Loyola University Chicago Law Journal

Volume 13
Issue 4 *Summer 1982 Criminal Sentencing Symposium*

Article 5

1982

Federal Parole and Federal Sentencing: A Report on the Present and Some Thoughts for the Future

David J. Gottlieb
Assoc. Prof., University of Kansas School of Law and Director, Kansas Defender Project

Federal Parole and Federal Sentencing: A Report on the Present and Some Thoughts for the Future

*David J. Gottlieb**

INTRODUCTION

In the past fifteen years an almost unanimous consensus has developed over the need for sentencing[1] reform. Critics have maintained that the unregulated discretion currently granted judges fosters extensive and unwarranted disparity in the treatment of like cases.[2] Commentators have condemned indeterminate parole and sentencing procedures as morally unjustifiable,[3] and as a cause of prison unrest.[4] Underlying both these concerns is disillusionment with the rehabilitative ideal.[5]

---

* Associate Professor, University of Kansas School of Law and Director, Kansas Defender Project. B.A. 1969, Oberlin College; J.D. 1974, Georgetown University Law Center.

This article grows out of the author's experience supervising University of Kansas law students in hearings and appeals before the United States Parole Commission. The author wishes to thank William Fortune, Professor at the University of Kentucky College of Law, for his assistance with Part II of the article, Sidney A. Shapiro, Professor, University of Kansas School of Law, for his helpful comments on an earlier draft, and Debra Watson, third-year student at the University of Kansas School of Law, for her valuable assistance in the preparation of this article.

1. Since the parole decision sets the actual release date for many inmates, it will be referred to as a sentencing decision for the purposes of this article.

2. *See, e.g.*, AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 45-46 (1971) [hereinafter cited as STRUGGLE FOR JUSTICE]; D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS 193-99 (1975) [hereinafter cited as D. FOGEL]; M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972) [hereinafter cited as M. FRANKEL]; J. MITFORD, KIND AND USUAL PUNISHMENT (1973) [hereinafter cited as J. MITFORD]; N. MORRIS, THE FUTURE OF IMPRISONMENT (1974) [hereinafter cited as N. MORRIS]; P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 1-15 (1977) [hereinafter cited as P. O'DONNELL]; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976) [hereinafter cited as A. VON HIRSCH].

3. STRUGGLE FOR JUSTICE, *supra* note 2, at 40-47, 93-96; D. FOGEL, *supra* note 2, at 238-48; M. FRANKEL, *supra* note 2, at 96-97; J. MITFORD, *supra* note 2, at 79-117; N. MORRIS, *supra* note 2; P. O'DONNELL, *supra* note 2, at 28; A. VON HIRSCH, *supra* note 2, at 102. *See also* Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 226, 229-32 (1959).

4. *See* Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinancy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 95-96 (1978) [hereinafter cited as Hoffman & Stover].

5. The disillusionment rests upon the concomitant beliefs that institutional programs have not been successful in promoting rehabilitation and that rehabilitation cannot be mea-

Considerable agreement has also developed concerning some of the solutions required to reform the present system. Commentators have maintained that equitable sentencing decisions can be achieved through the use of guidelines which specify a customary range of prison terms based on the nature of the offense and the background of the offender.[6] The existence of definite sentencing standards eliminates unstructured judicial discretion which, it is argued, has produced unwarranted disparity. Because the guidelines are based upon preincarceration data, a determinate sentencing term can be imposed.

The 1973 publication of the United States Parole Commission[7] guidelines for release marked a major event in the movement for more equitable sentences.[8] The guidelines, rather than attempting to measure the magic moment of rehabilitation, predicate the re-

---

sured, as well as on a concern over the ethical legitimacy of coercive rehabilitation. *See infra* notes 23-25 and accompanying text.

6. *See, e.g.*, D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, GUIDELINES FOR PAROLE AND SENTENCING (1978); P. O'DONNELL, *supra* note 2; Hoffman & Stover, *supra* note 4. A different solution to the problem of undue disparity is "fixed price" or "flat-time" sentencing. In this scheme the legislature specifies very narrow ranges within which all sentences must be imposed. *See* Hoffman & Stover, *supra* note 4, at 98. The "flat-time" system has been criticized because it requires the legislature to engage in the "prodigous" and "impossible" task of specifying in minute detail the precise circumstances justifying different penalties. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 560-61 (1978) [hereinafter cited as Alschuler, *Prosecutorial Power*]. *See* Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 738 (1980) [hereinafter cited as Schulhofer]. The fixed-price system has also been attacked on the ground that it would merely move unstructured discretion from the judge to the prosecutor. Alschuler, *Prosecutorial Power*, *supra* this note, at 563-76. Finally, critics have suggested that flat-time sentences may, in practice, lead to longer average terms of imprisonment. Foote, *Deceptive Determinate Sentencing*, in NATIONAL INSTITUTE OF LAW ENFORCEMENT & CRIMINAL JUSTICE, DETERMINATE SENTENCING: REFORM OR REGRESSION 133-41 (1978); Hoffman & Stover, *supra* note 4, at 100.

A guideline system differs from the flat-time system in that the former retains fairly broad legislative punishment categories and delegates to an administrative or judicial body the task of devising guideline ranges. The individual decision-maker then applies the guidelines to arrive at an appropriate sentence, but may also deviate therefrom, provided justification for the departure is given.

7. Prior to the Parole Commission and Reorganization Act of 1976, 18 U.S.C. § 4201-4218 (1976), the Commission was known as the Board of Parole. For the purposes of this article, the term "Parole Commission" will be used throughout.

8. The guidelines are set forth at 28 C.F.R. § 2.20 (1981). *See also infra* notes 33-53 and accompanying text. After this article was completed, the Parole Commission announced a final rule which revises certain features of the guidelines. 47 Fed. Reg. 56,334 (1982). The revised guidelines, effective January 31, 1983, are discussed in the epilogue to this article, and are set forth, in part, in Appendix I. *See infra* notes 205-09 and accompanying text. While the Commission's change merits comment, it does not affect the analysis in this article in any major respect.

lease decision upon a computation of the severity of the inmate's current offense and his prior criminal behavior. Because the facts necessary to such computation are known by the time of sentencing, offenders can be informed of a presumptive release date shortly after entering prison. The Commission's guideline system thus attempts to achieve the goals of equity and determinacy sought by the advocates of sentencing reform.

Although the guidelines have been in place for almost a decade, only limited attention has been paid to some of their effects upon the sentencing system. This article examines the current parole system and suggests some lessons which sentence reformers may draw from the first federal guideline experiment. The first section provides a brief background and description of the Parole Commission's guidelines. The second part discusses the Commission's fact-finding procedures. This section explores the difficulty of determining pre-incarceration historical facts in a post-sentencing administrative proceeding. The third section considers the effect of the guidelines upon federal sentencing options and contends that imposition of the guidelines has created friction between the Commission and the participants at sentencing. That friction has in turn produced an effort by attorneys and judges to avoid the guidelines, and has hindered the Commission's efforts to reduce disparity. Finally, the article examines the proposals currently pending in Congress which seek to replace the Parole Commission with a judicial sentencing guideline system. The article concludes that, at present, too little is known about the impact of sentence guidelines to warrant abolition of the Commission.

THE PAROLE GUIDELINES: HISTORY AND OPERATION

The Pre-Guideline System

The parole system developed, in large part, because of changes enacted during the Progressive Era in one of this country's first great experiments in sentencing reform. By the latter part of the nineteenth century, reformers had come to believe that criminal punishment should fit the offender, not simply the crime. These advocates maintained that criminal sentences should be structured to further rehabilitation and that release from imprisonment should occur when rehabilitation was achieved.[9] A necessary corol-

9. NATIONAL PRISON ASSOC., TRANSACTIONS OF THE NATIONAL CONFERENCE ON PENITENTIARY AND REFORM DISCIPLINE 541-42 (Wines ed. 1870) (reprinted by American Correctional

lary of this theory was that the optimum period of incarceration could only be determined during the term of sentence. Since judges could not predict, when imposing sentence, how soon a prisoner would become rehabilitated, parole authorities were delegated the authority to determine the appropriate release period.[10]

Although rehabilitation was never the only goal of criminal sentencing, the rehabilitative model greatly influenced sentencing structures. Thus, in the federal system, Congress prescribed a broad range of punishments for most offenses. The sentencing judge was given complete discretion to sentence an inmate to probation or to prison and, if imprisonment was imposed, wide discretion to select an appropriate maximum sentence. After 1958, the court also possessed some discretion to set the date when an inmate became eligible for parole.[11] No guidelines existed for these determinations, nor was the court required to state its reasons for imposing a sentence. Finally, after the inmate became parole eligible, the federal Parole Commission would review his progress and determine when he was ready for release.

For over sixty years federal parole authorities were authorized under this system to grant parole to eligible inmates if there existed a "reasonable probability" that the inmate could "live and remain at liberty without violating the laws, and if, in the opinion of the Board such release [was] not incompatible with the welfare of society."[12] Prior to publication of its parole policy guidelines in

---

Association); Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 27 (1899) ("Convicts can never be rightfully imprisoned except upon proof that it is unsafe for themselves and for society to leave them free, and when confined can never be rightfully released until they show themselves fit for membership in the free community"). *See* STRUGGLE FOR JUSTICE, *supra* note 2, at 34-40; D. FOGEL, *supra* note 2, at 30-35; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 162-63 (1967); Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 31 (1978) [hereinafter cited as Orland].

10. *See* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 389-90 (1973); Act of June 25, 1910, ch. 387, § 3, 36 Stat. 819 (1910). *See also* STRUGGLE FOR JUSTICE, *supra* note 2, at 37-38; Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 U. COLO. L. REV. 237, 238 (1980) [hereinafter cited as Alschuler, *Parole Release Guidelines*]; Hoffman & Stover, *supra* note 4, at 91; Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 HOFSTRA L. REV. 281, 282-83 (1979) [hereinafter cited as Skrivseth].

11. *See* Act of Aug. 25, 1958, Pub. L. No. 85-752, 72 Stat. 845 (1958) (formerly codified in 28 U.S.C. § 334 and 18 U.S.C. §§ 4208-4209 (amended 1976)). *See also* notes 125-31 *infra* and accompanying text.

12. Act of June 25, 1948, ch. 645 §§ 4201-4203, 62 Stat. 854 (1948) (formerly codified in 18 U.S.C. § 4203(a) (1970) (amended 1976)). The criteria were essentially unchanged from 1910 until the enactment of the Parole Commission Reorganization Act of 1976. *See* Act of

1973,[13] the Parole Commission made almost no attempt to delineate its release criteria. It was difficult, therefore, to judge how the Commission exercised its discretion, although it was generally assumed that the Commission was influenced significantly by whether an inmate had been "rehabilitated."[14]

The Commission apparently considered an inmate's institutional progress an important factor in gauging rehabilitation. While the Commission did not ignore the severity of the inmate's offense or his prior criminal record, it did indicate that these factors were only two of many items weighed in determining the release date. According to the Commission, its interest was in the inmate's future, not his past.[15] More precise descriptions of the Commission's reasons for its decision were impossible, since the Commission refused to attribute any particular weight to the criteria governing parole release. Indeed, it claimed it could make no such specific assessment. Instead, the likelihood of parole was determined on an individualized basis.[16]

The parole hearing procedures were veiled in secrecy. Interviews before hearing examiners were brief and without counsel. After completing an interview, examiners would forward a recommendation to Washington where the Board of Parole would make a completely discretionary determination whether to grant release.[17] The decision, when announced, was unaccompanied by explanation.[18]

June 25, 1910, ch. 387 § 3, 36 Stat. 819 (1910).

13. 38 Fed. Reg. 31,942 (1973) (codified in 28 C.F.R. § 2.20).

14. *See* Curtis, *Federal Judicial Power, Parole Guidelines, and Sentence Reform*, in II PRISONERS' RIGHTS SOURCEBOOK, THEORY, LITIGATION, PRACTICE 91, 101-02, 120 n.57 (I. Robbins ed., student ed. 1980) [hereinafter cited as Curtis]; Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 492 & n.60 (1973) [hereinafter cited as Kastenmeier & Eglit]. As George Reed, former Chairman of the Board, testified before Congress: "I believe that basic to every decision of the Parole Board is a philosophy of releasing inmates on parole at the psychologically 'right time' to best assure their eventual complete rehabilitation." *Hearings on Corrections, Federal and State Parole Systems Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 385 (1972) (testimony of George Reed, former Chairman, United States Board of Parole).

15. UNITED STATES DEP'T OF JUSTICE, YOU AND THE PAROLE BOARD 4-5 (1971) [hereinafter cited as YOU AND THE PAROLE BOARD], *quoted in* Curtis, *supra* note 14, at 120 n.57.

16. As one Parole Commission publication stated: "Since no man's situation is just like another man's, factors of importance in one case won't even be considered in another." YOU AND THE PAROLE BOARD, *supra* note 15, at 4, question 11.

17. Project, *Parole Release Decision-Making and the Sentencing Process*, 84 YALE L.J. 810, 820-22 (1975) [hereinafter cited as Project].

18. *Id.* at 821.

Despite its hopeful origins, this system[19] was eventually assailed by commentators[20] and the courts[21] for lacking both articulated standards to regulate Commission discretion and procedural protection for inmates.[22] Sentencing experts also began to voice disillusionment with the rehabilitative model of sentencing. Social science studies seemed to demonstrate that prison programs had little effect in curbing recidivism.[23] Moreover, experts questioned the ability of parole officers to measure when or whether an inmate had become rehabilitated.[24] Opponents of the model stated that the stress of not knowing one's release date was morally unjustifiable and questioned whether rehabilitation could ever be achieved if it were coerced under threat of a longer sentence.[25] Finally, there were eloquent expressions of concern over unwarranted disparities in sentencing which resulted from the unstructured discretion possessed by sentencing judges.[26]

In partial response to these criticisms, the Parole Commission, in

---

19. The federal parole system's secret hearing system resembled those of most states. According to a national survey completed in 1972, 40 states did not give reasons for their decisions, 31 made no verbatim record of the proceedings, 30 prohibited counsel, and 34 prevented the inmates from calling witnesses. O'Leary & Nuffield, *A National Survey of Parole Decision-Making*, 19 CRIME & DELIQUENCY 378, 386 (1973); O'Leary & Nuffield, *Parole Decison-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651, 658 (1972). *See also* Kastenmeier & Eglit, *supra* note 14, at 482 (1973); Project, *supra* note 17, at 821 n.54. By 1976, most jurisdictions had modified their procedures to provide that a statement of reasons for parole grant or denial be given the inmate. However, 29 jurisdictions continued to refuse to permit counsel's attendance, 28 states did not make verbatim records of proceedings, and 31 states did not permit the inmate to call witnesses. V. O'LEARY & K. HANRAHAN, PAROLE SYSTEMS IN THE UNITED STATES 39 (3d ed. 1976).

20. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY 126-33 (1969) [hereinafter cited as K. DAVIS]; *See also* Kastenmeier & Eglit, *supra* note 14, at 482-99; ABA, *Administrative Conference Recommendation 72-3: Procedures of the United States Board of Parole*, 25 AD. L. REV. 531 (1973).

21. *See, e.g.*, Childs v. United States Bd. of Parole, 371 F. Supp. 1246 (D.D.C. 1973), *modified*, 511 F.2d 1270 (D.C. Cir. 1974).

22. Professor Davis's critique of the Commission concluded that "the performance of the Parole Board seems on the whole about as low in quality as anything I have seen in the federal government." K. DAVIS, *supra* note 20, at 133.

23. D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971) [hereinafter cited as Robison & Smith]. *But see* Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979) (questioning his earlier views).

24. *See, e.g.*, P. HOFFMAN, PAROLE SELECTION: A BALANCE OF TWO TYPES OF ERROR 6-8 (NCCD Parole Decision Making Supp. Rep. No. 10, 1973); Bixby, *A New Role for Parole Boards*, 34 FED. PROBATION 24-28 (June, 1970); Robison & Smith, *supra* note 23, at 68-80; Project, *supra* note 17, at 826 n.82.

25. *See supra* note 3 and accompanying text.

26. *See supra* note 2 and accompanying text.

cooperation with the National Council on Crime and Delinquency, launched a study to determine the criteria implicit in its decision-making.[27] After completing the study, the Commission introduced a system of guidelines, first on an experimental basis in the northeast in 1972,[28] and then nationwide in 1973.[29] In 1976, Congress passed the Parole Commission and Reorganization Act,[30] which reorganized the Board of Parole into the United States Parole Commission and explicitly authorized the Commission to implement guidelines in making its parole decisions.[31] While minor changes have since been made in the guidelines, the system adopted in 1973 is essentially the one which is in use today.[32]

Operation of the Guidelines System

The Commission's guideline scheme embraces the twin goals of

---

27. *See* Gottfredson, Hoffman, Sigler & Wilkins, *Making Parole Policy Explicit*, 21 CRIME & DELIQUENCY 34, 37-39 (1975) [hereinafter cited as Gottfredson, Hoffman, Sigler & Wilkins], *reprinted in* FEDERAL PAROLE DECISION MAKING: SELECTED REPRINTS 7, 10-12 (U.S. Parole Comm'n Research Unit 1978) [hereinafter cited as SELECTED REPRINTS vol. I]; *See also* P. HOFFMAN & D. GOTTFREDSON, PAROLING POLICY GUIDELINES: A MATTER OF EQUITY (NCCD Parole Decision Making Project Supp. Rep. No. 9, 1973) [hereinafter cited as P. HOFFMAN & D. GOTTFREDSON].

