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## Discretion in Making Legal Decisions: A Frances Lewis Law Center Colloquium

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## DISCRETION IN MAKING LEGAL DECISIONS A Frances Lewis Law Center Colloquium\* Principal Paper

### On Legal Decision-Making\*\*

KEITH HAWKINS\*\*\*

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\* The Colloquium was held at Lewis Hall, Washington and Lee University, March 27-29, 1985. Professor William S. Geimer chaired the sessions. Professor Thomas L. Shaffer edited the colloquium papers for publication.

\*\* Sections of this paper are drawn from a writing project on legal decision-making on which I am engaged at the Centre for Socio-Legal Studies at Oxford. The project is a collaborative one involving my colleague Peter K. Manning. Parts of the discussion reflect some of his contributions to our joint work which I wish to acknowledge with thanks (though I offer myself alone as the target for any critical comments about what follows). The paper itself was drafted while I was at the Law School of the University of Texas at Austin as Visiting Professor. I am grateful for the facilities made available to me there, and I would particularly like to thank Debbie Craig of the Law School staff for her help in typing the paper. Part III of the essay is drawn from a study funded by Grant Number 78-NI-AX-0153 from the National Institute of Justice, United States Department of Justice, Washington, D.C. Points of view expressed are mine, and do not necessarily represent the official position or policies of the Department of Justice.

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### III. A PIECE OF DETAIL—AND BACKGROUND

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### IV. A REFLECTION

#### I. PARTS OF A LANDSCAPE

In this paper, I want to offer some observations about the way actors in the legal system make decisions. I shall draw attention to some of the many complexities of legal decision-making, criticize some of the research on the subject which has been conducted in recent years, and conclude with an account of some of my empirical work on an aspect of parole board decision-making which is intended to illustrate some of the points in my argument.

My paper proposes some of the central concerns which theoretical and empirical explorations into decision-making in legal settings should address. Its argument is that there exists only a rather imperfect understanding of the ways in which legal discretion<sup>1</sup> is exercised, and this is substantially due to the poverty in method and conception of much of the existing research; indeed, much of the literature seems not to have even clarified the conceptual terrain before beginning building work. The result of this is a simplistic image of the nature of decision behavior. This paper argues for more naturalistic study of the processes of law to develop an empirically-based understanding of how and why legal decisions are made in certain ways in routine cases. I am not, therefore, concerned with the development of a normative theory.

The business of law is the business of making decisions. Decisions are made at every step of the legal process, though obviously some are weightier, more consequential for the individual, than others. Perhaps for the layman "the law" is personified by the judge (note the significance of the word) presiding over the public ceremonies of the courtroom and delivering a judgment on the rival claims in a civil case, or by the jury's verdict in a criminal case. Similarly, much of the raw material of traditional legal scholarship consists of the reports of the decisions of judges and their supporting rationales, which together comprise a legal "case."<sup>2</sup> But the layman's picture of the law (if it is accurately described) is distorted. Judges

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1. I use the terms "discretion," "decision-making," "decision behavior," and "judgment" synonymously, in the interests of the reader rather than of scholarly accuracy.

2. However, I use the term "case" in a different way, to refer to the building up of knowledge and information about a person's involvement in the civil or criminal law—about a claim for damages, for example, or about alleged involvement in criminal behavior—which may then be handled, referred on, filed away, or decided about. At any rate, such a case takes on real and concrete qualities for those who must deal with it.

are clearly significant figures and judicial decisions are of central importance to legal work—even if precisely how and in what circumstances they are important are not well understood. Yet judges are only one kind of legal actor, and their judgments only one kind of a vast array of legal decisions which are made in modern industrialized welfare states. Robert Kagan has made the point well:<sup>3</sup>

The great mass of official decisions in the legal system of the modern welfare-regulatory state are not made by judges, after considering the arguments of legal counsel, but by “eligibility workers” processing files in welfare and unemployment insurance offices, or by low-paid regulatory inspectors, tax auditors, licensing officials and assorted other bureaucrats. In theory, of course their decisions are subject to review by courts; but in practice appeal often is unfeasible. The law, as applied, thus is a product of “the bureaucracy”. . . .

I interpret the term “legal decision-making,” then, in a very broad way to include a variety of decisions made by individuals and groups involved in legal processes. A variety of illustrations could be marshalled to suggest that decision-making is an immensely complex matter, though examples used here will be drawn primarily from the criminal justice process because it has produced the largest number of studies which illuminate the problem. This, and the use of criminal law to implement regulatory policy, have been the areas in which my own work has been concentrated. Accordingly, I shall draw, explicitly or implicitly, on research on aspects of the decision behavior of a variety of legal actors, in particular regulatory officials (water pollution control officers), enforcing rules carrying a criminal sanction;<sup>4</sup> and members of American state parole boards.<sup>5</sup> My remarks may well, however, be relevant to many aspects of the less-researched arenas of civil legal processes.

Why is it worth studying how legal actors make decisions? It is a commonplace that the law in action frequently bears little resemblance to the structure of rules found in statute and precedent, but what is the precise nature of the mechanism by which this occurs? It is in the everyday discretionary behavior of police officials, lawyers, judges, and others that the legal system takes shape and gets things done. The abstract and often terse statements of the legislature are given form and purpose in the choices legal actors make about the reach and meaning of their conception of the law. The making of decisions is an all-pervading feature of human activity, with consequences which are sometimes trivial or banal, sometimes drastic or dramatic. A concern for the making of decisions by legal actors is important because law is the most consequential normative system in a

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3. R. Kagan, Book Review, *Inside Administrative Law*, 84 COLUM. L. REV. 816 (1984).

4. K. HAWKINS, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* (1984).

5. K. Hawkins, *Assessing Evil: Decision Behavior and Parole Board Justice*, 23 BRIT. J. OF CRIMINOLOGY 101 (1983).

society. "The law provides the general framework within which social life takes place," writes Raz:<sup>6</sup>

It is a system for guiding behaviour and for settling disputes which claims supreme authority to interfere with any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in society. By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself up as the supreme guardian of society.

The significance of decision behavior in the translation of legal rules into action is self-evident. It is difficult to imagine many occasions when legal rules are mechanically applied; at every stage in the legal process choices are made by actors: litigants, accused persons, lawyers, enforcement officials, judges, penal practitioners, and so on. The creation of any legal "case" and its subsequent career are shaped by decisions made in a dynamic unfolding process. Cases flow through the various handling systems employed in legal processes, their courses shifting or terminating at various salient decision points. Furthermore, few cases in proportion to the numbers theoretically eligible are dealt with visibly in the court room, the forum presumably intended to be the site for formal legal decisions by judges about their ultimate disposal. Instead, this decision-making tends for the most part to be done in informal settings characterized by a high degree of privacy. Thus although judges play a key role in making decisions in a formal setting (decisions which may of course acquire, through the authority of precedent, a significance outside themselves in the higher courts if a rule is being clarified or modified), other crucial decisions are made, largely invisibly, by officials and legal practitioners whose primary concerns are bound up with the handling and management of a stream of cases seen in interactional and organizational contexts.

Legal decisions are, of course, potentially weighty matters for the participants in the process, especially suspects, defendants, and litigants. In the criminal process the judgments of enforcement and prosecution officials effectively serve as screening devices sorting out which cases are worth prosecuting and with what charge.<sup>7</sup> In the civil law, claims in, say, tort or contract are handled in analogous fashion, though here possibly more extensive screening is effected by sometimes lengthy negotiations to settle out of court.<sup>8</sup> The civil case which reaches formal adjudication in the courtroom is statistically highly exceptional.

Decision-making, in short, is the stuff of the law. Discretion enables legal rules and mandates to be interpreted and given purpose and form. It enables judgments to be made about the application, reach, and impact of the law. And it enables the conflicting imperatives of consistency and individualization to be reconciled.

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6. J. RAZ, *THE AUTHORITY OF LAW* 120-121 (1979).

7. See, e.g., D. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* (1980); M. Myers & J. Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 *SOC. PROBS.* 439 (1979).

8. See, e.g., L. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970); D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

*On Form and Structure in Legal Decisions*

My purpose here is to draw attention to aspects of the richness and diversity of various kinds of legal decision and to clarify a little of the vocabulary of legal decision-making. This is important because there is not only an impressive range in the types and numbers of legal officials who actually make decisions, but diversity as well in the form of such decisions and the settings in which they occur, with significant implications for the kinds of decisions made. Indeed, the term "legal decision-making" covers an enormous range of activities, from the studied judgment, the ceremony and solemnity of the judge in the courtroom, to the often hasty (and usually unceremonious) decision of a policeman on the street about how to deal with a suspect. Bear in mind also that the homogeneity of the decisions made by legal actors varies widely. Some enjoy a broad range of substantive choice as to the precise nature of any decision made. Policing, for example, is well known for the decisions of a social work, order-maintenance, or peacekeeping kind, as well as the more familiar judgments about arrest.<sup>9</sup> And police officers, of course, like other gatekeeping officials controlling access to the legal system, have the power to decide to do nothing.<sup>10</sup> In contrast, the kinds of decisions made by other sorts of legal actors—the members of a parole board, for instance—may be very much more homogeneous. In the case of parole boards, their task is much more narrowly framed in terms of having essentially to decide whether to release a prisoner before expiration of sentence or not, or whether to recall a parolee to prison. In short, the ways in which decisions are made and the outcomes of any decisions made may be heavily influenced by precise matters of structure, form, and personnel in legal decisions.

It is important to be clear about the terms and concepts used in this analysis. To begin with, the word "decision" refers to the *outcome* of deciding, while the term "decision-making" speaks to the *process* of making up a mind. Much of the literature on decision-making tends to regard legal decisions as judgments made at particular salient points in the civil or criminal-justice systems as cases flow through them.<sup>11</sup> Decisions about arrest, charge, plea, and guilt, for instance, are examples of such salient points in the criminal-justice process. However, if we are to develop an understanding of how legal decisions are actually made, it is important to regard them as constituent parts of a continuous process which seamlessly connects one salient decision point with the next. Indeed, the process itself consists of an almost infinite number of complex decisions of greater or lesser significance about the handling or processing of a case *between* these salient decision points. Furthermore, some of these ancillary decisions, though less visible, may have significant consequences. For example, if the single judge in the English legal system who sits to determine whether a convicted offender is

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9. *E.g.*, J. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* (1968).

10. *See, e.g.*, I. Piliavin & S. Briar, *Police Encounters with Juveniles*, 70 *AM. J. OF SOC.* 206 (1964); K. Hawkins, *Creating Cases in a Regulatory Agency* 12 *URB. LIFE* 371 (1984).

11. *See, e.g.*, D. GOTTFREDSON & M. GOTTFREDSON, *DECISION-MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* (1980).

to be granted leave to appeal against sentence or not decides against that offender, that decision puts an end to the matter, and the Court of Appeal, of two or three judges will not hear the case.

A distinction needs to be made, then, in analyzing legal decisions between *primary*, or first-order, decisions and *secondary*, or second-order, decisions. Primary decisions are those visible, salient or significant decisions which comprise the key decision points in the career of a legal case, addressing the handling or disposal of that case, or changing the status of the person caught up in the process. Thus, decisions to arrest or not, prosecute or not, convict or not may be regarded as primary decisions. Secondary decisions would be comprised of those various ancillary decisions made in the course of handling or disposing of any case: What security classification should be imposed on this prisoner? Should the prisoner go to a secure or an open institution? Many second-order decisions may not seem to be particularly significant, such as what information should be included as part of the raw material of a case, but they may have enormous implications for how subsequent primary decisions are made. Such secondary decisions are virtually endless in both kind and number. They tend also to be made in private and not at more visible points in the system; instead many of them tend to come together in a process of accretion as a mosaic of supplementary handling decisions.

The concept of decision implies the existence of information; and it implies a choice, for if there were no choice, how could it be said that there was a decision? Accordingly, in referring to the making of a decision I have in mind the question of *choice as to action* which is exercised by the wide variety of legal actors, who, at various points in legal processes, exercise a choice to do otherwise. The notion of choice is variable. It may be in many cases very wide and very real but in other circumstances it may be much more apparent than real, automatic almost, rather than creative, because a "decision" made merely reflects one or more other decisions already reached earlier in the civil or criminal justice handling systems in the processing of the case. In other words, it is important to distinguish the concept of *deciding* from the concept of *ratifying*. In some forms of legal decision-making those who supply information, opinion, or assessment may have such an enormous influence on the decisions subsequently made about the handling of a case that it becomes difficult to conceive of the salient decision point as being the one at which a real choice was made.<sup>12</sup> For example, "If a [life] prisoner had the backing of C5 [the section in the Home Office in London responsible for collating and summarizing all the information about the handling of such cases], he was almost certain to be released. During the period analysed, C5 gave positive suggestions for the release of 71 men and these were accepted by the [Parole] Board in 70 cases."<sup>13</sup> It is difficult to escape the conclusion that the real decisions in this example are, with very few exceptions, made with the framing of the "suggestions" put forward by the Home Office.<sup>14</sup>

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12. K. Hawkins, *supra* note 5.

13. M. Maguire, F. Pinter & C. Collis, *Dangerousness and the Tariff*, 24 BRIT. J. OF CRIMINOLOGY 255 (1984).

14. Similarly, in a pilot study of 250 parole applicants it was found that the Pennsylvania

The use of language in documentary reports may or may not reveal where the real or effective source of authority or influence in the making of a decision actually resides. Doubtless in certain circumstances the effective source of decision authority is obscured. Formal accounts of decision practices are sometimes conspicuously careful in their use of language to convey the impression of the exercise of a discretion which may be more apparent than real. In some forms of legal decision, for example, people supplying information are requested or encouraged to make a "recommendation" to those in whom decision-making authority is formally located, though less assertive language may sometimes be employed. For example, in the paroling of life-sentence prisoners in England and Wales the judiciary are "consulted" by the Home Secretary for "an initial judicial view . . . as to the period of years to be served," a form of input to the decision subsequently described as "advice."<sup>15</sup> It may safely be assumed that such "advice" carries considerable weight.

Decisions are made, then, about the kind and amount of information to supply the maker of a first-order decision where that decision is made on the basis, *inter alia*, of documentary information; the nature of such data, which becomes the raw material for decision by legal actors, may vary enormously. Data may exist in the form of written statements, reports or accounts, or in the form of a real person. Another much more diffused form of data resides in the institutional memory possessed by officials in organizations about normal ways of handling matters.<sup>16</sup> Data used to make a decision may be "raw," or processed on one or more occasions; it may be overlaid in various ways such that a record may be composed; or it may accumulate by accretion, as in a parole dossier or the many other records and files written by various officials at various points in time. Different people may have a different orientation to the data, the person, and the decision at that time, thereby transforming the nature of the reality reported on. Creating a file on a case involves in effect the selective social reconstruction of history.<sup>17</sup> Data which exist in written form are readily reproducible and transmissible to others and exist as a record where they may be stored, classified, and retrieved as circumstances demand. Such data often acquire a particular authority as well as a persistence and permanence in case files, which sometimes are overburdened by the accumulated detritus of years past. However, other data for legal decisions in certain circumstances may be much more ephemeral (though nonetheless influential), consisting of oral statements by individuals, or in many cases non-verbal cues—the sort of data which research has shown to play a central part, for example, in the

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Board of Parole agreed with the recommendation made by the Board's Parole Interviewer in 98 % of the cases. See J. Carroll, R. Wiener, D. Coates, J. Galegher, & J. Alibrio, *Evaluation, Diagnosis and Prediction in Parole Decision Making*, 17 LAW & SOC'Y REV. 199 (1982).

15. REPORT OF THE PAROLE BOARD FOR ENGLAND AND WALES FOR 1983 at 2 (1984).

16. D. Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965).

17. See, e.g., D. NELKEN, *THE LIMITS OF THE LEGAL PROCESS: A STUDY OF LANDLORDS, LAW AND CRIME* (1983).



decision to arrest a suspect or not. A number of research studies<sup>18</sup> have shown how police officers respond to non-verbal cues such as dress, demeanor and symbols of toughness or aggression, in deciding whether and how to invoke the criminal process.

Whatever the nature of the data for decision, however, a crucially important feature is the source of those data. The identity or status of a person offering an evaluation or assessment to a decision-maker, or the character of a witness in a trial, may be extremely influential, and in a conflict of evidence may prompt a series of common-sense assessments about the credibility or otherwise of an individual, whether suspect, witness, or claimant, caught up in the arms of the law.

### (i) Forms of legal decision

Our stereotypical public image of legal decision-making as symbolized by the judge handing down a judgment or sentence as the culmination of the ceremony of the courtroom reflects a conception of legal decisions as a matter of *adjudication*. However, the great bulk of what I am treating as legal decisions are not solemn adjudications by judges,<sup>19</sup> but are decisions made by lesser and less visible, individuals: lawyers, policemen, probation officers or other social workers, or a host of administrative officials in regulatory bureaucracies. The decisions made here are not usually the product of adjudication, but of *negotiation*.

The formal law in the Anglo-American tradition seems to contemplate a legal case as a matter to be settled by adjudication and as constituted by two parties, a claimant and a defendant in a civil case, or the state and the accused in a criminal case. In both settings, the problem of the competing claims is resolved at trial by the judge (and where appropriate, the jury) acting as the third party whose decision is binding upon the other two. The essence of legal decision-making by adjudication, then, is the existence of an authoritative third individual or group empowered to make a decision binding upon the two competing parties, and its defining feature is the imposition of a solution to a problem defined in adversarial terms, in contrasting ways.<sup>20</sup> The parties contribute to the adjudicated decision, but do not take part in the process of deciding itself; "they seek", as Gulliver puts it, "to affect the judgment in their own interests, but they do not participate in the decision-making."<sup>21</sup> Adjudication works because there is an overriding au-

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18. E.g., I. Piliavin & S. Briar, *supra* note 10; C. Werthman & I. Piliavin, *Gang Members and the Police*, in D. BORDUA (ed.), *THE POLICE: SIX SOCIOLOGICAL ESSAYS* 56 (1967); D. Black, *supra* note 7.

19. Unless it is clear from the context, I use the term "judge" to refer to all such officials who adjudicate in trials, including magistrates.

20. I am indebted to V. Aubert, *IN SEARCH OF LAW* (1984) and P. Gulliver, *Case Studies of Law in Non-Western Societies*, in L. NADER (ed.), *LAW IN CULTURE AND SOCIETY* 11 (1969) in this part of the discussion.

21. Gulliver, *supra* note 20, at 18.

thority to decide. A decision is imposed, an outcome which tends to be cast in categorical binary terms (guilty or not guilty, liable or not liable). Authority is a crucial ingredient in adjudication since the binary outcome (win-all or lose-all) presumably means that the party who loses the case would be otherwise unwilling to accept the verdict. Since adjudicated decisions are in effect all or nothing, it is often possible to predict with some degree of accuracy which is the more likely outcome: guilty or not guilty, liable or not liable.<sup>22</sup> In legal and indeed in many other social settings the processes of adjudication are often attended with considerable formality and ceremony, presumably to endorse the independence and authority of the adjudicating individual or panel.

Arbitration may be regarded as a sub-species of adjudication to the extent that it is a device permitting an arbitrator to choose between the competing claims of two parties. Two key differences between adjudication and arbitration, however, are that the arbitrator may provide an answer to a question which represents a compromise between the competing claims, and an answer which need not necessarily be binding on the parties.

In contrast with adjudicated decisions, negotiation is a means of solving problems arrived at in the absence of an authoritative, imposed outcome. It is a flexible system of decision-making relying upon bargaining, and to that extent the agreed outcome is tolerable to both sides.<sup>23</sup> Negotiation works in the absence of an authoritative decision-maker because there is at least a measure of consensus and commitment to the outcome of the decision-making process felt by both parties.<sup>24</sup> They must be "in agreement with it", in Gulliver's words, "and must accept it as the best that can be obtained in the circumstances. Acceptance is by compulsion, of course, but it is the compulsion exercised by the other party and not by overriding external authority."<sup>25</sup> It is decision-making by compromise rather than by the imposition of one verdict or another. There is no fully authoritative party (though of course bargaining strengths may well differ between the parties), thus the complete acquiescence of one side or the other in an all-or-nothing outcome is unusual. To the extent that each side enjoys at least some measure of bargaining strength, the negotiated decision is mutually arrived at, not imposed, giving negotiation the character of a search for a solution to a problem (where the character of adjudication tends to be that of finding an answer to a question). This search takes place in informal settings which are unencumbered with a structure of formal rules and procedures, in contrast with adjudication, for there is no authority to decide which norms apply.<sup>26</sup>

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22. I would not wish to give too much emphasis to such predictions, however. Presumably, if parties enjoyed a high degree of certainty about the likely outcome of any formal adjudication in a civil case, such an adjudication would not be needed in the first place.

23. P. Gulliver, *supra* note 20, at 17.

24. K. Hawkins, *supra* note 4.

25. P. Gulliver, *supra* note 20, at 18.

26. *Id.*

Mediation is a form of decision-making closely allied with negotiation, in the sense that it is a means of facilitating the striking of a bargain between the competing parties. The bargain is reached through the good offices of a non-authoritative third party.

If negotiation is characterized by informality of procedure, adjudication is closely tied to notions of legal formality. In systems of legal decision-making surrounded by formality, a structure of rules operates to create a measure of predictability. That is to say, the outcome of a decision process may be logically deduced by the rational consideration of the facts of the case and the application of relevant rules: "The problem has become objective in the sense that a solution can be reached by an outsider who knows the rules of evidence and is able to perform logical manipulations within a normative structure."<sup>27</sup>

In decision-making by negotiation, in contrast, "a solution to an interest conflict that is based on the reciprocal adjustment of needs," Aubert says, "is ill-suited to the promotion of predictability."<sup>28</sup> It might be more apt to use the term "less suited" in this statement, however, because regularities are discernible in the behavior of those who make decisions to settle problems or to process cases in the informal and quite private settings in which most legal negotiations take place. Indeed, it is difficult to envisage how plea-bargaining, as portrayed, for example, by David Sudnow,<sup>29</sup> could operate effectively in the absence of a high degree of familiarity between defense and prosecution lawyers about how each regards certain forms of offense and offender.

Formal, legal—adjudicated—decisions are also bound up with publicity. Adjudicators' decisions in law are sometimes made in the public ceremony of the courtroom. And where they are made privately (by a parole board or a tribunal, for example), their results are often available to the public. Judicial and some administrative decisions are also made ostensibly within the structure of publicly known substantive and procedural rules, and there are usually arrangements for accountability, with provisions for appeal or review of cases. Negotiated decisions, however, characterized as they are by informality, tend to be made in private, with a low degree of visibility of process and result. They tend also to be made in accordance with few publicly known substantive or procedural rules, though there may well be various other kinds of rules in evidence, such as the norm of reciprocity.<sup>30</sup> In effect, decision-making by negotiation does not necessarily owe a heavy debt to the past, whereas, according to Aubert, formal legal processes are prisoners of their past in the sense that "in the mutual adjustment of needs" which characterizes informal negotiated decision processes, "what has been said or

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27. V. Aubert, *supra* note 17, at 69.

28. *Id.* at 70.

29. D. Sudnow, *supra* note 16.

30. A. Gouldner, *The Norm of Reciprocity—A Preliminary Statement*, 25 AM. SOC. REV. 52 (1960).

done before can be left unsettled if it suits the parties." The parties "can often (but not always) disregard the precedent implications of the settlement." Thus "a bargain struck leaves no mark upon the normative order; it is not a consequence of it nor does it become a constituent part of it."<sup>31</sup> It might be added that informality of process is associated with invisible decision practices, whose existence is often not recorded, and whose potential for becoming public and therefore creating the possibility of a record—a past—is extremely limited.

