



2012

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Recommended Citation

Bing, Stefan J. (2012) "Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions," *Kentucky Law Journal*: Vol. 100 : Iss. 4 , Article 9.

Available at: <https://uknowledge.uky.edu/klj/vol100/iss4/9>

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Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions

*Stefan J. Bing*¹

INTRODUCTION

In 1976, Marie Ragghianti, then serving as chair of Tennessee's Board of Probation and Parole, blew the whistle on wide-scale corruption involving then Governor Ray Blanton.² Before she was fired, Ragghianti exposed a "cash for clemency" scheme propagated by Blanton's administration to the Federal Bureau of Investigation. In this scheme, inmates with ties to the Governor or his political allies paid to be released from prison and the Governor pardoned them in exchange.³ Governor Blanton's legal counsel, Eddie Sisk, pressured Parole Board members to violate their release guidelines in order to "recommend" these inmates for pardon.⁴ Ragghianti became suspicious when Sisk continued to pursue the release of an inmate convicted of double homicide.⁵ She began collecting evidence about the corruption while the state mounted a campaign to discredit her, including two alleged setups for DUI arrests.⁶ Ultimately, Ragghianti resigned and became a political pariah, Sisk and another participant were convicted, Blanton did not seek reelection (and later was convicted for his participation in selling liquor licenses), and Ragghianti's story became the subject of a successful motion picture.⁷

1 Juris Doctor, 2012, University of Kentucky College of Law; BA, 2005, Case Western Reserve University. The author wishes to thank the editors and staff of the *Kentucky Law Journal*, whose dedication to producing a flawless publication is apparent and appreciated. All remaining errors are my own.

2 See HANK HILLIN, FBI CODENAME TENNPAR: TENNESSEE'S RAY BLANTON YEARS 58–60, 73–80 (David Fox ed., 1985). See generally PETER MAAS, MARIE: A TRUE STORY (1983) (providing biographical information and further detail of Ragghianti's account).

3 See April Hejka-Ekins, *Marie Ragghianti: Moral Courage in Exposing Corruption*, in EXEMPLARY PUBLIC ADMINISTRATORS: CHARACTER AND LEADERSHIP IN GOVERNMENT 304, 307–16 (Terry L. Cooper & N. Dale Wright eds., 1st ed. 1992); HILLIN, *supra* note 2, at 58–59, 74–76.

4 Hejka-Ekins, *supra* note 3, at 307–08.

5 *Id.* at 308.

6 *Id.* at 310–14.

7 See *id.* at 315–17; MAAS, *supra* note 2, at 414–15; see also *Marie*, IMDb, <http://www.imdb>.

Perhaps the most infamous incident of corruption within state parole boards, Marie Ragghianti's story, albeit an extreme example, represents many of the problems facing the criminal justice system today in the area of parole board decision making. Parole boards in many states function as the final step in the sentencing phase; they have the final word on the length of the prison sentence. The discretion that parole board members exercise has important implications for the system and society in general and "affects public safety by selecting for release those inmates predicted to discontinue criminal behavior."⁸ Parole boards apportion resources by controlling prison populations, "influenc[ing] prison officials' ability to control inmate populations because boards consider prison behavior in deciding whether to release the inmates," and "influenc[ing] the legitimacy of the entire criminal justice system."⁹ The legitimacy of the criminal justice system is bolstered when "victims, offenders, and the general public" regard state parole board decisions as "fair and rational."¹⁰ Society must be satisfied that members of the parole board are qualified to perform their discretionary function, maintain a level of impartiality to political whims and corruption, and make decisions that are "proportionate, equitable, uniform, [and] predictable."¹¹

Currently, all fifty states have parole boards in some fashion.¹² However, sixteen states have cancelled the release authority of their boards.¹³ Congress passed the Violent Crime Control and Law Enforcement Act of 1994¹⁴ which, inter alia, provides funding for additional state prisons for states that meet certain criteria.¹⁵ One of these criterion, called "truth-in-sentencing,"¹⁶ requires that States enact laws that require persons convicted of violent crimes "to serve not less than 85 percent" of the prison

com/title/tt0089555/ (last visited Feb. 26, 2012) (detailing that the MGM film, released on September 27, 1985, was directed by Roger Donaldson and starred Sissy Spacek as Ragghianti and Jeff Daniels as Sisk).

⁸ Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 568 (1994).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 572.

¹² See generally *Interstate Compact Office Directory*, INTERSTATE COMM'N FOR ADULT OFFENDER SUPERVISION, 1-29 (Mar. 16, 2012), <http://www.interstatecompact.org/Portals/0/Library/contacts.pdf>; see also *Probation and Parole Directory*, AM. PROB. & PAROLE ASS'N, http://www.appa-net.org/eweb/DynamicPage.aspx?Webcode=VB_Directory (last visited Mar. 12, 2012).

¹³ MODEL PENAL CODE: SENTENCING § 6.10 cmt. b (Discussion Draft No. 2, 2009).

¹⁴ Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 2, 15, 16, 21, 28, and 42 U.S.C.).

¹⁵ See *id.* §§ 20101-09, 108 Stat. at 1815-19 (current version at 42 U.S.C. §§ 13701-13708 (2006)).

¹⁶ § 13704.

sentence.¹⁷ One effect of the “truth-in-sentencing” requirement has been the diminution of the importance of parole boards in certain states. Eight states abolished parole board release during the same year a truth-in-sentencing law was passed.¹⁸ Nevertheless, these states retain their parole boards to make decisions regarding persons sentenced “prior to the effective date of the law that eliminated parole board release.”¹⁹ Moreover, in addition to establishing the date of release, parole boards supervise felons after their release from incarceration.²⁰

Most states provide certain statutory requirements for parole board membership. Many state statutes provide relatively narrow requirements for board members. For instance, in South Dakota, the board is required to have three attorneys.²¹ New York law requires that each member of its parole board have at least a bachelor’s degree and five years work experience in the fields of “criminology, administration of criminal justice, law enforcement, sociology, law, social work, corrections, psychology, psychiatry or medicine.”²² However, most states do not have strict requirements,²³ resulting in underqualified board appointees.²⁴

Provisions for judicial immunity and deficient release guidelines both illustrate parole board members’ lack of accountability. First, much like judges and executive officials making discretionary decisions, state parole board members are generally given absolute judicial immunity against damages suits brought under 42 U.S.C. § 1983.²⁵ Thus, despite the distinct due process implications of parole board hearings—especially parole revocation hearings—board members’ decisions are insulated from liability. Second, parole release guidelines in states that have maintained their boards’ release authority are inconsistent and often do not provide sufficient criteria to ensure accountability for release decisions.²⁶

17 § 13704(a)(1); *see also* PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=820>.

18 DITTON & WILSON, *supra* note 17, at 3 (Arizona, Delaware, Kansas, Mississippi, Ohio, Virginia, Washington, and Wisconsin).

19 *Id.*

20 *See* Palacios, *supra* note 8, at 574.

