becomes eligible for parole at the Parole Board's discretion; under present Board rules, such a prisoner is immediately eligible for release without serving any mandatory initial period. Finally, under the "(a)(1)" provision the judge may set a minimum eligibility date at any point earlier than one-third of the maximum imposed. Eligibility for parole consideration under each alternative requires observance of institutional rules and completion of any minimum incarceration period required by the sentence.

Federal judges may also commit eligible adult offenders pursuant to the criminal provisions of the Narcotic Addict Rehabilitation Act of 1966 (NARA), in which case the offenders are by statute auto-

31. 28 C.F.R. § 2.3 (1974); U.S. Bd. of Parole, You and the Parole Board 1 (1971); see Garafola v. Benson, 505 F.2d 1212, 1215 (7th Cir. 1974). Immediate eligibility for parole also attaches to every sentence under the National Firearms Act, 18 U.S.C. § 924(a) (1970); 28 C.F.R. § 2.7 (1974).
34. Id. §§ 4251-54. Before committing an offender under the Narcotic Addict Rehabilitation Act (NARA) the court must find that he or she is an "eligible offender" as defined

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matically eligible for parole after six months of institutional treatment. Certain younger offenders may be sentenced under special statutes which provide for immediate parole eligibility.

Prior to the date tentatively scheduled for the initial parole hearing, an offender sentenced under the Regular Adult, (a)(1), or (a)(2) provisions, must either apply for parole or waive the right to a hearing. Inmates sentenced under the (a)(2) provision generally have their initial hearing within the first four months of confinement, while inmates sentenced under (a)(1) or Regular Adult alternatives have their initial hearing one or two months before their minimum eligibility date. NARA-committed offenders are not required to apply for parole, and generally receive initial hearings after serving six to seven months. Similarly, certain youth offenders need not request parole consideration.


18 U.S.C. § 4254 (1970). In addition, before the Board can parole NARA-committed offenders, the inmate must be “certified” by the Surgeon General, or his designated representative, as having made sufficient progress to warrant release. Id. The Attorney General, or his designated representative, may also report to the Board whether the individual should be released. See 28 C.F.R. § 2.6 (1974), as amended, 39 Fed. Reg. 45224 (1974).

Although an offender receives full credit for the examination period of § 4252, see note 34 supra, it does not count toward the six month minimum for parole eligibility.


37. A youthful offender sentenced to a six year term under 18 U.S.C. § 5010(b) (1970) must be conditionally released on or before the expiration of four years of his sentence, 28 C.F.R. § 2.40 (1974), and youthful offenders receiving terms of more than six years under § 5010(c) must be conditionally released under supervision not later than two years before the expiration of the term imposed by the court. Id. A court may sentence any offender younger than 26 under the YCA. 18 U.S.C. § 4209 (1970). See 28 C.F.R. § 2.11(c) (1974), as amended, 40 Fed. Reg. 3337 (1975).


Inmates on occasion waive their scheduled parole hearing date in order to remain eligible for parole and avoid any premature adverse judgment of their institutional adjustment. They can then improve their institutional record and request a parole hearing when they believe their chances of parole have increased.

39. See pp. 890-91 infra.

40. Observation of parole hearings (II a-m), at Danbury FCI, Aug. 1974. For an explanation of symbols used in connection with observations of parole hearings, see note 95 infra. NARA sentences receive their initial hearings after the statutorily required period of six months of treatment before release, 18 U.S.C. § 4254 (1970), and often not until they have been “certified” for release by the NARA institutional staff. Telephone Interview with P. Hoffman, Research Criminologist for the U.S. Bd. of Parole, Dec. 2, 1974. See 28 C.F.R. § 2.11(c) (1974), as amended, 40 Fed. Reg. 5357 (1975).


The failure to apply for parole may have consequences as to the applicability of § 6 of the Administrative Procedure Act, 5 U.S.C. § 555(e) (1970); see pp. 858-59 infra.
C. Previous Parole Decisionmaking

Prior to the implementation of the new procedures and policies adopted by the United States Board of Parole, all parole release decisions were made by members of the Board. Each hearing was conducted by a Board member or authorized hearing examiner, with the inmate and his or her institutional caseworker present.

Traditionally, the hearing stage of parole decisionmaking was thought to provide decisionmakers with an opportunity to speak with and observe the prospective parolee, to search for such intuitive signs of rehabilitation as repentance, willingness to accept responsibility, and self-understanding. Parole decisions were not based on formally articulated criteria or policies, but on the discretionary judgments of individual decisionmakers. The courts, to the extent that they were willing to review the parole decision at all, agreed with the Board that any attempt to impose even minimal due process constraints on the hearing or decisional process would unnecessarily interfere with fulfillment of its duty to engage in psychological diagnoses and prognoses:

[T]he Board has an identity of interest with [the inmate] . . . . It is seeking to encourage and foster his rehabilitation and readjustment to society . . . . In making this determination the Board is not restricted by rules of evidence developed for the purpose of determining legal or factual issues. It must consider

42. When hearing examiners were first used, they were empowered to conduct parole hearings and prepare a summary of their findings which included a recommendation to the Board relating to parole. They could not, however, "vote" on any case. See (1968-70) U.S. Bd. of Parole, Biennial Rep. [hereinafter cited as (1968-70) BOARD REPORT]. See generally Johnson, Federal Parole Procedures, 25 AD. L. REV. 499 (1973) [hereinafter cited as Procedures]; Comment, Parole: A New Approach, 18 LOYOLA N.O. L. REV. 87, 93-94 (1972); note 90 infra.


44. In the past the United States Board of Parole has spoken with pride of the absence of specific criteria for its own decisionmaking and its related inability to give reasons for its decisions. Gaylin, No Exit, HARPER'S MAG., Nov. 1971, at 86, 88-89. However, the Board, as well as other parole boards, has in fact relied upon certain specific policies and criteria. For example, the United States Board of Parole at one time had a policy of granting early paroles to draft resisters who were Jehovah's Witnesses. Parsons-Lewis, supra note 14, at 1528. The California Adult Authority has issued a general statement of policy priorities that rates, for example, the "protection of the public" as the first priority and "rehabilitating the offender" as the fourth priority; this statement also declares that "any doubts...are to be resolved by continued incarceration to protect the public." Cal. Adult Authority, Policy Statement No. 24, Mar. 1973.

45. See, e.g., Tarlton v. Clark, 441 F.2d 384, 385 (5th Cir.), cert. denied, 403 U.S. 934 (1971) ("it is not the function of the courts to review the discretion of the Board in the denial of application for parole"); Hyser v. Reed, 310 F.2d 223 (D.C. Cir.) (en banc), cert. denied, 375 U.S. 957 (1963); TASK FORCE REPORT: CORRECTIONS, supra note 1, at 85; pp. 842-44 infra.
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many factors of a non-legal nature [such as] medicine, psychiatry, criminology . . . psychology and human relations.46

Thus, counsel or other personal representation for the inmate was not permitted, information being considered was not revealed, and written findings or reasons were not given.47 Hearings were commonly short and incomprehensible to the prisoner.48

At the conclusion of the hearing the examiner or member prepared a case summary to be mailed to the Board’s offices in Washington, D.C. The other Board members, without discussion, then reviewed the summary and voted on the case. The Board’s final order was based on an agreement of two members out of a voting quorum of three.49 The Board did not give reasons for any of its decisions,50 and prisoners were “left in a total state of uncertainty.”51 The inmate was merely to appear, to be scrutinized, to answer the questions put and ask no others, and to assume the attitude he or she believed best indicated “readiness” for parole.52 Under this procedure inmates usually had to wait two to three months before learning the outcome of their parole hearing, and they had no avenue of administrative appeal.53

These practices, similar to those of many state parole systems,54


47. Note, supra note 43. See generally K.C. Davis, supra note 14, at 126-33.

48. In 1970, the Parole Board’s eight members and eight hearing examiners conducted over 12,000 release hearings and reviewed 5,000 progress reports on the record. Hearings on Parole, supra note 6, at 378. Thus the 10 to 15 minute “hearings” conducted by the Board were more aptly described as “interviews.” Procedures, supra note 42, at 522. Ten-minute parole hearings remain typical in California. Comment, The California Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Law, 5 U. CAL. D.L. REV. 360, 372 (1972).

49. In selected proceedings the Board could establish a voting quorum of a larger number; U.S. Bd. of Parole, Rules 17 (1971).

50. Gaylin, supra note 44, at 88-89.

51. Hearings on Parole, supra note 6, at 597 (testimony of Sen. Goodell); Kastenmeier & Eglin, supra note 1, at 489. (“[P]arole epitomizes for most inmates a system of whim, caprice and uncertainty . . . .”)


54. Until very recently, the federal system in its secret procedures resembled the great majority of state parole systems. According to a state-by-state survey of parole decision-making completed in 1972, 40 parole boards did not record reasons for parole decisions; 31 did not make verbatim transcripts of their proceedings; 30 prohibited counsel at hearings, and 24 forbade the inmate to present witnesses. O’Leary & Nuffield, A National Survey of Parole Decision-making, 19 CRIME & DELINQ. 378, 386 (1973).
came under increasingly heavy criticism on two levels. The first concerned the procedural inadequacies of the process, including the lack of reasons, of speedy decisions, of representatives, and of an appellate process. Much of the confusion and frustration of the prospective parolee, it was thought, could be overcome by adopting procedural reforms. The second level of criticism was directed at the exercise of discretion within the decisionmaking process itself. Critics called for structuring discretion through articulated standards, or for eliminating discretion altogether.

D. The Present System

1. Substantive Criteria for Decisionmaking: The Guideline Table

The Board, first in an experimental “Pilot Project,” and ultimately in all five of its regions, has responded to these substantive criticisms by establishing “Guidelines for Decision-making” (the Guideline Table and the rules governing its use). The purpose of the Guidelines

55. See K.C. Davis, supra note 14, at 126-33; Gaylin, supra note 44; Administrative Conference Recommendations 72-5: Procedures of the United States Board of Parole, 25 Am. L. Rev. 551 (1973); Note, supra note 19.


57. Note, supra note 45, at 1032-36; Comment, supra note 56, at 431.


59. The adult Guideline Table is reproduced in the Appendix to this Project.


60. On June 5, 1974, a minor revision of all the rules was published, 39 Fed. Reg. 20628 (1974); 28 C.F.R. §§ 2.1-2.57 (1974). Federal district judges were not directly notified of the Board’s new procedures until August 1974. Letter from Judge Wollenburg (N.D. Cal.), Chairman of the Committee on the Administration of the Probation System, to “All federal district judges” (Aug. 1974) (a copy of the Board’s June 1974 regulations with an explanatory memorandum prepared by the Federal Judicial Center) (on file with the Yale Law Journal). In a survey of federal district judges conducted between June and September 1974 (see discussion in note 19 infra) 72 percent of those judges responding had prior knowledge of the use of the Guideline Table. However, only 2 percent learned of their use through the Federal Register and only 8 percent stated that they were notified by the Parole Board. Nineteen percent of those responding had received notification through the Administrative Office of the U.S. Courts. The same percentage (19 percent) had already presided over proceedings in their courts through which they learned of the use of the Guideline Table. See Project Survey of Sentencing Judges, questions 3, 4.

60. The Guideline Table was developed through the research of the National Council on Crime and Delinquency (NCCD) working in conjunction with the United States Board of Parole. See Gottfredson, Hoffman, Sigler & Wilkins, supra note 5.
is to provide a scientific and objective means of structuring and institutionalizing discretion in parole release decisionmaking. In so doing, the Guidelines also attempt to minimize the effects of sentencing disparity.

The Guideline Table consists of two basic indices on which inmates are scored: an "Offense Severity" index and a risk prediction or "Salient Factor" index. These two indices form the axes of a matrix: on the vertical axis inmates are placed into one of six severity groups according to their "offense behavior," while along the horizontal axis they are divided into four risk groups according to their Salient Factor Score. At the intersection of each severity and risk category, a range of months is listed. This range represents the amount of actual time to be served prior to the first release of an inmate with those offense and risk characteristics. By scoring and rating an inmate on the two indices, the hearing examiners determine the inmate's expected incarceration period. They will normally recommend a decision—parole, a continuance to a later hearing or report (a set-off), or imprisonment until the expiration of the sentence (continue to expiration, or CTE)—such that the total time actually served by the inmate at release will be within that expected range.

The Offense Severity Scale was derived by averaging the evaluations of Parole Board members and examiners of the seriousness, on a scale of one through six, of typical offense behaviors. Offense severity and risk prediction were chosen because the NCCD study found that Parole Board members' evaluations of those criteria had been most influential in past decisions. Research indicated that the Board's past decisions could have been "predicted" on the basis of the decisionmakers' evaluations of offense severity and parole prognosis, NCCD Supp. Rep. 9, supra note 5, at 5; P. Hoffman, supra note 59.

The six severity ratings are: Low, Low Moderate, Moderate, High, Very High, and Greatest. The four risk groups are: Very Good Parole Prognosis (Salient Factor Score of 9 to 11); Good (6 to 8); Fair (4 to 5); and Poor (0 to 3). The Guideline Table is reproduced in the Appendix to this Project. The "adult" Guidelines very closely resemble the Guideline Tables used for NARA and YCA sentencees. See 28 C.F.R. § 2.20, at 69-70 (1974). In apparent deference to the rehabilitation-treatment orientation of NARA and YCA, however, the time ranges to be served prior to release are lower under those Guidelines than under the adult standard; cf. Snyder v. United States Bd. of Parole, 383 F. Supp. 1153 (D. Colo. 1974); United States v. Norcome, 375 F. Supp. 270, 274-75 n.3 (D.D.C. 1974).

In calculating total time served for purposes of setting a release date, the Parole Board includes "jail time" served prior to conviction and/or sentencing for which the inmate would receive credit on his federal sentence, 28 C.F.R. § 2.20, at 69 (1974), even if the time was served in a nonfederal jail or other facility. See 18 U.S.C. § 3568 (1970).

Continuance to expiration results in imprisonment until the mandatory release date, see note 6 supra, unless the Board on its own motion modifies the order to allow another hearing. See 28 C.F.R. § 2.28 (1974).

The initial descriptions for the offense behaviors were developed from offenses contained in the California penal code with which the research team was more familiar, rather than the federal penal codes. NCCD Supp. Rep. 9, supra note 5, at
Rating reflects the Parole Board’s independent, subjective evaluation of the gravity of the inmate’s past criminal behavior. Classification on the severity scale is not based on the legal “offense of commitment” or on sentence length; rather, the Board makes its own determination of the inmate’s offense behavior, which it then rates relative to “offense behaviors . . . commonly seen by the parole board.”

The Salient Factor Score is designed to predict the likelihood that an inmate will succeed on parole. This score is measured by an 11-point Salient Factor Scale, which consists of nine weighted personal characteristics that were statistically determined to have high predictive power in discriminating between past groups of releasees who “succeeded” and “failed” after their release. All but two of the nine items are part of the inmate’s past criminal record and behavior; they are “static” and generally known to the judge at the time of sentencing. The items scored cannot reflect rehabilitative progress, because they bear little or no relation to the commitment offense, the amount of time the inmate has served, or the programs in which he or she has participated at the institution. The Salient Factor Score’s prediction of


69. No prediction device can make predictions about an individual inmate. Rather, the Salient Factor Scale classifies individuals by certain characteristics into large groups possessing similar characteristics, about which groups accurate predictions of the likely rate of success or failure can be made. P. Hoffman & J. Beck, Parole Decision-Making: A Salient Factor Score, Apr. 1974, at 15 (U.S. Bd. of Parole Res. Unit: Rep. 2) [hereinafter cited as Salient Factor Report]. For example, inmates with a Salient Factor Score of 6 to 8 belong to a risk group whose expected range of favorable outcomes is between 72 and 79 percent. Id. at 9. The Salient Factor Score does not enable the scorer to determine which individual inmates within a risk group will succeed, and which will be among those who fail. However, use of the Salient Factor Score to “predict” which inmates will succeed or fail will result in more “correct” predictions in the aggregate than would non-statistical predictions by trained personnel. See note 86 infra.

70. See note 311 infra.

71. Salient Factor Report, supra note 69, at 9; see note 311 infra.

72. The Salient Factors are: number of prior convictions, number of prior incarcerations, age at first commitment, whether the crime involved auto theft, prior negative experience on parole or probation, history of drug abuse, high school degree or equivalent, verified prior employment or full time school attendance for at least six months in last two years in community, and release plan to live with spouse (legal or common law) or children. Number of prior incarcerations and number of prior convictions may amount to two points each on the score; all other items equal one point. 28 C.F.R. § 2.20, at 73 (1974). Present age of the prisoner is not a factor on the Salient Factor Scale, even though it has been shown to be highly correlated with recidivism. See D. Glaser, The Effectiveness of a Prison and Parole System 36-37 (1964) (persons released from prison over 40 have markedly lower recidivism rates than similarly situated but younger releasees). The question whether the offender, if released, plans to live with his or her spouse or children cannot be finally determined at the time of sentencing, for the offender could become divorced or estranged, thereby losing one point, or could conceivably be married while incarcerated, thereby gaining one point. Whether an offender has a high school or general equivalency diploma (G.E.D.) can only be determined at sentencing if the answer is yes, for inmates normally have the opportunity to earn a G.E.D. while incarcerated.
success or failure is generally constant over time and usually does not change during the entire period of incarceration.

Neither the Offense Severity nor the Salient Factor Scale measures the inmate's rehabilitative progress or institutional adjustment. Neither alone nor together can these scales actually determine when to release an inmate. To derive the Guideline time ranges the research staff analyzed a retrospective sample of Parole Board decisions to develop average ranges of time actually served before parole by offenders with various combinations of severity and salient factor ratings. The Board then chose to base their future decisions on this table.

The Guideline Table now determines almost all first parole release decisions. There are, however, provisions for decisionmaking outside the Guideline time ranges. For instance, because Parole Board members objected to the complete elimination of rehabilitative considerations, the Guideline Table is said to be "predicated upon good institutional conduct and program performance." Unusually good or bad performance may "justify" a parole release decision earlier or later than the Guideline time indicated. A range of discretionary fac-

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73. Salient Factor Report, supra note 69, at 4.
74. The institutionalization of past Parole Board practices, reflected in the time ranges on the Guideline Table, is subject to semi-annual revision by Parole Board members on policy ground. Originally, this range was developed by researchers who found the median number of months actually served by a sample group of federal prisoners who had the respective pair of offense and offender characteristics and were released between August 1970, and June 1972. The Guideline range of months to be served was based on this median, but Parole Board members can and have made changes in the range based on their own beliefs that a given range was too short or too long, or based on feedback from hearing examiners' decisions showing that the median range of time actually served was moving higher or lower in the total range. D. Gottfredson, The Utilization of Experience in Parole Decision-Making: A Progress Report, June 1973, at 32 (NCCD Parole Decision-Making Project Summary); NCCD Supp. Rep. 9, supra note 5, at 17-18; cf. NCCD Supp. Rep. 13, supra note 67, at 27-28; 28 C.F.R. § 2.20(f) (1974).
75. Between October 1973, and March 1974, 91.7 percent of all decisions at initial parole hearings were within the Guidelines, while 4.5 percent were decisions above the Guidelines and 3.8 percent were decisions below the Guidelines. P. Hoffman & L. DeGostin, Parole Decision-Making: Structuring Discretion, June 1974, at 10, (U.S. Bd. of Parole Res. Unit: Rep. 5) [hereinafter cited as Structuring Discretion]. There is some dispute as to the meaning of these figures. If all cases are excluded that involve either minimum sentences greater than the Guideline range or maximum sentences or mandatory release dates below the Guideline range (cf. note 80 infra), then the percentage of decisions at initial hearings within the Guidelines is 88.4 percent with 5.3 percent below and 6.3 percent above.
76. The Board has emphasized that the Guidelines are only that, guidelines, and are not rigid rules amounting to an administrative minimum sentencing scheme. Battle v. Norton, 365 F. Supp. 925, 933 (D. Conn. 1973) (Affidavit of M. Sigler, Chairman, U.S. Bd. of Parole). According to the Board the Guidelines are designed to "structure discretion without removing it, and thus permit a more rational and consistent decisionmaking... [the Guidelines] merely specify the parameters of decisionmaking outside of which fairness demands specific justification." Structuring Discretion, supra note 75, at 6. See note 266 infra.
77. 28 C.F.R. § 2.20 n.5, at 70, 71, 73 (1974).
78. Id. § 2.20(c).
tors, such as mitigating or aggravating circumstances of the offense, may also justify decisions outside the Guidelines. Explicit decisions outside the Guidelines must be accompanied by special justification from the hearing panel that makes such a recommendation.

The Guideline Table thus represents two major departures in previous parole release decisionmaking. It establishes explicit criteria which, in most cases, determine the parole release date. And in its choice of criteria, it abandons any attempt to condition release upon rehabilitative factors.

The Board has quite properly abandoned the search for the "magic moment" for release based on rehabilitation that characterized parole release decisionmaking for 20 years. In so doing it has also implicitly relinquished any claim of expertise in predicting or assessing rehabilitation. Extensive social science research strongly suggests that rehabilitation—defined as an increasing likelihood of successful adjustment upon release—cannot be observed, detected or measured.

79. Other bases for decisions outside the Guidelines include a determination by the hearing panel that their clinical judgment indicates a risk different from that indicated by the Salient Factor Score; that the inmate has unusual health or emotional problems; that the inmate needs to complete specific programs; or that he or she is being paroled to deportation or to a state detainer to serve more time. Id. § 2.20(d), (e); Structuring Discretion, supra note 75, at 11; see 28 C.F.R. §§ 2.33-2.34 (1974).

80. 28 C.F.R. § 2.23(c) (1974). If, however, the decision of the panel results in actual time served above or below the Guidelines because of the sentence imposed by the court (maximum sentence below Guideline range; minimum sentence above Guideline range), the Board considers the decision to be within the Guidelines and does not require further justification. See note 75 supra.


[In general time served is unrelated to parole outcomes.... There is little evidence for the effectiveness of a myriad of prison programs thought to be rehabilitative.... Most information predictive of parole outcomes is known at the time of reception in prison.... To many informed persons, this suggests....that both the parole board and parole supervision should be abolished.

This assumes, however, that we have adequate knowledge that nothing works, when in fact our investment to discover what works and what does not work has been less than minimal....Less than 1 percent of funds for the criminal justice system have [sic] been aimed at decreasing our ignorance in this field.... Our ignorance....argues less for...abandonment than for a concerted, adequately funded effort to determine what procedures work for what offenders.

But even if treatment or rehabilitation could be effectively achieved and measured, it
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When inmates with similar backgrounds and past records are compared, neither institutional program participation and achievement, nor disciplinary record, nor the level and type of pre-incarceration or post-release supervision programs, have any measurable impact on the probability of successful rehabilitation, the rate of recidivism, or the likelihood of later parole success. Holding other factors constant, time served in an institution appears to have, if anything, a slightly negative effect on the inmate's chances for success once he or she is released. Nor do "expert" decisions by parole officers or psychologists appear any more accurate in discerning likely success than decisions by lay people. There simply is no way to know when "rehabilitation" has occurred in an individual. To conform to its statutory directive to release an inmate only when there is a "reasonable probability" that he or she will not violate the law, the Board quite would still raise difficult issues; see Note, Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients, 45 S. CAL. L. REV. 616 (1972).


84. See GLASER, supra note 72, at 302-04; I. KAUFMAN, PRISONS: THE JUDGES' DILEMMA (1973); MANNHEIM & WILKINS, supra note 82; Types of Error, supra note 82, at 6-8; V. O'Leary & J. Nuffield, The Organization of Parole Systems in the United States xxii-xxiii (NCCD, 2d ed. 1972); Bailey, Correctional Outcomes: An Evaluation of 100 Reports, 57 J. CRIM. L.C. & P.S. 153 (1966); Bixby, supra note 82; Frankel, Lawlessness in Sentencing, 31 U. CIN. L. REV. 1 (1972); Kastenmeier & Eglit, supra note 1; Robison & Smith, supra note 83; Hearings on Parole, supra note 6, at 224 (testimony of D. Gottfredson, criminological researcher).

85. See note 82 supra.

86. In one study, 10 parole officers and 10 laypersons were presented with full case files for 200 persons who had actually been released on parole, and of whom approximately one-half had been returned for violations. They were asked to predict parole success or failure, type of violation and timing of violation. Although parole officers did slightly better than laypersons in correctly predicting nonviolators, laypersons excelled in correctly predicting violators. The ability of both groups to predict nonviolators was less than the number of successful predictions that would be expected from random guessing. Hakeem, Prediction of Parole Outcomes from Summaries of Case Histories, 53 J. CRIM. L.C. & P.S. 145, 150 (1961). However, the parole officers may have been less accurate than usual because the "violation" or "failure" rate of 50 percent may have been higher than that to which they were accustomed. Similar findings were reported by researchers in the California Adult Authority system. Gottfredson, A Strategy for Study of Social Agency Effectiveness, Social Agency Effectiveness Study, NIMH Project, discussed in Grant, It's Time to Start Counting, 8 CRIME & DELINQ. 259, 262 (1962).

Surveys have indicated that in many areas of prediction—psychiatric prognoses, prediction of academic success and parole prognoses—statistical devices for the prediction of risk will make more correct predictions than those made by professionals in the field. P. MEERH, CLINICAL VERSUS STATISTICAL PREDICTION 90-98 (1954); B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 184-86 (1959); D. Gottfredson, Assessment and Prediction Methods in Crime and Delinquency, in U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 171-82 (1967) [hereinafter cited as Assessment and Prediction Methodol]; cf. Kastenmeier & Eglit, supra note 1, at 505 (parole board's claims to expertise would be enhanced by greater reliance on statistical data).

properly concerns itself primarily with the predictive, static factors of the Salient Factor Scale.\textsuperscript{88}

While the Guideline Table's method for reaching decisions is more rational than the Board's previous practices, its abandonment of rehabilitation as a primary goal of the parole system eliminates a major justification for the existence of the parole system as a second stage in the decision as to length of incarceration. In most cases, the Board's opportunity to observe institutional progress and rehabilitation—the only relevant information not available to the judge at sentencing—does not affect the release decision.