The discussion up to this point has been focussed upon decision-making in particular *cases*, which will remain the primary concern of this essay. It should be noted, however, that a significant part of legal decision-making is of another kind, and is not addressed to case decision-making at all, that is, the question of how to dispose of a discrete and concrete individual case. Instead, decision-makers are often concerned with the making of *policy*, in other words making decisions about how to decide particular classes of case. Policy decision-making assumes considerable importance in public law, where legal rules are implemented by "street-level bureaucrats"<sup>32</sup> who are members of formal organizations. This is not to deny that case decision-making is also a form of policy-making, as Lipsky has argued,<sup>33</sup> a form which may be regarded as emerging from the aggregated use of discretion in individual cases and made possible by a relatively high level of discretion and autonomy in the organization. The point is that very often the environment of a legal decision, so far as the official is concerned, is partly made up of existing decisions which comprise a policy purporting to inform the handling of particular kinds of case in particular ways. Thus the discretion of individual police officers may be shaped in particular instances by the fact that they are involved in a crackdown against a particular form of offense.

#### (ii) Location of decision-making authority

Another aspect of the diversity of legal decision is to be found in the variations in the *location* of legal authority to make decisions. The number and the kind of decision-makers vary in different legal settings. Some decision processes may be helpfully looked at as a sequence of choices made *in series*, one following another. In these circumstances, matters such as the flow of information from one point in the system to a subsequent point, or the status or credibility of the source of a piece of information, become particularly important. There may well be various kinds of connection between decisions about the handling of a case over time, with subsequent decisions made in such a way as to amplify or correct earlier decisions. Put another way, a decision made in a certain way can affect the way in which a subsequent decision is made. This may be the explanation, for example, of

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31. V. Aubert, *supra* note 20, at 70.

32. M. LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980).

33. *Id.* at 13 ff.

the finding that prisoners with existing records of institutional misconduct are more likely to be reported for subsequent rule violations than those without such records,<sup>34</sup> or the finding that a substantial proportion of people detained in custody awaiting trial are not subsequently sentenced to a custodial term upon conviction.<sup>35</sup> Sometimes, in addition, it is useful to consider some sorts of decisions as being made *in parallel* to the extent that a particular outcome is reached by a number of decision-makers acting together. This is the case when, for example, a decision is to be made by a tribunal, a panel of judges, a jury, or members of a parole board. What assumes significance here is the fact that decisions by individuals have to be molded in social interaction into one judgment or verdict purporting to represent the (in reality often differing) views of the constituent members.

Some decisions are made by apparently single decision-makers such as the police officer on the street, or the sentencing judge. The phrase "apparently single" is important because effective decision-making authority does not usually reside solely in one particular spot, but is diffused among information suppliers and colleagues whose ostensible role is to service the decision-makers, like probation officers with their presentence enquiries. For instance, there can be few cases where the single decision-maker actually makes a decision alone, devoid of knowledge contributed by others, without a stock of information about individual, event, and relevant history, which together make up a legal "case." The police officer is probably the most familiar example of an individual decision-maker who occasionally has to make swift decisions about whether to proceed with suspects apparently unaffected by the discretionary work of others, but even here such decisions may well be affected by departmental policy of one sort or another.<sup>36</sup> Note also that a seemingly spontaneous or isolated decision is still informed by informal decision rules operating as part of the legal actors' occupational cultures which grow by accretion from routine practices over time. Judges, on the other hand, not only make their sentencing decisions in conjunction with written materials, they also have the benefit of sometimes lengthy oral proceedings in the courtroom (some of which are, of course, specifically intended to affect the exercise of judicial discretion).

Many legal decisions are made by a number of discrete individuals who comprise panels of decision-makers, of which appeal courts, juries, tribunals, and parole boards are all examples. In these settings, where final decisions are made in parallel, there is not only a flow of information to each decision-maker but also the possibility of a variety of interactional effects between them which need to be addressed. Panels are, of course, expressly designed in recognition of the principle that "two (or three, or five, or twelve) heads are better than one." Where decisions have binary outcomes (such as the

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34. E. Poole & R. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 LAW AND SOC'Y REV. 931 (1980).

35. See, e.g., D. Gottfredson & M. Gottfredson, *supra* note 11, at 102.

36. See, e.g., I. Piliavin & S. Briar, *supra* note 10.

jury's guilty/not guilty verdict), personal interaction between decision-makers assumes central importance in cases where people come individually to different conclusions about the right decision. Unless decision by majority is an approved practice (as is the case with appellate courts or the jury or the parole board in some jurisdictions), these different verdicts have to be negotiated so that only one outcome, purporting to represent the collective view of the membership, is produced. (And even though there is scope for majority verdicts in some settings, it may well be the case—it certainly is among some parole boards—that voting is preceded by some attempt to negotiate a seemingly unanimous outcome if possible.)

Of course the authority to decide is dependent upon the structure of the legal system itself and the extent to which rules may formally confer discretion upon or limit the discretion of legal actors. A wide authority to decide may arise from explicit delegation of authority or the absence of a rule prohibiting action. Lawyers, indeed, may conceive of a part of a legal system without rules as one of "absolute discretion,"<sup>37</sup> but from a sociological point of view this does not necessarily make sense since the sociologist will see discretion as shaped by a variety of constraints, human, organizational, or economic, operating beyond legal rules. One familiar legal form, for example, is explicitly organized, when legislatures are unwilling or unable to make specific choices, to provide for a large amount of discretionary leeway to be allocated to administrative officials, and the exercise of discretion here is (presumably) largely uninformed by legal rules. In regulatory systems of legal control which employ the criminal sanction to cope with the unfortunate and undesired consequences of industrialization, legislatures are often unwilling or unable to be specific about the precise nature of the social or economic ills which they wish to control, the degree of control which they wish to be exerted, or precisely how the costs and burdens involved are to be borne. Instead they leave the precise formulation of administrative rules and standards to officials who are allocated substantial discretion both to make policy and to enforce that policy, because the legislature does not want to contemplate the complexities of particular case decisions (though another view would be that this form of law is employed because it is not in the interests of powerful groups that matters relevant to such decisions are crystallized and made specific).<sup>38</sup> In penal law also, wide discretion is often granted to judges, probation and parole officials and others, by legislatures which prefer to fudge or to remain silent on some of the thorny perennial problems of penal policy. This is particularly true of the position in England. "The silence of the statutes is deliberate," Nigel Walker has said. "Legislators who want Parliament's assent to a new type of sentence are well advised not to specify its objective, but instead to leave members [and, Walker might have added, those who have to implement the legislation] free to interpret it

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37. See, e.g., J. Raz, *supra* note 6.

38. See, e.g., A. Hopkins & N. Parnell, *Why Coal Mine Safety Regulations in Australia Are Not Enforced*, 12 INT'L J. OF THE SOC. OF L. 179 (1984).

according to their individual philosophies. Nothing divides a committee like a discussion of the aims of punishment."<sup>39</sup>

While regulatory law may typically embody a somewhat vague statement of the broad objective of the legislation, and society relies upon the expert exercise of discretion by officials to attain the ends of the law, extensive discretion can in reality, however, also be associated with legal forms which, in fact, ostensibly purport to curtail rather severely the amount of discretion which legal actors should exercise. For instance, the evidence in the United States has been that more scope for bargaining as to plea in criminal cases has been found where jurisdictions have adopted legislatively-fixed sentences whose intention is to remove sentencing discretion from the judge.<sup>40</sup> And where attempts are made to regulate discretion with detailed rules, the amount of discretionary latitude is by no means reduced, as Long's study of federal tax legislation discovered.<sup>41</sup>

Doubtless, however, there are a number of constraints upon discretion which (presumably) inhere in legal rules or judicial precedent. To a variable extent such rules expressing the legal ideal are translated into the reality of legal action in the web of decisions made by human beings. The degree to which the two correspond almost certainly varies depending upon the branch of law and the particular legal rule concerned. Besides, it is still empirically rather unclear how legal rules or statements actually influence legal discretion,<sup>42</sup> and it is difficult methodologically to throw light on the issue by listening to decision-makers discuss their judgments in a formal fashion. What decision-makers may later articulate as decision criteria or principles may in fact be criteria or principles. But if they are not, they amount to justifications for, rather than explanations of, a decision, and that is a rather different matter. Furthermore, it is quite possible that the image of the rational, calculating, introspective decision-maker can be over-extended, and it is necessary to contemplate the possibility that many kinds of legal decisions may be made without being logically thought through, because they are made on impulse, or because they are made in conformity with "normal"—if often intellectually unexplored—ways of deciding matters.<sup>43</sup> This may even be true to some extent of those decision-makers who have the opportunity for calm reflection and reasoning before announcing a decision. A small study of sentencing recently carried out in England found, for instance, that many judges "appeared not to have thought systematically about some of

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39. N. WALKER, *SENTENCING IN THEORY, LAW AND PRACTICE* 105 (1985).

40. D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966); J. BALDWIN & M. MCCONVILLE, *NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY* (1977); K. Hawkins, "On Fixing Time: Reflections on Recent American Attempts to Control Discretion in Sentencing and Parole," unpublished paper presented at the Howard League Seminar Series, "The Future of Parole," London School of Economics, October, 1980.

41. S. Long, *Social Control in the Civil Law: The Case of Income Tax Enforcement*, in *LAW AND DEVIANCE* 185 (L. Ross ed., 1985).

42. H. HART, *THE CONCEPT OF LAW* (1961).

43. D. Sudnow, *supra* note 16.

the [sentencing] issues . . . raised with them."<sup>44</sup> The researchers also noted "the clear indications that judges are relatively unaware of their own sentencing pattern and relatively unaware of the extent to which it is their own beliefs which constrain their sentencing decisions."<sup>45</sup> The methodological implication for any retrospective analysis of decision behavior using interview or documentary analysis techniques is significant to the extent that it is accepted that there may well be a disjunction between word and deed, and possibly one also between thought and deed.

### *On Decision Outcome and Other Matters*

I have already noted the fact that many key legal decisions have binary outcomes. The formal legal system is ultimately founded upon the production of a digital reality (in the language of communication theory), whereas the problems law addresses are analogic in character.<sup>46</sup> Digital reality, expressed in binary outcomes, is particularly observable in the ultimate formal decisions in a court of law, in which it is decided that a person is guilty or not, liable or not, or that an appeal should succeed or not. Yet the world is not a simple place and the indeterminacy of the banal facts of everyday life comprising the social problems prompting legal intervention is complicated and intractable. This, after all, is why law is used. The law is a problem-solving mechanism, but in order to do its work it must compact reality into manageable molds. Hence the law prefers to address the world with the rigors of a system of binary logic. Thus one is in law married or not, unemployed or not;<sup>47</sup> or one does, or does not, have a right or a duty. In reality, of course, people would often find it difficult to describe their position in such uncompromising categories. Binary logic is particularly evident in the way in which the law provides answers to problems—that is, in the way in which it produces decisions—but it also emerges in the reasoning which allows those decisions to be produced. The complexities of any case tend to be compressed by the method of formal law at key points—and not simply in formal and public arenas—into opposing alternatives: liable/not liable, guilty/not guilty.

In an adversarial trial, the partisan, normative character of fact finding becomes clear.<sup>48</sup> Indeed, the imperative to answer a question insists on binary outcomes. In operating within an adversarial structure, law creates established facts, practical certainties, rights and wrongs. A legal judgment does not in effect concede probabilities; it does not recognise the uncertainties and

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44. A. ASHWORTH, E. GENDERS, G. MANSFIELD, J. PEAY, & E. PLAYER, *SENTENCING IN THE CROWN COURT: REPORT OF AN EXPLORATORY STUDY* 16 (1984).

45. *Id.* at 17.

46. K. Schuyt, "Law as Communication," unpublished paper presented to the annual conference of the International Sociological Association Research Committee on the Sociology of Law, St. Hugh's College, Oxford, 1981.

47. *Id.*

48. See V. Aubert, *supra* note 20, at 91.



indeterminacy of life but makes a quite categorical statement. It is not given to compromise, which is only possible in second-order decisions—for instance, as to settlement out of court, or the award of damages, or the sentence in a criminal case, or the awards of costs in trial cases. It is the first-order decisions in law which are usually binary in character. However, the main point is that the reality of the formal legal process is adjudicating a matter of guilt—or innocence, liability—or no liability.<sup>49</sup>

The implication of binary decision outcomes which exist at salient points in the sequence of legal decisions is that following adjudication law imposes all upon, or gives all to, one party but not the other. It is never certain which party will receive the whole benefit or the whole penalty,<sup>50</sup> which, after all, is why courts are used to provide an authoritative answer to the question in the first place. The people caught up in this process often have a strong incentive, then, to avoid the all-or-nothing position and this gives rise to a considerable willingness on their part to engage, for example, in pre-trial negotiations about settling a tort claim<sup>51</sup> or about pleading guilty in a criminal case.<sup>52</sup> Bargaining is employed by both parties to avoid the various costs and uncertainties of adjudication.

But despite the law's appearing to prefer digital decision-making, the great bulk of legal work is done by relying on decisions which are analogic in character. Most legal problems are settled by bargaining. Furthermore, many second-order decisions following a formal adjudication, though contingent on the earlier binary outcomes, yield graded outcomes. One of the most important decisions in civil legal processes, for example, is concerned with the amount of settlement that is appropriate in or out of court, once the principle of liability has been decided or accepted: It may be the most trivial sum, or an enormous one; it is, almost always, something in between. Sentencing in criminal cases is a decision that also displays a wide array of graded outcomes;<sup>53</sup> in English penal law nearly all cases may, in theory, be disposed of, upon conviction, by means ranging from an absolute discharge, or some sort of non-custodial penalty, to any period of imprisonment up to the maximum specified by statute, with the possibility of consecutive sentences for multiple convictions. It would appear that decision-makers quite often use such a wide range in possible outcome to mitigate the rigors of a prior binary choice, as when, for example, derisory damages are awarded in

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49. I recognize that in some jurisdictions there may be the possibility of a "not proven" finding or the existence of doctrines of contributory negligence, but this does not affect the basic point I wish to make.

50. V. Aubert, *supra* note 20.

51. L. Ross, *supra* note 8; J. Phillips & K. Hawkins, *Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims*, 39 MOD. L. REV. 497 (1976).

52. D. Newman, *supra* note 40; L. Mather, *Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles*, 8 LAW AND SOC'Y REV. 187 (1974).

53. D. THOMAS, PRINCIPLES OF SENTENCING (2d ed. 1979); A. ASHWORTH, SENTENCING AND PENAL POLICY (1983).

civil proceedings to a claimant, perceived in fact—if not law—to be undeserving, who has won on liability in a marginal case, or when a judge hands down a seemingly lenient sentence to a person convicted of an ostensibly serious offense (or vice versa).

Sometimes a bargained decision can take on the categorical character of a binary outcome. For example, I shall show below how some American parole boards may decide in principle to release—but delay the effect of their decision for some months. This is a *de facto* conditional decision, a tactic often used as a bargaining ploy in marginal cases which do not seem to be obviously deserving of immediate release or immediate refusal. The tactic is used where the board is under pressure to maintain a sufficient turnover of the prison population but the possible candidates do not visibly measure up to the standards of suitability which the board wishes to establish and announce to the prison population as a whole. Is such a ploy to be regarded in binary terms as a decision to release or deny? The commitment to release (albeit reluctantly) which seems to be evident here may be less certain when we take into account that many of these deferred releases are in fact bargains struck with prisoners in the interests of institutional control, and the decision to release may be revoked or further delayed if the prisoner fails to live up to some requirement about his continued good conduct. In other words, the apparently adjudicative nature of parole board decision-making may in certain cases more closely resemble decision-making by negotiation.

Furthermore, it is possible to view many legal decisions as in a sense containing overlapping or sequential digital and analogic elements. Police officers may sometimes decide to arrest a suspect, or to do nothing. But quite often they may decide not to arrest but to take other forms of action with the suspect, such as temporary detention, a formal caution, and so on.<sup>54</sup> Indeed one can speculate that in rehearsing the various possible decisions available in any case, decision-makers proceed by using both digital and analogic procedures. For example, an ostensibly analogic decision may actually be treated by the decision-maker as a binary choice, at least to begin with. In the example of sentencing in criminal cases, it is possible that in a number of cases of moderate seriousness (either in terms of gravity of the offense, or the offender's persistence in crime)—or perhaps in all cases—a judge actually begins the process of deciding a sentence by considering the question of whether the offender deserves to be confined or not. The analogic questions concerning degree of punishment are then contingent upon this prior digital decision as to the fundamental kind of punishment. It is conceivable, therefore, that a categorization of decision outcome as either digital or analogic may overlay quite complex processes and suggest a spurious simplicity.

What in the literature of decision-making is regarded as a decision actually consists of two distinct components. We typically regard a legal

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54. See, e.g., I. Piliavin & S. Briar, *supra* note 10.

decision as one implying an action—arrest, sentence, or settlement. However, much more subtle, complex, and necessarily prior matters are decisions which select or define the “facts” or referents<sup>55</sup> deemed relevant to a decision. These may encompass a range of potentially relevant facts from, say, how the member of a parole board should regard the toy pistol which the convicted armed robber is reported to have been brandishing in the supermarket, to choices about which pieces of an assemblage of information presented as the material out of which a decision is to be forged, need reading or treating seriously.

Such matters are presumably the very stuff of policy decision-making, but they are crucial also to the making of case decisions. For example, when officials handle criminal cases and talk of such things as “offense,” “record,” and “personality,” to what do these words refer, and what do they mean? Is it the case that the “facts of the case” speak for themselves, and can be taken for granted, or are the “facts” themselves matters of interpretation?

In the real world of legal action facts are rarely self-evident, especially in a legal system organized around the principle of adversarial debate. In effect, as Aubert has observed, law creates its own reality.<sup>56</sup> Whether a tort claim for damages for personal injury is being pursued, for example, or a prosecution for an alleged criminal offense, adversarial confrontation which seeks to make the better case (rather than expose “the truth”—though I recognize that evidence lawyers will hold a different view) means that two contrasting images of reality are created quite artfully by lawyers and presented to those with responsibility for decisions about liability or guilt. Note also the trial lawyer’s concept of “the other side” and the extent to which this suffuses decisions made in anticipation of “what the other side will do.” In the prototypical drug trafficking case, for example, the jury may be asked by counsel for the defense to believe that the defendant was totally ignorant of the contents of the packet he was bringing in his bags through the green channel at Heathrow Airport. He was merely doing an innocent favor for a friend (and should therefore be found not guilty). On the other hand, the jury may be told by prosecuting counsel that the individual was a courier, deeply in debt and in immediate need of a large sum of money, who belonged to a highly-organized drug-trafficking operation, some of whose members had also made the Heathrow run a number of times before. The implication here, of course, is that the individual should be found guilty, and—perhaps—should be punished accordingly. The jury’s “decision” in this kind of case, whose contrasting imagery is familiar to all who work in the criminal-justice process, rests upon the greater plausibility of one image rather than the other. In this decision setting the lawyers in preparing and presenting their cases are essentially creating a framework for

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55. D. Gifford, *Decisions, Decisional Referents, and Administrative Justice*, 37 *LAW AND CONTEMP. PROBS.* 3 (1972).

56. V. Aubert, *supra* note 20.

the making of a decision by recreating a particular kind of reality.

Furthermore, these "facts" which comprise the two competing images of reality are not only presented in every contested criminal trial, they are also present in every sector of the criminal process where a suspect, an accused, a defendant, or a convicted person encounters an individual acting as an officer of the state. The "facts" are themselves products of human choice and judgment, since they are comprised of mosaics of a multitude of decisions made earlier in the creation and processing of the case. One of the consequences of the handling of legal cases over time is a recreation and transformation of the matter comprising the legal case. It is in the nature of the legal process to pare down or remove the uncertainty characteristic of the real world. "[L]egal thinking and a legal view of social reality," wrote Cicourel in his outstanding study of the juvenile justice system, "remove the contingent features of everyday life in the course of successive transformations over time from the original event or act to final adjudication."<sup>57</sup> However, even when one might feel confident that the facts of any case are a reliable representation of some real event, or that some assessment of character is an accurate reflection of a real person, one still must contend with the meaning conferred upon the "facts" by the framework within which the decision-maker views his or her world, a subject to which I shall return in more detail shortly.

The distinction between decisions about fact defining (and fact finding) and action decisions is also important when addressing the question of the relationship between rules and discretion. To claim that one is dispassionately following a rule is to take for granted the interpretative work surrounding fact finding, and to assume that the facts assembled are relevant to the application of that particular rule (rather than another one), quite apart from the judgments made about the rule itself, its nature and relevance.

## II. FOREGROUND

### *On Rationalist Conceptions of Decision*

Research which has displayed an interest in understanding the decision behavior of legal officials has tended to be cast within two very different intellectual traditions. In this paper I wish to argue for the value of *naturalist* research conducted within a broadly interpretive or phenomenological framework in which emphasis is given to matters of process and meaning, content and context. Accordingly, I shall criticize research within the other tradition, which I shall refer to as *rationalist*.

I regard rationalist work as positivist and normative in character. Emphasis here is given to notions such as rationality, information, and decision goals. Empirical research in this tradition usually focusses upon input to and output from decision-makers, and the strength of any empirical association

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57. A. CICOUREL, *THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE* 27-28 (1968).

that can be demonstrated between the two. The rationalist approach to research design tends to take the official objectives imputed to a particular segment of the criminal justice system<sup>58</sup> as a given (vague, inconsistent, or assumed in character though they may be), and then to see how the existing decision practices within that segment seem to measure up to those objectives. The naturalist, on the other hand, is much less likely to be involved in a research enterprise explicitly directed towards changing things, and is instead concerned with understanding and explaining what legal decision practices are, and what shapes them.

The essential criticism made in the following pages about work in the rationalist tradition is not that the authors do not appreciate the richness and variety of the many sorts of decision criteria which may be treated as relevant, but that their lack of a naturalist understanding of how routine legal decisions are actually made creates serious flaws in their accounts. The rationalist literature of decision-making, for example, has a tendency to focus on adjudicated decisions, a tendency reflected in its concern with sentencing and parole studies in particular, despite the widespread practice of decision-making by negotiation. Another problem of rationalist work, in my view, is a utilitarian and normative character which also obscures or distorts the nature of decisions in the real world. I shall discuss this point more generally in what follows, but one example of the difficulty I have in mind would be the unrealistically narrow and inaccurate conception of what constitutes "information" for any decision. A central decision-making problem for the rationalist is uncertainty, a difficulty to be remedied by more and better quality information and information handling capacities.<sup>59</sup> Such a focus, however, tends to close off certain important characteristics. Thus there seems to be little awareness that information may well not be neutral or objective, but may instead be deliberately or unwittingly contrived by suppliers or creators of information in artful ways to produce certain effects upon the decision-makers' behavior.

This will be one theme in what follows. Subsequent discussion will then be devoted to a second theme, which is a methodological critique, since the frailties in rationalist work are, in my opinion, further exposed by the particular sorts of research methods employed. The final theme will address the question of meaning in decision behavior, since there seems to be little or no sensitivity in rationalist work to the significance of what data mean to a decision-maker, and how a piece of information may acquire a particular meaning and relevance depending upon the way it is framed and made sense of by a person making a decision. I think there is some recognition of some of the problems in this aspect of rationalist decision-making work in the

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58. I organize the discussion around the criminal justice system in particular here since it has almost exclusively been the subject of research in the rationalist tradition.