21 *See* S.D. CODIFIED LAWS § 24–13–1 (Supp. 2003).

22 *See* N.Y. EXEC. LAW § 259–b(2) (McKinney 2010).

23 *See, e.g.*, CAL. PENAL CODE § 5075 (West 2011) (Board members “shall reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the population of the state.”); MO. REV. STAT. § 217.665 (2004) (“[M]embers of the board shall be persons of recognized integrity and honor.”).

24 *See* Palacios, *supra* note 8, at 579.

25 *See* Julio A. Thompson, Note, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241, 244–45 (1988).

26 *See* Part I.A, *infra*.

Currently, the American Law Institute is drafting new sentencing provisions for its Model Penal Code, much of which addresses the parole process in the United States. This ambitious new draft addresses three important issues that directly relate to the state of parole boards across the country. First, the new Model Penal Code, recognizing the failure of the current parole structure as well as recent trends in many states and the federal system, recommends a movement toward determinate sentencing that will essentially eliminate the release authority of state parole boards.²⁷ Second, the new draft of the Model Penal Code addresses the need to provide thorough, uniform sentencing guidelines that reflect the emerging field of evidence-based sentencing.²⁸ Evidence-based sentencing, colloquially referred to as “best available research,” recognizes the importance of quantitative research and data analysis to assess “the needs of offenders that must be met to facilitate their rehabilitation, and to assist the courts in judging the amenability of individual offenders to specific rehabilitative programs in confinement or in the community.”²⁹ Third, the ALI has proposed to add a new provision to the Code to address the modification of long-term prison sentences by affording an “official decision maker” the authority to take a “second look” at prisoners who have served more than fifteen years.³⁰ The statute and comments purposely avoid making a determination as to who should have the authority to take this “second look” at sentences. It identifies three options: newly created agencies or tribunals, parole boards, and trial courts.

This Note will make sense of the impact that evidence-based sentencing, reflected in the new draft of the Model Penal Code, may have on the parole process in the United States. Part I of this Note will examine the current state of parole boards across the country, including the appointment and removal process, the requirements for board membership, the current makeup of board membership, the inconsistent and often inadequate release guidelines afforded to parole boards that result in overly broad discretion, and the lack of accountability of board members resulting from absolute immunity from prosecution. Part II will outline the three key proposals in the American Law Institute’s Model Penal Code sentencing provisions and their potential effect on state parole boards.

Part III will address the changes that are necessary in order for parole board membership to comport with the recent trend toward evidence-based sentencing. As they are presently structured, parole boards are woefully unprepared to embrace states’ ambitions to adopt evidence-based sentencing. Former law enforcement officials, wardens, and parole officers, which currently constitute the majority of parole board membership

²⁷ MODEL PENAL CODE: SENTENCING § 6B.09(1) (Discussion Draft No. 2, 2009).

²⁸ *See id.*

²⁹ *Id.*

³⁰ *Id.* § 305.6(1) cmt. a.

positions, generally lack the skills necessary to analyze quantitative data. Moreover, attorneys, who also constitute a substantial portion of parole board membership, generally do not understand statistical concepts³¹ and often view statistical data and research-based information as less helpful than clinical opinion.³²

Finally, Part IV of the Note will recommend that states adopt a statutory structure that requires a balance of law enforcement officials, attorneys, and social scientists on state parole boards. Parole boards with this blend of membership are the best-suited for providing a “second look” at long-term sentences, supervising the rehabilitation of paroled inmates, and understanding the new sentencing guidelines reflecting evidence-based sentencing. If there is an accession that evidence-based sentencing will be the wave of the future, the decision regarding who makes the decisions becomes even more high stakes than ever before.

I. CURRENT STATE OF PAROLE BOARDS AND STRUCTURE OF THE LAW

A. Parole Board Structure and Inconsistent Guidelines

In most states, parole board members are nominated by the governor and approved with the advice and consent of the state senate.³³ Aside from this common similarity, however, the state laws governing parole board appointments beyond this shared thread are disparate. For example, the number of members on state parole boards may range from three members³⁴ to nineteen.³⁵ Most state statutes require that parole board members serve in their capacity full-time.³⁶ Additionally, parole board members serve

³¹ Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAPMAN J. OF CRIM. JUST. 1, 16 n.79 (2009), available at <http://ssrn.com/abstract=1424008>.

³² Richard E. Redding & Daniel C. Murrie, *Judicial Decision Making About Forensic Mental Health Evidence*, in FORENSIC PSYCHOLOGY: EMERGING TOPICS AND EXPANDING ROLES 683, 685–86 (Alan M. Goldstein ed., 2007).

³³ See, e.g., ALA. CODE § 15–22–20 (LexisNexis 2011) (“shall be filled by appointment by the Governor, with the advice and consent of the Senate”); ALASKA STAT. § 33.16.020 (2010); ARIZ. REV. STAT. ANN. §§ 31–401, 38–211 (2002); ARK. CODE ANN. § 16–93–201 (2006); CAL. PENAL CODE § 5075 (West 2011); FLA. STAT. ANN. § 947.02 (West 2010); GA. CODE ANN. § 42–9–2 (1997); 730 ILL. COMP. STAT. ANN. 5/3–3–1(a) to (b) (West 2007); KAN. STAT. ANN. § 22–3707 (2007); KY. REV. STAT. ANN. § 439.320(1) (LexisNexis 2010); MASS. ANN. LAWS ch. 27, § 4 (LexisNexis 2007); MISS. CODE ANN. § 47–7–5(1) (West 1999); MO. ANN. STAT. § 217.665(1) (West 2004); 61 PA. CONS. STAT. ANN. § 6111(b) (West 2010); TEX. GOV’T CODE ANN. § 508.031(a) (West 2004); VA. CODE ANN. § 53.1–134 (2009).

³⁴ OR. REV. STAT. § 144.005(1) (2011) (“at least three but no more than five members”).

³⁵ N.Y. EXEC. LAW § 259–b.1 (McKinney 2010) (“board shall consist of not more than nineteen members”).

³⁶ See, e.g., ALA. CODE § 15–22–20(g) (LexisNexis 2011); GA. CODE ANN. § 42–9–5 (Supp. 2011).

terms ranging from three to six years.³⁷ The requirements for removing parole board members also vary from state to state. Whereas one state may allow removal only for cause, another state may offer very little protection for parole board members and remind them that they serve at the pleasure of the Governor.³⁸ This threat of removal introduces a “political element”³⁹ into the parole process. Parole board members seeking to serve another term are likely to act in accordance with the goals of the administration so they can ensure reappointment.⁴⁰ Parole boards also face pressure from sources beyond the political sphere. Members are “prone to bend to community pressure in connection with decisions to award or deny parole to notorious criminals.”⁴¹

Some states do not specify any particular requirements for parole board membership.⁴² Other states use vague and expansive language without mentioning any specific criteria.⁴³ A few states provide only that parole board members should reflect “a cross section of the racial, sexual, economic, and geographic features of the population of the state.”⁴⁴ Some states, on the other hand, require parole board members to meet more rigorous requirements for appointment such as extensive experience in certain disciplines⁴⁵ or a Bachelor’s degree.⁴⁶ In certain states, statutes

37 Thompson, *supra* note 25, at 252.

38 VA. CODE ANN. § 53.1-134 (2009).

39 See Thompson, *supra* note 25, at 253.

40 See *id.*

41 *Id.*

42 See, e.g., ALA. CODE § 15-22-20(b) (LexisNexis 2011) (“Any vacancy occurring on the board . . . shall be filled . . . from a list of five qualified persons.”); ALASKA STAT. § 33.16.020(d) (2010) (“The governor shall make appointments to the board with due regard for representation on the board of the ethnic, racial, sexual, and cultural populations of the state.”).

