A fundamental policy question confronted in this draft is whether the revised Model Penal Code’s recommended sentencing system should be determinate or indeterminate, that is, whether its official decisionmakers should include a parole board with substantial prison-release discretion. This study sets out information and analysis relevant to the Institute’s consideration of the question of parole release.

In traditional American indeterminate systems, for prison sentences, the judge imposes a range of possible prison terms (often a very broad range) within which parole-board discretion operates to set actual lengths of stay. The 1962 Code strongly endorsed the indeterminate structure, which was in place in every American jurisdiction in the middle third of the 20th century. Under original § 6.06(2), for example, a judicially pronounced sentence for a felony of the second degree might be “three to ten years” in prison. Once the sentenced offender served a minimum term of three years, perhaps reduced by credits for good behavior, it was left to the parole board to decide whether the offender would be released after three years, three years and one day, four years—or any length of stay up to the maximum of 10 years, which again might be lowered for the inmate’s good behavior. By historical usage, the

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1 By formal definition dating to the late 19th century, “indeterminate” sentencing systems are those that empower a parole-release agency to set the actual lengths of prison terms. Marvin E. Frankel, Criminal Sentences: Law Without Order (1973), at 86; David R. Rothman, Conscience and Convenience: The Asylum and Its Alternatives in Progressive America (1980), at 44.

2 See Paul W. Tappan, Sentencing Under the Model Penal Code, 23 Law & Contemp. Prob. 528 (1958), at 538-539 (“That prison sentences should be indeterminate in length appears entirely justifiable on the basis of experience and reason. How long the offender should be imprisoned cannot be precisely determined in advance, but should be related to his behavior and attitude in the correctional situation.”). Tappan was Associate Reporter for the correctional provisions of the 1962 Code.

3 Original § 6.06(2) provided a fixed maximum prison sentence of 10 years for second-degree felonies (except in unusual cases where an “extended term” maximum of 20 years was available under §§ 6.07 and 7.03). The sentencing court, having decided to impose a prison sentence, held discretion only to set the minimum term—and was only free to select a minimum term of between one and three years.

4 Under the original Code, full credit for an inmate’s “good behavior and faithful performance of duties” could reduce both minimum and maximum prison terms by 20 percent. Reduction up to an additional 20
word “indeterminate” denotes that, on the day a prison sentence is handed down in court, no
one—including the judge—can estimate with any certainty how long the defendant will
actually be confined. The severity of an indeterminate sentence is unknowable, sometimes
for many years.

Determinate sentencing systems, in contrast, are those that have removed the parole
board’s authority to fix prison-release dates. Provisions for good time typically remain in
place to encourage rule compliance and enrollment in prison programs. Thus, for example, in
a jurisdiction offering good-time credits of 20 percent, a judicially pronounced sentence of
five years will result in release eligibility after four years. Because good time is awarded
routinely to most inmates in most jurisdictions, the actual time the defendant will serve is
reasonably calculable on the day of judicial sentencing. Judges as a general matter know the
severity of the punishments they select.

The choice between system types can be distilled to one of preference for who should
hold primary sentencing discretion in prison cases. Durations of terms are largely prescribed
by parole boards in an indeterminate structure, but the board’s power is transferred to the
courts in a determinate framework. This is often described as a shift of sentencing discretion
from the “back end” to the “front end” of the sentencing chronology.

Of these alternatives, the revised Code concludes that a properly-designed determinate
sentencing system is superior, see § 6.06(4) and (5) and Comments a and e (this draft). This
reflects, in part, the Code’s preference for visible, regulated, and accountable forums for the
percent could be made for “especially meritorious behavior or exceptional performance of his duties.” See

Andrew von Hirsch and Kathleen J. Hanrahan, The Question of Parole: Retention, Reform, or
Abolition (1979), at 27.

See James B. Jacobs, Sentencing by Prison Personnel: Good Time, 30 UCLA L. Rev. 217, 240-252
(1982) (observing that both theorists and state legislatures have included good-time credits within their
determinate sentencing schemes).

See Nora V. Demleitner, Good Conduct Time: How Much and For Whom? The Unprincipled
systems, most inmates are awarded the entire available amount of good time.”); Dora Schriro, Is Good Time a
is granted automatically when inmates meet certain requirements such as complying with prison rules and
avoiding disciplinary infractions.”); Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. 217, 225 (“In
large prison systems with vast inmate turnover and scarce resources, it is inconceivable that a thoughtful decision
could be made each month as to whether an individual prisoner deserves to be awarded good time. Therefore,
there is an inexorable tendency for statutory and meritorious good time to be awarded automatically.”).

See Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Structures, 64 U.
Colo. L. Rev. 679, 684 (1993) (“Almost all guidelines efforts have endeavored to move sentencing discretion
from the back-end of the system to the front-end of the system. . . . Consequently, the leaders of many of the
guideline efforts have come from the judiciary.”).
exercise of sentencing discretion. It also reflects a policy judgment that the durations of prison
terms ordinarily should be determined by courts based on considerations known at the time of
sentencing, subject only to marginal adjustments for an inmate’s conduct or achievements
while institutionalized. Finally, it reflects the reality that American parole boards have proven
to be, in the words of Kenneth Culp Davis, administrative agencies of low quality.9

While few defend indeterminate sentencing systems as they now exist, or have existed
in the past, there have been recurring calls for the “reinvention” of the nation’s parole-release
agencies. While this remains a laudable goal worthy of serious effort, no reform has yet been
consummated that could serve as a platform for model legislation. Indeed, we lack evidence
that a “reinvention of parole” is possible in American correctional cultures—nor are there
compelling models of accomplishment elsewhere in the world.10 In contrast to these
unknowns, there are a number of long-running determinate sentencing systems in the United
States that have enjoyed comparative successes in areas of policy implementation, sentence
uniformity, procedural fairness, transparency, the (marginal) reduction of racial disparities in
punishment, improved information systems, and correctional resource management.11 It is
these proven systems that have supplied the institutional foundations for the new Code.

In advocating the elimination of the release authority of the parole board, the Code
raises no question about the desirability of high-quality aftercare for prison releasees and,
when needed, a period of continuing surveillance.12 Postrelease supervision (“parole
supervision” in indeterminate states) is retained in the Code, with much continuity dating
back to the 1962 provisions. Indeed, the revised Code urges state legislatures to give priority
to investments in reintegrative services for ex-prisoners, often today called “reentry”
programs.13 Because release dates are relatively easy to calculate in determinate systems,
planning for in-prison program completion and postrelease services is often easier than in a
discretionary release framework.

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9 See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1971), at 133 (“the
performance of the Parole Board seems on the whole about as low in quality as anything I have seen in the
federal government”).

10 For an informative survey of European systems, see Nicola Padfield, Dirk van Zyl Smit, and Frieder

11 For a full discussion, see Model Penal Code: Sentencing, Report (2003), at 41-115.

(1980), at 222 (“parole release decisionmaking and the supervision of released parolees bear neither a theoretical
nor a practical relationship to the other. . . . [T]he abolition of parole release decisionmaking will not lead to any
deleterious effects upon parole release supervision and may even improve its management”).

13 See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (stating that the “reintegration of offenders into the
law-abiding community” is one principal purpose of the Code’s provisions on sentencing).
Few absolutes exist in the law. The current draft qualifies the Institute’s preference for a determinate sentencing system in several ways—and comparable exceptions can be found in all American determinate jurisdictions. First, the revised Code endorses the use of good-time allowances, see § 305.1 (this draft). Second, the Code introduces a mechanism to confront the problem of exceptionally long prison sentences—those measurable in decades rather than months or years—which U.S. jurisdictions mete out more frequency than most other nations. The draft creates a new process for a judicial decisionmaker to review lengthy prison terms after inmates have spent 15 years in confinement, with recurring review thereafter, see § 305.6 (this draft). Third, and building upon majority practice in the United States today, § 305.7 (this draft) permits the judicial modification of prison sentences for aged or infirm inmates, in cases of exigent family circumstances, or when other compelling reasons exist that justify a modified sentence under the principles of § 1.02(2) (Tentative Draft No. 1, 2007). Fourth, all U.S. jurisdictions have established a clemency power, usually held by the executive, often mandated in the states’ constitutions.\(^\text{14}\)

Despite such provisos, there remain large differences in how and by whom sentencing discretion is exercised in systems that have eliminated the parole board’s release discretion and those that have not. Because the policy choice between the two approaches is fundamental to the institutional design of a criminal-sentencing system, this study sets out the reasoning behind the draft’s recommendations at some length.\(^\text{15}\)

\(^{14}\) Once exercised with great regularity in many states, the clemency power fell into relative disuse by the latter 20th century. Rachel Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent’g Rptr. 153 (2009).

\(^{15}\) Strong views on both sides of this issue have been aired since the beginning of the Model Penal Code: Sentencing project. E.g., comments of Judge Jack Davies (supporting parole-release discretion in a new Model Penal Code sentencing system) and Judge Theodore A. McKee (favoring elimination of parole-release authority in the Code), ALI Members Consultative Group meeting, Philadelphia, September 21, 2002. Respected academic voices have called for the retention—with substantial reworking—of parole-release authority in American sentencing systems. See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 187 (recommendation that “we should reinstitute discretionary parole release in the 16 states that have abolished it”; recommendation founded on need to provide incentives to inmates to rehabilitate themselves and provide state officials a tool to prevent the release of dangerous inmates); Steven L. Chanenson, The Next Era of Sentencing Reform, 54 Emory L.J. 377, 455 (2005) (recommending “a guided, reconceptualized, and humble approach to parole release”; recommendation supported in major part by argument that such a system avoids Sixth Amendment requirements of jury factfinding at sentencing); Mark Bergstrom, Jordan Hyatt, & Stephen Chanenson, The Next Era of Sentencing Reform Revisited (paper presented to the American Bar Association Commission on Effective Criminal Sanctions: Roundtable on “Second Look” Sentencing Reforms, December 2008); Petty Burke & Michael Toney, Successful Transition and Reentry for Safer Communities: A Call to Action for Parole (2006), at 30 (arguing that “such a sentencing scheme provides incentives that can be used to increase offenders’ willingness to participate in treatment and engage in the process of change”).
THE POLICY QUESTION

Fourteen states, the federal system, and the District of Columbia have abolished the release discretion of parole boards, including half of sentencing-guidelines jurisdictions. Five states cancelled their parole boards’ release authorities in the 1970s, four did so in the 1980s, and seven more in the 1990s. Two states later reversed course. In 1994, the American Bar Association endorsed the trend, recommending that time served in prison should be determined by sentencing judges subject to good-time reductions, all within a framework of sentencing guidelines.