59. See D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR SENTENCING AND PAROLE* 105 ff. (1978).

following remarks of one of its most distinguished practitioners, Leslie Wilkins:<sup>60</sup>

Perhaps our main problem is that we have not been honest in our language in discussing criminal justice procedures. We have tried to believe that our actions were rational when they were mainly symbolic and we have used the language of a medical analog and confused many significant issues of equity in the process. If we were to acknowledge the symbolic elements, we might begin to understand their import and discover that they were of considerable value.

To give the critique of rationalist studies of decision-making some focus, I shall organize my remarks around the contents of two books in particular: *Decision-making in the Criminal Justice System: Reviews and Essays*, edited by Don M. Gottfredson (1975), and *Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion*, by Don M. And Michael R. Gottfredson (1980). At the outset, it is important to be clear that my argument is not that measurement of natural phenomena is not a worthwhile thing to do, or that we should not be concerned with policy questions about how to make legal decisions somehow "better" or more "fair." These are self-evidently important issues. What I do want to suggest, however, is that the conceptual and methodological stances of rationalist work give rise to difficulty, and that rationalist work sometimes displays the influence of various assumptions and preconceptions about the behavior under study which are empirically questionable. One of the implications of this is that *to the extent that the research seeks to portray actual decision behavior it is seriously flawed, and it becomes correspondingly less valuable to policy-makers, lawyers, and others who would wish to change things.*

My first critical theme was of a simplistic or distorted appreciation of the nature of real decisions. It is as if the rationalists seek to portray the jungle of human decision-making by removing all the undergrowth, scrub, and saplings, leaving a broad landscape over which are dotted a number of large and important trees. Their landscape of legal decisions consists of some significant and salient markers which change the status of the individual caught up in the administration of the criminal law from suspect, to accused, to defendant, to prisoner, to parolee, and so on. But how all this happens is never clear. The rationalists ignore both the supporting work that makes such transfers of status possible, and the context in which this all happens. Their picture is serene and orderly, but it lacks both detail and background.

One of the ways in which violence is done to the natural world resides in the assumptions which rationalists bring to their explorations. For instance, there seems to be a supposition in the rationalist literature<sup>61</sup> that legal decision-making is essentially a utilitarian exercise aimed at attaining the

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60. L. Wilkins, *Perspectives on Court Decision-Making*, in D. GOTTFREDSON (ed.), *DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM: REVIEWS AND ESSAYS* 81 (1975).

61. E.g., D. GOTTFREDSON, *supra* note 60.

officially-proclaimed objectives of whichever part of (say) the criminal justice system that is being studied. When the proclaimed official goals of the criminal justice system are taken as a description of what in practice the goals of decision-makers are (as Gottfredson and Gottfredson<sup>62</sup> seem to do), it is not surprising to find statements such as, "Utilitarian aims lie at the heart of every decision we have discussed."<sup>63</sup> Yet this bold assertion is hardly supported by the authors' subsequent discussion in the same chapter, or the many references which they make to such concepts as justice, equity, or commensurability. This is a problem inherent in the rationalist approach which takes official objectives as a given. Thus, for instance, it seems to be taken for granted that parole boards work primarily in terms of predicting who will be risky prisoners to release and adopting a practice accordingly of releasing the less risky while holding the more risky (a view, incidentally, on which much of the critical penological literature of the 1970s<sup>64</sup> was based). It may well be that in certain circumstances this is what some members of some parole boards do. But until thorough descriptive analyses of the actual practices of parole board members are carried out, the assumption about the importance of risk remains an assumption. (It should be noted also that the concept of "risk" is usually left imprecise, without any suggestion as to whether it refers to *likelihood* of failure, *gravity* of failure, or a mix of the two.) My own research into parole decision-making in various American states<sup>65</sup> suggests that far from "the ubiquitous centrality of prediction" (as Gottfredson and Gottfredson put it)<sup>66</sup> in criminal justice decision-making, a substantial part of parole board discretion is reflective and backward-looking in character, essentially concerned with punishing the wickedness of the offense and giving the prisoner his just deserts, rather than predictive and preoccupied with the prisoner's future risk. Indeed, to the extent that decision-makers are motivated by moral, retributionist concerns, decisions are reflective, not predictive, in character. In this connection it is worth recalling the enormous amount of work carried out since the late 1920s on the development of parole prediction tables,<sup>67</sup> which were originally designed to assist board members in appreciating the riskiness of parole candidates. The evidence is that these prediction devices were hardly ever, if ever, employed as decision aids,<sup>68</sup> even though it is well-known that their accuracy

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62. D. GOTTFREDSON & M. GOTTFREDSON, *supra* note 11.

63. *Id.* at 334.

64. *E.g.*, N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE: RETENTION, REFORM, OR ABOLITION?* (1979).

65. K. Hawkins, *supra* note 5.

66. D. Gottfredson & M. Gottfredson, *supra* note 11, at 334.

67. *E.g.*, K. HAWKINS, *PAROLE: A SELECT BIBLIOGRAPHY WITH ESPECIAL REFERENCE TO AMERICAN EXPERIENCE* (2d ed. 1971).

68. K. Hawkins, "Parole Selection: The American Experience," Ph.D. dissertation, Cambridge University, 1971; V. Evjen, *Current Thinking on Parole Prediction Tables*, 8 *CRIME AND DELINQUENCY* 215 (1962).

is generally superior to clinical decision-making practices.<sup>69</sup> The failure to use prediction tables may well be another piece of evidence to suggest that decision-makers in the real world by no means operate with the same objectives and procedures as those imputed to them by researchers.

This is not to argue that parole-board members and other kinds of legal decision-makers do not make predictive decisions. Sometimes they do—and in the sense intended by rationalist researchers. Very often, however, predictive judgments are made which are predictive in another sense. A good deal of legal work consists of decisions made *in anticipation* of what others will do—one of the skills of the practising lawyer after all is to be able to advise a client in light of predictions about what the other side is likely to do. Indeed, bargaining in legal contexts (“in the shadow of the law”, in Mnookin’s memorable phrase)<sup>70</sup> is made possible through the tacit predictions of the other party’s likely repertoire of moves in response to particular decisions which might be made about courses of action or inaction.

It is possible that the degree to which a decision is predictive in character (in the sense in which the rationalists mean it) varies according to its point in the process and perhaps depending upon structural features of the system in question. It is conceivable, for example, that decisions about whether to bail or to detain before trial may indeed be concerned with the court’s prediction of whether the accused will present himself for trial. That is, in law, what the bail decision is supposed to be about. Though even here there is evidence that, in making the decision, courts are more concerned with the reflective consideration of the gravity of the offense charged. Again, it is necessary to study the naturally-occurring behavior unencumbered by any particular expectations (derived from official statements of goal) about what the research should show.

The concept of rationality itself poses problems when used to inform research on legal decision-making. Leslie Wilkins defines as a rational decision<sup>71</sup>

that decision among those possible for the decision-maker which, in the light of the information available, maximizes the probability of the achievement of the purpose of the decision-making in that specific and particular case.

It might be observed in passing that the quantitative methods employed by rationalist students of decision-making seem to be calculated precisely not to understand what “the purpose of the decision-maker in that specific and particular case” might be. But the concept of rationality raises serious

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69. P. Meehl, *et al.*, *supra* note 14; *see also* J. Carroll, R. Wiener, D. Coates, J. Galegher & J. Alibrio, *Evaluation, Diagnosis, and Prediction in Parole Decision-Making*, 17 *LAW AND SOC’Y REV.* 199 (1982); D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* (1978).

70. R. MNOOKIN, *BARGAINING IN THE SHADOW OF THE LAW: THE CASE OF DIVORCE* (1979).

71. Wilkins, *supra* note 60, at 70.



questions when considered in conjunction with legal processes. What does a rational decision look like when it is difficult to conceive of a legal decision or a legal institution with a single purpose? What does a rational decision look like when its purpose is confused, unknown, or not widely accepted as legitimate? For example, what was generally accepted as the official goal of the parole system used to run something like: "The rehabilitation of the offender and the protection of the public," which presumably meant that in practice the purpose to be achieved by parole board members was to release reformed offenders without risk to the community (idealistic though that may seem). But could legitimate purposes have also included making release decisions in such a way as to introduce greater equity among disparate, judicially-fixed prison sentences? Or not releasing badly-behaved prisoners? Or underlining the deterrent function of a sentence, even though there may have been no need for rehabilitation and no risk to the community? Or maintaining a steady turnover of the prison population in the interests of administrative efficiency and state economy? The rationalist writers seem to construct a notion of rationality derived either from some conception of what a decision is supposed officially to be about, or from claims by decision-makers about what they are trying to do (what people say, of course, and what they do are not necessarily the same). In short, to talk of rationality in legal decision-making presumes some clear knowledge of the decision-maker's goals. In empirical terms we do not know a great deal about actual decision goals, and in policy terms it is often by no means clear what the official goals of parts of the justice system are supposed to be. Those who design the institutions of (say) criminal justice or social regulation presumably do so in response to certain pressures and constraints and to attain certain ends—not necessarily clear or specific ends. The institution is born and sustained with appropriate rhetoric. Meanwhile those who have to make the institution work will have their own objectives and be subject to their own constraints and pressures, of which the institutional designers may have only been dimly aware. They have to get their jobs done with limited resources, ironing out possible inconsistencies and anomalies in the design of the institution while at the same time maintaining an appropriate public face for the institution and its position in the network of other institutions and agencies comprising the larger system. In all of this it would not be prudent to assume that any particular announced utilitarian aim survives its transformation and expression in the real world of actual practice with its purity unscathed.<sup>72</sup>

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72. Thus discussing the history and evolution of parole in the United States, Gottfredson and Gottfredson state: "the utilitarian goals of treatment and incapacitation both were clearly involved at the outset; and so were the concepts of classification and prediction." D. GOTTFREDSON & M. GOTTFREDSON, *supra* note 11, at 282. This confident assertion is unsupported by any reference. It is by no means clear how, or to what extent, the goals to which the authors refer were "involved", or how they might have been related to others. For an alternative historical view, see D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980); S. Messinger, J. Berecochea, D. Rauma, & R. Berk, *The Foundations of Parole in California*, 19 *LAW AND SOC'Y REV.* 69 (1985).

Much of what I am criticizing in rationalist research on decision-making derives from its normative character. A good deal of the penological writing, for example, is explicitly correctionalist in tone. For instance, Don Gottfredson refers to the "kind and degree of treatment most appropriate . . . for individuals," and argues that "to the extent that similar persons respond differently to differential program placements, *that* experience could guide future decisions and thus could improve the results of jail and probation programs."<sup>73</sup> Indeed one of Gottfredson's chapters in *Decision-making in the Criminal Justice System* is actually called "Correctional Decision-making," explicitly reflecting a presupposition about the goals of the process. Not surprisingly, the remedies prescribed in the chapter are based upon this assumption about the essentially corrective character of the penal system, in the absence of any empirical analysis of its actual nature.

Leslie Wilkins shares Gottfredson's approach. Wilkins asks the question, "How may a decision-maker seek to increase his confidence that a decision he may make is correct?"<sup>74</sup> To pose the question in this way is to put the issue in utilitarian terms. It may be the case that in many legal decisions the decision frame (see below) employed is not utilitarian at all, but a moral one.<sup>75</sup> And even if we accept that a decision may have been informed by utilitarian concerns, it suggests that decisions are single-valued, when in fact they may be a good deal more complex than that, with different interests to be served in different contexts or at different times. Indeed, the emphasis upon the utilitarian character of decision behavior in legal settings may be overdone. For instance, the rationalist uses the language of "feedback" because it is important that the rational decision-maker know the results of his or her decision. But if the decision-maker is involved in a moral enterprise in which a decision is intended to reflect upon a rulebreaker's moral deserts and thereby to administer punishment for retributive purposes (like many sentencing judges, say), the concept of feedback is not relevant. The retributive sentencing judge does not need feedback because his decision is rational to the extent that it metes out due punishment in just proportion to the wickedness and harmfulness of the crime. Similarly, in a decision context of negotiation (rather than adjudication) a bargainer does not need feedback either, because the rationality of the decision is determined by the acceptance of the compromise negotiated.

My second critical theme spoke to the widespread adoption of quantitative research methods in an effort to describe and explain the behavior of legal decision-makers. The work has been heavily influenced by statistical decision theory and it focuses in particular upon information and outcome. My argument here is that such an approach is not so much inappropriate as premature.

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73. D. Gottfredson, *Correctional Decision-Making*, in D. Gottfredson, *supra* note 60 (emphasis in original).

74. Wilkins, *supra* note 60, at 66.

75. *E.g.*, R. EMERSON, *JUDGING DELINQUENTS: CONTEXT AND PROCESS IN JUVENILE COURT* (1969); K. Hawkins, *supra* note 4.

While quantitative data may have a security about them, a feeling that numbers are unproblematic and can be trusted, there is a difficulty for the reader in such work that arises from its essentially atheoretical character. What the work does in relating output to input is essentially to predict decision outcomes rather than to explain decision-making processes. Without some effort to theorize about the meaning of the statistical patterns revealed we are left with a laundry list of "factors" or "criteria" that explain variance, but without any suggestion as to how these matters are actually connected with the outcome of decisions, or what determines the ascendancy of one variable over another as the dominant influence upon the decision made. The tone of hesitation, of speculation, when researchers come to try to understand what their quantitatively-derived data might mean is evident from the following remarks by Gottfredson and Gottfredson:<sup>76</sup>

If the judge's assessment of risk (prognosis for recidivism) and offense seriousness, together with the legal class, are interpreted to be major determinants of the decision (which is plausible though not proved by this analysis), it may be asked how this relates to the sentencing purposes discussed above. The latter two items both may be interpreted as indicants of seriousness—one reflecting the judges' assessments, the other that of the legislature in establishing the legal offense classes. Thus, the use of these factors may be regarded as attuned to the desert aim. At the same time, however, they may reflect concern for general deterrence or treatment, including special deterrence. From this analysis it is not possible to tell. The situation is similar when one considers the factor of recidivism probability. At first glance, it may appear that this item is deemed relevant in respect to incapacitative aims. It is possible, though, that this may imply to the judge a greater need for treatment, in order to reduce the perceived probability of repeated offending.

My point is not to complain about the caution that the authors rightly display but rather to suggest the considerable amount of interpretative work which the reader must engage in when struggling to make sense of hard data. But at the same time, the authors' serpentine rehearsal of one possible meaning then another in their efforts at balance and evenhandedness does betray their lack of real contact with their data. I do not want to suggest with these remarks, however, that the authors do not appreciate the significance of the meaning of things to those who make decisions. They do, as the following questioning about the pervasive importance of an offender's prior record in decision-making suggests:<sup>77</sup>

The persistence of this correlate of decision outcomes also raises numerous critical issues. Does it signify, for example, simply another

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76. D. GOTTFREDSON & M. GOTTFREDSON, *supra* note 11, at 187.

77. *Id.* at 331, footnote omitted.

measure of "legal seriousness," whereby not the act but the person is regarded as "more serious" and thus deserving of greater state intervention? Or is the repeated use of this factor related primarily to predictive aims of incapacitation and treatment? What are the implications of fairness of compounding decision after decision on the basis of the same data about previous conduct? We can only raise these questions here, noting that they arise from the consistency of the empirical findings reviewed in this book.

It is a nice question, in fact, whether the way in which a research problem is conceptualized leads to the adoption of a particular kind of research method, or whether the way in which a problem is conceived of and defined is substantially a consequence of the research method employed. In many of the quantitative analyses of sentencing or parole decision-making, for example, a stimulus-response model of decision behavior is employed. The "decision" is treated as a choice made by an individual or a panel of decision-makers based upon unproblematic "factors" or "criteria." These latter are deducible from an analysis of a putative relationship between observed input to the decision-maker (in the form of information of various kinds) to observed output (namely the particular choices made). The nature of the link between the two—how input is transformed into output—is, however, not explored. The rather narrow field of relevant data derived from a positivistic model produces a mechanistic image of decision-making. There is little conception of decision-making as process, a highly subtle, shifting, dynamic matter. Nor is there an appreciation of the problematic nature of the information which is the raw material for decision. Little attention is given to the broader constraints upon decision-makers and the contexts in which they must work: ideological, symbolic, socio-political, economic, organizational, and interactional. Finally, there is little consideration of the interpretative work in which decision-makers engage and the meaning of matters defined as relevant.

The quantitative methodologies employed have, in conjunction with a limited and artificial conception of human judgment, tended to do violence to the inherent complexities involved in making decisions in legal settings. The result is a tendency to see a decision at a particular point in the legal process as a salient and isolated matter, as something logically separable from what surrounds it, what precedes—and, indeed, what follows—it in the processing of cases. On this view, decisions are simple, discrete and unproblematic, and not relatively complex, subtle, and part of, or the culmination of, a process, in which external constraints, such as organizational and occupational rules, norms, procedures, and resources also operate. Indeed, decisions may well appear to be simple, discrete matters because the structure of the legal process requires them to be presented, described, and sent forward for consideration in that form. It may also be the case that decision-makers sometimes have an interest in making them appear so.

Many of the early sociological studies of legal decision-making conducted with quantitative techniques seemed implicitly to recognize that much was

missing from their analysis. In some of the "explanations" of decision behavior in the sentencing literature, for example, it is clear that the researchers acknowledged their analyses only offered a partial account of the phenomenon under study, the unexplained residue being variously referred to as "the individuality of the judge,"<sup>78</sup> "the human equation," the "personality of the judge,"<sup>79</sup> or "the subjective, intuitive assessment of the individual case."<sup>80</sup> Another writer concluded that, "The personal attitude of the trial judge and his individual sentencing habits have in fact a marked influence," a matter subsequently referred to as an "indefinable element."<sup>81</sup> It is interesting, writes Asquith<sup>82</sup> in this connection, that "many researchers have in fact claimed disparity can only be explained by reference to the human element though they had neither collected information on the interpretation of information by individual magistrates nor on the actual processes of the court hearing and the communication involved." Some decision-making studies, however, have attempted to address ostensibly wider issues and to reduce the "individual factor" by introducing variables into the analysis such as background, social class, education, and so on. Yet the nature of the link between such variables and decision behavior again remains unexplored.

This approach to formally rational decision-making analysis, wedded though it is to quantitative techniques, ironically tends to yield an image of decision-making as the product, to a significant extent, of ultimately inexplicable and evanescent human factors. Rather than suggest where regularities in decision behavior might be found, it emphasizes human differences, since it tends to produce evidence, for example, of apparent disparities in sentencing decisions made about apparently similar cases. In terms of relevance to public policy, the attention drawn to discrepancy presents it as a pejorative matter, rather than as an intrinsically interesting feature of human behavior to be explored and explained. Furthermore, the focus on discrepancy lends empirical credence to the currently influential view in administrative law that much discretionary behavior is "arbitrary" or "capricious."<sup>83</sup> This is not to doubt the possibility of disparate decisions. Indeed, it is well known that in an experimental setting decision-makers will produce different decisions when asked to judge the same hypothetical case<sup>84</sup>—though such studies are typically

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78. E. Green, *quoted in* R. HOOD & R. SPARKS, *KEY ISSUES IN CRIMINOLOGY* 152 (1970).

79. F. Gaudet, *quoted id.* at 152.

80. H. Mannheim, J. Spencer, & G. Lynch, *quoted id.* at 152.

81. S. Shoham, *quoted id.* at 152.

82. S. ASQUITH, *CHILDREN AND JUSTICE: DECISION-MAKING IN CHILDREN'S HEARINGS AND JUVENILE COURTS* 110 (1983).

83. *See, e.g.*, K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

84. P. Takagi, "Evaluation Systems and Adaptations in a Formal Organization: A Case Study of a Parole Agency," Ph.D. dissertation, Stanford University, 1967. *See also* J. Peay, *Mental Health Review Tribunals: Just or Efficacious Safeguards?*, 5 *LAW AND HUM. BEHAV.* 161 (1981).

high on internal validity, but low on external validity.<sup>85</sup> Yet we have perhaps been too hasty in our judgments about "disparity" and "arbitrariness" or "capriciousness," for a sensitive understanding of natural decision behavior from the decision-maker's point of view will reveal in general a patterned, situatedly rational process at work, even in those kinds of decisions extravagantly characterized by lawyers as examples of the operation of "unfettered" discretion.<sup>86</sup>

There are two other serious, inter-related, methodological problems in this connection which should be aired briefly. One is the assumption in many quantitative studies of decision-making that the only data relevant to a decision are those concrete and documentary data which are retrievable from case files (if these are the materials for decision)—as if sentencing judges, for instance, operated in a vacuum, responding only to the evidence adduced at trial perhaps in conjunction with the remarks of a probation officer in a presentence social enquiry report. Judges live and work in the community like the rest of us. They are conscious of prevailing climates of opinion about how certain offenders should be punished. They are exposed to the media and their concerns, like the rest of us. They work with colleagues with whom they wish to maintain continuing relationships, colleagues who may well have an interest in what decisions they make. They are also aware of resource constraints, problems of institutional overcrowding, and so on. Do these matters count for nothing in their day-to-day decisions?

The second problem is the prevailing image in much work in the rationalist tradition that legal decisions are made by autonomous individuals exercising a discretion essentially unencumbered by the preferences of their colleagues, those who supply them with information, and those who will have to handle the implications of their decisions. Criminal justice decision-makers often "make" a decision only in the sense that theirs is the final word on the matter, and they are accountable for it. But often their room for decisional maneuver has essentially been foreclosed by decisions made earlier in the process, or by the way information, assessments, or recommendations have been framed by others. In other kinds of decision setting the autonomy of individuals may be substantially circumscribed by the presence of colleagues with different views as to the proper decision in any case.

Before leaving the discussion of methodology and exploring the third critical theme, of the significance in the real world of meaning and frame, it is important to acknowledge that a considerable contribution to understanding natural decision behavior in legal settings has already been made in a number of outstanding studies of various aspects of the legal process. These authors,<sup>87</sup> working within broadly symbolic interactionist or ethno-

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85. D. FARRINGTON, K. HAWKINS & S. LLOYD-BOSTOCK, (eds.), *PSYCHOLOGY, LAW AND LEGAL PROCESSES* (1979).

86. See G. Baldwin & K. Hawkins, *Discretionary Justice: Davis Reconsidered*, PUB. L., Winter, 1984, at 570.

87. See, e.g., D. Sudnow, *supra* note 16; J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW*

methodological perspectives, have illuminated many of the complexities of decision-making. It is important to note, however, that for some of these authors, at least, studying decision behavior as such may not have been the central intention of their inquiries. Of the monographs which do explicitly focus on the discretionary behavior of legal actors, however, two are outstanding studies which both deal with the processing of juvenile delinquents: Aaron Cicourel's *The Social Organization of Juvenile Justice* (1968) and *Judging Delinquents* (1969), by Robert Emerson.

Cicourel's analysis illustrates an approach to legal decision-making as a species of natural or practical decision-making which is very valuable. Cicourel studied the routine decision processes surrounding juveniles who encountered police, court officers, and teachers in their official capacities in two cities in California, to see how they perceived and explained what was done. He also gathered documents which were seen as summaries of very complex events, observations, and interviews to explore the "unexamined ways we idealize experience" and see how norms, values, rules, and assumptions get packed into selectively organized and remembered discourse and textual representation."<sup>88</sup> Once very diverse situations were typified (a "bad attitude" on the part of a child, or a "broken home") and recorded, Cicourel sought to see how court, police, and social workers' records became the bases for reconstructions of people's lives and "careers."