28. *See* P. HOFFMAN & D. GOTTFREDSON, *supra* note 27, at 12-13; Project, *supra* note 17, at 822 n.59. *See also* Battle v. Norton, 365 F. Supp. 925, 926 (D. Conn. 1973).

29. 38 Fed. Reg. 31,942 (1973) (codified at 28 C.F.R. § 2.20). The guidelines originated from a study of decision making in cases under the Youth Corrections Act between 1971 and 1972. *See* P. HOFFMAN, PAROLING POLICY FEEDBACK 4-8 (NCCD Parole Decision Making Project Supp. Rep. No. 8, 1973). The study concluded that the evaluation by board members of the inmate's institutional program participation and disciplinary record were relatively insignificant factors in determining the parole decision. Rather, the examiner's rating of severity of the offense was found to be the most significant factor in the determinations, with the rating of parole prognosis the second most important item. *Id.* at 16.

After receiving the study, the Commission decided to transform the data into a set of guidelines for adult and youthful offenders. *See* Gottfredson, Hoffman, Sigler & Wilkins, *supra* note 27, at 38; SELECTED REPRINTS vol. I, *supra* note 27, at 11; P. HOFFMAN & D. GOTTFREDSON, *supra* note 27, at 7-12. *See also* Flaxman, *The Hidden Dangers of Sentencing Guidelines*, 7 HOFSTRA L. REV. 259, 269 (1979).

30. Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (codified in 18 U.S.C. §§ 4201-4218 (1976)).

31. 18 U.S.C. § 4203 (1976).

32. Various changes have been made in the "offense severity" and "salient factor" score over the years. *See, e.g.*, 46 Fed. Reg. 36,138 (1981) (change in offense severity); 46 Fed. Reg. 35,637 (1981) (revision of salient factor score); 44 Fed. Reg. 26,540-26,542 (1979) (change in offense severity); 42 Fed. Reg. 52,398 (1977) (subdividing "greatest" severity level into greatest I and greatest II); 42 Fed. Reg. 31,784 (1977) (change in offense severity); 42 Fed. Reg. 12,043 (1977) (change in salient factor score). After this article was completed, the Commission announced another revision of its guidelines. 47 Fed. Reg. 56,334 (1982); *see infra* notes 205-09 and accompanying text.

equity and determinacy.[33] The guidelines seek to achieve equity by structuring discretion so that prisoners with similar backgrounds and offense characteristics will be released after serving the same amount of time.[34] The guideline system achieves determinacy by requiring that the inmate's presumptive release date be fixed shortly after the sentence begins, and by permitting only minor alterations in the date for reasons of positive institutional conduct.[35]

The guidelines employ two basic measures to determine when an inmate eligible for parole should be released: "offense severity" rating and "salient factor" score. First, the Commission ranks the type of crime committed by the inmate into one of seven "offense severity" categories, ranging from "low" severity for, as an example, possession with intent to distribute small amounts of marijuana, to "greatest II" severity for crimes such as kidnapping.[36] In ranking the inmate's crime on the offense severity scale, the Commission does not look solely to the crime of conviction; rather, it independently evaluates the case and determines the defendant's

---

33. P. HOFFMAN & D. GOTTFREDSON, *supra* note 27, at viii-x, 19-21; Stone-Meierhoefer & Hoffman, *Presumptive Parole Dates: The Federal Approach*, 46 FED. PROBATION 41 (June 1982) [hereinafter cited as Stone-Meierhoefer & Hoffman], *reprinted in* 4 FEDERAL PAROLE DECISION MAKING: SELECTED REPRINTS 7 (U.S. Parole Comm'n Research Unit 1982) [hereinafter cited as SELECTED REPRINTS vol. IV]. *See also* McCall, *The Future of Parole — In Rebuttal of S. 1437*, 42 FED. PROBATION 3, 4 (Dec. 1978) [hereinafter cited as McCall], *reprinted in* 2 FEDERAL PAROLE DECISION MAKING: SELECTED REPRINTS 41-42 (U.S. Parole Comm'n Research Unit 1980) [hereinafter cited as SELECTED REPRINTS vol. II].

34. *See, e.g.*, 44 Fed. Reg. 26,549 (1979); Gottfredson, Hoffman, Sigler & Wilkins, *supra* note 27, at 41-42; SELECTED REPRINTS vol. I, *supra* note 27, at 14-15; McCall, *supra* note 33, at 3-4; SELECTED REPRINTS vol. II, *supra* note 33, at 41-42.

35. *See* Stone-Meierhoefer & Hoffman, *supra* note 33, at 41-45; SELECTED REPRINTS vol. IV, *supra* note 33, at 7-11; 42 Fed. Reg. 39,808 (1977) (Commission explanation for early hearing system). *See infra* notes 48-53 and accompanying text. While inmates who follow institutional directives can receive only modest advances in a release date for superior behavior, the Commission retains the discretion to impose substantial penalties upon inmates who violate institutional rules. *See* Stone-Meierhoefer & Hoffman, *supra* note 33, at 43; SELECTED REPRINTS vol. IV, *supra* note 33, at 9. According to the Commission, the guidelines are predicated upon "good institutional adjustment and program progress." 28 C.F.R. § 2.20(b) (1981).

36. The current levels are low, low moderate, moderate, high, very high, greatest I, and greatest II. *See* 28 C.F.R. § 2.20 (1981). In a final rule effective Jan. 31, 1983, the Commission will modify this scheme by dividing the offense severity rankings into eight categories and by redesignating the levels in numerical form. *See* 47 Fed. Reg. 56,336 (1982). *See also infra* notes 205-09 and accompanying text. The descriptive terms in effect in 1982 will be used throughout this article. At the time the guidelines were implemented in 1973, the offenses were divided into six severity levels (low, low moderate, moderate, high, very high and greatest). *See* 38 Fed. Reg. 31,942 (1973). In 1977, the "greatest" severity level was subdivided into "greatest I" and "greatest II" categories. *See* 42 Fed. Reg. 52,398 (1977).

actual "offense behavior."[37] The Commission takes into account criminal charges dismissed before or after plea bargaining, as well as allegations of criminal conduct which never even resulted in the filing of charges.[38] Thus, the Commission attempts to treat the individual accused of bank robbery who pleads to larceny the same as the individual who pleads to bank robbery, if it believes that the two participated in the same type of crime. Moreover, the Commission's decision to categorize a particular type of offense behavior as "low" or "high" bears no particular relationship to the maximum possible sentence decreed by Congress. Offenses with the same maximum sentence may fall into widely different severity categories. For instance, a mail theft conviction is a "moderate" offense if the value of the property taken is $2,000-$20,000; a "high" offense if the value is from $20,000-$100,000; a "very high" offense if the value is $100,000-$500,000; and a "greatest" offense if the value is over $500,000.[39]

The second measure used by the Commission to determine the release date ranks the inmate's risk of violating parole into one of four categories based upon the inmate's salient factor score. This score is obtained by a ten point scale which measures six different salient factors.[40] Each of the salient factor variables is worth from

---

37. 28 C.F.R. § 2.20 (1981); UNITED STATES PAROLE COMM'N, RULES AND PROCEDURES MANUAL 122 (1982) [hereinafter cited as PROCEDURES MANUAL].

38. *See* 44 Fed. Reg. 26,549 (1979). The Commission's Procedures Manual states that the examiners may take into account information contained in a count of an indictment that was dismissed as a result of plea bargaining, or any allegation which is corroborated by established factors and from a source which appears credible. PROCEDURES MANUAL, *supra* note 37, at 122.

39. 28 C.F.R. § 2.20 (1981).

40. 28 C.F.R. § 2.20 (1981). When the guidelines were first imposed, the salient factors were: number of prior convictions, number of prior incarcerations, age at first commitment, whether the commitment involved auto theft, whether parole was revoked, the inmate's history of drug dependence, the presence or absence of high school education, the existence of verified employment prior to incarceration, and the existence of a place to live with spouse and children. 38 Fed. Reg. 31,945 (1973). The number of possible points attainable for each salient factor varied between one and three, with a total of 11 points possible for all the items. The present salient factor guidelines no longer consider the inmate's education, previous employment, or release plan. The current factors are: the number of prior convictions and adjudications, the number of prior commitments of more than 30 days, the age at commencement of the current offense or prior commitment, whether the inmate has a recent "commitment free period," the inmate's probation/parole/confinement/escape status, and his history of heroin or opiate dependence. 28 C.F.R. § 2.20 (1981).

These particular factors are thought to reflect the ability of the parolee to avoid parole violations or subsequent arrests or convictions. The original factors were chosen following research on the history and characteristics of a sample of inmates released from prison in 1970. Hoffman & Beck, *Parole Decision Making: A Salient Factor Score*, 2 J. CRIM. JUST.

one to three points. These points are added together to arrive at one of four salient factor categories;[41] the higher the salient factor category, the shorter the period of incarceration the inmate can expect.[42] The variables, such as the number of prior convictions, measure the inmate's prior criminal history; they are not intended or able to measure rehabilitative progress during the prisoner's term.

The two release date measures form the axes of a graph plotted by the Commission. At the intersection of each offense severity and salient factor category, a range of months is established. By computing the inmate's offense severity and salient factor score, the hearing examiners can arrive at a specific range of months of incarceration for the inmate.[43]

Thus, a hypothetical inmate charged and convicted of armed bank robbery should receive an offense severity rating of "very high," as long as he neither fired a weapon nor injured a victim in the robbery. If the inmate has an unblemished prior record and

---

195 (1974), *reprinted in* SELECTED REPRINTS vol. I, *supra* note 27, at 47 (1978).

Several subsequent analyses have been performed to demonstrate the correlation between success on release and a high salient factor score. *See* Hoffman & Beck, *Salient Factor Score Validation — A 1972 Release Cohort*, 4 J. CRIM. JUST. 69 (1976), *reprinted in* SELECTED REPRINTS vol. I, *supra* note 27, at 59 (1978); Hoffman, Stone-Meierhoefer & Beck, *Salient Factor Score and Release Behavior: Three Validation Samples*, 2 L. & HUM. BEHAV. 47 (1978), *reprinted in* SELECTED REPRINTS vol. II, *supra* note 33, at 63; Hoffman & Beck, *Revalidating the Salient Factor Score: A Research Note*, 8 J. CRIM. JUST. 185 (1980) [hereinafter cited as Hoffman & Beck], *reprinted in* 3 FEDERAL PAROLE DECISION MAKING: SELECTED REPRINTS 51 (U.S. Parole Comm'n Research Unit 1981) [hereinafter cited as SELECTED REPRINTS vol. III].

The most recent survey, a sample of 697 inmates released in 1976, found that the following percentage of each salient factor category had achieved a "favorable outcome" — that is, had not been rearrested within one year from release.

SALIENT FACTOR SCORE			
[0.3]	[4-5]	[6-8]	[9-11]
56%	63%	73%	92%

Figures from the 1970 and 1971 samples are:

	[0-3]	[4-5]	[6-8]	[9-11]
1970	51%	64%	76%	91%
1971	51%	60%	78%	91%

See Hoffman & Beck, *supra* note 40; SELECTED REPRINTS vol. III, *supra* note 40, at 52.

41. The salient factor score categories are: "very good," "good," "fair" and "poor." 28 C.F.R. § 2.20 (1981).

42. *See supra* note 40.

43. The present parole guidelines, found at 28 C.F.R. § 2.20 (1981), are set forth at Appendix II to this article. The guideline table, which will become effective on Jan. 31, 1983, is found at 47 Fed. Reg. 56,336 (1982) and is in part set forth as Appendix I.

accordingly a "very good" salient factor score, he should expect a parole date in twenty-four to thirty-six months. An inmate with one prior conviction for which he had been imprisoned for over thirty days within three years of the robbery would receive only a "good" salient factor score and should anticipate a term of thirty-six to forty-eight months.

In the majority of cases, eligible federal prisoners are paroled within the guideline ranges. Those inmates who, because of the length of their sentence, do not become eligible for parole[44] until serving a minimum period of time that exceeds the expected guideline period can expect parole as soon as they become parole eligible; inmates whose sentences expire short of the indicated guideline range are generally required to serve the sentences until expiration.[45] In fewer than twenty percent of the cases, the examiners will render a discretionary decision above or below the guidelines.[46] Such decisions must be accompanied by specific explanations of "good cause" for the deviation.[47]

Commission rules provide that most prisoners receive an initial parole hearing and guideline determination within 120 days of the beginning of the federal sentence.[48] Interim hearings are then scheduled at specified intervals to consider any changes which may

---

44. An inmate with a sentence of over one year will generally be eligible for parole after serving one-third of his sentence. 18 U.S.C. § 4205(a) (1976). The sentencing court possesses the discretion to designate the inmate eligible for parole at any time prior to the one-third point, or to declare the inmate immediately eligible for parole. *Id.* at § 4205(b).

45. In approximately 11% of its decisions between October 1979 and September 1980, the Commission released inmates already over the guidelines at the time they became parole eligible; in 16% of the cases, the Commission "continued to expiration" inmates whose sentences expired prior to their guideline range. Thus, in only 73% of the cases within its jurisdiction does the Commission have the option of applying its guidelines. See figures furnished by United States Parole Commission (on file with the Kansas Defender Project).

46. *See* UNITED STATES DEP'T OF JUSTICE, REPORT OF THE UNITED STATES PAROLE COMMISSION [1978-1980] 22 (1981) [hereinafter cited as PAROLE COMMISSION REPORT]. In the period between October 1978 and September 1980, the following percentage of decisions were either rendered within the guidelines or were "non-discretionary" decisions outside the guidelines:

1978	79.3%
1979	80.7%
1980	82.6%

47. 18 U.S.C. § 4206(c) (1976); 28 C.F.R. § 2.13(d) (1981).

48. 28 C.F.R. § 2.12 (1981). "By making a presumptive release decision early in the parole process, the prisoner is given certainty to the extent that a release date has been set which cannot be taken away except for specified reasons." Stone-Meierhoefer & Hoffman, *supra* note 33, at 43; SELECTED REPRINTS vol. IV, *supra* note 33, at 8. The early hearing provision is inapplicable to those prisoners who do not become parole eligible within 10 years, i.e., prisoners with sentences of over 30 years. 28 C.F.R. § 2.12(a) (1981).

have occurred after the initial hearing.[49] Following an interim hearing, the Commission may order no change in the parole date, advance the parole date, or retard the date if the inmate has committed disciplinary infractions.[50] The Commission's regulations specify that a presumptive parole date should not be advanced on the basis of an inmate's good institutional behavior unless the inmate can demonstrate superior program achievement or other clearly exceptional circumstances.[51] The Commission publishes a scale which specifies the permissible reduction in a presumptive parole date for superior achievement. For example, an inmate with a guideline range of forty-three to forty-eight months incarceration can have a reduction for superior program achievement of no more than five months.[52]

In sum, the Commission sets a tentative parole date for almost all prisoners at the outset of the inmate's sentence which closely approximates the inmate's actual release date. Unless the inmate violates institutional rules, there is little he can do to affect a change in the release date.[53]

Parole Commission Fact-Finding

Given the history of parole, it is difficult to overemphasize the change caused by the Parole Commission guidelines. With a single stroke, the Commission publicly abandoned the task previously thought to be its principal justification for existence: the predictive evaluation of rehabilitation. In its place, the Commission created a highly structured system for judging retribution (offense behavior) and incapacitation (salient factor) upon pre-incarceration data. The Commission's determination to base its parole decisions upon specific findings of historical fact, rather than evanescent judgments concerning rehabilitation, was designed to promote a more consistent exercise of discretion and equality of treatment for like cases. However, equitable decision-making can only be achieved if Commission hearings are adequate to determine the facts.

In reaching its decisions, the Commission looks beyond the factual findings made at the criminal trial or admitted by a guilty

---

49. 28 C.F.R. § 2.14(a) (1981).
50. *Id.* § 2.14(a)(2), (3).
51. *Id.* § 2.60.
52. *Id.* § 2.60(e).
53. Application of the guidelines and release on parole is predicated on good institutional behavior. 28 C.F.R. § 2.18 (1981). Inmates who violate institutional rules are also subject to rescission of presumptive parole dates. *Id.* § 2.34.

plea. The Commission's decision to consider total offense behavior in determining offense severity often requires hearing examiners to decide whether an inmate engaged in criminal conduct evinced by charges dismissed under a plea bargain, or by allegations which never resulted in a criminal charge. Similarly, to determine the salient factor score, examiners must judge facts, such as the number of prior incarcerations over thirty days, which would rarely be the subject of an admission at plea or proof at trial.

