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SENTENCING REFORM AND PAROLE RELEASE GUIDELINES

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Although parole release guidelines have achieved many of the advantages of determinate sentencing, they raise troublesome issues. Subject to important caveats, the author maintains that sentencing guidelines can better be administered by courts than by parole boards. He also maintains that current federal parole guidelines unfairly disregard plea bargained charge reductions, and that the construction of equitable guidelines requires detailed offense-by-offense and situation-by-situation studies that have not yet been undertaken.

Amidst the furor over proposals for fixed and presumptive sentencing, something remarkable has happened. Parole boards, with the United States Parole Commission in the lead and with several State parole boards not very far behind,¹ have taken substantial steps toward solving the most important sentencing problems. The guidelines that these boards have promulgated have emphasized, not an offender's dimly perceived progress toward rehabilitation, but the circumstances of his offense and his personal characteristics. Because these circumstances and characteristics are known at the time that an offender arrives at a correctional institution, the presumptive date of his release can be determined shortly thereafter. In addition, this release date can be promptly communicated to the prisoner.

This system of parole guidelines achieves many of the advantages that advocates of determinate sentencing have sought. When guidelines effectively preordain the amount of time that an offender will be required to serve, he has less to gain through hypocritical efforts to curry favor with the parole board; he need not pretend to be someone other than who he is; his prison experience becomes less an exercise in mendacity; and rehabilitative programs are made available on a voluntary basis to inmates motivated by a desire to change rather than simply by a desire to manipulate correctional authorities. Moreover, if "the very indeterminacy of indeterminate sentences is a form of psychological torture,"² parole guidelines, by making the date of parole relatively certain, reduce this torture substantially.

The guidelines also mark dramatic progress toward solving the

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This article is a revised version of testimony before the United States Parole Commission.

1. See A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE: RETENTION, REFORM OR ABOLITION?* 3 (1979) [hereinafter cited as A. VON HIRSCH & K. HANRAHAN].

2. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 553 (1978).

problem of judicial sentencing disparity.³ The sentence that a trial judge imposes is not a factor in the guidelines calculation, and except in those relatively rare cases in which the judge imposes a sentence that precludes the Parole Commission from ordering release on the date suggested by its guidelines, the sentence imposed by the court becomes an irrelevancy. One wonders, for example, whether the excitement generated by the Second Circuit Sentencing Study⁴ might have been dissipated in part by determining the practical effect of the seemingly disparate judicial sentences that the study revealed. Under the Parole Commission's guidelines, these apparently unequal sentences might not have affected the length of incarceration at all.⁵ Of course, no set of parole guidelines can reduce disparity in the most important component of the judicial sentencing decision, the choice between prison and probation; but it is significant that the most ambitious of the State determinate sentencing statutes, those enacted in California and Illinois,⁶ also have left the critical "in-out" decision to the uncontrolled discretion of trial judges.

Despite these substantial benefits, our new regime of parole guidelines raises troublesome questions. Parole boards were established, for the most part, in the early twentieth century as a concomitant of the Progressive Movement. The asserted justification for their powers was that expert penologists, who could evaluate an offender's conduct and his response to treatment in prison, could best determine the appropriate moment for his release. With what Professor John C. Coffee has called "remarkable candor for a bureaucratic agency,"⁷ the Federal Parole Commission has now recognized that determining the "magic moment" when an offender has become rehabilitated is beyond its capacity. The Commission's guidelines look, not to progress toward rehabilitation, but to factors that can be assessed at the time of the initial sentencing proceeding. As Professor Coffee puts it, "To point out that the Emperor has no clothes raises a ticklish dilemma when the party making the announcement is the Emperor."⁸

3. The reduction of judicial sentencing disparity was, in fact, one of the initial goals of parole. See Messinger, *Introduction*, in A. VON HIRSCH & K. HANRAHAN, *supra* note 1, at XX-XXI (quoting various statements of the CALIFORNIA STATE PENOLOGICAL COMMISSION REPORT (1887)).

4. A. PARTRIDGE & W. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY* (1974).

5. See Krislov, *Debating on Bargaining: Comments from a Synthesizer*, 13 LAW & SOC'Y REV. 573, 581 (1979).

6. CAL. PENAL CODE §§ 1170-1170.6 (West Cum. Supp. 1979); ILL. ANN. STAT. ch. 38, §§ 1005-3-1 to 1005-10-2 (Smith-Hurd Supp. 1979).

7. Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 990 (1978).

8. *Id.*

Do the Commission's guidelines remove the reason for its existence? If the length of an offender's confinement is to be determined by the seriousness of his offense, his prior record, and other characteristics known at the time of sentencing, should the relevant determination be made by a parole board or by the sentencing court?

One possible answer to this question looks to the fact that the Parole Commission is a national agency and a relatively small, collegial body. It can reasonably be expected to apply its guidelines—and to articulate reasons for departing from the guidelines—in a more uniform fashion than hundreds of federal district judges throughout the land.⁹ This advantage may be outweighed, however, by an advantage that courts possess in determining the length of incarceration under a guidelines system. They are in a better position to assess the relevant facts.