The decision and decision-maker may be rational according to the viewpoint of the actor, but rules used, information guiding decisions, the processing and definition of such facts, the relevance of imputed conditions, organizational position and goals are rarely gathered, according to Cicourel,<sup>89</sup> and basic notions such as choice and decision on the part of actor are not explicated. Actors' conceptions of the necessary articulation of formal, abstract, statutes, customs, and precedents and the concrete situations that reflect particular cases and events that arise are, he argues, particularly critical in a legal analysis of decisions. An actor's conception of what is "rational," "logical," "reasonable," and so forth, during the course of action is Cicourel's basis for natural rationality. Cicourel's research suggests many of the complexities inherent in the study of natural decision-making.

I have already asserted that a notion of *decision frame* is an important concept in understanding how and why decisions are actually made. One of the limitations of much existing work on legal decision-making, inherent in its formal analysis of the process, is that it leads to the character and context

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ENFORCEMENT IN DEMOCRATIC SOCIETY (1966); E. Bittner, *Police Discretion in Emergency Apprehension of Mentally Ill Persons*, 14 SOCIAL PROBS. 278 (1967); A. BLUMBERG, CRIMINAL JUSTICE (1967); L. ROSS, *supra* note 8; J. RUBINSTEIN, CITY POLICE (1973); M. ATKINSON, DISCOVERING SUICIDE: STUDIES IN THE SOCIAL ORGANIZATION OF SUDDEN DEATH (1978); M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1978); R. MCCLEARY, DANGEROUS MEN: THE SOCIOLOGY OF PAROLE (1978); M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

88. A. CICOUREL, *supra* note 57, at xi (1968).

89. *Id.* at 46.

of decisions being ignored. Put another way, the focus on particular features ("factors" or "criteria") so dominates the analysis that the environment of decision and its broader shaping forces are overlooked. Those who employ the metaphor of the rational decision concentrate on matters variously described as "factors" or "criteria" at the expense of a notion of decision frame.

By "decision frame" I mean the structure of knowledge, experience, values, and meanings that the decision-maker shares with others and brings to a choice. In other words, a decision frame may be regarded as a master code which shapes, typifies, informs, and even confirms the character of choices. It determines, for instance, what information is to be sought, what is to be used, and what meaning such information conveys, for notions of relevance and significance are incorporated in the concept. In rationalist research on decision behavior, "factors" or "criteria" are ostensibly those things that are taken into account in reaching a decision and are treated, therefore, as linked (in some unexplained way) with stipulated outcome. In the absence of close study of natural decision-making, however, any link made by the researcher between criterion and outcome has to be informed with attributed meaning derived from theoretical presupposition or assumptions drawn from policy notions which claim to inform the exercise of discretion. To be sensitive to the notion of decision frame, however, is to allow a tie to be made between criterion and outcome, or to create a means for interpreting the connections. The frame provides a set of background expectancies or meaning for that criterion.<sup>90</sup>

A decision frame is not, however, rigidly applied. The frame may change because the priorities accorded the values brought to any decision task change. Decision-makers do not appear to be irrevocably wedded to a particular frame through which they view the world. For example, when resource availabilities change, decision priorities change. A recent paper by Robert Emerson suggests how the problem of allocating resources differentially among a group of competing cases prompts what he calls "partial caseload effects." One such effect is to lead to a subtle shift in the decision frame adopted:<sup>91</sup>

One characteristic situation approximates the economic model of marginal decision-making in which problems of allocation become acute *only* after the point at which resources become scarce and competitive. Thus, cases arising early in a case stream may be given or denied resources solely on the basis of assessed 'need.' But as the resource is used up, each next (marginal) decision becomes increasingly competitive with other actual or anticipated cases. . . . A parole agent may seek revocation rather freely, that is, without explicit

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90. See *id.*; H. GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967).

91. R. Emerson, *Holistic Effects in Social Control Decision-Making*, 17 *LAW AND SOC'Y REV.* 425, 445-446 (1983) (emphasis in original).



reference to other cases or total caseload, until the 10 percent quota is approached. At that point, each next possible revocation must compete with other possible or anticipated revocations.

These remarks nicely illustrate the relativity of human judgment.

Furthermore, different decision frames can produce different outcomes. Gottfredson and Gottfredson,<sup>92</sup> for example, have noted that people reach different decisions on the same information. Doubtless one source of the "disparity" which exercises critics of discretionary justice is different framing of the same information by different decision-makers, while another is to be found in the clash of an observer's (researcher's) decision frame with those frames informing the judgments reached by decision-makers. Thus, when writers refer to such abstruse ideas as typifications,<sup>93</sup> categorizations, or shared perspectives, they are urging the reader to recognize that "facts," "cases," and even decisions themselves are both defined by a given frame and granted meaning within that frame. Thus, a case does not exist as a concrete entity, but is given meaning by the definitions brought to it by people. Much research frequently reifies a case and a person, or a legal case with an organizational label, when each of these definitions is a function of an analytic perspective on the facts, not a set of predefined, independently existing facts contained somewhere in a folder. In some cases the identity of individuals, as holders of perspectives or group values, may be irrelevant to explaining outcomes insofar as variance in case decisions may be better explained by features inherent in the setting or context of the decision, such as workloads, resource base, immediate socio-political environment, and so on.<sup>94</sup>

To illustrate some of these points, consider one of the most common findings in the sentencing and parole studies. Something usually described as "gravity of crime" is normally found to be the most important "factor" in these decisions.<sup>95</sup> What does this finding actually reveal? Unless the reader speculates as to its meaning (which most readers probably do and need to do) the finding yields little insight. If we consider two alternative decision frames, however, "gravity of crime" can acquire two very different meanings. Let us imagine a judge who actually believes in and puts into practice in his or her sentencing the now unfashionable ideology of rehabilitation. The seriousness of the offender's crime will be taken as crucial evidence of some sort of underlying pathology, condition, or problem which requires remedy in the form of a designated sentence with a particular form of disposal and treatment currently deemed appropriate for rehabilitative purposes. Let us now assume the same crime is considered by a second sentencing judge who moves in a moral world where rule-breaking should be visited

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92. D. GOTTFREDSON & M. GOTTFREDSON, *supra* note 11.

93. D. Sudnow, *supra* note 13; P. ROCK, MAKING PEOPLE PAY (1973); W. Waegel, *Case Routinization in Investigative Police Work*, 28 SOC. PROBS. 263 (1981).

94. I am grateful to Peter Manning for many of the points in this paragraph.

95. See, e.g., D. Gottfredson & M. Gottfredson, *supra* note 11.

with punishment in due proportion to its wickedness and the harm done. The seriousness of the offender's crime will again be employed as a "factor," but in this instance as telling evidence of evil which deserves punishment in the form of a particular sentence of a particular weight. The two contrasting decision frames may well produce very different outcomes (or indeed the same outcome). In each case, however, it should be noted that the identified primary factor or criterion is the same, and will appear to be the same in research which ignores what criteria mean.

There are probably a number of master frames informing decision behavior in legal settings, perhaps interacting with different emphases in various segments of the criminal and civil systems. Some research has drawn attention to the moral world in which legal decision-makers work. It does seem that behavior which is guided by no sanction other than the individual's sense of right or wrong<sup>96</sup> is a pervasive feature in human judgment in legal settings. The strength of such individual values is suggested by a number of studies of such diverse legal actors as juvenile justice officials,<sup>97</sup> pollution-control officers,<sup>98</sup> child protection workers,<sup>99</sup> and parole-board members.<sup>100</sup> The dominance of "tariff" sentencing which Thomas<sup>101</sup> has discerned in the formal judgments of the Criminal Division of the English Court of Appeal is also surely explicable in moral terms. Moral fault, furthermore, is the central notion in the conception and operation of the tort system.<sup>102</sup> Perhaps none of this is surprising since so much of the substance of legal rules speak to issues of right and wrong. The moral may be the dominant frame in translating legal rules into legal action upon which other matters may be contingent.

If the moral frame is regarded as a matter of personal values or ideology, then another frame which may be relevant may be treated as a kind of institutional ideology, one derived from conceptions of legal or organizational mandate or the organizational interest. Presumably, legal actors behave to some extent in accordance with or in response to their conception of what their jobs entail. Legal mandates are often terse, patchy, or contradictory, and are elaborated upon by the organization or professional association to which the actor belongs. For example, it seems to be a characteristic of regulatory systems of control that they emerge when the legislature defines the existence of an undesirable social or economic problem in broad terms (polluted water, dangerous workplaces, or impure food, for example) and responds by creating an enforcement bureaucracy to do something about the

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96. T. SHIBUTANI, *SOCIETY AND PERSONALITY: AN INTERACTIONIST APPROACH TO SOCIAL PSYCHOLOGY* (1961).

97. R. Emerson, *supra* note 75.

98. K. Hawkins, *supra* note 4.

99. R. DINGWALL, J. EEKELAAR, & T. MURRAY, *THE PROTECTION OF CHILDREN* (1983).

100. K. Hawkins, *supra* note 5.

101. D. Thomas, *supra* note 53.

102. D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD & Y. BRITAN, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* (1984).

problem. Precisely how the problem is to be remedied—what constitutes “dirty water” (for example) in kind and degree, and how the organizational conception of dirty water is to be implemented in practical terms—is, however, left to the discretion of administrative officials in recognition of the presumed impossibility of formulating rules which speak to any set of possibly relevant circumstances that may be contemplated or encountered. The legal mandate, such as it is, is translated and crystallized into a series of agency objectives and practices that comprise the policy which ostensibly informs the exercise of discretion in some (as yet imperfectly understood) way.<sup>103</sup>

A related set of organizational values are also known to influence discretionary behavior. The constraints that inhere in organizational relationships introduce values which are concerned with doing legal jobs efficiently, that is to say, displaying organizationally appropriate activity at a minimum of personal time and trouble.<sup>104</sup> Thus “covering oneself” from criticism from organizational superiors seems to be a pervasive value in the exercise of discretion by enforcement agents at street level,<sup>105</sup> a strategy in American policing (and, doubtless, other occupations) known as “CYA” (cover your ass).<sup>106</sup> This reflection of an ultimate concern for self-preservation may interact with the system of organizational control to impinge upon individual discretion, resulting in decision behavior which resists the risky, the unorthodox, or the innovative.

To be concerned with matters of organizational control is essentially to be concerned with the implications of various forms of decision outcomes or causes of action. Decision behavior here is essentially *prospective*. Legal decision-makers are often concerned with anticipating the consequences of certain decisions which might rebound on the individual's future relationships with colleagues or organizational superiors. We know something, for example, about the ways in which police discretion is affected by indicators of organizational output such as arrest quotas,<sup>107</sup> or the clearance rate,<sup>108</sup> or the way in which a rule of, “Don't disagree with me and I won't disagree with you,” is often to be observed operating in parole panel decision-making.<sup>109</sup> Often the supervening organizational relationships are a particularly dominating force, producing various notions of “tradition,” “culture,” or “normal policy” which shape an operational philosophy patterning routine decisions.<sup>110</sup>

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103. See K. Hawkins, *supra* note 4.

104. A. Blumberg, *supra* note 87.

105. K. Hawkins, *supra* note 4.

106. P. MANNING, *POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING* 178 (1977).

107. D. Petersen, *Informal Norms and Police Practice: The Traffic Ticket Quota System*, 55 *SOC. AND SOC. RESEARCH* 354 (1971).

108. J. Skolnick, *supra* note 87.

109. K. Hawkins, *supra* note 68.

110. D. Sudnow, *supra* note 16; W. Waegel, *supra* note 93.

The need of the individual as organizational actor to manufacture various organizationally appropriate signs of suitable activity is also mirrored in a broader sense at agency level. The shared concerns of officials comprising the organization to dramatize impact or effectiveness in the police,<sup>111</sup> for example, or a regulatory agency,<sup>112</sup> require attention in the field for the implications for the organization of a particular course of action (or inaction) which an individual official may choose to take. A form of covering technique which operates at the institutional level is akin to the "covering" behavior of individual officials. This is the minimax strategy which informs decision-makers that cases should be handled so as to minimize the maximum harm to the organization or institution—cases such as those possessing properties which are likely to attract a great deal of public attention and criticism if certain kinds of decision are made, or if adverse outcomes follow the decisions.

Frame, then, is a feature of overriding importance in understanding decision behavior. It is the means by which meaning and relevance are given to information, for information as such does not automatically prompt a particular decision, and it involves organizing, selecting, and omitting "facts"—as well, of course, as interpreting them.

In the last part of this paper I shall present part of an analysis of the exercise of discretion by parole board members in a number of American states. In terms of some of the structural characteristics of decision-making discussed earlier, the parole selection decision is formally an adjudicated decision, though it will become clear from the data that a good deal of bargaining between decision-maker and decision subject goes on in practice. The decision is a case (rather than a policy) decision, made following personal interview and study of written records and assessments, and to a greater or lesser extent it is the product also of interaction between decision-makers. It thus possesses elements of decisions made both in series and in parallel. The purpose of this analysis of one of the least visible areas in the administration of justice<sup>113</sup> is to suggest how concerns with such organizational preoccupations as the smooth administration of penal institutions, assistance in the management of the prison system, and relationships with colleagues in the institutions may come to dominate the exercise of discretion by a board when confronted by certain kinds of cases. It is important to emphasize that what follows is only a partial analysis, since it focusses upon the organizational aspects of parole-board work. In no sense is it intended to serve as a descriptive analysis of parole-board behavior in general. Note, finally, that the official, stated objectives of a parole board are supposed to be the selective identification and release of presumably "rehabilitated" prisoners.

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111. P. Manning, *supra* note 106.

112. K. Hawkins, *supra* note 4.

113. E. Poole & R. Regoli, *supra* note 34, at 392.

### III. A PIECE OF DETAIL—AND BACKGROUND<sup>114</sup>

#### *Tickets, Getting Out, and Running the Joint*

Lewis Bolden [pseudonyms are used throughout] has been re-scheduled to see the parole panel two weeks late because he was in punitive segregation when he was originally due to appear before the board. Before he comes in the panel discusses his institutional misconducts and the sanctions they have invited. His sentence is a five-year maximum for third-degree burglary.

“You’ve had some misconducts, Lewis . . . in here,” says Jerry Gordon, the acting chairman. “Several . . . indicative of short temper or bad judgment or both, and some of them quite serious. In fact you just picked one up, so I think the panel would like to hear some explanation.”

“Some of ’em were true, like. I got kinda excited.”

114. The bulk of the data on which this part of the paper is based was collected in the course of a study of decision-making practices in a number of American parole boards. Three state boards are primarily represented; to preserve undertakings of confidentiality I have named the states Hamilton, Madison, and Jefferson (for the same reason I conceal the real names of board members and prisoners). These jurisdictions were selected for study because they conferred different degrees of administrative discretion upon their parole boards, as a consequence of variations in their sentencing structures.

In Hamilton, the parole board operates in the leeway allowed between the minimum and maximum terms (both of which are imposed by the judiciary). I regard this as an example of a board working with middle-range discretion. Madison, on the other hand, has a parole board which enjoys high discretion. In this state the maximum term is fixed by law (with typically generous amounts of imprisonment possible), and the minimum term is fixed by the sentencing judge. Jefferson was selected for study because it had recently introduced a system of parole guidelines ostensibly to control the exercise of discretion by its parole board, and therefore appeared to be a state in which the board had limited discretion. In this state the board operates within very high maximum terms set down by statute. It fixes a term of imprisonment to be served by each individual prisoner according to a complicated formula (speaking chiefly to the gravity of the prisoner’s crime) established by its parole guidelines.

The research methods employed were ethnographic and involved my attending during the summer and fall of 1979 a series of parole board hearings in each state at a wide variety of the prisons holding eligible inmates. In addition, I spoke at length with board members (tape recording the discussions), and with prison and parole administrative staff. Some of the data presented are drawn from research conducted with board members in 1967-68 and 1975. Hamilton and Jefferson were two of the states researched in 1967-78 (reported in K. Hawkins, *supra* note 67), together with two others (which I have referred to as Eastern state and Western state).

Though some of the data are quite old, this does not detract from the thrust of the analysis. Indeed, for convenience, I use the “ethnographic present” in describing and discussing the findings. Similarly, there have been changes in law and procedure in some of the states researched more recently, affecting sentencing structure and parole-board practice, but again this does not affect the point of the analysis. Indeed the decision behavior with which I am concerned here was observable over time and across states which differed greatly in their sentencing structures, policies and procedures. Differences observed were of degree, not kind.

It emerges that the most recent infraction had occurred a week before Bolden's parole hearing. He had a charge of possession of dangerous contraband: a razor blade had been found in his cell. Bolden says he used the blade to cut pictures out of magazines. He was then put into administrative segregation, where he had problems with a guard.

"Did you say you didn't hide the razor blade?" Gordon asks. "Did you assume that other people knew you had it?" It then emerges that the blade was set in a piece of wood. Bolden claims that he did this to protect his fingers. "I'm asking," Gordon explains, "to help know whether you realize how serious the infraction was and whether you did it deliberately to break the rule."

"Well. Oh, boy. He really raised hell here," Gordon says to his colleagues after Bolden's fifteen-minute interview was over. "Now, if we were all institution people [a comment directed to me, referring to a lunchtime conversation we had had about the relevance of board members' previous experience to their decision-making] he'd be denied forthwith. I don't believe we have a hardened criminal here, anything like that. But I do think we do have someone who doesn't realize it but does need some kind of counseling. Do you want him to get it here or outside? (Pauses—silence from colleagues.) Mental health or something? (Pauses—more silence.) Let's give him a date which shows him he's got to respect the rules of the institution."

The board fixes a parole date four months later, with a requirement for mental-health treatment on release. Bolden returns to the hearing room and is told of the parole. "However," Gordon continues, "we found it necessary to let you know that you've got to realize that you have to respect the rules of the institution, which are [for] the protection of guards and inmates, and if there's any serious infraction between now and then we might bring you back . . . to see you again." [A Hamilton case.]

The traditional positivist view of parole (one shared by rationalist writers) calls for administrative discretion to be exercised in timing the release of prisoners, in which the central issue is one of defining "suitability" for release on parole. In a positivist decision frame, the suitable prisoner is one who has made efforts at self-improvement, who has developed "insight" or "maturity," who has acquired skills, or some other personal attributes, which suggest a diminished propensity for further law-breaking. Parole decisions are supposed to reflect these concerns, being at once diagnostic and predictive. This utilitarian view of the parole system is accompanied by a concern for how prisoners are to live under supervision in the community, thus presumably assisting the constraints against further law-breaking. The "success" of a parole system is contingent upon this, since it typically displays its effectiveness by reference to parole-revocation rates. Parole

supervision thus occupies a central place in the positivist's scheme as a system of control over social deviants external to the prison.

In this discussion, however, I shall be concerned with the part parole plays as a means of control *internal* to the prison. The central theme is how parole discretion may be framed by organizational, rather than positivist considerations, or sometimes even considerations of a moral character (connected with punishing law-breakers with their just deserts), which arguably is the dominant feature in parole decision-making.<sup>115</sup> Here I want to suggest some of the implications for parole decision-making of a system of discretion in which benefits are selectively conferred upon, or withdrawn from, a captive population. My argument is that parole discretion may often be directed not so much forward in time and outwards to the community, but backwards to prison conduct and inwards to the institution, in response to the decision-maker's conception of the organizational interests of penal institutions. Ironically, however, it is by the standards of a prisoner's subsequent behavior in the community that parole is normally evaluated. The argument, then, is that whatever else they may try to do with their decisions, members of parole boards seek to protect administrative values of smooth, quiet and efficient management. This is revealed in a particularistic concern for the condemning of certain kinds of conduct by individual inmates, and a broader preoccupation for the control of inmate conduct in an institution in general. Furthermore, however, the selective use of the power to release early (and, to a lesser extent, the selective use of the power to revoke parole and recall the individual to prison to continue his sentence), is employed in a broader context to assist in the management of population levels (and implicitly, costs) in the penal system. Towards the end of the discussion, therefore, I shall address some of the ways in which parole discretion may be employed as an administrative decision in which the primary concern is with the maintenance of relationships with other segments of the criminal justice system.

The focus of the discussion, however, is the proposition that parole may be employed as a subtle control system directed to the management of inmate behavior.<sup>116</sup> The parole board is not simply concerned with the extent to

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115. K. Hawkins, *supra* note 5.

116. Note that quantitative analyses of parole decision-making also suggest the importance of institutional conduct and its relationship with decision outcome. In Pennsylvania, for example, it appeared to be "the single strongest factor associated with the parole decision": J. Carroll *et al.*, *supra* note 14, at 212. In Oklahoma it was "the most striking feature of the parole hearings" of a board which operates part-time: J. Conley & S. Zimmerman, *Decision Making by a Part-Time Parole Board: An Observational and Empirical Study*, 9 CRIMINAL JUSTICE AND BEHAVIOR 396 (1982). "Those inmates receiving the most disciplinary reports were incarcerated the longest", writes Scott, "even when the legal seriousness of the crime and all other independent variables were controlled." J. Scott, *The Use of Discretion in Determining the Severity of Punishment for Incarcerated Offenders*, 65 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 214, 219 (1974). The key question, however, to repeat the argument again, is why this should be so: are badly-behaved prisoners predicted to be badly-behaved citizens, or are they being punished for their misconduct for institutional control or other purposes?

which prisoners observe the rules of the institution, but also the degree to which they participate in prison programs, make efforts at self-improvement, and in general act in ways of which the parole board and institutional administrators approve. This system of control operates in a very simple way, on the "carrot and stick" principle, by rewarding the compliant and sanctioning the badly-behaved by grant or denial of parole, in much the same way that prison guards reward and sanction inmates by their selective enforcement of prison disciplinary rules.<sup>117</sup> In fact parole boards are concerned with the implications of their words and actions for the prison community as a whole—staff as well as inmates. For this reason the deterrent rationale of sanctioning misconduct by denial has wide appeal. In using their discretion to serve the ends of institutional control, parole-board members exercise a real *administrative* authority. To understand the nature of decisions about "justice," or, indeed, other kinds of legal decisions, an essential dimension always to be addressed is the implication of dispensing justice by organizational means. Legal punishments, indeed the implementation of legal rules in general, are constrained by organizational considerations, and this analysis is intended to suggest some of the ways in which this happens, using the example of parole as an administrative device.

The scope of the parole decision as a means of managing institutional conduct has long been formally recognized in the widely-observed requirement that parole boards be comprised of members ostensibly independent of the prison ("ostensibly" because prison staff make a major contribution to parole decisions in the information and evaluations on prisoners they compile and present to the board in case files). The extent to which the use of parole denial to sanction misconduct is employed seems to vary among members of the same board, and probably varies substantially among states. In Jefferson, for instance, the board's general approach is to leave specific questions of control to the institutional authorities unless the misconduct is particularly conspicuous. In Madison, on the other hand, the board is extremely sensitive to any issues surrounding institutional control: "We probably are very ticket [misconduct] conscious," said a member of the board, "and I think it's from an institutional management point of view. . . ." There are three reasons in particular why this should be so. First, the Madison board operates in a sentencing structure that grants it substantial discretionary latitude. Administrative control will be a particularly sensitive issue in those jurisdictions in which the sentencing structure is such as to employ high maximum terms and to confer wide discretion on the paroling authority, so that those prisoners who are released at all tend to be released by parole.<sup>118</sup> Secondly,

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117. R. CLOWARD, D. CRESSEY, G. GROSSER, R. MCCLEERY, L. OHLIN, G. SYKES & S. MESSINGER, *THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON* (1960); G. SYKES, *THE SOCIETY OF CAPTIVES* (1958).