43 See, e.g., ALASKA STAT. § 33.16.030(a) (Supp. 2010) (“The governor shall appoint members who are able to consider the character and background of offenders and the circumstances under which offenses were committed.”); ARIZ. REV. STAT. ANN. § 31-401 (Supp. 2011) (“Each member shall be appointed on the basis of broad educational qualifications and experience and shall have demonstrated an interest in the state’s correctional program.”); HAW. REV. STAT. § 353-61 (Supp. 2007) (“Nominees to the authority shall be selected on the basis of their qualifications to make decisions that will be compatible with the welfare of the community and of individual offenders, including their background and ability for appraisal of offenders and the circumstances under which offenses were committed.”).

44 CAL. PENAL CODE § 5075(b) (West 2011); see also ALASKA STAT. § 33.16.020(d) (2010) (“The Governor shall make appointments to the board with due regard for representation on the board of the ethnic, racial, sexual, and cultural populations of the state.”).

45 See 730 ILL. COMP. STAT. ANN. 5/3-3-1(b) (West 2007) (“The members of the Board shall have had at least 5 years of actual experience in the fields of penology, corrections work, law enforcement, sociology, law, education, social work, medicine, psychology, other behavioral sciences, or a combination thereof.”).

46 61 PA. CONS. STAT. ANN. § 6111(d) (West 2010).

provide that the board must consist of a person who has been the victim of a crime.⁴⁷

As a result of these disparate requirements, the makeup of parole boards is extremely different from state to state. For example, in Kentucky, the nine-member parole board has two attorneys, one retired teacher, and six members with a background in criminal justice and corrections.⁴⁸ On the other hand, each member of Utah's five-member parole board has received a Juris Doctorate.⁴⁹ Generally, most parole board members have served in the corrections system as a corrections officer, warden, parole officer, probation officer, or in another capacity.⁵⁰

B. Judicial Immunity for Parole Board Members

The United States Supreme Court has held that common law judges are entitled to absolute immunity from § 1983⁵¹ damages suits for performing a “judicial act,”⁵² but this immunity does not insulate them from all liability. For example, personnel decisions made by a judge may not be an “adjudicative function” that enjoys the protection of absolute immunity.⁵³ Procedural safeguards are in place within the judicial process that will “prevent and correct most constitutional violations,”⁵⁴ such as “insulation of the judge from political influence, the importance of precedent in resolving

47 See VA. CODE ANN. §§ 53.1–134 (2009) (requiring that one member of the Parole Board be a member of crime victim's rights organization or an actual victim of crime).

48 See *Board Members*, KY. JUST. & PUB. SAFETY CABINET, <http://justice.ky.gov/parolebd/members.htm> (last visited Mar. 12, 2012).

49 See *Board Members*, ST. UTAH BD. PARDONS & PAROLE, <http://bop.utah.gov/board.html> (last visited Feb. 24, 2012).

50 See, e.g., *Board Members*, KY. JUST. & PUB. SAFETY CABINET, <http://justice.ky.gov/parolebd/members.htm> (last visited Mar. 12, 2012).

51 Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2006) (entitling those who have suffered a “deprivation of any rights . . . secured by the Constitution” caused by a state official acting “under color of any statute, ordinance, regulation, custom, or usage, of any State” to a remedy for civil damages “except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, *injunctive relief* shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable”); see also Thompson, *supra* note 25, at 242.

52 See *Stump v. Sparkman*, 435 U.S. 349, 356–57, 362 (1978) (holding that a judge performed a judicial act in ordering the sterilization of a young girl on the ex parte application of her mother); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (holding that a judge was not liable for an unconstitutional conviction); see also Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 273 (2006).

53 See *Forrester v. White*, 484 U.S. 219, 227 (1988) (“[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.”).

54 Johns, *supra* note 52, at 266.

controversies, the adversary nature of the process, and the correctability of error on appeal.”⁵⁵

Absolute immunity has been extended to government officials, who are subject to similar restraints and perform adjudicatory functions.⁵⁶ However, courts have been unwilling to grant absolute immunity to this class of individuals, except in special circumstances.⁵⁷ Instead, courts generally agree that *qualified* immunity “rather than *absolute* immunity is sufficient to protect government officials in the exercise of their duties.”⁵⁸ The Court provides qualified immunity for damages from civil liability for government officials serving a discretionary function “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁵⁹ Qualified immunity has been provided for many government officials including police officers⁶⁰ and governors (and their aides),⁶¹ while absolute immunity is provided for the President,⁶² prosecutors,⁶³ and state judges.⁶⁴

The Supreme Court specifically reserved judgment on the question of whether absolute or qualified immunity should apply to members of state parole boards in *Martinez v. California*.⁶⁵ However, the Tenth Circuit held that parole board members are protected by absolute, quasi-judicial immunity, at least for “actions taken in performance of the [b]oard’s official duties regarding the granting or denying of parole.”⁶⁶ The assumption is that parole board members “so closely resemble judges that at least some of their official conduct should be cloaked with absolute, quasi-judicial immunity, so that they too may be impartial decisionmakers.”⁶⁷ For the

55 *Butz v. Economou*, 438 U.S. 478, 512 (1978).

56 *See id.* at 515.

57 *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.4 (1993) (quoting *Burns v. Reed*, 500 U.S. 478, 486–87 (1991)).

58 *Id.* (emphasis added).

59 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (providing qualified immunity for presidential aides).

60 *See Pierson v. Ray*, 386 U.S. 547, 557 (1967).

61 *See Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974).

62 *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

63 *Imbler v. Pachtman*, 424 U.S. 409, 423, 427 (1976).

64 *See Pierson*, 386 U.S. at 553–54.

65 *Martinez v. California*, 444 U.S. 277, 285 n.11 (1980) (“We reserve the question of what immunity, if any, a state parole officer has in a § 1983 action where a constitutional violation is made out by the allegations.”).

66 *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir. 1992) (quoting *Knoll v. Webster*, 838 F.2d 450, 451 (10th Cir. 1988)); *see also Giese v. Scafe*, 133 F. App’x 567, 569 (10th Cir. 2005).