Although the quality of its decision-making depends heavily upon accurate fact-finding, the Commission has neither the time nor the resources to determine pre-incarceration data in a *de novo* evidentiary hearing. The Commission's hearing examiners are responsible for over 10,000 initial hearings each year;[54] each hearing examiner averages twelve hearings per working day.[55] Moreover, the timing and location of the hearings preclude full-blown adversary proceedings. Parole hearings are held at federal penal institutions, which are often far from the place of trial. The cost and inconvenience of transporting witnesses to evidentiary hearings at these institutions would be staggering. Furthermore, if evidentiary hearings were held, the Commission would be pressed to assign counsel and permit cross-examination.[56] Parole hearings would

---

54. PAROLE COMMISSION REPORT, *supra* note 46, at 19. The examiners held 11,980 initial hearings in 1978, 11,872 hearings in 1979, and 10,379 hearings in 1980. *Id.*

55. *Bureau of Prisons and the U.S. Parole Commission: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 32 (1981) (testimony of Cecil C. McCall).

56. *See generally* Alschuler, *Parole Release Guidelines*, *supra* note 10, at 239-40. Whether any of these procedural incidents ought to be required as a matter of due process is a question beyond the scope of this article. The critical case is Greenholtz v. Inmates, Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), in which the Court examined whether Nebraska parole release procedures comported with due process. The initial parole hearing in Nebraska involved an annual file review of the inmate's status, followed by an interview with the prisoner. The Eighth Circuit had held the procedure inadequate, and required, *inter alia*, that a "formal hearing" be held for each eligible inmate. The Supreme Court reversed. The Court first declared that a denial of parole release does not constitute a deprivation of "liberty" calling for due process protection absent a state created "entitlement." After accepting that the Nebraska statute created such an entitlement, the Court determined that Nebraska's file review plus interview procedure adequately safeguarded against serious risks of error, and thus satisfied due process. *Greenholtz*, 442 U.S. at 15.

At first blush, *Greenholtz* provides strong support for the view that the current Commission procedures are more than adequate to satisfy due process. The federal parole hearing system provides considerably more procedural protections than the Nebraska process held adequate in *Greenholtz*. Moreover, the courts are not even agreed that the federal parole statutes create a protectible entitlement sufficient to call due process analysis into play. *Compare* Solomon v. Elsea, 676 F.2d 282, 284-85 (7th Cir. 1981) and Evans v. Dillahunty, 662 F.2d 522, 525-26 (8th Cir. 1981), *with* Page v. United States Parole Comm'n, 651 F.2d

thus be transformed from today's brief proceeding into extensive and expensive hearings.

Because it is unequipped to hold evidentiary hearings, the Commission has designed a proceeding which relies heavily upon data prepared for the judicial sentencing hearing. The Commission is directed by statute to consider a variety of record evidence, including psychiatric evaluations, recommendations made by the sentencing judge, official reports of the inmate's criminal record and the presentence report.[57] Before the hearing, the prisoner is permitted to review these records and may present additional documentary evidence.[58] At the hearing, the examiners will ordinarily discuss with the inmate the various offense severity and salient factor items and any other information they deem pertinent.[59] The hearing, however, is not a trial; there is no witness testimony or cross-examination. While the prisoner may be represented by a person of his choice, the representative's function is limited to making a statement at the close of the hearing or responding to the examiner's questions.[60] The initial hearing is thus an opportunity to present documentary evidence and clarify the existing record, rather than a forum for a *de novo* evidentiary hearing.

While the Commission may consider a variety of data, the presentence investigation report (PIR) prepared by the probation office for the sentencing judge is generally the key document for guideline assessment.[61] Prepared after the trial or plea and follow-

---

1083, 1086 (5th Cir. 1981) and Shahid v. Crawford, 599 F.2d 666, 670 & n.5 (5th Cir. 1979).

Nevertheless, there are notable differences between the federal and Nebraska statutes which support claims for greater procedural protections in federal parole release decisions. The Supreme Court in *Greenholtz* took pains to distinguish the Nebraska Parole Board's decisions, which were described as "subjective in part and predictive in part," from procedures "designed to elicit specific facts." *Greenholtz*, 442 U.S. at 13, 14. The federal parole system no longer purports to make subjective, "equity" type judgments, but bases its decision on specific factual findings. Arguably, its hearing system requires a greater measure of procedural protections. *See* Alschuler, *Parole Release Guidelines, supra* note 10, at 240 & n.12.

57. 28 C.F.R. § 2.19(a) (1981).

58. *Id.* §§ 2.11(e) & 2.19(b). All record evidence is disclosable except "(1) [d]iagnostic opinions, which if known to the prisoner could lead to a serious disruption of his institutional program; (2) [m]aterial which would reveal a source of information obtained upon a promise of confidentiality; or (3) [a]ny other information, which if disclosed, might result in harm, physical or otherwise to any person." *Id.* § 2.55(c). The information withheld must be summarized for the inmate. *Id.* § 2.55(d).

59. *Id.* § 2.13(a).

60. *Id.* 2.13(b).

61. P. Hoffman, B. Stone-Meierhoefer & J. Fife, Reliability in Guideline Applicaton: Initial Hearings — 1980 8 (U.S. Parole Comm'n Research Unit Rep. No. 27, Draft

ing interviews with the defendant and law enforcement personnel, the report includes a summary of the defendant's background and prior record as well as prosecution and defense descriptions of the offense.[62] The PIR description of the offender's background and criminal record frequently serves as the source of the information for the salient factor score.[63] Moreover, the prosecutor's version of the offense, the official version contained in the PIR, is the crucial tool for rating offense severity.[64]

Even though they are the key documents in deciding parole guidelines, presentence reports are nonetheless prepared in a manner which invites the inclusion of unclear, inaccurate, and unverified information. In compiling the reports, probation officers are not restricted to firsthand or carefully documented information. Many probation officers investigate and report all relevant information concerning the defendant, whether or not it is demonstrably reliable.[65] Accordingly, officers will often include unverified in-

---

July, 1981) [hereinafter cited as P. HOFFMAN, INITIAL HEARINGS]. *See, e.g.*, Curtis, *supra* note 14, at 108; Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1628-30 (1980) [hereinafter cited as Fennell & Hall]; Project, *supra* note 17, at 878.

62. *See* DIVISION OF PROBATION, ADMIN. OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT (Pub. No. 105, 1978) [hereinafter cited as PRESENTENCE INVESTIGATION REPORT].

The Administrative Office Publication directs that the Presentence Investigation Report (PIR) be divided into five "core" categories. First, the report is to relate the "official" (prosecutor's) and the "defendant's" version of the offense. This section should include a description of the defendant's specific involvement in the offense, as well as any aggravating or extenuating circumstances surrounding the offense. The second section of the report describes the defendant's "prior record," both juvenile and adult. The Administrative Office directs that information be given on the date, charge, location, disposition, and representation of counsel for all prior offenses. The third category, "personal and family data," should include background information on the defendant's relatives, marital status, education, employment, physical, mental and emotional health, military service, and financial wherewithal. The fourth section contains the officer's "evaluation" of the information. The officer is directed, as part of this section, to estimate the defendant's parole guideline range. The final section of the report is the officer's "recommendation" for disposition. *See id.* at 7-17.

63. *See* Project, *supra* note 17, at 878. For an example of a case where arguably improper PIR information was used in computing the salient factor score, see Majchszak v. Ralston, 454 F. Supp. 1137, 1139-41 (W.D. Wis. 1978). *See generally* P. HOFFMAN, INITIAL HEARINGS, *supra* note 61.

64. *See* Project, *supra* note 17, at 878-79. For cases in which the defendant has challenged offense behavior information based upon the PIR, see, e.g., United States *ex rel.* Goldberg v. Warden, 622 F.2d 60 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980); Billiteri v. United States Bd. of Parole, 541 F.2d 938, 944 (2d Cir. 1976); United States *ex rel.* Petri v. Warden, 507 F. Supp. 5 (M.D. Pa. 1981); Payton v. Thomas, 486 F. Supp. 64 (S.D.N.Y. 1980).

65. *See* Rosati v. Haran, 459 F. Supp. 1148, 1154 (E.D.N.Y. 1977) ("to 'screen out' material information would be an abuse of the probation officer's discretion and an arroga-

formation in the report, with at most an attribution of the source of the information.[66]

The probation officer's treatment of the official version of the offense presents particularly significant opportunities for the inclusion of unreliable information. This portion of the report is prepared from United States Attorney files and from interviews with law enforcement personnel.[67] In the course of this investigation, the probation officer may read reports which state in conclusory fashion that the defendant is an organized crime figure or ringleader,[68] or which charge the defendant with criminality on a grand scale.[69] If and when the source of the information is identified, the information may prove to be double or triple hearsay. Nevertheless, this data will often be presented as fact in the official report.[70]

While the allegations in the official report may be challenged by the inmate at his parole hearing, they are not easily disproved. Commission regulations provide that when PIR allegations are

---

tion of the court's own authority to determine the importance of information in the imposition of sentence"). Fennell & Hall, *supra* note 61, at 1658. *See also* PRESENTENCE INVESTIGATION REPORT, *supra* note 62, at 9.

66. *See* Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1362, 1395 (1975); Fennell & Hall, *supra* note 61, at 1657-58. *See also infra* note 70.

67. PRESENTENCE INVESTIGATION REPORT, *supra* note 62, at 8-9.

68. *Id.* at 9; *see* Fennell & Hall, *supra* note 61, at 1656-57. *See also infra* notes 69-70.

69. *See, e.g.*, United States v. Weston, 448 F.2d 626, 628 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) (information depicting defendant as major drug supplier).

70. *See, e.g.*, Moore v. United States, 571 F.2d 179, 184 (3d Cir. 1978) (allegation that defendant was member of "Black Mafia" and had shot several people); United States v. Perri, 513 F.2d 572, 574 (9th Cir. 1975) (organized crime allegation); United States v. Weston, 448 F.2d 626, 628 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) (drug supplier allegation).

A criminal defense attorney related the following experience from personal knowledge:

> A presentence report prepared on a defendant convicted of a bank robbery stated that the defendant was involved in six other robberies. No other information was given — neither the basis of the assertion nor the source of the information; not even the dates and the places of the alleged robberies. The same report stated that the defendant himself was in possession of a weapon during the robbery. Not only was no basis for the assertion stated, it was contrary to the evidence at trial.

Statement of Phylis Skloot Bamberger, on behalf of the National Legal Aid and Defender Association, concerning Proposed Federal Criminal Code H.R. 1647, prepared for the Subcomm. on Crim. Justice of the House Comm. on the Judiciary (Nov. 1981) (copy available at the Kansas Defender Project) [hereinafter cited as Bamberger].

The persistence of this unreliable information can be attributed to the failure of probation officers to verify the information related by law enforcement officers. Fennell & Hall, *supra* note 60, at 1657. Another reason advanced by commentators for misleading PIR information is the anti-defendant bias of some probation officers. *See* Bamberger, *supra* note 70; Frankel, *supra* note 2, at 34-35.

challenged, the Commission is to decide the contest by a preponderance of the evidence standard[71]—that is, the Commission must weigh the inmate's claim against the PIR information and accept the version of the facts "that best accords with reason and probability."[72] The difficulty for inmates in meeting this standard is that most lack the ability to produce evidence to rebut the PIR information. Inmates usually appear without counsel.[73] There is no possibility of calling witnesses from the community where the offense occurred. Inmates may not know where to obtain documentary evidence and, even if they do, the evidence may be unavailable. Thus, inmates are often left to counter an unverified allegation in the PIR with an unverified denial. In such a contest, the government's version usually prevails.[74]

A recent Kansas Defender Project case illustrates the problem. An inmate received a "greatest I" severity rating based on a finding that his fraud offense resulted in losses of over one million dollars. The inmate claimed the figure was grossly inflated, that no such loss occurred, and that the figure was never established at trial. Prior to his hearing, the inmate attempted, but failed, to obtain the trial transcript to document his claim. Instead, he was obliged to rely upon newspaper accounts of the fraud. Despite an extensive record of trial, the contest before the Parole Commission pitted the inmate's unverified denial against the absent prosecutor's estimate of the fraud contained in the PIR. The Commission chose to rely upon the prosecutor's estimate.

In the above example, the inmate was given a "greatest" severity rating based on information he alleged was unverified and untrue. Inmates are also exposed to potentially incorrect decisions by the Commission because of information which is incomplete or vague. Recent studies by the General Accounting Office[75] (GAO) and the Parole Commission itself[76] have found that, in many cases, the in-

---

71. 28 C.F.R. § 2.19(c) (1981); PROCEDURES MANUAL, *supra* note 37, at 122.

72. "The normal indicants of reliability are (a) the report is specific as to the behavior alleged to have taken place; (b) the allegation is corroborated by established facts; and (c) the source of the allegation appears credible." PROCEDURES MANUAL, *supra* note 37, at 122.

73. *See* PAROLE COMMISSION REPORT, *supra* note 46, at 24. In 1980, 35.6% of inmates appearing for initial hearings were accompanied by "representatives." *Id.*

74. Project, *supra* note 17, at 879. The author's observations are in accord with those of the Yale Project.

75. COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, FEDERAL PAROLE PRACTICES: BETTER MANAGEMENT AND LEGISLATIVE CHANGES ARE NEEDED (1982) [hereinafter cited as FEDERAL PAROLE PRACTICES].

76. P. HOFFMAN, INITIAL HEARINGS, *supra* note 61, at 6-8.

formation necessary for guideline assessment is not contained in the PIR. The Parole Commission study showed that information concerning the number of prior convictions or parole violations was often unclear.[77] The GAO findings were that forty-two percent of the presentence reports examined did not include sufficient details on the nature of the offense or characteristics of the offender to establish an appropriate offense severity or salient factor score rating.[78]

The weakness of the PIR, as a parole hearing device, may be due in part to the lack of "responsiveness of that document to the informational needs of the Commission."[79] The PIR is a document intended first and foremost for the sentencing judge. Although the probation officer is instructed in preparing this report to estimate the inmate's likely parole guideline range, many officers are unfamiliar with guideline scoring criteria.[80] Because the facts necessary to the Commission's ratings may differ from the facts necessary at sentencing, information critical to the Commission's decisions may be omitted or overlooked by probation officers. For example, the guidelines provide that auto theft of less than seventy-two hours duration with no substantial damage to the car and "not theft for resale" is a "low" severity crime; a theft of three cars or less with a value not exceeding $19,999 is classified as "moderate" severity; and a theft of autos worth $20,000 would rate a "high" classification. The Dyer Act,[81] which makes it a federal crime to transport a stolen automobile across state lines, contains no requirement that the theft occur for any particular duration, or that the autos possess any particular dollar value. Unless the probation officer is cognizant of Commission guidelines, the Commission may find itself rating offense severity without any statement on the duration of the theft and with only the barest conclusion on the value of the

77. "Several cases were noted in which it was not clear from the presentence report how many prior convictions the offender had, or whether or not the offender had been on probation/parole at the time of the current offense." *Id.* at 7.

78. FEDERAL PAROLE PRACTICES, *supra* note 75, at 92. The GAO based this finding on examinations of presentence reports from 10 judicial districts for 342 offenders sentenced to a term of imprisonment in excess of one year. *Id.*

79. P. HOFFMAN, INITIAL HEARINGS, *supra* note 61, at 8.

80. *See generally* P. HOFFMAN, INITIAL HEARINGS, *supra* note 61, at 6-8; FEDERAL PAROLE PRACTICES, *supra* note 75, at 94-95.

81. The Dyer Act provides as follows: "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned nor more than five years, or both." 18 U.S.C. § 2312 (1976).

automobiles.[82]

The defendant can best avoid the consequences of Commission reliance on the PIR by challenging or clarifying erroneous information in the PIR at the time of sentencing. Before the court may consider challenged information in sentencing, it must make a finding on the validity of the evidence.[83] While the nature of the fact hearing and the burden of proof are open to some doubt,[84] the defendant, represented by counsel, will at least have the opportunity to present evidence before the court rules on the facts.[85] The court's finding will apparently be accepted by the Commission.[86]

If the court believes it can impose sentence without considering the challenged information, it may avoid deciding the facts by stating on the record that it is not relying on the contested portion of the PIR.[87] In such a case, the Parole Commission will again be obliged to make the factfinding determination.[88] Recognizing the practical difficulties facing an inmate who challenges the PIR at the initial parole hearing, one court recently permitted the defense counsel to submit at sentencing proof of a contested matter, de-

---

82. *See generally* Alschuler, *Parole Release Guidelines, supra* note 10, at 239.

83. *See, e.g.*, United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972). *See also* STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES & PROCEDURES § 18.64 commentary at 452-62 (Approved Draft 1979) [hereinafter cited as SENTENCING ALTERNATIVES].

84. *See* SENTENCING ALTERNATIVES, *supra* note 83, § 18.64 commentary at 452-62; Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515, 1523-28 and cases cited therein (1978).

85. *See, e.g.*, United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976); United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir. 1974); United States v. Powell, 487 F.2d 325, 329 (4th Cir. 1973).

86. While employees of the Parole Commission have expressed this view to the author, it does not appear in written form in the guidelines. *See also* H.R. REP. No. 1396, 96th Cong., 2d Sess. 521 (1980):

> Under the doctrine of collateral estoppel and on the basis of fairness, the United States Parole Commission is of course bound by findings of fact made by the sentencing court. . . . But the Parole Commission may consider newly discovered evidence that was unavailable dispite [sic] diligent and good faith efforts, at the time of the sentencing hearing.

87. *See, e.g.*, Wixom v. United States, 585 F.2d 920, 921 (8th Cir. 1978); United States v. Stevenson, 573 F.2d 1105, 1107 (9th Cir. 1978); Rosati v. Haran, 459 F. Supp. 1148, 1160 (E.D.N.Y. 1977).