This Study considers the question of parole-release discretion in light of accumulating experience since the 1970s in the two-thirds of U.S. sentencing systems that have retained a paroling authority, and the one-third that have not. The study first asks whether parole-release systems better advance the goals of the sentencing system than determinate systems. It then examines the procedural setting for parole-release decisions and the safeguards available to prisoners, with reference to the procedural attributes of judicial sentencings. Last, the study compares parole-release “abolition” jurisdictions with “retention” jurisdictions for their differing experiences of prison population growth over the past three decades.

Purposes of Sentencing and the Model Penal Code

The revised Model Penal Code adopts a framework of utilitarian purposes within limits of proportionality in sentence severity. The next four sections will consider the question of who—a court or a parole board—is best situated to set prison-release dates in light of the Code’s sentencing purposes.

The traditional view is that a parole board’s release decisions should be made on utilitarian grounds: At what point has prisoner A been rehabilitated? Is prisoner B still too dangerous to release, thus requiring further confinement on incapacitation grounds? The board’s release authority was the centerpiece of the medical model of sentencing that took root in American penality in the late 19th and early 20th centuries. The board was meant to

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18 Section 1.02(2)(a) (Tentative Draft No. 1, 2007).
determine if and when the “cure” of correctional treatment had taken hold upon individual prisoners.  

It is conceivable, however, that the justifications for the board’s powers have evolved since parole release became established in the early 1900s. The following four sections explore a number of possible rationales for the retention of substantial “back-end” prison-release authority. They ask, in turn, whether a parole-release agency should be created in order to revisit questions of sentence proportionality, general deterrence, incapacitation, and offender rehabilitation.

Proportionality in Sentencing

Section 1.02 of the revised Code defines sentence proportionality with reference to “the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.” American statutory schemes of parole release explicitly require, or tacitly allow, parole boards to reassess the seriousness of the offense. They are not bound by the sentencing courts’ views of the matter, so long as they stay within the minimum and maximum terms of confinement. Studies of parole boards in action have found that they weigh the offense of conviction, along with criminal history, most heavily of all considerations, with institutional behavior secondary. Occasionally, parole release has even been defended as a way to iron out disparities in the punishments handed out by the trial courts. The question is not whether parole releasing agencies rule upon sentence proportionality, but whether it is desirable.

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19 For a history of parole-release discretion from the 1890s to the 1960s, see Rothman, Conscience and Convenience, ch. 5 (“A Game of Chance: The Condition of Parole”).

20 Section 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

21 In New York and a number of other systems, for example, the parole board must be satisfied that the release date “will not so deprecate the seriousness of his crime as to undermine respect for law.” See Cons. Laws of N.Y. § 259-i(2)(c)(A); Tenn. Rules and Regulations § 1100-01-01-07(4)(b); Wis. Admin. Code § PAC 1.04; accord Laws of R.I., § 13-8-14(a)(2). In other states, the board weighs the “sufficiency” of the amount of time that has been served by each prisoner, or is instructed to respond to the “severity” or “nature” of the offense for which the inmate is imprisoned. See Ala. Bd. of Pardons and Parole Pardons and Parole, Annual Report, Fiscal 2008-09 (2009), at 27; Ga. Code § 42-9-40(a); Iowa Admin. Code § 205-8.10(906); Tex. Gov. Code § 588.144(a)(2); Tex. Admin. Code § 145.2(b)(1). Boards also commonly consider the prisoner’s criminal record, anything contained in the original presentence report, and victim impact information. See Tenn. Rules and Regulations § 1100-01-01-07; Rev. Code Neb. § 83-192(1)(f)(v); N.H. Admin. Code Rules, Par. 301.03; Code of N.M. Rules, R. 22.510.3.8; N.D. Code § 12-59-05; R.I. Admin. Code, Rule 49-1-1:1.


The reference points of proportionality ordinarily do not change or become more
knowable between the sentencing hearing and later parole-board hearings. It is thus difficult
to explain why the parole board should be permitted to recast the proportionality judgment of
the sentencing court—especially when, as in the Code’s system, the judge’s decision was
informed by sentencing guidelines and subject to appeal. Indeed, it can seem pernicious to
have the parole board second-guessing the courts in this way, given that the transparency and
formalities of parole-board decisionmaking fall far short of those in the criminal courtroom
(see discussion below).

If one takes the view that an offender’s just punishment for a past crime should turn in
part on his postsentencing behavior, or other postsentencing developments, then we have the
seed of an argument that paroling authorities should share in ultimate judgments of
proportionate prison terms. Some may believe, for example, that an inmate’s behavior while
in prison incrementally moves the inmate up or down on a gestalt scale of personal
blameworthiness. This view would not support a vast power in the parole board to alter
release dates, however. A more limited mechanism of credits for good behavior (as in § 305.1
of this draft) can also serve the function of penalizing or rewarding in-prison behavior.

The most forceful claim for the relevance of postsentencing developments to
proportionality determinations rests on a belief in the possibility of human redemption. If we
think that offender blameworthiness can diminish over time through the effects of remorse,
empathy, religious conversion, or other processes of personal growth, then we may want to
empower a sentencing agency with discretion to recognize these changes in an offender’s
moral identity. The authority to grant or withhold official dispensation on such open-ended
and subjective grounds will strike many as troubling, however. Nor is it clear that parole
boards, with their relatively poor history of dealing with more prosaic tasks, should be given
this profound power. The revised Code takes the view that claims of dramatic human change
should be available in limited circumstances, and should be heard by judicial decisionmakers,
see § 305.6 (this draft) (judicial decisionmaker granted discretion to modify prison terms after
period of 15 years), § 305.7 (this draft) (courts granted discretion to modify prison terms at
any time for “compelling reasons” in light of purposes in § 1.02(2)).

A wholly different realpolitik argument is sometimes offered in favor of back-end
release discretion: that final judgments of proportionality are best made only when
considerable time has passed after the commission of offenses. On this view, judges are often
disabled by being too close to their cases and the interested parties, and cannot free
themselves from emotions and publicity that may surround a sentencing decision. Parole

Research, vol. 12 (1990), at 339; Michael Tonry, Real Offense Sentencing: The Model Sentencing and
Corrections Act, 72 J. of Crim. L. and Criminology 1550, 1588 (1981). Of course, the diametrically opposite
claim is also made, that the boards’ decisions themselves are inconsistent, inexplicable, or politically-driven. See
Frankel, Criminal Sentencing, at 92-95; James J. Bagley, Why Illinois Adopted Determinate Sentencing, 62
boards, in contrast, are portrayed as having greater detachment and the freedom of generally operating outside the glare of publicity. Months or years after an extremely disturbing event such as a serious crime, in other words, cooler heads can prevail.

This contemplates that the sentencing judge announce a penalty in open court that (by design) sounds much more formidable than the system will actually produce. The afterglow of the sentencing hearing, and the next day’s headlines, will satisfy the appetite for a cathartic punishment, but neither the corrections system nor the defendant will really pay the advertised price. As Franklin Zimring has put it, “In a system that seems addicted to barking louder than it really wants to bite, parole (and ‘good time’ as well) can help protect us from harsh sentences while allowing the legislature and judiciary the posture of law and order.”

If we accept these claims, little weight should be given to the decisions of sentencing judges in emotionally charged cases. The true sentencer ought to be an entirely separate agency, with power to effect significant alterations in judicial penalties not only on proportionality grounds, but on all other grounds. If judges are too clouded by the pressures of the moment to adjudge proportionality, they should not be trusted to weigh utilitarian purposes, either.

To accept the realpolitik argument, we must endorse a courtroom process for sentencing that is symbolic but intentionally misleading. We must be prepared to believe that crime victims and the general public will not realize what is happening. None of this is palatable or realistic.

Finally, there is reason to doubt that parole boards are in fact politically insulated decisionmakers, and that the tugs of publicity and victim sentiment do not tell upon their actions. Over the past decades, parole boards nationwide have become visibly more risk averse in their release decisions, often jolted by a single but terrifying episode of criminality by a prison releasee. All systems of release will experience horrific failures in a small number of cases. Yet paroling authorities are poorly constituted to withstand the pressures of an impossibly difficult job.

The above analysis suggests the following conclusions about the role of proportionality in the apportionment of prison-release discretion: The permissible range of proportionate prison sentences should usually be established at the front end of the sentencing process rather than the back end. The courts, in collaboration with a sentencing commission,


25 See Norval Morris, Maconochie’s Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform (2002), at 183 (“[p]oliticians and parole boards dislike this game and its certain losses; the only figure in the criminal justice system who should properly consider such predictions [of an offender’s ability to conform to the law], bounded of course by the gravity of the harm the prisoner has already encompassed, is the judge. The judge should be assisted in this task, but the ultimate responsibility should be that of the judge”).
should have primary responsibility for such judgments. If there is a place for proportionality-based adjustments of dates of release in the mine run of cases, those adjustments should be responsive to postsentencing behaviors and events. The revised Code takes the position that this is an incremental task best achieved through a routinized system of credits for good behavior, together with judicial sentence-modification discretion for cases of extraordinary postsentencing developments.

**General Deterrence**

The Code allows criminal sentences to vary within the range of proportionate severity if there is a good utilitarian reason to move up or down within the range. This Study will consider each of the crime-reductive utilitarian goals of punishment in turn, beginning with general deterrence. Although the proposition is debatable, the discussion below accepts *arguendo* that general deterrence can be effected through variations in penalty severity.27

Deterrence, effected through communication to the society at large, would seem a function best discharged through a judge’s pronouncement of penalty in open court. The formality and solemnity of most courtrooms, the public nature of their proceedings, the stature of most judges, and the opportunities for participation extended to offenders, victims, and other concerned parties—all augur in favor of a maximally effective deterrent message, at least within the realm of what is realistically possible.

Is there any strong argument that an agency with back-end release authority should share discretion over the length of prison terms in order to enhance the pursuit of general deterrence? This seems unlikely. Such later-in-time discretion would tend to weaken the postulated inhibitory force of judicial sentences once it is widely known that only a fraction of sternly voiced prison terms will typically be served. Courtroom sentences without street credibility may have insidious effects more widespread than those upon potential criminals who are weighing their odds. General deterrence is sometimes allied with the idea that the

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26 If there is no utilitarian basis to move up or down in sentence severity, § 1.02(2)(a)(iii) (Tentative Draft No. 1, 2007) requires that a sanction near the low end of the range of proportionate punishments be chosen.