118. This issue, of course, is one of the mainsprings of the criticisms about the "unfettered" discretion of parole boards. There remain, however, a number of jurisdictions in which the board retains high discretion; at the time of fieldwork Madison and Jefferson (in effect, if not in appearance) were two examples.



most members of the Madison board have worked their way through the state's penal system in their professional careers and are particularly alert to questions about controlling prisoners; as one of them pointed out, ". . . three or four of us come from the institution and, sure, we're going to be very supportive of [it]." Two members, in fact, have worked all their careers in the adult prisons and have personal experience of a major prison riot. Thirdly, many Madison inmates are housed in one very large, maximum security institution which by its very size proves to be extremely difficult to manage, and many originate from a declining city well-known for its crime problems. The result of all of this is that the Madison board is particularly concerned with reports of institutional misconduct—"tickets" in parole-board argot—and the inmate who does not have a ticket is a rarity in many of the institutions.

Prison is a particular form of social organization, a species of "total institution."<sup>119</sup> Though the ideology of rehabilitation regards prison benevolently as a place of treatment and reform, the pre-eminent concern of any prison official, and perhaps the defining characteristic of imprisonment, is *control* of a potentially unruly clientele. Only when the demands of institutional control are satisfied can any other penal objectives of reform, deterrence, or incapacitation be attempted. Indeed, far from regarding control as facilitating the aims of rehabilitation, staff may see the interests of control as readily *served* by institutional programs and privileges.<sup>120</sup>

The entire workability of the concept of rehabilitation is implicitly founded on a recognition of the principles of reward and punishment. While correctional theorists have argued that participation in prison programs must be voluntary to be effective, it is widely accepted that inmates participate "voluntarily" only as a means of achieving release as early as possible. Offenders co-operate with correctional workers, Cressey has suggested,<sup>121</sup>

not in order to facilitate their own reformation but in order to secure release from surveillance as quickly as possible and as unscathed as possible. Prisoners, for example, participate in group therapy, group counseling, and individual "intensive treatment" programs as much from a belief that doing so will impress the parole board as from a conviction that they, as individuals, need to change.

Thus, as board members are well aware, prisoners at their hearings will say whatever they think will improve their chances:<sup>122</sup>

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119. E. GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961).

120. The warden of an overcrowded institution in Jefferson, for example, was convinced that the single most important influence underpinning his staff's control of inmates was the provision of cable television in the cell blocks.

121. D. Cressey, *Sources of Resistance to the Use of Offenders and Ex-Offenders in the Correctional Process*, in JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, *OFFENDERS AS A CORRECTIONAL MANPOWER RESOURCE* 45 (1968).

122. D. Jackson, *Parole Board*, *Life*, vol. 69, no. 2, p. 60 (1970).

Johnson was nervous before the hearing. "I'm wondering whether I'll say too much or not enough," he had said, "whether I'll put my foot in my mouth. If they ask me 'Is this yellow wall blue?' I'll say 'Of course it's blue'. I'll say anything I think they want me to say, if they're getting ready to let me go."

Parole possesses, therefore, a subtly coercive power over prisoners. And because the parole decision may be employed in an exemplary fashion, what in prisoners assumes considerable importance for the decision-maker are the *symbols of compliance*.

The exemplary character of parole board decision-making draws its coercive force from uncertainty. Prisoners, parole boards, judges, the public, and the mass media all measure punishment in terms of the extent to which an offender is deprived of liberty. How long someone is to be confined is a much more important part of punishment than where the time is to be served, despite the fact that there can be an enormous disparity in the quality of life between, say, a maximum security penitentiary and a minimum security prison farm. Furthermore, though imprisonment is an unpleasant matter for most inmates, loss of liberty is fundamental to all the other deprivations prisoners must suffer.<sup>123</sup> In this context, parole means release from an unpleasant condition before release need legally be granted. And while it is a grant of that most widely valued good in a democratic society—personal liberty—parole is discretionary release. It is selective in terms of who is to be released, and when in the sentence release takes effect.

Over the years methods of managing the behavior of prisoners have gradually shifted from the application of various physical punishments to the adoption of measures threatening to reduce further the prisoners' already substantially restricted liberty. With the greater relaxation of prison regimes in general, however, and increasing use of the less overtly physical methods of security and control, prison staff have been led to depend more and more upon the active co-operation of their inmates actually to run the prisons. Prisons today work because of this often uneasy co-existence.

Though denial of privileges is still employed as a sanction for a variety of minor institutional transgressions, the more important punishments now employed are connected with security re-classification, transfer, and the loss of time on the sentence which might otherwise be remitted, either by withdrawal of good time or denial of parole. Indeed, both remission and to an extent parole originated as systems to control inmate behavior and population levels.<sup>124</sup> Security status and transfer are, like the denial of privileges, sanctions which affect the quality of daily life in prison, making the pains of imprisonment more distressing.<sup>125</sup> Both are potentially significant sanctions in their own right: Security status encroaches on a prisoner's liberty

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123. G. Sykes & S. Messinger, *The Inmate Social System*, in R. Cloward, et al., *supra* note 117, at 5.

124. K. Hawkins, *supra* note 68; D. ROTHMAN, *supra* note 72.

125. G. Sykes, *supra* note 117.

in the prison, while transfer determines where prisoners will actually continue serving their sentence, an important matter for many who value visits from family and friends. Both sanctions are also significant, however, in their potential implications for the parole decision, for a decision to release may be directly contingent upon them. For instance, in some states prisoners have been treated as either not eligible for parole by virtue of being in punitive segregation, or at least not eligible to be heard during the period of segregation (like the case of Lewis Bolden at the beginning of this discussion). In other cases, a grant of parole may be indirectly contingent upon a transfer decision, as when a badly-behaved prisoner is sent off to a maximum security institution where there may be no "relevant" programs for the prisoner's "problems," and therefore little or no opportunity for him to present parole board members with grounds for release.

The extra loss of liberty through forfeiture of good time is regarded by parole board members and prison officials alike as a more serious matter than security reclassification or transfer. Loss of good time, however, remains a less potent sanction than a parole denial. The prevailing practice is to grant good time as a matter of routine at the beginning of a sentence and to withdraw it only for conspicuously bad behavior. Prisoners consequently expect to be granted their good time as a matter of course, and do not regard it as a privilege to be earned. Parole (except perhaps where formal guidelines are employed) cannot, in contrast, be taken for granted.<sup>126</sup> Besides, good time lost can always be restored, and quite often is, wholly or partly. Any good time normally affects a smaller proportion of the total sentence than parole (usually one third, sometimes one half); eligibility for parole, depending on the particular type of sentencing structure employed, may remain possible over the whole or at least the major part of a maximum term.<sup>127</sup>

Parole is thus a much more problematic matter for prisoners than good time. In relatively low-discretion jurisdictions, or those with relatively low paroling rates (like Hamilton or England or Wales), *whether* prisoners will be granted parole is the crucial question. In high-discretion and/or high-parole-rate jurisdictions, where prisoners have a reasonable expectation of being paroled at some point in their sentences, they cannot be sure *when* they will be released. Whatever the particular sentencing structure employed, however, not to be paroled may be a cruel blow to a prisoner, because parole normally affects a larger proportion of the term to be served than

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126. This statement would have been less true in the sixties and early seventies when some states, like California, Minnesota, and Washington employed sentencing structures with maximum terms so high that release on parole was for almost all prisoners the only way in which they could realistically expect to leave prison. Many such sentencing structures fell victim to the recent reforms introduced in the movement towards so-called "just deserts" (or determinate, or presumptive) sentencing. See F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); K. Hawkins, *supra* note 40.

127. In those jurisdictions where the statute announces no minimum term to be served the parole board has in theory complete discretion up to the maximum as to the term to be served.

good time and because most prisoners naturally cling to hopes of getting out early, however unrealistic these hopes may seem to others. It is this which presents parole board members with a potent source of authority.<sup>128</sup>

The use of parole-boards' discretionary leeway derives its effectiveness as a control mechanism from the simple fact that most people who are locked up would prefer not to be. As the warden of a large, maximum security institution in Madison put it:

They release, that is the parole board, they parole a number of men every month from this facility . . . now this gives us a tool as managers of this large prison to use and capitalize on, that is that very strong desire for freedom.

The preservation of a sense of hope of release in the inmate population, he continued, is a major management tool:

. . . there's a kind of hope out there. [The prisoner] almost has an instinctive tendency to act for that ray of hope in a positive fashion. Even some of the most difficult prisoners I've known over the years—that is, difficult-to-manage prisoners—have retained that ray of hope.

Parole boards may seek to preserve the sense of hope and may accordingly adjust their tolerances by being more willing to release prisoners in institutions for long-termers than they would if such prisoners were held elsewhere, and in general by avoiding a reduction in release rates. The same warden had this to say about the consequences of a shift to a less liberal releasing policy:

Warden: I think initially—it would lead to a more depressed prisoner population. It would get at that ray of hope. . . . There just isn't any ray of hope at the end of the tunnel. If that persisted long enough then I think you'd have the potential for more outpouring of this frustration either through minor disturbances or major disturbances. Maybe like food—"We'll not eat," type of thing, "We're not going to work," type of thing. And that is always the potential for a major disturbance in the institution. To me the key is that ray of hope. . . .

Hawkins: And in practical terms for the board that means keeping a nice predictable steady turnover of the population; keeping . . . the exit door opening, fairly regularly?

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128. The more indeterminate the sentencing structure, the stronger the authority of the parole board members will be. Under the old indeterminate sentence regimes now in decline, imprisonment in generous quantities was routinely specified by statutes for unexceptional offenses in an effort to allow for the conspicuously bad case. The way in which parole boards coped with this authority was a factor contributing to the powerful criticisms of indeterminate sentencing and parole in the seventies. K. Hawkins, *supra* note 40.

Warden:                Yeah. In terms of our current sentencing structure, yes. Yeah, I think that's an acknowledged statement.

The problem of managing institutions is regarded as one of increasing difficulty, however, owing to a deterioration in the tractability of prisoners. "There's more acting out," one Madison board member observed with a certain nostalgia:

. . . more over-rebelliousness than there ever was when I was in the prison. We used to have a nucleus of older, real criminals, real convicts, beautifully behaved. So as an administrator they really helped make the job easy. There weren't nearly as many gang rapes, gang robberies. . . . They had their football pools and they gambled, and they broke rules, but non-violent sorts of things. And now you're getting . . . people who react in the prison just exactly as they reacted in the streets. . . . [Y]ou've been with us, you've seen some of these guys . . . that are bad dudes, as they say. They are basically anti-social, assaultive, rough, and they don't give a damn for society or conformity or whatever. Now, you got a kid that's trying to make it in prison and is really serious and wants to go home, he has a helluva time.

Prisoners, however, remain obsessed with "getting out": "Inmates want out, and most of them will lie, smile, or grovel to get out."<sup>129</sup> "The parole board is an important group in every prisoner's mind in this institution, and throughout the system," said the warden of Madison's largest maximum security prison:

Every man who enters the institution is interested in release. That's the uppermost thought in the prisoner's mind in the institution. Now this is reinforced as time goes on by other prisoners because monthly the board is here to meet two or three times. They're seeing men not only parole but discharge. This is also intensified by the visiting situation, where the families—be it the wife, mother, girlfriend, or relatives . . . or friends—are also talking about "when you get out."

The sorts of conduct that parole boards feel compelled to sanction or reward all reflect the primary issue of control. There is a rich range of misconduct that parole boards normally sanction, including sexual or other physical assault on other prisoners; violence to prison guards; smuggling; possession of weapons or of contraband (such as drugs or gambling paraphernalia), or of other items that seem trivial but are often treated very seriously by board members as possible evidence of illicit activity. Other misconduct includes "disruptive" behavior, being out-of-place, gambling, and verbal abuse to the staff. Escape is the most serious of the commoner forms of misconduct, because it represents an actual as well as a symbolic loss of control by the institution. This is particularly so in maximum-security

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129. D. Jackson, *supra* note 122, at 61.

prisons, for it makes public their vulnerability. Conduct classified as escape varies enormously, embracing everything from those rare cases where a prisoner "goes over the top," to the much commoner (if less glamorous) absconding from an outside working party or failing to return from home leave. Many escapes are prosecuted as new crimes; they also invite heavy administrative sanctions apart from the denial of parole. In addition to punishing a breach of institutional rules, parole boards also penalize indifference, laziness, or other failure to engage in treatment programs they deem appropriate to a prisoner's "problems."

Boards not only look at the prisoner's misconduct but also the punishment imposed by the institution, for this is taken as a good indicator of the gravity of the rulebreaking. Prison sanctions depend upon an inmate's security status and location in the institution. These are, however, relative notions, board members according institutional misconduct variable significance depending on the prison in which an inmate is held. For the parole board a disciplinary report in one institution may be a much graver matter than the same kind of ticket awarded in another. And in some institutions, the gravity of a prisoner's conduct will be visibly displayed to the parole board if the prisoner is disqualified by virtue of his prison disciplinary record from appearing before the board, or if he enters the hearing room in handcuffs or chains.

One consequence of sanctioning institutional misconduct by denial of parole is a kind of double jeopardy. The prisoner has already been punished for his violation of the institutional rules and is now punished again for the same misconduct. This is another fact of the cumulative, compounding effects produced by labelling in the criminal justice system; similarly the prisoner with a disciplinary record is more likely to be reported for subsequent prison rule-breaking than the person without such a record.<sup>130</sup> Administrative values take precedence here over legal values. Board members willingly acknowledge that this double punishment is a consequence of their decisions, while defending the practice on the grounds that the interests of institutional management simply do not permit them to overlook misconduct.

The prisoner who seeks to abide by the rules of the prison is not, however, necessarily in an advantageous position so far as the parole board is concerned. Whereas poor conduct deserves to be sanctioned, good conduct is regarded as the norm and is not, itself, deserving of release (despite the encouragement given by board members to good behavior). And particularly compliant behavior risks being characterized unfavorably by board members as mere evidence of a prisoner who is "prisonwise" or who has "learned how to do time." This is particularly the case if the inmate's crime is especially disreputable. Apart from conformity with the rules, parole boards routinely expect hard work and participation in prison programs. (This is less a matter of involvement in treatment than evidence of the game-like bargaining that parole boards engage in with prisoners.) Conspicuously good

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130. E. Poole & R. Regoli, *supra* note 34.

behavior of a certain kind, however, may sometimes be rewarded. For instance, assisting the authorities is often—but not always—rewarded with a parole. A tip-off about an escape, or help to an officer in trouble may be regarded as courageous, but may also be regarded as self-serving. Assistance to staff will be favorably viewed if the board is confident that it was “genuine.” In the following Madison case, the prisoner had been sentenced to five to ten years for rape and assault to rape. He had been refused twice, for twelve months and nine months. He also had a number of tickets and was in segregation. Except for the fact that the prisoner had been refused twice (which tends of itself to predispose towards greater leniency in subsequent hearings), most of the features in his case were pointing towards a parole denial.

Myra Levin was reading out loud the list of the man’s tickets and was interrupted by the prisoner’s Correctional Counselor who interjected that the man had recently come to the aid of a guard. “An officer was in trouble and he went down the hall and got help. That’s why he’s over here.” [In segregation, under protection.] Mrs. Levin went on to talk about the extent to which the prisoner was a danger to women, concluding by asking for a psychological evaluation. She announced her position by saying, “I’m leaning to parole. There’s the incident where he came to someone’s help. He’s made some gains.” The case had to be referred to Executive Session for lack of favorable votes—doubtless a reflection of the crime and institutional record—but the panel appeared to be favorably disposed to the prisoner.

Characterizations of “truth,” “genuineness,” or “sincerity” are fundamental to decisions in legal contexts, and judging prison conduct is no exception to this. There are sometimes striking examples of the precariousness of the interpretative work in this context. Consider the following example from California:<sup>131</sup>

An inmate I know once helped an officer (after he requested the aid) who was being beaten by two other inmates. When the Good Samaritan went before the Parole Board he was informed that it was decidedly abnormal for one inmate to help an officer against two other inmates; why had he done so? The man told the Adult Authority member, Mr. Madden, that it had seemed the decent thing to do. Madden decried this motive and suggested that the man was *so* violence-prone that he even stepped in where he normally did not belong. Four years later the man is still incarcerated, and he has had three fights with friends of the men whom he fought. Staff seem not to care.

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131. R. Hyland, *Diagnosis: Extreme Alienation*, in R. MINTON (ed.), *INSIDE: PRISON AMERICAN STYLE* 51 (1971) (emphasis in the original).

Precariousness is sometimes evident where board members encounter cases that appear to them to have been engineered by prisoners to give the impression of helping the staff or the institution. Board members often lack procedures by which to discern the credibility of one view of the prisoner's conduct, rather than another.

Dan Johnson was describing in an Executive Session of the Madison board the case he had recently heard of a prisoner who committed two robberies four months after being paroled from a robbery. He had 25 tickets. "A lieutenant came into the room for the first time in 30 years to support the man's parole. He did something for the institution which has to be of great help for the institution." Johnson continues, now quoting from the file, " 'A bunch of keys was lost and the inmate was instrumental in retrieving the keys within 1 1/2 hours of their loss. Without these keys large parts of the institution would be insecure and would have necessitated the changing of many locks.' " Cal Smith responded by recalling the case of another prisoner who turned in a gun and was paroled, but described him as a hustler who set it up. The board members argued as to whether the present case had also been set up, finally concluding that it had not and deciding to parole in six months.

### *The Ticket*

Getting out, not surprisingly, is a pervasive theme of parole hearings. Two of the recurrent images that prisoners elaborate upon in hearings is "life out there" and "going home". Equally pervasive, however, and very often linked by board members to the topic of going home, is the question of the prisoner's conduct during his incarceration, a matter also accorded substantial prominence in reports received by the parole board. It is likely to be commented on, *especially if it is untoward*, not simply by custodial staff but by many of those supplying evidence and assessments about the prisoner and his suitability for release. In some states the record of any institutional infraction is reproduced together with the sanction imposed so that board members can see for themselves what the inmate is alleged to have done. Information in the file about prison misconduct, in particular, is designed to be salient and easily retrievable. In Eastern State, for example, it is presented as the "warden's card" to the board at the beginning of the day's hearings (and so remains the one source of absolutely up-to-date documentary information), while in Western State and Madison the prison-conduct record is reproduced on paper of a different color making it immediately accessible among the many other reports in a typically bulky file.

Prison behavior is especially weighty in parole decisions because whatever the fundamental approach to decision-making adopted, there is agreement that the concerns of management must be protected. The interests of the



rationalist or positivist parole board members are shared by their colleagues who operate with a moral or classical approach to decision-making (in which the imposition of commensurate punishment for a criminal act is the central value). The result is that from their very different starting points very similar outcomes may be produced, because prison misconduct means something significant to each of them.

In interpreting the meaning of the ticket the positivist sees it as evidence of "lack of adjustment," indicating a continuation of the "problems" that brought the inmate to prison in the first place. The ticket is testimony to a continuing pathology, whose only cure is "more time." A series of tickets, according to this viewpoint, is evidence of a serious "failure of adjustment," which is further secured by the assumption that such failure is *predictive* of failure outside.<sup>132</sup> In certain cases decision-makers find such positivist assumptions about misconduct persuasive, especially if clear links can be perceived between conduct prior to and during imprisonment. If, with all the constraints of imprisonment, the positivist assumption runs, misbehavior in prison seems to be part of an enduring and unbroken pattern, what likelihood is there that there will be any change in the future? Such persistence suggests to the positivist at best lack of change (or "poor judgment" as some of the Hamilton board call it), at worst a persistent pathology:

Hal Brandon: Carter, Apparently, is a serious behavioral problem.  
[Board secretary]

Jorge Martinez: We really shouldn't be hearing him now, he's already lost 90 days.  
[Chairman]

Brandon: Well, it's either a case of seeing him now or putting him off and making him think you're setting him up for parole.

Martinez: This kid is very bad. He tried to assault the Captain at [the Reformatory]. His crime was assault on a policeman and there's a previous case of assault in his record.

Brandon: There's a psych.

Martinez: Yeah, it's negative. [The psychiatric evaluation ends: "It would seem to me that it would be rather difficult for the board to consider releasing him in view of his *recently negative behavior* and the absence of any clear cut indicators of his attempts to cope. . . ." (my emphasis).]

[Carter enters the hearing room and responds to the Chairman's opening question about his prison conduct]: "I'm in segregation 'cause

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132. In Madison this is supported by the institutional parole prediction tables, which (uniquely, so far as I am aware) show prison conduct to have some predictive power.

I can't handle population. I been paranoid since I been in here."

Martinez: The record shows you use that word a lotta times. What does "paranoid" mean to you?

Carter: I can't do anything without shaking. I walk around and I can't stop shaking. . . . I been hearing voices and stuff. That's why I hit the Captain with the chair.

Martinez: Were you trying to prove to him that you had something wrong with you?

Carter: I dunno what was happening. [He goes on to explain his arrest at length, stressing police provocation and brutality.] I been in this jail a year. It might not seem a long time to some people, but I know I ain't coming back. I'm gonna get me a job and live like one of them citizens. I just can't handle it here. . . . I can't handle the situation.

[The discussion moves on to Carter's drinking habits, his use of drugs and his plans on release. As the hearing begins to wind up he acknowledges, "I don't have much for you, it's true," and, subsequently, "When I look back I can't believe what a mess I made—loafing around and goofing up."]

Martinez: [After Carter has left the hearing room:] "Oh boy, boy. There's no question we gotta deny him. . . . Y'know, if he'd come here with just something. . . . He's got to get a hold of himself or he's gonna do a lotta time. The same thing would happen again today if that officer were to try and arrest him. . . ."

[After a few more brief comments with Jessica Moran (another member of the panel), Martinez decides on another hearing in a year's time together with a psychiatric evaluation because of the violence of Carter's offense and his persistently poor conduct in the institution, including, Martinez notes, an assault on a correctional officer very similar to his earlier behavior. "He has a real problem with authority," Martinez says to Brandon, who is noting the board's reasons as Martinez dictates them. "He lacks judgment, lacks responsibility. Here's another reason—he hasn't done anything positive during his period of incarceration. . . . If he did shape up, we'd probably parole him next time round, so I'd recommend some involvement, some more education."

When Carter is told, he simply exclaims "Next September]" To this Martinez replies, "This behavior compares with your behavior outside." A Hamilton case.]

The chairman's reasoning in this case seems clear enough. Though young ("a kid"), Carter is regarded with suspicion because his assaultive behavior in the institution can be persuasively linked with his prior conduct to suggest that he is a prisoner who is violent and who "has a real problem with authority" (diagnosis), whose recent behavior suggests persistence, for the "same thing would happen" (prediction). The decision is clear ("no question"). What the board will be looking for to change its verdict next year is for Carter to "shape up." Ideally, the positivist requirement is that he should involve himself in the program in the hope of acquiring a sense of responsibility, but the absolute minimum clearly implied is that there should be an improvement in Carter's prison conduct, which will serve to weaken the link with his earlier assaultive ways, thereby making possible a different prediction of his future behavior. The bad impression formed by the prison misconduct can be mitigated to an extent by better behavior and preferably by some more positive signs in the form of involvement in prison programs. These signs are important because of their capacity to cancel contrary signs ("if he'd come here with just something").

Fundamentally, however, the issue is one of predictive relevance. As a board member said in response to my question why tickets were important, "Because they tell me . . . 'if you cannot follow the rules in here, where you're under pretty constant supervision, and the rules are very well defined, how are you ever going to follow parole rules?'" This is decision-making firmly aligned with a positivist approach. Links may be perceived between the institutional conduct and earlier criminal behavior, and the decision-maker finds it tempting to project continued behavior of a similar kind into the future. In these circumstances it is rational to deny parole since the risks associated with release are all too evident, and this rationality can be readily made clear to others.