67 *Thompson, supra* note 25, at 246.

most part, the First,⁶⁸ Second,⁶⁹ Fourth,⁷⁰ Fifth,⁷¹ Sixth,⁷² Seventh,⁷³ Eighth,⁷⁴ Ninth,⁷⁵ and Eleventh⁷⁶ Circuits have echoed the Tenth Circuit's determination.

Some scholars argue that absolute, quasi-judicial immunity is an inappropriate extension of the protection often given to judges and executive officers. First, it "violates the common-law understanding in 1871 that parole decisions were protected by qualified, not absolute immunity."⁷⁷ Section 1983 was not in force in 1871 and parole decisions were made by executive officials who enjoyed qualified immunity.⁷⁸ Second, absolute immunity is inappropriate because parole proceedings do not meet the requirement that absolute judicial immunity is only permitted when there are "procedural safeguards comparable to those of the judicial process."⁷⁹ Parole proceedings are characterized by "informality and brevity,"⁸⁰ the rules of evidence do not apply,⁸¹ and the decisions are only subject to very minimal judicial review.⁸²

C. *The Current State of Parole*

States have made a number of changes to parole practices over the past generation. Some states have made smaller changes such as relying on drug testing, allowing parole officers to carry weapons, and requiring parolees to wear electronic monitoring bracelets.⁸³ The most drastic example of more sweeping changes is the wide-scale trend toward diminishing the power of state parole boards to grant early release to prisoners. The ongoing

68 See *Johnson v. R.I. Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir. 1987).

69 See *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999).

70 See *Pope v. Chew*, 521 F.2d 400, 405–06 (4th Cir. 1975).

71 See *Hulsey v. Owens*, 63 F.3d 354, 356 (5th Cir. 1995).

72 See *Horton v. Martin*, 137 F. App'x 773, 775 (6th Cir. 2005).

73 See *Wilson v. Kelkhoff*, 86 F.3d 1438, 1445 (7th Cir. 1996).

74 See *Anton v. Getty*, 78 F.3d 393, 396 (8th Cir. 1996).

75 See *Bermudez v. Duenas*, 936 F.2d 1064, 1066 (9th Cir. 1991); see also *Sellars v. Procutier*, 641 F.2d 1295, 1302 (9th Cir. 1981).

76 See *Sultenfuss v. Snow*, 894 F.2d 1277, 1278–79 (11th Cir. 1990).

77 Johns, *supra* note 52, at 304.

78 See *id.*

79 *Id.*; see also *Butz v. Economou*, 438 U.S. 478, 512–14 (1978).

80 See *Christopher v. U.S. Bd. of Parole*, 589 F.2d 924, 932 (7th Cir. 1978) (holding parole board did not violate prisoner's due process rights by deny him cross-examination of adverse witnesses).

81 See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998).

82 Johns, *supra* note 52, at 307.

83 JEREMY TRAVIS & SARAH LAWRENCE, *Beyond the Prison Gates: The State of Parole in America*, URB. INST. JUST. POL'Y CENTER, 1–2 (Nov. 2002), http://www.urban.org/uploadedpdf/310583_beyond_prison_gates.pdf.

battle over whether to adopt determinate or indeterminate sentencing has also come to the foreground of the legal debate. In 1976, sixty-five percent of prison releases were made by discretionary decisions as states predominantly had indeterminate sentencing structures.⁸⁴ By 1999, this number dropped to twenty-four percent with the remaining releases determined by law.⁸⁵ The causes for this general shift are the subject of much debate.

To date, sixteen states, the federal system, and the District of Columbia have eliminated the parole-release authority of their parole boards.⁸⁶ One study⁸⁷ shows that four states cancelled their parole boards' release authorities in the 1970s, six jurisdictions did so in the 1980s (including one that later changed its mind)⁸⁸ and seven more took the step in the 1990s. In 1994, the American Bar Association endorsed this pattern, recommending that "time served in prison should be determined by sentencing judges subject to good-time reductions, all within a framework of sentencing guidelines."⁸⁹ Nevertheless, two-thirds of U.S. sentencing systems have retained paroling authority with substantial parole-release authority.⁹⁰

II. REVISED MODEL PENAL CODE: SENTENCING

The drafters of the new Model Penal Code provisions for sentencing are currently undertaking an enormous project aimed at addressing fundamental problems with the 1962 version. This Note addresses three key changes that have an immense impact on parole board decision making. First, the drafters of the Model Penal Code favor adopting a determinate sentencing system, which removes the parole board's authority to fix prison-release dates. This is certainly the most radical change in the new draft and one that underlies almost every other change. Second, the drafters propose a new article providing sentencing guidelines that acknowledge and suggest the implementation of much of the evidence-based, quantitative, statistical methods of risk assessment. Third, the drafters continue to consider the concept of sentence modification for extremely long sentences. In essence, this "second look" would provide an "official decision maker" the opportunity to revisit sentences after the prisoner had served at least fifteen years, a process that mirrors current parole board practices.

84 *Id.* at 4.

85 *Id.*

86 MODEL PENAL CODE: SENTENCING reporter's study at 3 (Discussion Draft No. 2, 2009).

87 *Id.* at 3 (citing JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 66-67 (2003)).

88 *Id.*

89 *Id.* at 3-4 (citing AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 30-31, 133-34, 160 (3d ed. 1994)).

90 MODEL PENAL CODE: SENTENCING, *supra* note 86, at 4.

A. *Determinate Sentencing*

In the current draft of the Model Penal Code's sentencing provisions, the American Law Institute expressed its concern with the current state of affairs of parole boards that possess parole–release authority. Due to its view that parole boards are “the most disappointing of administrative agencies,”⁹¹ the Institute has recommended removing the parole–release authority from state parole boards, which sixteen states and the federal system have already done.⁹² Implementation of a determinate system reflects the Code's preference for “visible, regulated, and accountable forums for the exercise of sentencing discretion.”⁹³ It also reflects a policy judgment that courts should determine the actual length of sentences at the time of sentencing, “subject to only marginal adjustments based on an inmate's behavior while institutionalized.”⁹⁴ These new guidelines are a drastic departure from parole boards' traditional discretionary release function and bring into question whether they are becoming obsolete.

The Determinate Sentences of Imprisonment provision of the revision exemplifies this movement away from indeterminate sentencing:

§ 6.10. Determinate Sentences of Imprisonment; Postrelease Supervision

(1) Offenders sentenced to a term of imprisonment shall be released after serving the prison term imposed by the sentencing court reduced by credits for time served and good behavior as provided in §§ 7.09 and 305.1 [For offenses committed after the effective date of this supervision, the authority of the parole board to grant parole release to imprisoned offenders is abolished.]

(2) An offender sentenced to a term of imprisonment may be sentenced to a separate term of postrelease supervision, to follow completion of the prison term. The length of term of postrelease supervision independent of the length of the prison term, served or unserved, and shall be determined by the court at the time of sentencing under Article 305.