88. *See, e.g.*, United States v. Stevenson, 573 F.2d 1105, 1107-08 (9th Cir. 1978); United States v. Cesaitis, 506 F. Supp. 518, 522-23 (E.D. Mich. 1981); Rosati v. Haran, 459 F. Supp. 1148, 1160 (E.D.N.Y. 1977). *But cf.* Wixom v. United States, 585 F.2d 920, 921 (8th Cir. 1978). In *Wixom*, the Eighth Circuit suggested that where the defense challenged a PIR allegation and the court failed to credit the information, it would be "inappropriate" for the Parole Commission to consider the information.

spite the judge's disclaimer of reliance upon the information.[89] The court noted that the sentencing hearing was the best opportunity for the inmate to present evidence on issues which would be decided at the parole proceeding.[90] Where no evidentiary hearing is held, defense counsel may still provide an invaluable aid for his client by submitting a sentencing memorandum to the court which can then be transmitted to the Parole Commission. This procedure, seldom used by defense attorneys,[91] can provide the inmate with valuable evidence to be submitted to the examiners.

Whenever a challenge to the PIR takes place, it is essential that the information disclosed at sentencing be transmitted to the Commission. At present, however, there is no assurance such disclosure will occur. The Commission has no general procedure requiring that a copy of the sentencing transcript be included in the parole file; in most cases, the Commission does not have a copy of the sentencing minutes when it decides the guideline range.[92] Judges are not required to inform the Bureau of Prisons or the Parole Commission that certain portions of the PIR were challenged and not relied on in sentencing.[93] In fact, recent studies demonstrate that few judges pass sentencing information on to the Parole Commission.[94] In addition, the prisoner is usually many miles from the court in which he was sentenced and not in contact with his attorney. He may not remember what arguments were made at the time of sentencing, and may be unable to produce a transcript of the sentencing hearing.

---

89. United States v. Cesaitis, 506 F. Supp. 518 (E.D. Mich. 1981).

90. *Id.* at 525.

91. Of 117 judges questioned, 98 (84%) stated that sentencing memoranda or parallel presentence reports are submitted by private attorneys in no more than 10% of their cases. Of the judges responding to this question with respect to public attorneys, 75 (89%) stated that such reports were received 10% or less of the time. Fennell & Hall, *supra* note 61, at 1669 n.225.

92. FEDERAL PAROLE PRACTICES, *supra* note 75, at 118-19. In January 1981, the Chief Judge for the Northern District of California began sending a copy of the sentencing hearing transcript to the commissioners in all cases where the defendant was sentenced to two or more years. The Regional Commissioner of the Western Region reported that the information supplied by the court improved the quality of parole decisions. *Id.* at 119.

93. *Id.* at 107-09. Fennell & Hall, *supra* note 61, at 1679-83. Proposed amendments to rule 32 of the Federal Rules of Criminal Procedure would require the sentencing judge to inform the Bureau of Prisons and the Parole Commission of any factual findings made by the sentencing court on controverted issues, and of any information upon which the court disclaimed reliance. Judicial Conference of the United States, Administrative Office of the United States Courts, Proposed Amendments to the Federal Rules of Criminal Procedure — Preliminary Draft, *reprinted in* 30 CRIM. L. REP. 3001, 3014-15 (1981).

94. Fennell & Hall, *supra* note 61, at 1682.

Thus, as matters presently stand, a significant number of guideline decisions are likely based upon vague, unreliable, or inaccurate information.[95] Such decisions subvert the Commission's goal of achieving equity. The Commission itself has conceded that its decisions can be no more accurate than the information transmitted to it.[96] If improvement in Commission factfinding is going to occur, therefore, it must be accomplished by the sentencing participants. Probation officers, judges, prosecutors and defense attorneys must recognize their power and responsibility to insure the accuracy of the information furnished the Commission.

PAROLE GUIDELINES AND THE COURT'S SENTENCING OPTIONS: GUIDELINE EFFECTS AND MANIPULATIONS

The Parole Commission's policy decisions have altered the administration of federal sentences. The guidelines, in effect, have turned formerly indeterminate terms into determinate sentences, but without an overall change in federal sentencing statutes. Sentences based upon the rehabilitative ideal are administered under guidelines which predicate release on retribution and incapacitation. Further, the Commission's view of just punishment, has often conflicted with that of federal judges, resulting in a belief among some judges that the Commission's "resentencing" is intruding into the judiciary's domain.[97] It has also conflicted, at

---

95. Though this research revealed a number of ambiguities in guideline scoring instructions and instances of what appears to be hearing panel error, the variation in specificity and quality of the information provided to the Commission appears to be an even more basic problem. Obviously, decisions about sentencing and parole are not likely to be better than the information upon which they are based. P. HOFFMAN, INITIAL HEARINGS, *supra* note 61, at 7.

96. *Id.*

97. *See, e.g.*, Geraghty v. United States Parole Comm'n, 579 F.2d 238, 261 (3d Cir. 1978) ("When . . . the parole authority focuses consideration entirely on factors of deterrence, incapacitation and retribution, it takes into account . . . factors that are available to the sentencing judge. The commission then begins to perform functions which are within the traditional province of the judiciary."), *vacated and remanded*, 445 U.S. 388 (1980); Buckhannon v. Hambrick, 487 F. Supp. 41, 43 (S.D.N.Y. 1980) ("[T]he district judges no longer truly sentence a defendant. The parole guidelines do. This is unfortunate for a number of reasons.").

An early result of the tension between the district courts and the Parole Commission was an effort by district courts to overturn guideline decisions when they differed from the expectation of the sentencing judge. *See, e.g.*, Musto v. United States, 571 F.2d 136 (3d Cir. 1978); Kortness v. United States, 514 F.2d 167 (8th Cir. 1975). Eventually, a split in the circuits arose over the power of the sentencing judge to overturn an otherwise legal sentence because the Parole Commission's action had rendered inaccurate the judge's understanding of what would happen to the defendant. United States v. DiRusso, 548 F.2d 372 (1st Cir.

times, with the desires of prosecutors and defense attorneys engaged in plea bargaining. Accordingly, sentencing participants have tried to anticipate the impact of the guidelines and to avoid their effects. This section of the article will describe the process of Parole Commission action and judicial reaction.

Commission Action: Rehabilitative Sentences

Youth Corrections Act

The Parole Commission's application of its guidelines to individuals sentenced under the Federal Youth Corrections Act (YCA)[98] and the Narcotics Addict Rehabilitation Act (NARA)[99] has altered significantly the nature of those sentences. At present, any offender under twenty-six years of age at the time of conviction may be sentenced under the YCA. If the offender is under twenty-two years of age, the trial court must sentence under the Act unless it specifically finds that the inmate is likely to receive "no benefit" from YCA treatment.[100] Offenders between twenty-two and twenty-six, "young adult offenders," can receive YCA treatment if the court finds that the offender would benefit from the Act.[101] In either case, once the Act is invoked, the court has three sentencing options. First, if the court determines that a sentence of incarcera-

---

1976); United States v. Salerno, 538 F.2d 1005 (3d Cir. 1976); United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975). In United States v. Addonizio, 442 U.S. 178 (1979), the Supreme Court resolved the conflict, holding that the sentencing court could not entertain collateral attacks based on arguments that decisions of the Commission frustrated the expectation of the sentencing judge.

The Court's decision was based upon its interpretation of the federal motion to vacate sentence, 28 U.S.C. § 2255 (1976). The Court noted that previous decisions had held relief under § 2255 limited to constitutional and jurisdictional errors, or errors constituting a "fundamental defect which inherently results in a complete miscarriage of justice." *Addonizio*, 442 U.S. at 185 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). Errors of fact could be raised only if of the most "fundamental character." *Addonizio*, 442 U.S. at 186. The Court found that the sentencing judge's error concerning the Parole Commission's treatment of an inmate was not of "fundamental" character, and further declared that the sentencing judge had "no enforceable expectation with respect to the actual release of a defendant short of his statutory term." *Id.* at 190.

Addonizio established that federal district courts cannot use collateral attack under § 2255 as a means of monitoring or determining the release dates of inmates under Parole Commission jurisdiction. Nevertheless, as this article demonstrates, district judges continue to possess considerable power by means other than collateral attack to affect the actual release date of prisoners they sentence. *See infra* notes 136-47 and accompanying text.

98. 18 U.S.C. §§ 5005-5026 (1976).

99. *Id.* §§ 4251-4255.

100. *Id.* § 5010(d). *See* Dorszynski v. United States, 418 U.S. 424, 436-44 (1974).

101. 18 U.S.C. § 4216 (1976).

tion is unnecessary, it may suspend sentence and place the defendant on probation.[102] Second, the court may sentence the defendant to the custody of the Attorney General for an indeterminate term of "treatment and supervision"[103] totalling six years. The court has no discretion to impose a shorter period of confinement;[104] the statute requires a six-year term, even if the maximum term which could be imposed upon an adult is less than six years.[105] Third, where the offense of conviction allows a term greater than six years, the court may impose an indeterminate sentence of from six years to the maximum term provided.[106]

Enacted in 1950, the YCA was intended to provide "a new alternative sentencing and treatment" scheme for eligible offenders.[107] Modelled on the English Borstal system, "the underlying theory of

---

102. *Id.* § 5010(a).

103. *Id.* § 5010(b). An offender committed under § 5010(b) shall be released conditionally under supervision on or before the expiration of four years from the date of conviction, and discharged unconditionally on or before six years from the date of conviction. *Id.* § 5017(c).

104. *See, e.g.*, United States v. Jackson, 550 F.2d 830 (2d Cir. 1977) (mandamus issued against judge imposing a YCA sentence of less than six years); United States v. Cruz, 544 F.2d 1162 (2d Cir. 1976). *But see* 18 U.S.C. § 3401(g)(1) (Supp. III 1979) (provides that a federal magistrate may not sentence a youth offender convicted of a misdemeanor to a term in excess of one year, and may not sentence a youth convicted of a petty offense to more than six months' confinement).

105. *See, e.g.*, United States v. Van Lufkins, 676 F.2d 1189, 1193-94 (8th Cir. 1982); Johnson v. United States, 374 F.2d 966, 967 (4th Cir. 1967); Kotz v. United States, 353 F.2d 312, 314 (8th Cir. 1965); Rogers v. United States, 326 F.2d 56, 57 (10th Cir. 1963); Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962); Cunningham v. United States 256 F.2d 467, 472 (5th Cir. 1958). *See also* Ralston v. Robinson, 102 S. Ct. 233, 238 n.3 & 250 n.13 (1981) (Stevens, J., dissenting); Watts v. Hadden, 651 F.2d 1354, 1357 n.2 (10th Cir. 1981). *But see* United States v. Hunt, 661 F.2d 72, 75-76 (6th Cir. 1981); United States v. Amidon, 627 F.2d 1023, 1026-27 (9th Cir. 1980).

Hunt and *Amidon* conclude that changes enacted by the Federal Magistrate Act of 1979 evince Congress' intent to bar the courts from imposing a longer sentence on youths than could be imposed upon adults. The recent amendment provides that a magistrate may not sentence an eligible youth convicted of a misdemeanor to a YCA term which extends beyond one year, and may not sentence a petty offender to a YCA term in excess of six months. 18 U.S.C. § 3401(g)(1) (Supp. III 1979). In *Hunt* and *Amidon*, the courts found that Congress would not have intended to restrict a magistrate's power to impose a YCA indeterminate term on a misdemeanant while permitting such a sentence to be imposed by a district judge. Thus, the courts found it "implicit in the Federal Magistrate Act of 1979 that Congress intended that neither a district court judge nor a magistrate may sentence a youth under the Youth Corrections Act to a term of confinement longer than it could impose on an adult." *Amidon*, 627 F.2d at 1027, *quoted in* United States v. Hunt, 661 F.2d 72, 76 n.8 (6th Cir. 1981). *Contra* United States v. Van Lufkins, 676 F.2d 1189, 1194 (8th Cir. 1982) (explicitly rejecting *Amidon*).

106. 18 U.S.C. § 5010(c) (1976).

107. S. REP. No. 1180, 81st Cong., 1st Sess. 1 (1949).

the bill [was] to substitute for retributive punishment methods of training and treatment designed to correct and prevent anti-social tendencies. It departs from the mere punitive ideas of dealing with criminals and looks primarily to the objective idea of rehabilitation."[108] This rehabilitation was to be accomplished by correctional, educational, vocational, and psychological treatment in facilities designed to keep youths segregated from more hardened criminals.[109] In keeping with the goals of the statute, an individual was considered entitled to release when he became rehabilitated.[110]

Despite the rehabilitative character of the YCA, the Parole Commission, in 1973, designed its own set of guidelines for youthful offenders.[111] These guidelines, generally in effect today,[112] apply the same offense severity and salient factor score criteria to all persons under twenty-two years of age, whether they are sentenced to

---

108. H.R. REP. No. 2979, 81st Cong. 2d Sess. 3 (1950).

109. *See* Dorszynski v. United States, 418 U.S. 424, 434 (1974).

110. *See, e.g.*, Durst v. United States, 434 U.S. 542, 546 & n.7 (1978) (quoting *Correctional System for Young Offenders: Hearings on S. 1114 and S. 2609 Before a Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st Sess. 27 (1949) (statement of James V. Bennet, Director, Bureau of Prisons)); Dorszynski v. United States, 418 U.S. 424, 434-35 (1974); Shepard v. Taylor, 556 F.2d 648, 652-53 (2d Cir. 1977).

111. The Youth/NARA guidelines are now set forth at 28 C.F.R. § 2.20 (1981). The Commission's imposition of the parole guidelines upon what was thought to be a rehabilitative sentencing scheme produced a flurry of litigation. A number of courts concluded that the Commission's unilateral decision to give great weight to offense severity contravened congressional intent as expressed in the release provisions of the YCA. *See, e.g.*, Marshall v. Garrison, 659 F.2d 440, 443-44 (4th Cir. 1981); United States *ex rel.* Mayet v. Sigler, 403 F. Supp. 1243 (M.D. Pa. 1975), *aff'd*, 556 F.2d 570 (3d Cir. 1977).

In 1976, Congress amended the YCA to make YCA release decisions subject to the general parole criteria applicable to adults. *See* Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 7, 90 Stat. 219, 232 (1976) (codified at 18 U.S.C. § 5017(a) (1976)). Relying on this change, courts have generally approved the application of the guidelines to prisoners whose offenses occurred after 1976. *See* Smith v. Hambrick, 637 F.2d 211 (4th Cir. 1980); Shepard v. Taylor, 556 F.2d 648, 653 (2d Cir. 1977); United States v. DiRusso, 548 F.2d 372 (1st Cir. 1976). *But see* Watts v. Hadden, 651 F.2d 1354, 1380 (10th Cir. 1981). On the other hand, the majority of courts have held it a violation of the ex post facto clause to apply the post-1976 standards to prisoners tried before 1976. *E.g.*, Marshall v. Garrison, 659 F.2d 440, 444-45 (4th Cir. 1981); Benites v. United States Parole Comm'n, 595 F.2d 518, 521 (9th Cir. 1979); DePeralta v. Garrison, 575 F.2d 749, 751 (9th Cir. 1978); Shepard v. Taylor, 556 F.2d 654 (2d Cir. 1977).

112. *But cf.* Watts v. Hadden, 651 F.2d 1354 (10th Cir. 1981). In *Watts*, the Tenth Circuit determined that the "uniform" application of the Parole Commission Youth Guidelines, even to prisoners sentenced after 1976, violated congressional intent as expressed in the Youth Corrections Act. *Id.* at 1377. The court found that the use of the guidelines was not per se illegal, but held that the YCA requires that the inmate's "rehabilitation" and "response to treatment" be considered. *Id.* at 1382. The court also found the Commission's rigid application of the guidelines to violate that mandate. At present, the status of the YCA guidelines in the Tenth Circuit is at best uncertain.

YCA or regular adult sentences. For parole purposes, all youths are treated similarly.[113] The only difference between the youth and adult guidelines is that the youth guidelines provide for a shorter term of incarceration in each guideline range.

The imposition of Parole Commission guidelines would seem to place YCA inmates in the same position as youths sentenced under regular sentences. In fact, YCA inmates may often serve longer terms than non-YCA inmates. While the non-YCA inmate has the opportunity to receive a short prison term which will expire before his guideline range, the YCA inmate has no such opportunity, nor has he any expectations of early release if he shows evidence of rehabilitation.