27 Most criminologists agree that there is little or no evidence in support of this belief—although many caution that the absence of evidence is not the same thing as affirmative proof that severity-based deterrence does not occur. See Anthony N. Doob & Cheryl Marie Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003) (surveying 10 years of deterrence research; arguing that it is time to accept the null hypothesis that incremental increases in punishment severity do not deter). Some economists assert that changes in punishment severity can exert a measurable influence upon the behavior of potential criminals, as the perceived costs of a criminal act increase in relation to perceived benefits. See Steven D. Levitt, Deterrence, in James Q. Wilson & Joan Petersilia eds., Crime: Public Policies for Crime Control (2002). There is wide agreement across disciplines that general deterrence is better effected through increases in the certainty of punishment following criminal conduct than through increases in the severity of threatened sanctions. See Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and P-O. Wikstrom, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (1999), at 45, 47-48.
criminal law can have an educative effect on citizens at large, reinforcing beliefs that the legal order must be respected.28 Within this more diffuse understanding of general deterrence, parole release can produce negative ripple effects among those who see it as a failure of the legal system to keep its promises—or worse, among those who see it as a machinery for deceiving the public.

Parole-release discretion is not ordinarily defended as a way in which the general deterrent powers of the criminal law can be strengthened. In order to find a comfortable resting place for back-end release discretion as an aid to general deterrence, we would have to return to the discomfiting “bark and bite” approach discussed earlier, in the hope that the public can be dissuaded from crime by the pronouncement of tough sentences that the legal system does not intend to carry out. The Institute, however, is unwilling to advocate a program that relies on smoke and mirrors.

Incapacitation (and Rehabilitation)

Theories of incapacitation and rehabilitation, the traditional underpinnings of parole-release discretion, are two sides of the same coin. The flip side of releasing prisoners when we think they have been rehabilitated is continuing their confinement when we think they remain crime-prone.29 Under the revised Code, in a case where the prospects for an offender’s rehabilitation are slim, and the risks of future serious criminality are high, a policy of incapacitation may push toward the longest prison term allowable within limits of proportionality.30

Is a parole board with back-end release authority necessary or useful to the goal of extended confinement of dangerous criminals? The answer depends on whether the parole board, through observation of an offender during a prison term, is in a better position to forecast postrelease recidivism than the sentencing court.

In research and practice, the most powerful known predictive risk factors for serious criminality or violent behavior are all “static factors” about an offender. Static factors are unchangeable during the incarceration term, or else are characteristics (like age) that move along in a march-step fashion. They include the number and type of prior convictions, juvenile adjudications, and incarcerations, employment history, marital history, history of prior drug use, age of onset of criminal activity, gender, and current age. Attributes potentially

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29 See Herbert L. Packer, The Limits of the Criminal Sanction (1968), at 55.

subject to change during the offender’s term of imprisonment are termed “dynamic factors.”
These include observations over time of such things as an offender’s antisocial behaviors and
atitudes, social interactions, authentic (as opposed to grudging or feigned) participation in
treatment programming, work ethic, ability to regulate emotions, impulsivity, expressed
insights into violence, and compliance with terms of supervision.\(^{31}\) Static factors tend to be
objectively knowable; dynamic factors usually require qualitative judgment calls.

Despite much intuitive appeal, the predictive value of the so-called dynamic factors
has yet to be demonstrated empirically. In 2002, Norval Morris wrote that “[t]he blunt truth is
that at the time of sentencing as good a prediction as to when the prisoner can be safely
released can be made as at any later time during confinement.”\(^{32}\) Although there has been
much hope for the development of statistical risk measures that incorporate consideration of
inmates’ in-prison activities, to improve upon predictions prior to confinement, these
technologies remain unproven. Today, the most used and most successful risk-prediction
instruments rely heavily or exclusively on static factors.\(^{33}\) In the research community, there is
disagreement over how close we are to valid dynamic models that may be applied to prison
inmates,\(^{34}\) but consensus that the development of prediction models made better through the
use of dynamic variables remains a horizon for future research.\(^{35}\)

\(^{31}\) See Stephen C. P. Wong & Audrey Gordon, The Validity and Reliability of the Violence Risk Scale:
A Treatment-Friendly Violence Risk Assessment Tool, 12 Psychology, Public Policy, and Law 279, 282 n.1

\(^{32}\) Morris, *Maconochie’s Gentlemen*, at 186. Morris added the qualification that “Those sentenced to
long terms are exceptions, most of whom will pass through ‘criminal menopause’ during their late thirties or
early forties, aging out of their criminous proclivities.” See also Morris, *The Future of Imprisonment*, at 35
(“Protracted empirical analysis has demonstrated . . . that *predictions of avoidance of conviction after release are*
*no more likely to be accurate on the date of release than early in the prison term.*”) (emphasis in original).

\(^{33}\) See Thomas P. LeBel, Ros Burnett, Shadd Maruna, and Shawn Bushway, The ‘Chicken and Egg’ of
Subjective and Social Factors in Desistance from Crime, 5 European J. of Criminology 130, 133 (2008) (“There
is ‘no disagreement in the criminological literature’ about the most powerful, static predictors of recidivism—
age, gender, criminal history and family background factors . . . . On the other hand, the more dynamic factors
related to success or failure after prison are less well understood and such variables are rarely included in
predictive recidivism research”)(citations omitted).

\(^{34}\) For an optimistic view, see Paul Gendreau, Tracy Little, and Claire Goggin, A Meta-Analysis of the
Predictors of Adult Offender Recidivism: What Works!, 34 Criminology 575, 588 (1996) (“While very few
studies have assessed how well changes over time within dynamic factors predict recidivism, the data suggest
that changes in criminogenic needs may produce strong correlations in that regard.”).

\(^{35}\) See Anthony J. Glover, Diane E. Nicholson, Toni Hemmati, Gary A. Bernfeld & Vernon L. Quinsey,
A Comparison of Predictors of General and Violent Recidivism Among High-Risk Federal Offenders, 29
Criminal Justice and Behavior 235, 236, 247 (2002) (“Most currently available actuarial approaches use
primarily static or historical predictors . . . Future work could focus on dynamic factors (e.g., criminal attitudes,
antisocial associates) relating to high-risk individuals”); Stephen C. P. Wong & Audrey Gordon, The Validity
and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool, 12
Despite all of this, there is a resilient commonsense view that observable events during a prison term must tell us something about an inmate’s likely future conduct. In criminal justice policy, such intuitions count for a great deal. On reflection, however, it is not altogether paradoxical that a prisoner’s ability to navigate in the disciplined and artificial prison environment might not indicate very much about his functionality outside. As Hans Mattick famously said, “It is hard to train an aviator in a submarine.”

Prison is an environment wholly unlike any free community, with its own norms, culture, economy, status hierarchies, risks, and incentive systems. Above all, it is a highly-structured world in which freedom of action is drastically curtailed. Once released, the former inmate is plunged back into the world of temptations, personal deprivations, and criminogenic forces—probably more acute than before confinement—that propelled him toward the penitentiary in the first place.

In sum, contemporary risk-prediction science lends slight support to an across-the-board recommendation that parole-release discretion should be retained (where it exists) or restored (where it has been extinguished). This picture could change with future research breakthroughs, but it is unsound to design whole sentencing systems on knowledge we do not yet possess. Years ago, Marvin Frankel wrote that he had no categorical objection to indeterminate sentences for some offenders—but he believed they should be made available only “where the system can claim the ability to identify successes and failures with a decent approach to precision.” The revised Code echoes that sentiment, and disapproves of a broad-

dynamic variables to predict recidivism and to inform and facilitate violence reduction interventions is the next major challenge in the field of risk assessment and management”); Kevin S. Douglas & Jennifer L. Skeem, Violence Risk Assessment: Getting Specific About Being Dynamic, 11 Psychology, Public Policy, and the Law 347, 347, 349, 352, 358 (2005) (“[E]mpirical investigation of dynamic risk is virtually absent from the literature. . . . The field’s next greatest challenge is to develop sound methods for assessing changeable aspects of violence risk. . . . To date, the scientific focus on dynamic risk and risk management has been more conceptual than empirical. . . . [I]t is unclear what the most promising dynamic risk factors are.”).

36 Quoted in Morris, The Future of Imprisonment, at 16. As Professor Jacobs has further explained:

Prison is a quintessentially abnormal environment dominated by a prison subculture with its own norms and values. Some of the most sophisticated and powerful prisoners either are never driven to break prison rules; or, if they are, their violations are not discovered or punished. Some individuals, however, necessarily break the rules in order to survive; others do so regularly in response to the extreme social, material, emotional, physical, and sexual deprivations which attend maximum security prison life. Those individuals incapable of coping with the extraordinary pressures of prison life may cope well enough with the stresses of everyday life on the streets. On the other hand, there are many individuals who have learned to survive and even “prosper” in prison who cannot or will not adhere to the rules imposed by our larger society.


37 Frankel, Criminal Sentences, at 98-100 (emphasis supplied).
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based power to set prison-release dates, held by a parole board, without a better account of how the board is meant to exercise that authority.

Rehabilitation (and Incapacitation)

Under the revised Code, sentence severity may be allowed to vary in the pursuit of offender rehabilitation, so long as the resulting penalty is not disproportionate under § 1.02(2) (Tentative Draft No. 1, 2007). Consider, for example, the case of a repeat offender convicted of a violent crime in the middle range of seriousness, who has a history of severe drug and alcohol dependency. Research shows that a sentence of two or three years of confinement with intensive drug treatment (even if the offender does not participate voluntarily) stands a realistic chance of bringing the offender’s addiction under control and reducing or eliminating his propensity for crime. The research also tells us that success rates in such programs are correlated with longer time periods of intervention. Three years would probably be better than two. Finally, assume that the sentencing judge (possibly double-checked by an appellate court) has concluded on proportionality grounds that the penalty deserved by the offender falls somewhere in the range of one-to-three years of institutionalization. In such a case, the revised Code allows the sentencing court to select a three-year term at the high end of the range.

Does a back-end paroling authority have a role to play in weighing and applying such concerns? Much of this question was addressed in the preceding section, which examined the hypothesis that parole boards can detect when in the timeline of a prison sentence an inmate can safely be released into free society. The search for statistically powerful “dynamic factors” in risk prediction could be described as the quest for reliable markers of prisoner rehabilitation. While a determinate system can encourage enrollment in programs with good-time or earned-time credits—and the revised Code does so, see § 305.1 (this draft)—we cannot tell which individuals have reaped rehabilitative benefits from their participation.