(3) Violations of conditions of postrelease supervision, and sanctions upon violations, are determined as provided in Article 305.⁹⁵

Although the revised section 6.10 seems to provide for the unilateral elimination of parole boards, this is not entirely the case. First, as will be addressed in Section C, the revised Code proposes a “second look” provision, by which an “official decision maker” revisits long-term sentences. Although that provision, in its most current version, does not necessarily endorse parole boards as the gatekeeper of that function, it does not foreclose the idea either. Second, the drafters acknowledge that “[t]he elimination of a parole releasing authority in a jurisdiction bears no relation to the question of whether a term of postrelease supervision

⁹¹ *Id.* at 2.

⁹² *See supra* Part I.C.

⁹³ *See* MODEL PENAL CODE: SENTENCING, *supra* note 86, at 2.

⁹⁴ *Id.*

⁹⁵ MODEL PENAL CODE: SENTENCING, *supra* note 13, § 6.10.

is provided to released inmates.”⁹⁶ The Reporter’s Note to section 6.10 favorably cites the fact that “nearly all states with determinate sentencing structures retain and use widely a machinery for postrelease supervision.”⁹⁷ These mechanisms are commonly referred to as community supervision or probation by the states.⁹⁸ Most of these states retain parole boards that “have the responsibility to set conditions of release for offenders under conditional or supervised release, the authority to return an offender to prison for violating the conditions of parole or supervised release, and the power to grant parole for medical reasons.”⁹⁹

The revised Code provisions do not directly address the role of parole boards in supervised release. Rather, the Code suggests that the current structure in place in states that have already adopted determinate sentencing structures is satisfactory. The implication is that the drafters of the revised Code are not in favor of total abandonment of parole boards, despite their contempt for the ineffectiveness of the institution. Thus, if parole boards are to remain intact, it is sensible that they undergo a major overhaul that reflects the current Code provisions. An excellent first step in this process is to provide more rigid requirements for board membership that parallels the trend toward evidence-based sentencing guidelines.

B. Sentencing Guidelines

Another recommended change to the 1962 Code is the proposal for uniform sentencing guidelines that acknowledges the potential benefits of using statistical methodology to assess needs and risks inherent in the process. The newly created section 6B.09 provides the framework:

§ 6B.09. Needs and Risk Assessments of Offenders

(1) The sentencing commission shall develop, and update as necessary, instruments or processes, based on the best available research, to assess the needs of offenders that must be met to facilitate their rehabilitation, and to assist the courts in judging the amenability of individual offenders to specific rehabilitative programs in confinement or in the community. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(2) The commission shall develop, and update as necessary, offender risk-assessment instruments or processes, supported by current and ongoing recidivism research of felons in the state, that will estimate the relative risks that individual felons pose to public safety through future criminal conduct. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

⁹⁶ MODEL PENAL CODE: SENTENCING § 6.10 reporter’s note cmt. d (Discussion Draft No. 2, 2009).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ DITTON & WILSON, *supra* note 17, at 3; *see also* Palacios, *supra* note 8, at 574 (“Reformers who insist that ‘parole’ be abolished frequently confuse determinate and indeterminate sentencing” because “[t]he second aspect of parole is the continuing supervision of felons after release from incarceration.”).

(3) The commission shall study the feasibility of identifying, through risk–assessment instruments or processes, felony offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low–risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a prison term of shorter duration than indicated in statute or guidelines. The sentencing guidelines shall provide that such exercises of discretion by the sentencing court are not departures from the sentencing guidelines.¹⁰⁰

The Reporter’s Note following this proposed provision defines “risk assessment” as “predicting who will or will not behave criminally” in the future¹⁰¹ and defines “needs assessment” as “using predictive methods to attempt a reduction in criminality through assignment to differential treatments.”¹⁰² Although the comments state that the provision “incorporates statistical knowledge where it exists, and clinical judgments where they can be most helpful,”¹⁰³ the Reporter’s Note addresses the notion that actuarial predictions of risk may be superior to clinical predictions of risk.¹⁰⁴ For example, the Reporter cites a study that argues, “in virtually every decision–making situation for which the issue has been studied, it has been found that statistically developed predictive devices outperform human judgment.”¹⁰⁵ Meanwhile, certain states have already begun codifying needs and risk assessment via empirical research in their statutes.¹⁰⁶

In addressing the flaws of the revised sentencing provisions, Judge Michael H. Marcus maintained, “the revision will disappoint any who expected a modern, empirical, or promising strategy for overcoming the shortcomings of the current criminal justice system.”¹⁰⁷ Principally, Marcus is critical of the Code for recognizing the various purposes of sentencing, such as “rehabilitation, deterrence, parsimony, incapacitation when necessary to public safety, and proportionality,”¹⁰⁸ without prioritization

100 MODEL PENAL CODE: SENTENCING, *supra* note 13, § 6B.09.

101 MODEL PENAL CODE: SENTENCING § 6B.09 reporter’s note cmt. a (Discussion Draft No. 2, 2009) (quoting Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 CRIME & DELINQ. 178, 192 (2006)).

102 *Id.*

103 MODEL PENAL CODE: SENTENCING, *supra* note 13, § 6.10 cmt. b.

104 MODEL PENAL CODE: SENTENCING, *supra* note 101, § 6B.09 cmt. a.

105 *Id.* (quoting Stephen D. Gottfredson & Don M. Gottfredson, *Accuracy of Prediction Models*, in CRIMINAL CAREERS AND CAREER CRIMINALS 247 (Albert Blumstein ed., 1986)).

106 *See, e.g.*, KAN. STAT. ANN. § 21–4729 (2011) (incorporating actuarial and clinical tools into risk–needs statute for drug offenders to determine risk of recidivism as well as for the selection of treatment interventions to be used in specific cases).

107 Michael H. Marcus, *Responding to the Model Penal Code Sentencing Provisions: Tips for Early Adopters and Power Users*, 17 S. CAL. INTERDISC. L.J. 67, 67 (2007).

108 *Id.* at 68.

of these purposes or a “strategy for their pursuit.”¹⁰⁹ Marcus recognizes an “ideological stalemate” among those who favor incarceration as rehabilitation and those who favor it as a means of public safety that has produced “an unholy alliance against empiricism.”¹¹⁰ He recommends a code that would “focus sentencing primarily on crime reduction within limits of proportionality and priority, throughout the range of available sentencing dispositions, and with due regard for available resources.”¹¹¹ To achieve this goal, it is recommended that states adopt specific provisions that allow for evidence-based sentencing.¹¹² Marcus’s recommendations go further than the proposed “best evidence available” language of the revised Code to suggest “best available evidence, research, and data.”¹¹³

Despite these concerns, from the language of the sentencing guidelines statute, the accompanying commentary, and recent breakthroughs among states codifying actuarial assessment strategies, commentators can infer that the revised Code will increase the importance of empirical data analysis in sentencing decisions. This movement toward statistical assessment suggests that states echo this trend in membership requirements for parole boards. Without social scientists, statisticians, or other persons trained with actuarial expertise, the adoption of the revised Code would be fruitless. Parole boards given the responsibility of overseeing post-release supervision must understand the fundamentals of how sentencing decisions are made. The current structure of parole boards, dominated by former law enforcement officials and, to a lesser degree, attorneys, is contrary to the statistical analysis of the purpose of risk-needs assessment. There is evidence suggesting that “lawyers typically have little or no training in science, and few understand basic statistical concepts.”¹¹⁴ Investing resources in adopting the revised Code without any accompanying changes to parole board membership requirements is analogous to buying an expensive jet without anyone to pilot it.