A recent district court case, *Buckhannon v. Hambrick*,[114] demonstrates a situation when a youth offender may serve a longer term than a young person given a regular adult sentence. In *Buckhannon*, the defendant was convicted of a number of armed robberies, apparently prompted to some degree by his addiction to narcotics. Believing that the defendant could be rehabilitated, and anticipating that he would receive a twenty to twenty-seven month guideline range, the district court sentenced the defendant to an indeterminate term as a young adult offender. The Parole Commisson thereupon categorized the inmate's offense behavior as "greatest I" and required a term of imprisonment of over forty months. Expressing its frustration with the parole guidelines, the court noted that had it accurately foreseen the Commission's guideline decision, it would have ignored the YCA and sentenced

---

113. *See* 28 C.F.R. § 2.20(h)(2) (1981). Like the Parole Commission, the Bureau of Prisons has attempted in the past to treat YCA inmates in a manner identical to adult prisoners. Beginning in 1976, the Bureau of Prisons ended the designation of certain of its facilities as "federal youth centers" and began housing youth and adult offenders together. Watts v. Hadden, 651 F.2d 1354, 1359 (10th Cir. 1981); Partridge, Chaset & Eldridge, *The Sentencing Options of Federal District Judges*, 84 F.R.D. 175, 201-02 (1980) [hereinafter cited as Partridge]. A number of court decisions followed, declaring the Bureau's policy to be a violation of the requirement that YCA offenders be separated from adult prisoners. *See* United States *ex rel.* Dancy v. Arnold, 572 F.2d 107 (3d Cir. 1978); Brown v. Carlson, 431 F. Supp. 755 (W.D. Wis. 1977). The Bureau thereupon altered its policy and established YCA units in federal institutions. In such units, inmates are segregated during sleep hours and during participation in certain youth offender programs, but are otherwise mixed with adults. Watts v. Hadden, 651 F.2d at 1356. Most of the programs available to youth offenders are also available to adult offenders. Partridge, *supra* this note, at 202. In January, 1982, presumably in response to the holding in *Watts v. Hadden* that this Bureau policy failed to comply with the segregation requirement of the YCA, the Bureau announced its intention to reconstitute separate YCA facilities. 47 Fed. Reg. 3752, 31,248 (1982) (to be codified at 28 C.F.R. § 524.20). *See* United States v. Hudson, 667 F.2d 767, 770-71 (8th Cir. 1982).

114. 487 F. Supp. 41 (S.D.N.Y. 1980).

the prisoner to a shorter adult sentence.[115]

Narcotics Addict Rehabilitation Act

The Parole Commission also applies its youth guidelines to offenders, young and old, who are sentenced under the Narcotics Addict Rehabilitation Act (NARA).[116] Under the Act, narcotic addicts meeting certain eligibility criteria may be sentenced to "treatment" if the court finds that the offender is likely to be "rehabilitated."[117] The sentence imposed must be an indeterminate term not to exceed ten years, or the maximum term which otherwise could be imposed if the maximum is less than ten years.[118] This indeterminate sentencing provision was designed to allow authorities flexibility in treating addicts while providing a "lengthy period of sentence for those recalcitrant offenders who do not respond to treatment."[119]

An offender committed under NARA may not be released until he has been treated for at least six months. At any time thereafter, the Attorney General may certify by report to the Parole Commissioner whether the offender should be conditionally released under supervision. After receipt of the Attorney General's report, and a certification by the Bureau of Prisons that the prisoner has made

---

115. *Id.* at 44.

116. 28 C.F.R. § 2.20 (1981).

117. 18 U.S.C. § 4253 (1976). An "eligible offender" is defined as any individual who is convicted of an offense against the United States, but does not include:

> (1) an offender who is convicted of a crime of violence.
>
> (2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.
>
> (3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided*, that an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.
>
> (4) an offender who has been convicted of a felony on two or more prior occasions.
>
> (5) an offender who has been committed under Title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions.

Id. § 4251(f).

118. *Id.* § 4253(a).

119. H.R. REP. No. 1486, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 4245, 4252.

sufficient progress to warrant release, the Parole Commission may order release.[120]

Under the Youth-NARA guidelines, the characteristics of the addict's offense and prior record, rather than his rehabilitation, govern release. The guidelines provide a benefit for the adult NARA prisoner, since the expected period of incarceration under the guideline range is less for NARA inmates than under the regular adult guidelines.[121] The NARA inmate, however, receives this benefit at the cost of the removal of the trial judge's discretion to impose a shorter term of imprisonment. Moreover, the NARA statute provides a hurdle to release above and beyond the guidelines: the certification that the inmate has made progress sufficient to warrant conditional release.[122] Thus, inmates with early guideline release dates, who fail to receive certification quickly, stand to serve longer terms than inmates sentenced to regular adult sentences.[123] In short, the Parole Commission's administration of YCA and NARA sentences has rendered a defense request to impose such a sentence a risky and needless choice.[124]

Immediate Parole Eligibility

For the inmate sentenced as an adult, the guidelines have produced a notable change by diminishing the effect of a sentence that provides for immediate parole eligibility. At present, the court sentencing an adult offender to a term in excess of one year possesses limited discretion to determine the parole eligiblity date. Under a "regular" adult sentence, the inmate is eligible for parole

---

120. The statute, as drafted, provided for certification by the Surgeon General of the United States. The responsibility of the Surgeon General to certify sufficient progress has been delegated to the Bureau of Prisons. *See* United States Bureau of Prisons, Program Statement 5330.5 ¶1092 (1979); Partridge, *supra* note 113, at 206.

121. *See* 28 C.F.R. § 2.20 (1981). For example, adult guidelines provide a customary range of imprisonment of 14-20 months for an individual with a "high" offense severity and a "very good" salient factor category; the Youth/NARA guidelines provide for a 12-16 month range for the offender with a similar severity and salient factor score.

122. 18 U.S.C. § 4254 (1976). A certificate is issued upon successful completion of a drug abuse program. Partridge, *supra* note 113, at 206.

123. Partridge, *supra* note 113, at 206.

124. The conditions of incarceration for NARA inmates do not vary significantly from those of regular adult inmates. The current Bureau of Prisons policy is to provide inmates, whether or not committed under NARA, with an opportunity to participate in drug treatment programs. While special drug treatment units exist at some Bureau facilities, they are not restricted to NARA inmates. A NARA sentence does differ from an adult term in that NARA inmates are expected to participate in the drug programs. *See* United States Bureau of Prisons, Program Statement 5330.5 ¶1080 (1979); Partridge, *supra* note 113, at 206.

after serving one-third of the sentence.[125] If the court decides that the prisoner should become eligible before this time, it may designate an earlier parole date or may specify that the prisoner is immediately eligible for parole. The authority for granting immediate parole eligibility is now codified in the United States Code, title eighteen, section 4205(b)(2); hence, the common term for this type of sentence is a "(b)(2)" sentence.

Congress had rehabilitative goals in mind when it granted courts the power to dispense with statutory eligibility limitations.[126] Under this provision, immediate parole eligibility would be granted when, in the court's judgment, "it might reasonably be expected to facilitate the rehabilitation of the prisoner."[127] Many judges imposing (b)(2) sentences contemplated that, while a (b)(2) sentence did not per se require early parole, it did contemplate an "individualized" decision based upon the inmate's adjustment to confinement and readiness for release.[128]

Application of the parole release guidelines to (b)(2) sentences changed, at least publicly, the criteria thought to be used in the release decision. While the district court may still recommend individualized treatment to the Parole Commission through the imposition of a (b)(2) sentence, it is now clear that "rehabilitation plays a minor part in the Commission's decision, and has no special significance for (b)(2) prisoners."[129] Thus, prisoners with (b)(2)

---

125. 18 U.S.C. § 4205(a) (1976).

126. This power was granted to district judges in 1958. *See* Act of Aug. 25, 1958, Pub. L. No. 85-752, § 3, 72 Stat. 845 (1958).

127. S. REP. No. 2013, 85th Cong., 2d Sess. 6, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3894, 3986 (statement of Warren Olney, Director, Administrative Office of United States Courts presented before Subcomm. No. 3 of the House Comm. on the Judiciary at Hearings on Apr. 30, 1958, on H.R.J. Res. 424, H.R.J. Res. 425, & H.R. 8923). *See also* Grasso v. Norton, 520 F.2d 27, 33 (2d Cir. 1975); Garafola v. Benson, 505 F.2d 1212, 1216-17 (7th Cir. 1974).

128. *See* Garafola v. Benson, 505 F.2d 1212, 1217-18 (7th Cir. 1974), and sources cited therein. 18 U.S.C. § 4208(a)(2) was recodified in 1976 as § 4205(b)(2). *See* Parole Commission and Reorganization Act, *supra* note 111.

129. Moore v. Nelson, 611 F.2d 434, 438 (2d Cir. 1979). Prior to 1976, authorities questioned whether the application of the guidelines to defendants with (b)(2) sentences would provide inmates with the individualized parole consideration contemplated by the authors of the indeterminate sentencing option. Grasso v. Norton, 520 F.2d 27, 39-40 (2d Cir. 1975) (Feinberg, J., concurring and dissenting); Project, *supra* note 17, at 891. *See also* Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974). In the 1976 Parole Commission and Reorganization Act, *supra* note 111, Congress authorized the Commission's use of guidelines, and proclaimed no exception for (b)(2) prisoners from the general standards required for release. *See* 18 U.S.C. § 4206(a) (1976). Relying on this legislative statement, courts have upheld the application of the guidelines to post-1976 inmates with (b)(2) sentences. Hayward v. United

sentences can expect to be released within the same guidelines as regular adult prisoners. Only when the guidelines call for an incarceration period that is less than one-third of the entire sentence will (b)(2) prisoners receive an earlier release date.[130]

Relative Culpability

The preceding section demonstrated the effects of the Commission's rejection of rehabilitation and its move to sentencing decisions based upon retribution and incapacitation. Although much attention has focused on this change in function, the categories chosen by the Commission to measure retribution and incapacitation have also had a major impact upon federal sentencing practice. Certain aspects of culpability have been depreciated in the guidelines, whereas others have received new emphasis. Judges who have imposed individualized sentences for factors not considered in the guidelines have seen these sentences "modified" by Parole Commission policies.

One of the most notable among the Commission's policies is its decision to ignore the relative culpability of co-defendants in the offense severity scale. The severity ratings do not distinguish among defendants based upon the degree of their intent or volition. As a result, the impulsive addict-robber acting to support his habit will receive the same offense treatment as the professional thief. While the Commission could use differences in relative culpability to justify a decision above or below the guidelines, it has done so in only a small minority of cases. The view that the relative gravity of the roles of co-defendants should be given minimal significance is not shared by many sentencing judges. Thus, courts may impose carefully calibrated sentences after finding one defendant less culpable than another, only to learn that the disparity has been nullified by the Parole Commission.[131]

Total Offense Behavior

The Commission's policy decisions have also had an impact upon prosecutorial and defense conduct in the plea bargaining process. As noted, the Commission bases its assessment of offense severity

---

States Parole Comm'n, 659 F.2d 857, 860-61 (8th Cir. 1981); Moore v. Nelson, 611 F.2d 434 (2d Cir. 1979); Shahid v. Crawford, 599 F.2d 666, 668-70 (5th Cir. 1979); Wilden v. Fields, 510 F. Supp. 1295, 1307 (W.D. Wis. 1981).

130. Moore v. Nelson, 611 F.2d 434, 438-39 (2d Cir. 1979).

131. *See, e.g.*, United States v. Manderville, 396 F. Supp. 1244 (D. Conn. 1975).

not upon the crime of conviction but upon "offense behavior." Thus, the criminal defendant who has apparently committed a bank robbery and has been allowed to plead to larceny will have his offense severity rated as robbery, "very high," just as if he had been convicted of the offense. In making this determination, the Commission may consider counts dismissed pursuant to plea bargaining.[132]

The Commission's policy is consciously designed to influence the effect of plea bargaining by "preventing disparities in the prosecutorial practices from being transferred to . . . the point at which the offender is finally released from prison."[133] A defense attorney's "ability" to secure the dismissal of several counts in a multi-count indictment may have little practical effect if the Commission considers the dismissed counts in deciding the inmate's release date. For the attorney involved in plea bargaining, a prosecutor's offer to dismiss several counts in a multi-count indictment should be considerably less appealing than it might have been years ago.

No matter how laudable the Commission's attempt to reduce prosecutorial disparity may seem to some, its efforts have been perceived as unfair by sentencing participants. Defendants who have given up their right to trial in order to secure the dismissal of certain counts of an indictment often believe that the bargain includes the requirement that the government not treat them as guilty of the dismissed offenses.[134] The reliance on unadjudicated offenses may seem particularly unfair in cases where the prosecutor's decision to bargain results from perceived weaknesses in the government's case or the existence of a strong defense to the major charge.[135] Whatever the reasons for the bargain, unless the defense attorney takes pains to establish a record at sentencing contesting the underlying offense, his client runs the risk of having the Parole Commission treat him as guilty of such offense because of the pros-

---

132. "Information in the file describing offense circumstances more severe than reflected by the offense of conviction (for example, information contained in a count of an indictment that was dismissed as a result of a plea agreement) may be relied upon to select an appropriately higher severity rating . . ." PROCEDURES MANUAL, *supra* note 37, app. 4 at 122. *See, e.g.*, Billiteri v. United States Bd. of Parole, 541 F.2d 938, 940, 942-44 (2d Cir. 1976); Bistram v. United States Bd. of Parole, 535 F.2d 329, 330 (5th Cir. 1976); Manos v. United States Bd. of Parole, 399 F. Supp. 1103, 1105 (M.D. Pa. 1975).

133. 44 Fed. Reg. 26,549 (1979) (Parole Commission statement on use of "offense behavior"), *reprinted in* Partridge, *supra* note 113, at 212.

134. *See* Alschuler, *Parole Release Guidelines*, *supra* note 10, at 241-42.

135. *Id.*

ecutor's description of the offense in the PIR.

Guideline Avoidance[136]

It should not be a surprise that the aims of sentencing participants have clashed with those of the Parole Commission. To some extent, the roles of the Commission and defense counsel will necessarily conflict. While the Commission seeks to reduce disparity, defense counsel's role at sentencing must be to emphasize those facts about the client which call for disparate treatment. It should also be no surprise that the Commission's policies conflict with judicial aims. Many judges feel it is their responsibility, not the Commission's, to make specific findings concerning retribution and incapacitation. Because of these diverging views, sentencing participants have attempted to anticipate the Commission's guideline decisions, and to craft sentences to avoid their impact.

Judges, for instance, possess more than enough tools to frustrate the impact of Parole Commission guidelines. The most obvious way a judge may avoid conflict with parole guidelines is to impose a sentence which is not administered by the Commission. In fact, approximately seventy percent of federal sentences are of this variety.[137] One such sentence is a term of probation. Probation subjects the defendant to a period of supervision of up to five years by the United States Probation Office. If the defendant violates probation, the court possesses the authority to order him to prison.[138]

For those defendants who must be sentenced to a term of imprisonment, the court may avoid the jurisdiction of the Parole Commission by imposing a sentence of one year or less. There are three forms of sentences under one year: a "regular" sentence, a "split" sentence,[139] and a sentence "as if on parole."[140] If the court imposes a regular sentence of under a year, the defendant's release date will be the stated time of the sentence minus "good time."[141] If the court wishes to impose a term of incarceration, yet provide

136. The coining of the term "guideline avoidance" and the first analysis of the phenomenon was completed by Professor Curtis. *See* Curtis, *supra* note 14, at 106-09.

137. The Commission only exercises jurisdiction over inmates sentenced to terms in excess of one year. 18 U.S.C. § 4205(a) (1976). In the past, only 30% of federal sentences have fallen into this category. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT, table D-7 at app. 86-87; ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1978 ANNUAL REPORT, table D-7 at app. 89 (1978); Curtis, *supra* note 14, at 116 n.32.

138. 18 U.S.C. §§ 3651, 3653 (1976).

139. *Id.* § 3651.

140. *Id.* § 4205(f).

141. *See id.* § 4161. (specifying amount of good time available for federal sentences).

for community supervision, it may impose a "split" sentence. Under a "split" sentence, the defendant may be required to serve up to six months followed by a term of probation, with a total time of up to five years.[142] Only where probation is violated and where the defendant is sentenced to a prison term of greater than one year will the Parole Commission's jurisdiction commence.

Still another way for the court to avoid Parole Commission jurisdiction, yet provide for a period of incarceration plus a period of supervision, is to impose a sentence "as if on parole." Under this statutory authority, the court may impose a sentence of from six months to one year and prescribe that the inmate be released, as if on parole, after serving one-third of the sentence.[143] The statute has been interpreted as permitting the court to specify release at any point after one-third of the sentence has been served, and before the expiration of the one year sentence.[144] Thus, the court may impose a sentence of greater than six months combined with a short release period, a combination not possible under a split sentence.[145]

As noted, these sentencing options—probation, split sentences, sentences of one year or less and sentences as if on parole—account for approximately seventy percent of all federal sentences.[146] With respect to all of these sentences, the Parole Commission will be without jurisdiction to impose its guidelines. In the other thirty percent of the cases, counsel may still attempt to secure a disposition to avoid application of the guidelines. The simplest means is to urge a sentence to a term which expires before the applicable guideline range. If the court believes that the guideline term provides for a greater period of incarceration than is reasonable, the court may impose a term that expires, with "good time," below the expected guideline range. Approximately fifteen percent of federal sentences over one year are of this variety.[147]

The court may also impose a "mixed" sentence, a short term under one count, accompanied by a term of probation on another count. By so doing, the court will guarantee the defendant a period of imprisonment under one year as well as a substantial period "on the street" under supervision.

---

142. *Id.* § 3651.
143. *Id.* § 4205(f).
144. United States v. Pry, 625 F.2d 689 (5th Cir. 1980), *cert. denied*, 450 U.S. 925 (1981).
145. *Id.* at 692-93.
146. *See supra* note 137.
147. *See supra* note 45.