2. Procedures and Hearings under the Guidelines

The Board has also responded to the criticisms of its prior procedures.\textsuperscript{89} Parole Board members now serve in supervisory, appellate, and policy-setting roles, while panels of two hearing examiners conduct all parole hearings.\textsuperscript{90} Inmates appear before the panel and are given an opportunity to present a statement.\textsuperscript{91} They may also bring a representative into the hearing with them. The representative may be anyone of their choosing, including a lawyer, but the representative is restricted to making a short oral presentation and responding to questions, if any, from the hearing examiners.\textsuperscript{92} Official notifica-
tion of denial of parole is accompanied by reasons for that decision, and inmates may contest the denial through an internal, administrative appellate process.

In order to determine how the Guidelines and other new procedures were actually affecting the parole hearing itself, members of the Project staff obtained permission from the United States Board of Parole to observe parole hearings in various institutions in the Parole Board's Northeast Region, the first area in which the Parole Board introduced its innovations.

With the implementation of the federal Parole Board's new Guidelines for Decisionmaking, it might have been expected that hearings

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93. The inmate receives written notification within 15 working days. *Id.* § 2.13. Panel decisions are subject to review by the appropriate regional director. *Id.* §§ 2.23(b), (c), 2.24; see note 102 *infra*. For the history of the Board's decision to begin giving reasons, see [1970-72] BOARD REPORT, *infra* note 29, at 9.

94. Within 30 days of the official entry of decision the inmate may file a Level I appeal to the regional office. 28 C.F.R. § 2.25 (1974). If the first appeal is denied, a Level II appeal may be filed with the appellate board in Washington within 30 days of entry of the decision from the Level I appeal. *Id.* § 2.26. The appellate board consists of the chairman, vice chairman and at least one member of the full Board. *Id.* § 2.1(b).

95. *See* note 58 *infra*. When the empirical research for this Project was conducted, the U.S. Board of Parole was in the process of regionalizing and modifying parole release decisionmaking across the country. It was felt that little real understanding of the impact of the Guidelines would be derived from observing hearings in regions which were in a transition phase, and thus the study was limited to the Northeast Region where the Guidelines had been in use for over a year.

Hearings were observed at three of the five institutions in the Northeast Region: the Federal Penitentiary, Lewisburg, Pennsylvania; the Federal Correctional Institution, Danbury, Connecticut; and the Federal Reformatory for Women, Alderson, West Virginia. These institutions were chosen to reflect the three basic levels of security found in the federal system: Danbury, a medium security institution for men; Lewisburg, a maximum security institution for men; and Alderson, a minimum security institution for women. Members of the Project viewed 109 parole hearings and one "review of the record."

Table I summarizes the institution and type of hearings observed:

<table>
<thead>
<tr>
<th>Institution</th>
<th>Initial</th>
<th>Review</th>
<th>Rescission*</th>
<th>Revocation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lewisburg</td>
<td>34</td>
<td>16</td>
<td>1</td>
<td>2</td>
<td>53</td>
</tr>
<tr>
<td>Danbury</td>
<td>23</td>
<td>11*</td>
<td>1</td>
<td>3</td>
<td>37</td>
</tr>
<tr>
<td>Alderson</td>
<td>12</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>18</td>
</tr>
<tr>
<td>Total</td>
<td>69</td>
<td>30c</td>
<td>3</td>
<td>7</td>
<td>109</td>
</tr>
</tbody>
</table>

* "Rescission" hearings are explained in note 137 *infra*.

* Includes two court-ordered hearings.

* One "review on the record"—conducted in the form of an institutional review hearing at which the inmate's representative, but not the inmate, was present—was also observed.

* Includes three hearings ordered by the U.S. Board of Parole.

Each inmate was asked at the beginning of each hearing if he or she objected to the student observer's presence; no inmate did. In order to fulfill the observers' promise to both the Board and the inmates that the anonymity of all participants would be maintained, this Project, in referring to specific observations, identifies only the institution and month of each hearing; Project members are identified through assigned roman numerals, and specific hearings are identified through assigned lower case letters.


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would become predictable, routine proceedings designed to explore the information relevant to classification on the offense severity and risk scales. But the Guideline Table's radical departure in the substantive basis of decisionmaking has not prompted a similarly marked change in the hearing itself. Rather, the hearing under the Guidelines retains the broad scope and rehabilitative emphasis of earlier parole hearings. Indeed, observation of the hearing itself provides hardly a hint that the Guideline Table controls actual decisions.

This continuing emphasis on rehabilitative factors means that the parole hearing is poorly suited to decisionmaking under the Guidelines. Hearings, still conducted basically as interviews, often focus on factors rarely relevant to the ultimate decision under the Guideline Table. As a result, the primary criteria of decisionmaking are concealed, and substantial areas for discretionary judgment within the Guidelines are hidden. In short, the procedural reforms implemented by the Board are not as effective as they might be in protecting inmates' rights or promoting prompt, accurate and fair decisions by the hearing examiners.

The hearing process begins before the inmate enters the hearing room. At this time, the hearing examiner who will be conducting the hearing (the "primary" examiner) reviews the more extensive of two files on the inmate. If it is an initial hearing, the generally prepares

97. The first hearing an inmate receives, referred to as the initial hearing, is used primarily to determine his or her incarceration range under the Guideline Table by calculating the Salient Factor Score and rating the severity of offense behavior. Record at 27, Díaz v. Norton, 376 F. Supp. 112 (D. Conn. 1974) (testimony of P. Hoffman, Research Criminologist, U.S. Board of Parole).

All hearings conducted at the institution subsequent to the initial hearing are referred to as "Institutional Review Hearings." 28 C.F.R. § 2.14 (1974). Since the Guideline system is new, some "review" hearings have been conducted as "Guideline" initial hearings, if the inmate's initial hearing had been prior to the introduction of the Guidelines. Record at 27, supra. An additional mechanism for setting a date is the progress report, by which a hearing examiner panel, upon receipt from the institution of a report on the inmate's conduct, reviews "on the record" an application for parole. 28 C.F.R. § 2.14 (1974), as amended, 39 Fed. Reg. 45225 (1974). Reviews on the record, based on progress reports, are made in the following situations:

a. Cases receiving continuances of six months or less;

b. YCA or FJDA sentencees who receive continuances of two years or more receive progress reports and reviews on the record after completing 18 months of such set-off; and

c. (a) (2) sentencees with maximum sentences of more than 18 months who are given a continuance at an initial hearing to a date past one-third of their maximum sentence at an initial hearing, receive a progress report and review on the record upon completion of one-third of their sentence.

But see Garafola v. Benson, 505 F.2d 1212, 1219 (7th Cir. 1974); Grasso v. Norton, 376 F. Supp. 112 (D. Conn. 1974); Díaz v. Norton, 376 F. Supp. 112 (D. Conn. 1974) (holding progress reports in (a) (2) cases insufficient). See note 392 infra. In addition, during the month preceding a regularly scheduled review hearing an examiner panel may review a case on the record, and, if the decision is made to grant parole, no hearing is conducted. 28 C.F.R. § 2.14 (a) (1974), as amended, 39 Fed. Reg. 45225 (1974).

The practice of making Guideline ratings at the initial hearing means that the in-
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a tentative Salient Factor Score sheet, rates the offense severity, and arrives at the probable Guideline range. At the same time the other ("secondary") examiner prepares a summary report for the Parole Board in Washington on the hearing just concluded, in which he served as the primary examiner. The secondary examiner's role is generally limited to asking questions late in the hearing about items not covered by the primary examiner.

While the primary hearing examiner is reading the master file, he may consult with the caseworker, who is usually in the room, to fill in gaps or correct inaccuracies in the file. This consultation can also serve other purposes, such as confirming information already before the hearing examiner or eliciting the caseworker's attitude on the particular case. Caseworkers, aware of this opportunity to convey their feelings or express their opinion to the examiners, occasionally volunteer comments.

When the hearing examiners are ready, the inmate and representative, if any, are called into the hearing room. After asking if the

institutional review hearing has become primarily a parole granting hearing that merely confirms the incarceration range determined in the initial hearing. The examiners check to see if the inmate has abided by the rules of the institution; if so (and often if he or she has not complied, but did not thereby forfeit any "good time"), the inmate is usually granted parole and exhorted to observe the conditions of parole. A typical institutional review hearing was conducted as follows:

This was a review hearing for a white inmate with a five year sentence for counterfeiting; hearing examiners told the observer before the hearing that the man and his wife had owned a boutique, but that it had been destroyed by fire, and he had taken to making counterfeit bills. Also, before the man came in, the caseworker said that the inmate was doing well in the institution in terms of general discipline and personality development.

The inmate then appeared. He was asked about what he'd done in the institution; then about his release plan and whether he had a job lined up. His wife who was there as his representative said she thought her husband had benefited from prison, just like some people benefit from the service.

After the inmate left the room, it required little discussion to note that he had "done his time" (they had rated his SFS as Very Good and his crime as High at their first hearing) and to grant him parole.

Observation of parole hearing (IIc) at Danbury Federal Correctional Institution (FCI) June 1974.

98. E.g., Observation of parole hearing (IIc) at Lewisburg Federal Penitentiary (FP), Aug. 1974.

Occasionally, caseworkers also offer information in the absence of the inmate at the conclusion of the hearing. See, e.g., Observation of parole hearing (IIb) at Danbury FCI, Aug. 1974.

99. Prior to the inmate’s entrance in 14 observed cases there was substantial discussion between the hearing examiners and the caseworker, concerning the inmate’s offense severity, his Salient Factor Score, his institutional adjustment or progress, or his situation with respect to detainers or charges in other jurisdictions.

100. The inmate had a representative in 52 of 109 hearings observed. Family representatives often did not appear on the correct day for the hearing; this is partially due to the fact that hearing days are changed, depending on how slowly or quickly the panels are moving through their caseload. Although inmates who requested representatives were offered the opportunity to be heard with their representative either on another day or at the next set of hearings, they usually decided to waive representation.
inmate understands the parole hearing process, the examiner usually
explains the hearing procedure and mentions (but does not explain)
the administrative appellate procedure.\textsuperscript{101} Examiners state that their
decision is only tentative and will be confirmed or changed by an
official decision from Washington within 15 working days.\textsuperscript{102}

The substantive part of the hearing then begins. It can vary from
a short, relatively simple proceeding to an extended discussion.\textsuperscript{103} At
no point do the hearing examiners state or imply that the Guideline
Table is in use or that some facts under discussion are more signifi-
cant than others. Rather, a generalized discussion of many aspects of
the inmate's past and present life ensues.\textsuperscript{104} At initial parole hearings

\textsuperscript{101} In the report dictated at the end of each decision the hearing examiner always
recites that the inmate was informed of the hearing procedures. However, in 21 cases (20
percent of those observed) the hearing examiners did not in fact so advise the inmate.

\textsuperscript{102} All inmates were told that they will be officially notified of the final decision in
15 working days, or three weeks. Under the Board's regulations, all decisions by the hear-
ing examiner panel are final, except where:
1) there is a split vote between the hearing examiners, in which case the appropriate
Regional Administrative Hearing Examiner shall cast the deciding vote (or, if he
was on the panel, another hearing examiner). 28 C.F.R. \S 2.23(b) (1974). (three split
votes were observed in 109 hearings);
2) the hearing panel proposes to make a decision outside the Guidelines, in which
event the proposed decision is always reviewed by the Regional Administrative
Hearing Examiner (or, if he was on the panel, by another hearing examiner). If the Ad-
ministrative Hearing Examiner does not concur, he may, with the concurrence of the Regional
Director, modify the parole date to the nearest limit of the Guideline. \textit{Id.} \S 2.23(c);
3) the Regional Director, on his own motion, reviews any decision and refers it,
with his recommendation, to a vote of the National Appellate Board, consisting of
the chairman, vice-chairman and one other Board member permanently stationed in
Washington, D.C. \textit{Id.} \S\S 2.24, 2.1.

\textsuperscript{103} Each panel commonly saw 12 to 16 inmates a day, conducting an average number of
15 hearings per day. The average time devoted to each decision, from the primary
examiner's reading of the inmate's master file to the dictation of the final report, was
approximately 25 to 30 minutes. This observation agrees with the average time reported
by P. Hoffman, Research Criminologist, U.S. Bd. of Parole. Record at 21, Diaz v. Norton,
376 F. Supp. 112 (D. Conn. 1974). Of this time, an average of 10 to 12 minutes was
devoted to discussion with the inmate. Of the hearings observed, 14 were especially short,
that is, about eight minutes spent with the inmate and less than 12 to 15 minutes for the
entire decision process. In 10 of these hearings a clear decision to grant parole had been
made before the inmate entered the room, while four involved inmates with short sen-
tences who were treated as if parole were unavailable because their mandatory release
dates came before the time specified in the Guideline Table. Six release hearings were
unusually long, involving more than 15 minutes of discussion with the inmate. Most of
these resulted in decisions outside the Guidelines, or in extremely long set-offs. (See p.
823 for an explanation of "set-offs".) One such case, however, resulted in an immediate
parole grant to an inmate whom the hearing examiners disliked, mistrusted and thought
was irresponsible, but whose Guideline time had arrived. Observation of parole hearing
(HI) at Lewisburg FP, Aug. 1974.

\textsuperscript{104} The discussion reflects the contents of an unweighted list of criteria which, under
regulations promulgated before the Guideline Table but still in effect, the Board may
consider at parole hearings. U.S. Bd. of Parole, \textit{supra} note 49, at 14-16. The list was first
little change in 28 C.F.R. \S 2.19 (1974). Among its approximately 30 factors are such
items as sentence data, changes in motivation and behavior, psychological tests and
evaluation, past record, personal and social history. It has been described as a "laundry
list" in recognition of the limited utility of such an inclusive and unweighted list in
structuring discretion and making decisions, NCCD Supp. Rep. 9, \textit{supra} note 5, at iv
(preface, M. Sigler, Chairman, U.S. Bd. of Parole).
the inmate's commitment offense and related behavior are always discussed, while at review hearings the inmate's institutional conduct is at least mentioned.

When a discussion with the inmate and representative is concluded, both are asked to leave the room. The hearing examiners discuss any differences in opinion as to either the ratings on the indices or whether a decision outside the Guidelines is appropriate. They then call back the inmate, alone, to give notice of the decision and reiterate that it is only tentative. At this point, the inmate is often told that the Guidelines dictated the decision.\textsuperscript{105} There may be some additional colloquy between the inmate and hearing examiners. After the inmate leaves the room, the primary hearing examiner dictates a summary report that will be forwarded to the Regional Director for final confirmation,\textsuperscript{106} while the secondary hearing examiner prepares to conduct the next hearing.

3. \textit{Deficiencies in the Present Hearing}

a. \textit{Accuracy of Salient Factor Score}

Information necessary to classify inmates on the Salient Factor Scale is often discussed in the course of parole hearings. In none of the hearings observed, however, did the examiners explain, the Salient Factors, or indicate their importance to a "score" that would determine exactly how much time inmates would serve before being released. Nor did they generally inform the inmate that the Guidelines Table would be used in making the examiners' tentative decision.

Since much of the information needed to compute the Salient Factor Score is traditionally contained in the presentence investigation report (PSI) or elsewhere in the prison file, the hearing examiners often "rate" an inmate's parole prognosis prior to his or her first entry into the hearing room. When the examiners know they are confused or lack necessary information, they seek clarification or elaboration from the inmate. In several hearings, the examiners disregarded certain in-

\textsuperscript{105} Likewise, inmates are often told when a decision outside the Guidelines has been made. In that case the examiners describe their decision as "tentative" and stress the possibility that it will be reversed by the Regional Director.

\textsuperscript{106} The summary report followed a form evidently set forth in the hearing examiners' instruction books provided by the Board. The report takes the form of brief paragraphs dictated on each of the following topics: I. Advised of Hearing Procedure; II: Offense and Sentence Structure; III. Prior Record (not always complete); IV. Social History (not always completed); V. Work Assignment—Institutional & Vocational Progress; VI. Release Plans; VII. Representative and Remarks; VIII. Evaluation and Justification; IX. Tentative Decision.

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formation in the file in reliance on his or her word that it was incorrect.\textsuperscript{107} But in very few hearings is every factor on the scale discussed or confirmed.\textsuperscript{108} And even those factors that are discussed in the hearing are not raised directly, so the prospective parolee often does not have a fair opportunity to rebut or respond to information derived from the PSI.\textsuperscript{109}

107. For example, one inmate, then serving a five-year, (a)(2) sentence for distribution of narcotics, responded in answer to a question that he had had two prior convictions; the examiner straightforwardly commented, "But the record says you have three." The inmate explained that one of those convictions was actually his brother's and that the court records had gotten mixed up. The hearing examiners changed their scoring and gave him credit for having only two previous convictions. Observation of parole hearing (IIk) at Lewisburg FP, Aug. 1974. In another hearing, the institutional progress report indicated a previous conviction in the inmate's native Colombia. On his bare word during the hearing that he had never before been arrested, the examiners adjusted their scoring from an 8 to a 9, resulting in a 10-month reduction in their tentative set-off decision. Observation of parole hearing (Ir) at Lewisburg FP, Aug. 1974.

108. Some factors were discussed at most hearings. In 70 of the 109 hearings observed, the inmate's past record was clearly mentioned or discussed. Other factors received less attention. In only 50 cases did the hearing examiners explicitly inquire whether the inmate had had at least six months of employment or student status in his or her last two years in the community. But at the two observed hearings in which translators were required for inmates who could not speak English, virtually every Salient Factor was covered.

109. One summary of a hearing observed during the course of this Project offers a good example of how Salient Factor Score information is established in a parole hearing: A black inmate serving a 10 year narcotic rehabilitation sentence had done 14 months at the time of this initial hearing. The examiner first discussed the factual basis for his conviction of burglary II and petit larceny; the prisoner had climbed onto the roof of a store, opened a window, and grabbed some clothing which he intended to sell to support his habit. The amount of the drug habit was established. The examiner then asked, "Were you working at the time of your offense?" When the inmate answered yes, the examiner stated that he had no record of it and asked whether all the inmate's jobs had lasted for short periods. The inmate said yes.

The examiner then commented that there was no record of whether the inmate had obtained his high school equivalency diploma; the inmate responded that he was to take the test the following month. The examiner asked him how many times he had been convicted and incarcerated. The inmate answered that he had had four convictions and three incarcerations. The examiner asked, "You're not married?" The answer was "No." The hearing examiner then proceeded to inquire about what the inmate had gotten out of the NARA program, his release plans (to live with a sister and brother-in-law), his employment possibilities, and a physical handicap he had.

After the inmate left the room, the caseworker spoke in the inmate's behalf, but the hearing examiner said, "He's rough. He's robbed people three times." They decided to set an institutional review hearing in eight more months. When the inmate returned to hear their decision, the examiner advised him of the result and told him that the reason for the decision was that he needed further counseling and therapy. Observation of parole hearing (Ie) at Danbury FCI, Aug. 1974. While the hearing examiners did discuss six of the nine items on the Salient Factor Scale in this unusually thorough interview, they did not inquire about the inmate's age at first commitment, whether he had ever had parole or probation revoked, or whether the offense involved a stolen auto. Further, the inquiry into past employment did not appear to be sufficiently complete to indicate whether he had held employment for at least six months in his past two years in the community. The hearing examiners determined the inmate's Guideline range to be 18 to 24 months and the set-off to 22 months would thus appear correct. But unexplored Salient Factor points might have reduced the Guideline period to only 12 to 18 months, and his set-off to 22 months would then have called for additional justification. 28 C.F.R. § 2.323(e) (1974). Although this result was "determined" by the Guidelines on the basis of a low Salient Factor Score, it was explained to the inmate as if the reason for the denial was his need for further counseling. Further counseling, of course, would
When the questioning did touch on crucial Salient Factors, the colloquy often revealed doubt or even inaccuracy. Dispositions of prior criminal cases are very difficult to establish accurately; history of drug dependence was another factor frequently disputed. Given the number of times such uncertainties arose incidentally during the hearings, there can be no doubt that far more inaccuracies go unchallenged and uncorrected. Many of these informational flaws must significantly alter the results of hearings.

b. Determination of Offense Severity Rating

Although the Offense Severity classification is a more subjective rating than the Salient Factor Score, the Board provides only two written rules to structure this essentially discretionary decision: "If an offense behavior can be classified under more than one category, the most serious applicable category is to be used"; and "If an offense behavior involved multiple separate offenses, the severity level may be increased." While in initial parole hearings an inmate's "offense behavior" is invariably discussed, hearing examiners generally obscure the discretionary nature of their evaluation by failing to inform the inmate of the significance of the offense behavior discussion or that facts not previously adjudicated are commonly used to rate offense severity.

The Offense Severity Rating is generally determined on the basis of information in the inmate's file, with little or no weight given to contradictory accounts provided by the inmate in the hearing. Despite the fact that official reports of offense behavior are at times incom-

not improve his score, and his "need" for it was not the reason he had been denied. Moreover, his institutional counselor was supporting his application for parole, since he had completed the entire available institutional program and been recommended for community after-care in a halfway house.


111. This factor is of unusual importance because of its ambiguous impact on the ultimate Guideline outcome. See note 126 infra.

112. Inaccurate information may also have caused another problem. When the Guideline Table was first being used by the Board to assist in parole release decisionmaking, inmates were neither informed of the Guidelines' existence nor of their classifications on the table. See note 59 supra. In view of the highly predictive implications of each item, this lack of notice may have resulted in substantial errors through inaccurate placement.


114. In 20 of the observed hearings there was a substantial discussion or mention of nonadjudicated facts pertaining to offense behaviors other than the conviction offense. In at least six cases, such factors changed the Offense Severity Rating that would otherwise have been chosen on the basis of the conviction offense.
plete\textsuperscript{113} and unreliable,\textsuperscript{116} the examiners do not appear to use the hearing as an opportunity to check accuracy or correct possible misinformation relevant to rating an inmate's offense severity.\textsuperscript{117} Often, the examiners do not question the inmate about important aspects of alleged offense behaviors which later are included in their reports as justifications for a particular severity rating.\textsuperscript{118} Even when examiners make a detailed inquiry into some of the circumstances surrounding what they believe to be the "offense behavior," the inmate's denial of facts appears to have no effect. Inmates sometimes maintain that they did not commit all of the offenses listed in an indictment but not proven at trial or by plea.\textsuperscript{119} But in contrast to the credibility accorded inmates' denials of apparently false information relevant to the Salient Factor Score,\textsuperscript{120} examiners are reluctant to believe inmate accounts of offense behavior.\textsuperscript{121} When an inmate's version disagrees...
with the official version, examiners do not point out or explore the discrepancy, but appear instead to evaluate the response for other purposes, usually with an eye to discovering whether the inmate is repentant or willing to accept responsibility for his actions. On the other hand, admissions drawn out in the hearing are relied on. For example, after asking an inmate to describe the circumstances of a narcotics sale which was the basis for his conviction, the examiner inquired, "Well, what about the other sales?" The inmate responded, "What other sales?" The examiner replied, "This couldn't have been your first sale. How many other had you made?" Intimidated, the inmate answered that he had made two or three others. In light of these practices, it is clear that the parole hearing is not presently used to maximize the accuracy of the Offense Severity Rating.

c. Discretion and Uncertainty in Classification

A primary purpose of instituting the Guidelines was to structure discretion and thereby reduce inequality of treatment. Yet the Guidelines do not completely eliminate opportunities for unstructured discretionary judgments by hearing examiners. For example, examiners may treat "negative" factors favorably. A previous history of drug abuse will cause an inmate to lose one point on the Salient Factor Scale, but may reduce the offense severity level on a drug-related offense if the inmate can establish that he or she became involved in the crime because of the drug dependence. The Guidelines do not focus or control discretion in such a case.

Classification on the Guideline scales can sometimes also be a way of shielding a decision that would otherwise require additional justification as a decision outside the Guidelines. Examiners can use the seeming objectivity of the Guidelines as a way of hiding the exercise of discretion. Occasionally, examiners modify the Salient Factor Score


122. See p. 838 infra.

123. Thus, if an inmate admits to unproven offenses, he or she may provide the Board with a factual basis for classification at a higher offense severity (based on multiplicity), 28 C.F.R. § 2.20 n.3 (1974), or for making a decision outside the Guidelines because of "aggravating" circumstances.


126. A history of drug dependence means a loss of one Salient Factor point, Guideline Evaluation Worksheet, Item F, 28 C.F.R. § 2.20, at 73 (1974). If the offense was drug-related, however, addiction is a mitigating factor which may improve an inmate's offense severity rating from "very high" to "high" or even "moderate." See id. § 2.20.
to achieve a desired result. In one case involving a young German immigrant with a four-year firearms sentence the examiners agreed that they wanted to grant parole, but the Guidelines indicated that a minimum of another four months would be expected. Neither examiner could think of an articulable reason to go below the Guidelines. Then one suggested that they simply ignore the inmate's juvenile offenses; the result would be a significant improvement in two Salient Factor items: age at first conviction and number of prior convictions and commitments. This plan was agreed to, the score was altered, and the prisoner called back to be informed that his parole had been granted "within the Guidelines." But had the examiners actually thought that their "clinical evaluation of risk" should "override [the] predictive aid [Salient Factor Scale]," they could have used that justification to make a decision outside the Guidelines and been subject to the more stringent internal review applied to such decisions.

More commonly, Offense Severity Ratings rather than Salient Factor Scores are manipulated to avoid explicit decisions outside the Guidelines. In one such case, an inmate serving a five-year sentence for larceny was also serving shorter concurrent sentences for two lesser offenses. His Salient Factor Score and an Offense Severity Rating based on his conviction offenses would have yielded a Guideline range calling for immediate parole. The hearing examiners felt this was inappropriate. The following discussion ensued:

Examiner (2): Is his total sentence just five years?
Examiner (1): Yes. Where should we rank his offense severity?
(2): Looks to me like it's a moderate, unless you want to increase it because of multiples.
(1): I do. He's got a serious problem, and he thinks he has it licked, but he doesn't.
(2): O.K., then, we'll up it on multiple offenses.