C. “Second Look” Long-Term Sentence Modification

Although the revised Model Penal Code recommends eliminating the parole-release authority of state parole boards, it proposes to accomplish this drastic undertaking by retaining modification of long-term prison sentences. Unlike other provisions in the revised Code, the American Law Institute “does not recommend a specific legislative mechanism for

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 70.

¹¹¹ *Id.* at 84.

¹¹² *Id.* at 97 (“In all respects, the determination of what sentence best serves the purposes of sentencing shall be based on the best available evidence, research, and data.”).

¹¹³ *Id.*

¹¹⁴ Redding, *supra* note 31, at 16 n.79.

carrying out the sentence–modification authority.”¹¹⁵ However, the revised Code lays out “principles of legislation” to help guide states who wish to adopt this approach:

§ 305.6 Modification of Long–Term Prison Sentences
[Principles for Legislation]

- (1) An official decisionmaker in each jurisdiction shall be granted authority to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of imprisonment under any sentence of imprisonment as defined in § 6.10A.
- (2) A prisoner’s right to apply for sentence modification under this provision should recur at intervals not to exceed a period of 10 years.
- (3) An institution may be designated to screen prisoners’ applications, and decide which applications will go forward to the official decisionmaker in paragraph 1, or make recommendations to that decisionmaker concerning which applications should go forward.
- (4) If the applicant prisoner is indigent, an adequate mechanism for the discretionary appointment of counsel shall exist under this provision.
- (5) The legal standard for sentence modification under this provision shall be prospective. The underlying inquiry shall be whether, in light of current circumstances, the purposes of sentencing in §1.02(2) would be best served by completion of the original sentence or a modified sentence.
- (6) The official decisionmaker shall be authorized to modify any aspect of the original sentence, so long as the remainder of the modified sentence is no more severe than the remainder of the original sentence. The decisionmaker’s authority under this provision shall not be limited by any mandatory–minimum term of incarceration specified in statute.
- (7) An adequate record of proceedings under this provision shall be maintained, and the official decisionmaker shall be required to make a statement of reasons for its decisions on the record.
- (8) There shall be a mechanism for discretionary review of decisions under this provision by the courts.
- (9) Adequate procedures shall be created to give notice to prisoners of their rights under this provision.

The Institute concludes, “creation of a ‘second look’ sentence–modification mechanism is imperative whenever a legal system deprives offenders of their liberty for a substantial portion of their adult lives.”¹¹⁶ This provision originally would have granted trial courts discretionary authority to revisit extremely long sentences of imprisonment after the prisoner has served at least fifteen years.¹¹⁷ However, vesting such power in trial courts was rejected because the provision provided “an unsound basis for exclusive recommendation to every state.”¹¹⁸ Thus, the provision now gives states the discretion to choose the “official decisionmaker.” The comments following the provision outline various entities that could serve as this decisionmaker. Examples include newly created agencies or tribunals, parole boards, trial courts, sentencing commissions, Departments of Corrections, and Boards of Pardons.¹¹⁹ The Reporter acknowledges

¹¹⁵ MODEL PENAL CODE: SENTENCING, *supra* note 13, § 305.6.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

that many states will be tempted to place existing parole boards in charge of the sentence–modification process, but recommends that states exercise caution in bestowing this responsibility because of parole boards’ susceptibility to political influences.¹²⁰

Bestowing “second look” sentence modification responsibility on parole boards should be a viable option considered by states adopting the revised Code. First, the provision’s requirement that courts retain the power of discretionary review of decisions provides a procedural safeguard that mitigates the potential for political influences. Judges certainly are not immune to political pressure, but permitting review of sentence–modification decisions will increase transparency in the process and may expose unwarranted political influences. Second, if states reform board membership requirements to adhere to evidence–based sentencing, the more balanced makeup of the board membership would serve as its own safeguard. Governors will be more inclined to appoint social scientists or actuarial experts based on their level of expertise rather than political cronyism, or else face public scrutiny.

III. WHO SHOULD SERVE ON PAROLE BOARDS?

A. *Lawyers*

Although former law enforcement officials and corrections officers dominate membership on state parole boards, attorneys make up the next closest demographic. Among the states that report information regarding parole board membership, lawyers constitute anywhere from zero¹²¹ to one hundred percent¹²² of parole board memberships. Many states’ boards include a balance of attorneys and former law enforcement officials. For instance, North Carolina’s three–member parole commission has one member with a Juris Doctorate degree,¹²³ Ohio has three attorneys on its eight–member board,¹²⁴ and Massachusetts has four attorneys on its seven–

¹²⁰ *Id.*

¹²¹ See, e.g., *About PPP: South Carolina Board of Pardons and Paroles*, ST. S.C., <http://www.dppps.sc.gov/stateboard.html> (last visited Mar. 25, 2012); *Commissioners*, NEV. BD. PAROLE COMM’RS, <http://parole.nv.gov/node/5> (last visited Mar. 25, 2012); *Delaware Board of Parole Members*, ST. DEL., <http://boardofparole.delaware.gov/board.shtml> (last visited Mar. 25, 2012); *The Florida Parole Commission*, MY FLA., <https://pc.state.fl.us/> (last visited Mar. 25, 2012); *Welcome from the Director*, ALA. BD. PARDONS & PAROLE, <http://www.pardons.state.al.us/ALABPP/Main/ALABPP%20MAIN.htm> (last visited Mar. 25, 2012).

¹²² The State of Utah Board of Pardons and Parole currently consists of five members who have attained a Juris Doctorate. *Board Members*, ST. UTAH BD. PARDONS & PAROLE, <http://bop.utah.gov/board.html> (last visited Mar. 25, 2012).

¹²³ *The Parole Commissioners*, N.C. DEP’T PUB. SAFETY, <http://www.doc.state.nc.us/parole/bios.htm> (last visited Mar. 25, 2012).

¹²⁴ *Parole Board Members*, OHIO.GOV, <http://www.drc.ohio.gov/web/PBMembers.htm> (last

member board.¹²⁵ State statutes generally do not establish a minimum requirement for the number of attorneys on state parole boards.¹²⁶ However, South Dakota requires that at least three attorneys serve on its nine-member parole board (one appointed by the Governor, one by the Attorney General, and one by the Supreme Court).¹²⁷

Why does South Dakota recognize the importance of having attorneys on the parole board process? There are a number of theories that suggest that attorneys are excellent resources in processes such as parole. First, in acting on matters relating to parole, the board is a deliberative body and is deemed to be performing a judicial function.¹²⁸ This “judicial function” includes ensuring that board actions adhere to the constitutional requirements of due process. The Supreme Court has held that mandatory language in parole statutes can create a liberty interest that requires minimal due process.¹²⁹ Notions of “due process” and “liberty interest” are complicated and unlikely to be understood by laypeople. Moreover, the determination that a statute contains mandatory language requires the ability to closely analyze statutes, a skill developed in law schools across the country.