A less individualized rehabilitation-based argument might still support the existence of parole release, however. Joan Petersilia and others have reasoned that it is important to give inmates incentives to commit themselves to reform, and that the general effectiveness of prison programs will be increased if prisoners believe that their early release depends on authentic engagement. This argument supposes that: (1) holding dates of release in suspense


39 Petersilia, When Prisoners Come Home, chapter 2. See also Connie Stivers Ireland and JoAnn Prause, Discretionary Parole Release: Length of Imprisonment, Percent of Sentence Served, and Recidivism, 28 J. Crime & Justice 27 (2005) (“discretionary parole release is the best mechanism by which rehabilitation can be meaningfully achieved, as mandatory releasees are given an automatic release date and therefore have no system incentives to seek programs and treatment to facilitate change”).
can help prisoners apply themselves more effectively toward positive change, and (2) prisoners will trust paroling authorities to recognize and reward their honest efforts.40

To the extent these are commonsense assertions about human nature (that positive incentives can bring about change, that people need to believe they have control over their futures), it is interesting to note that they are contrary to the observations of other experienced observers of the psychology of confinement. Norval Morris argued that the coercive edge of the parole board’s release power actually destroys the best chances for obtaining inmates’ genuine involvement in prison programming. In Morris’s telling, a system of discretionary release is most likely to encourage play-acting, or other behavior designed to ingratiate the inmate with prison staff—not real commitment to change. Further, there is little in the annals of parole history to support the idea that prisoners have placed their trust in parole boards to make fair decisions on legitimate criteria. Quite the contrary—and prisoners’ suspicions about the unlovely quality of the boards’ deliberations have often been well founded.41

If the question were simply one of intuition, it would be hard to choose between the opposing views that parole release helps, or hurts, the chances of in-prison rehabilitation. Unfortunately, the empirical studies that have looked into the question do not get us past the need for speculation. They have produced conflicting results and are rooted in unacceptably weak data.42

In one study, for example, Connie Stivers Ireland and JoAnn Prause argue that there is empirical foundation for the belief that discretionary release is a more successful way to help prisoners transition to a law-abiding lifestyle than a system of determinate release.43

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40 Note that both suppositions could be true even if the parole board has no real ability to detect rehabilitation or earnest effort. The important thing is that prisoners believe this to be so.

41 See, e.g., Rothman, Conscience and Convenience, at 159-201; Wilbert Rideau and Ron Wikberg, Life Sentences (1992), at 124-147. Even strong proponents of parole-release discretion sometimes concede the point that decisionmaking in the past has been unsystematic, and that a structured approach would be something new. See Peggy B. Burke, Current Issues in Parole Decisionmaking: Understanding the Past; Shaping the Future (1988), at xiv-xv (“[P]arole board members have in the past operated primarily as individual decisionmakers. They considered a case and cast a vote. There was no need to be explicit with one’s colleagues about why the vote was cast, what factors were considered, or what goals were sought. But times have changed. More structure, accountability, and scrutiny are required of parole”).


43 Stivers Ireland & JoAnn Prause, Discretionary Parole Release, supra.
Using data from the U.S. Justice Department’s National Corrections Reporting Program (NCRP), collected from 30 states and the federal system, and multiregression analysis, the authors report that “those released from prison via a mandatory mechanism were less than half as likely to successfully complete parole than those released from prison under discretionary (parole board) systems.” Without regression, mandatory releasees were 75 percent less likely to succeed on parole. These findings give credence to the claim that back-end release discretion, as presently exercised in American jurisdictions, has a net positive effect on prisoner’s behavior following release.

In fact, the results are highly suspect. The most evident problem with the study is the disproportionate importance of data from a single determinate state, California. Among the 30 jurisdictions in the NCRP sample, California supplied more than one-quarter of all prison releasees and more than one-half of all releasees from legal systems that had eliminated parole-release discretion. The study’s findings do not really tell us how determinate release is working in all 17 jurisdictions across the country that have such an arrangement. We are primarily seeing how it plays out in California.

This is an enormous problem because California, for idiosyncratic reasons, had the highest rate of revocation of postrelease supervision of any state in the union. In 1995, at the time of the Stivers Ireland-Prause study, parolees’ failure rate in California was a staggering 77 percent. Among all other states, the average failure rate was 47 percent. Looking across all states that have abolished parole-release discretion, California is the only jurisdiction that has produced revocation practices well above national averages.

What happens to the study’s main finding if we redact the anomalous California numbers? In 1995, using raw data, prisoners released by discretionary authorities nationwide succeeded on parole at a rate of 54.2 percent, while those released in “non-California” determinate systems succeeded at a rate of 64 percent. The removal of California does not simply soften the study’s conclusions; it reverses them. Without California fouling the data, it could be argued that prisoners who have served time in determinate systems are in general more rehabilitated upon release than those who have languished in indeterminate systems.

It is dangerous to draw policy conclusions from these statistics, however. Aside from allowing one outlier state to overwhelm the sample, Stivers Ireland and Prause’s methodology labors under an important conceptual difficulty that plagues much of recidivism research. Simply put, it is a serious error to equate failure rates on postrelease supervision with the

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44 Id. at 38.
45 In 1995, only eight of the fourteen U.S. jurisdictions that had abolished back-end release discretion were included in the NCRP database. See id., at 34 table 1.
46 In 1999, for example, an ex-prisoner was 18 percent more likely to succeed on postrelease supervision in a determinate regime than in an indeterminate system.
actual behavior of prison releasees. The states are far too different in their revocation practices
to allow us to consider the data compatible from state to state. In any jurisdiction, the number
and rate of revocations depends to some degree on the good or bad conduct of parolees, to be
sure, but it also depends at least as much on what might be called the “sensitivity” of the
supervision system to violations. Sensitivity varies with formal definitions of what constitutes
a violation, the intensity of surveillance employed by parole field officers, the institutional
culture of field services from place to place, and the severity of sanctions typically used after
findings of violations. Judging by the great differences in revocation patterns found
throughout the nation, it is hard to avoid the conclusion that high or low revocation rates are
more the result of the system’s sensitivity to violations than any demonstrated difference in
the postrelease conduct of offenders from place to place. One must be supremely cautious
about drawing conclusions from a methodology that equates low revocations in a state with
successful in-prison rehabilitation, or vice versa.

There is a further conundrum, even if we had hard data that discretionarily-released
prisoners offend less often than those who “max out” or are released per determinate
formulas. Most parole boards use actuarial-risk-assessment scales when deciding which
prisoners should be freed. If we assume that the boards make use of these measures with even
rough precision, and bring a healthy attitude of risk aversion to bear to their jobs, then
prisoners discretionarily released will on average be lower-risk individuals than those who
serve their full terms, or releasees unsorted by risk in determinate systems. This posited effect
would bear no connection to prisoner rehabilitation, however. The same identification of low-
risk offenders could have been performed on the day of original sentencing.47

In summary, we possess no persuasive evidence that discretionary prison release, as
opposed to determinate release, facilitates rehabilitation. This does not mean that a
hypothesized connection between release mechanism and future behavior cannot exist or does
not merit future study. But we should be wary of building important components of a
sentencing system, especially rules and processes that apply indiscriminately to large numbers
of prisoners, upon an absence of knowledge.

Procedural Protections at Sentencing and at Parole Release

The procedural safeguards that have traditionally attended judicial sentencing are
notoriously inadequate.48 Judge Gerard Lynch has dubbed sentencing a “second-string fact-

47 See § 6B.09(3) (this draft) (proposing diversion of otherwise prison-bound defendants who are
identified as posing an unusually low risk of serious reoffending; proposal includes judicial discretion to depart
from mandatory-minimum penalties).

48 Stephen Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733 (1980); Kevin R. Reitz,
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If this is a fair assessment, then the procedural accoutrements of parole release are of the third- or fourth-string variety.  

The release process is necessarily streamlined given small person-power and large caseloads. Parole boards simply cannot marshal resources comparable to trial-court systems; they are tiny agencies averaging a total of five or six members. The number of prisoners considered for release by the average state parole board in 2006 was 8,355—about 35 cases for each working day, and comprising only one part of a typical board’s responsibilities. Kenneth Culp Davis reported that the well-resourced U.S. Parole Board, before abolition of parole in the federal system, heard roughly 50 cases per day. Studies of parole in its mid-20th-century heyday found decisionmaking times of only 3 to 20 minutes per case. With the explosion in correctional populations since then, it is unlikely that greater attention is given today.

Parole-release “hearings” are often no more than brief interviews of the prisoner, sometimes convened without notice. The prisoner’s role at the hearing varies quite a bit among the states, but is often limited to responding to the board’s questions. Sometimes there is no right for the prisoner to be present at all; the case is decided solely on the papers.

There is seldom a genuine adversarial process with the prisoner’s interests effectively represented. Few prisoners are competent to raise the strongest legal and factual arguments on their own behalf. In court, defendants have or are provided lawyers, and sometimes expert witnesses, but such assistance is far from the norm in the parole milieu. Some states bar

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50 As a matter of federal constitutional law, discretionary parole systems are not thought to create a liberty interest on the part of prisoners, so the Due Process Clause guarantees no minimum level of procedural regularity. See, e.g., Dopp v. Idaho Commission of Pardons and Parole, 84 P.3d 593 (Idaho App. 2004); Morales v. Michigan Parole Bd., 676 N.W.2d 221 (Mich. App. 2003); Barna v. Travis, 239 F.3d 169 (2d Cir. 2001) (reviewing N.Y. parole procedures); Weaver v. Pa. Bd. of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997); Quegan v. Mass. Parole Board, 673 N.E.2d 42 (Mass. 1996); Vice v. State, 679 So. 2d 205 (Miss. 1996); Saleem v. Snow, 460 S.E.2d 104 (Ga. 1995). A liberty interest does arise if state law requires release after a set period unless contrary findings are made by the parole board—but, even then, the safeguards mandated by the constitution are not impressive. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).


52 Davis, Discretionary Justice, at 127.


representation by counsel outright. Some permit only limited representation, such as allowing counsel to submit written statements—but even this assumes the prisoner has paid for a lawyer. Only a tiny handful of states provide appointed counsel for indigent prisoners.

Often, there is no formal burden of proof a parole board must apply for its factual determinations. For example, in Tennessee, release is permitted only when the board is “of the opinion that there is reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the prisoner’s release is not incompatible with the welfare of society.” Some states define the applicable burden as the “preponderance of the evidence” standard, but there is no enforcement mechanism to see that the standard is actually applied. In addition, there is no requirement that the parole board’s factfinding be consistent with the facts established when the prisoner was convicted, or those found by the sentencing court. Real-offense sentencing—punishment for crimes for which there has been no conviction—is the norm in parole proceedings.