Establishing links between past and future, however, is a complex matter for certain decision-makers:

We look for a continuation of that same type of behavior in the institution, and misconducts that are similar to that type behavior are significant to us, see. Out-of-place tickets [are] not necessarily significant to me—it's with some types of offenders. They would be with a homosexual . . . but not necessarily with an armed robber. Or a guy . . . serving for felonious assault, if . . . the tickets that he gets aren't assaultive in nature, [they] don't bother me all that much. But if he's pressuring guys and making threats and strong-arming guys in the prison . . . we're looking at a guy who's possibly doing the same thing he was doing out on the streets. [A Madison board member.]

These remarks suggest that rule-breaking in the institution is insufficient in itself to be allied with earlier social rule-breaking. Instead, a tie has to be made between the type of behavior and the type of offender. Misconduct that seems something of a discontinuity in the thread of deviance can be regarded as a less ominous matter. As important to the decision-maker as

the gravity of the institutional misconduct is the sense of pattern or continuity it represents. As a colleague of the Madison board member quoted immediately above put it:

. . . certain kinds of institutional misconduct really don't bother me. I don't care if they smoke pot. I don't care if they drink spud juice. I don't care if they gamble in the joint. I really don't; and I see that maybe they have to do that to survive as a person in these kinds of places. You know, if they're involved in assaultive behavior in the institution, I care about it. If I think a pattern of behavior which in and of itself may not seem serious, is predictive of whether he's going to be involved in future crime, then I may evaluate it.

Positivist reasoning can be quite subtle, as, for example, in the distinction made in categorizing events or acts as *pathological* or *situational*. A situational misconduct (the more tolerable form) would be regarded as a rational response to a peculiar and unpleasant environment. A pathological misconduct, on the other hand, is yet another instance of the deviant's problem: His institutional behavior is treated as representative of his character with its underlying frailties. In the following remarks by a Madison board member, note his careful distinction between a "fight" (situational) and an "assault" (pathological):

. . . if I . . . read that ticket and it's strictly a fight, that really does not concern me because I know that some guys have to stand up to their manhood. Some guys just have to . . . you know, "Stay out of my face," y'know, "Leave me alone," if it comes to a physical confrontation. There's fights and then there's assaults. And it's the fight that's really an assault by a character who's an assaultive character to begin with. And to me that does relate to his behavior.

The pathological assault is a more serious matter than the situational fight, then, because it contains the clear implication that, being evidence of real character, it will continue in the future. This predictive value underpins any desire to sanction the misconduct for purposes of institutional control.

The Carter case (above) is one of those in which positivist reasoning is readily apparent. In a substantial number of cases where prison conduct is a significant feature in the parole decision, however, the issue tends to be one reasoned in classical punishment terms: A willingness to break the rules must be punished in the interests of the smooth administration of the prison. It is what the prisoner deserves. Furthermore it is a symbolic matter. Judgments about parole release or denial hinge in these circumstances not on what prison conduct might tell the decision-maker about the kind of person being judged, but on what meanings and values are implied by a particular verdict upon a particular inmate. Just as in granting parole to a convicted prisoner a board is making a powerful symbolic statement of forgiveness, so in adjudging a badly-behaved prisoner as deserving or not deserving of parole, the parole board continues to be *engaged in the appearance of condoning or condemning his prison misconduct*:

I do feel pretty strongly about what does this [ticket] mean to the rest of the inmate body? And I have offered the argument, "Well, that ain't all that big a thing," y'know: But what are these other guys going to think? You're releasing this guy right out of the hole, out of detention, or out of top lock. At least *delay* the release date 30 days or something to show the others that you don't do these sorts of things and still get parole. . . . [A Madison board member; his emphasis.]

This aspect of the parole decision, then, is another facet of the exemplary character of much criminal-justice decision-making. So far as parole boards are concerned there is great symbolism in the judgment about time for crime, but great symbolism also surrounding the way the prisoner responds to his prison environment. Thus serious incidents of misconduct cannot be condoned, while a long record of trouble in prison signifies persistence, which also cannot be condoned. There is a coincidence in all of this between the concerns of positivism and classicism, since the misconduct is sanctionable for the former because it is evidence of a continuing need for treatment, and for the latter because it is rule-breaking to punish. Carter's case, for example, is equally understandable in moral and symbolic terms, even though the reasoning followed positivist lines.

The symbolic issues arise in a particularly explicit form when a prisoner has been found guilty of misconduct shortly before his parole hearing, for this violates the precept that "everyone knows" that a prisoner keeps his nose clean before seeing the board. To do otherwise is to seem utterly irresponsible:

Hal Brandon (after a hearing): Gee! That jerk! He had a disciplinary report on 10/5/79 [four days before]. (Reads from file): "Disobeying a direct order—five days loss of privileges, thirty days loss of good time, suspended thirty days." He'd done two years without any. [A Hamilton case.]

What is important to a board, however, is not so much the prisoner who has no misconduct reports at all, as the prisoner who has had none since his last hearing, for this display of greater compliance, visible to staff and inmates alike, is again a conspicuous improvement in behavior to be rewarded. Something resembling the following snatch of dialogue from a Hamilton hearing will quite often be heard.

- Any misconducts?
- No. I had one in '77.
- None since you've been denied?
- No.

While it is possible for decision-makers to employ either positivist or classical rationales in treating the seriousness of institutional misconduct

where administrative concerns are dominant, there is also an inherent ambiguity. Administrative decision-making can be made to appear rational in classical terms because those who break rules self-evidently deserve to be punished. But it can also be made to appear rational in positivist terms because a series of misconducts (damaging to the smooth running of the institution) may be presented as a "failure to adjust" and as evidence of a predicted inability to adjust in the community. The nature and extent of the relationship between behavior inside prison and behavior on the street, despite the fact that for years it has been a major resource for parole-board members to reason by (taking the form "how can we expect you to behave on the street, when you can't behave in here?") has, however, been subject to little research. A decision to deny parole on management grounds alone, however, is hardly ever justified in such terms. The use of parole as an administrative decision is instead taken for granted as rational and appropriate. The following case may be taken as typical:

A prisoner convicted of larceny from a building, who was up at his first hearing, was given a parole date six months past his minimum and told that his adjustment had to be good. He asked what "adjustment" meant and was told, quite simply, "No tickets. Get into programing." The member's colleague then tried to emphasize that the board wanted a clean conduct record. When the prisoner left the room the first board member observed: "He's lucky he didn't get a flop [outright refusal]. . . . If he gets a ticket or two we'll max him anyway."

### *The World of the Prison*

The preoccupation among prisoners for getting out, expressed in the endless imagery in hearings of "outside," and the pervasive concern among staff to maintain control, makes for two constituencies with the utmost sensitivity to parole-board work. Whatever parole boards say or do becomes a topic of considerable concern in the world of the prison.

Parole boards know this. And they have a particular view of the prison, when decisions have to be made about rewarding or (more likely) sanctioning prison conduct. Here, ironically, the prison is not the place of treatment or training envisaged by those whose urge is to reform. Instead the prison is regarded as a snake-pit. The suspicion and distrust of inmates which seem typical of staff attitudes to their charges in many total institutions is shared by parole boards. A prison, whether it be a maximum-security state penitentiary or a minimum-security camp, is for the parole board a tight, highly-regulated, claustrophobic world, a sinister, shadowy, vicious place, peopled by a collection of outcasts compelled there against their will. The maximum security prison, in particular, is a place kept precariously under control by staff continually under pressure, continually confronted by violence and danger. Prison is a world with its own rules, roles, and life.<sup>133</sup>

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133. Some of the best writing in criminology has been that which has documented the life

In many American prisons, life is a hard and cruel existence of violence, forcible sex, drugs, gambling, alcohol ("spud-juice" or "pruno"), and other illicit activities. In some maximum-security institutions this life is taken for granted by parole boards as an inevitable consequence of the herding together of outcasts condemned to confinement for years. It is a life which can "screw'em up terribly. It really can," said a member of the Madison board, who spoke from personal experience of working in adult prisons. "I know that."

[T]he pressure on men is tremendous. There's no place, or time really, for a man to be alone, y'know, in spite of the fact that he's locked up. . . . [S]ometimes frankly they run in gangs in the prisons and they pressure men for every goddam thing: their money, their shoes, sex. Y'know, it can be . . . devastating. . . .

In this world, matters which might otherwise be regarded as of minor importance come to acquire major significance. Failure to observe some of the regulations of the institution (for example, wearing the wrong clothes) can acquire an ominous significance for the parole board. Falling asleep at work is, in prison, punishable activity:

Hal Brandon: He lost 10 days in April.

Debbie Herr: He's a very good tutor.

Brandon: He lost 10 days for falling asleep on the job. (Reading from the institutional report): "I found him sound asleep in the tool store." [A Hamilton case.]

Prison as the context in which such decisions must be made can cast a sinister meaning on what might be regarded in other circumstances as unexceptional, as Carter's case suggests. Thus disobeying a direct order is a grave matter, as in the case where a prisoner disobeyed an order to move a heavy object in the prison gymnasium. He was punished by the institution even though he had been excused from such activity on medical grounds.

On the other hand, many inmates claim to feel compelled to protect their reputations and their sense of personal integrity. They accordingly present the viciousness of prison in mitigation of their misconduct. Prisoners have a good idea of how parole boards think and employ a variety of counter-strategies to present themselves to the board in as blameless a light as possible. In this respect the inmate in a total institution is not totally without power—especially if the releasing authority has to parole a steady number to maintain some control over population levels in its institutions.

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of penal institutions. See D. CLEMMER, *THE PRISON COMMUNITY* (1940); E. GOFFMAN, *supra* note 119; G. SYKES, *supra* note 117; and the collections of papers in R. CLOWARD, *et al.*, *supra* note 117; D. CRESSEY, *infra* note 156; J. JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* (1977); L. HAZELRIGG, *PRISON WITHIN SOCIETY: A READER IN PENOLOGY* (1968); N. JOHNSTON, L. SAVITZ, & M. WOLFGANG, *THE SOCIOLOGY OF PUNISHMENT AND CORRECTION* (2d ed. 1970).

Many of the strategies employed by prisoners hinge on some view of the prison as a place of irresistible pressure:

Inmate: . . . I went to the hole.

Dean Akers: What d'ya go to the hole for?

Inmate: Fighting. Then I lost my job.

[Akers reads aloud the two tickets from the file. In the fight, the inmate is reported to have knocked another prisoner to the ground, then to have kicked him, with the help of other prisoners.]

Inmate: I'm doing a lotta time. This is a very abnormal situation. And there's a lotta racial tension. . . . There's a lotta things here go on where people are abused. . . . I thought I had to stand on my own two feet, rather than go out on the street all screwed up by my experiences in here. . . . Rather than be pushed around or slapped around by someone, I'd therefore be beaten up. . . .

[The prisoner was denied a year, a board member telling him to use his "brain, not brawn."] [A Jefferson case.]

These comments give the impression of an inmate who is accounting for his untoward behavior by appealing to qualities which in a context outside the prison would be regarded as virtues. He wants to stand on his "own two feet." More importantly he claims he behaved aggressively in the interests of his own rehabilitation, so that he would not go back on the street "all screwed up."

The same ploy can also be used to explain failure on the street when a prisoner is readmitted as a parole violator and the question arises of how much more time he must serve:

The only people I knew were people from the joint. I learned about drugs in the pen, it's a good way of killing time . . . you got to go in front of the parole board or the classification committee—it's a good way. It's easier if you're fucked up . . . it helps kill the time. . . . I do beautiful in the institution. I've only had one write-up in my whole time. [A Jefferson case.]

Prisoners frequently claim harassment as a major cause of misconduct. One, for example, gave evidence against another and had his life threatened. Having spent time in administrative segregation, he was still having difficulty with other prisoners. "The people over in F block now, they harass me, man. Like they call me 'snitchy' and things." The prisoner's most recent misconduct (a month before) occurred when another inmate threw a tray of food into his cell, which prompted him to retaliate by doing the same thing to his assailant. This kind of case presents a dilemma to the board—it wishes to sanction misconduct, but is faced by a prisoner who claims his misbehavior



is a consequence in effect of his co-operating with the authorities. On this occasion the prisoner was paroled.

Some prisoners exploit this dilemma by committing misconducts, they claim, to forestall worse behavior.

Jerry Gordon (to an inmate who had had a sex misconduct and had lost five days for fighting): You have some misconducts. What's your excuse for that?

Inmate: I was scared to be on the galleries.

Gordon: But why would you insult people?

Inmate: To go to the box [punitive segregation].

Gordon: (Asks about the sexual misconduct.)

Inmate: I don't make advances here.

Gordon: Where do you?

Inmate: On the street. I'm a bisexual. People don't like homosexuals or bisexuals or snitches. My partner told people I was a snitch the first day I got in here.

[Later Debbie Herr returns to the same theme. The inmate said that people had been spitting into his cell, throwing water and urine into his cell and onto his bed.]

Herr: I know there are lots of problems about serving time, but there are a lot of young men in this institution who manage to do time without your difficulties. Don't you think there's something about your personality that leads you into these difficulties?

Inmate: People don't like a homosexual.

Gordon: (Later returns with a question: "Do you consider yourself aggressive and disruptive?")

Inmate: When I have to be. . . . If someone takes a swing at you in here you can't walk away or you'll get called a punk.

[After further discussion the board reaches a decision, Gordon telling the prisoner: "There are some unresolved areas of behavior pattern that we'd like some clarification on. Meanwhile please try and stay out of trouble."] [A Hamilton case.]

Prisoners do not always suggest, however, that the pressure comes from other inmates. Some try the riskier strategy of complaining that they are being picked on by particular guards. Boards find this an easier problem to handle. Whereas all prisoners share a discredited moral status, guards do not. Plausible accusations can accordingly be levelled at one prisoner by

another; but where a guard is the target, the accusation rebounds to the prisoner's detriment, becoming implausible and merely more evidence of his own manipulativenness, disreputability or, in some cases, of his paranoia.

### *The Meaning of the Ticket*

The tendency in board members to expect good prison conduct as the norm presents inmates with the practical problem of how they display "good conduct." One tactic which has been observed is to behave badly on arrival—to "screw up"—then to "settle down."<sup>134</sup> This provides the decision-maker with conspicuous evidence of "change" for the better. This confers rationality upon the decision. For the educated, intelligent, or skilled prisoners, or those who otherwise cannot be regarded as in "need" of institutional treatment or training programs (a relatively rare category), improved conduct is one of the very few criteria of change open to them to display for symbolic reward by the parole board.

Prisoners do not have a great deal available to them as resources for influencing parole-board decisions. There are institutional programs of various kinds directed towards correction of "problems" or "needs." These are, however, often lacking in some institutions, and some inmates cannot readily be defined as in need of certain kinds of prison programs.<sup>135</sup> The only resource accessible to all inmates, in fact, as a criterion of change, desert, or accomplishment is their institutional conduct. It is particularly important as a criterion also because it is recent evidence of the deviant's behavior and presumed ability to live by the rules.

It is in the context of a holding institution that the meaning of the ticket has to be appreciated. The nature of each institution generates its own set of expectations in board members as to where to expect "trouble" as well as what kinds of trouble to expect. For example, in a minimum-security institution, an absconding, while treated seriously, is not regarded as the grave matter that an escape from a more secure prison is (as the difference in vocabulary suggests). In large maximum-security institutions, on the other hand, the physical arrangements, staffing problems, composition and crowding of the inmate body all conspire to produce an impression that violence and viciousness are commonplace. Paradoxically, however, such misconduct is likely to be treated the more seriously if it occurs in conditions of lesser security.

The issue of consistency arises in particular with the different meanings tickets possess in different institutions. In Madison, for example, in the reformatory

where you have several hundred youthful aggressive offenders housed in an overcrowded situation where they can't move without bumping

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134. See D. Ward, "Prison Rule Enforcement and Changing Organizational Goals," Ph.D. dissertation, University of Illinois, 1960.

135. One prisoner who did not drink but nevertheless insisted on going to his prison Alcoholics Anonymous sessions was regarded by his parole board as rather odd.

into one another, it's inevitable that you're going to have fights, and so you get tickets. And you might put those same guys out on a camp situation where they're not crowded like that and they might not get the tickets.

The ticket has to be evaluated, then, for its meaning in the context of the prison, quite apart from what it may reveal about the prisoner. Not only do structural features in the prison vary, but their staffs are recognized as having different approaches to institutional control. Some wardens, a member of the Madison board remarked, follow a policy of "don't be writing up a ticket every time you turn around. This is a situation you should be able to handle on the spot with a reprimand or an understanding talk with the guy." But, he continued, "young officers I've heard say, in some of these institutions, 'If I don't write tickets, they don't think I'm doing my job.'" This board member thus recognizes that the ticket is the outcome of organizational activity which can be employed by superiors as an index of productivity and commitment. Boards must not only know their institutions, they must know their staffs.

When perspectives, positivist and neoclassical, differ, yet agree that prison misconduct *must mean something*, tickets can be treated as significant in a number of ways. The gravity of the behavior involved in the misconduct is a signal for concern. One ticket alone, if it is an escape or an escape attempt, or an assault on a guard, may well be enough to encourage the board to sanction the misconduct by denial. A persistent pattern of misconduct will also cause anxieties. In determining persistence board members will organize time to create a career of misconduct,<sup>136</sup> linking a prisoner's past conduct with the present in a continuity of view. This is a procedure familiar to prisoners as well as board members. In the following dialogue from a case in Madison, the prisoner was a 35-year-old convicted of attempted felonious assault. Jack Collins remembered him from a previous encounter:

- Collins:            You used to box, didn't you? (Noticing tickets in the file)  
                           Oh, oh. You used to fight, but you still do, don't you!  
                           There was a fight in March, and another in May. Two  
                           months apart. . . .
- Myra Levin:        You had a few tickets when you first came in here. Why?
- Inmate:            Back at that time I was growing into maturity, man, see?
- Collins:            Two fighting tickets since the last flop is real bad. (Further  
                           dialogue establishes that the man had been knifed in a  
                           fight in the institution in the last year.)

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136. See J. ROTH, *TIMETABLES: STRUCTURING THE PASSAGE OF TIME IN HOSPITAL TREATMENT AND OTHER CAREERS* (1963).

- Levin (to Collins): He's very high risk [a statistical category in the data supplied to the board]. We gotta take it back [to discuss further at Executive Session]. (to Inmate): I really think it'll be another flop, but I can't say whether it'll be another year or not.
- Inmate: But what can I do? I got only two [tickets] in the last four years. (He goes on to claim the fighting was only horseplay.)
- Collins: There's no such thing as horseplay.

Here, the suggestion of the violent inmate is established with reference to "a fight in March, and another in May." The significance of this for the board is that those dates are too close and too recent. "Two months apart" suggests persistence and commitment. Levin also establishes that the man had "a few tickets when he first came in," which the prisoner takes as an opportunity to display himself as changed: "I was growing into maturity." After all, he has "got only two in the last four years." However, there is also the matter of the gravity of the recent fighting misconducts, as Collins observes: "Two fighting tickets since the last flop is real bad." The time structure in the reference to "since the last flop" also signals a view of the gravity of the tickets: the prisoner *should have known better* than to have incurred misconducts having already been refused parole.

Inmates know this rule of the game and will try to play down their misconduct or neutralize the impression of culpability where they can. The following discussion took place in a Madison prison with a first termer who had lost 45 days good time:

- Carl Mayer: You sure got a helluva burden of tickets.
- Inmate: I can't justify that. I ain't done time before. I just didn't know how to handle that.
- Mayer: But it's what the tickets imply. It's an attitude.
- Inmate: I was goin' through a kinda phase. Things just came down on me.
- Mayer: When was your last ticket?
- Inmate: May 10—but that was the first for four months.

[The board members then engaged in the following dialogue in the prisoner's presence (and doubtless for his benefit) in reaching a decision.]

- Mayer: I'm afraid the adjustment's been that poor.
- Dan Johnson: It's too bad, I hate to max out a young guy, but, hell, 30 tickets! And you sound pretty good today—and some of them have been pretty aggressive.
- Inmate: I'd hate to max out.

Mayer: But all you can do is try to earn back as much good time as possible.

[Then, turning to the writing of the report on the hearing, Mayer continued: "The inmate has two convictions and during incarceration has incurred many misconduct reports and has not given the parole board assurances it needs to parole."']

Johnson: (By way of explanation of the decision to me after the inmate had left the room): "Nature of tickets with nature of crime".

The board's apparent reluctance to turn the prisoner down is evident: He was a first term, and a youth when the crimes were committed, both features regularly being treated as mitigating, hence G.F.'s remark, "I hate to max out a young guy." He was also sounding "pretty good" at his hearing. For his part the prisoner had not "done time before," so he did not "know how to handle that." And he could claim an interruption of four months before his last ticket, in the hope that the board would treat that as evidence of a change for the better. In fact, the board members' reluctance about refusing parole is probably as much apparent as real or ironic; expressions of regret, after all, serve as a way of "cooling out" the prisoner.<sup>137</sup> In the first place the inmate had "a helluva burden of tickets." Secondly, and more ominously for him, "It's what the tickets imply. It's an attitude." In other words, Mayer was prepared to articulate a positivist view that there is predictive relevance in the tickets; a position endorsed by Johnson with his linking of "nature of tickets with nature of crime." Mayer, as the prisoner had sensed, was probably searching for a sign of change when asking when the prisoner's last ticket was. It was two months before, though as the inmate hastened to point out, it was the first for four months. Board members normally prefer not to have such recent tickets, and recency in this case was the more sinister given the thirty or so tickets this prisoner had amassed.

In confronting cases of institutional misconduct, the prisoner's ticket is treated by the board as reliable evidence (indeed all reports from official sources are generally invested with an aura of reliability). With few exceptions, institutional records of misconduct are treated as accurate, as possessing a concrete, definitive quality. Prisoners, however, often have denials or other explanations for their misconduct which are totally at odds with the account in the record. Since the prisoner occupies a discredited moral status, board members find it extremely difficult wholly or even partly to accept his version of reality: To do so would impugn the integrity of institutional staff involved either as recorders of the misconduct or occasionally as victims of it. And the prisoner who does challenge the record runs precisely that risk.

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137. E. Goffman, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, 15 *PSYCHIATRY* 451 (1952).

This says more to the board member about the prisoner than about the staff.

Since board members have to rely on a written account of controversial incidents which are not tried by procedures of any great formality, and since they routinely expect prisoners to attempt by whatever means to play down the alleged misconduct, they draw inferences from the written record about the gravity of the misconduct, a practice which confers a substantial authority upon those institutional staff who have a direct input to the documents going to the parole board. If emphasis is needed they can also take advantage of the personal contact which occurs when the board visits the institution. "I've done that," said the warden of a large prison in Madison:

in terms of—maybe discussing a case with the board saying, "Look at this type of behavior in the institution." That's done in several ways, that can be done from the standpoint of the man's involvement in difficulties in the institution by simply putting reports in the file. . . . Where I see certain things in the institution I'll put "Parole not recommended." That's saying to the board that I, as Warden, am not supporting this particular case.

Hawkins:           And when the Warden of a major institution like this says that, presumably the board will go along?

Warden:            I would think so, yes (laughs).

In these circumstances, a parole board is as much ratifying a decision already reached by others as it is making a decision of its own (and in any discussion about the decision members would make they tend to focus on whether or not they should accept a recommendation, rather than whether they should release a prisoner). Board members realise, however, that in receiving the views and reports of institutional staff they confront the problem of consistency and commensurability in justice.