Second, because parole board decisions are generally not subject to judicial review,¹³⁰ lawyers may provide the necessary balance to ensure fair and unbiased decision-making. In most jurisdictions, inmates eligible for parole are not permitted to have counsel during parole hearings. Thus, attorneys may be indispensable to the practice of examining the legal implications of decisions. In their brief on behalf of the petitioner in *Gideon v. Wainwright*, the American and Florida Civil Liberties Unions opined, “[o]ur system of justice depends upon the active participation of trained counsel on both sides—of persons who meet the rigid qualifications necessary for admission to the bar. This is the essence of our adversary system. Lawyers are not superfluous appendages in the criminal process.”¹³¹ Lawyers provide valuable assistance in navigating “the labyrinth of the

visited Mar. 25, 2012).

125 *Parole Board Members*, MASS.GOV, <http://www.mass.gov/eopss/agencies/parole-board/board-members.html> (last visited Mar. 25, 2012).

126 *See, e.g.*, ALA. CODE § 15–22–20 (LexisNexis 2011), ALASKA STAT. § 33.16.020 (2010).

127 S.D. CODIFIED LAWS § 24–13–1 (2003).

128 67A C.J.S. *Pardon & Parole* § 46 (2002).

129 *Bd. of Pardons v. Allen*, 482 U.S. 369, 380–81 (1987) (finding that Montana’s parole statute that contained mandatory language created a protected liberty interest); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (finding that the Nebraska parole statute’s use of mandatory language created a protected liberty interest); *see also* Palacios, *supra* note 8, at 589.

130 *See* Johns, *supra* note 52, at 307.

131 Brief for the ACLU et al. as Amici Curiae Supporting Petitioner at 23, *Gideon v. Cochran*, 371 U.S. 857 (1962) (No. 155), 1962 WL 115121.

law”¹³² which may be “too intricate for the layman to master”¹³³ because “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.”¹³⁴

B. Social Scientists / Evidence-Based Sentencing

As discussed previously, most states favor law enforcement officials and occasionally attorneys when appointing members to serve on state parole boards. Few state parole boards are made up of social scientists in the fields of sociology, psychology, or statistics. However, recent trends in the way states and the ALI have begun thinking about sentencing decision making suggest that a change in parole board membership should also include an increase in appointments of social scientists. Over the last ten years, many scholars have argued that sentencing decisions should be made by using “evidence-based sentencing,” which focuses on using scientific research to improve the quality of decision making.¹³⁵ Although there is no uniform definition of “evidence-based sentencing,” it generally contains the following common characteristics:

- An assessment of risk factors (that increase the likelihood of recidivism);
- An assessment of protective factors (that decrease the likelihood of recidivism);
- An assessment of criminogenic needs (‘clinical disorders or functional; impairments that, if ameliorated, substantially reduce the likelihood that the offender will recidivate’);
- An estimate of recidivism risk (defined with reference to particular types of recidivism, in particular contexts, over a specified time period) through the use of scientifically-validated risk assessment instruments and methods;
- An identification of the most effective (i.e., recidivism preventing) sentencing options and interventions (including correctional and treatment programming) based on the particular offender’s risk factors, protective factors, and criminogenic needs.¹³⁶

¹³² *Chewning v. Cunningham*, 368 U.S. 443, 446 (1962).

¹³³ *Id.*

¹³⁴ *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

¹³⁵ Redding, *supra* note 31, at 2.

¹³⁶ *Id.* at 3–4 (quoting Douglas B. Marlowe, *Evidence-Based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs*, 1 CHAP. J. CRIM. JUST. 167, 181 (2009)).

As recently as thirty years ago, the questions of how to prevent recidivism and how to rehabilitate offenders were virtually impossible to answer, leading at least one researcher to surmise that “nothing works.”¹³⁷ Certain experts also concluded that predicting “recidivism risk” was extremely inaccurate, perhaps no more accurate than flipping a coin.¹³⁸ Studies demonstrated that attempts to predict violent behavior had a ninety percent error rate¹³⁹ and that “psychologists and psychiatrists are accurate in no more than one out of three predictions of violent behavior.”¹⁴⁰

However, there is no longer a dearth of information regarding identification of risk factors and protective factors,¹⁴¹ nor a lack of scientific techniques capable of reliably assessing that risk.¹⁴² Our increased expertise in understanding and analyzing these factors “has . . . led to more sophisticated and scientifically-based rehabilitation programs with proven effectiveness, along with an understanding of why some programs do not work.”¹⁴³ Evidence-based sentencing embraces the development in the field and puts this scientific knowledge to use “in a systematic and structured way, to guide sentencing.”¹⁴⁴ Many scholars believe evidence-based sentencing will become more common as courts and legislatures become more familiar with the methodology and results.¹⁴⁵

Recent U.S. Supreme Court cases “appear to push federal and state sentencing systems towards allowing greater judicial discretion,”¹⁴⁶ which may lead to an accelerated trend in evidence-based sentencing.¹⁴⁷ The American Law Institute’s new Model Penal Code sentencing provisions

¹³⁷ See Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, THE PUB. INT., Spring 1974, at 22, 48–49.

¹³⁸ See Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711–16 (1974).

¹³⁹ *Barefoot v. Estelle*, 463 U.S. 880, 920 n.2 (citing various studies and the amicus brief of the American Psychological Association).

¹⁴⁰ JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47 (1981).

¹⁴¹ Redding, *supra* note 31, at 5; see also DONALD ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (4th ed. 2006); OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE, *SERIOUS AND VIOLENT JUVENILE OFFENDERS* 4–5 (1998) (identifying risk and protective factors for serious juvenile crime).

¹⁴² Redding, *supra* note 31, at 5.

¹⁴³ *Id.* at 5–6.

¹⁴⁴ *Id.* at 6.

¹⁴⁵ DAVID L. FAIGMAN ET AL., *SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES* 112 (2002) (internal citations omitted) (“Violence risk assessment is likely to continue to move strongly in an actuarial direction.”).

¹⁴⁶ Redding, *supra* note 31, at 6–7; see also Steven L. Chanenson, *The Next Era of Sentencing Reform*, 53 EMORY L.J. 377, 377–86, 400–08 (2005) (reviewing recent U.S. Supreme Court cases that have invalidated aspects of mandatory sentencing guidelines, and suggesting that such decisions may allow for greater judicial discretion in sentencing and also provide the opportunity to reform state sentencing systems).