Finally, prosecutors and defense attorneys have attempted to anticipate the guideline effects in plea bargaining practice. Some defense attorneys have sought assurance, as part of a plea bargain, that the prosecutor will not represent to the Parole Commission that the defendant committed particular types of aggravating behavior.[148] This kind of information bargaining creates the potential for circumventing the Commission's total offense behavior rating as well as its efforts to reduce disparity in the plea bargaining process.

Problems in Guideline Prediction

The ability to tailor a criminal plea or sentence that anticipates the parole guidelines presupposes an accurate prediction of how the Commission will apply its guidelines. As noted, despite the publication of the guidelines and the Commission's efforts to make guideline application as certain as possible,[149] accurate forecasts of the Commission's actions are often difficult.

Studies by the Commission and the GAO have shown that the Commission's guideline scoring is often unreliable. A study by the Commission's research unit found that in approximately twenty percent of the cases studied there was disagreement between the hearing examiner's conclusions and those of the research unit.[150] The GAO results were more startling: it found that in a sample of thirty cases given to thirty-five hearing examiners, there was disagreement among the examiners in every case.[151] In all but one case, the examiners found two to five different severity levels; further, in only one case did all examiners agree on the salient factor score.[152]

One of the reasons for this inconsistency, the inaccuracy of information transmitted to the Commission, has already been noted.

---

148. *See* United States v. Cook, 668 F.2d 317 (7th Cir. 1982) (government promise to offer "nothing in aggravation" breached by probation officer's access to damaging information in United States Attorney's file); United States v. Heldt, 668 F.2d 1238, 1287 (D.C. Cir. 1981) (agreement not to represent that offenses amounted to more than $2,000 in value). In *Cook*, the court questioned the propriety of a prosecutorial agreement to withhold relevant information from the probation office or court. *Cook*, 668 F.2d at 320 n.4. *See also* U.S. Dep't of Justice, Principles of Federal Prosecution 46 (1980) (an attorney for the government should cooperate with probation service in preparation of the PIR).

149. *See infra* notes 205-09 and accompanying text. *See also* 42 Fed. Reg. 31,784 (1977).

150. P. Hoffman, Initial Hearings, *supra* note 61, at 4. The Commission's study concluded that in a majority of cases in which the guideline scores disagreed, the difference was "not likely to have affected the actual release-decision." *Id.*

151. *See* Federal Parole Practices, *supra* note 75, at 15, 22.

152. *Id.* at 22. In 28 of the 30 cases, the difference in guideline interpretation resulted in disparity of over one year in the recommended release date.

Another cause may be due to vagueness in the guideline criteria. In the past, the guidelines have failed to include many federal crimes in the offense severity scale. Probation officers and defense attorneys estimating the treatment of an unincluded offense have been left with only the general nostrum that "the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed," or that, if more than one severity fits, the most severe one should be used.[153] Significantly, a revision of the guidelines effective January 31, 1983, will respond to this problem by including a number of formerly unlisted crimes in the offense severity table.[154]

A more confusing feature of the guidelines is the policy regarding multiple separate offenses. The Commission provides little guidance about how it will rate an individual convicted of multiple separate offenses beyond the statement that it "may," in its discretion,[155] increase the offense severity. The breadth of discretion lodged in hearing examiners in multiple offense situations has therefore created the opportunity to manipulate offense severity ratings.[156]

Even if counsel and the sentencing courts are able to predict the guideline range, the Parole Commission can render discretionary decisions above the guidelines, and does so in approximately ten percent of the cases.[157] Thus, counsel will be able to predict the Commission's behavior with certainty only by knowing in advance those cases in which the Commission may exceed its guidelines. The Commission's guideline application manual does specify some types of offense behavior and parole factors which merit decisions above the guidelines. Nevertheless, the Commission's standards are considerably general in nature.

For example, the Commission will render decisions above the guidelines in cases where it finds the offense behavior unusually

---

153. 28 C.F.R. § 2.20 notes B, C (1981).

154. 47 Fed. Reg. 56,334-41 (1982); *see infra* notes 205-09 and accompanying text.

155. 28 C.F.R. § 2.20 note D (1981). In a recent amendment to its Rules and Procedures Manual, the Commission included a chart to "provide guidance in assessing whether the severity of multiple offenses is sufficient to raise the offense level." RULES AND PROCEDURES MANUAL, *supra* note 37, at 168 (rev. June 1, 1982). Regrettably, the chart is not included in the guidelines published in the Code of Federal Regulations.

156. "More commonly, offense severity ratings rather than salient factor scores are manipulated to avoid explicit decisions outside the Guidelines." Project, *supra* note 17, at 838.

157. *See* PAROLE COMMISSION REPORT, *supra* note 46, at 22.

sophisticated or of unusual magnitude.[158] While the Commission seems to pay particular attention to conspiracy offenses in general and narcotics conspiracies in particular,[159] a wide variety of cases can be grouped under this umbrella.

One consideration relating to the salient factor score which justifies a decision over the guidelines is whether an offender has an unusually extensive record.[160] For example, a prisoner with four prior convictions will score a zero for the salient factor which considers prior convictions. If an inmate has a more extensive record, the only way available for the Commission to reflect that the inmate is a poorer risk than the zero rating indicates is to score the inmate outside the guidelines.[161]

Finally, counsel and the court may not anticipate the final guideline decision where the guidelines current at the time of sentencing are subsequently changed under the Commission's regulatory mandate to review and modify its guidelines.[162] When modifications occur, the ultimate parole guideline decision may prescribe more incarceration than any of the parties could have anticipated.[163]

As a result of the uncertainty of guideline predictions, courts have attempted to retain jurisdiction of cases in order to monitor the Commission's performance. Such action is feasible by a motion to reduce sentence under rule 35 of the Federal Rules of Criminal Procedure. Rule 35 permits a defendant to file a motion for modification of sentence within 120 days of sentencing or within 120 days of the expiration of a direct appeal. Since most initial parole hearings may be held within 120 days of commitment,[164] any defendant who has begun serving a sentence while taking an appeal will have received a parole decision well before the expiration of time for a rule 35 motion. In these cases, a motion may be filed and the court

158. PROCEDURES MANUAL, *supra* note 37, at 125-26, app. 4.

159. *See, e.g.*, O'Brien v. Putnam, 591 F.2d 53, 55 (9th Cir. 1979) (cocaine conspiracy); Smaldone v. United States, 458 F. Supp. 1000, 1002 (D. Kan. 1978) (gambling and cocaine conspiracy); Stoller v. Tennant, 448 F. Supp. 712, 714 (C.D. Cal. 1978) (cocaine conspiracy); Foddrell v. Sigler, 418 F. Supp. 324, 325 (M.D. Pa. 1976) (heroin conspiracy).

160. PROCEDURES MANUAL, *supra* note 37, at 126, app. 4.

161. Other reasons for setting a parole date beyond the guidelines include a finding that the inmate has a history of assaultive behavior, an on-going pattern of criminal violations over a period of years, or a history of repeated parole failures. *See* PROCEDURES MANUAL, *supra* note 37, at 126, app. 4.

162. 28 C.F.R. § 2.20(g) (1981).

163. *See* United States v. Tully, 521 F. Supp. 331, 336 (D.N.J. 1981); United States v. DeMier, 520 F. Supp. 1160, 1165 (W.D. Mo. 1981).

164. 28 C.F.R. § 2.12(a) (1981).

may adjust a sentence after the Parole Commission's decision. In cases where the beginning of the sentence corresponds to the beginning of the running of time to file a rule 35 motion, it may still be possible to secure a modification of sentence after the parole decision, so long as the rule 35 motion is timely filed before the expiration of the 120 days.[165] Thus, if the defendant files his motion shortly before the termination of the 120 days, the court may withhold decision pending the Parole Commission's initial guideline decision. Courts have used rule 35 in this manner to maintain jurisdiction to monitor the Commission's performance until the initial parole decision, and later, throughout the administrative remedy process.[166] Where disagreements with the Parole Commission over the use of its guidelines have occurred, federal judges have reduced prison terms,[167] imposed probationary sentences,[168] or ordered release.[169]

In sum, the Commission's efforts to reduce disparity and to impose its sentencing philosophy have been met by an effort by some participants in sentencing to maintain control over the process. In the present scheme, at least, the success of the Commission in reducing overall disparity is not free from doubt.

Some Thoughts for the Future

The parole guideline system was implemented during a period of continuing concern over the fairness of federal sentencing practices.[170] The calls for sentence reform have found recent expression

---

165. Courts have held that rule 35 permits a sentencing court to decide the motion after the 120 day period, as long as it is filed within 120 days. United States v. Mendoza, 581 F.2d 89 (5th Cir. 1978) (en banc); United States v. Stollings, 516 F.2d 1287 (4th Cir. 1975); Leyvas v. United States, 371 F.2d 714 (9th Cir. 1967). *See* 8A J. Moore, Moore's Federal Practice ¶35.02[2] (2d ed. 1981).

166. United States v. Snooks, 493 F. Supp. 1364 (W.D. Mo. 1980).

167. United States v. Benson, 75 Cr. 538 (S.D.N.Y. Dec. 2, 1977) (available on Lexis, Genfed library, Dist file); United States v. Jackson, 410 F. Supp. 1240 (D. Md. 1976); United States v. Manderville, 396 F. Supp. 1244 (D. Conn. 1975).

168. United States v. Sinkfield, 484 F. Supp. 595 (N.D. Ga. 1980).

169. United States v. Wigoda, 417 F. Supp. 276 (N.D. Ill. 1976).

170. *See, e.g.*, A. Von Hirsch & K. Hanrahan, The Question of Parole: Retention, Reform or Abolition (1979); Alschuler, *Prosecutorial Power, supra* note 6; Bazelon, *Missed Opportunities in Sentencing Reform*, 7 Hofstra L. Rev. 57 (1978) [hereinafter cited as Bazelon]; Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 Geo. L.J. 975 (1978) [hereinafter cited as Coffee]; Curtis, *supra* note 14; Hoffman & Stover, *supra* note 4; Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267 (1977); Orland, *supra* note 9; Schulhofer, *supra* note 6; Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 Va. L. Rev. 637 (1981); Skirvseth, *supra* note

in a number of congressional proposals for revision of the federal sentencing statutes.[171] One such proposal, originally part of the Senate's omnibus criminal code revision bill,[172] has now surfaced in both Houses as part of the Violent Crime and Drug Enforcement Improvements Act of 1982.[173] If enacted, the bill would mandate far-reaching changes. It would specify, for the first time, the purposes of sentencing.[174] It would also provide a mechanism for the development and use of guidelines for judges in the sentencing process.[175] Finally, the proposed legislation would mandate a phas-

---

10; Tjoflat, *A Practical Look at the Sentencing Provisions of S. 1722*, 72 J. CRIM. L. & CRIMINOLOGY 555 (1981) [hereinafter cited as Tjoflat]; Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315 (1979).

171. *See, e.g.*, S. 2572, 97th Cong., 2d Sess. (1982) [hereinafter cited as S. 2572]; H.R. 6497, 97th Cong., 2d Sess. (1982) [hereinafter cited as H.R. 6497].

Prior to the introduction of S. 2572 and H.R. 6497, the sentencing reform proposals were included as part of the omnibus federal criminal code revision bills. Five such bills have been introduced in the 97th Congress. S. 1630, 97th Cong., 2d Sess. (1982) [hereinafter cited as S. 1630]; H.R. 5679, 97th Cong., 2d Sess. (1982) [hereinafter cited as H.R. 5679]; H.R. 5703, 97th Cong., 2d Sess. (1982) [hereinafter cited as H.R. 5703]; H.R. 4711, 97th Cong., 1st Sess. (1981) [hereinafter cited as H.R. 4711]; H.R. 1647, 97th Cong., 1st Sess. (1981) [hereinafter cited as H.R. 1647]. S. 1630 was reported out of the Senate Judiciary Committee but has failed thus far to reach the Senate floor for debate. *See* 128 CONG. REC. 522 (daily ed. Jan. 25, 1982); 128 CONG. REC. S4004-07 (daily ed. Apr. 27, 1982). None of the House Bills has even been reported from committee in this session.

The efforts to reform the federal criminal code revision bill have now spanned a decade. In 1971, the National Commission on Reform of the Federal Criminal Laws (the "Brown Commission") issued a proposed federal criminal code. In 1973, the first legislative recodification attempt, S.1, was introduced in the Senate. S.1, 93rd Cong., 1st Sess. (1973). S.1 was reintroduced in 1975, S.1, 94th Cong., 1st Sess. (1975), and was succeeded in 1977 by S. 1437 and its counterpart in the House of Representatives, H.R. 6869. S. 1437, 95th Cong., 1st Sess. (1977); H.R. 6869, 95th Cong., 1st Sess. (1977). S. 1437 was the first of the recodification measures to contain detailed sentencing reform provisions. The bill passed the Senate, 124 CONG. REC. 1463 (1978), but died in committee in the House. In 1980, the judiciary committees of both houses of Congress reported on new bills to revise the federal criminal code, neither of which was passed. S. 1722, 96th Cong., 1st Sess. (1980); H.R. 6915, 96th Cong., 2d Sess. (1980).

172. S. 1630, *supra* note 171.

173. *See* S. 2572, *supra* note 171; H.R. 6497, *supra* note 171. Because the Senate and House versions of the bills are identical in all relevant respects, only the Senate version will be cited throughout. The article will also provide parallel citations to the relevant sections of S. 1630, *supra* note 171, the criminal code revision bill still pending in the Senate.

174. *See* S. 2572, *supra* note 171, tit. V, sec. 502, § 3553(a); S. 1630, *supra* note 171, tit. I, §2003(a).

175. *See* S. 2572, *supra* note 171, tit. V, sec. 502, § 3553, sec. 507, §§ 991-998; S. 1630, *supra* note 171, tit. I, § 2003, tit. III, sec. 126, §§ 991-998. The Senate's guideline setting body would be the United States Sentencing Commission, an independent commission with seven voting members. Four of the members would be appointed by the President with the consent of the Senate. The other three members would be federal judges chosen by the President from a list submitted by the Judicial Conference of the United States.

Two of the House criminal code reform proposals introduced in the 97th Congress also

ing out of the Parole Commission and move all the authority for the sentencing decision to the trial court.[176]

Ironically, the Commission's action in implementing the guidelines has played a part in this call for its abolition. The Commission's abandonment of the rehabilitative model, while applauded by many, left it with a primary function duplicative of the judicial sentencing decision. As a result of this perceived redundancy, some critics have called for the Commission's abolition.[177] The Commission has responded by arguing that the guidelines are still important as a means of reducing unwarranted sentence disparity.[178] Critics, in turn, have asserted that the Parole Commission is neither a desirable nor a necessary body within which to place the disparity reduction mechanism. Additionally, commentators have noted that, since the Commission reviews only those sentences exceeding one year—some thirty percent of present federal sentences—it is powerless to moderate undue disparity in seventy percent of the cases.[179]

The current parole guideline system has even been accused of increasing sentencing disparity by tolerating, and at times encouraging, the guideline manipulation described in this article.[180] Some

---

call for the use of sentencing guidelines by the district court. The House bills differ by mandating the Judicial Conference of the United States to propose sentencing guidelines. The guidelines would be transmitted to Congress, and would take effect within 180 days unless disapproved. H.R. 5679, *supra* note 171; H.R. 1647, *supra* note 171, tit. I, § 4301(a). The bills would also establish a committee on sentencing appointed by the Judicial Conference to collect data and recommend guidelines to the Judicial Conference. H.R. 5679, *supra* note 171, tit. I, §§ 4303-4304; H.R. 1647, *supra* note 171, tit. I, §§ 4303-4304.

176. *See* S. 2572, *supra* note 171, tit. V, sec. 508(a)(3) (repealing parole chapter) & sec. 525(b) (phase-out of Commission); S. 1630, *supra* note 171, tit. IV, sec. 134(b); S. REP. No. 307, 97th Cong., 1st Sess. 955-75 (1981).

Several of the House versions of the criminal code revision provide for continued Parole Commission jurisdiction. H.R. 5703, *supra* note 171, tit. I, §§ 4701-4716; H.R. 4711, *supra* note 171, tit. I, §§ 4701-4717; *see* H.R. REP. No. 1396, 96th Cong., 2d Sess. 505-34 (1980). *But see* H.R. 5679, *supra* note 171, tit. I, § 4716 (providing for termination of Parole Commission 5 years after sentencing guidelines take effect).

177. *See, e.g.*, Alschuler, *Parole Release Guidelines*, *supra* note 10, at 238-40; Marvin E. Frankel, remarks on Sentencing Provisions of the Proposed Federal Code at the Plenary Session of the Association of American Law Schools (Dec. 28, 1977), *reprinted in Current Developments in Judicial Administration*, 80 F.R.D. 147, 156-57 [hereinafter cited as Frankel]; Newman, *A Better Way to Sentence Criminals*, 63 A.B.A.J. 1562 (1977) [hereinafter cited as Newman]. *See also* S. REP. No. 307, *supra* note 176, at 971-72.

178. *See* McCall, *supra* note 33, at 4-7; SELECTED REPRINTS vol. II, *supra* note 33, at 42-45.