The issue of commensurability becomes significant when boards address the gravity of the institutional misconduct in the context of institutional sanctions already applied. This is an important matter for board members. Some inquire in minute detail into the wording of a ticket for a sense of the gravity of the misconduct, for if it is a minor matter it can be left with whatever sanction the institutional staff will have imposed. Indeed the institutional sanction is itself carefully noted as a means of penetrating the typically terse misconduct reports which find their way into the prisoner's file. As with the prisoner's original crime, it is crucially important for the board to know "what actually happened." An invariable relationship is assumed between the gravity of the institutional sanction and the gravity of the misconduct. This leads to an unfortunate irony, so far as the prisoner is concerned, for the more serious the infraction is judged to be by virtue of its sanction, the greater the likelihood of its being punished further by the parole board by denial or deferral of parole over and above the sanction already imposed by the institution.

The use of institutional sanctioning practices as an index of gravity is suggested in the following case from Hamilton:

An inmate serving three to seven on assault first (shooting and injuring a fifteen year old boy) had some disciplinaries the previous year, including one (he denied) in which he was alleged to have thrown a water bag at an officer. Hal Brandon read the most salient details out to the rest of the board before the prisoner entered, listing the misconducts together with the sanctions, concluding: "So in substance he got a two-week loss of recreation for all of this. The words 'attempted assault' look a lot more serious than the ticket does." The prisoner was later given a short denial partly because of his "poor judgment . . . as evidenced by his tickets," as the board's written reasons put it.

Here, it seems the board secretary draws the conclusion that despite the apparent repetition of violence, the trivial sanction imposed by the institution indicates misconduct that is not serious. Boards are willing to rely on the institutional staff's view about the appropriateness of their sanction because, being closer to the action and having the keenest possible concern for control, they know best. Besides, the boards' abiding concern with the symbolism of their activities does not permit them to make decisions which are interpretable as critical of—and thus as undermining the authority of—institutional staff. Accordingly it is important for the parole board to know about the prisoner's transfers, his time in segregation, his loss of good time—and how many days have been lost—and so on.

Because of the stance of scepticism<sup>138</sup> adopted by board members when considering central issues in the decision (such as original crime and prison misconducts) in which a prisoner has a vested interest in presenting his actions to the board in a particular light, tickets can be made to acquire a very sinister meaning in some cases. Information elsewhere in the file or sometimes passed orally to the board can transfigure the account presented in the ticket. At a term fixing hearing in Jefferson, a young armed bank robber was involved, according to the ticket, in a fight. A board member, discussing the case before the prisoner entered, said, "He's supposed to be disabled—but he was fighting with another guy and the guards think it was a diversionary tactic while another guy tried the wall. . . . It was planned at least three weeks in advance."

Here a "fight" is transformed into a much more ominous misconduct, for not only is the prisoner alleged to have been involved in aiding an escape attempt, the incident is the more serious for having been planned in advance. At his hearing, the prisoner, predictably, supported the account as presented by the ticket, even displaying himself as partly to blame: "I'm small, and I have a bit of a loud mouth. I guess I don't get on in an institutional setting at all."

#### *Bargaining and Institutional Control*

Where board members encounter prison misconduct cases which they would otherwise be prepared to parole, they are frequently confronted with

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138. K. Hawkins, *supra* note 5.

yet another dilemma. System pressures, which require a fairly stable and predictable turnover in numbers to keep prison population levels under control, may encourage or indeed compel them to be relatively tolerant in their approach to the question of release. Perhaps as important, however, is the fact that the board member's own sense of what constitutes a just proportion of time for crime resists too much distortion of the crime-punishment equation in the interests of sanctioning institutional rule-breaking. Yet the interests of institutional control demand recognition of rule-breaking.

This dilemma is resolved by parole-board members resorting to bargaining. The prison troublemaker will often be told, "Keep your nose clean for six months and you'll get out." Earlier release risks the appearance of condoning the misconduct, yet where a prisoner may have been turned down in the past, the board will be conscious of the fact that continued denial well beyond the expected range of the prisoner's term risks the appearance of vindictiveness—even though he may be branded an institutional troublemaker—quite apart from adding to the prison population burden. To bargain with the inmate about his good behavior is a practical compromise to the dilemma: The marginal cases are (eventually) paroled while the bad behavior is marked and the capacity to deter is (presumably) retained.

The bargain is arranged either by giving the prisoner a parole release to take effect some months in the future, conditional upon his good behavior, or by denying him for a relatively short period on the understanding that a display of compliance in the meantime (significantly described as a "demo" in Madison argot) will be rewarded with a parole:

The third termer is up on a short pass. Myra Levin explains that he is being seen because his conduct record, with a ticket for disobedience, is not good. Grant Jacobs adds that the board cannot parole today because the prisoner has another ticket for soliciting sexual favors from other inmates. "If we gave you another short pass," says Levin, "could you try to bring us clear conduct? No tickets?" Jacobs adds, "What we're thinking about is an October date [it is now July] providing there's no foolishness. Now cut that out. . . . We're talking about October, so don't screw it up. You already screwed one of'em up."

Sometimes a prisoner is told explicitly that his institutional misconduct is the sole reason for his being kept. In less serious cases the board finds it irrational to parole where there is persistent institutional misconduct, as the following dialogue (done partly rhetorically, for added force) between two board members in the prisoner's presence suggests. (The 20 year old Madison prisoner had already been flopped twice.)

Jack Collins: Why so many misconduct reports? . . . So we were saying we were ready to let you go if you could hold yourself together. When was the last one?

Myra Levin: Three months ago.



- Collins: Boy! We were trying, weren't we!
- Levin (to prisoner): You could've gone in February and then in May. It means the board is not terribly worried about your conduct, but about your institutional behavior because it says something about the way you're likely to behave on the street.
- Levin (to Collins): How about nine?
- Collins: O.K.
- Levin (to prisoner): Can you go to February without getting any more tickets? If the report is cool, you can go out in February.
- Correctional Counselor: But you also understand that if you blow up again that's just the date you'll be looking at [referring to the maximum sentence].
- Collins: I just been looking your file and you ain't got no criminal record. You're being kept in this joint because you can't make out in here.

[Prisoner leaves.]

- Correctional Counselor: He's not a bad kid, but he just runs his mouth all the time.

In this case, the overt rationale for refusing parole yet again is interesting and familiar: The inmate's behavior says something about the way he is likely to behave on the street. Even if the board members do not believe it in any specific case, the justification does at least have the appearance of rationality—and the prisoner might possibly believe it.

The degree to which a bargain will be honored is evident from the following case where the board had second thoughts about a prisoner's suitability:

A man on his fifth prison term had only two years left on his sentence, having already served over eight. His record included three robberies and two escapes; he was classified statistically as a "very high" risk in terms of his propensity for further violence against the person. The Madison board in Executive Session agreed not to parole him. Then Cal Smith saw a note in the file that the board had promised the man a parole if he kept his nose clean—and he had. The board reluctantly reversed itself, agreeing to parole to keep its word.

But where the bargain is broken the board will not hesitate to deny parole; such is the degree of concern for not appearing to condone misconduct. In

the following case (also from Madison) a 29-year-old fourth termmer had already been passed over three times for nine, four, and six months on the grounds of his misconduct record in the institution. The board finally ordered parole. Subsequently the inmate was found during a shakedown to have twelve sticks of marijuana up his sleeve. He claimed he was holding it for another inmate:

Jack Collins  
(discussing the  
first refusal):

At that time you had half a million tickets, didn't you! Then you began to shape up. Or at least it looked that way. You didn't get so many tickets, but then you blew it and got more tickets. Are you 30? (Inmate says he will soon be 30.) 30 years old. (Pauses.) Should I preach? I don't normally preach. You're 30 years old and the board's beginning to wonder whether you want to stick around here, rather than go home. (Inmate protests his innocence of the marijuana misconduct.)

Correctional  
Counselor:

Why was contraband up your sleeve if you were innocent?

Collins:

Actually we've been trying to coax you out of prison, to get you out, to shape up, to get you out of this joint. . . . Perhaps you like it in here too much?

[After further discussion of the inmate's attitude Collins decides to refuse parole and tells the prisoner the case will have to go to Executive Session to determine whether the pass should be six or twelve months.]

Inmate  
(angrily):

What's all this over? That one ticket!

Collins:

Yes. That one ticket. That says volumes.

In this case the one misconduct was apparently the sole criterion. Its force may be judged from the fact that the prisoner was convicted of breaking and entering—not normally regarded as “serious”—and he had already been passed over on three prior occasions, apparently in recognition of his unruliness since “B and E” men are not normally flopped more than once, if at all. While the Madison board tended not to regard possession of marijuana as a minor violation of disciplinary rules, it is also the case that this charge was treated as substantially less serious than escape or tickets for violence. But the prisoner was defined as persistent in his misconduct, and persistence had to be sanctioned.<sup>139</sup>

Since the bargain is bound up with exemplary decision-making, the prisoner must conspicuously be seen as having lived up to his side of it:

139. Those inmates who have particularly bad records of erratic behavior inside (“the unstable”) can also be handled in the same way. They may be required for their “demo” to

The prisoner had been involved in a sawn-off shotgun robbery of a store. He had been passed over for nine months at his first hearing, subsequently receiving a number of tickets and the loss of seven months' good time. The inmate claimed he had been harassed by another prisoner and by officers "writing him up" [giving him tickets]. The board member read out a list of infractions from the file, concluding with ". . . but since February you've been clear."

"I'm looking you right in the eye as I say this," Carl Mayer continued, "cause I'm going to go back on my word. I saw you last time and I remember it very well. But you've not lived up to your side of the bargain. For me it's going to be a flop. Program-wise you're doing some good things but the tickets reflect an attitude you gotta put right before you get outa here. How can a guy get such good program reports and such crappy disciplinary write-ups?" Mayer suggested a nine-month pass. His colleague, Dan Johnson, was slightly more favorably disposed and suggested six months. Mayer agreed with reluctance, telling the prisoner, "And I'm biting my tongue on it, I want you to know." In the notes written at the end of the hearing the board members said they wanted a "clear conduct record as assurance." As the inmate prepared to leave Johnson said, "You were expecting a year, right?" The prisoner smiled and agreed. The institution had recommended a twelve-month flop, but he had a date in six months if he behaved himself. [A Madison case.]

Inmates therefore have to play the game to get out by doing in prison what parole boards define as appropriate for their "problems" or "needs."

Bargaining is facilitated in those jurisdictions where there is personal contact between prisoner and parole board and the board gives reasons in person to the prisoner as to why he has not been released. In these circumstances the board is able to announce to the inmate what he must do in the future to achieve a favorable verdict. Indeed, a system of personal hearings (commonplace in the U.S.) greatly facilitates bargaining between board and prisoner; presumably the sanctioning force of a denial is weakened where there is no personal contact between parole board and prisoner, as in the present English parole system.<sup>140</sup> It is in the interest of those American parole boards which give reasons to prisoners in person for a refusal immediately after the hearing to spell out what the prisoner must do to secure a favorable verdict in the future. If he conforms, and does what is

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continue their term successfully in open population in the institution. This also offers the board a means of rationally releasing the prisoner who has proved difficult but who has certainly served his time on other grounds.

140. One of the criticisms made about the English parole system, where there is no personal hearing nor any reasons given for a parole refusal, is that the system denies the possibility of implicit bargaining. The prisoner who is not told why he has been turned down cannot know what he has to do to receive more favorable treatment the next time his case is considered. K. Hawkins, *Parole Procedure: An Alternative Approach*, 13 BRIT. J. OF CRIMINOLOGY 6 (1973).

required, the board has been presented with grounds (which it has already defined as suitable) for release. In other words, a subsequent release appears to be rational. A failure to abide by the rules is open to interpretation as a reason for not being paroled by inmates and staff using common sense conceptions about punishment and reward in conjunction with the common stock of knowledge in prison about board practice.<sup>141</sup> In a bureaucratic, depersonalized system like the English, however, the interpretive work in which staff and inmates must engage is altogether more precarious, though no less inevitable.

Where board members have personal contact with prisoners, they frequently exploit their position of authority in support of institutional rules: "You know enough to do what the guard says. You know you can't win. Just go ahead and move when the man tells you to move."

In cases where prison misconduct has been a central issue, hearings frequently close with a blunt exhortation, pitched in terms which inmates most readily grasp: "Quit bein' stupid. You ain't no big-time hoodlum. Stay cool." The frequent use of such forms of exhortation suggests that prison conduct is very largely viewed as a matter within the prisoner's choice and control, rather than as evidence of pathology:

Myra Levin

(having agreed

to parole):

Can you try to bring us good conduct if we do that? If there are tickets you'll max out.

Inmate:

I wasn't expecting that, but I'll do that much for you.

Levin and  
Collins (to-  
gether as a  
chorus):

It's not for us, it's for you.

Jack Collins:

I've heard a lot of guys over the years say, "Man, do I want out." But they don't act like it. You learn that there are other things more important like saving face, peer pressure, and the rest. Those are the things that are more important to them than getting out. [A Madison case.]

In prisons where inmate unruliness is a major problem, board members may often present a very clear inducement to a prisoner: they offer him a release—but not an immediate release—and in return he "keeps his nose clean." One Hamilton case observed in 1968, for example, involved a man convicted of a violent crime who had a long record of misconduct in prison. There had been no reports of trouble, however, since his last hearing. It was made clear to the inmate by the board that his misconduct was the only reason why he had not been released earlier. The chairman of the board congratulated the prisoner on his better conduct and on two separate

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141. P. Morris & F. Beverly, *Myths and Expectations: Anticipations of the Parole Experience*, 1 *ANGLO-AM. L. REV.* 153 (1972).

occasions within the space of a few minutes told him that the board was quite willing to be "conned" so long as he avoided collecting disciplinary reports. This, the chairman explained to the prisoner, would give the parole board good reason to make a favorable decision. In the discussion following the departure of the prisoner, the chairman remarked that the inmate had kept his nose clean for a year. "He may be conning us about his good behavior", said a colleague. "But at least he's succeeding", was the reply. The board decided to grant parole. The chairman told the institutional parole staff that the prisoner should be informed that any subsequent misconduct would be treated very seriously indeed. Furthermore, a note should be sent to the inmate informing him that the board wanted "exemplary conduct" from him for his remaining period of imprisonment.<sup>142</sup>

This kind of compromise is another means of displaying the decision to the prison population as rational.

Carl Mayer was concerned with the prisoner's tickets when discussing a case in an Executive Session of the Madison board. "To outweigh the tickets, has there at least been some programming?" he asked. "Has he done a trade?" On hearing a colleague respond by reading details of the four tickets to him, Mayer concluded ruefully, "Gee. Sure doesn't give you much to hang that [parole] on."

Without a conspicuous show of approved behavior as the prisoner's contribution to the bargain board members will be anxious about appearing to condone misconduct in the eyes of the inmates *and staff* and thereby to risk an attenuation of the deterrent authority of a parole board denial. The interests of control require again that some minimal sign of good conduct be offered by the prisoner. The appearance of good behavior will help erase less favorable features in the prisoner's case, as the following example from Madison of a third termer who had already been refused a year earlier suggests. He had an escape in his record. The discussion turned to the man's institutional misconducts:

Inmate: I can't live down my past.

Carl Mayer: Yes you can. The only way is to stay cool, man.

[The board decides on another twelve month flop.]

Inmate: I was looking to be released today.

Carl Mayer: You can go this year and stay clean and we'll see what we can do. . . . We don't care where you do it, just stay clean. If you don't come out clean, you're gonna max out.

The board member here is not concerned in the slightest with the rehabili-

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142. This case is taken from K. Hawkins, *Some Consequences of a Parole System for Prison Management*, in D.J. WEST (ed.), *THE FUTURE OF PAROLE* 96 (1972).

tation program, just that the prisoner "stay clean." Bargaining about institutional conduct is apt, then, because it is conduct which is generally recognised as that part of the prisoner's institutional performance which is most within his control. In Madison and Hamilton the bargain will be quite explicitly understood as such, while the same is true of the term-fixing hearings in Jefferson.

Craig Friedman  
(discussing the  
case before the  
hearing):

I'd say about 30 to 33 months then offer some sort of acceleration if he goes into some drug program up to a year. What do you think?

Mark Sutton: O.K.

Friedman (subse-  
quently giving the  
decision to the  
inmate):

We also said six months *[with] no problems in the institution*, we'd parole you to an inpatient drug program. (My emphasis.)

The giving of reasons to prisoners in person is a relatively recent practice in many American parole systems, having been introduced in the last ten or fifteen years as a concession to the movement towards more due process and greater administrative accountability. The uncertainty which existed where reasons for action were not made clear, as in the traditional indeterminate sentencing and parole systems, provoked considerable criticism from commentators. In the most familiar criticism of the indeterminate sentence there was uncertainty, it was claimed, as to the amount of time a prisoner would have to serve.<sup>143</sup> But there was also uncertainty as to the criteria which had been—and would be—treated as significant by the decision-makers. Both kinds of uncertainty were condemned as the source of poor inmate morale.

For institutional administrators, with their concern for efficient management, the morale of both inmates and staff is a constant preoccupation. The power to manipulate terms served is regarded as having profound consequences for the atmosphere within a prison. Yet the uncertainty inherent in parole-board practices gives prison managers a much less sanguine view of these effects of administrative discretion, and one which has proved to be more persuasive to policy-makers in recent years. In traditional parole systems the positivist rationale exploited the coercive force of uncertainty. Inmates will do what they can to get out, it was assumed, and uncertainty as to precisely how long they will have to serve concentrates their minds on good behavior and self-improvement. As an administrator of a traditional parole and indeterminate sentencing system (in Western State) once remarked,

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143. See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); D. FOGEL, "WE ARE THE LIVING PROOF": THE JUSTICE MODEL FOR CORRECTIONS (1975).

with a comment which could be taken as a prototypical statement of positivist ideology:<sup>144</sup>

With this system, you don't fix the time [in advance]. You keep [the prisoner] agitated. You keep him nervous. You keep him worried. You keep him wondering what's wrong with him. You keep working on this [for him] to get some insight. Then, when he comes up before the board, why, he's been working on his problems and he's better equipped to do something about them when he goes out.

The logic supporting the long maximum terms and the high administrative discretion of the traditional parole system is here very persuasive, provided the dubious assumption about prisoners' responses to uncertainty is accepted. The problem of uncertainty is exacerbated when staff do not understand the parole board's decisions because they, too, are unclear as to what to do to prepare the prisoner for more favorable consideration in the future.

Criticisms of uncertainty about the criteria, rationale or timing of decisions claim that when a prisoner does not know what the board based its refusal on in his case he will not know what to do to improve his chances next time. Perhaps the problem is more subtle than that, however. Prisoners know very well the rules of the game that they and parole boards play. They know what the board is looking for. It wants, in the language of the prison, "To see you walk that walk and hear you talk that talk." The real source of uncertainty arises from the fact that the prisoner does not know how the cues he presents next time will be interpreted. A man who 'keeps his nose clean' cannot rely on getting out unless the board has specifically bargained with him to this effect. And even then it is a chancy matter (unless there is a written record of the bargain) for if a subsequent panel, comprised of different members, evaluates him less favorably (for whatever reason) the prisoner will be typified as 'knowing how to do time' (grounds for suspicion reducing the likelihood of release), rather than as 'having made a good adjustment.'

In parole systems where many prisoners may expect to see the board on more than one occasion, inmates may become the victims of competing definitions of central concepts like "crime," "problem," or "need" employed by board members, quite apart from potentially conflicting assessments of whether they have "genuinely" been motivated to participate, whether they have given a "sincere" account, or whether their self-portrait is "trustworthy." The problem is one of consistency, both in terms of how the same case is dealt with over time by different decision-makers, and how potentially similar cases are dealt with at the same time by different decision-makers. Both effects are visible to inmates, particularly the former. Competing definitions of salient features arise where the prisoner is judged by different board members, as usually happens where boards split into smaller panels to conduct routine hearings. A prisoner will normally find himself

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144. K. Hawkins, *supra* note 68.

seen subsequently by a panel consisting of different board members. And even if he is confronted by the same board member who interviewed him on an earlier occasion, it is by no means the case that that member will play much of a part in the subsequent decision, especially in systems where turn-taking practices in interviewing and proposing a decision operate.<sup>145</sup>

The compromise of bargaining is a further facet of the parole board's preoccupation with rationality. Where the parole of a persistently and continuously troublesome prisoner would appear to staff and inmates alike to be irrational, the unruly inmate who spends time in general population and succeeds in keeping himself free from tickets displays himself to the prison community not only as compliant but thereby as improved, this visible evidence of change for the better making a decision to release seem reasonable.

A concern for appearances, however, poses problems when the board is confronted with a prisoner who persists in his misconduct, but the board needs to maintain population turnover. As one member said in such a case, ". . . it's kinda hard for us when you keep having infractions." A concern for appearance as much as substance reveals the game-like quality of much of the bargaining which goes on. For example, in the following case the inmate wanted to be quite sure he knew the rules the board would play by:

The prisoner had been seen twice already and had collected six disciplinaries in the meantime. The decision hinged entirely on his prison conduct, Jorge Martinez, the board chairman, concluding "He's dumb. He makes no attempt to play along with the system. If we give him a long date on the understanding that if there are any misconducts we'll take away his parole?" Subsequently the chairman announced the decision to the prisoner:

- Martinez:           The decision is to give you an extended parole on March 1, 1980 [i.e. six months later], but it's contingent upon you getting no misconducts. . . . If you really mean you don't intend getting any more misconducts you have a parole in your pocket.
- Inmate:             But I never came in here with the intention of getting misconducts.
- Martinez:           I know. But you've been in here four years and you ought to be able to see the situation coming. . . .
- Inmate:             O.K. What are you talking about? One misconduct or—?
- Martinez:           We'll hear about them and we'll evaluate them. Make a special effort. O.K.? Good luck. [A Hamilton case.]

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145. *Id.*



This system of bargaining has operated in an informal way for years. In a penal system ostensibly committed to rehabilitation, the very foundations of institutional treatment programs rest on the parole board's ultimate authority to coerce inmates to take part in them by the prospect of early release. Prisoners, as always, also know the rules of this game. They know that board members are looking for evidence of a commitment to prison programs which is explicit, visible, and "genuine." So far as prisoners are concerned, their motive for engaging in treatment programs may simply be a desire to provide the parole board with the evidence of commitment it is looking for, allied with a wish to relieve the tedium of months or years of incarceration. For their part, parole board members approach the task of evaluating a prisoner's commitment and accomplishment with a degree of suspicion that may stem partly from an awareness that prisoners know how to play the game. Perhaps more important as a source of suspicion, however, is the fact that the motives and accounts of the morally disreputable are suspect. They are much more likely to be explicitly regarded as adopting the ploy of presenting the board with the kinds of evidence it is looking for. They are seen in this way because the board will be looking for evidence to confirm the model it has already established of the prisoner's moral disreputability, which has been created by his crime and record. The more morally disreputable the prisoner, the more likely he is to be deemed able to con the board, or the more likely he is to be defined as dangerous, *because* his motives are suspect. Where the prisoner is regarded as less morally disreputable, his motives for engaging in prison programs will not be enquired into.

### *Parole Boards and the Administration of the Penal System*

While the power to control time served in individual cases confers a substantial authority over prisoners, seen in the aggregate the general power to affect terms served by all prisoners eligible for parole (that is, the great majority of state and federal prisoners) grants another kind of control to parole boards that derives from their position in the network of relationships with other agencies in the penal system. Parole boards enjoy, in effect, a substantial authority to affect the administration of other parts of the penal system with their control of prison population levels and the allocation of punishment.