The rules of evidence, and protections against the use of hearsay evidence, are inapplicable to the parole process. The lack of rigor in this regard should be considered in light of the usual contents of an inmate’s dossier:

Besides . . . hard data, the file may also contain “soft” information, such as observations of guards, counselors, and other corrections personnel. Even unsubstantiated rumors may appear. . . . Anything that an inmate may have done (and perhaps even some things that an inmate may not have done) in his or her life, but particularly while in prison, may be recorded in the file.

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57 See Hawaii Rev. Stat. § 706-670(3)(c); Mont. Code § 46-23-202. It is probably not a coincidence that these are states with very small prison populations.


Basic rights of confrontation of adverse witnesses are often nonexistent. For example, a Vermont statute provides that “the inmate shall not be present when the victim testifies before the parole board.” Indeed, the prisoner’s ability to respond to damaging information of any kind can be severely limited. Some states refuse the prisoner access to the contents of his dossier, some routinely permit it, while most give the board discretion to disclose some or all of the file on a case-by-case basis. Court challenges to rules barring access have generally failed.

Fair process requires identifiable and enforceable decision rules. While some U.S. jurisdictions have adopted statutory presumptions or guidelines that must be applied by sentencing courts, there are no equivalent substantive directives for parole boards. Where statutory criteria or parole guidelines exist, they are merely advisory; where risk-assessment instruments come into play, it is entirely up to the parole boards to decide whether they should be heeded or disregarded.

Decision standards have little integrity without a meaningful review process. This is lacking in virtually all American parole systems. In some systems, administrative review is technically available, but it almost never operates as a real check on the board’s discretion. Reversals of decisions rarely occur. Oversight of any kind is hindered by the fact that many states do not require a transcript or verbatim record of parole proceedings, and by the general absence of requirements of reasoned explanations for decisions. Some jurisdictions

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63 Vt. Stat. § 507(b).
65 See Ind. Code § 11-13-3-3(i)(2); Md. Code, Art. 41, § 4-505.
68 Edward E. Rhine, The Present Status and Future Prospects of Parole Boards and Parole Supervision, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011). Parole guidelines are demonstrably weaker instruments than presumptive sentencing guidelines, such as those envisioned in the revised Code. But they also lack the indirect enforcement mechanisms of advisory sentencing-guidelines systems. No sentencing commission collects and reports upon release decisions to monitor compliance rates and the reasons given for noncompliant decisions, and no appellate court polices questions such as whether the parole guidelines were duly considered by boards, or whether there were errors in the guidelines’ application or in the calculation of an offender’s recidivism risk.
70 See Tenn. Code § 40-28-105(11); Davis, Discretionary Justice, at 130.
do require that reasons be given, but are not rigorous about the content of the explanations. Boilerplate, or a slight improvement on boilerplate, is often good enough.\footnote{See Walker v. N.Y. State Div. of Parole, 610 N.Y.S.2d 397 (N.Y. App. Div. 1994); Goins v. Klincar, 588 N.E.2d 420 (Ill. App. 1992); N.M. Stat. § 31-21-25(C).

Shoddy process might, to some extent, be offset by well-qualified decisionmakers. A highly professionalized model might insist that board members have expertise in corrections, criminology, and prediction science.\footnote{See Model Penal Code, Complete Statutory Text § 402.1 (1985).} Falling far short of this standard, formal requirements for appointment to state parole boards are often minimal or nonexistent.\footnote{See Rev. Stat. N.H. § 651-A:3; Fla. Stat. § 947.02(2); Miss. Code § 47-7-5(2); Neb. Stat. § 83-189; Texas Government Code §§ 508.032(b) & 508.033; Mich. Laws § 791.231a(2); Utah Code § 77-27-29(1); Rev. Stat. Neb. § 83-189; N.M. Stat. § 31-21-24 (D).

Even in the minority of states that mandate a background in criminal justice, the prerequisites do not address the core function of behavioral science or risk prediction.\footnote{See Colo. Rev. Stat. § 17-2-201(1)(a); Md. § 7-202(a)(3); N.D. Code § 19-59-0; Vt. Stat. § 451(a).\footnote{Wis. Stat. § 15.145(1)(a). Nor do under-qualified appointees receive adequate training once they assume their posts. Mario A. Paparozzi and Joel M. Caplan, A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism, 89 The Prison Journal 401, 416, 418 (2009).}

Instead of experience or training, political connections are often the main prerequisite for appointment to a parole agency.\footnote{See Rothman, Conscience and Convenience, at 162.\footnote{Paparozzi and Caplan, A Profile of Paroling Authorities in America, 89 The Prison Journal at 411, 418.}} Public recruitment of board members is virtually unknown in the United States; by and large, positions are doled out in a closed process controlled by the governor.\footnote{Dumond Case Revisited: A Reminder of Huckabee’s Role in His Freedom, Arkansas Times, September 1, 2005.} There is little pretense otherwise. A member of the Arkansas parole board recently told the press, “We are not talking rocket science here. The board jobs are known to some degree [to be] political patronage, and they’re not the most difficult jobs for the pay [$70,000 per year].”\footnote{Susan C. Kinnevy and Joel M. Caplan, Findings from the APAI International Survey of Releasing Authorities (Center for Research on Youth and Social Policy, 2008), at 6-7.}

Fair process also requires a neutral decisionmaker—and one component of neutrality is the freedom to decide cases on the merits, without fear for one’s job. Service on a parole board is usually a full-time commitment, and so the primary source of members’ livelihoods. In nearly all states, the sole appointing authority is the governor,\footnote{Susan C. Kinnevy and Joel M. Caplan, Findings from the APAI International Survey of Releasing Authorities (Center for Research on Youth and Social Policy, 2008), at 6-7.} which includes...
reappointments at the expiration of members’ terms. Also, in many states, members can be
removed from parole boards relatively easily, often at the discretion or instigation of the
governor. One board member expressed the “most obvious” reality of the situation: “If the
governor likes you, you might get to keep your job.”

Political pressure on a board to adopt new practices is remarkably successful. It is commonplace across the United States for parole-release policy to change abruptly and radically in response to a single high-profile crime in the jurisdiction.

The glaring weaknesses in American parole-release procedures stem, historically, from a view of the benignity of government. The American Progressives who promoted indeterminate sentencing reforms saw the state as a force with considerable resources that could be turned to good purposes, and did not reflexively distrust state officials ceded with fee-ranging discretion. The shortfalls of the parole-release process have remained a blind spot for lawmakers, courts charged with constitutional review, and many academics. The stubborn belief that indeterminacy is at root a compassionate system still insulates it from scrutiny.

Does the Abolition of Parole-Release Discretion Contribute to Ungoverned Prison Expansion?

Unless the preceding discussion has taken a serious wrong turn, neither proportionality concerns, nor any of the traditional utilitarian theories of sentencing, offer justification for a sentencing system that places a large reservoir of discretion in a parole-release agency. Likewise, legal-process values do not augur in favor of a powerful parole board.

The argument cannot end here, however, for it is possible to favor the existence of discretionary release on other grounds. There is a romantic view of parole release that, despite its defects, it can at least be relied upon to work in the direction of lenity for many individual

82 See Miss. Code § 47-7-5(1); Fla. Stat. § 947.03(3); Utah Code § 77-27-2(2)(c).
83 Dumond Case Revisited, supra.
85 Rothman, Conscience and Convenience, at 70. In contrast, the failure of indeterminate sentencing to gain a strong foothold in England and the Continent is explained in part by a fear of giving the government too much unstructured power over individual liberty. As one European scholar has argued, “the hypothesis of a discretionary sentence immediately evoked the resurgence of the unlimited administrative arbitrament of the prerevolutionary era, as if the storming of the Bastille had been fruitless.” Michele Pifferi, Individualization of Punishment and the Rule of Law: Reshaping the Legality in the United States and Europe between the 19th and the 20th Century, (unpublished paper), ms. at 39, available: http://works.bepress.com/michele_pifferi/1/ (last visited Mar. 14, 2011).
prisoners, and the reduction of incarceration rates overall.86 There are many who hold a
committed humanitarian view that the United States overincarcerates offenders by a large
margin, has done so for a long time, and that the problem has greatly worsened in the last 40
years.87 Thus any device, even if clumsy, will find strong adherents if it is perceived to go
hand-in-hand with lenity in prison policy.

It is also argued that the abolition of back-end release authority allows pressures
toward prison growth to become ungovernable because there is no longer a flexible release
valve at the back door of institutions. Thus, we have become accustomed to hear charges that
determinate sentencing, where it has been adopted, has been a powerful contributor to late
20th-century prison growth.88 This indictment is sometimes made specific to parole-release

86 Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, Introduction to Articles 6 and 7 (1985),
at 22-23; Douglas A. Berman, The Enduring (And Again Timely) Wisdom of the Original MPC Sentencing
Provisions, 61 Florida Law Rev. 709, 724 (2009); Wilbert Rideau and Ron Wikberg, Life Sentences: Rage and
Survival Behind Bars (1992), at 136; Leonard Orland, Vengeance to Vengeance: Sentencing Reform and the
Demise of Rehabilitation, 7 Hofstra L. Rev. 29, 49 (1978). Of course, parole is sometimes condemned on the
same empirical assumption, when it is characterized as releasing criminals prematurely and sacrificing public
40; Rothman, Conscience and Convenience, at 159-161.

87 See, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness
(2010); Todd R. Clear, Imprisoning Communities: How Mass Incarceration Makes Disadvantaged
in America (2006); Marc Mauer, Race to Incarcerate (rev. ed. 2006); Michael Jacobson, Downsizing Prisons:
How to Reduce Crime and End Mass Incarceration (2005); Michael Tonry, Thinking About Crime: Sense and
Sensibility in American Penal Culture (2004); David Garland ed., Mass Imprisonment: Social Causes and
Elliott Currie, Crime and Punishment in America: Why the Solutions to America’s Most Stubborn Social Crisis
Have Not Worked—and What Will (1998). Even before the spectacular growth in American incarceration rates
that occurred from the early 1970s through the early 2000s, distinguished commentators expressed the view that
U.S. prison sentences were too numerous and too severe. See Morris, The Future of Imprisonment, at 7-8;
Frankel, Criminal Sentences, at 58-59.