Had the hearing examiners not relied on the two lesser offenses to increase the severity rating, they would have had to justify their decision with additional reasons on the record, subject to the approval of a regional member of the Parole Board.

127. Observation of parole hearing (Im) at Danbury FCI, Aug. 1974. In another hearing the inmate made such a favorable impression on the examiners during the hearing that they overtly manipulated both the Salient Factor Score and Offense Severity Rating in order to render an otherwise unjustifiable parole "within the Guidelines." Observation of parole hearing (IV) at Lewisburg FP, Aug. 1974.
129. Id. § 2.23(c).
131. See 28 C.F.R. § 2.23(c) (1974).
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Even though decisions may be determined entirely by the Guideline Table, inmates are lectured to, counselled, and given reasons for decisions that are at best misleading and at worst dishonest. For example, one inmate had served 49 months; his Guideline range was 45 to 55 months. The hearing examiners dismissed the inmate and rapidly reached a decision to grant parole within the Guidelines, with the special condition that he abstain from alcoholic beverages. Rather than relying on the Guideline Table as the basis for release, the examiner explained to the inmate:

We've read your record and it's real poor. What you did—you say you did it for your family—but it was more for your own purposes. We'll take a chance on you, though, but we'll throw in a few extra conditions . . . .

Such spurious explanations conceal from the inmate the true basis for the parole decision.

d. Effectiveness of Representatives

Just as reasons given in the hearing context do not always correspond to the Guideline Table that is controlling decisions, so the role of representatives, as structured by the hearing examiners, is not oriented to decisionmaking under the Guidelines. While one might hypothesize that representatives would be encouraged to assist in accurate classification, they are instead urged to comment on factors which the Guideline Table has rejected as bases for normal decisions, and which could only serve to justify a decision outside the Guidelines or to influence the discretionary decision as to when during the Guideline range the inmate will be released.

The only class of representatives given relatively negative treatment

132. Observation of parole hearing (IIp) at Lewisburg FP, Aug. 1974. In this case the hearing examiners appeared well-intentioned. After the inmate had left, one examiner said to the other, that he had given the inmate "your psychology" in the hope of promoting his chances for success upon release.

Another inmate was given a set-off to his Guideline range, but was told to participate in a special drug program so that the "Board could consider granting parole next time." Observation of parole hearing (II) at Lewisburg FP, Aug. 1974. In no observed hearing, however, was an inmate continued beyond the Guideline range because of failure to complete an institutional program.

133. Observation of parole hearing (Ic) at Lewisburg FP, Aug. 1974.

134. Wives are generally asked, when they do not volunteer, whether they have seen any change in their husbands. E.g., observation of parole hearing (Ic) at Lewisburg FP, Aug. 1974. One of the two wives who seemed to make a strong favorable impression on the panel convinced them that her husband really was "rehabilitated." She announced that she could not understand how her husband had allowed himself to perform a criminal act, that she could not "relate" to it, but that she believed he had learned his lesson and would return to his job and law-abiding life. Observation of parole hearing (Ih) at Lewisburg FP, Aug. 1974, (IIc) at Danbury FCI, June 1974.
by the hearing examiners is lawyers and law students.\footnote{The original rules of the Parole Board's pilot project, experimentally implementing the Guidelines and other new procedures, provided that anyone except lawyers and law students could represent inmates at parole hearings. See Bureau of Prisons Operations Memorandum 40100.14, Experimental Parole Board Regionalization Project, Oct. 19, 1972, at 3 (on file with Yale Law Journal); Letter from J. Berry, Counsel to the U.S. Bd. of Parole, to D. Curtis, Jerome N. Frank Legal Servs. Org., Yale Law School, May 1, 1973. This regulation has been modified. See 28 C.F.R. § 2.12(a) (1974).} Lawyers do not usually appear as representatives at parole release hearings. Attorneys served as representatives in only two observed hearings; they were expressly told to speak for only five minutes, and one was cut off in the middle of his presentation after that time.\footnote{Attorneys and law students are commonly told not to make legal arguments on behalf of their clients.}\footnote{Observations of parole hearings (IIh, IIk) at Danbury FCI, June 1974, (III) at Alderson FRW.} Attorneys and law students are commonly told not to make legal arguments on behalf of their clients.\footnote{The transcript of a parole rescission hearing submitted in Williams v. United States Bd. of Parole, 383 F. Supp. 402 (D. Conn. 1974) as quoted in the court's opinion showed that: Williams' attorney was prevented from effectively defending his client. At the outset of the hearing, the examiner expressed his opinion that "It's [sic] hard to keep a lawyer's [sic] mouth shut" and therefore cautioned Williams' counsel "not to act in a legal capacity" and further ruled that he would not "listen to any legal aspects of the case." Id. at 405 (first ["sic"] in original).} The treatment accorded lawyers is consistent with the observers' finding, confirmed by the Parole Board, that institutional personnel are the most effective representatives.\footnote{This hearing was held under the provisions of 28 C.F.R. § 2.30(a) (1974), providing for a review hearing if a previously granted parole date is "retarded" for more than 60 days on account of institutional misconduct after the date of the parole hearing. The purpose of the hearing is to determine if the parole grant should be rescinded or a new parole date established. The procedures followed in all such hearings are identical to those followed in parole-release hearings, id. § 2.12. Compare Koptik v. Chappell, 321 F.2d 389 (D.C. Cir. 1963), and United States ex rel. Felder v. United States Bd. of Parole, 307 F. Supp. 159 (D. Conn. 1969) (before Morrissey v. Brewer, 408 U.S. 471 (1972)), with Williams v. United States Bd. of Parole, 383 F. Supp. 402 (D. Conn. 1974); Batchelder v. Kenton, 383 F. Supp. 299 (C.D. Cal. 1974); Means v. Wainwright, 299 So. 2d 577 (Fla. 1974); and In re Frewitt, 8 Cal. 3d 470, 505 P.2d 1326, 105 Cal. Rptr. 316 (1972) (en banc) (post-Morrissey). See Jackson v. Wise, 42 U.S.L.W. 2272 (C.D. Cal. Dec. 10, 1974). But see Sexton v. Wise, 494 F.2d 1176 (5th Cir. 1974), rev'd 352 F. Supp. 147 (W.D. Tex. 1973). The Board's provisions have since been elaborated but not substantially changed. 28 C.F.R. § 2.37, as amended, 40 Fed. Reg. 5361-62 (1975).} As the Board itself has suggested in explaining their greater effectiveness as representatives:

\begin{quote}
136. The treatment accorded lawyers is consistent with the observers' finding, confirmed by the Parole Board, that institutional personnel are the most effective representatives.\footnote{Emphasizing the inmate's success in the program, his "readiness" for release as contrasted with his "problem" at commitment, and the program's lack of further utility, the caseworker persuaded the examiners to make a decision below the Guidelines in one case and at the shorter end of the Guideline range in the other. Observations of parole hearings (IIh, IIk) at Danbury FCI, Aug. 1974.}
\end{quote}
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Institutional staff . . . primarily convey information concerning prison adjustment, compliance with institutional goals, and the degree to which the inmate appears to be rehabilitated . . . . Equally important may be the balanced information provided by institutional staff not found with other types of information . . . .139

Although the hearing procedures are conscientiously explained to them, noninstitutional representatives are not regarded as "experts" on rehabilitation and hence are perceived by examiners as impediments to the efficient conduct of the hearing.140 Despite the Guidelines Table's explicit abandonment of any effort to measure rehabilitation or to base parole decisionmaking on it, the parole examiners' belief in "rehabilitation" is reflected in the type of the representation they find most persuasive.141

In sum, the revamped parole hearing proves useful only in the small number of cases that present the hearing examiners with borderline questions of whether to make decisions outside the Guidelines and how to exercise their limited discretion as to when, during the guideline range of several months, the inmates should be released. The traditional rehabilitative concerns of adjustment and discipline,142 no longer reflected in the Guidelines, are still dominant in many hearings, but they seem to affect decisionmaking only in extraordinary cases.143 Thus, although the present parole hearing has fairer procedures than before, its actual functioning is virtually unrelated to the basic substantive standards for decisionmaking.

II. Reform of the Hearing

The procedural reforms needed to remedy many of the problems with parole hearings under the Guidelines could be achieved easily and voluntarily by administrative action. With more effort, they could be achieved through statutory amendment. If neither reform is forthcoming, however, inmates denied parole under the Guidelines may be expected to seek such changes by judicial action.

139. Effect of Representation, supra note 138, at 12.
140. Hearing examiners generally expressed relief when a case scheduled to be heard with a representative decided to proceed without the representative. See note 100 supra.
141. While the effectiveness of a representative varies according to how convincing the examiners find his or her description of the inmate's rehabilitative changes, the presence of a representative is itself correlated with a small reduction in the time served before release within the discretionary range permitted under the Guidelines. Effect of Representation, supra note 138, at 5.
143. E.g., in one of the observed hearings an inmate was rewarded with a parole under the Guidelines for "ratting" on the escape plans of other inmates. Observation of parole hearing (II) at Danbury FCI, Aug. 1974.
A. Reform through Judicial Action: Constitutional and Statutory Requirements for the Hearing

1. Traditional Judicial Approaches

One of the most striking aspects of the traditional parole release process has been the virtual unreviewability of parole board decisions affecting the substantial personal rights of prisoners. In recent years courts have provided some procedural protections and articulated criteria for review of the conditions which parole boards have set upon parolees' conduct and for the revocation of parole and return to prison. But until very recently, federal and state courts almost invariably rejected claims that the denial of parole was subject to review because of procedural or substantive defects in the parole release decision process.

The grant of parole has long been analogized by courts to the grant of an executive pardon, essentially an "act of grace," or the conferring of a privilege, giving rise to no rights or expectations in need of due process protection for the grantee or potential grantee.


In addition to the "act of grace" and "privilege" rationales, another theory for judicial passivity in this area has been the argument that parole constituted a mere change in the nature of custody, and that therefore the parole release decision lay in the area of administrative prison decisionmaking. Anderson v. Corall, 263 U.S. 193, 196 (1923); United States ex rel. Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir.), vacated as moot, 404 U.S. 797 (1971); Jenkins v. Madigan, 211 F.2d 904, 906 (7th Cir.), cert. denied, 348 U.S. 842 (1954); United States v. Lewis, 274 F. Supp. 184, 189 (S.D.N.Y. 1967); Poole v. Stevens, 190 F. Supp. 938, 941 (E.D. Mich. 1960); cf. Jones v. Cunningham, 371 U.S. 236 (1963). Courts abstained from interference, claiming a lack of knowledge of...
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Another rationale used to justify the vast and unreviewable discretion accorded parole boards is that they are acting as *parens patriae* with respect to the inmates; as such, they are concerned only with promoting the inmate’s own rehabilitation through the exercise of their expert knowledge and judgment, which obviates any need for procedural protections. This rationale reflects the pervasive judicial view that release decisions are part of a process of rehabilitation that promotes the offender’s reintegration into society. In support of this view, courts emphasized that parole boards possess an administrative expertise in evaluating “nonlegal” factors relevant to the release decision, such as family history or physical and psychological conditions. They have acquiesced in the boards’ assertion that the proper moment for parole can be determined only after an inmate has been observed and attempts made to treat him or her within the rehabilitative institutional context.

In *Menechino v. Oswald*, a prisoner argued that the state board’s denial of his application for parole was illegal because he had not received notice of the information to be considered, a fair parole hearing with a right to counsel, to cross-examination and to produce favorable witnesses, or a specification of the grounds and underlying facts upon which the denial was based. The court offered two reasons in holding that these due process rights did not apply to parole release hearings. First, the inmate had no legally cognizable “interest” in his parole grant, since he did not presently enjoy a status that was being threatened or taken away. Second, the parole board’s interest in the institutional exigencies requiring immediate discipline or other action. See *The Parole System, supra* note 2, at 288.

However, the theories of “grace” or “privilege” are inconsistent with the view that parole is a mere change in custody status, since the former theories recognize that the substantial benefit of conditional freedom is being conferred. The “custody” theory ignores the fact that a major purpose of parole is to provide a halfway point between incarceration and total freedom in the community, in order to promote rehabilitation while still protecting society. C. Newman, *Sourcebook on Probation, Parole and Pardons* 206-07 (3d ed. 1968); Giardini, *supra* note 9, at 21; Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 827 (1961); *Note, Parole Revocation Procedures*, 64 Harv. L. Rev. 309, 311 (1951); *Note, Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U. L. Rev. 702, 713-14 (1963).


152. 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971).
in the proceedings was not adverse to that of the inmate's,¹⁵³ because "the Board . . . is seeking to encourage and foster his rehabilitation and readjustment into society."¹⁵⁴

Expanding upon Menechino as to procedural rights, the Fifth Circuit ruled that it would not review the Parole Board's actions even to determine whether it had acted in compliance with its own regulations.¹⁵⁵ Although the regulations provided that all relevant factors were to be considered, the court found that the Parole Board was justified in considering only some (or one) factor, such as the inmate's past record. The court explained:

The decision to grant parole is a very complicated one. Many factors are necessarily involved in such determinations. The Board's final determination may be based on any or all of [a list of factors]. The Board possesses the expertise and experience for ascertaining which factors are determinative in the unique situation presented by each applicant . . . . The weight to be given Scarpa's criminal history is solely within the province of the Board's discretion in determining parole eligibility. It is not the function of the court to second guess the outcome of such proceedings nor what factors went into their formulation.¹⁵⁶

This attitude still confronts those who attempt to obtain judicial review of parole release decisions.¹⁵⁷

Judicial attitudes and beliefs about the capacities of parole boards are reflected not only in their decisions on prisoner petitions, but also in their use of various sentencing mechanisms.¹⁵⁸ However, unlike the Parole Board, courts have not yet begun to issue position papers, rules or regulations concerning sentencing procedures and criteria. Therefore, this Project undertook a Survey of Sentencing Judges to explore judicial attitudes about sentencing and parole.¹⁵⁹ The re-

¹⁵³. Id. at 407-08.
¹⁵⁴. Id.
¹⁵⁶. 477 F.2d at 281.
¹⁵⁸. See pp. 818-19 supra.
¹⁵⁹. In June 1974, questionnaires with an accompanying letter of explanation were mailed to the 162 district court judges (including senior judges) in the districts of D.C., Conn., Del., Md., Mass., N.H., N.J., N.Y., (Southern, Western, Eastern and Northern), Pa. (Eastern, Middle, and Western), R.I., Vt., Va. (Eastern and Western). Persons sentenced in these districts are most likely to be committed to institutions in the Board's Northeast Region. See note 95 supra. In August, a followup letter was sent to those judges who had not yet responded and to 12 judges in these jurisdictions who were not on the original mailing list, enlarging the original sample to 174. Forty-two senior district judges
results of this Survey indicate a continuing judicial emphasis on the rehabilitation of inmates and the expertise of the Parole Board. Those judges who responded to the questionnaire clearly indicated that they believed the major concern of the Board should be the inmate's rehabilitative progress and institutional adjustment. In describing why they choose the relatively indeterminate (a)(2) sentence, over 41 percent of those responding answered that the primary reason was to enable the Parole Board to release an inmate at the time best suited to promote his or her rehabilitation and reintegration into the community; the next largest group rated as foremost their desire to give the inmate an incentive to good prison performance, that is, to foster such conduct as would be encouraged by the knowledge that the Parole Board had the power to release him or her at any time.

Similarly, with respect to both Regular Adult and (a)(2) sentences, judges indicated that the primary concern of the Parole Board in determining whether and when to release an inmate should be his or her institutional behavior and rehabilitation.

In addition to the unsuccessful efforts to bring Parole Board actions within the compass of judicial review by direct constitutional

were then excluded, as many of them had replied that they seldom sentenced any more, reducing the total to 132. Five of the nonsenior judges had either died or resigned. Of the remaining number (127) 59 did not respond, 4 indicated they did not wish to participate, and 64 (slightly over 50 percent) returned completed questionnaires; the last figure thus provides the base for all calculations performed.

Project Survey of Sentencing Judges, question 9. Seventy percent ranked this reason as among their primary reasons. Some eight percent of the judges responding cited as their major reason for using the (a)(2) sentence a desire to indicate to the Board that rehabilitation should be its first concern in this case; 34 percent thought it an important factor. Another eight percent use the (a)(2) sentence primarily to signal the Board to give serious consideration before the expiration of one-third of the sentence; 27 percent listed this factor as important.

Fifty-two percent of the judges responding stated that they use (a)(2) sentences to motivate good prison performance by holding out the possible reward of earlier parole. Project Survey of Sentencing Judges, question 9.

Judges were asked to rank the order of importance in which they thought the Parole Board, in determining a release date for an individual with a Regular Adult sentence, should consider (a) offense severity, (b) rehabilitative progress and institutional achievement, should be of primary importance, while 22 percent answered that (a), offense severity, should be paramount. Only six percent felt (c), past record, should be most important. In making the same determination for (a)(2) prisoners, 73 percent felt that (b) should be first, 14 percent responded that (a) should be the principal consideration, and no judge responded that (c) should be most significant. No judge stated that (b) should be of least importance.

Although rehabilitative progress and achievement of institutional goals was overwhelmingly listed as being foremost in what the Parole Board should consider in administering parole release for both Regular Adult and (a)(2) inmates, only 31 percent of the judges felt that Regular Adult decisions were actually made primarily on the basis of an inmate's progress and conduct after commitment, while 50 percent thought that this was not true (19 percent did not answer); only 33 percent felt this was true for (a)(2) inmates, while 45 percent disagreed (22 percent did not answer). Project Survey of Sentencing Judges, questions 13-14.
theory, prisoners have long sought to obtain relief from adverse Board decisions through reliance on the Administrative Procedure Act of 1946 (APA). The United States Board of Parole has never considered itself an "agency" within the meaning of the APA, and so has never attempted to comply with its various provisions. No reported case indicates that any inmate attempted to apply any facet of the APA to the parole release decision during the period prior to 1972. Beginning shortly after passage of the APA, however, a number of re-committed parole violators sought to challenge the revocation of their paroles through declaratory judgment actions against the Board or its chairman in the District of Columbia, alleging jurisdiction under the APA. Without having to so hold, the court of appeals consistently assumed that the Board was an agency as defined in the APA. However, its 1963 decision in Hyser v. Reed held that a revocation hearing was not an "adjudication" within the meaning of § 5 of the Act so as to require the notice and fair hearing there afforded. After Hyser, little effort was made for some ten years to use the APA to obtain judicial review of Parole Board actions.

2. Legal and Empirical Criticisms of Traditional Approaches

The inadequacies of traditional justifications for judicial nonintervention, including their failure to conform to legal or social realities,
have been well demonstrated. Further, the right-privilege distinction has been rejected as the basis for constitutional analysis in many other areas, and should also be rejected in the parole release context. The "act of grace" theory is inconsistent with the legislative purpose of the parole statute, which was to establish an additional mechanism in a unified correction system to promote its penological and rehabilitative purposes. And regardless of whether parole was originally intended to be administered solely to mitigate the harshness of criminal sanctions, it has since come to serve the economic and administrative needs of the courts and penal institutions.

The "parens patriae" or "rehabilitative expertise" theory for permitting parole boards to exercise unreviewable discretion is also subject to objections. Even though a parole board may conceive of itself as assisting the inmate to achieve rehabilitation—as manifested in the many instances of counselling and advising that occur in the hearing context—its decision can have a substantial negative impact on personal freedom. A denial of parole, for whatever reason, results in continued incarceration. In other areas of the law involving restraints on personal liberty, courts have come to recognize that the decision-makers' presumed identity of interest with the subject of the decision does not eliminate the need for procedural protections, and this learning should be applicable to the parole process.

In addition to the above criticisms, continuing judicial deference to parole board expertise is mistaken for an even more fundamental reason—it is based upon a misapprehension of the facts concerning a parole board's exercise of its discretionary powers and upon an ig-


174. "Preventing crime and rehabilitating prisoners are traditional governmental functions, which the executive should effect with the best means available. If parole serves these functions, can the parole system be properly labelled an act of grace?" The Parole System, supra note 2, at 294. See 18 U.S.C. § 4203 (1970) (criteria and purposes of parole release in federal system); cf. Biddle v. Perovich, 274 U.S. 480, 486 (1927).

175. "Economic factors belie the concept of grace. Given the high cost of confinement, it is difficult to ascribe the state's action to clemency." The Parole System, supra note 2, at 294. Institutionalization of one inmate costs about six times as much per year as his maintenance under parole supervision. Task Force Report: Corrections, supra note 1, at 180, 189. See Kadish, supra note 148, at 826.

176. See, e.g., In re Gault, 387 U.S. 1 (1967) (doctrine of "parens patriae" is insufficient to deny due process in quasi-criminal juvenile proceedings).
norance of the best social scientific data on the achievement of rehabilitative goals by penal and correctional institutions.

Confidence in the expertise of the parole board is profoundly misplaced. First, in deferring to the competence of parole boards, courts have often overlooked the obvious fact that, with the exception of institutional performance and evaluation, all of the information upon which parole boards base their release decisions is also used by the court in making a sentencing determination. However, courts which frequently sentence offenders and are thus experienced in the area deny any comparable expertise or ability to oversee the substantive criteria of parole boards. Moreover, most parole board members are not trained in any of the correctional, sociological or criminological sciences in which they are supposed to be "experts"; few statutes, including the federal, specify the qualifications of parole board members, who are usually, like the judges themselves, political appointees.

But more disturbing than either of these facts is that even if parole board members were all thoroughly trained in such relevant fields as penology, criminology, psychology, and sociology, the present state of the social sciences is not sufficiently advanced to permit precise decisions as to the best time to release an incarcerated offender in order to promote rehabilitation and reintegration into the community. For the vast majority of cases, a parole board's unique opportunity to assess an inmate's progress after incarceration will not enable it to determine the appropriate time for release any better than could have been determined when the prisoner was first committed. The Guidelines themselves represent an abandonment by the Parole Board of its former pose of expertise in the area of rehabilitation and the Board no longer claims to act on information not before the court at sentencing. By placing primary reliance on the Guidelines in its release decisions, the federal Board has shifted its orientation from rehabilitation to achieving relatively longer incapacitation of likely recidivists, and to furthering the "punitive" functions of deterrence, retribution and denunciation.

177. See note 416 infra; Carter & Wilkins, Some Factors in Sentencing Policy, 58 J. CRIM. L.C. & P.S. 503, 509 (1967) (Table VIII).
180. Id. at xxiv-xxviii.
181. See pp. 824-28 supra.
182. The factors that best predict ultimate success or failure upon release are static and established before arrival at the institution. See note 72 supra; Kastenmeier & Eglit, supra note 1, at 496-97 nn.71-72, 503-10; Frankel, supra note 84, at 34.
183. See pp. 826-28 supra.
3. Three Models of Procedural Fairness

The traditional deference by courts to parole board expertise that virtually precluded judicial review in the past cannot withstand legal analysis. More significantly, such deference was premised upon certain factual assumptions concerning rehabilitation which have proved to be false. Moreover, the federal Parole Board has abandoned any pretext of relying upon these assumptions in most decisions. Finally, observation of parole hearings raises questions about the effectiveness of the hearing procedures to develop facts relevant to decisions under the Guidelines. It is therefore necessary to examine the theories under which appropriate procedural protections might be judicially extended to parole release hearings. Three basic models are considered here: minimum due process, sentencing due process, and the Administrative Procedure Act.

a. Minimum Due Process

The minimum due process model is set forth by the Supreme Court in *Morrissey v. Brewer*\(^{184}\) (parole revocation) and *Wolff v. McDonnell*\(^{185}\) (inmate disciplinary hearings).\(^{186}\) Under these cases, a determination must first be made whether due process protections apply at all in a particular governmental decision process.\(^{187}\) This determination is accomplished not simply by characterizing the governmental benefit involved as a "right" or a "privilege,"\(^{188}\) but by examining "the extent to which an individual will be condemned to suffer grievous loss."\(^{189}\) The Court in *Morrissey* concluded that the liberty of a parolee, though conditional and indeterminate, "includes many of the core values of unqualified liberty ... and must be seen as within the protection of the Fourteenth Amendment."\(^{190}\) Likewise, the Court reasoned in *McDonnell*:

The State having created [a statutory] right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to

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186. Although *Morrissey* and *McDonnell* arose under the Fourteenth Amendment, which is applicable only to the states, similar standards apply to the federal government under the Due Process Clause of the Fifth Amendment. See note 174 infra.
187. 408 U.S. at 481.
188. See note 172 supra.
190. 408 U.S. at 482.
entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.191

Once it is determined that due process applies, the second step of the minimum due process analysis examines "the question of what process is due."192 At this stage, state and individual interests are balanced to arrive at the requisite procedural protections.

The state's interests in parole release decisionmaking are essentially the same as those recognized in Morrissey. In both cases, the major governmental interest is in the efficient administration of the parole process. Society also has an interest in not revoking parole on the basis of inaccurate information or the erroneous evaluation of information. It has an interest as well in the fair treatment of individuals so as to "enhance the chances of rehabilitation by avoiding reactions to arbitrariness."193 As to the individual interests involved, release, revocation, and disciplinary proceedings all vitally affect the convict's liberty and freedom from incarceration, matters of obviously great importance.194 The balance between these competing interests determines the appropriate due process protections.

Three courts of appeals have applied this analysis to the parole release decision.195 In United States ex rel. Johnson v. Chairman of New York State Board of Parole196 the Second Circuit reaffirmed its earlier view in Menechino v. Oswald197 of the rehabilitative function of parole and the identity of interests between the parole board and

191. 418 U.S. at 557.
192. 408 U.S. at 483.
193. Id. at 484.
194. The Court recognized in McDonnell, however, that even the deprivation of "good time" there involved did not result in an immediate "change in the conditions of [the prisoner's] liberty." 418 U.S. at 561.
196. 500 F.2d 925 (2d Cir.), vacated as moot, 95 S. Ct. 488 (1974).
197. 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971), discussed at pp. 843-44 supra.