¹⁴⁷ Redding, *supra* note 301, at 6.

reflect the trend toward evidence-based sentencing in an attempt to reduce recidivism by “deterrence, incapacitation, or rehabilitation.”¹⁴⁸ Even prior to the passage of the final version of the Model Penal Code, jurisdictions across the country are beginning to adopt evidence-based sentencing practices.¹⁴⁹ In fact, Oregon passed legislation in 2005 mandating that seventy-five percent of its funding for correction programs be allocated to evidence-based programs.¹⁵⁰

As states begin to adopt this new Code, a parallel restructuring of parole board membership to include members who can comprehend this evidence and utilize it in the board’s decision making is imperative. Despite the ALI’s movement toward determinate sentencing and away from discretionary release decisions, the ALI has not suggested the dissolution of parole boards. Instead, it acknowledges that parole boards may still serve a vital function in both “second look” sentence modification and the supervision of parolees. Consequently, states adopting the structure promoted by the new MPC must simultaneously guarantee that their parole boards are prepared to meet new requirements placed on them by the influx of evidence-based sentencing.

It is precisely for these reasons that states should mandate that social scientists, or even experts in applied mathematics, are present on state parole boards because, as various scholars have argued, “decision makers in the criminal justice system need to become well versed on the science and practice of risk assessment.”¹⁵¹ Psychiatrists, psychologists, statisticians, sociologists and other social scientists often have extensive training in statistics and understanding otherwise confusing data. Unlike most attorneys or law enforcement officials, those with training in quantitative statistical methodology are better equipped to analyze risk assessment data.

There are a number of reasons to advocate inclusion of social scientists as board members (as opposed to training current members). First, “the evidence-base used to develop risk assessment procedures is “inchoate”—both incomplete and constantly changing.”¹⁵² As advances in research and theory occur, what is considered “good” evidence-based risk assessment may be considered “bad” in the next year.¹⁵³ In order to provide training to current parole board members (attorneys and law enforcement officials) on evidence-based sentencing, a well-defined system would be necessary. Those with training in statistics, however, are more likely to understand

¹⁴⁸ *Id.*

¹⁴⁹ MODEL PENAL CODE: SENTENCING, *supra* note 13, § 6B.09 (discussing eight states that have instituted risk assessment procedures as a routine part of sentencing).

¹⁵⁰ OR. REV. STAT. § 182.525 (2005).

¹⁵¹ Redding, *supra* note 31, at 13–14.

¹⁵² Stephen Hart, *Evidence-Based Assessment of Risk for Sexual Violence*, 1 CHAP. J. CRIM. JUST. 143, 164 (2009).

¹⁵³ *Id.*

the need to adapt their approach as research advances. Given the difficulty of training law enforcement officials and attorneys on how to understand this new evidence-based system in the first place, it would be a drain on time and resources to continually “re-train” them each time a new advance is made. Social scientists may also need similar re-training, similar to Continuing Legal Education for attorneys, but their education and statistical acumen should mitigate a resource drain from training.

Second, “although a risk assessment procedure may be characterized generally as evidence-based (to some greater or lesser degree), the risk assessment of a given offender is not.”¹⁵⁴ That is to say, it is impossible to measure the specific probability that a particular offender will recidivate. A balance of social scientists, law enforcement officials, and attorneys will be able to utilize each of their areas of expertise in making a well-informed decision regarding release (or “second look” sentence modifications). The law enforcement official can use her long history in behavioral evaluation; the attorney can be the gatekeeper of deliberation and guarantor of constitutional rights; social scientists can ensure that the recommendations comport with what is statistically preferable.

IV. IMPLEMENTATION: TWEAKING THE “SOUTH DAKOTA APPROACH”

As states continue to move toward embracing evidence-based sentencing, they must simultaneously address the parallel changes needed in their parole board membership. Despite the criticism of parole boards and the movement toward determinate sentencing with extremely limited discretionary release authority, state parole boards continue to serve a vital role in the criminal justice system. However, failure of states to modernize their parole board membership while they simultaneously modernize parole practices would be a substantial waste of effort and resources. As this Note argues, striking a balance between the backgrounds of parole board members is a tremendous first step that will lead to more effective decision making. The inclusion of social scientists in the makeup of parole boards serves as the final step in effectuating evidence-based sentencing.

Fortunately, the paradigm shift in thinking about sentencing does not require a fundamental overhaul of the statutory schemes most states have in place. South Dakota’s parole board statute should serve as a guidepost for those states that wish to adhere to this balanced approach to parole board membership. South Dakota requires that at least three attorneys serve on its Board of Pardon and Paroles,¹⁵⁵ with one appointed by the Governor, one appointed by the Attorney General, and one appointed by the Supreme Court, all approved with the advice and consent of the South

¹⁵⁴ *Id.*

¹⁵⁵ S.D. CODIFIED LAWS § 24-13-1 (2011).

Dakota Senate.¹⁵⁶ Therefore, attorneys comprise at least one-third of the nine-member Board. Moreover, the appointment decisions are not left to the whims of the Governor.

States who adopt the new Model Penal Code sentencing provisions or independently enact evidence-based sentencing should include similar language in their statutes requiring inclusion of social scientists, applied mathematicians, or other candidates with a strong background in the actuarial sciences. Similarly, state statutes may require that the other members consist of law enforcement officials, victims of crimes, or ordinary citizens. Codification of such suggestions reflects the need for a balanced decision-making body while also respecting the long-standing traditions of state parole board membership.

As states enact evidence-based sentencing, they must also make serious endeavors to educate judges, prosecutors, probation officers, and attorneys about the new empirically based sentencing guidelines. Recognizing Professor Stephen D. Hart's "clarion call for probation officers, prosecutors, and judges to become knowledgeable about risk/needs assessment,"¹⁵⁷ Professor Richard E. Redding maintains that "[r]isk assessment is invaluable when used appropriately and in conjunction with other information, which necessitates an understanding of the limitations of risk assessment instruments and how to interpret and use the information they provide."¹⁵⁸ This education will require additional funding, but the cost can be mitigated by the inclusion of social scientists in deliberative bodies, such as parole boards, which can provide oversight to ensure that the empirical data is being appropriately considered by other board members.

CONCLUSION

Reforming parole board membership is one of the many ways in which states must begin to address some of the inadequacies of their criminal justice system. With the emergence and gradual acceptance of policies such as evidence-based sentencing, aimed at modernizing an often-anachronistic system, states must not neglect to make changes wherever necessary. This Note demonstrates the importance of addressing parole board membership as states begin to reform their sentencing provisions and guidelines. Most scholarship on evidence-based sentencing currently focuses on either touting or questioning the merits of empirically based decision-making. Some academics also address the implementation of these policies as states adopt the approach. Often, however, parole boards are left out of this academic discourse. Failure to address parole boards in

¹⁵⁶ *Id.*

¹⁵⁷ Redding, *supra* note 31, at 16.

¹⁵⁸ *Id.*

light of evidence-based sentencing reform can be likened to constructing an environmentally friendly house with solar panels that still uses inefficient incandescent light bulbs. It would be anathema to common sense to engage in a paradigm restructuring of the sentencing system without addressing corollary changes needed to the makeup of state parole boards, which comprise a vital component of the criminal justice system.