88 See, e.g., David F. Weisman and Christopher Weiss, The Origins of Mass Incarceration in New York
State: The Rockefeller Drug Laws and the Local War on Drugs, in Steven Raphael and Michael A. Stoll eds., Do
Prisons Make Us Safer?: The Benefits and Costs of the Prison Boom (New York: Russell Sage Foundation,
2009), at 76-77; Douglas A. Berman, Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing
Guidelines, 21 Fed. Sent’g Rptr. 182 (2009); Todd R. Clear, Imprisoning Communities: How Mass Incarceration
Punishment and the Widening Divide Between America and Europe (2003), at 56-57; David Garland, The
Culture of Control: Crime and Social Order in Contemporary Society (2002), at 60-61; Marc Mauer, Race to
Incarcerate (1999), at 49, 56-58; David J. Rothman, More of the Same: American Criminal Justice Policies in the
1990s, in Thomas G. Blomberg and Stanley Cohen eds., Punishment and Social Control: Essays in Honor of
169-171; Edward E. Rhine, William R. Smith, and Ronald W. Jackson, Paroling Authorities: Recent History and
Developments, and Prospects for the 1990s, in Michael Tonry and Norval Morris eds., Crime and Justice: An
Annual Review of Research, vol. 12 (1990), at 342; Alfred Blumstein, Prison Populations: A System Out of
abolition, and is sometimes broadened to include sentencing guidelines and other determinate sentencing laws as alleged engines of punitive expansionism. On this view, the quintupling of imprisonment rates that occurred nationwide from 1972 to 2009 would have been ameliorated if all U.S. jurisdictions had retained their former indeterminate sentencing laws.

These speculations are invariably voiced without empirical support. They have entered the conventional wisdom because they seem intuitively correct—and because they line up with one conspicuous example of determinate sentencing reform gone awry. Most lawyers, judges, and academics are aware that the federal sentencing system, which abolished parole release in 1987 while instituting felony sentencing guidelines, has worked over the past 20 years to balloon the federal imprisonment rate. Per capita confinement in federal prisons grew 281 percent from 1987 to 2009—a near quadrupling—and a spectacular amount even when compared with the swift nationwide growth among state prisons of 109 percent over the same period. There are obvious dangers in extrapolating from events in a single jurisdiction, however. Too often, the federal experience is taken as conclusive evidence that all determinate sentencing reforms produce the same results.

If we broaden the inquiry from the 12 percent of prison inmates housed for federal crimes to include the 88 percent under state jurisdiction, observations about the effects of parole-release abolition shift dramatically. Indeed, the federal criminal-justice system bears so little resemblance to any state system that has abolished parole or has instituted guidelines for sentencing, that it is the poorest of starting points for generalization. When policymakers

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89 A frequent object of attack is the proliferation of mandatory-minimum penalties nationwide, which are the most extreme examples of determinate sentencing legislation. See Michael Tonry, The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings, in Michael Tonry ed., Crime & Justice: A Review of Research, vol. 38 (2009). Some mandatory-penalty laws have been directly linked to large upswings in prison growth. See Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You're Out in California (2001). The revised Code, like the original Code, takes a strong view that mandatory-minimum prison sentences should not be legislated for any offense, see § 6.06(3) and Comment d (this draft).


91 The published scholarship of sentencing law and policy exacerbates the problem of knowledge and perception focused too much on one system, by devoting nearly exclusive attention to federal law. See generally A Symposium on Sentencing Reform in the States, 64 U. Colo. L. Rev. 645-847 (1993).

92 U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), at 19, app. table 4 (at yearend 2009 there were a total of 187,886 inmates in federal prisons and 1,360,835 in state prisons).

consider the future design of a state’s sentencing system, the pertinent knowledge base should be drawn from other states.

*Indeterminacy, Determinacy, and the Expansionist Era*

Although it is frequently asserted today that determinate sentencing reform has been an instrument of prison growth, there was a widespread belief mere decades ago that *indeterminate* sentencing systems were peculiarly associated with prison expansionism. It is ironic that perceptions have flipped, but the kernel of wisdom here is that such broad-brush statements are almost always oversimplifications. Historically speaking, it is clear that the structural design of a sentencing system does not dictate by itself whether and how quickly the prisons will grow. In the late 19th century and for the first 70 years or so of the 20th century, American sentencing systems were increasingly taken over by indeterminate sentencing reform (they were *all* indeterminate by the 1930s). Across that period the nation’s prisons grew slowly but relatively steadily. From 1880 to 1980 the state prisons

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94 See Francis A. Allen, The Borderland of Criminal Justice (1964), at 34-35 (“The tendency of proposals for wholly indeterminate sentences . . . is unmistakably in the direction of lengthened periods of imprisonment”); Norval Morris, The Future of Imprisonment (1974), at 48 (“The tendency of parole boards to overpredict danger and to follow the politically safer path of prolonging incarceration . . . would lead one to suspect that parole may well have increased total prison time.”); Sheldon L. Messinger and Philip E. Johnson, California’s Determinate Sentencing Statute: History and Issues (1977), reprinted in Franklin E. Zimring and Richard S. Frase, The Criminal Justice System (1980), at 954 (reporting criticisms from “groups concerned with civil liberties and prisoners’ rights” that California’s indeterminate sentencing scheme “resulted in overlong prison terms on the average and especially for prisoners guilty of displeasing their guardians for failing to conform to middle class behavioral norms”); American Friends Services Committee, Struggle for Justice A Report on Crime and Punishment in America (1971) (“During a period when the treatment ideal was maximized [in California] . . . more than twice as many persons served twice as much time.”); Paul W. Tappan, Sentencing Under the Model Penal Code, 23 Law & Contemp. Prob. 528 (1958), at 531-532, 535 (“individuals in these [indeterminate] jurisdictions are subject to the possibility, and often to the fact, of greatly extended imprisonment. Elsewhere, much lower sentences are imposed for similar crimes.”) (footnote omitted) (study finds time served 20 percent longer in indeterminate jurisdictions than in systems of “definite” sentences); John C. Coffee, The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice, 73 Mich. L. Rev. 1361, 1364-1365 n.8 (1975) (collecting studies); American Bar Association, Standards for Criminal Justice, Sentencing Alternatives and Procedures, Second Edition (1980), at 18-66 (“In general, the rehabilitative model appears also to have encouraged longer authorized sentences, and it is symptomatic that average sentence lengths have been longest in jurisdictions that have subscribed most thoroughly to the rehabilitative model”); Samuel Walker, Popular Justice: A History of American Criminal Justice (1998), at 120 (“The tendency of the indeterminate sentence to lengthen prison terms became one of the major criticisms of the practice voiced by liberals in the 1960s”); Rothman, *Conscience and Convenience*, at 194-197 (surveying state reports and concluding that “the bulk of the data does justify the conclusion that parole was not a matter of leniency”).

95 See Walker, *Popular Justice*, at 122.
enlarged by 832 percent compared to national population growth of 351 percent.\textsuperscript{96} There were brief periods of declining incarceration rates, however, most notably around World War II and during the 1960s. Indeed, the performance of America’s sentencing systems of the 1960s was quite striking, and may have been etched indelibly in the minds of deincarceration advocates: Prison rates went down in that decade despite skyrocketing crime rates and a boom economy. The nation could have paid easily for more prisoners, but indeterminate sentencing systems were (temporarily) not delivering that result.\textsuperscript{97}

In studying the track records of indeterminate versus determinate punishment structures, this section will focus on the current era of prison expansionism beginning in 1972 through 2009. During this period, state and federal prison counts swelled nearly eight times over from a combined population of 196,092 to 1,548,721, and the national imprisonment rate (corrected for population change) rose fivefold from 94 per 100,000 in 1972 to 504 in 2009.\textsuperscript{98}

The main goal of the analysis below will be to refute the conventional wisdom that determinate sentencing reforms such as parole-release abolition and sentencing guidelines have fueled the incarceration explosion to any greater degree than “unreformed” indeterminate systems. In the following pages, state-by-state analysis will support the following conclusions:

- **Although all state prison systems have grown appreciably in the last four decades, rates of imprisonment and prison growth vary widely across jurisdictions.**

- **Prison growth has been most explosive in states that have retained indeterminate sentencing structures, and the highest incarceration rates nationwide are also found in indeterminate jurisdictions.**

- **On average, states that have abolished parole-release discretion have had less prison growth than states that have retained such discretion.**


• Prison growth has been most restrained in those states that have abolished parole-release discretion in conjunction with the adoption of sentencing guidelines.\(^9\)

Franklin Zimring and Gordon Hawkins, in their classic book, *The Scale of Imprisonment*, pointed out that the punishment systems in the 50 states and U.S. federal system were so markedly different from one another that they should be seen as “fifty-one different countries.” Working with figures from 1980, the state with the highest imprisonment rate (then North Carolina) had more than 10 times the prison rate of the state with the lowest rate (New Hampshire).\(^1\) By 2009, decades of prison explosion had compressed the ratios a little, but the state at the top of the scale (Louisiana with a prison rate of 881 per 100,000) out-incarcerated the state at the bottom (Maine, 150 per 100,000) by nearly a factor of six.\(^2\)

Looked at another way, there are some U.S. jurisdictions today whose incarceration practices are roughly in the same ballpark as the most punitive Western European nations.\(^3\) There are other states, however, that outstrip any known standard of confinement on the planet, even in the Third World.\(^4\) When researchers point out that the United States is the world leader in incarceration, the observation is driven by states like Louisiana and Texas, but the characterization does not fit jurisdictions like Vermont and Minnesota.

It is therefore essential to study the prison-growth courses of individual states, and compare the track records of states that have been using different types of sentencing systems. From many different angles, this investigation absolves determinate sentencing reforms of any special responsibility for the U.S. prison explosion.

\(^9\) This is the type of sentencing system proposed by the revised Model Penal Code, see generally Tentative Draft No. 1 (2007); Model Penal Code: Sentencing, Report (2003), at 41-115.

\(^1\) Zimring and Hawkins, *The Scale of Imprisonment*, at 137, 149.


\(^3\) The highest incarceration rate among Western European nations in 2009 was Luxembourg, with a rate of 155 per 100,000 population, followed closely by England and Wales with a rate of 153. See Roy Walmsley, World Prison Population List, 8th ed. (International Centre for Prison Studies, 2009), at 5 Table 4, available at http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8 (last visited Mar. 14, 2011). These high-end confinement nations line up with low-end imprisonment states in the United States for the same time period (e.g., Maine with a prison rate of 150 per 100,000), although a truer comparison between European and American practices should refer to total confinement rates that incorporate jail as well as prison. While state-by-state total incarceration counts are not annually compiled, the low-end states in 2001 were Maine (222 per 100,000) and Vermont (226). U.S. Dept. of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001* (2002), at 13 table 16.