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prospective parolee.\textsuperscript{198} But it rejected the second premise of \textit{Menechino} that the inmate lacks a sufficient "interest" in a parole grant to justify constitutional protection.\textsuperscript{199} "To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration."\textsuperscript{200} The court then turned to the specific issue of whether reasons must be given for a parole denial.\textsuperscript{201} Although neither the New York parole statute nor the parole board's rules and regulations had articulated criteria to guide the exercise of the board's broad discretion, the court found that "a statement of reasons will permit reviewing courts to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious denials or actions based upon impermissible considerations."\textsuperscript{202} In addition, the court suggested that the board promulgate release criteria and a list of factors to be considered in determining whether the criteria have been met.\textsuperscript{203}

In \textit{Bradford v. Weinstein},\textsuperscript{204} the Fourth Circuit followed \textit{Johnson} in holding that a denial of parole without a statement of reasons would be a denial of due process. The court further noted that "it would be a grievous loss for a prisoner by reason of a completely \textit{ex parte} proceeding, and the resulting increased opportunity for committing error, to be denied parole . . . because the attention of the parole board was not called to data tending to indicate that parole should be granted."\textsuperscript{205} Similarly, in \textit{Childs v. United States Board of Parole},\textsuperscript{206} the District of Columbia Circuit agreed that reasons for a denial must be stated. It also remanded the case for consideration whether prospective parolees must be given access to adverse information in their files prior to the parole hearing, in order to be able to respond to any inaccuracies and contest any possible unfavorable inferences.

\textsuperscript{198} 500 F.2d at 927, citing 430 F.2d at 407.
\textsuperscript{199} 500 F.2d at 927.
\textsuperscript{201} 500 F.2d at 928-35.
\textsuperscript{203} 500 F.2d at 930, 933, 934.
\textsuperscript{204} No. 73-1751 (4th Cir., Nov. 22, 1974).
\textsuperscript{205} Id. at 11.
\textsuperscript{206} Nos. 74-1052 to 74-1142 (D.C. Cir., Dec. 19, 1974).
In addition to a statement of reasons for parole denial, the “minimum due process” model would entitle the inmate to other procedural protections. Morrissey held that the parolee facing revocation is entitled to a hearing attended with written notice of claimed violations, disclosure of adverse evidence, opportunity to appear, be heard, and present witness and documentary evidence, the right to confrontation and cross-examination of adverse witnesses in most cases, a “neutral” hearing body (such as a parole board), and a written statement of the reasons and evidence relied upon for revocation. In Gagnon v. Scarpelli, the Court further established a due process right to the presence of retained counsel or to the appointment of counsel at least when there is a colorable claim of innocence or when “there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and . . . the reasons are complex or otherwise difficult to develop or present.”

Like a revocation or disciplinary hearing, the parole release hearing involves two distinct stages: fact finding and disposition. The basic facts relevant to the parole release decision are often as complex and subject to dispute as those at issue in the other types of proceedings. And in each type of hearing the ultimate disposition involves the exercise of judgment and discretion: In a revocation or disciplinary hearing the question is whether an offender found to have committed the violation charged should be subject to further punishment and, if so, what kind, while in a release hearing the issue is whether the examiners should take the action indicated by the Guidelines or exercise special discretion. Moreover, the interest of the prospective parolee in his or her hearing is similar to that of the accused violator; indeed, Johnson, Bradford and Childs hold that the interest in conditional freedom is the same. And the inmate has more at stake in a parole release hearing than when facing institutional discipline; the prospective parolee stands to gain immediate conditional release, while being “acquitted” in a good-time forfeiture hearing means only that the inmate’s tentative future release date will not be postponed.

207. The Court held that an inmate was entitled to both a preliminary hearing near the place and time of the alleged violation and a final revocation hearing. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).
208. 408 U.S. at 489.
210. 411 U.S. at 790.
211. See pp. 857-58 infra.
212. See note 200 supra.
These similarities among the three types of hearings seem to indicate that approximately the same due process requirements should apply in all of them. In \textit{Wolff v. McDonnell},\textsuperscript{213} however, the Court relied on two factors in holding that fewer protections adhere in good-time forfeiture hearings: the absence of an immediate threat to the prisoner's liberty\textsuperscript{214} and the special tensions and dangers inherent in confrontational proceedings within a prison.\textsuperscript{215} In light of these differences, the Court refused to order confrontation and cross-examination or to allow the assistance of retained or appointed counsel.\textsuperscript{216} The Court held that the inmate "should be allowed to call witnesses and present documentary evidence," but only when "permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."\textsuperscript{217} The Court did require advance written notice of claimed violations, an opportunity to marshal facts and prepare a defense, and a statement of evidence and reasons for any forfeiture.\textsuperscript{218}

The considerations in \textit{McDonnell} that led to this lesser degree of protection do not arise so markedly in the parole release hearing. First, the prospective parolee stands to gain immediate conditional release, so that the denial of parole does present an immediate threat to the inmate's liberty. Moreover, under the federal Parole Board Guidelines, sensitive institutional factors will seldom play a major part in the outcome of the hearing.

At the same time, some factors involved in parole release hearings differ from those considered in \textit{Morrissey}. The difference between the parolee's liberty and the prisoner's expectation, although certainly thin, is not entirely insubstantial. More significant, however, is the fact that the parole release hearing is not accusatorial; the inmate is not facing "charges" that he or she must rebut. This factor reduces but does not eliminate the need \textit{Morrissey} recognized for direct confrontation.

Bearing in mind the enormous caseload of the Board and the concomitant demand for an efficient and orderly process, the analysis of \textit{Morrissey}, \textit{Scarpelli} and \textit{McDonnell} would allow those procedures minimally necessary to assure accuracy in fact finding and fairness in

\textsuperscript{213} 418 U.S. 539 (1974).
\textsuperscript{214} The Court's analysis in this regard does not take account of the other and immediate results of an inmate disciplinary hearing. In addition to the loss or suspension of good time credits, the inmate may be placed in closer custody, including punitive segregation, may lose any work or social privileges, and may be denied eligibility for parole or furlough.
\textsuperscript{215} 418 U.S. at 561-63.
\textsuperscript{216} Id. at 567-70.
\textsuperscript{217} Id. at 566.
\textsuperscript{218} Id. at 563-65.
dispositions under the Guidelines. These protections include advance access to relevant data, analogous to notice of the “charges” in a revocation or disciplinary hearing, and a fair opportunity during the hearing to discuss and correct any errors through the presentation of documentary evidence and, in extraordinary cases, favorable testimony. Reasons would be required that give a full and fair explanation of any denial, together with a brief, specific statement of the evidentiary facts relied on in reaching that conclusion. However, minimum due process does not seem to require counsel at all release hearings, however useful and appropriate such a rule might be; nonetheless, there may be some cases, such as those outlined in Scarpelli and McDonnell, where representation would be mandated.

b. Sentencing Due Process

A second analytical framework for considering due process at parole release hearings is the sentencing model. The sentencing and parole release decisions are very similar:

219. See note 278 infra. Of course, it is not enough that the prisoner have notice and an opportunity to contest adverse information. For such a right to be effective, the inmate must know the significance of the information. Moreover, the hearing examiners must be willing to question the official records in an appropriate case and fairly consider the conflicting evidence. See pp. 833-37 supra. For example, in Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974), the severity of the inmate’s offense was rated “very high,” rather than “high,” on the basis that he had used a gun in committing a robbery. In fact he had not, nor was there any evidence that he had, and Kohlman strenuously denied it. Neither the examiners nor the Board’s appellate structures would take his word. The court ordered him released on habeas corpus unless the Board rescinded and altered its previous classification, holding that parole decisions without any evidentiary basis violate due process; cf. Thompson v. City of Louisville, 362 U.S. 199 (1960) (due process requires appellate reversal of criminal conviction unsupported by any evidence). See Maschiello v. Norton, 564 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation that petitioner’s father was member of organized crime, and that petitioner would become one if released, insufficient basis to deny parole); cf. United States ex rel. Campbell v. Pate, 401 F.2d 55 (8th Cir. 1969) (claim for equitable relief stated where parole consideration date was allegedly delayed on basis of prison officials’ capricious and unreliable determination of a purported disciplinary infraction).


220. See pp. 856-57 infra.


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Determining when during the offender's term he shall be released approximates the judicial setting of a term of imprisonment. The only difference is the time of the determination . . . .

Like the judge at sentencing who must determine within the statutory range permitted for the conviction offense how much punishment the particular offender merits, so the parole hearing examiners must determine, within the range set by the judicial decision, how much time the particular offender should serve prior to first release. Like the defendant at sentencing, the inmate's goal is to avoid or minimize time spent in prison.

Sentencing itself, however, currently suffers from many of the same problems that have afflicted parole release decisions. Primary among them is the absence of any requirement that sentencing be guided by legislatively or judicially established criteria. A related defect is that courts are not required to state reasons or findings in support of a sentence, nor are "legal" sentences reviewable on appeal. The release of information in presentence reports or other ex parte documents relied on by the judge is only discretionary. Given the enormous range of discretion afforded sentencing judges, the lack of these safeguards results in arbitrary and inequitable sentencing decisions which appear to violate fundamental notions of due process of law.

223. Kadish, supra note 148, at 812-13. See also Comment, supra note 222, at 500.
224. Types of Error, supra note 82, at 8.
225. There is no statutory guide to the imposition of sentence in the federal penal system, except those provided under such treatment-oriented sentencing alternatives as YCA or NARA. See 18 U.S.C. §§ 4209, 4252-53, 5010 (1970); cf. id. § 3651 (1970) (court may suspend sentence and impose probation when it finds "that the ends of justice and the best interest of the public as well as the defendant will be served thereby").
228. Fed. R. Crim. P. 32(c)(1); note 229 infra. Some defendants spend ten years in prison before discovering that the judge relied on false information at sentencing; others never find out. See, e.g., Townsend v. Burke, 334 U.S. 736 (1948); M. Frankel, supra note 226, at 32-33.
229. See Frankel, supra note 84, at 2-16; Kutak & Gottschalk, In Search of a Rational Sentence: A Return to the Concept of Appellate Review, 50 NEB. L. REV. 469, 499 (1974); Motley, "Law and Order" and the Criminal Justice System, 64 J. CRIM. L. & CRIMIN. 259, 260, 265-66, 268-69 (1973); Singer, Sending Men to Prison: Constitutional Aspects of the
Until the law of sentencing reaches minimum constitutional standards necessary to assure fairness and accuracy, it can hardly be pronounced as a general model for the developing law of parole release decisionmaking. In one respect, however, the law of sentencing has recognized an important procedural right not yet afforded at the parole release hearing and not clearly required under the minimum due process model: the right to be represented by counsel. Counsel has been held to be required at sentencing for three purposes: first, to protect a defendant's rights that would otherwise be waived; second, to assure the factual accuracy of the sentencing determination; and third, to present the case for minimal punishment appropriate in light of the offense committed, the offender's personal characteristics, and the available alternatives.

Although parole release decisionmaking does not involve the possibility of waiver of trial-level rights, it is otherwise parallel to the sentencing decision. The Board passes on information similar or identical to that presented at sentencing; because of inadequate safeguards to insure accuracy of information in the files, counsel must be available.
at parole hearings to insure inaccurate information is not relied on.\textsuperscript{233} The Board's decision determines (within the parameters of the sentence) the length of incarceration required, and counsel's arguments in mitigation of extended incarceration are as important here as at sentencing.

Courts have thus far rejected the argument that parole release determinations should be held to the same constitutional standards for counsel that apply at sentencing. Both \textit{Gagnon v. Scarpelli}\textsuperscript{236} and \textit{Menechino v. Oswald},\textsuperscript{237} in denying claims that counsel was required at revocation or release determinations, suggested that the presence of counsel at such determinations would interfere with the "'predictive and discretionary,'" i.e., dispositional, functions of such proceedings.\textsuperscript{238} But counsel is presently required at sentencing, which, like parole, is essentially a dispositional rather than adjudicative proceeding.\textsuperscript{239} The primary fact finding relevant to guilt or innocence has already been made, or the defendant has admitted guilt, prior to the sentencing stage.\textsuperscript{240} And like the judgments of parole boards, sentencing itself is a complicated decision that involves balancing various policies and factors, many of which are imprecise and nonlegal. The courts have recognized the importance and relevance of lawyers' skills of investigation, verification of evidence, and factual distinction in reaching these decisions.\textsuperscript{241} There is thus little justification for judicial reason-
ing that currently affords counsel at sentencing but denies it at parole hearings.\textsuperscript{242}

c. The Administrative Procedure Act

The Administrative Procedure Act (APA)\textsuperscript{243} provides a third, statutory model for parole hearing procedures. Due process aside, the APA requires certain protections for persons affected by agency actions.\textsuperscript{244} Jurisdiction under the APA to consider actions of the Parole Board has long been allowed, although cases arising before 1972 uniformly denied prisoners' or parolees' claims.\textsuperscript{245} Because these claims were denied on the merits, there was never a square holding that the federal board was an "agency" under the Act. In \textit{King v. United States},\textsuperscript{246} however, the Seventh Circuit held that the Parole Board was within the coverage of the APA and therefore had to provide "a brief state-

\textsuperscript{242} Just as the essential similarity of sentencing and parole should lead to the extension of counsel to the parole hearing, so that same similarity should require at sentencing those procedural protections available at the parole hearing, especially articulated criteria and the explanation of reasons for each decision. See pp. 850-31, notes 229-30 \textit{supra}; Berkowitz, \textit{supra} note 226.

\textsuperscript{243} See note 163 \textit{supra}.

\textsuperscript{244} The APA requires that in every "adjudication required by statute" interested parties be afforded timely notice of the "time, place, and nature of the hearing," and of "the matters of fact and law asserted." 5 U.S.C. § 554(b) (1970). It also allows parties in such adjudications to submit facts for consideration and to be protected from \textit{ex parte} consultation by hearing examiners with anyone "on a fact in issue, unless on notice and opportunity . . . to participate." \textit{Id}. §§ 554(c), (d). The Act requires that persons "compelled to appear" be permitted legal counsel "in any agency proceeding," and allows the appearance of interested parties "in connection with an agency function," so far as "the orderly conduct of public business permits." \textit{Id}. § 555(b). Section 6 of the Act also entitles a "person compelled to submit data or evidence" to "procure a copy or transcript thereof," \textit{id}. § 555(c), and "any interested person" to receive a "brief statement of the grounds" for denial of any written application. \textit{Id}. § 555(e). In addition, § 10 of the APA grants a statutory right of judicial review of agency actions under most circumstances; \textit{id}. §§ 701-06. Some courts have also interpreted this section as an independent grant of jurisdiction to the district courts. See note 166 \textit{supra}.


\textsuperscript{245} See p. 846 \textit{supra}.

\textsuperscript{246} 492 F.2d 1337 (7th Cir. 1974); \textit{accord}, Mower v. Britton, 504 F.2d 396 (10th Cir. 1974). See 27 \textit{VAND. L. REV.} 1257 (1974).
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ment of the grounds” for the denial of any written application for parole.247 After reviewing both recent recommendations248 and constitutional arguments249 that the Board should give such reasons, the court proceeded to rest its decision solely on the plain language of § 6(d) of the Act.250

In Pickus v. United States Board of Parole,251 the Court of Appeals for the District of Columbia reached a complementary result, holding that the Parole Board was subject to the APA. The court further held that § 4 of the Act252 required notice of proposed rulemaking by prepublication in the Federal Register, allowing at least 30 days for public comment, of the parole Guidelines and most of the accompanying procedural regulations.253 In applying the APA to

247. 5 U.S.C. § 555(c) (1970). The court reversed a dismissal of the action and remanded the case solely for a finding of whether the application for a parole hearing had in this case been written. Applications for initial hearings are filed in writing, but written applications for subsequent review hearings are “not necessary.” 28 C.F.R. § 2.11(a) (1974). The court in King did not consider whether denial of parole at a review hearing (which, under § 2.11, the inmate “may not waive”) would require written reasons if only the initial hearing had been requested in writing. The Board now voluntarily gives written reasons, consisting of the inmate’s rating on the Guideline Table. Id. §§ 2.13(c), (d), 2.14(d). A reason for parole denial merely reciting reliance on the Guidelines was held insufficient under King and Mower in United States Bd. of Parole, 383 F. Supp. 1153 (D. Colo. 1974).

248. See Administrative Conference Recommendation, supra note 55, at 534; Task Force Report: Corrections, supra note 1, at 86.

249. See pp. 859-51 supra.

250. 5 U.S.C. § 555(c) (1970). Citing legislative history, King distinguished Hyser v. Reed, 318 F.2d 225 (D.C. Cir.) (en banc), cert. denied, 375 U.S. 957 (1963), on the basis that the latter case involved a different and narrower provision of the APA. The provisions involved in Hyser, §§ 554, 556 and 557, apply only to those agency adjudications “required by statute to be determined on the record after opportunity for an agency hearing.” Hyser held that revocation hearings were not subject to those requirements, see p. 346 supra, but a court might now give a different construction to 18 U.S.C. § 4907 (1920), which plainly does mandate a hearing before parole can be revoked. But see Procedures, supra note 42, at 479-80. There is no comparable statutory requirement in the present law for hearings before parole release, however, and it seems unlikely that the more extensive protections of those sections of the APA could be extended to the release stage. See note 148 supra; de Vyver v. Warden, 16 CRIM. L. Ri'rR. 2339 (M.D. Pa., Dec. 23, 1974).


253. Prior to the Pickus decision in the district court, Pickus v. United States Bd. of Parole, Civil No. 112-73 (D.D.C., July 26, 1973) (Green, J.), the Board had published certain procedural regulations in the Code of Federal Regulations, but had never complied with the prepublication and public comment requirements, see 28 C.F.R. §§ 2.1-2.49 (1973). Substantive standards and considerations for granting or denying parole, however, did not even appear in the Code, but only in the Board’s own “Rules,” which were last published (in pamphlet form) in 1971. U.S. Bd. of Parole, supra note 49. After Pickus the Board integrated the former C.F.R. regulations, most of the 1971 rules, and provisions of the Pilot Project in a new set of regulations that were published at 38 Fed. Reg. 26652-57 (Sept. 24, 1973). In its publication of the new regulations, the Board “expressly disclaimed” any obligation to comply with the APA, and it repeated that disclaimer when it first published the Guidelines. Id. at 26652, 31942. Ten weeks after Pickus was affirmed, the Board compiled and prepublished its rules in slightly amended form, declaring for the interim period that they would serve as “emergency regulations.” 39 Fed. Reg. 45223-35, 45296 (Dec. 31, 1974). The Board continues to assert that it “does not acquiesce in
the Guidelines themselves and finding that promulgation had violated the statutory requirements, however, the court did not express an opinion as to whether adherence to the new rules might be inconsistent with the Act in any way.

In light of King and Pickus, attempts will certainly be made to force the Parole Board to comply with other provisions of the APA. For example, under the Act an inmate appearing at a parole release hearing would be entitled to representation by counsel. Moreover, the assistance of counsel cannot be fully effective without access to the record on which the hearing examiners will make their decision, and such disclosure may therefore also be required by the Act. In addition, the Freedom of Information Act would seem on its face to require that parole release decisions be publicly available, along with the votes of individual Board members. Finally, the APA also per-

the decision." Id. at 45296. The Board amended several of its regulations again a month later, 40 Fed. Reg. 5357-62 (Feb. 5, 1975), but did not comply with the APA requirements, asserting that to do so would be "impractical." Id. at 5357. On the plaintiff's motion for supplemental relief, the district court extended the time for public comment to May 4, 1975, and ordered that the new rules be properly prepublished. Pickus v. United States Bd. of Parole, Civil No. 112-73 (D.D.C., Feb. 28, 1975).

254. There are two possible statutory supports for this right. First, § 6(a) of the Act, 5 U.S.C. § 555(b) (1970), affords a right to counsel to a "person compelled to appear in person" before an agency or its representative, and a parole board regulation states that "prisoners shall appear" for review hearings, 28 C.F.R. § 2.14 (1974); see Procedures, supra note 42, at 481; K.C. Davis, Administrative Law Treatise § 8.10, at 376 (1970 Supp.). Second, the same APA provision goes on to state that a "party is entitled to appear...with counsel...in an agency proceeding," and King held that a parole hearing is "an agency proceeding." 492 F.2d at 1344. Thus, even if an inmate were held not to be "compelled to appear in person" at the parole hearing, he or she might still be entitled to the assistance of counsel. Procedures, supra note 42, at 481. 28 C.F.R. § 2.12(a) (1974), which allows an inmate to have a "representative" at a hearing but severely limits the representative's role, may be incompatible with the APA and with the proper role of counsel; cf. Mempa v. Khay, 389 U.S. 128, 135 (1967).

255. The primary hindrance to effective advocacy in the existing process is not that counsel may not attend the hearing, but rather that he may not examine the entire record, to correct prejudicial errors, omissions, and misplaced emphasis. Procedures, supra note 42, at 482. The Freedom of Information Act generally favors disclosure of agency files. Files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" are exempted from public disclosure under the FOIA, 5 U.S.C. § 552(b)(6) (1970), but a prisoner might have the right to waive that privacy in order to allow counsel access to prison records that the Board relies on. If these files were "investigatory records compiled for law enforcement purposes," the Act would allow their disclosure unless it would "interfere with enforcement proceedings" or "disclose the identity of a confidential source and...confidential information furnished only by the confidential source." Id. § 552(b)(7), as amended, Act of Nov. 21, 1974, Pub. L. 93-502, 88 Stat. 1561. The applicability of this section to presentence reports is unclear. See pp. 878-79 infra.

The Privacy Act of Dec. 31, 1974, 5 U.S.C.A. § 552a (Supp. 1975), greatly facilitates individual access to government files containing information about private persons, including a right to review those records and request corrections or amendments. The section, however, specifically allows the Board to exempt from these provisions "any system of records...maintained by...parole authorities and which consist of...reports compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision." Id. § 552a(2)(C); cf. Note, The Investigatory Files Exemption to the FOIA: The D.C. Circuit Abandons Bristol-Myers, 42 Geo. Wash. L. Rev. 889 (1974).

mits persons "compelled to submit . . . evidence," such as the inmate at a hearing, to "procure a copy or transcript" of that testimony.257

B. The Necessary Procedural Protections

The above sections have explored the extent to which existing legal standards require procedural protections in parole hearings under the Guidelines. Neither of the two due process models, standing alone, will necessarily assure adequate protections, for the Constitution imposes only minimum requirements. And neither the APA nor the constitutional models necessarily provide optimal procedures, since each must apply to a wide range of factual settings and legal problems. In the specialized and critically important parole process, both the Board and Congress should take steps to provide the fairest and most accurate possible procedures.

At the hearing stage, at least those procedural requirements designed to protect the inmate from Board reliance on faulty factual assumptions should apply. Most basically, there should be open discussion of the nine Salient Factor questions at the hearing.258 Only by discussion within the hearing itself can factual disputes be effectively resolved. And as long as parole release decisions are based primarily on the Guidelines, the hearing should, at least in part, be structured to encourage such factual confrontation, rather than discourage it by concentrating on rehabilitative factors having little bearing on the ultimate outcome.

To facilitate this discussion at the hearing, there should be advance notice of all these facts in the file upon which the Board's final Guideline rating will depend.259 The Guideline Table facilitates such ad-

257. 5 U.S.C. § 555(c) (1970). Such transcripts are presently available only upon court subpoena. 28 C.F.R. § 2.12(b) (1974).
258. See Administrative Conference Recommendation, supra note 55, at 533; Note, supra note 56, at 454-57.
In response to these and other similar recommendations, the Board has begun to encourage explicit discussion at the hearing of information relevant to the Salient Factor Score. Interview with M. Sigler, Chairman, U.S. Bd. of Parole, Jan. 20, 1975.
There is also an emerging right in the federal courts to disclosure of material adverse information relied on in sentencing. Shelton v. United States, 497 F.2d 156, 159 (5th Cir.
vance disclosure, since it isolates those few criteria and factors which are most relevant. As one judge has noted:

The entire thrust of the Board's commendable new approach is to have objective facts such as a prisoner's offense and his offender characteristics play a prominent part in parole decisionmaking. [While] the Board makes known to prisoners both the guideline table and the rating system used to score offender characteristics . . . [, it does not inform him] whether [it] is rating his offense severity by his convicted offense or some other alleged offense . . . . [W]hen an alleged offense may be considered by the examiners, either to select an appropriate offense category or to continue confinement beyond a guideline period, it would be helpful to alert the prisoner to this prospect during the parole hearing in order to maximize his opportunity to challenge the allegations.260

There is no reason why an inmate should have to wait for an error to be corrected through the administrative appellate process,261 or eventually by the courts, when the likelihood of error is fostered by the absence of safeguards and lack of fairness in the original determination.

Increased fairness and accuracy will also result from allowing a greater role for counsel at the hearing. Instead of being prevented from "acting like lawyers," counsel should be present262 to act as an attorney whenever the inmate's version of the offense behavior differs from the one relied upon by the Parole Board.263 If, for example, the Board is going to rate the inmate's offense severity at a higher level on the basis of counts in an indictment of which the inmate was not convicted, an attorney should be allowed to show that there is no factual basis for including these other acts in the evaluation of "offense severity."264

There is also a role for counsel to present argument where facts are not disputed. For example, the classification of ambiguous offense behavior may call for the exercise of judgment as to the relative criminality of different acts. An attorney's skill and experience in analysis, comparison and differentiation would be helpful in assuring the essen-

261. See notes 271, 276 infra.
262. Administrative Conference Recommendation, supra note 55, at 534; Note, supra note 56, at 449-54; Comment, supra note 222, at 502-05.
263. See pp. 836-37 supra.
tial fairness of such determinations. An attorney with experience in allocution might also be valuable in explaining to the examiners why they should consider the inmate a better "clinical risk" than indicated by a Salient Factor Score.

To further ensure the accuracy of the Salient Factor Score and Offense Severity Rating, the reasons given for a parole denial should include a statement of the evidence or facts underlying the rating. While it is now the practice of the Board to reveal the inmate's score on each scale, this disclosure only identifies the severity rating and component items of the Salient Factor Scale without indicating the factual basis for lost points. None of the basic purposes for giving reasons is thus fulfilled. The inmate does not receive an explanation sufficient to make him or her feel that the decision is reasonable and fair, and the administrative (or ultimately judicial) reviewing pa-

265. Id. But see M. FRANKEL, supra note 226, at 37 (most lawyers present boilerplate, ineffective pleas for leniency at sentencing).