179. *See, e.g.*, S. REP. No. 307, *supra* note 176, at 963. *See also* Curtis, *supra* note 14, at 107; Skrivseth, *supra* note 10, at 290.

180. *See* S. REP. No. 307, *supra* note 176, at 959: "[T]he existence of the Parole Com-

trial judges sentence defendants in the hope of circumventing the impact of the guidelines. In fact, approximately twenty-five percent of sentences over one year either end before the guideline period, or do not provide for parole eligibility until after the guideline range.[181] Arguably, the result of these manipulations may be to increase sentence disparity at the sentencing level, cancelling out the reduction in disparity at the Parole Commission level.

Critics have also asserted that the Commission's espoused disparity reduction functions will be unnecessary after promulgation of detailed sentencing guidelines.[182] Judges and commentators have stated that the proper way to mete out just punishment and reduce unwarranted disparity is to establish a structured judicial sentencing system,[183] not to rely on an administrative parole process that is ill-suited to adequate factfinding.[184]

The alternative to the Parole Commission, first proposed in the Senate, is a system of detailed sentencing guidelines promulgated by a sentencing commission and applied by district courts.[185] Although the exact shape of the sentencing guidelines is unclear, it has been suggested that they might take a form somewhat similar to the grid of the Parole Commission guidelines.[186] The proposed statute would require sentencing judges to impose a sentence within the appropriate guideline range absent an aggravating or mitigating circumstance that was not adequately considered by the sentencing commission.[187] The sentence imposed would then correspond almost exactly with the sentence served. The prisoner would

---

mission may actually invite judicial fluctuation by encouraging judges to sentence with the availability of parole in mind." *See also* Partridge, *Changes in Prison and Parole Policies: How Should the Judge Respond?* 45 FED. PROBATION 15 (June 1981).

181. *See supra* note 45 and accompanying text.

182. *See, e.g., Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 1901-02 (1979) (Hon. Harold R. Tyler); S. REP. No. 307, *supra* note 176, at 970 n.66; Skrivseth, *supra* note 10, at 298, 300.

183. *See* Frankel, *supra* note 177, at 157: "The idea of a parole board or commission serving in effect to review the judges was not sound when it was more or less covert; it does not improve as an express proposition." *See also* Newman, *supra* note 176, at 1566: "By using the table, the commission acknowledges it is not making release decisions based on rehabilitation. It is simply selecting appropriate lengths of time to be served for various combinations of offense severity and offender characteristics. That is, or ought to be, the essence of a sentencing decision."

184. Alschuler, *Parole Release Guidelines, supra* note 10, at 239.

185. *See supra* note 175.

186. Tjoflat, *supra* note 170, at 558 n.22, 616 .

187. S. 2572, *supra* note 171, tit. V, sec. 502, § 3553(b); S. 1630, *supra* note 171, tit. I, §2003(b).

be able to shorten his term of imprisonment only by receipt of "good time" of up to ten percent of his sentence each year, or by a very limited right to petition the court for review of the sentence.[188] Youth Corrections Act and Narcotics Addict Rehabilitation Act sentences would be eliminated, and the Parole Commission would be phased out.[189]

This sentencing guideline scheme possesses a number of tempting advantages. It shifts the guideline determination to the trial court, a forum well-suited to factfinding. It eliminates the Youth Corrections Act and the Narcotic Addict Rehabilitation Act, thereby ending the disharmony caused by the use of a determinate sentence system for sentences rehabilitative in origin. The proposal also eliminates sparring between the Parole Commission and the court over the appropriate length of sentence.

Despite these seeming benefits, there are reasons to be wary of the unitary sentencing guideline model. One concern is that the scheme will reduce unwarranted judicial discretion only to increase the effects of prosecutorial discretion. Our sentencing system contains at least five components: the police, the prosecutor, the judge, the Parole Commission, and the Bureau of Prisons. Experience with parole guidelines has shown that the roles of the parties within the process are interdependent, and that attempts to eliminate disparity in one portion of the system may increase the likelihood of disparity caused by decisions in other branches. Thus, while the Parole Commission has endeavored to reduce disparity through the guidelines in its part of the system, judges in disagreement with the Commission's sentencing philosophy have tailored their sentences to avoid these guidelines by imposing, for example, very short sentences to require release before the guideline period.[190]

Imposition of guidelines by a proposed sentencing commission could cause analogous shifts of power within the criminal justice

---

188. S. 2572, *supra* note 171, tit. V, sec. 502, §§ 3582(c), 3624(b); S. 1630, *supra* note 171, tit. I, §§ 2302(c), 3824(b); *see* S. REP. No. 307, *supra* note 176, at 972-73, 1249.

189. S. REP. No. 307, *supra* note 176, at 972 n.68, 1340; *see* S. 2572, *supra* note 171, tit. V, sec. 502, § 3581(b) & sec. 525(b); S. 1630, *supra* note 171, tit. I, § 2301, tit. IV, sec. 134(b). The bills reject separate sentencing statutes for youths and addicts, and instead instruct the Sentencing Commission to consider the effect that age and drug dependence should have on the "nature, extent, place of service, or other incidents of an appropriate sentence." S. 2572, *supra* note 171, tit. V, sec. 507, § 994(d); S. 1630, *supra* note 171, tit. III, sec. 126, § 994(d); S. REP. No. 307, *supra* note 176, at 1340.

190. *See supra* text accompanying notes 125-49.

system from judges to prosecutors. Federal prosecutors already possess considerable power over the sentencing decision. United States Attorneys exercise discretion in deciding whether to prosecute, what charges to bring, and whether to reduce charges or enter a plea bargain. In exercising these powers, prosecutors already have great ability to determine the sentence actually imposed.[191] In the present system, however, prosecutorial power to set the actual sentence can be moderated by both the trial court, which is empowered to impose a wide range of sentences, and by the Parole Commission, which attempts to base its offense severity rating on the actual offense committed rather than the one charged.[192]

The Sentencing Commission scheme would eliminate the Parole Commission's ability to moderate disparity and might reduce the court's moderating ability as well. The proposal directs the sentencing commission to establish guidelines based upon "each category of offense involving each category of defendant."[193] Although there will surely be some basis for aggravating or mitigating circumstances, the presumptive sentence, in one commentator's words, is "directly tied" to the charges to which a defendant pleads guilty.[194] Thus, the effect of the sentence guidelines could be to decrease judicial discretion to vary a sentence for a single charge and to increase the importance of the prosecutor's discretion in selecting a charge. Even more important, the system would increase the bargaining leverage of the prosecutor by magnifying the effect of a prosecutor's willingness to reduce charges during plea bargaining.[195]

---

191. *See, e.g.*, COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, REDUCING FEDERAL JUDICIAL SENTENCING AND PROSECUTING DISPARITIES: A SYSTEM-WIDE APPROACH NEEDED 15-16 (1979) [hereinafter cited as REDUCING DISPARITIES]; Tjoflat, *supra* note 170, at 619 n.258.

192. *See* REDUCING DISPARITIES, *supra* note 191, at 20; Schulhofer, *supra* note 6, at 742-43; Tjoflat, *supra* note 170, at 620-21.

193. S. 1630, *supra* note 171, tit. III, sec. 126, § 994(b). *See* S. 2572, *supra* note 171, tit. V, sec. 507, § 994(b).

194. *Legislation to Revise and Recodify Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary on H.R. 6869*, 95th Cong., 1st & 2d Sess. 2338 (1978) (statement of Matthew T. Heartney, Yale Law School) [hereinafter cited as *Hearings on H.R. 6869*].

195. There have been frequent expressions of concern that the Senate's sentencing scheme will increase disparity by limiting judicial discretion while at the same time leaving prosecutorial discretion intact. *See Hearings on H.R. 6869, supra* note 194, at 595-96 (Thomas Emerson, Yale Law School), 1934 (Judge James M. Burns), 2224 (Cecil C. McCall, Chairman, U.S. Parole Commission), 2264-65 (John J. Cleary, on behalf of Nat'l Legal Aid and Defender Ass'n), 2324-29 (Daniel J. Freed, Yale Law School), 2336-40 (Matthew T. Heartney, Yale Law School), 2356-57 (G. LaMarr Howard, Nat'l Ass'n of Blacks in Criminal Justice), 2462-73 (William Anderson, Gen. Acct. Off.), 2474 (Judge Morris E. Lasker); RE-

The Senate Judiciary Committee has recognized the possibility that the scheme may increase the effects of prosecutorial disparity. Its answer to this problem includes relying upon the sentencing court's power under rule 11 of the Federal Rules of Criminal Procedure to reject a charge reduction bargain, and requiring the sentencing commission to issue "policy statements" with regard to plea acceptance.[196] The efficacy of this approach is, of course, entirely unknown. It is arguable, however, that the power to reject a plea bargain will be infrequently exercised and that this all or nothing approach is a less successful means of controlling prosecutorial discretion than a combined parole and sentencing guideline system.[197]

The very complexity of drafting and implementing sentencing guidelines cautions against abandoning the "safety net" provided by the Parole Commission guidelines. Little if anything is known abut how the sentencing commisson and guidelines will operate. The more than 500 federal trial courts may be plagued with even greater inconsistency in guideline scoring than the thirty-five parole hearing examiners. The reverse, of course, is possible and an effective sentence guideline scheme may render superfluous certain aspects of the parole function. However, as the American Bar Association has noted, "removing the safety net should be the last step, not the first."[198]

The abolition of the Parole Commission may also be unwise in that it would dismantle an agency capable of developing and analyzing valuable postsentence data concerning offenders. Concededly, the current parole system is not based upon a rehabilitative

---

DUCING DISPARITIES, *supra* note 191, at 19-20; McCall, *supra* note 33, at 6; SELECTED REPRINTS vol. II, at 44; Schulhofer, *supra* note 6, at 742-57; Tjoflat, supra note 170, at 618-24. *See also* Alschuler, *supra* note 6, at 566-67; Bazelon, *supra* note 170, at 68-69; Coffee, *supra* note 170, at 979-80 & n.15; Crump, *Determinate Sentencing: The Promises and Perils of Sentence Guidelines*, 68 KY. L.J. 1, 11-12 (1979).

196. S. REP. No. 307, *supra* note 176, at 1335; S. 2572, *supra* note 171, tit. V, sec. 507, § 994(a)(2)(D); S. 1630, *supra* note 171, tit. III, sec. 126, § 994(a)(2)(D). S. 1630 also includes a proposed amendment to rule 11 of the Federal Rules of Criminal Procedure to clarify the court's power to reject a bargain covering withholding of charges as well as one involving dismissal. S. 1630, *supra* note 171, tit. II, sec. 111(h)(2).

197. The combined sentence guideline/parole system was recommended and approved by the House Judiciary Committee in its report on the Criminal Code Revision Act of 1980, and was incorporated in one of the first code revision bills introduced in the 97th Congress. *See* H.R. REP. No. 1396, *supra* note 176, at 509, 513; H.R. 1647, *supra* note 171, tit. I, §§ 4301-4306, 4701-4717. *Accord* SENTENCING ALTERNATIVES, *supra* note 83, commentary at 5-14.

198. SENTENCING ALTERNATIVES, *supra* note 83, commentary at 9.

model and places slight weight upon institutional progress. Nevertheless, at present, modest advances in a presumptive parole date are possible for inmates demonstrating superior program achievement, and individuals who violate institutional rules may have release dates extended.[199] Even presumptive sentence systems have seen a need to consider institutional behavior and provide a limited incentive for inmates to obey institution rules.[200] If prison progress is to be considered, the Parole Commission is arguably an appropriate agency to find the relevant facts.

The Parole Commission, if retained, would also be available to view postincarceration behavior in the event that future studies of institutional behavior validate its utility as a predictive device. If the Commission's knowledge of the effects of institutional programs improves, it would be able to add criteria to its guidelines which consider institutional behavior. The author is mindful of the wealth of criticism which argues that rehabilitation, even if measurable, should not affect an inmate's release date.[201] However, if courts and commissions are willing to consider a defendant's prior record to determine the appropriate duration of incapacitation, it is difficult to see the unfairness in considering, as well, a defendant's institutional behavior, so long as the standards used to measure rehabilitation are public and fairly administered.

Conclusion

There are few areas of the law where fashions seem to change more rapidly than in sentencing. It has been only thirty years since the enactment of the Youth Corrections Act, perhaps the high-water mark of rehabilitative sentencing. Yet today there is almost universal agreement that the rehabilitative experiment has failed. Research in the next thirty years may demonstrate, however, that there is some empirical method of measuring rehabilitation. It is more likely that we may decide to increase our emphasis on institutional behavior if our experience in the next decade with guideline sentences convinces us that we are no more able to measure the magic just desert or the magic period of incapacitation than we were able to measure the magic moment of rehabilitation under

199. *See supra* note 48-53 and accompanying text.

200. Thus, the Senate's sentencing commission proposals provide that a prison term can be reduced by up to 10% per year by receipt of "good time," S. 2572, *supra* note 171, tit. V, sec. 502, § 3624(b); S. 1630, *supra* note 171, tit. I, § 3824(b).

201. *See supra* notes 2, 23 & 24.

the previous model.

If parole is maintained, recent experience suggests that changes need to be made in the Parole Commission factfinding process. The Commission has acknowledged that it is dependent upon the information developed at sentencing.[202] Accordingly, reform must begin at the sentencing hearing.

Two revisions of current sentencing practice would help accomplish more accurate guideline decisions. First, procedures should be established requiring evidentiary hearings at sentencing on any contested factual assertions in the PIR which were not resolved by the trial or plea. Appropriate procedures should include, at a minimum, the opportunity to present evidence and to call witnesses not protected by a legitimate claim of privilege.[203] At the close of the hearing, the court should be required to make findings on all contested facts. Moreover, inasmuch as the PIR is a court document, the court should not be able to avoid deciding factual issues relevant to parole by disclaiming reliance on the PIR and moving the factfinding responsibility to the Parole Commission.

Second, after the factual determinations have been made, they should be communicated to the Parole Commission. The transcript of the sentencing hearing should be included in every case as a part of the parole file. The trial court should be required to communicate its view of the relevant facts and appropriate punishment to the Commission.[204]

---

202. *See* H.R. 5703, *supra* note 171, tit. I, § 3105; H.R. 5679, *supra* note 171, tit. I, § 3105; H.R. 1647, *supra* note 171, tit. I, § 3105; H.R. 4711, *supra* note 171, tit. I, § 3105. The House proposals require the court to hold an evidentiary hearing to determine any unresolved issue of fact "essential" to the sentencing decision. The proposals differ regarding the standard used by the court to rule on requests by the parties to subpoena, call and cross-examine witnesses. *Compare* H.R. 5703, *supra* note 171, tit. I, § 3105(b)(1) (court "shall permit the parties to subpoena, call and cross-examine witnesses . . . unless the court determines that the information provided is not significant or that good cause exists for nondisclosure of the source of information") *with* H.R. 5679, *supra* note 171, tit. I, § 3015(b)(1) (court "may permit the parties to subpoena, call and cross-examine witnesses"). The House Committee, considering the 1980 version of the reform bill, declined to adopt a rule which would have guaranteed parties a fixed right to subpoena witnesses and documents after the Department of Justice "persuasively argued that there were situations where it would be inappropriate to require Government informants as witnesses." H.R. REP. No. 1396, *supra* note 176, at 445. *See also* SENTENCING ALTERNATIVES, *supra* note 83, §§ 18-5.5, 18-6.4.

203. In this respect, the author's suggestions differ from the House of Representatives criminal code revision proposals, which contemplate an evidentiary hearing and findings only for those issues "essential" to the sentencing proceeding itself. *See supra* note 202.

204. *See* H.R. 5703, *supra* note 171, tit. I, § 3105(c)(2)(E); H.R. 5679, *supra* note 171, tit. I, § 3105(c)(2)(E) ("[T]he court shall assure that any finding of fact by the court that ne-

Finally, if the Commission is to retain a guideline determining function, it is essential that hearing examiners continue their efforts to become more proficient in guideline application. In a sense, the Commission, in 1972, traded its expertise in gauging rehabilitation for its expertise in guideline application. While the Commission has worked long and hard to prove that its assumption of expertise in guideline imposition is more warranted than was its assumption of expertise in judging rehabilitation, much obviously remains to be done.

Epilogue

The Parole Commission's efforts to refine its decision-making continue. After this article was completed, the Commission published a final rule adopting a number of major alterations to the guidelines.[205] The revision, effective January 31, 1983, expands the offense severity scale from its current seven levels to eight.[206] It also redesignates the offense severity categories from their present descriptive labels to a numerical listing, with "category 1" representing the lowest severity, "category 8" the greatest.[207] Of most significance, the revision includes in the severity table a number of formerly unlisted offense severity examples and defines more specifically certain listed offenses.[208] The new offense severity table thus reduces the vaguenes in guideline criteria described earlier in this article.[209] The Commission's revision, set forth in part in Appendix I, is a significant response to some of the recent criticism of its decision-making.

---

gates a factual statement in the presentence report is made a part of such report.").

205. 47 Fed. Reg. 56,334-42 (1982).

206. *Id.* at 56,335-36.

207. *Id.*

208. *Id.* at 56,335-41.

209. *See supra* notes 153-54 and accompanying text.