\(^4\) In 2009, the U.S. total confinement rate was 756 per 100,000. The nearest competitor worldwide was Russia with a rate of 629 per 100,000. See Walmsley, *World Population List*, at 1. In 2001, 13 U.S. states surpassed the Russian standard in total confinement per capita—some by as much as 40-to-50 percent. U.S. Dept. of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001*, at 13 table 16.
While it is true that determinate sentencing system reforms originated during, or overlapped with, the expansionist period, it is a logical fallacy to equate temporal coincidence with causation. The years of burgeoning incarceration in America have been for the most part years in which indeterminate sentencing remained the structure of choice nationwide. Indeterminate systems were in use in more than 80 percent of all "jurisdiction-years" during the period. It is highly unlikely that determinate reforms could have been a major contributor to any nationwide trend. They were of too recent origin, and are insufficiently widespread, to have massed into a dominant force behind national prison growth.

Looking to individual jurisdictions, suspicion quickly shifts to indeterminate systems. Nine of 10 states with the highest standing imprisonment rates at yearend 2009 were indeterminate jurisdictions. The 10th state, Arizona, experienced most of its prison expansion prior to 1994, when it too was an indeterminate state. The five states with the largest per capita prison rates in 2009 included carceral powerhouses Louisiana, Texas, Oklahoma, and Georgia—all indeterminate jurisdictions. The fifth state among the top five, Mississippi, used an indeterminate system from 1972 through 1995, and the state’s per capita prison rate more than quintupled during that 23-year period.


See Kevin R. Reitz, Don’t Blame Determinacy: U.S. Incarceration Growth Has Been Driven By Other Forces, 84 Tex. L. Rev. 1787, 1795 (2006) (calculating, for all 50 states, the District of Columbia, and the federal system, there were a total of 1664 jurisdiction years during the high-prison-growth period from 1972 to 2004; only 288 of these jurisdiction years, or 17 percent of the total, were jurisdictions with determinate sentencing systems).


If we ask which states have had the most per capita prison growth over time, the track record of indeterminate states is equally un-lenient. From 1980 to 2009, 9 of the “top” 10 prison-growth states were indeterminate jurisdictions. The top 10 prison-growth states were Louisiana, Mississippi, Oklahoma, Texas, Alabama, Connecticut, Missouri, Idaho, California, and Colorado. Of these, only California currently has a determinate sentencing system.

It is revealing to compare changes in prison use over time, categorizing states according to the type of sentencing system they use. It would not be sensible, however, to compare one state with another (or with a nationwide average) in terms of raw growth in prison populations. For instance, the state of Maine has seen its prison populations increase by 1370 inmates since 1976, when Maine became a determinate sentencing state through the abolition of its parole board’s prison-release discretion. In the same period from 1976 to 2009, the state of Texas, working with an indeterminate sentencing structure that included parole-release discretion, added 141,469 inmates to its prison populations. A Maine–Texas comparison based on these statistics alone tells us almost nothing useful for evaluating the relative incarceration histories of the two jurisdictions. To make a gross comparison on a common scale, we must correct for the different populations of the two states, and for population change over time.

In an attempt to make such corrections, Figure 1 charts the experience of all states that have abolished the parole board’s release authority, using the states’ pre-abolition prison rate as a common baseline. For each state, the chart displays the increment of growth in the state’s imprisonment rate (prison population against general population) from the effective date of parole abolition through 2009. For comparison, the chart also provides the national baseline (total marginal growth in state-prison populations against total U.S. population) for the identical time period—displayed separately for each state. Thus, Figure 1 asks, “How many inmates has each state added since removing parole-release discretion from its sentencing system?” and gives an answer on a per capita basis.

For example, assume that State A eliminated the release discretion of its parole board in 1985. If State A had a prison rate of 100 per 100,000 in 1985 and a prison rate of 300 per

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100,000 in 2009, the increment of change in the state’s prison rate over that full-time period would be displayed as 200. This state-specific increment of change would also be paired in Figure 1 with the incremental change in the national prison rate among all states over the same period, 1985 to 2009. Thus, the figure makes a series of apples-to-apples comparisons while holding the time frames for comparisons constant.

Figure 1 delivers a surprising message. Of the 14 parole-abolition states, only three (California, Indiana, and Arizona) have experienced growth in prison rates that has outstripped that among all states in the years since abolition took effect. Eleven of the determinate states fall below the national average, and 2 of them (North Carolina and Wisconsin) have experienced net reductions in their imprisonment rates since the discontinuation of parole release.111

Figure 1 is at odds with the common wisdom that parole release promotes leniency, but its findings would not shock all observers of the parole process in America. The most sophisticated proponents of discretionary release have long asserted that determinate sentencing structures tend to deliver shorter prison terms than parole-release systems. Indeed, a central argument raised by advocates of parole-release retention is that indeterminacy permits tougher sentences for offenders identified as dangerous by parole boards. Peggy Burke wrote in 1995 that “in every state that has abolished parole, the alternative has resulted in shorter, definite sentences.”112 In their 2005 study of 33 jurisdictions, Ireland and Prause found that time served for most offenses was longer in indeterminate than in determinate systems:

> Determinate sentencing and the accompanying mandatory release mechanism have not delivered the increased punitiveness and public safety promised with the tough-on-crime movement. Instead, the data indicate discretionary release may be more “tough” than mandatory release.113

111 Florida operated with a determinate system from 1983 to 1997, and experienced 16 percent less prison growth than the national average during that period. Since reinstating an indeterminate system in 1997, Florida’s prison rate has grown by an increment of 121 prisoners per 100,000 population, while state prisons as a whole grew by only 37 per 100,000—or more than three times the national increase. U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009; U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1990, at 605 table 6.56 (for 1983 rates).

112 Peggy B. Burke, Abolishing Parole: Why the Emperor Has No Clothes (1995), at 14 (Burke argued that the relatively fixed sentences in determinate systems were undesirable because the system had “no ability to extend sentences to reflect the risk of the offender”).

113 Stivers Ireland and Prause, Discretionary Parole Release, at 45. For example, homicide offenders spent on average 8 months less time in prison in determinate states; rape offenders 2 months less; robbery offenders 3 months less; burglary offenders 8 months less; assault offenders 6.5 months less; drug-possession offenders 6 months less, and petty-theft offenders 6.5 months less. For a handful of offenses, it appeared that time served tended to be longer in determinate jurisdictions than in parole-release jurisdictions. For instance,
Parole Abolition and Sentencing Guidelines

Beginning with Minnesota in 1980, a total of nine guidelines states have deliberately reapportioned sentencing authority over prison durations by removing it entirely from parole boards at the back end of the decisional chronology and repositioning it at the front end of the system, where it is now concentrated in the sentencing commission and the courts. If the guidelines are not too restrictive, the judiciary acquires a substantial amount of new authority in such a system, since judicial sentences will now bear close resemblance to the punishments actually experienced by offenders. If sentencing courts comply with guidelines most of the time, either voluntarily or because the guidelines have a degree of legally binding force, the sentencing commission also inherits some of the discretion formerly possessed by a parole-release agency.

drug-sale offenders spent on average 1 month more time in prison in determinate states; weapons offenders 3 months more; and DUI offenders 2 months more. Id. at 41 table 4. Stivers Ireland and Prause argued on policy grounds: “In sum, mandatory release may not only be more ‘soft’ on crime than discretionary release, it may also prevent paroling authorities from ensuring that the most dangerous offenders are retained in prison.” Id. at 45.
Figure 1. Per Capita Prison Growth in States with No Parole Release Discretion From Date of Parole-Release Abolition Through 2009
We are here concerned with the impact of sentencing reforms on the course of prison population growth. Figure 2 speaks directly to that issue, using the same methodology as Figure 1. It charts the histories of prison expansion in nine determinate-guidelines states with more than five years of operation, from the date of reform through 2009, and compares those states against national trends over the same time. Florida, the only state to have instituted such a system and abandon it later, is included in Figure 2 for the years in which it operated with the determinate-guidelines structure.\(^{114}\)

The major finding in Figure 2 is that nine out of nine determinate-guidelines states have experienced post-reform prison expansion, corrected for population, below the national benchmarks for equivalent periods.

Figure 3 then groups all 50 states into 4 basic sentencing-system types, according to the system in operation in 2009, and shows the average growth in prison rates for each group since 1995. Determinate states have experienced less prison buildup than their indeterminate counterparts, with the least occurring in determinate states with sentencing guidelines. Substituting data back to 1980 yields the same rank ordering.\(^{115}\)

\(^{114}\) Since abandoning the determinate-guidelines structure, Florida has had higher prison growth than the average among other states. See note 111, supra.

\(^{115}\) From 1980 to 2009, the per capita increment of prison population growth (per 100,000 general population) among indeterminate-guidelines states was 330; for traditional indeterminate states it was 301; for determinate-no-guidelines states it was 281; and for determinate-guidelines states it was 227. One problem with this crude measurement over the longer period is that so many states have changed their sentencing systems since 1980, so net prison growth for many states occurred under two or more different schemes. This difficulty is not nearly so great when going back to 1995. Other studies have addressed the issue of changing systems with more sophisticated methodologies, but their results lend credence to the gross observations reported here. See Don Stemen and Andres F. Rengifo, Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978–2004, 28 Justice Quarterly 174 (2011); Reitz, Don’t Blame Determinacy, 84 Tex. L. Rev. at 1794-1801.
Figure 2. Per Capita Prison Growth in Guidelines States with No Parole Release Discretion From Date of System Adoption Through 2009

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Among social scientists, using a variety of statistical methods, there is an emerging consensus that determinate sentencing reforms, presumptive sentencing guidelines, and especially systems that combine the two, have been associated with lower incarceration rates and less prison growth over the past three decades than other sentencing system types. In a 2005 study sponsored by the Vera Institute of Justice, principal investigator Don Stemen and his coauthors concluded:

Appendix B

We consistently found that states with the combination of determinate sentencing and presumptive sentencing guidelines have lower incarceration rates than other states. . . . Further, the combination of the two policies was also associated with smaller growth in incarceration rates. The stability of the combined policies was noticeable in all analyses conducted, after controlling for all other policies and social variables.\footnote{Don Stemen et al., Vera Inst. of Just., Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975–2002 (2005), at 143.}

Such findings have been heralded by one seasoned researcher as “a refreshing departure from the usual negative results when evaluating criminal justice reforms.”\footnote{Thomas B. Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. of Crim. L. and Criminology 696, 707 (1995).}

Past experience does not guarantee that parole-release abolition has an inherent tendency to push inmate counts up or down. It appears that either outcome is possible, and many factors other than the state’s prison-release mechanism are surely at work. The history of determinate sentencing in America over the last 30 years, however, is wholly \textit{unsupportive} of the claim that parole-release abolition always, or usually, speeds up incarceration growth when compared against systems of parole-release retention. The general drift of things over several decades has been in the other direction.