266. The Board's regulations allow the examiners' "clinical evaluation of risk" to "override this predictive aid" (Salient Factor Score) "where circumstances warrant." 28 C.F.R. § 2.20(c) (1974). This opportunity may be constitutionally required. 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. See Vlandis v. Kline, 412 U.S. 441 (1973). See generally Note, Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur, 62 Geo. L.J. 1173 (1974); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1594 (1974); Note, The Conclusive Presumption Doctrine: Equal Protection or Due Process?, 72 Mich. L. Rev. 800 (1974); Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975).

Even a rebuttable presumption may violate due process if the presumed facts do not bear a sufficiently close relationship to the proved fact. It is unlikely that the risk prediction generated by a Salient Factor Score would be held to a criminal presumption standard of due process. See Turner v. United States, 596 U.S. 398, 416 (1970); Leary v. United States, 395 U.S. 6, 36 (1969).

Since the Salient Factor Scale's predictions are more discriminating than chance and even better than expert clinical judgment, there is at least "some rational connection," Mobile, J. & K.C. R.R. v. Turnipseed, 219 U.S. 35, 43 (1910), between an inmate's Salient Factor Score and his or her risk of ultimate parole failure. Therefore, the scale does not seem violative of due process as an impermissible rebuttable presumption; cf. pp. 875-76 infra.


268. One court has ruled that when the Board's determination of offense severity is based on offenses other than the conviction offense, and parole is thereby denied, it must specifically so inform the inmate. Lupo v. Norton, 371 F. Supp. 156, 161-62 (D. Conn. 1974); cf. Billiteri v. United States Bd. of Parole, 363 F. Supp. 1217 (W.D.N.Y. 1974). See pp. 824, 838-39 supra. This holding should also apply where examiners use facts properly the basis for decisions outside the Guidelines to raise an inmate's Salient Factor Score. Adherence to this decision would at least prevent the hidden exercise of discretion.

269. Reasons serve both to ensure reviewability and to demonstrate fairness to the subject of the decision. Monks v. New Jersey St. Parole Bd., 58 N.J. 238, 246, 277 A.2d 199 (1971); United States ex rel. Johnson v. Chairman, 500 F.2d 925 (2d Cir.), vacated on other grounds, 95 S. Ct. 488 (1974). Reasons for denial are also said to enable the inmate to know how to direct his or her rehabilitation so as to improve his or her later chances for parole. Bradford v. Weinstein, No. 73-1751 (4th Cir., Nov. 22, 1974), at 11.
nels are not sufficiently notified of the factual basis of the decision to discover whether the decision was within lawful bounds. A satisfactory reason would have to identify with some precision any unfavorable facts that caused a prisoner to lose Salient Factor points. For example, this part of the decision might read:

You have a “good” parole prognosis, having scored 7 out of a possible 11. You lost points for your one 1963 New Hampshire conviction (one point lost); your 1965 parole revocation (one point); your history of barbiturate dependence (one point); and your lack of a high school diploma or equivalent (one point).\textsuperscript{270}

Less informative reasons mean less satisfactory and useful reasons, both to the inmate and to the Board.

The internal appellate process adopted by the Board\textsuperscript{271} cannot be considered a remedy to the lack of fairness in Salient Factor scoring and Offense Severity Rating. An inmate receives no notice of the factual basis for his Salient Factor Score or Offense Severity Rating.\textsuperscript{272} An effective appeal by an inmate is thereby hampered, if not prevented, especially in light of the low literacy level of many inmates and their lack of access to supporting documents.\textsuperscript{273}

Taking greater care to expose crucial facts to confrontation and discussion would be advantageous to the Parole Board as well as to the prisoner. When the Board unwittingly relies on false data the


\textsuperscript{271} 28 C.F.R. §§ 2.24-2.27 (1974). During the first ten months of the Pilot Project (October 1972 to July 1973) 366 of 1,365 decisions not to parole were appealed to the Regional Director (Level I). L. DeGostin & P. Hoffman, Administrative Review of Parole Selection and Revocation Decisions, Jan. 1974 (U.S. Bd. of Parole Res. Unit: Rep. 1), reprinted as Administrative Review of Parole Decisions, FED. PROBATION, June 1974, at 24. See note 94 supra. Approximately 75 percent of these appeals led to an affirmance of the earlier decision; 25 percent of the decisions were modified at the regional level and led to results favorable to the inmate. However, the study did not report what percentage of the modifications were based on Guideline misplacement, and what percentage were based on discretionary considerations, such as the rating of an inmate's offense severity. Finally, the study was conducted at a time when only approximately 63 percent of the examiner panels' decisions were within the Guidelines, compared to the existing rate of 92 to 94 percent. See Battle v. Norton, 365 F. Supp. 925, 933 (D. Conn. 1973) (63 percent of decisions within the Guidelines); Grasso v. Norton, 376 F. Supp. 116, 119 (D. Conn. 1974) (92 to 94 percent). During the ten month period of the study only 15 Level II appeals were filed, about 12 percent of those eligible for Level II consideration. See note 89 supra. Fourteen were affirmed by the Board member designated to review the case, and one was scheduled for a review on the record before the National Appellate Board, which then affirmed the decision. DeGostin and Hoffman, supra, at 6.


Salient Factor Score loses its predictive power. The inmate is then improperly rated on the Guidelines and may be released at a time inconsistent with the goals of the Guidelines. Moreover, disclosure would also save time for the Board by avoiding unnecessary and time-consuming appeals which often result in a second hearing or at times in a court challenge. Finally, inaccurate Guideline rating is inconsistent with the Board's dedication to achieving "fairness" by providing like treatment of similarly situated offenders. The use of unchecked data from unreliable sources leads to results as capricious and arbitrary as those intuitive decisions the Guidelines were designed to curtail.

Such procedural reforms, with the possible exception of permitting counsel to attend parole hearings, would impose a very limited burden on the Parole Board. The files on which decisions depend are maintained not by the Board, but by the institution where the prisoner is incarcerated. Before each hearing the institutional caseworker must prepare a "progress report" for the examiners, which entails a review of the inmate's file. Beginning in mid-1974 these reports were disclosed to inmates before their hearings. No special burden would attach if the caseworker were required to reveal in that report, sufficiently far in advance to allow a response to be prepared, those facts in the PSI and other reports reasonably bearing upon Salient Factor and Offense Severity determinations. If the inmate and caseworker did not agree in advance of the hearing on the correct state of facts, the

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274. Salient Factor Report, supra note 69, at 14.
275. See L. DeGostin & P. Hoffman, supra note 271, at 9 (during first nine months of allowing appeals, approximately ten percent led to new hearings).
277. In Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974), the Notice of Action was entered by the Parole Board on February 1, 1974; the petitioner then exhausted his administrative remedies by filing unsuccessful Level I and Level II appeals, contesting the severity rating of his offense behavior. The district court entered judgment in his favor on July 31, 1974, six months after the Board's action, finding that there was no evidence to support the severity rating the Board gave him. See Jerome N. Frank Legal Servs. Org., New Haven, Conn. Case File YD951-74; see note 219 supra.
278. In the interests of time and administrative convenience, permitting or requiring witnesses to attend parole hearings should not generally be the rule. However, in extraordinary cases where there is substantial disagreement between the inmate and the Board over an evaluation of facts material to his parole outcome, the inmate should be able to submit a request to present witnesses, detailing their testimony.

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inmate would have an adequate opportunity to prepare a presentation of alternative facts in the parole hearing. The Board's concern that arguments of counsel would consume too much time is reasonable, but could be accommodated short of a ban on representatives' "acting like lawyers." It would not be unfair to impose a reasonable, pre-announced time limit, especially if the Board reveals in advance the facts on which it will rely.

In sum, major revisions are needed in the parole release hearing to ensure fair and accurate decisionmaking. Relevant factual issues should be explicitly discussed during the hearing. To render this discussion effective, there should be advance disclosure of those facts in the inmate's file upon which the Guideline rating will be based. In addition, counsel should have a more active role in the hearing. Finally, reasons for denial of parole should be given, including a detailed and meaningful statement of the underlying facts or evidence. Such innovations, while offering significant benefits to both the inmate and the Parole Board, would not constitute an undue burden on the Board.

The adoption of these reforms would substantially improve the parole release process within the Board's present decisionmaking authority. However, this discussion has not addressed the larger problem of the appropriate role of the Parole Board in the post-conviction process. The use of the Guidelines raises important questions about the relationship between the Board and sentencing judges, an issue to be considered later.

III. Legality of the Guidelines

While the above procedural reforms will enhance the fairness and accuracy of the parole release hearing, they will be of little importance if the substantive criteria and purposes of the release decision are in-

279. In January 1975, the Parole Board arranged with the Bureau of Prisons for a prisoner, during classification at an institution, to fill out a form (I-32), seeking to elicit the information needed to compute the Salient Factor Score. Caseworkers attempt to resolve any discrepancies with the prison file records. Interview with P. Hoffman, Research Criminologist, U.S. Bd. of Parole, Jan. 20, 1975, at New Haven, Conn. The effect of this new provision, however, may be minimal. First, a substantial period of time may elapse before this form is used, since an inmate is classified upon entering an institution, 18 U.S.C. § 4081 (1970), but will normally receive a parole hearing only after serving one third of the sentence, 18 U.S.C. § 4202 (1970). See p. 818 supra. More important, the presentation of information in a written statement is not a satisfactory substitute for open disclosure, confrontation and discussion of disputed information in the context of the parole decision.

280. This concern, however, is not founded upon the Board's research. Its study of the effect on hearings of various kinds of representation did not include any attorney representatives. Effect of Representation, supra note 138, at 14.

281. See pp. 882-97 infra.
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valid. Such an inquiry has previously been inhibited by the secrecy surrounding parole release decisionmaking; as a consequence, most criticism has been focused on suggestions for procedural reform. Because the Parole Board’s Guideline Table has so well articulated and rationalized the criteria and goals of decisionmaking, it permits, and indeed compels, this analysis. Therefore, the legality of the Guidelines will now be considered.

A. Fixed and Mechanical Decisionmaking

The Guideline Table’s most fundamental innovation is its articulation of two basic criteria that are applied to virtually all inmates to determine how much time each must serve prior to release. Although the Parole Board’s previous emphasis was on individualizing the treatment and consideration accorded each inmate, establishment of the Guidelines reflects a change toward the goal of equality of treatment under generalized rules. Individualization, on the one hand, and equality of treatment on the other, are important goals of any governmental decision process, especially the post-conviction process. But while there is no irreconcilable conflict between the values of individualization and the discretion needed to assure it, and of equality of treatment based on systematic criteria or rules, the Board emphasizes:

By “fairness” we mean that similar persons are dealt with in similar ways in similar situations . . . . [Fairness] cannot relate to the

282. "[W]e should not spend more money on the Parole Board....[I]t is a total failure. But like most situations where you have a total failure, reform comes along and says, 'Spend more money. Put in more personnel.' [N]o matter how much money you spend on the Parole Board and parole system, it is still going to be a failure, because it attempts to do something which cannot be done." Hearings on Parole, supra note 6, at 597-98 (testimony of Sen. Goodell, Chairman, Comm. on the Study of Incarceration). See id. at 94 (testimony of Prof. L. Orland).

283. See Kadish, supra note 1, at 921; Lederburg, The Freedoms and the Control of Science: Notes from the Ivory Tower, 45 S. CAL. L. REV. 596, 597 (1972); Note, Procedural Due Process at Judicial Sentencing for Felony, 81 HARV. L. REV. 821, 824 (1968); Note, Freedom and Rehabilitation in Parole Revocation Hearings, 72 YALE L.J. 368, 379 (1962); cf. TASK FORCE REPORT: CORRECTIONS, supra note 1, at 7-15 (while individualized treatment is desirable “there is a danger of creating an illusion of scientific omniscience through premature use of advanced methods for handling data.” Id. at 15).

284. Hearings on Parole, supra note 6, at 91, 192-93; GIARDINI, supra note 9, at 145; Comment, supra note 48.


286. U.S. CONST. amend. XIV; Hearings on Appellate Review, supra note 227, at 7 (legislative efforts to eliminate disparity in sentencing); M. FRANKEL, supra note 226, at 11; Wyzanski, A Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281, 1291 (1952).

unique individual . . . . The question of justice is one of beliefs; but we can, by the use of research methods . . . , address the question of fairness.\textsuperscript{288}

The Guidelines generally seem to structure discretion quite well.\textsuperscript{289} Their explicit criteria for determining release dates cause the hearing panel to consider carefully why they think an inmate should be an exception and to provide reasons for that decision.\textsuperscript{290} Decisions out-

\textsuperscript{288} NCCD Rep. 9, \textit{supra} note 5, at xii-xv (Foreword by Leslie Wilkins).

\textsuperscript{289} See note 293 \textit{infra}; but cf. pp. 833-39 \textit{supra}.

\textsuperscript{290} For example, in one case involving a first offender, the hearing examiners discussed the background of the inmate's offense: he had been approached several times by a narcotics agent and had agreed to ask his cousin where the agent could get some heroin. His cousin had supplied the heroin and had paid him a small amount of the price received from the agent. By the time of the hearing the inmate had served 11 months of his one to nine year sentence. The institutional staff recommended his early release on the grounds he was unlikely to commit future criminal acts, was thoroughly repentant, and appeared to be on the verge of a nervous breakdown. In addition, the hearing examiners were impressed by the inmate's wife who appeared as his representative. However, the examiners were in a quandary as to how to justify a decision outside the Guidelines. After the inmate left the hearing room the following discussion ensued:

Examiner (1): The impression I had was that he got pressured into it. He demonstrated to me that this sentence had a serious impact on him. Besides, I'm afraid to let him sit more.

Caseworker: Everyone says he's been very good here, that he should really be released.

Examiner (1): But I'm afraid that the Board won't buy it if we do give him a grant. I don't know how we can classify him—it can't be sale of narcotics for own use, since there's absolutely no history of drug dependence—they put him in the D.C. Treatment Center, and dismissed him after 3 weeks—said he had no need of it—so we have to classify the offense as sale of narcotics for profit—hard drugs, sale for profits; it has to be classified for money, not for personal use.

Caseworker: Of all the cases I've had, he's the best parole risk—It'll really hurt him to stay here.

Examiner (1): But he has a Salient Factor Score of 10, so it's hard to use the "better risk [than Salient Factor Score indicates] based on clinical evaluation" reason.

Examiner (2): But couldn't you say—he appears to be a better risk than the Guidelines indicate because of this isolated instance?

Examiner (1): Well, we'll do it and just caution him that it probably won't go through. When it's outside the Guidelines so far, it has to go to [the Regional Parole Board Member]—And if he may send it to the National Board—and if he does that, we're dead.

Examiner (2): Maybe we could talk to the chief hearing examiner?

Examiner (1): This will give him 13 months, and 3 weeks.

Caseworker: I really think that if I were a judge and he appealed this, I'd give it to him.

Observation of parole hearing (Ilh) at Lewisburg FP, Aug. 1974.

The examiners recommended release before the Guideline time. The justifications relied on in their report were that further incarceration would serve no useful purpose and would result in the deterioration and bitterness of the inmate; that he had an outstanding institutional adjustment; and that the subject was an excellent risk.
side the Guidelines are commonly based upon facts pertaining to the offense severity,\textsuperscript{291} or to a list of criteria which the Board's regulations specify may be considered in parole release decisionmaking.\textsuperscript{292}

However, the very effectiveness of the Guideline Table in structuring discretion raises an important problem. Approximately 90 percent of release decisions are within the Guidelines.\textsuperscript{293} Many release dates are routinely determined prior to the hearing and then, after a seemingly perfunctory proceeding, are affirmed with little discussion beyond a statement of the Guideline range.\textsuperscript{294} Moreover, hearing examiners appear to believe that there is an informal quota on decisions outside the Guidelines.\textsuperscript{295} They also appear to feel constrained

\textsuperscript{291} In six hearings in which decisions outside the Guidelines were made, the primary basis of the panel's evaluation was that the gravity of the inmate's behavior was either more or less severe than the gravity of other, nominally similar, behaviors.

\textsuperscript{292} See note 104 \textit{supra}. In six hearings in which decisions below the Guidelines were made, facts not related to the offense severity were the apparent motivating force (e.g., cooperation with government prosecution of others, serious illness, time served prior to the sentence). One inmate with terminal cancer was given a decision below the Guidelines, observation of parole hearing (Ic) at Danbury FCI, and an addicted Vietnam War veteran convicted of conspiracy to smuggle heroin was given a continuance to a release date substantially earlier than that indicated by the Guidelines. Observation of parole hearing (If) at Danbury FCI, Aug. 1974.

In one hearing, an inmate convicted of extortion accompanied by threats and physical violence received a release date 20 months below his minimum Guideline time of 45 months, because he had cooperated in the prosecution of coconspirators. Observation of parole hearing (Id) at Lewisburg FP, Aug. 1974.

\textsuperscript{293} The Parole Board reported in March 1974 that close to 94 percent of all parole board decisions are within the Guidelines. Structuring Discretion, \textit{supra} note 75, at 10 (reports 91.7 percent within Guidelines); Testimony of P. Hoffman, Research Criminologist, U.S. Bd. of Parole, Record, at 85-84, Diaz v. Norton, 376 F. Supp. 112 (D. Conn. 1974) (92 to 95 percent within Guidelines). This figure also includes all those released before their Guideline time because they have reached their mandatory release date, and all the persons released after the Guideline time indicated, but only because the minimum term on their sentence was higher than the Guideline time called for. Structuring Discretion, \textit{supra}, at 10. If those cases are not counted as decisions within the Guidelines, the figure drops to 89 percent. \textit{Id.}

The Board's most recent nationwide data tentatively indicate that decisions within the Guidelines have dropped to between 81 and 89 percent. If all cases outside the Guidelines by virtue of sentencing decisions are excluded from the figures, 77 to 85 percent of the decisions were within the Guidelines range. The larger number of decisions within the Guidelines as reported in the figures of March 1974 is attributed by the Board to the hearing examiners' reluctance to rely on their own judgment when the unfamiliar Guideline Table first came into use, and, at the same time, hearing examiners were for the first time delegated decisionmaking authority. Interview with P. Hoffman, Research Criminologist, U.S. Bd. of Parole, Jan. 20, 1975, in New Haven, Conn.

Of 99 release hearings observed, 12 resulted in decisions outside the Guidelines. Of these twelve, seven involved decisions below the Guideline time indicated, and five decisions went beyond the Guideline time indicated. This does not correspond with the Board's overall figures, which show more decisions to go above the Guidelines than below them. \textit{Id.}

More recent data indicate that a greater percentage of decisions nationwide are now below, rather than above, the Guidelines. Interview with P. Hoffman, Research Criminologist, U.S. Bd. of Parole, Jan. 20, 1975, in New Haven, Conn.

\textsuperscript{294} Project observers noted that this was the case in approximately 25 percent of the initial hearings observed.

\textsuperscript{295} Hearing examiners informally kept track of how many decisions outside the Guidelines they were making each day (and throughout the course of their "visit" to an institution); they discussed the number occasionally between hearings, and especially
to give reasons from their formbook for such decisions, so that decisions outside the Guidelines appear based on uncritical and repetitive considerations.

In light of these observations the legal question arises whether parole decisionmaking under the Guidelines meets the current legal standards requiring judges to make individual sentencing decisions and avoid a “fixed and mechanical” approach. Has the Parole Board, in its attempts to achieve fairness in decisionmaking, imposed on itself a tyranny of rules amounting to an abuse of discretion?

It is an abuse of judicial discretion to employ a “fixed and mechanical approach” in imposing sentences. The exercise of individualized discretion is mandatory. The parole decision appears to be sufficiently similar to sentencing that it would be subject to the same requirement. The sentencing decision is often said to be a complex determination, and judges are “regarded as expert professional[s] with talents to make crucial decisions where the law meets the limits of its competence.” Parole is also a complex decision, and parole officials are considered to have a similar expertise. Moreover, one court has expressly held that individualized discretion must be exercised in parole decisions. Therefore, under present doctrine the “fixed and mechanical” standard would be applicable to the parole release decision.

Generally, the “fixed and mechanical” rule applies only where it is clear that the judge had a policy of sentencing offenders convicted of a given offense to the same term, often the maximum permitted by statute, or where a parole authority has a policy based solely on the offense. If this is the extent of the doctrine, the Guidelines when they were considering another decision outside the Guidelines. Observations (Ilb-m), Danbury FCI, and (IIc-p), Lewisburg FP, Aug. 1974. The Board’s official policy is that panels should recommend decisions outside the Guidelines whenever in their judgment it is warranted. 28 C.F.R. § 2.20(c) (1974).


298. Kadish, supra note 1, at 906.

299. In re Minnis, 7 Cal. 3d 659, 498 P.2d 997, 102 Cal. Rptr. 749 (1972) (en banc) (California Adult Authority’s policy that no narcotics offenders would be paroled held to be an abuse of discretion; CAA required to make “individualized” determinations).

300. See note 296 supra. The cases overturning sentences on this ground do not require the appellant to establish that every offender is sentenced on the basis of a fixed policy, but only that such a policy exists and that the appellant was sentenced under that policy.

301. In re Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972) (en banc).
clearly are not “fixed and mechanical,” for they include the other factors contained in the Salient Factor Scale. At least one court, however, has gone further. In United States v. Schwarz, the refusal to sentence under the Youth Corrections Act a well-educated, middle-class woman with a stable employment history who had sold four ounces of cocaine, was held to be a “fixed and mechanical” approach amounting to an abuse of discretion. The court wrote that the judge’s reasons implied that a certain class of offenders—characterized by their backgrounds—would not receive YCA sentences, and that such a rule did not meet the requirements of a “careful appraisal of the variable components relevant to the sentence upon an individual basis...” Under this latter approach, the Guidelines might well amount to an unlawful “fixed and mechanical” scheme.

However, more careful consideration suggests the contrary conclusion. The “fixed and mechanical” doctrine is based on the assumption that justice and fairness require each decision to be individualized. Under the Guidelines, however, the Parole Board has not abandoned such individualized decisions. Rather, the Board identified certain personal and offense characteristics relevant to the goals it chose to implement in the parole release decision; based on these characteristics, the Board developed the two Guideline Table scales according to which inmates are classified. Thus, for purposes of classification, each individual’s particular characteristics are given consideration.

302. The Guidelines clearly rely on at least two factors: offense severity and prediction of risk. Because the prediction of risk is based on the nine items of the Salient Factor Scale, the Guideline Table can be said to rely on 10 or 11 factors. Further, all offenders convicted of the same offense are not treated alike under the Guidelines. It could be argued that offenders with similar likelihoods of recidivism are held for predetermined periods of time solely on the basis of offense severity, amounting to a fixed approach. However, the Board’s failure to rely on the convicted offense may save it from successful attack on this theory, since each inmate’s offense is scored individually on the severity scale.

303. 500 F.2d 1350 (2d Cir. 1974).

304. Id. at 1352. The dissent suggests that the court of appeals may have implicitly established a substantive standard as to the relative weight which should be accorded otherwise legitimate factors considered in sentencing. See McLeary v. State, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

305. See In re Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972) (en banc). Especially where an inmate has been sentenced under a rehabilitation-oriented program, the Guideline Table may provide an inadequately individualized approach to parole release decisionmaking. In Snyder v. United States Bd. of Parole, 383 F. Supp. 1153 (D. Colo. 1974), the court held the denial of parole to a YCA sentence with the highest possible Salient Factor Score, where the only reason given was that “after consideration of all relevant factors and information presented, it was determined that a decision outside the Guidelines was not warranted...” Id. at 1156. Although the court carefully noted that the “adoption of the Guidelines by the Board...is not, in itself,...arbitrary and capricious...,” it concluded that with respect to YCA sentences, the Board’s “emphasis must be placed upon treatment and rehabilitation of the offender.” Id. at 1157, 1156. Thus, it held that reasons for parole denial must “at a minimum, relate to the adjustment and rehabilitative efforts made...within the institution.” Id. at 1157. Accord, United States v. Norcome, 375 F. Supp. 270, 274-75 n.3 (D.D.C. 1974).
However, if these groupings determined every release decision, the Guidelines still might run afoul of the "fixed and mechanical" standard. But the parole system explicitly provides the opportunity for decisions outside the Guidelines, based on the judgment of the examiners in the individual case. Such opportunities are presently utilized. Thus, the potential is present in every hearing for further individualization beyond that already introduced by the multiple factors of the two Guideline scales.

In sum, the Guidelines, despite their often routine application, have introduced a beneficial measure of certainty and equality to parole decisionmaking. The "fixed and mechanical" doctrine should not be applied in such a way as to inhibit the development or use of flexible and articulated criteria such as those represented by the Guideline Table.

B. The Problem of Prediction—Due Process and Classification (Equal Protection)

The Parole Board’s Salient Factor Scale is an experience table "validated" for use as a predictive device. The Board’s use of a Sa-

306. Schwarz suggests that any inmate denied parole in a decision within the Guidelines would have been treated in a "fixed and mechanical" manner. Under this interpretation the "fixed and mechanical" doctrine would invalidate any sentence based on factors that are part of an articulated, consistent policy. To the extent that this interpretation is correct, the doctrine interferes with the development of rational and articulated criteria and their use to eliminate sentencing disparities, and should be abandoned. See M. Frankel, supra note 226, at 41-42; United States v. Schwarz, 500 F.2d 1350, 1354 (2d Cir. 1974) (Moore, J., dissenting).

307. One of the major sources of unrest in prisons has been the enormous uncertainty associated with the parole system. See p. 821 supra. The Guideline Table has now enabled many inmates to "predict" their parole decision. In fact, to arrive at the basic criteria of the Guidelines, NCCD researchers developed "experience" tables that enabled them to "predict" parole decisionmakers' responses to various inmates appearing before them. NCCD Supp. Rep. 9, supra note 5, at 5.