APPENDIX I

GUIDELINES FOR DECISION-MAKING (effective 1/31/83)

[Guidelines for decision-making, customary total time to be served before release (including jail time)]

Offense characteristics: Severity of offense behavior	Offender characteristics: Parole prognosis (salient factor score 1981)			
	Very Good	Good	Fair	Poor
	(10–8)	(7–6)	(5–4)	(3–0)
	Months	Months	Months	Months
Category 1 (formerly "low severity"):				
Adult range	≤ 6	6–9	9–12	12–16
(Youth range)	(≤ 6)	(6–9)	(9–12)	(12–16)
Category 2 (formerly "low moderate severity"):				
Adult range	≤ 8	8–12	12–16	16–22
(Youth range)	(≤ 8)	(8–12)	(12–16)	(16–20)
Category 3 (formerly "moderate severity"):				
Adult range	10–14	14–18	18–24	24–32
(Youth range)	(8–12)	(12–16)	(16–20)	(20–26)
Category 4 (formerly "high severity"):				
Adult range	14–20	20–26	26–34	34–44
(Youth range)	(12–16)	(16–20)	(20–26)	(26–32)
Category 5 (formerly "very high severity"):				
Adult range	24–36	36–48	48–60	60–72
(Youth range)	(20–26)	(26–32)	(32–40)	(40–48)
Category 6 (formerly "Greatest I severity"):				
Adult range	40–52	52–64	64–78	78–100
(Youth range)	(30–40)	(40–50)	(50–60)	(60–76)
Category 7 (formerly included in "Greatest II severity"):				
Adult range	52–80	64–92	78–110	100–148
(Youth range)	(40–64)	(50–74)	(60–86)	(76–110)
Category 8 [1] (formerly included in "Greatest II severity"):				
Adult range	100+	120+	150+	180+
(Youth range)	(80+)	(100+)	(120+)	(150+)

[1] NOTE: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category by more than 48 months, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

APPENDIX II

ADULT GUIDELINES FOR PAROLE DECISIONMAKING

Offense characteristics-severity of offense behavior (examples)	Offender characteristics-parole prognosis (SFS 81) (salient factor score)			
	Very good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Low Alcohol or cigarette law violations, including tax evasion (amount of tax evaded less than $2,000).[1] Gambling law violations (no managerial or proprietary interest). Illicit drugs, simple possession Marihuana/hashish, possession with intent to distribute/ sale [very small scale (e.g., less than 10 lbs. of marihuana/less than 1 lb. of hashish/less than .01 liter of hash oil)]. Property offenses (theft, income tax evasion, or simple possession of stolen property) less than $2,000.	≤ 6 mo	6 to 9 mo	9 to 12 mo	12 to 16 mo.
Low Moderate Counterfeit currency or other medium of exchange [(passing/ possession) less than $2,000]. Drugs (other than specifically categorized), possession with intent to distribute/sale [very small scale (e.g., less than 200 doses)]. Marihuana/hashish, possession with intent to distribute/ sale [small scale (e.g., 10-49 lbs. of marihuana/1-4.9 lbs. hashish/.01-.04 liters of hash oil)]. Cocaine, possession with intent to distribute/sale [very small scale (e.g., less than 1 gram of 100% purity, or equivalent amount)]. Gambling law violations—managerial or proprietary interest in small scale operation [e.g., Sports books (estimated daily gross less than $5,000); Horse books (estimated daily gross less than $1,500); Numbers bankers (estimated daily gross less than $750)]. Immigration law violations Property offenses (forgery/fraud/theft from mail/embezzlement/ interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than $2,000.	≤ 8 mo	8 to 12 mo	12 to 16 mo	16 to 22 mo.
Moderate Automobile theft (3 cars or less involved and total value does not exceed $19,999)[a]. Counterfeit currency or other medium of exchange [(passing/ possession) $2,000-$19,999]. Drugs (other than specifically categorized), possession with intent to distribute/sale [small scale (e.g., 200-999 doses)]. Marihuana/hashish, possession with intent to distribute/ sale [medium scale (e.g., 50-199 lbs. of marihuana/5-19.9 lbs. of hashish/.05-.19 liters of hash oil)]. Cocaine, possession with intent to distribute/sale [small scale (e.g., 1.0-4.9 grams of 100% purity, or equivalent amount)]. Opiates, possession with intent to distribute/sale [evidence of opiate addiction and very small scale (e.g., less than 1.0 grams of 100% pure heroin, or equivalent amount)]. Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun). Gambling law violations—managerial or proprietary interest in medium scale operation [e.g., Sports books (estimated daily gross $5,000-$15,000); Horse books (estimated daily gross $1,500-$4,000); Numbers bankers (estimated daily gross $750-$2,000)]. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/ receiving stolen property) $2,000-$19,999. Smuggling/transporting of alien(s)	10 to 14 mo	14 to 18 mo	18 to 24 mo	24 to 32 mo.

See footnote at end of table.

ADULT GUIDELINES FOR PAROLE DECISIONMAKING—Continued

Offense characteristics-severity of offense behavior (examples)	Offender characteristics-parole prognosis (SFS 81) (salient factor score)			
	Very good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
High				
Carnal knowledge[a] Counterfeit currency or other medium of exchange (passing/possession) $20,000-$100,000]. Counterfeiting [manufacturing (amount of counterfeit currency or other medium of exchange involved not exceeding $100,000)]. Drugs (other than specifically listed), possession with intent to distribute/sale [medium scale (e.g., 1,000-19,999 doses)]. Marihuana/hashish, possession with intent to distribute/sale [large scale (e.g., 200-1,999 lbs. of marihuana/ 20-199 lbs. of hashish/.20-1.99 liters of hash oil)]. Cocaine, possession with intent to distribute/sale [medium scale (e.g., 5-99 grams of 100% purity, or equivalent amount)]. Opiates, possession with intent to distribute/sale [small scale (e.g., less than 5 grams of 100% pure heroin, or equivalent amount) except as described in moderate]. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Gambling law violations—managerial or proprietary interest in large scale operation [e.g., Sports books (estimated daily gross more than $15,000); Horse books (estimated daily gross more than $4,000); Numbers bankers (estimated daily gross more than $2,000)]. Involuntary manslaughter (e.g., negligent homicide) Mann Act (no force—commercial purposes) Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) $20,000-$100,000. Threatening communications (e.g., mail/phone—not for purposes of extortion and no other overt act.	14 to 20 mo...	20 to 26 mo...	26 to 34 mo...	34 to 44 mo.
Very High				
Robbery—(1 or 2 instances) Breaking and entering—armory with intent to steal weapons. Breaking and entering/burglary—residence; or breaking and entering of other premises with hostile confrontation with victim. Counterfeit currency or other medium of exchange [(passing/possession/manufacturing) amount more than $100,000 but not exceeding $500,000)] Drugs (other than specifically listed), possessin with intent to distribute/sale [large scale (e.g., 20,000 or more doses) exept as described in Greatest I]. Marihuana/hashish, possession with intent to distribute/ sale [very large scale (e.g., 2,000 lbs. or more of marihuana/200 lbs. or more of hashish/2 liters or more of hash oil)]. Cocaine, possession with intent to distribute/sale [large scale (e.g., 100 grams or more of 100% purity, or equivalent amount) except as described in Greatest I]. Opiates, possession with intent to distribute/sale [medium to a very large scale (e.g., 5 grams or more of 100% pure heroin, or equivalent amount) unless the offense is described in Greatest I or Greatest II]. Extortion [threat of physical harm (to person or property)]. Explosives, possession/transportation Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) more than $100,000 but not exceeding $500,000.	24 to 36 mo...	36 to 48 mo...	48 to 60 mo...	60 to 72 mo.

See footnote at end of table.

ADULT GUIDELINES FOR PAROLE DECISIONMAKING—Continued

Offense characteristics-severity of offense behavior (examples)	Offender characteristics-parole prognosis (SFS 81) (salient factor score)			
	Very good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Greatest I Aggravated felony (e.g., robbery; weapon fired or injury of a type normally requiring medical attention). Arson or explosive detonation [involving potential risk of physical injury to person(s) (e.g., premises occupied or likely to be occupied)—no serious injury occurred]. Drugs (other then specifically listed), possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 200,000 doses)]. Cocaine, possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 1 kilogram of 100% purity, or equivalent amount)]. Opiates, possession with intent to distribute sale [managerial or proprietary interest and large scale (e.g., offense involving more than 50 grams but not more than 1 kilogram (1000 grams) of 100% pure heroin or equivalent amount)]. Kidnaping [other than listed in Greatest II; limited duration; and no harm to victim (e.g., kidnaping the driver of a truck during a hijacking, driving him to a secluded location, and releasing victim unharmed)]. Robbery (3 or 4 instances) Sex act—force [e.g., forcible rape or Mann Act (force)]	40 to 52 mo	52 to 64 mo	64 to 78 moj	78 to 100 mo.
Greatest II Murder Voluntary manslaughter Aggravated felony—serious injury (e.g., robbery; injury involving substantial risk of death, or protracted disability, or disfigurement) or extreme cruelty/brutality toward victim. Aircraft hijacking Espionage Opiates, possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 1 kilogram (1000 grams) of 100% pure heroin or equivalent amount)]. Kidnaping (for ransom or terrorism; as hostage; or harm to victim). Treason	52+mo	64+mo	78+mo	100+mo. Specific upper limits are not provided due to the limited number of cases and the extreme variation possible within category.

YOUTH/NARA GUIDELINES FOR DECISIONMAKING

Offense characteristics-severity of offense behavior (examples)	Offender characteristics-parole prognosis (SFS 81) (salient factor score)			
	Very good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Low Alcohol or cigarette law violations, including tax evasion (amount of tax evaded less than $2,000).[4] Gambling law violations (no managerial or proprietary interest). Illicit drugs, simple possession Marihuana/hashish, possession with intent to distribute/ sale [very small scale (e.g., less than 10 lbs. of marihuana/less than 1 lb. of hashish/less than .01 liter of hash oil)]. Property offenses (theft, income tax evasion, or simple possession of stolen property) less than $2,000.	≤ 6 mo	6 to 9 mo	9 to 12 mo	12 to 16 mo.
Low Moderate Counterfeit currency or other medium of exchange [(passing/ possession) less than $2,000]. Drugs (other than specifically categorized), possession with intent to distribute/sale [very small scale (e.g., less than 200 doses)]. Marihuana/hashish, possession with intent to distribute/ sale [small scale (e.g., 10-49 lbs. of marihuana/1-4.9 lbs. hashish/.01-.04 liters of hash oil)]. Cocaine, possession with intent to distribute/sale [very small scale (e.g., less than 1 gram of 100% purity, or equivalent amount)]. Gambling law violations—managerial or proprietary interest in small scale operation [e.g., Sports books (estimated daily gross less than $5,000); Horse books (estimated daily gross less than $1,500); Numbers bankers (estimated daily gross less than $750)]. Immigration law violations Property offenses (forgery/fraud/theft from mail/embezzlement/ interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than $2,000.	≤ 8 mo	8 to 12 mo	12 to 16 mo	16 to 20 mo.
Moderate Automobile theft (3 cars or less involved and total value does not exceed $19,999)[5]. Counterfeit currency or other medium of exchange [(passing/ possession) $2,000-$19,999]. Drugs (other than specifically categorized), possession with intent to distribute/sale [small scale (e.g., 200-999 doses)]. Marihuana/hashish, possession with intent to distribute/ sale [medium scale (e.g., 50-199 lbs. of marihuana/5-19.9 lbs. of hashish/.05-.19 liters of hash oil)]. Cocaine, possession with intent to distribute/sale [small scale (e.g., 1.0-4.9 grams of 100% purity, or equivalent amount)]. Opiates, possession with intent to distribute/sale [evidence of opiate addiction and very small scale (e.g., less than 1.0 grams of 100% pure heroin, or equivalent amount)]. Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun). Gambling law violations—managerial or proprietary interest in medium scale operation [e.g., Sports books (estimated daily gross $5,000-$15,000); Horse books (estimated daily gross $1,500-$4,000); Numbers bankers (estimated daily gross $750-$2,000)]. Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/ receiving stolen property) $2,000-$19,999. Smuggling/transporting of alien(s)	8 to 12 mo	12 to 16 mo	16 to 20 mo	20 to 26 mo.

See footnote at end of table.

YOUTH/NARA GUIDELINES FOR DECISIONMAKING—Continued

Offense characteristics-severity of offense behavior (examples)	Offender characteristics-parole prognosis (SFS 81) (salient factor score)			
	Very good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
High				
Carnal knowledge[a] Counterfeit currency or other medium of exchange (passing/possession) $20,000-$100,000]. Counterfeiting [manufacturing (amount of counterfeit currency or other medium of exchange involved not exceeding $100,000)]. Drugs (other than specifically listed), possession with intent to distribute/sale [medium scale (e.g., 1,000-19,999 doses)]. Marihuana/hashish, possession with intent to distribute/sale [large scale (e.g., 200-1,999 lbs. of marihuana/ 20-199 lbs. of hashish/.20-1.99 liters of hash oil)]. Cocaine, possession with intent to distribute/sale [medium scale (e.g., 5-99 grams of 100% purity, or equivalent amount)]. Opiates, possession with intent to distribute/sale [small scale (e.g., less than 5 grams of 100% pure heroin, or equivalent amount) except as described in moderate]. Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Gambling law violations—managerial or proprietary interest in large scale operation [e.g., Sports books (estimated daily gross more than $15,000); Horse books (estimated daily gross more than $4,000); Numbers bankers (estimated daily gross more than $2,000)]. Involuntary manslaughter (e.g., negligent homicide) Mann Act (no force—commercial purposes) Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) $20,000-$100,000. Threatening communications (e.g., mail/phone—not for purposes of extortion and no other overt act.	12 to 16 mo.	16 to 20 mo.	20 to 26 mo.	26 to 32 mo.
Very High				
Robbery—(1 or 2 instances) Breaking and entering—armory with intent to steal weapons. Breaking and entering/burglary—residence; or breaking and entering of other premises with hostile confrontation with victim. Counterfeit currency or other medium of exchange [(passing/possession/manufacturing) amount more than $100,000 but not exceeding $500,000)] Marihuana/hashish, possession with intent to distribute/ sale [very large scale (e.g., 2,000 lbs. or more of marihuana/200 lbs. or more of hashish/2 liters or more of hash oil)]. Cocaine, possession with intent to distribute/sale [large scale (e.g., 100 grams or more of 100% purity, or equivalent amount) except as described in Greatest I]. Opiates, possession with intent to distribute/sale [medium to a very large scale (e.g., 5 grams or more of 100% pure heroin, or equivalent amount) unless the offense is described in Greatest I or Greatest II]. Extortion [threat of physical harm (to person or property)]. Explosives, possession/transportation Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) more than $100,000 but not exceeding $500,000.	20 to 26 mo.	26 to 32 mo.	32 to 40 mo.	40 to 48 mo.

See footnote at end of table.

YOUTH/NARA GUIDELINES FOR DECISIONMAKING—Continued

Offense characteristics-severity of offense behavior (examples)	Offender characteristics-parole prognosis (SFS 81) (salient factor score)			
	Very good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Greatest I				
Aggravated felony (e.g., robbery; weapon fired or injury of a type normally requiring medical attention).				
Arson or explosive detonation [involving potential risk of physical injury to person(s) (e.g., premises occupied or likely to be occupied)—no serious injury occurred].				
Drugs (other then specifically listed), possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 200,000 doses)].				
Cocaine, possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 1 kilogram of 100% purity, or equivalent amount)].	30 to 40 mo	40 to 50 mo	50 to 60 mo	60 to 76 mo.
Opiates, possession with intent to distribute sale [managerial or proprietary interest and large scale (e.g., offense involving more than 50 grams but not more than 1 kilogram (1000 grams) of 100% pure heroin or equivalent amount)].				
Kidnaping [other than listed in Greatest II; limited duration; and no harm to victim (e.g., kidnaping the driver of a truck during a hijacking, driving him to a secluded location, and releasing victim unharmed)].				
Robbery (3 or 4 instances)				
Sex act—force [e.g., forcible rape or Mann Act (force)]				
Greatest II				
Murder				
Voluntary manslaughter				
Aggravated felony—serious injury (e.g., robbery; injury involving substantial risk of death, or protracted disability, or disfigurement) or extreme cruelty/brutality toward victim.				
Aircraft hijacking	40+mo	50+mo	60+mo	76+mo.
Espionage	Specific upper limits are not provided due to the limited number of cases and the extreme variation possible within category.			
Opiates, possession with intent to distribute/sale [managerial or proprietary interest and large scale (e.g., offense involving more than 50 grams but not more than 1 kilogram (1000 grams) of 100% pure heroin or equivalent amount)].				
Kidnaping (for ransom or terrorism; as hostage; or harm to victim).				
Treason				

[1] Alcohol or cigarette tax law violations involving $2,000 or more of evaded tax shall be treated as a property offense (tax evasion).

[2] Except that automobile theft (not kept more than 72 hours; no substantial damage; and not theft for resale) shall be rated as low severity. Automobile theft involving a value of more than $19,999 shall be treated as a property offense. In addition, automobile theft involving more than 3 cars, regardless of value, shall be treated as no less than high severity.

[3] Except that carnal knowledge in which the relationship is clearly voluntary, the victim is not less than 14 years old, and the age difference between offender and victim is less than four years shall be rated as a low severity offense.