Both history and data suggest that the abolition of parole-release discretion has been a particularly important component of the success of some sentencing commissions in deliberately managing the use of correctional resources. Why should this be so? Part of the answer is the happenstance of policy preferences in determinate-guidelines states. Most jurisdictions that have created such systems have done so in the hope of slowing or stopping preexisting cycles of incarceration expansion, prison construction, and spiraling correctional expenditures.\footnote{See Leonard Orland and Kevin R. Reitz, Epilogue: A Gathering of State Sentencing Commissions, 64 U. Colo. L. Rev. 837, 839-840 (1993).} But there is no necessary connection between the determinate-guidelines machinery and restraint in the use of confinement. If the same states had chosen to use an identical framework to accelerate their use of incarceration, they likely would have succeeded in that goal as well.\footnote{See Michael Tonry, The Success of Judge Frankel’s Sentencing Commission, 64 U. Colo. L. Rev. 713 (1993) (arguing that federal and state sentencing commissions have had markedly different policy goals, but they have largely succeeded in achieving those goals). There are only two sentencing-guidelines systems that were created deliberately to work sharp increases in aggregate punishments—the federal system and the guidelines system in Pennsylvania. Both succeeded, although the Pennsylvania commission turned its efforts to managing and rationing prison growth in later years. See Kevin R. Reitz, The Status of Sentencing Guideline Reforms, in Michael Tonry ed., Penal Reform in Overcrowded Times (2001).}

Still, it is important to emphasize that determinate-guidelines reforms, in most of the places they have taken root, including a majority of all parole-release abolition states, have not
been intended to accelerate the growth of incarceration or push up the average length of prison stays. The academic literature often gets this wrong. Indeed, the Reporter knows of no determinate-guidelines reform propelled by such a policy goal except the federal system.

From a deincarceration perspective, this may not be reassuring, since the policymakers who brought in determinate-guidelines reforms with one set of expectations may easily change their minds in later years—or be replaced by other officials who decide to turn the system toward greater severity. In 1976, before any American sentencing-guidelines system had taken effect, Franklin Zimring noted that the character of determinate sentencing systems could be changed in an instant by erasing one set of sentence prescriptions and substituting larger numbers. Zimring thought this was likely to happen, given political pressures on criminal-justice decisionmakers and the acute temptation to make sweeping “get-tough” changes in law. The hypothesized vulnerability of determinate punishment systems to punitive policy shifts is sometimes abbreviated as “Zimring’s eraser.”

There is no way to refute suspicions about the possible future, but we now have 35 years of experience since Zimring coined the eraser metaphor, and these were decades of unprecedented toughness in crime response. Even during the expansionist period, however, the vast majority of determinate-guidelines systems were not visibly overwhelmed by draconian impulses when compared with other system types.

History is always complicated, so it is important to qualify the above statement. The typical state that has employed a determinate-guidelines structure for any length of time has experienced some years in which state policymakers wanted to turn the system toward greater severity, and other years in which different priorities have prevailed. In Minnesota, for example, in the late 1980s, three high-profile crimes in Minneapolis parking lots caused the legislature to instruct the sentencing commission to ratchet up guideline penalties for serious violent offenses. The changes were dramatic, doubling presumptive sentence ranges in some categories. For some years following the amendments, the rate of growth in the Minnesota prisons outstripped national averages. On the other side of the coin, however, many years under the Minnesota guidelines have been periods of relative restraint in the use of prison resources. The sentencing commission, in Minnesota as in other determinate-guidelines states, provides the legislature with correctional population projections on a periodic basis, and these also accompany proposed

121 See Zimring, Consumer’s Guide to Sentencing Reform, at 16-17 (with determinate sentencing legislation, “it takes only an eraser and pencil to make a one-year ‘presumptive sentence’ into a six-year sentence for the same offense”).


changes in sentencing legislation or guidelines. Legislatures have been known to balk at the high-cost forecasts that can attend new laws, or to soften the laws’ terms before they are enacted. Or else they have found ways to offset punishment increases in one part of the criminal code with a lightening of penalties elsewhere. During some years, therefore, the determinate-guidelines systems provide effective tools to retard punitive expansionism that would otherwise occur—and this ends up being significant even if it does not happen every year. Over the long term, the broken cadence of punitiveness in some years, and restraint in others, seems to yield a pattern of slower prison growth than in indeterminate jurisdictions that always, year-in and year-out, lack the systemic controls of the determinate-guidelines system. Despite intermittent stretches of rapid prison growth, Minnesota remains 49th out of all states for its prison rate (and 49th for its combined prison and jail rate).

As a matter of abstract theory, a parole board could be just as effective at managing the use of prison resources as a sentencing commission, but this has not often happened in practice over the past 35 years. Part of the reason, noted by Michael Tonry, is that sentencing commissions are able to address “in-out” decisions as well as sentence durations. Parole boards, in contrast, have no say over who comes into the prisons in the first place, and thus are lacking one critical lever for the management of prison use. An even more important concern may be the susceptibility of parole boards to political influence and a natural institutional drift toward severity in practice. There is no catchy term like “Zimring’s eraser” to describe the phenomenon, but most parole boards since the 1980s have become stingier in their release decisions.

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124 This mechanism has been made a part of the revised Code. See § 6A.07 (Tentative Draft No. 1, 2007).


126 See Frase, Sentencing Guidelines in Minnesota.


Since its beginnings, however, parole has had unforeseen repercussions for prisoners. Dating back to the turn of the century, effective prison sentences in states that adopted parole grew longer rather than shorter. Two phenomena help explain this seeming paradox. First, legislatures and judges felt free to impose higher sentences when they knew that those sentences might not be served in full. Second, staying on good behavior during parole is no easy task . . . . The end result is often that the creation of parole leads to the imposition of longer sentences.

128 Tonry, Sentencing Matters, at 27. An important part of the prison-resource control strategy in North Carolina, for example, has been to make slight reductions in the probability of incarceration following a conviction at the low end of the felony scale, while increasing the probability of a prison term for more serious felonies. Presentation of Thomas Warren Ross, Meeting of ALI Advisers, Model Penal Code: Sentencing Project, September 20, 2002 (data on file with author).
Sometimes parole-release practice has changed dramatically in reaction to a single publicized incident, as in Pennsylvania following the police killing committed by parolee Robert “Mud Man” Simon in 1995, or the 2007 Petit family murders in Connecticut. Parole boards have become more risk averse than they used to be, and are aware that they will seldom draw criticism for holding someone in prison too long.

Beyond the parole boards, other government officials in indeterminate systems may face subtle encouragement to act in ways that contribute to prison growth. Legislators may feel little reluctance to enact new laws providing for draconian maximum penalties—thus winning public approval for their “toughness” on crime—on the supposition that the parole board will soften the law’s effects by releasing most prisoners far short of the new maximum. Similar thinking could lessen a sentencing judge’s qualms over imposition of a high maximum term—also on the theory that the parole board is the real decisionmaker, and will act with appropriate restraint when the time comes. The question of whether the parole board will deliver on its expected part of the bargain will not be answered for many years, when the offenders in question reach their parole-eligibility dates. If release rates drop markedly in the intervening period, if the parole process is subjected to increased scrutiny, if fear of crime rises on the political agenda, if boards come to place greater premium on risk-averse decisions—all of which happened in the United States of the 1980s and 1990s—then the psychological freedom to be severe at the front end will have no genuine offset at the back end. The pleasant illusion of indeterminacy as a pro- leniency program, with more “bark” than “bite,” could itself be one cause of swelling prison populations.

In contrast, most parole-release abolition jurisdictions, including all determinate-guidelines states, decided to build in the “early release” probabilities of a discretionary release system when they moved to determinate release. The expected behavior of a parole board was incorporated into the new determinate or guideline sentences when the systems were redesigned. This requires considerable explanation to the public, who have to be made to understand that a two-year prison sentence under the new regime is actually more severe than, say, a five-year sentence under the former law. Provided this hurdle can be surmounted, the release assumptions embedded in the typical guidelines system are harder to erode than are the behaviors of line officials who make discretionary release decisions. In the latter instance, a telephone call from the governor would probably suffice. In a sentencing-commission state, meetings, public notice,
fiscal-impact projections, and open debate must precede any change of similar consequence—and representatives from all sectors of the criminal-justice system and across the political spectrum will have the opportunity to weigh in. Determinacy, with its concomitant advantages of systemic planning, may not be severity-prone by nature. And Zimring’s eraser is perhaps not so worrisome an office supply as may have appeared 35 years ago.

Conclusion

This Study has suggested that, based on the underlying goals of the sentencing system, and values of fair legal process, it is difficult to justify the routine allocation of large authority over prison durations to a parole board. The Study has further shown that common preconceptions that parole release inclines toward lenity in prison sentences, and that parole-release abolition goes hand-in-hand with greater severity, are not supported by actual experience. Prison populations have grown more slowly in parole-release-abolition jurisdictions than elsewhere, and the slowest growth patterns among all American sentencing system types in recent decades have been found in parole-abolition states that have also instituted sentencing guidelines.

The Code’s preference for a determinate sentencing structure is not absolute—when good reasons for a different approach exist. The availability of good-time credits for most prisoners is a routine departure from pure determinacy, but is justified by the needs to maintain prison discipline and encourage inmate participation in rehabilitative programming. See § 305.1 (this draft). Provisions for the “compassionate release” of elderly inmates, or physically or mentally infirm prisoners, are commonplace in jurisdictions that otherwise adhere to determinate sentencing principles. The revised Code recognizes the propriety of both of these familiar qualifications to a determinate framework. Indeed, the Code includes a “compassionate release” provision that is broader than any existing provision of the kind. See § 305.7 (this draft). In addition, there was consensus among the Advisers, Members Consultative Group, and Council that extremely long prison sentences (measured in decades rather than years) present unique concerns even if one has concluded that parole-release discretion, as it has existed in the past, does not belong in the criminal-justice system. Societal conceptions of proportionate punishments can change over the course of a generation (or comparable period); and the technologies of utilitarianism—one hopes—are constantly evolving. Very long sentences ought to inspire humility that premises that appear justified in one era may be doubted in the next. For the limited group of prisoners serving extremely long terms, the revised Code allows for reexamination of their sentences under § 305.6 (this draft) after they have spent 15 years in confinement. With these exceptions, however, it is a cornerstone philosophy of the revised Code that sentencing courts should have discretion to individualize penalties in specific cases, and should know to a reasonable approximation what the severity of their chosen sentences will be.