308. In developing the Salient Factor Scale, researchers sought to determine which personal characteristics had the best predictive value in discriminating between groups of releases who did and did not "succeed" after their release. See note 311 infra (a discussion of the definition of "success"). The Factors found to be the best "predictors" of "failure" were among those found by previous research efforts to be good "predictors" of "recidivism." See, e.g., D. Glaser, supra note 72, at 36-53; Glaser & O'Leary, Personal Characteristics and Parole Outcomes, in SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 412-33 (5d ed. C. Newman 1968); Mannheim & Wilkins, supra note 82, at 143. Other criminologists have constructed experience tables largely based on factors much more "subjective" than those on the Salient Factor Scale. A. Bruce, F. Burgess & A. Harro, The Workings of the Indeterminate-Sentence Law and the Parole System in Illinois (1928); S. Glueck & E. Glueck, Predicting Delinquency and Crime (1959); L. Ohlin, Selection for Parole 124-29 (1951). Curiously, the use of such a scale was considered by the U.S. Bd. of Parole in 1939 and rejected after an extensive study as unlikely to be helpful. Mannheim & Wilkins, supra, at 13-14. A good index of prediction requires that different raters will evaluate the same material at the same score. Mannheim & Wilkins, supra, at 140; Assessment and Prediction Methods, supra note 86, at 172-73. The NCCD factors chosen for the Salient Factor Scale all showed a relatively high degree of reliability in this sense. NCCD Supp. Rep. 12, supra note 110. See L. Wilkins, Inefficient Statistics,
lient Factor Score as a key element in determining the length of incarceration for federal offenders raises important legal issues.209

As already described,310 the answers to nine weighted questions about an inmate's history and status place him or her in one of four “risk groups.” These risk groups—ranked “very good,” “good,” “fair,” or “poor”—solely determine, for offenders otherwise similarly situated, the time at which each may expect release. Of the members of each group, a predictable percentage will succeed on parole, and a predictable percentage will fail.311 Because neither the length of


An experience table only describes the characteristics of the group on which it was based, but it does not necessarily apply to any other group, not even to a group similar to the original in all respects but arising later in time. B. Wootton, supra note 86, at 182.

A prediction table is “valid” only if it does in fact predict what it is supposed to predict on new samples. Mannheim & Wilkins, supra, at 140; Assessment and Prediction Methods, supra, at 171, 175.

The Salient Factor Scale was based on the actual records of 25 percent of those released from federal prisons during the first half of 1970. This table was then validated against two other samples: another 25 percent of the same six months' releases, and a 20 percent sample from the second half of the same year. Salient Factor Report, supra note 69, at 10. Despite some shrinkage in “predictive” capacity, these validations compared favorably with earlier parole table studies, which in turn had been shown to be better predictors than clinical judgment; and “the predictive power of this measure was deemed sufficient to recommend implementation.” Id., at 13; see L. Wilkins, The Problem of Overlap in Experience Table Construction, June 1973, at 12-14 (NCCD Parole Decision-Making Project Supp. Rep. 5). The Salient Factor Scale thus has a legitimate claim to be called a “prediction table” as well as an “experience” table.

Yet when a device is experientially “validated” as to a later group, the validation is not prospective but only retrospective; its validity for other future groups is still unknown. B. Wootton, supra, at 183-84. In parole prediction all validation is inevitably performed on those whom the board in fact decided to parole in a given year, plus those who were mandatorily released during the same year, having been denied parole in the past. This group is not necessarily comparable in relevant respects to the universe of parole eligibles of a later year, on whom the table will be used.

While social scientists have produced a voluminous literature on prediction in the past half-century, legal scholars have hardly considered the enormous potential impact of these studies. What consideration there has been among those trained in law has focused on predictions of juvenile delinquency and on preventive detention of suspects and the mentally ill. See, e.g., B. Wootton, supra note 86, at 173-99 (British magistrate criticizes the Gluecks' delinquency prediction work); Dershowitz, supra note 229; Goldstein & Katz, Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity, 70 Yale L.J. 225 (1960). Neither delinquents nor the mentally ill are considered responsible for their antisocial behavior; adult criminals are. The use of prediction devices to decide on extended incarceration of these persons, then, may raise different legal and philosophical problems. But see Von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 Buff. L. Rev. 717 (1972). This section of this Project focuses on the problems raised by the use of prediction devices in the context of presumably responsible felons.

310. See p. 824 supra.

311. The measure of “success” and “failure” obviously depends on the definitions of these terms. A lax definition of “success” means a lower perceived rate of “failure” and vice versa. Various definitions of failure have been suggested: continued criminality, including those acts detected by official agents and those detected by researchers which would be penal code violations, S. Glueck & E. Glueck, 500 Criminal Careers (1930), After Conduct of Discharged Offenders (1945); parole violation warrants; and technical violations. “Success” may be defined in terms of such considerations as “total” adjustment, avoiding major new convictions, avoiding subsequent incarceration. See generally L. Ohlin, supra note 308, at 41-46; Mannheim & Wilkins, supra note 82, at 5.

For the parole board study, the following events were defined as “failures”: a new
incarceration prior to parole nor successful participation in a rehabilitative program increases the likelihood of success on parole, neither factor contributes to the “parole prognosis” or affects the “risk group” to which an inmate is assigned. The inmate with a greater likelihood of recidivism is confined longer solely for incapacitation, not because such confinement will ultimately improve his or her chances of leading a law-abiding life upon release.

The use of the Salient Factor Scale raises the legal question of whether the Due Process Clause is violated by basing differential lengths of incarceration on the “risk categories” to which convicted federal prisoners are assigned. If two inmates have the same offense severity rating and the same length and type of sentence, but one has a Salient Factor Score of five (a “fair” risk) and the other of six (a “good” risk), then the “good” risk inmate is likely to be paroled some six months earlier than the other. Is this classification into risk groups and the resulting deprivation of liberty rationally related to a legitimate governmental purpose, in light of the respective personal and public interests at stake?

conviction resulting in a sentence of 60 days or more; a return to prison for parole violation; or an outstanding warrant. Salient Factor Report, supra note 69, at 2-3.

One aspect of the question of what should be predicted is the question of how long a time period after release the researcher follows. If the criterion of success is total adjustment, then presumably the follow-up period would be a lifetime. However, criminologists seem to agree that most parole revocations occur during the first year after release. P. Tappan, Crime, Justice and Correction 749 (1960). See W. Hammond & E. Chayen, Persistent Offenders 89-90 (1963) (ultimate expected reconviction rate of releases in England of 80 percent; 73 percent reconviction rate within three years). But see G. VoI'd, Prediction Methods and Parole 52-54 (1921).

312. See pp. 826-28 supra; G. Kassem, D. Ward & D. Wilner, Prison Treatment and Parole Survival (1971); D. Glaser, supra note 72, at 301-04; Mannheim & Wilkins, supra note 82, at 119; G. VoI'd, supra note 311, at 46-47; Robison & Smith, supra note 82; Types of Error, supra note 82, at 7; Bixby, supra note 82, at 24-28.

313. The Guidelines are published as tables to 28 C.F.R. § 2.20 (1974). See also Appendix infra.

314. The Equal Protection Clause of the Fourteenth Amendment applies by its terms only to the states. However, the same restrictions and standards are imposed upon the federal government by the Due Process Clause of the Fifth Amendment. See, e.g., Schlesinger v. Ballard, 95 S. Ct. 572, 576-77 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Schneider v. Rusk, 377 U.S. 186, 188 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

The Supreme Court has recently held that the “determination of an optimal time for parole eligibility elicited multiple legislative classifications and groupings, which...require only some rational basis to sustain them.” McGinnis v. Royster, 410 U.S. 263, 270 (1973). Although the Guideline Table reflects not a legislative determination of parole eligibility dates, but an administrative scheme for determining parole release dates, there is no reason to believe the Court would require a higher standard of rationality to sustain a classification contained in the Guidelines. See Dandridge v. Williams, 397 U.S. 471, 487 (1970) (state welfare regulation upheld as “rational”); Marshall v. United States, 414 U.S. 417 (1974) (Court upheld as rational the exclusion from eligibility for rehabilitative drug treatment sentencing anyone previously convicted of two or more felonies). The Court emphasized its view that “in areas fraught with...scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation...” 414 U.S. at 427). See generally Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Gunther, Foreword: In Search of Evolving Doctrine on a
Of the risk group labelled "fair," 60.8 percent are expected to succeed on parole when released; of the "good" risks, some 77.4 percent are expected to succeed. At some time during their sentences, members of the "good" risk group will be released, while "fair" risks who are otherwise similar to the "good" risk inmates will be imprisoned an additional period of time. If there were 100 prisoners in each of these two groups, the Parole Board would know that it was releasing, among the "good" risks, approximately 77 future successes and 23 future failures, while holding incarcerated 61 likely successes and 39 likely failures in the "fair" risk group. Of the total of 200 prisoners, about 37 percent of those who will fail on release gain immediate freedom, while 44 percent of those who would succeed are detained.

This seemingly high percentage of error, however, does not render the use of the Table illegal. The governmental objective served by the risk prediction—longer incapacitation of marginally greater risks—is among the legitimate goals of sentencing. The perceived governmental interest in a marginally reduced crime rate is obviously enormous and every delay in the release of recidivists causes a real albeit minor reduction in crime. More important, neither social science nor clinical expertise can identify the misclassified individuals in the released and detained risk groups. These classifications result in the most accurate predictions that modern criminology can presently achieve. The relative deprivation of liberty thus seems not only ra-

References:


315. Salient Factor Report, supra note 69.

316. The "good" and "fair" risk groups are about the same size. (In the sample used to construct the original scale, of 902 releasees classified, 268 scored "good" and 266 scored "fair." There were somewhat fewer "poor" risks (253) and many fewer "very good" risks (115). Id.)


319. All errors of classification in either group could be eliminated. Releasing all prisoners immediately would ensure that no one remained in prison who would be a safe risk if free; holding all prisoners indefinitely would eliminate recidivism. Neither approach would be legally or politically possible. An acceptable balance of the two types of error may be called the goal of any reasonable parole policy. Types of Error, supra note 82.

320. Studies indicate that predictions based on actuarial risk categories correctly identify more successes and failures than expert, clinical estimates. But within a given risk group, no statistical device now known can predict whether a given individual will succeed or fail on parole, nor is there any evidence that expert clinical judgment can do so. Salient Factor Report, supra note 69, at 13; see L. Wilkins, Evaluation of Penal
tional but also necessary if the legitimate goal of incremental incapacitation is to be achieved. Therefore, the Guidelines will not be invalidated through an equal protection challenge directed at the risk classifications.

C. The Problem of Status—Due Process and Cruel and Unusual Punishment

It is also possible to argue that risk prediction violates constitutional standards by serving to punish those who share the “status” of being a “bad risk.” In *Papachristou v. City of Jacksonville*, a unanimous Supreme Court struck down a municipal vagrancy ordinance as too vague to satisfy due process. Beyond vagueness, however, the ordinance purported to punish the status of being a particular type of person. Similarly, *Robinson v. California* held that any punishment imposed for the “crime” of being a narcotics addict would be cruel and unusual and thus barred by the Eighth Amendment. The Salient Factor Score is merely a composite of nine status classifications, each no more susceptible of separate criminalization than addiction.

*Robinson* and *Papachristou* would clearly prohibit the detention of a free citizen simply because of his or her Salient Factor Score. But
the Court's criticism of status crimes cannot be applied to a parole denial based on a relatively poor risk prediction. The standards for each risk category are not vague; specific, objective factors are spelled out.\footnote{327} More important, the government is not criminalizing a status, since the “bad risk” label is not applied to an “innocent” suspect, but only to certain persons who have already been properly convicted. If attended with reasonable procedural protections,\footnote{328} the assignment of a prospective parolee to a certain risk category is clearly more acceptable than the arrest of a vagrant or addict.\footnote{329} Thus, neither a Fifth nor an Eighth Amendment attack on the use of status classifications would invalidate the parole Guidelines' differential treatment of risk groups.\footnote{330}

However, concluding that the Guideline Table meets minimum legal standards is only the first step in the analysis. The Guidelines have significant implications for the practices and goals of other elements of the criminal justice system, and these implications must now be considered.

IV. Implications of the Guidelines for the Criminal Justice System

The process of parole release decisionmaking has been described and criticized above. Although the hearing has been shown to be inadequate on constitutional, statutory and policy grounds, the Guideline

\footnote{327} On the possibility of erroneous classification, see pp. 833-35 supra. On the opportunities for manipulation of the Salient Factor Score, see pp. 837-38 supra.

\footnote{328} See pp. 861-66 supra.

\footnote{329} A different status argument would attempt to show that the Salient Factor Score is highly correlated with an inmate's race and thus amounts to a disguised denial of parole on forbidden racial grounds. Indeed, many of the unfavorable Salient Factors do relate to personal attributes possessed disproportionately by black Americans: prior convictions, prior incarcerations, young age at first commitment, history of drug dependence, lack of high school diploma or equivalent, unemployment, single marital status. See U.S. Bureau of the Census, Statistical Abstract of the United States 58-39, 83, 115, 151, 154, 162, 225-26 (1973). This argument is specious. First, a statistical correlation is not necessarily legally sufficient to establish a violation of equal protection. See Jefferson v. Hackney, 406 U.S. 535, 547-49 (1972). More importantly, while the correlation is true of the general population it is apparently not true as to the federal prison population. In that universe there are somewhat more blacks proportionately in the middle two risk groups and somewhat more whites among the best and worst risks. Interview with P. Hoffman, Research Criminologist, United States Board of Parole, Nov. 11, 1974, in New Haven, Conn. Indeed, while being black was found to be among those factors most highly correlated with parole failure, its overlap with the other Salient Factors mentioned above was so substantial that it was eliminated early in the experiments on purely mathematical (as well as “ethical”) grounds. Id. See Salient Factor Report, supra note 69, at 4.

\footnote{330} Gross disproportionality of sentence to offense also offends the Eighth Amendment. Weems v. United States, 217 U.S. 349 (1910); see Furman v. Georgia, 408 U.S. 238, 273 (Brennan, J.), 325 (Marshall, J.) (1972). Thus, if the increment in increased detention were grossly disproportionate or excessive in relation to the difference in predicted risk, the assignment of federal offenders to “risk categories” might be unconstitutional. However, since the terms of confinement set by the parole Guidelines are relatively short in comparison with lawfully imposable sentences, such a theory would not succeed as a challenge to the risk increment; cf. Von Hirsch, supra note 309, at 750-55.
Table appears to meet minimum constitutional standards. This section examines the implications of the Guidelines—including the abandonment of rehabilitation and the choice of other goals—for the larger criminal justice system. The fundamental question to be considered is the proper allocation of governmental authority and responsibility in the post-conviction process of sentencing and parole.

A. The Presentence Investigation Report

With the implementation of the Guideline Table, the accuracy of the presentence investigation report (PSI) becomes critically important, since it is the primary source both for answering the nine questions which determine the inmate’s Salient Factor Score and for obtaining the “official version” of the inmate’s offense used to determine offense severity. The large number of errors that appear in PSI’s has been well documented. Since an inmate’s parole release date may often be adversely affected by such inaccuracies, some way must be found to insure the reliability of the PSI.

One obvious method to improve the accuracy of the Salient Factor Score is to have the probation officers seek to answer each of the nine questions in preparing the report. Focusing probation officers’ attention on the Salient Factors should result in some improvements in accuracy and would enable the probation officers to indicate any problems or questions encountered in documenting any of the Salient


332. Procedures, supra note 42, at 510.


334. The judges of the Southern District of New York have directed their Probation Office to include in presentence reports an estimate of both the Salient Factor Score and the time of release if the Guidelines are followed. Letter to Project authors from Judge Frankel, S.D.N.Y., Dec. 16, 1974 (on file with the Yale Law Journal).
Factors. This proposal falls short of being a final answer, however, because the officers' sources of information and time for further investigation would remain limited, and there would still be the possibility of human error.\textsuperscript{333}

A similar procedure would sensibly apply to the Offense Severity Rating. The presentence report, which is the basis for the parole examiner's severity rating,\textsuperscript{336} normally contains an "official" description of the offense and a "defendant's version" of the offense. The "official version" is obtained primarily from the United States Attorney\textsuperscript{337} or the indictment, but occasionally is supplemented with additional facts provided by the defendant.\textsuperscript{338} Sometimes, PSI's note other existing versions as well as aggravating or extenuating circumstances concerning the offense.\textsuperscript{339} However, tests done in conjunction with an NCCD study agree with this Project's observations that hearing examiners and board members overwhelmingly rely on the official description of the offense without considering the inmate's description.\textsuperscript{340} In effect, the Offense Severity Rating may be based on unsubstantiated allegations of the United States Attorney or unproven charges in the indictment, regardless of the conviction offense. Rather than relying solely on the counts of the indictment or the word of the United States Attorney, the Probation Officer should provide a more complete and impartial account by including attributed accounts of the offense from as many sources as may be available. Scrupulous presentation of mitigating and aggravating circumstances may assist the hearing examiners in reaching a fairer and more accurate determination of offense severity.\textsuperscript{341}

\textsuperscript{333} During 1970, 614 federal probation officers completed 21,509 full presentence investigation reports, 2,259 limited presentence investigation reports, and 5,529 prerelease investigations for the Board of Parole. Various other types of reports totaling 23,768 were prepared by probation officers for the Board of Parole, the Bureau of Prisons, the U.S. Disciplinary Barracks and U.S. Attorneys. Probation officers also supervised 35,469 released persons. Administrative Office of the U.S. Courts, Annual Report of the Director, 1970, at 178-82.


\textsuperscript{336} NCCD Supp. Rep. 13, \textit{supra} note 67; \textit{see pp. 835-36 supra.}

\textsuperscript{337} \textit{The Presentence Investigation Report, supra} note 335, at 10.

\textsuperscript{338} Interview with Stephen Gzregorek, \textit{supra} note 333.

\textsuperscript{339} \textit{Procedures, supra} note 42, at 510.

\textsuperscript{340} NCCD Supp. Rep. 5, \textit{supra} note 121.

\textsuperscript{341} The judge's evaluation of offense severity should also be clearly stated in the PSI. \textit{But cf. note 345 infra.}
B. The Guilty Plea

In the contemporary criminal justice system the vast majority of convictions are achieved through pleas of guilty.\(^{342}\) Agreements on plea bargains may arrive at an acceptable consensus as to the sentence to be imposed on an “offender.” The plea focuses principally on the sentence imposed or imposable by the court.\(^{343}\) Since the parole release decision is the primary determinant of when an offender will be released from incarceration,\(^{344}\) and since that decision has become almost mechanically predictable under the Guidelines, it may well be that the judge who accepts the guilty plea will be required to inform the defendant of the Parole Board’s use of the Guidelines.\(^{345}\)

Rule 11 of the Federal Rules of Criminal Procedure provides that a court shall not accept a guilty plea “without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.”\(^{346}\) Because the unavailability of parole “directly affects the length of time an accused will have to serve in prison,” courts have recognized that ineligibility may “have great importance to an accused in considering whether to plead guilty.”\(^{347}\) Thus, it has been held that ineligibility for parole\(^{348}\) is a consequence of the plea within

\(^{342}\) In some jurisdictions up to 80 percent of convictions result from guilty pleas. U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). In the federal courts in fiscal year 1969, 86 percent of the convicted defendants pleaded guilty or nolo contendere; over two-thirds of all defendants—whether dismissed, nolled, acquitted, or convicted—ultimately entered pleas of guilty or nolo contendere. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT: 1969, at 273; see Dawson, supra note 1, at 179.


\(^{344}\) See notes 1-6 supra.

\(^{345}\) Thirty-four percent of federal district judges surveyed thought a defendant should be informed of the Parole Board’s Guidelines before pleading guilty, while 61 percent responded negatively. Three percent had other responses and two percent did not answer. Project Survey of Sentencing Judges, question 18. It would be in the interest of the fair administration of criminal justice for the court to calculate and inform the defendant of his likely Guideline rating. This practice, however, could raise as many problems as it cures; prisoners might challenge either their plea or the Board’s determination of the Guideline range if a court and the Board reached different results under the Guidelines. This difficulty could be reduced by binding the Board to the court’s evaluation of offense severity. See pp. 887-89, 895 infra.

\(^{346}\) See p. 882 infra. The fact that a judge will probably not know what sentence he might impose when he first accepts the plea or the defendant’s Guideline range would not bar the judge from informing the defendant at that time of their use. Before sentencing the defendant, when judges normally provide an opportunity to withdraw the plea of guilty, they could advise the defendant of the expected Guideline range and its possible effects upon the probable sentence. See note 345 supra.

\(^{347}\) Bye v. United States, 435 F.2d 177, 180 (2d Cir. 1970).

the meaning of Rule 11 and therefore must be made known to the
defendant before accepting his or her plea of guilty.\textsuperscript{349}

Because parole is assumed to be available to the average defendant,
it is imperative that he or she be informed of the terms and conditions
of eligibility and any limitations thereon.\textsuperscript{350} This explanation should
include warnings that severity levels are independently determined
by the Board, and that decisions outside the Guidelines are possible. This
advice should at least be required when the Guidelines call for a period
of incarceration beyond the mandatory release date of the sentence to
be imposed.\textsuperscript{351} For example, as part of the Offense Severity Rating, the
Guidelines contemplate consideration of offenses which are either
charged in counts dropped as part of the plea agreement or alleged but
not officially charged by the U.S. Attorney.\textsuperscript{352} This knowledge might
have a significant effect upon a defendant's decision to plead guilty.
Defendants who believe they are "getting a break" by pleading guilty
to a conspiracy charge with a five year maximum that is lower than
the maximum for the substantive offense may revise that opinion upon
learning they might not be paroled because the Board may rate the

\textsuperscript{349} See, e.g., Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394
U.S. 459 (1969). The fact that a "special parole term" is required to be imposed in addition
to the regular sentence has been held to be within the scope of Rule 11. Michel v.
United States, 507 F.2d 461, 463-64 (2d Cir. 1974); Roberts v. United States, 491 F.2d
1296 (3d Cir. 1974); United States v. Richardson, 483 F.2d 516 (8th Cir. 1973). "Special
parole" is a novel provision of the Comprehensive Drug Abuse Prevention and Control
Act, 21 U.S.C. § 841 (1970) (effective May 1, 1971). It is separate from and begins after
the regular sentence has been served, including any other parole and is required to be
imposed under § 841 for offenders convicted under that section. Subsection (c)(2) of the
proposed revision of Rule 11 requires that the judge advise a defendant of "the manda-
tory minimum penalty provided by law, if any, and the maximum possible penalty
provided by law for the offense to which the plea is offered," 62 F.R.D. 271, 275. Argu-
ably this would require the court to inform a defendant of the Guideline range. The
effective date of the proposed amendments has been postponed for one year to August
1, 1975, Act of July 30, 1974, Pub. L. No. 93-361, 88 Stat. 397, in order to allow further
study.

\textsuperscript{350} Bye v. United States, 435 F.2d 177 (2d Cir. 1970); Harris v. United States, 426 F.2d
99 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970); Durant v.
United States, 410 F.2d 689 (1st Cir. 1969); Berry v. United States, 412 F.2d 189 (3d Cir.
1969); Munich v. United States, 357 F.2d 356 (9th Cir. 1964). Contra, Trujillo v. United
States, 377 F.2d 286 (5th Cir.), cert. denied, 389 U.S. 899 (1967); Smith v. United States,
324 F.2d 436 (D.C. Cir. 1963), cert. denied, 376 U.S. 957 (1964). But see Sanchez v. United
States, 417 F.2d 494, 496 (5th Cir. 1969) (Trujillo questioned); Spradley v. United States,
L. 93-481, § 2, 88 Stat. 1455, these offenders were made eligible retroactively. See Herrera
v. United States, 507 F.2d 143 (5th Cir. 1975).

\textsuperscript{351} See Bye v. United States, 435 F.2d 177, 180-81 (2d Cir. 1970).

\textsuperscript{352} The Parole Board makes its Offense Severity Rating on the basis of the "offense
behavior" of the defendant rather than on the offenses which he or she is convicted of or
pleads guilty to. P. Hoffman, J. Beck & L. DeGostin, The Practical Application of a
Severity Scale, June 1973 (NCCD Parole Decisionmaking Project Supp. Rep. 13); NCCD
Supp. Rep. 5. supra note 121. Parole Board members and examiners rely on the U.S. At-
torney's description of the offense without corresponding reliance on the defendant's
version. See J. SKOLNICK, supra note 343, at 175.
offense severity as if they had committed the underlying substantive offense.\textsuperscript{353} Such knowledge is a minimal requisite for a knowing waiver of rights.

C. Sentencing and the Post-conviction Process

1. Impact of the Guidelines on Sentencing Practices

Judges may well begin to consider the vital implications of the Guideline Table for the sentencing process.\textsuperscript{354} Parole release decisions are largely determined by the Guidelines for Decisionmaking.\textsuperscript{355} The Parole Board provides three different Guideline Tables: "Adult" (for Regular Adult, (a)(1) or (a)(2) sentences); "Youth" (for offenders sentenced under the Youth Corrections Act); and "NARA" (for offenders sentenced pursuant to the Narcotic Addict Treatment Act).\textsuperscript{356} The NARA and YCA guideline tables provide different—and often lower—time ranges for the same combination of offense and offender characteristics.\textsuperscript{357} Other sentencing alternatives, however, such as the (a)(1) or (a)(2) provisions of 18 U.S.C. § 4208, neither affect which guideline table is used\textsuperscript{358} nor play a significant role in the exercise of the Board's discretion.\textsuperscript{359}

Before imposing sentence a judge may wish to determine how the Guidelines would apply to the particular defendant.\textsuperscript{360} Indeed, it would seem that in order to make an intelligent sentencing decision that includes the factor of parole, the judge would have to determine the defendant's Guideline range by calculating the Salient Factor Score and Offense Severity Rating.\textsuperscript{361} The judge could then determine what

\textsuperscript{353} See Note, The Collective Sentencing Decision, supra note 229, at 715-19 (problems of plea bargaining and nonjudicial sentencing).

\textsuperscript{354} See note 346 supra.

\textsuperscript{355} Memorandum from Federal Judicial Center to all district judges, Concerning the Parole Policies of the U.S. Bd. of Parole, Aug. 1974, at 5 (on file with the Yale Law Journal) [hereinafter cited as Memorandum]; see p. 825 supra.