Maintenance of population equilibrium is to be observed wherever people are processed by officials possessing wide discretion. For example, though the police<sup>146</sup>

could readily multiply the number of arrests for some petty offenses, they somehow manage to produce just the right number to keep the courts busy and the jails full. With the same uncanny instinct they burden the hospital just to the limit of its capacity.

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146. E. Bittner, *supra* note 87, at 280-281.

Parole boards stand close to the center of a network of relationships with other agencies which all have an interest in the punishment of offenders. In practical terms this means that these agencies are also concerned with the amount of time being served by prisoners. They are in a position to help maintain the equilibrium of the loose federation of different institutions and agencies which comprise the criminal-justice system by controlling prison input and output rates, and, hence, prison population levels.<sup>147</sup> This in turn has major implications for the costs of the penal system.

The control of prison population levels is a matter of abiding concern in penal systems. Excess population levels occur from time to time posing considerable problems for penal administrators. During fieldwork, all three states (in common with most other state prison systems) were suffering acutely from a crisis of overcrowding. Parole boards are well placed to alleviate such problems, of course, in a particularly smooth and discreet fashion. Indeed, historically the emergence and early administration of parole was tied closely with the desire to ameliorate the difficulties of crowded institutions.<sup>148</sup> In California, write Berk *et al.*, "starting in 1907, regulation aimed at gearing the growth of the prison population to available and expected resources became a fundamental, if somewhat fumbling, part of the incarceration process. . . . [T]his was probably true outside of California as well."<sup>149</sup> In England the prisons have for several years been burdened with a plethora of inmates and it is interesting that the capacity of the parole system has recently been extended to render more prisoners eligible for consideration, in an effort to bring prison population levels (generally regarded as at crisis point) under greater control.<sup>150</sup>

The problem of overcrowding in the prisons is a significant item in parole decision making in at least three senses. First, it serves as a *context* in which decisions in individual cases are made. Overcrowding in this sense is a matter impinging on the tolerances which operate in any particular decision. In the words of a senior prison official:

The law of supply and demand certainly operates here. If we've got an overcrowded situation, the board looking at us would say, "We've got to do everything possible to extend co-operation to alleviate the overcrowding situation."

Secondly, overcrowding may be an issue prompting the adapting of general parole *policy*, as a member of the Madison board suggested:

We've pulled certain types of cases and we've gone through as many as 1500 cases at one time. Certain types of cases, first offenders, no

147. See R. Berk, S. Messinger, D. Rauma, & J. Berecochea, *Prisons as Self-Regulating Systems: A Comparison of Historical Patterns in California for Male and Female Offenders*, 17 LAW AND SOC'Y REV. 547 (1983).

148. K. Hawkins, *supra* note 68.

149. R. Berk, *et al.*, *supra* note 147, at 580 (emphasis in original).

150. HOME OFFICE, REVIEW OF PAROLE IN ENGLAND AND WALES (1981); REPORT OF THE PAROLE BOARD FOR ENGLAND AND WALES FOR 1984 (1985).

. . . juvenile history, no prior history, non-assaultive offenses, [predicted risk] low and low, and this kind of business. And we screened them for . . . special paroles, we made special arrangements with the courts on it. We've done several things on our own, and we've talked with the Director [of Corrections] about . . . moving people to Correction Centers more quickly. . . . We are conscious of the problem and we do something about it when we can, on our own.

Thirdly, overcrowding may sometimes be employed (as bad behavior by a particular prisoner is) as a criterion in an individual *case* decision. Another member of the Madison board had this to say:

Hawkins: Are you conscious of [overcrowding], however vaguely, shaping the way you do your work. . . ?

Mayer: Yeah. I do. I am. There's no question about it. You get the B and E [breaking and entering] guy, the first offender with a two to something or other. He hasn't been in school . . . y'know he's just been doing his time. You say, "Well, I'll take a chance on this guy," you know. And if he doesn't look too bad and not too many tickets, and the adjectives are not that extreme. . . .

The core of these processes is "a concern for maintaining resources sufficient to establish or continue the uneasy peace that is usually found inside prison walls".<sup>151</sup> Members of parole boards are well aware of the pressures on the prisons and the management difficulties which prison staff have to endure when institutions are crammed full. In the words of yet another of the Madison board: "I know living conditions for the inmates, the possibility of riot for the staff, the not-being-able-to-do-your-job that overcrowding causes." Overcrowding is both a matter of public concern in most states, as well as a matter of considerable significance for correctional budgeting and planning. At the same time it is also, of course, a matter of personal significance for individual inmates. It affects the quality of life behind bars. Crowded institutions are widely regarded as even more unpleasant places to live in; and there are implications also for the security conditions under which prisoners are held, and their privileges, such as the number of visits they are allowed, when the available staff resources are spread more thinly. In some cases prisoners will find themselves being transferred to less congenial locations, and they often discover that this also results in elimination of their opportunities to win parole by engaging in programs to display themselves to parole boards as "improved." In Madison and Hamilton, for example, the county jails were being forced during the research fieldwork to hold some of the surplus population from the state prisons. One Madison prisoner who had "problems" was denied at an Executive Session ostensibly because she had not participated in any programs. But the

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151. R. Berk, *et al.*, *supra* note 147, at 580.

board recognized that the woman had no choice in the matter, having been transferred to the county jail because of overcrowding, one member commenting, "This is a sad case; it shows what overcrowding can do." To this the chairman added, "Certainly needs a lot of help, and she's not getting it in jail."

It is as a problem of organizational management, however, that overcrowding is regarded with greatest concern. It is a widely-held belief in the prisons, and one which parole-board members are well aware of, that an overcrowded institution causes problems of control.<sup>152</sup> A parole board responsive to these concerns, therefore, may seek to effect an easing of the management difficulties: It is, after all, in a suitable position to achieve some reduction in the average length of term served. Even a slight reduction can have substantial impact upon population levels. The trimming can be made flexibly and virtually invisibly. Furthermore, the board also possesses some control over input to the prisons with its decisions about parole revocation. As a member of the Jefferson board said, "There's a good 20 per cent of people [parole violators], I've reinstated on parole because of the current overcrowding." The precision of this figure is not as important as the fact that the remark suggests that the board member was sufficiently conscious of population pressure for it to have been employed by him as the crucial criterion in a proportion of cases. The same concerns reach down to those who work in the lower reaches of the organization to become a determinant of the screening decisions made by parole officers about whether to recall parole violators to prison. Emerson<sup>153</sup> quotes one officer as saying: "In the long run, you can't have too many or too few returns. You usually don't have to worry about having too few because there's a natural recidivism built into your caseload. Usually you have to worry about too many returns. Sometimes you have to take it easy. You have to ignore things you don't really want to ignore."

Institutional staff believe that overcrowding makes their job more difficult: "We've had problems with large numbers [for the last five years]," said a prison warden in Madison.

I've never liked it because of all the pressure it puts on all your facilities, the anxieties it produces for prisoners and for staff. It's not a healthy environment in which to have prisoners and staff all the time. But then in terms of having any major—major—problem as a result, we've not had them. [His emphasis.]

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152. One example (according to preliminary analysis of the problem) of the trouble which institutional officials seek to avoid occurred in February, 1980, when the population level at the New Mexico State penitentiary reached a critical point and erupted in violence in which more than thirty prisoners died. In a study of the effects of overcrowding, the authors concluded that "the sheer population size of an institution exerts a negative influence on its inmates": G. MCCAIN, V. COX, & P. PAULUS, *THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR* vii (1980). A further finding was "a progressive and measurable increase in negative effects with an increase in housing density." *Id.* at iv.

153. R. Emerson, *supra* note 91, at 441.

The staff in institutions accordingly have a substantial incentive to see that the discretion of parole-board members is exercised in particular ways which help manage the population levels in institutions while not threatening their control of inmate conduct. One of the doubtless apocryphal stories of parole-board behavior which used to be current in a mid-western state was that it did not pay to see the board on a Monday. Friday was much to be preferred because by then the board members would have calculated their release rate for the week, discovered they had been too intolerant, and would compensate at the end of the week by releasing marginal cases more readily.<sup>154</sup>

Board members find that their attention will be drawn by institutional staff to population pressures as a matter of routine:

You get it [pressure to help reduce overcrowding] every time you get in the Warden's office. He'll say "Jesus Christ, give me some help." And you've got to be responsive. You might be able to relax a little, a month or two. But sometimes you just can't.

These remarks were made about the position in Madison. But it was the same in Jefferson. One set of hearings began with the associate superintendent of an institution putting his head round the door to greet the board members with the remark, "We got more in here than we got space for." At another institution in the same state, explicit and continuous pressure was exerted upon the parole panel by the institutional counsellor who was sitting with the board. For example, when asked his opinion of a particular prisoner's prospects, he said, with deadly seriousness: "So far as I'm concerned he's ready to go. We need the cell space." It was probably this comment that provoked the board members to tease the counsellor about the haste with which he was trying to push matters through to favorable conclusions during the case which followed. It prompted a board member to comment: "You sell roller skates, don't you?" To which the counsellor replied: "I need the cell space." Hamilton, also, was no exception to the pattern of overcrowding observable in the summer and fall of 1979, when fieldwork took place. In that state, for example, the position was described tersely by the chairman of the parole board as, "Past capacity. The worst it's been." The Guards Association in Hamilton had also formally complained to the Commissioner of Correction about overcrowding and understaffing.

The parole board should not, however, be regarded as a valve that merely opens more readily when extra pressure is exerted upon it. Valves are designed to retain contents which are not under pressure, and there is some evidence that parole boards behave the same way by keeping population levels up to a certain point at times when institutions have empty cells. It is in the interest of efficient management to have population levels that rest in

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154. This is an illustration of the way a stream of cases over time may be treated with different tolerances depending on resource availabilities. See the discussion of such caseload effects in Emerson, *id.*

an equilibrium below maximum capacity, but not in the personal interest of staff for population levels to be so low that they are transferred away to other, less congenial institutions, or that it becomes difficult to run the prison efficiently. After all, prisoners "represent the critical bodies needed for food processing, to fill classrooms, vocational shops, and the industries such as shoemaking, textiles, food preserving, dairying, road construction, and forest conservation. An implicit system requirement is to maintain population equilibrium."<sup>155</sup> In other words, the interests of systems management take precedence over the interests of personal liberty as well as over the interests of punishment. In Jefferson in the late 1960s, for example, the chairman of the board received complaints from the state's Department of Natural Resources that some prisoners based in conservation camps who carried out forestry work in conjunction with the Department were being paroled too soon. It was not a question of the men being regarded as unsuitable for release, but a reflection of the fact that their departure reduced the skilled labor pool, thereby depriving the Department of the investment it had put into the forestry training it had given to the prisoners. Indeed another of the apocryphal stories about parole boards which used to be current in the prisons in a mid-western state drew attention to the need boards have to maintain certain levels of population. Inmates used to argue that the first baseman of the prison baseball team (or the chef, in some versions) should not expect parole during the season (presumably the chef should not expect parole at all).

Whether or not there remains a means of discretionary early release in the form of traditional parole, questions about managing the penal system will have to be resolved in practice, for its priorities transcend the particular penal philosophy ostensibly in operation. "Guards and foremen who are to use work crews efficiently and to maintain peaceful routines, as well as treat inmates," wrote Cressey, "cannot accept a system of discharges, job transfers, and other treatment activities that ignores the institutional necessities and operates solely on the basis of individual needs of inmates."<sup>156</sup> Though these remarks were made twenty-five years ago when rehabilitative penology was at its height, they are also likely to be true of a penal system founded upon individualized punishment, simply because the temptation to try to solve immediate organizational problems by the use of administrative discretion is so great. If the administrative discretion of the parole board is removed or substantially cut down and parole boards abolished or severely constrained by guidelines, the pressures upon the system will force an adaptation elsewhere in the handling system, perhaps with the behavior of prosecutors or judges, as appears to have been the case in California, since the adoption there of a system of presumptive sentencing.<sup>157</sup>

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155. Takagi, *supra* note 84, at 81.

156. D. CRESSEY (ed.), *THE PRISON: STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE* 101 (1961).

157. K. Hawkins, *supra* note 40.

The adaptive capacities of the traditional parole system provided by the flexibility of administrative discretion draw attention to the reciprocal relationships which exist between the various segments of the criminal justice system. The decision practices of parole boards almost certainly reach back in some—as yet generally unexplored<sup>158</sup>—way to influence the behavior of other officials who possess discretionary authority over offenders. For example, since the traditional parole board (that is, the board with at least a moderate degree of discretionary latitude) plays the major part in the punishing of serious offenders by determining how long they actually have to serve, it is likely that board term-fixing practices create a series of general expectations among prosecutors and judges which in turn will affect their charging and sentencing behavior. At the same time this discretionary authority can be employed to serve the interests of other segments of the criminal process. For example, I happened to be present in the chairman's office in Eastern State when he was telephoned by a district attorney with a request for an early parole for a prisoner due up before the board in one of the state prisons in three weeks time. The man was part of an organized crime group and had offered to name three accomplices in return for parole. The district attorney wanted the board's cooperation.

It is the prosecutor's discretion over negotiations as to charge and plea which makes her or him such a powerful official in so many state systems of criminal justice. But where the judge possesses a wide sentencing discretion (in sentencing structures such as the English), he or she also becomes a key figure in the reciprocal relationships in the system. In England parole is often officially justified on the grounds that it has helped contribute to some control being exerted over a burgeoning prison population. This argument is true only to the extent that judicial sentencing behavior is largely constant and unaffected by the relatively recent grafting onto the penal system of an institution explicitly designed selectively to make inroads upon the principle of commensurability as expressed in the judicially fixed sentence. It is possible to argue to the contrary, however, namely that parole may have actually added to prison overcrowding, if its introduction has prompted the judges to lengthen their sentencing tariffs even slightly to ensure that prisoners do a certain minimum of time.<sup>159</sup> Only a minor shift in judicial sentencing

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158. Some of the possibilities here were canvassed in a classic paper, L. Ohlin & F. Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW AND CONTEMP. PROBS. 495 (1958), but this lead never seems to have been pursued explicitly by researchers.

159. This is speculation. A small study by Walker found no effects on sentence length, though it should be noted that his study was conducted on data from the scheme's first two years of operation, when it worked on a very small scale. See N. Walker, *A Note on Parole and Sentence Lengths*, CRIM. L. REV. 821 (1981). It is an accepted principle of sentencing in English law that courts may allow for the granting of remission for good behavior and lengthen their sentences accordingly when treatment or incapacitation are the aims. *R. v. Turner*, Cr. App. Rep. 72 (1967). The position is also difficult to research in England owing to the existence of other factors which have almost certainly contributed to an increase in terms, such as the abolition of capital punishment and the perceived growth in violent crime.

behavior over a period of time would be necessary to produce a noticeable effect on prison population levels.<sup>160</sup>

### Conclusion

The last section of the paper has tried to show that the use of discretion by legal officials has an important administrative aspect. The sanctioning practices engaged in by parole boards in response to institutional misconduct mirror their sanctioning of the prisoner's crime and record.<sup>161</sup> In both, the board's concern seems to be directed backwards to an assessment of a just punishment for what a deviant has done, rather than directed to the future in a prediction of what he is likely to do. The latter, of course, is a rationale of peculiar appropriateness as a means of justifying action taken on other grounds, just as it is in judging crime and the propensity for further wrongdoing. More importantly, however, the sanctioning practices are both intimately concerned with the *management of appearances*. While there is a visible audience of one (the prisoner) for the symbolic decisions made about prison conduct, there are other audiences, unseen and unheard, behind the scenes in the depths of the prison. A theme of this analysis has been a parole board's concern for the appearance of rationality so far as its interested audiences are concerned. Thus a bargain struck will be honored even if a prisoner is subsequently deemed on other criteria to be unsuitable, because a bargain derives its worth for its general audience from its binding force in a specific case. And since a parole board's organizational concern for what is rational is directed towards support of an institutional code centered upon the necessity for control, a major consequence is that *parole board decisions often have little to do with judgments about "rehabilitation," or "risk," or other aspects of a prisoner's future conduct*. The behavior of parole boards in this sense is tantamount to responding to the *form* of conduct, rather than its *content*.

What is important for parole boards, for practical purposes, is that they engage in predictable behavior. Accordingly, they organize their decisions to reflect a coherent and comprehensible approach to the problem of institutional control. A system of disciplinary punishments and rewards is patterned to be readily recognizable, while parole boards at the same time struggle with their own peculiar problem of administrative control, that of maintaining a steady turnover of prison population. Predictable behavior allows its

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160. There is much historical evidence of the relationship between the use of the paroling authority and the numbers of those incarcerated. Indeed many jurisdictions in the early twentieth century were accused of too liberal a use of the parole power as a means of controlling their population levels. The relationship was also recognized in England when the proposal to introduce a parole system was first made; a Government White Paper, *The Adult Offender*, noted, perhaps disingenuously, as grounds supporting the introduction of parole, that it would incidentally go some way to alleviate the existing overcrowding in the prisons. Home Office, *The Adult Offender*, para. 8 (1965).

161. See K. Hawkins, *supra* note 5.



organizational audience the opportunity of making its own decisions *in anticipation of* the parole board's response.

Predictability is also encouraged by a commitment by parole boards to the values of consistency—the principle that like offenders are treated alike. This is a principle which staff and inmates understand; indeed, it is deeply ingrained in the fabric of life in institutions. "Inmates demanded," McCleary writes, "and officials asserted as a premise of prison life that all inmates must be treated equally."<sup>162</sup> Predictability is also a major concern in the internal management of parole board decision-making. Any individual or group which must routinely make decisions finds it important to anchor verdicts in a precedent or series of similar judgments which together add up to a tradition of decisions, however recent or flimsy that tradition may be. Reference to precedent not only helps advance the sense of the rational and reduce the anxieties created by a particular case, it also quells the possibility of a contentious decision among those passing judgment.

When sanctioning institutional misconduct, a parole board's visible behavior resembles the stipulations of a rehabilitative ideology. This is to be seen in the implicit, and often explicit, bargaining which goes on between board and prisoner. In both, a parole release is the great prize offered by the board. In both, the prisoner offers the correction of some part of his conduct or character which is regarded as within his control. Where a board defers or denies parole, this is usually with the implied suggestion that the prisoner needs to take some particular action to achieve a favorable verdict next time. In rehabilitative theory this would be conspicuous effort at some form of self-improvement, in the realm of prison conduct some visibly better behavior. And even where matters are not now within the prisoner's control (such as, the gravity of his crime or the length of his record), population pressures compel the implied bargain to be still recognized: "In the absence of any good reason to keep you in, do your time, keep your nose clean, and you get out." This use of bargaining is aligned with another dominant conception surrounding parole, one possible only in a system of discretionary selective release, that it is a benefit to be earned, granted by the grace of a benevolent state.<sup>163</sup>

The dominance of the organizational frame, expressed in the desire to sanction inmate misconduct is a pervasive thing, cutting across the particular ideological preferences of individual decision-makers. To sanction misbehavior serves a number of often very different purposes, and it is this which makes such use of the discretion to parole such a persistent feature in the behavior of traditional parole boards:

. . . we're saying to [the prisoner]: "You've got to be more concerned than you have been so far." And I'm

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162. R. McCleary, *Communication Patterns as Bases of Systems of Authority and Power*, in R. Cloward, *et al.*, *supra* note 117, at 56.

163. M. Gottesman & L. Hecker, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y. U. L. Rev. 702 (1963).

also hoping that . . . there'll be a learning experience. . . .  
Not that they're going to learn to solve all the problems,  
but they're going to learn that there are some conse-  
quences. [A Madison board member.]

These remarks suggest an admixture of symbolic and positivist elements. The idea of a parole denial as the communication of a message to the prisoner is allied with another which suggests that the sanction can effect a change in behavior for the better. Indeed, the coincidence of interests is such that most parole board members seem implicitly to treat a failure to engage in treatment programs as itself a species of institutional misconduct, especially where they are committed to a view of the prisoner as a flawed individual in need of repair. It is a short step from this position to one which regards treatment programs as a means of institutional control (quite apart from any therapeutic value they may possess):

I think if you took away the program, or the positive things that we try to give them, oh, Jeez, then I hate to think what would happen. . . . I think if they ever stop this in the prison and just reached the point of saying, "You're going to prison for punishment, we're gonna lock your butt up," and that's it—then you really got trouble. [A Madison board member.]

But this is not to suggest that the interests of prison management are pursued unquestioningly by parole boards, for apart from cases where their own sense of values as to what constitutes commensurate punishment may collide with institutional concerns, there may be cases in which the board's own priorities will take precedence, especially where the board adheres with a high degree of commitment to a competing ideology. In the sixties that official ideology was rehabilitation. The basic tasks of institutional officials are holding and controlling a body of inmates, and while parole boards acknowledge and usually seek to support them, they must also recognize that their basic task is continually to release, for whatever purposes, a selected part of the inmate body:

The Jefferson board [which in 1968 was comprised of individuals heavily committed to the goal of rehabilitation] had already decided to parole a prisoner, when he was caught in an act of homosexuality in the prison. The board decided nevertheless to go ahead with the parole, which prompted the prison warden to complain to the board, since he had recommended a year's denial as a sanction. The Board had added only a month, which provoked the remark from the warden that this was insufficient for "such a serious infraction" because "it looks as if the administration and the Board are condoning active homosexual involvement in the institution." The board chairman, however, thought that the prisoner had had quite enough punishment meted out "by the previous institution action of being sentenced to twenty (20) days isolation, loss of custody from minimum custody to close custody, loss of his job, indefinite segregation,

and further that he has a detainer [warrant] and will face prosecution in Federal Court immediately upon his release."<sup>164</sup>

Such cases are not, however, commonly found.

#### IV. A REFLECTION

In general, parole discretion is exercised in part to assist the institutions of criminal punishment by sanctioning breaches of their rules. The shape discretion takes reflects the fact that legal punishment is administered by organizations, and whenever organizations are involved, questions connected with management and efficiency assume considerable significance. In consequence, a substantial part of parole board discretion is exercised to an extent independent of ostensibly rationalist concerns about punishment for crime in the community, the risk of offenders to the public, or the reintegration of the offender into the community.

The organizational frame generates meaning and relevance of a particular kind for the decision-maker: It imposes a structure upon information, gives meaning to it and translates a relevant item of information into a decision criterion. This is not to argue that all parole decisions are made within this frame (they are not), or even dominated by organizational concerns, but rather to suggest that in certain kinds of cases, in certain kinds of contexts, and at certain times (for frames may become more or less prominent over time), organizational values provide a significant context which shapes the making of a decision. Thus one of the major characteristics of decision behavior framed by organizational interests is that it is molded by a concern for the projected implications of a decision with a particular outcome. The decision is made in anticipation of the responses of significant audiences. In the case of parole decision-making this means that although the attention of the board member may be directed towards the future, it is predictive in ways not necessarily anticipated by a rationalist conception of parole board work. Put another way, the analysis should suggest something of the adaptive character of legal decision-making, for such decisions may be shaped both in response to particular decisions made earlier in the process and in anticipation of ones which might be made subsequently.

One of the major tasks for those interested in legal decision-making is to understand why and in what circumstances decision-makers accord changing priority to competing decision frames. This is a massive task, however, because it requires close and careful investigation of the fundamental decision model employed by legal decision-makers. It means, to begin with, lengthy and detailed exploration of the jungle.

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164. The quotations are from correspondence between the warden and the then chairman of the Hamilton board.