\textsuperscript{356} Memorandum, supra note 355, at 5; see 28 C.F.R. § 2.20 (1974). For a discussion of the federal sentencing statutes, see pp. 818-19 supra.

\textsuperscript{357} See note 64 supra.

\textsuperscript{358} Memorandum, supra note 355, at 5.

\textsuperscript{359} The Memorandum states that the main effect of the (a)(1) and (a)(2) provisions will be to expand the range of discretion available to the Board. Id.

\textsuperscript{360} Id. at 4. Fifty percent of the judges responding to the Project Survey of Sentencing Judges, see note 159 supra, stated that the Guideline Table would affect the length or type of sentence imposed. Forty-eight percent responded that they would calculate a defendant's Guideline time before sentencing, 42 percent said they would not, 2 percent had other responses, and 8 percent did not answer. Project Survey of Sentencing Judges, question 17.

\textsuperscript{361} Eighty-eight percent of the judges responding to the Project Survey stated that they considered parole in sentencing. Project Survey of Sentencing Judges, question 5. Forty-seven percent of judges, when they impose a Regular Adult sentence, generally
effect various possible sentences would have upon the indicated Guideline time. Generally, however, the length of sentence does not affect the determination of release dates on the Guideline Table; two inmates whose Salient Factor and Offense Severity scores call for 36 to 42 months will be released within that range of time even though one has a sentence of five years and the other a sentence of ten years.362

Despite the fact that the Guidelines themselves do not take account of sentence length, the judge can still have the effect of “overriding” the Guidelines by using the various sentencing alternatives available to him.363 One way this result can be accomplished is to impose a sentence of such a length that the Guideline period ends before the minimum parole eligibility date or after the mandatory release date. Using an example of a defendant whose Guideline time is between 20 and 26 months, a seven-year Regular Adult sentence would insure that the defendant would not be released on parole during the 20 to 26 month range, since the minimum parole eligibility date would not occur until 28 months (one-third of the sentence).364 Likewise, a two-year sentence would insure that the defendant did not serve 20 to 26 months, because the mandatory release date would occur shortly after 19 months.365

expect that an inmate will be released on parole after serving one-third of the sentence. Two percent responded that they expected release to come at one-half of the sentence, 17 percent at some time prior to mandatory release, 16 percent had other responses and 17 percent did not answer. (Percentages sum to 99 percent due to rounding error.) Project Survey of Sentencing Judges, question 6(b). In addition, many judges impose (a)(2) sentences under the belief—which they sometimes communicate to the inmate—that prison performance will be the key factor determining when the inmate is released. Project Survey of Sentencing Judges, question 9. Since the Guidelines indicate how long a committed defendant can expect to serve before being released on parole, and since prison performance and sentence length or type only rarely have an effect on that decision, the use of the Guidelines negates many of these judicial beliefs. Unless the judge consults the Table, he may be imposing sentence on the basis of materially false information and assumptions, in which case the sentence does not meet minimum constitutional standards. See United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970); United States ex rel. Brown v. Rundle, 417 F.2d 282 (3d Cir. 1969); cf. EUROPEAN COMM. ON CRIME PROBLEMS, COUNCIL OF EUROPE, REPOR BY THE SUB-COMM. ON SENTENCING 61-78 (1974).

362. However, varying sentence length beyond the Guideline range will affect the relative amounts of incarceration and community supervision an inmate will receive. Under a three-year sentence an inmate with a Guideline range of 20 to 26 months would serve between one-half and two-thirds of the sentence in prison, while spending between one-third and one-half of the sentence on parole; under a five year sentence, the same inmate could be expected to serve between one-third and less than one-half of the sentence before being released on parole.

363. Fifty percent of the judges stated that the Guidelines will have an effect on the length and type of sentence they might impose, while 37 percent said the Guidelines would not. Five percent had other responses and 8 percent did not answer. Project Survey of Sentencing Judges, question 19. See pp. 818-19 supra.


365. A person sentenced to a term of more than one year and less than three years earns statutory good time at the rate of six days a month, id. § 4161, thereby moving the mandatory release date to shortly after 19 months. This does not include any industrial or meritorious good time an inmate might earn, id. § 4162.
Alternatively, when judges want a particular defendant to serve less than the Guideline time in prison, followed by a period of supervisory custody, they can utilize 18 U.S.C. § 3651. Applicable to any offense with a maximum of more than six months, this section authorizes the judge to impose a sentence in excess of six months and provide that the defendant be incarcerated in a prison or treatment institution for a period not exceeding six months, with the execution of the remainder of the sentence suspended and the defendant placed on probation for that period and under those terms that the judge determines at sentencing.\footnote{Id. § 3651.}

Such "split sentencing" can be a particularly flexible technique when a defendant is convicted of, or pleads guilty to, more than one count. The judge could then impose Regular Adult sentence of imprisonment on the first count and impose a term of probation under § 3651 consecutive to the sentence on the first count. For example, if a defendant were convicted on two counts, the judge could impose a Regular Adult sentence of one year on the first count and a consecutive term of two years' probation on the second count. This would insure that the defendant would be released after no more than one year of incarceration, even if his Guideline time were greater, and that he would receive two years of supervision after his release.\footnote{Id. § 3651.}

Similar results can be achieved by utilizing the (a)(1) and (a)(2) provisions of 18 U.S.C. § 4208. For example, suppose a judge wanted to impose a seven-year sentence but felt it was unnecessary for the defendant to serve the normally required one-third of the sentence (28 months) before being released on parole. In this case, he could utilize § 4208(a)(2) to allow the defendant to be released within the established Guideline period even though this time may be less than 28 months. The flexibility given the judge under § 4208(a)(1), enabling him to establish parole eligibility at any set time less than one-third of the sentence, can be used to insure that there will be neither a premature parole release nor a requirement that the defendant serve one-third of his term before being eligible for parole. For example, if a judge wanted to impose a six-year term but did not think it necessary that the defendant serve 24 months (one-third of the sentence)
before being eligible for parole, but also thought he should serve more than the predicted Guideline period of 12 to 16 months, the judge under § 4208(a)(1) could set a minimum parole eligibility date of 20 months. Since the offender by that date would have already served more than the time required by the Guidelines, it could be expected that he would be paroled at his first hearing.

A final method by which a judge can attempt to effectuate the purposes behind a particular sentence is to provide the Parole Board with the reasons underlying its imposition. A memorandum distributed to federal district judges by the Judicial Center states that although the Parole Board welcomes such communications, either at the time of sentencing or later, such communications will be considered by the Board only in the exercise of discretion and will not be treated as a judicial limitation upon its administrative prerogative. In practice, examiners appear to be little influenced by a judge's reasons for imposing a particular sentence.

To ensure that their sentencing purposes are effectuated, therefore, judges will have to use the various statutory sentencing alternatives available to them. And to do so intelligently they will have to calculate a defendant's Salient Factor Score and Offense Severity Rating at sentencing even if those determinations officially remain within the power of the Parole Board.

Such manipulation of sentences detracts from the laudable purposes that motivated the recent reforms of the parole release process. First, it undermines the Guideline Table's capacity to achieve equality in treatment of offenders. More importantly, it indicates an underlying conflict between the judiciary and the Parole Board, and raises the

368. The form recently introduced for this purpose is A.O. 235, which enables the sentencing judge to communicate with the Parole Board without having to use the same form as the U.S. Attorney, U.S.A. form 792. The A.O. 235 specifically asks the judge to state the reasons underlying the sentence. In addition, of course, a judge may use a number of other means to communicate with the Board such as a personal letter or telephone call. See note 401 infra.

369. Memorandum, supra note 355; see 28 C.F.R. § 2.21 (1974). In the Project Survey of sentencing judges 20 percent of judges said that their communications with the Board would increase as a result of the Board's new procedures, 67 percent said their frequency of communication would remain about the same, 3 percent said it would decrease, and 10 percent did not answer. Project Survey of Sentencing Judges, question 20.

370. In one instance a first offender with a five-year (a)(2) sentence was represented by her trial counsel who quoted the sentencing judge as stating that he was imposing an (a)(2) sentence because he would have no objection if the Parole Board released her before one-third of her sentence. Despite this consideration, and notwithstanding her working and training as a dental assistant since arriving at the institution, the hearing examiners gave her a set-off of 24 months, which, together with the three months she had already served, would bring her within her Guideline range at her first review hearing. Observation of parole hearing (HII) at Alderson FRW, Sept. 1974.

371. See note 360 supra.

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2. *Relative Governmental Roles and the Allocation of Decisionmaking*

The use of the Guideline Table as the substantive basis for release decisions has significant implications for defendants, courts, the Parole Board and the Congress. It raises the fundamental question of which decisionmaker is most appropriate to determine the goals of punishment and to assure equality of treatment with respect to those goals in the post-conviction process.

With the adoption of the Guideline Table the Board has thrust itself into a central role in determining the goals of punishment and "justice" in the post-conviction process. The Guidelines have abandoned the goal of rehabilitation in favor of the goal of incapacitation. Further, the Board's reliance on offense severity is intended

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372. See 18 U.S.C. § 4203 (1970) (Board to determine that release "not incompatible with the welfare of society").

373. The legitimacy of incapacitation as a goal of punishment depends on the premise that past offenders are likely to commit future crimes. Indeed, the parole statute directs the Board to make an incapacitative prediction in each case. Unless "there is a reasonable probability that [a] prisoner will live and remain at liberty without violating the laws," the Board may not order release. *Id.* § 4203. Essentially, the Board is enjoined to incapacitate each prisoner until he or she is no longer a threat to society (or else until mandatory release), apparently in the belief that many offenders' risk of recidivism will decrease over the time spent in prison. The Parole Board states that the Salient Factor Scale relates to this statutory criterion. *Battle v. Norton*, 365 F. Supp. 925, 933 (D. Conn. 1973) (affidavit of M. Sigler, Chairman, U.S. Bd. of Parole).

The Salient Factor Score, however, is not designed to release those inmates with "reasonable probabilities" of not violating the law, but rather to hold those inmates with a greater probability of violating the law for longer periods of time than those inmates with lower probabilities of violating the law. This conflict with the statute is inevitable given the empirical finding that a prisoner's risk of recidivism depends largely on static factors unaffected by length of imprisonment. See pp. 826-28 *supra*.

It thus appears that either all offenders have, ab initio, a "reasonable probability" of not violating the law, in which case the statutory criterion is meaningless and should not serve as the basis for longer incarceration of some offenders, or the criterion is not capable of achievement unless the entire criminal justice system is willing to accept a marked decrease in the percentage of persons paroled.

This conflict presents a serious ideological dilemma for parole boards. The logic of incapacitation and the statistical coincidence that persons committing less serious crimes are, generally, more likely to engage in future criminal activity than persons committing more serious crimes would lead to very lengthy incarceration of petty criminals and minimal incarceration of violent criminals. *Glaser, supra* note 72, at 41-48 (especially 44); N. Walker, *Sentencing in a Rational Society* 92-94 (1969); see F. Zimring & G. Hawkins, *Deterrence: The Legal Threat in Crime Control* 131-32 (1973). But it cannot fairly be said that the Board's policy serves to incapacitate those whose predicted offense behavior upon release would be more "serious." The Salient Factor Score does not purport to discriminate according to what offense a predicted "failure" may commit, but only to predict the risk of "failure," as defined by the Board. *See note 311 supra*. In fact, there is no evidence to suggest that severity of commitment offense correlates highly with severity of recidivist offense, among those who do in fact "fail." See *Note, Preventive Detention*, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 289, 384 (1971). Some offenses, however, do seem to be frequently repeated by the same offenders, e.g., check forgery, auto theft. N.
to correct the perceived injustice that would arise from decisionmaking based solely on the risk factor. Murderers and bank robbers, no matter how unlikely it is that they will commit crimes in the future, should be punished more or longer than forgers or auto thieves, even though the latter are frequently worse risks than the former. According to the Board the offense severity factor is necessary for purposes of both general deterrence and retribution or condemnation.

In implementing these goals through adoption of the Guideline Table, the Board did not attempt a major research effort designed to explore how future criminals are deterred. Nor did they seek guidance from legislative or judicial sources. Rather, the Board developed an independent classification system for judging and comparing the seriousness of offenses. For example, if it is assumed that the statutory maxima permitted for various offenses reflect a congressional assessment of the seriousness of the criminal behavior, the federal penal code provides for 18 categories of offense severity. However, the Board's basic classification scheme has only six categories. Further, in placing specific types of "offense behavior" within each of the six groups, no apparent attempt was made to implement the legislative judgment of comparability of crime severity.

Walker, supra, at 93-94; Glaser, supra; F. Zimring & G. Hawkins, supra. The Parole Board can thus hardly be faulted for its half-hearted implementation of the goal of incapacitation, even in apparent contravention of the statutory directive. However, when incremental incapacitation becomes the bedrock purpose of a parole denial, this policy decision, like every decision, has costs as well as benefits to society and to various persons' liberty and property. Note, The Costs of Preventive Detention, 79 Yale L.J. 926 (1970); Von Hirsch, supra note 309, at 718; Note, supra. Society, for example, bears the social and budgetary costs of maintaining the "bad risks" in prison longer at state expense, either as compared to complete freedom or as compared to the cost of supervisory probation or parole. In state adult correctional institutions an average of $1,912.60 per year per inmate was spent in 1966. Task Force Report: Corrections, supra note 1, at 181. The average cost of parole supervision during the same period was $523 per year, or only one-sixth as expensive. Id. at 189. The decision as to the balance of financial costs and benefits of maintaining a prison system of a certain size is for the Congress to make, and for the Parole Board, within its delegated purview, to carry out.

375. 2 U.S. Nat'l Comm'n on Reform of Fed. Crim. Laws, Working Papers 1250 (1970) [hereinafter cited as Brown Comm'n Working Papers] indicates that there are 18 different maximum terms authorized in Title 18 of the U.S. Code, 14 of them over 6 months and thus potentially bringing persons within the jurisdiction of the Parole Board. But the federal penal code only establishes maximum sentences imposable, and offers no additional guide to sentencing an offender convicted of the "average" offense behavior. See United States v. Hartford, 489 F.2d 652, 655 (5th Cir. 1974); United States v. Daniels, 446 F.2d 967, 972 (6th Cir. 1971); McLeary v. State, 49 Wis. 2d 263, 275, 182 N.W.2d 512, 518-19 (1971). There is no guarantee that, because statutory maxima differ, the legislature expected "average" behaviors to differ in the same degree. Nonetheless, this discussion proceeds on the assumption that maxima bear some relationship to the legislative evaluation of the relative severity of various, typical offense behaviors.
376. For example, the general federal conspiracy statute, 18 U.S.C. § 371 (1970), imposes a maximum penalty of 5 years, the same as the maximum penalty for mail fraud, id. § 1341. However, under the Guidelines, mail fraud is classified as a "moderate" severity
The Board's approach to the goals represented by the offense severity factor may well be "better" than the congressional approach.\textsuperscript{377} But both the choice of goals and their relevance to particular forms of criminal behavior are decisions more appropriately made by legislative rather than administrative bodies.\textsuperscript{378} Congress has access to the mechanisms for considering the relative importance of such goals as rehabilitation, incapacitation, and general deterrence.\textsuperscript{379} It is the forum best suited to balance the complex costs and benefits inherent in particular goals of punishment: It pays for the prisons, for the supervisory personnel, for the rehabilitative program, and it is in closest touch with the constituencies that "pay for" criminal acts, that is, the general public. Congress also "pays for" the services of other institutions in the criminal justice process, from police to courts, and it could thus best determine which institutional actor should implement particular goals. In addition, the legislature is the only political body with

offense, while "conspiracy" is not listed at all and is classified on the basis of the underlying intended behavior. See Billiteri v. United States Bd. of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974).

377. The federal penal code has been called a "major failure," characterized by the "utter inconsistency and irrationality of its penalty structure," resulting in "the inconsistent evaluation of similar conduct and the irony of more severe penalties in one part of the present code than the penalties provided for a comparable offense in another." 2 Brown Comm'n Working Papers, supra note 375, at 1246. See generally Wechsler, Sentencing, Correction and the Model Penal Code, 109 U. Pa. L. Rev. 456 (1961); Comment, Sentencing: Disparity, Inconsistency and a New Federal Criminal Code, 20 Cath. U.L. Rev. 748 (1971). Combining authorized fines, maximum terms and other sanctions permitted in Title 18, there are between 65 and 75 categories for sentencing "without an apparent rational basis." U.S. Nat'l Comm'n on Reform of Fed. Crim. Laws, Study Draft of a New Fed. Crim. Code § 3002, at 268 (1970) [hereinafter cited as Brown Comm'n Study Draft]. Even where and if the penal code provisions are not inconsistent, they "nevertheless often reflect subtleties of moral judgment which are far more precise than would seem to be warranted by available information." Brown Comm'n Working Papers, supra note 375, at 1246.


378. In fact, courts have steadfastly refused to review sentences imposed within the legal maximum set by the legislature because "each offender is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by legislative act." Blockburger v. United States, 264 U.S. 299, 305 (1923); Accord, Dorzynski v. United States, 418 U.S. 424, 431-32 (1974); Gore v. United States, 357 U.S. 380, 393 (1958); see M. Frankel, supra note 226, at 105-11; Wechsler, supra note 377, at 488; Note, Due Process and Legislative Standards in Sentencing, 101 U. Pa. L. Rev. 257, 271-76 (1952). In United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 930 (2d Cir.), vacated as moot, 95 S. Ct. 488 (1974), the court, in holding that reasons must be given for parole denial, noted that such explanations were essential to enable courts to decide if the parole board is "arrogat[ing] to itself decisions properly made only by the legislature ...." See United States v. Norcome, 375 F. Supp. 270, 275 n.3 (D.D.C. 1974).

379. For example, the fact that the Board's implementation of incapacitative goals meets the minimal standards of constitutionality, see pp. 866-77 supra, should not preclude congressional review of these efforts in the light of the presently limited predictive capacity of modern social science. See pp. 826-27, 872-75 supra.
a colorable claim to represent societal moral values relevant to the amount of punishment appropriate for certain classes of crime.\footnote{380} The Parole Board's effort may well represent an understandable response to congressional indifference toward the complex decisions inherent in the post-conviction process. It is illustrative of what occurs in many areas of the law when the legislature simultaneously abdicates responsibility and delegates authority.\footnote{381} However, the Board's action involves fundamental choices concerning societal values and policies that are more properly within the province of Congress.

In addition to its delegation to the Parole Board, Congress has also conferred responsibility in this area on federal district court judges. Judges make prior decisions about all of the persons over whom the Parole Board has jurisdiction. These sentencing decisions should serve as a guide, as well as a limit, upon the Parole Board's discretion.

However, hearing examiners generally draw no inferences about the inmate from the length or type of sentence imposed.\footnote{382} The sentence imposed by the judge, whether the result of agonized deliberation or of casually skimming a presentence report, is usually ignored. This practice reflects the Board's effort to achieve true comparability among persons committing similar antisocial acts. They argue that judges may be bound by a plea agreement as to the "conviction offense" or sentence, so that neither of these considerations necessarily reflects the "true" gravity of the defendant's acts.\footnote{383} Yet for many inmates, the Board's exclusion of type and length of sentence from parole release decisionmaking appears to be a significant loss. Moreover, for purposes of allocation of decisional authority among different institutions in the post-conviction process, some of the results of the Board's new emphasis on equality of treatment appear to give insufficient weight to judicial determinations and to be inconsistent

\footnote{380}{Many "goals" of the post-conviction criminal justice system are based not upon their relative efficacy in preventing other crime, but rather on theories that it is wrong to disobey the law, and that therefore retribution and community condemnation are appropriate functions of the law. M. Frankel, \textit{supra} note 226, at 106.}


\footnote{382}{In one case hearing examiners relied on court ordered sentence reductions in making a decision below the Guidelines. Observation of parole hearings (II) at Lewisburg \textit{FP, Aug. 1974.} In two other cases hearing examiners made decisions beyond the Guideline range because they felt the judges had been too lenient in sentencing. Observation of parole hearings (II, II) at Lewisburg \textit{FP, Aug. 1974.}}

\footnote{383}{See NCCD Supp. Rep. 13, \textit{supra} note 67, at 4.}
with the total post-conviction scheme envisioned by Congress.\footnote{384} 

One example is the Parole Board's treatment of persons sentenced under 18 U.S.C. § 4208(a)(2). The (a)(2) sentence option enables judges to afford the Parole Board discretion not available under the Regular Adult one-third-of-sentence minimum to release an inmate at any time.\footnote{385} Although (a)(2) sentences are imposed by judges for diverse reasons,\footnote{386} most judges used the (a)(2) sentence primarily for the purpose envisioned by Congress.\footnote{387} to enable the Board to release the inmate at the moment best designed to further his rehabilitative progress and promote his reintegration into society.\footnote{388} 

Under the Guideline Table, however, inmates with (a)(2) sentences are not distinguished from other inmates. Only if the Guideline time falls below one-third of the maximum sentence imposed will an inmate with an (a)(2) sentence normally be released prior to an otherwise similarly situated inmate with a Regular Adult sentence.\footnote{389} All (a)(2) sentencees are rated on the Guideline Table at an initial hearing held very shortly after commitment, and are commonly denied

\footnote{384} In Snyder v. United States Bd. of Parole, 383 F. Supp. 1153, 1156 (D. Colo. 1974), the court held that use of the Guidelines as a basis for denying parole to persons sentenced under the YCA who had the highest possible Salient Factor Scores, gives rise to an inference...that the board is acting on the basis of the nature of the offense and prescribing minimum terms for narcotics violations. Such an approach would indeed contradict the decision of the sentencing judge. It was for the court to decide whether to impose a definite term or to use the flexibility of 18 U.S.C. § 5010(b). That judgment having been made, the [Board's] emphasis must be placed upon treatment and rehabilitation... This argument also would apply to persons sentenced under NARA or under 18 U.S.C. § 4208(a)(2) (1970). Accord, United States v. Norcome, 375 F. Supp. 270, 274 n.3 (D.D.C. 1974).


\footnote{386} United States v. Zacharias, 365 F. Supp. 256 (S.D.N.Y. 1973) ((a)(2) sentence imposed on motion for reduction of sentence, F.R. CRIM. P. RULE 35, to permit flexible Board response to institutional programs); Battle v. Norton, 365 F. Supp. 925, 927 (D. Conn. 1974) (bank robbers should have long, (a)(2) sentences because "no one should be imprisoned for a long time without the availability of administrative leniency (short of the pardoning power) in the event of totally unforeseen circumstances, such as terminal illness"); Project Survey of Sentencing Judges, question 9.

\footnote{387} See note 81 supra.

\footnote{388} Project Survey of Sentencing Judges, question 9. Out of a choice of six specified reasons, 41 percent responded that this was their primary reason for sentencing under (a)(2). Many judges believe that when they impose an (a)(2) sentence they are signalling to the Parole Board that the primary factor to be considered in deciding on parole release should be the inmate's conduct and progress during his incarceration. Project Survey of Sentencing Judges, question 9. See United States v. Velazquez, 482 F.2d 139 (2d Cir. 1973); United States v. Surgeon, 421 F.2d 119 (8th Cir. 1970); Rice v. United States, 420 F.2d 863, 867 (5th Cir. 1970), cert. denied, 398 U.S. 910 (1970); United States v. Zacharias, 365 F. Supp. 256, 257 (S.D.N.Y. 1973) (Weinfeld, J.). Confronted with Parole Board disregard of the (a)(2) choice, some courts may be moved to reduce these sentences under Fed. R. CRIM. P. 35 to compel early release; cf. United States v. Anneciarico, Criminal No. 71-1062 (E.D.N.Y., Jan. 25, 1974) (Weinfeld, J.). See United States v. Slutsky, No. 74-2041 (2d Cir., argued Oct. 21, 1974) (whether such policy constitutes new information warranting sentence modification).

\footnote{389} See p. 883 supra.
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parole and are given a date for another parole hearing within their Guideline time or are continued to expiration with no further parole consideration contemplated. As a result, (a)(2) sentencees often have no opportunity to demonstrate the exceptionally good institutional program achievement which may justify a decision outside the Guidelines. Indeed, they ironically have a lesser opportunity to demonstrate exceptional performance than do Regular Adult sentencees, who have served one-third of their sentence before they are classified on the Guideline Table by the Board. Although the Board's rationale is understandable—since the rehabilitation envisioned by the (a)(2) provision is no longer measured—its efforts to achieve equality here result in unequal treatment for (a)(2) sentencees. Such treatment seems inconsistent with the clear congressional policy expressed in the (a)(2) statute, and the Board's failure to provide special consideration for these prisoners may therefore be unlawful.

The Parole Board's independent handling of the court-imposed sentence also occurs in cases where inmates have received relatively short terms. Inmates with sentences of under three years often receive no serious parole consideration, because the hearing examiners know that the mandatory release date will arrive prior to that indicated by the Guidelines. Many inmates reasonably believe that the judge must

390. 28 C.F.R. § 2.20(c) (1974).

The hearing examiners appeared to resent having to conduct “court-ordered” hearings. At one such hearing, they decided to deny parole; when the inmate asked the reason for the parole denial, he was told, “Your release at this time would depreciate the seriousness of the offense committed and therefore be incompatible with the welfare of society.” This was one of four standard reasons which the Board was then relying on. The inmate then asked: “Well, what does than mean? what do I have to do?” The hearing examiners responded by telling him that this was a court-ordered hearing, and he was “not entitled to any more reason that that.” Observation of parole hearing (IIIId) at Danbury FCI, June 1974.

393. However, it must be stressed that the substantive basis for the Parole Board's action was scientifically correct; it properly abandoned the assessment of rehabilitative progress as the governing factor in a release decision. See pp. 826-27 supra. But given the existence of the (a)(2) statutory provision the Board ought either to have sought congressional authorization for its action or to have made special provision in its reforms to take account of the (a)(2) sentencing alternative.

394. In several hearings observed, inmates with “short,” i.e., two or three year sentences were, compared to other hearings observed, dealt with relatively summarily, as the hearing examiners went through the motions of an interview. For example in one initial
have meant something when he imposed a short sentence, and they resent the Board's failure to give them the same serious parole consideration as is given those sentenced to longer terms.

Another point at which the Board's actions appear to conflict with the sentencing authority of judges is in the weighing and balancing of various factors relevant to determining length of incarceration. Because parole release decisions are now virtually determined by the combined factors of risk prediction and offense severity, the Board in setting release dates is often making a second evaluation of those very factors which judges weighed in imposing the sentence. At sentencing, courts are encouraged to evaluate the severity of an offense beyond the mere facts surrounding conviction. Underlying the statutory scheme providing a range of punishments imposable for the same conviction offense is the assumption that in order to sentence a defendant justly, more information than is provided by the bare fact of conviction is required. Were this not so, mandatory, standardized penalties would be set for every penal offense. But do parole boards need more information than is provided by the mere fact of sentencing in order to take account adequately of offense severity?

Given the present state of sentencing law, the answer is probably yes, since judges are not required to explain the reasons underlying a sentence. Although many judges do state their reasons, they do

hearing where the prisoner's Guideline range was substantially longer than his actual sentence the examiners spent a total of 10 minutes making their decision to continue the inmate to expiration. Observation of parole hearing (IIa) at Lewisburg FP, Aug. 1974.

As U.S. District Judge Joseph Tauro has commented, "There is something inherently suspect about a policy decision which in effect tells a man sentenced for two years that he must serve three years before becoming eligible for parole." Boston Evening Globe, Nov. 20, 1974, at 1, col. 4.


397. Dorszynski v. United States, 418 U.S. 424, 440-44 (1974). Because of the absence of a body of appellate law on sentencing, there is little agreement on what should be the proper goals or criteria in sentencing. The courts have only just begun to consider the questions of what are impermissible criteria for sentencing. See United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974); United States v. Haywood, 502 F.2d 166 (7th Cir. 1974); United States v. Maples, 501 F.2d 985 (4th Cir. 1974); United States v. Clutchette, 465 F.2d 749, 754 (9th Cir. 1972); United States v. Wallace, 418 F.2d 876, 878 (6th Cir. 1969), cert. denied, 397 U.S. 955 (1970); United States v. Levine, 372 F.2d 70, 74 (7th Cir. 1967); Humes v. United States, 186 F.2d 875, 878 (10th Cir. 1951). Very few cases address themselves to what factors a court should consider at sentencing, or how much weight should be accorded each factor, e.g., United States v. Daniels, 446 F.2d 967 (6th Cir. 1971) (abuse of discretion to impose maximum sentence on Jehovah's Witness draft resister, without giving adequate weight or consideration to substantial mitigating evidence). See United States v. McKinney, 427 F.2d 449, 455 (6th Cir. 1970); United States v. Wiley, 278 F.2d 500, 505 (7th Cir. 1960); 41 U. Cin. L. Rev. 195 (1972). Arguments against appellate review of sentences have suggested that sentencing is not an objective decision, that no criteria, i.e., no law, exist to provide standards of review for essentially discretionary decisions. This argument is tautological, however, for in the absence of statutory guidelines, standards can only be developed through the process of appellate review itself. See M. FRIKEL,
so only in open court. Indeed, although a number of judges and commissions have recommended efforts to introduce explicit criteria into the sentencing process, the general response of the judiciary has been very unsympathetic. Therefore, rarely does the Board have articulated reasons from the bench to guide its parole release decisionmaking. Until communication between judges and parole boards increases and becomes more particularized, to say that the Board should not take into account offense severity may mean that for some defendants no official body has ever “counted” how much penalty should be imposed for the seriousness of the offense. Presently, however, that factor—and often no other—is counted twice. Not knowing whether differences in sentences reflect justifiable distinctions perceived by the sentencing judge, the Board continually second guesses the judge’s evaluation of many factors. Although perhaps inevitable under the present system of unexplained and “unreviewed” sentencing, the Parole Board’s second guess makes a mockery and often a nullity of the sentencing process, as unknown judicial purposes may be thwarted and further inequities introduced into the system.


398. Hearings on Appellate Review, supra note 227, at 78 (testimony of Judge Weigel) (most judges give reasons at sentencing but should not be required to); M. Frankel, supra note 226, at 108; Wyzanski, A Trial Judge’s Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1291-93 (1952); Hearings on Appellate Review, supra note 227, at 27 (remarks of Judge S. Sobeloff).

399. E.g., M. Frankel, supra note 226, at 39-45 (criticizes judicial failure to supply reasons). Senate Committee on the Judiciary, supra note 377, § 2005, would not require judges to state reasons, but does provide for limited appellate review of sentences.


401. Communication between the federal Parole Board and sentencing judges is, at best, erratic. M. Frankel, supra note 226, at 47. See p. 885 supra.

The Project Survey of Sentencing Judges explored the nature and extent of the communication between courts and the Parole Board. Judges were asked, first, if they ever communicated with the Parole Board: 75 percent answered yes, 25 percent answered no. Of those who answered yes, 8 percent answered that they “almost never” made such communication, 20 percent that they “seldom” did, 27 percent that they “sometimes” did, 8 percent that they “often” did, 6 percent that they “always” did, and 3 percent that they “always” did. When questioned as to their means of communicating with the Board, 59 percent said they made use of the U.S.A. 792 Form; 31 percent made use of personal letters; 2 percent communicated by telephone; 16 percent made use of the Judgment and Commitment Orders, and 13 percent indicated that they used “other means.” Project Survey of Sentencing Judges, question 11. It should be noted that announcing reasons for a sentence at the sentencing proceeding does not mean that those reasons will appear on the Order of Judgment and Commitment.

402. Judge Tauro has complained that the Board’s Guideline Table “demonstrat[es] on its face an unauthorized usurpation of the court’s sentencing responsibility and powers... What you have done there is effectively reverse my decision.” Boston Evening Globe, supra note 394. Other judges agree that the Board has usurped the sentencing
The Project Survey of Sentencing Judges strongly supports the conclusion that the Board’s Guidelines impede judicial sentencing purposes and ignore judges’ expectations about the relation between sentencing and parole. In the Survey questionnaire judges were asked to rank three criteria—offense severity, past record, and rehabilitative potential or institutional adjustment—in the order in which they should be considered at both the sentencing and the parole release decision of persons committed to Regular Adult and (a)(2) sentences. Offense severity appeared to be the foremost factor for most judges in sentencing: Fifty-seven percent of judges responding answered that the most important factor in sentencing persons under the Regular Adult statute was the offense severity, while 41 percent answered that offense severity was the most significant factor in determining sentence under the (a)(2) statute. However, only 22 percent responded that offense severity should be of principal importance in the parole release decision for Regular Adult sentencees, and only 14 percent said it should be of foremost consideration in deciding whether to release (a)(2) sentencees. In fact, most judges answered that offense severity should be the least important of the three factors in determining parole release decisions, and the overwhelming majority indicated that the primary consideration should be the inmate’s rehabilitative progress and institutional adjustment. But the Board’s actual decisions minimize those rehabilitative and institutional factors that judges think it ought to evaluate, and redetermine assessments already made by many judges about offense severity and likelihood of risk.

function, and that their decision process may now make a “nullity” out of the judicial sentencing decision. Interview with a federal district judge, Sept. 13, 1974; Interview with another district judge, Aug. 29, 1974. See United States v. Norcome, 375 F. Supp. 270, 275 n.3 (D.D.C. 1974); Lupo v. Norton, 371 F. Supp. 156, 163 (D. Conn. 1974) (“judges may... wonder why parole Guidelines specify various time periods of confinement correlated with various offense categories, rather than various fractions of the sentence imposed correlated with various offender characteristics. Under the latter approach, the Board could still ameliorate unjustified sentence disparities by prudent departure from the Guidelines...”); Frankel, supra note 84, at 37.

403. See note 159 supra.
405. Id.
407. Id.
408. Of the judges responding to this question, the majority (56 percent) thought offense severity should be the least important factor in parole release decisionmaking for (a)(2) sentenced prisoners and a plurality (45 percent) thought it should be the least important factor for prisoners with regular adult sentences. Approximately 15 percent of the judges did not answer this question. Project Survey of Sentencing Judges, question 13.
409. Sixty-three percent of the judges stated that rehabilitation should be paramount for Regular Adult sentenced inmates, and 73 percent ranked it first for (a)(2) inmates. No judge ranked rehabilitation last in the release of (a)(2) prisoners and only 7 percent felt it should be of least importance for Regular Adult inmates.
410. See pp. 842-46 supra.
With respect to offense severity, the Board's attempt to fill the void left by judicial abdication of responsibility is a poor method for achieving the goals of society or preserving the individual rights of inmates. Society's goals, be they instrumental goals of general deterrence or moral goals of denunciation or condemnation, can better be served in the more visible judicial forum. No matter how well publicized Board procedures become, no matter how much light and air come into the parole process, the courtroom is the focal point for the resolution of conflicts in the criminal law. The efficacy of "deterrent" measures depends primarily upon their being known to the relevant audience, and sentencing policy and practices are always more easily accessible to the general public than are parole practices. So little is known about general deterrence, much less about the "justice" of imposing particular penalties in the name of retribution or condemnation, that parole boards have no legitimate claim to expertise. Finally, if there is one decision on which judges feel they do not need the Board's assistance, it is the determination and assessment of the severity of the offense; this evaluation is a peculiarly legal and judicial one, calling upon skills of comparison and differentiation in the light of statutory definitions.

A similar conclusion also applies to the Parole Board's use of the Salient Factor Scale. Since research has not shown the likelihood of recidivism to be affected in measurable ways by institutional events, the judge could make that determination as well, possibly through use of criteria similar to those in the Guideline Table. Judges may not make the evaluations any better than the Board, but their visibility is a greater aid to the accomplishment of any goals embodied in the

412. F. Zimring & G. Hawkins, supra note 373, at 141-57.
413. Id. at 249-53; Andenaes, The General Preventive Effects of Punishment, 114 U. Pa. L. Rev. 949, 973-81 (1966). The only factor having a measurable impact on decreasing general crime rates is the certainty of punishment; severity of punishment is only effective as a marginal deterrent beyond a minimal level of certainty. Antunes & Hunt, The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis, 64 J. Crim. L. & Crimin. 486 (1973). Although the Board's Guidelines may create greater certainty with respect to Parole Board actions, they have no effect on the certainty of conviction or incarceration. See R. Hood & R. Sparks, Key Issues in Criminology 171-75 (1970); T. Honderich, Punishment: The Supposed Justifications 40-75 (1969).
414. M. Frankel, supra note 226, at 45. Judges are not unanimous in the belief that the Parole Board should not consider offense severity at all. For example, one judge commented that although there was a superficial incompatibility between the Board's determination of the seriousness of the crime and the judicial responsibility and discretion to evaluate offense severity in setting sentence, judges "expect" the Board to consider the gravity of the offense in making a prediction of risk; moreover, he noted, because the Board must make parole decisions for offenders with unjustifiably disparate sentences, there was a "necessity" for the Board to consider offense severity. Interview with a federal district judge, Aug. 29, 1974.
415. See Frankel, supra note 84.
decision and provides an accountability factor checking arbitrary decisionmaking.\textsuperscript{416}

The Board has further injected itself into the judicial arena by attempting to minimize sentence disparities.\textsuperscript{417} The Board seeks to reduce disparities by emphasizing "equality of treatment" in time served by offenders with similar characteristics and similar offense behaviors. In so doing the Parole Board has decided that sentence type and length will not be determinative of parole outcomes.\textsuperscript{418} Instead, the Board seeks to make the two scales of the Guideline Table the major criteria for decisionmaking. In effect the Board has determined that pursuing "equality of treatment" with respect to sentence type and length would be "unfair"\textsuperscript{419} because it would result in unequal treatment of inmates who are similarly situated with respect to other characteristics that the Board considers more important.\textsuperscript{420}

However, there are major obstacles to the Parole Board's effort to minimize sentence disparities. The most serious inequity in federal sentencing practice concerns defendants who are similar in all relevant regards, some of whom are incarcerated and others placed on probation.

\textsuperscript{416} Considerations of efficiency, accuracy and fairness also support the suggestion that the judge at sentencing should be responsible for determining the offender's Salient Factor Score and rating the offense severity. Defense and government counsel, two advocates presumably familiar with the characteristics of the defendant and the circumstances of the offense, are present at sentencing. See Moore v. Michigan, 358 U.S. 155 (1958); Townsend v. Burke, 334 U.S. 736, 741 (1948); United States v. Weston, 448 F.2d 626 (9th Cir. 1971). Defense counsel is entitled to make a statement to the court, and the defendant has an opportunity to speak in allocution, Fed. R. Crim. P. 32(a)(1). The presentence report has been prepared for the judge, Fed. R. Crim. P. 32(c)(1); see note 335 supra, and its contents may have been disclosed to the defendant or his counsel in advance of sentencing, Fed. R. Crim. P. 32(c)(2); see note 259 supra. Moreover, the judge could rate offense severity on the basis of the evidence presented at trial or, in the case of a guilty plea, on supportable statements submitted by the defense and prosecution. See United States v. Rosner, 485 F.2d 1215, 1229-30 (2d Cir. 1975); United States v. Weston, supra, at 633-34. Finally, there would be little difficulty in having the judge compute the Salient Factor Score, since all but one or two of the questions can be answered at the time of sentencing, see note 72 supra.


\textsuperscript{418} It should be noted that the Board's non-Guideline list of criteria which it may consider in parole release decisionmaking includes several factors on sentence data, including length and type of sentence, judge's recommendations, and district attorney's recommendations. 28 C.F.R. § 2.19 (1974).

\textsuperscript{419} See pp. 867-68 supra.

\textsuperscript{420} The Board seems to have concluded not only that decisionmaking based on sentence length would result in the unequal treatment of offenders similarly situated with respect to offense severity and likelihood of success, but also that such decisionmaking would serve no useful, individualizing purpose. See note 402 supra.
due to differences among sentencing judges. But the Board has no jurisdiction over those persons who are convicted but not sentenced to prison, and therefore it cannot remedy this inequality. Further, judges can easily circumvent the equalizing effects of the Guidelines even with respect to those persons sentenced to prison. Thus, the Guideline Table cannot effectively minimize sentencing disparities, and the task therefore falls upon the judiciary.

In sum, the Parole Board can make no greater contribution than can the judiciary in fairly effectuating the goals of punishment or reducing the most serious sentencing disparity. At one time it was believed that if the release decision were made by correctional and parole experts, within a broad range of discretion provided by the court, inmates would be both rehabilitated and treated fairly, and parole release would come only at the point when the rehabilitative progress of each had reached its zenith. The Board itself, having abandoned this effort, also abandoned any claim to expertise beyond that of the sentencing judge. Further, the balancing required in every case to determine what legislatively specified or inferrable goals should be implemented with respect to individual offenders is a peculiarly judicial task. Finally, the judiciary is the most appropriate body to minimize sentence disparity. The courts have the duty and responsibility of imposing sentences, but they have abdicated their concomitant obligation to ensure equality of treatment in the post-conviction process.

Conclusions and Recommendations

The Parole Board's articulation of standards and criteria may be the first step toward the ultimate removal of release decisionmaking from its hands. While the Board's efforts to insure equality of treatment and rationality in decisionmaking are admirable, these efforts

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422. See pp. 883-85 supra.

423. Various alternatives have been proposed for the accomplishment of this goal: sentencing councils, sentencing institutes, appellate review, or legislative intervention. The Eastern District of Michigan (among others) has been employing sentencing councils for years, in which three judges evaluate material relevant to each sentence. Upon the basis of their evaluation and discussion, the sentencing judge may, or may not, revise his original appraisal. See Note, *The Collective Sentencing Decision*, supra note 229. Such councils have been found effective in reducing overall disparities. M. Frankel, supra note 226, at 70-71; Hosner, *Group Procedures in Sentencing: A Decade of Practice*, Fed. Probation, Dec. 1970, at 18; Zavatt, *Sentencing Procedure in the United States District Court for the Eastern District of New York*, 41 F.R.D. 469 (1966).

have encroached upon congressional and judicial functions in the sentencing scheme.

It is the legislature's role to specify which legal institution will be charged with implementing each of the goals of punishment. Congress might rationally conclude that an administrative agency should have prime responsibility for evaluating offense severity and likelihood of risk; if this were the choice it would then be reasonable to remove all discretion—including whether to impose probation or a term of incarceration—from the courts. But it is difficult to see any purpose in having two independent decisions with respect to the same individual, based on the same data, aimed at achieving the same purpose, unless one is explicitly and intelligently assigned as a review or check on the other. Congress should at least clearly indicate which body has responsibility for making particular determinations.

Were Congress to conclude, as has been suggested here, that the balancing of offense severity and risk prediction is more properly performed by the sentencing judge, it follows that a presumptive date of conditional release should be set at sentencing. This process could take several forms. For example, one model would specify that release at that date was required unless the inmate had failed to observe the rules of the institution, allowing only the minimal necessities of institutional administration to interfere with the inmate's achieving conditional liberty at the presumptive release date. Under this model, any functions now performed by the Parole Board could be served by the Bureau of Prisons' administration of the "good time" laws. Alternatively, Congress might find that certain circumstances warrant limited postponement of the presumptive release date. It might authorize a parole board to postpone the presumptive release date upon a finding that the inmate needed a certain amount of time to complete specific institutional programs, or that there was substantial probability, based on specific evidence particular to the individual, that the inmate would engage in further criminal activity. Either of these models would be preferable to the present one of largely overlapping decisions based on different criteria.


426. If this system is adopted, with fixed, determinate sentences and the elimination of the Parole Board, then the provision for modification of sentence should be amended to allow the sentencing judge to respond to unexpected changes in the prisoner's personal situation at any time before the expiration of sentence; cf. Fed. R. Crim. P. 35, 45(b) (120-day jurisdictional limitation. But see Irizzary v. United States, 58 F.R.D. 65, 67 (D. Mass. 1973)).
Assuming, however, that parole decisionmaking will continue basically in its present form, the results of this Project's research prompt the following recommendations:

1) The courts should assume primary responsibility for eliminating disparities in sentencing. The Board's attempt to do so cannot fully remedy systemwide disparities, and results in a seemingly senseless disregard of the favorable sentencing decisions some inmates receive. The Guidelines might serve as a model for such judicial action. The Guideline system reasonably addresses the dual needs of minimizing disparities and preserving opportunities for individualized consideration. However, any "sentencing guideline" system would have to provide substantive criteria to structure the decision whether to impose probation, as well as a mechanism to clarify the purposes served by particular types of sentences in order to guide later post-conviction decisions.

2) The courts should articulate the reasons for imposing a given sentence so that the Board can better take the sentence into account in applying the Guidelines to a particular inmate. While some judges may offer standard reasons that envision or are compatible with parole decisionmaking under the Guidelines, a contrary judicial intention should be made known to the Board.

3) Defendants should be made aware of the Guideline Table by the court and by counsel, especially where a plea agreement contemplates either an (a)(2) or (a)(1) sentence recommendation, or a recommendation for a sentence so short that the inmate is likely not to be granted parole under the Guidelines.

4) Probation officers who compile presentence reports should be instructed how the Guideline Table works, and should then research and write these reports with an eye toward providing the most accurate information necessary for classification under the Guidelines.

5) Prior to every parole hearing, the Parole Board or caseworker should advise the inmate of his or her tentative rating on the Guideline Table. This should be done with sufficient specificity to enable the inmate to rebut any factual mistakes, to argue in mitigation of the Offense Severity Rating, or to contend that a decision outside the Guidelines is appropriate. When reviewing the inmate's file to prepare the progress report, the caseworker should disclose to the inmate all information in the file reasonably bearing upon Salient Factor and Offense Severity classification, and provide an opportunity for the inmate to correct the file prior to the hearing. Such notification should
occur sufficiently in advance of the hearing to allow the inmate adequate time to prepare his case.

6) Where the hearing panel thinks that a decision beyond the Guideline range may be justified by extraordinary information in the inmate's files, it should disclose during the hearing all relevant information which is in fact being considered as a basis for going outside the Guidelines. The Board might, in its discretion, prevent disclosure of psychiatric reports to the inmate; however, where this discretion is exercised, the substance of the decision together with all the evidence relied on should be reviewable in court.

7) Counsel or counsel-substitute should be permitted at parole release hearings, and should be permitted to perform certain adversarial functions such as specifically rebutting the Board's evaluations or factual determinations, questioning the inmate, and presenting arguments in favor of decisions outside the Guidelines. Counsel's presentation might be reasonably limited in time.

8) At the hearing, information necessary for classification on the Guidelines should be specifically discussed.

9) Reasons given by the Board for parole denial should be meaningful and specific. The reasons given should reveal the factual grounds for the loss of any Salient Factor points, the basis of the Offense Severity Rating and the basis for decision outside the Guidelines. Examiners may wish to give inmates personal advice to participate in rehabilitative or other institutional programs. However, such advice should not be characterized as a "reason" for denial.

10) Changes in the Guideline Table's classification of offenses or of ranges of time served for specific offenses, and other changes in the rules and regulations of the Board affecting procedures for parole release decisionmaking, should be announced and formalized in compliance with the requirements of the Administrative Procedure Act for public notice and opportunity to comment.

These recommendations are designed to promote greater fairness and accuracy in post-conviction decisionmaking. Given the deleterious consequences of incarceration, such measures are necessary to assure the maximum protection for individual liberty consistent with protection of society. Furthermore, fair and accurate decisionmaking is a crucial part of the effort to achieve equitable results in the imposition of sanctions. Despite serious flaws, the United States Parole Board's efforts to make explicit the criteria and priorities in its decisionmaking are a significant step that should spur legislatures and courts into more rational attempts to achieve the aims of the criminal justice system.
### APPENDIX

#### Guidelines for Decision-Making*

**Adult**

**Average Total Time Served Before Release (Including Jail Time)**

<table>
<thead>
<tr>
<th>OFFENSE CHARACTERISTICS:</th>
<th>OFFENDER CHARACTERISTICS:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Severity of Offense Behavior</strong></td>
<td><strong>Parole Prognosis (Salient Factor Score)</strong></td>
</tr>
<tr>
<td>(Examples)</td>
<td>Very Good</td>
</tr>
<tr>
<td></td>
<td>(11-9)</td>
</tr>
</tbody>
</table>

**LOW**

Immigration Law Violations; Minor Theft (Includes larceny and simple possession of stolen property less than $1,000); Walkaway.

| | 6-10 | 8-12 | 10-14 | 12-16 |
| | months | months | months | months |

**LOW MODERATE**

Alcohol Law Violations; Counterfeit Currency (Passing/Ownership less than $1,000); Drugs: Marijuana Possession (less than $500); Firearms Act, Possession/Purchase/Sale, single weapon—not altered or machine gun; Forgery/Fraud (less than $1,000); Income Tax Evasion (less than $3,000); Selective Service Act Violations; Theft From Mail (less than $1,000).

| | 8-12 | 12-16 | 16-20 | 20-25 |
| | months | months | months | months |

**MODERATE**

Bribery of Public Officials; Counterfeit Currency (Passing/Ownership $1,000-$19,999); Drugs: "Hard Drugs", Possession by drug user (less than $500), Marijuana, Sale (less than $5,000), "Soft Drugs", Possession (less than $5,000), "Soft Drugs", Sale (less than $500); Embezzlement (less than $20,000); Explosives, Possession/Transportation; Firearms Act, Possession/Purchase/Sale, altered weapon(s), machine gun(s), or multiple weapons; Income Tax Evasion $3,000-$50,000; Interstate Transportation of Stolen/Forged Securities (less than $20,000); Mailing Threatening Communications; Misprision of Felony; Receiving Stolen Property With Intent to Resell (less than $20,000); Smuggler of Aliens; Theft, Forgery/Fraud ($1,000-$19,999); Theft of Motor Vehicle (Not Multiple Theft or for Resale).

| | 12-16 | 16-20 | 20-24 | 24-30 |
| | months | months | months | months |

* During summer 1974, when the authors of this Project observed parole hearings, this version of the Guideline Table was in use. More recent revisions of the Table (28 C.F.R. § 2.20(f) (1974)), appear at 39 Fed. Reg. 45227 (Dec. 31, 1974) and 40 Fed. Reg. 5358 (Feb. 5, 1975).

(See Notes on following page)
OFFENSE CHARACTERISTICS:
Severities of Offense Behavior
(Examples)

HIGH
Burglary or Larceny (Other than Embezzlement) From Bank or Post Office; Counterfeit Currency (Passing/Possession $20,000 or more); Counterfeiting (Manufacturing); Drugs: “Hard Drugs”, Possession by drug dependent user ($500 or more), “Hard Drugs”, Sale To Support Own Habit, Marijuana, Sale $5,000 or more) “Soft Drugs”, Possession ($5,000 or more) “Soft Drugs”, Sale ($500-$5,000); Embezzlement ($20,000-$100,000); Interstate Transportation of Stolen/Forged Securities ($20,000-$100,000); Mann Act (No Force—Commercial Purposes); Organized Vehicle Theft; Receiving Stolen Property ($20,000-$100,000); Robbery (No Weapon or Injury); Theft, Forgery/Fraud ($20,000-$100,000).

VERY HIGH
Robbery (Weapon); Drugs: “Hard Drugs”, Possession by non drug dependent user ($500 or more) or by non-user (any quantity), “Hard Drugs”, Sale for Profit [No Prior conviction for Sale of “Hard Drugs”], “Soft Drugs”, Sale (more than $5,000); Extortion; Mann Act (Force); Sexual Act (Force).

GREATEST
Aggravated Felony (e.g., Robbery, Sexual Act, Assault)—Weapon Fired or Serious Injury; Aircraft Hijacking; Drugs: “Hard Drugs”, Sale for Profit [Prior conviction(s) for Sale of “Hard Drugs”]; Espionage; Explosives (Detonation); Kidnapping; Willful Homicide.

NOTES:
1. If an offense is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offenses listed.
2. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
3. If an offense behavior involved multiple separate offenses, the severity level may be increased.
4. If a continuance is to be given, allow 30 days (1 month) for release program provision.
5. These guidelines are predicated upon good institutional conduct and program performance.
6. “Hard Drugs” include heroin, cocaine, morphine or opiate derivatives, and synthetic opiate substitutes.