Consider the way in which the guideline revision that the Parole Commission is now considering¹⁰ would treat gambling offenses. "Small scale" gambling violations—with an estimated daily gross of under \$5,000—are classed as "moderate" in terms of severity. "Medium scale" gambling violations—involving operations with an estimated daily gross of \$5,000 to \$15,000—are classed as "high"; and "large scale" gambling violations—involving operations with an estimated daily gross of over \$15,000—are classed as "very high." A federal prisoner may have been convicted only of transporting some gambling paraphernalia in interstate commerce,¹¹ but if the Parole Commission determines that he is a "large scale" gambler, he will be incarcerated for a minimum of 26 months, more than twice as long as if the Commission had found him to be a "small scale" gambler. How, then, is the Commission to make this critical factual determination? A presentence investigation report may contain no estimate of the daily gross of a gambling operation, and when an estimate is presented, it may be based on rumor that has grown with every telling and on the crudest sort of conjecture. When a hearing examiner confronts a prisoner with this estimate, the prisoner is likely to dispute it; and then, on the basis of this limited "evidence," the Commission must make its determination.

In my view, the prisoner should be entitled to more careful fact-finding. If we can identify the daily gross of his illegal business as a vitally important factor in determining the length of his incarceration-

9. See McCall, *The Future of Parole—In Rebuttal of S.1437*, FED. PROBATION, Dec. 1978, at 3, 6-7.

10. 43 Fed. Reg. 46859 (1978) (to be codified in 28 C.F.R. § 2).

11. See 18 U.S.C. § 1953 (1976).

tion—if we have, in fact, “rationalized” the sentencing process to this extent—the defendant should receive a hearing on the issue, and the hearing should be one at which witnesses with direct knowledge of the facts can be presented and cross-examined. Moreover, the government probably should bear the burden of establishing the determinative facts by a preponderance of the evidence.¹² A sentencing court is certainly in a better position to provide this sort of hearing than a parole board, which must operate at a substantially greater distance in time and space from both the factual events that it is investigating and the trial on the merits. Although the procedural safeguards of a judicial sentencing hearing are significantly less than those of a trial, this hearing offers a greater opportunity for careful evaluation of the evidence than a parole board can realistically afford. In addition, the current utility of judicial sentencing hearings would be notably enhanced by a guidelines system that brought the critical factual issues into focus. In short, if the length of a prisoner’s confinement is to be based on facts that can be known at the time of the initial sentencing proceeding, it seems better to evaluate those facts as part of this proceeding than to judge them later as part of a proceeding before a parole board.

A caveat to this conclusion is appropriate, however. To entrust a factual determination to the court as a matter of law may often be to entrust it to the prosecutor and defense attorney as a matter of practice. Although a court is indeed in the best position to determine the relevant facts, no bona fide adjudication of these facts may occur. Instead the prosecutor may strike a bargain with the defense attorney: “I know that your client was taking \$15,000 a day in bets, but if he’ll plead guilty and save me the bother of a trial, I’ll stipulate that his daily gross was only \$4,999.” Although a parole board may be less able to adjudicate facts fairly and accurately than a court, its processes seem more likely to yield accurate factual determinations than this sort of negotiation. If an offender’s sentence should be deter-

12. Compare *Williams v. New York*, 337 U.S. 241 (1949), with *Specht v. Patterson*, 386 U.S. 605 (1967). These cases suggest that a State may be required to employ more elaborate procedures when it turns sentencing decisions on specified standards than when it seeks the benefit of discretionary decisions designed to take account of a multiplicity of factors whose relationship and weight cannot be specified in advance. Although the approach of the *Williams* and *Specht* cases may seem paradoxical—for it seems to “penalize” a State that makes the basis for its sentencing decisions explicit—I believe that the approach remains sound. The relevant principle is merely that a state must employ procedures appropriate to the goals that it has itself selected. Moreover, to the extent that the argument to the contrary has an empirical foundation, I doubt that a State legislature or other governmental body will often be dissuaded from specifying its goals by the prospect that this action will lead to new procedures that are in fact appropriate to the goals selected. Also compare *Meachum v. Fano*, 427 U.S. 215 (1976), with *Wolff v. McDonnell*, 418 U.S. 539 (1974).

mined by his personal characteristics and the circumstances of his crime rather than by the kind of bargain that he is able to strike, an administrative hearing may well approach this goal more closely than a staged judicial sentencing proceeding whose result has been predetermined by prosecutorial negotiations. With a restriction of plea negotiation, however, my view is that the administration of a guidelines system would be better entrusted to the courts than to the parole board; and even without a formal restriction of plea bargaining, my best guess is that a sentencing guidelines system would not be substantially perverted by plea bargaining in most federal courts. As I shall indicate, prosecutorial plea bargaining in the federal courts has followed a different pattern from that in the State courts and, in the main, has restricted judicial sentencing discretion less severely.

The practice of plea negotiation raises a difficult instance of the general problem of factual adjudication in sentencing. In determining the severity of a prisoner's offense, the Parole Commission currently looks to the historic circumstances of his crime as it perceives them rather than to the label attached to his crime by a court.¹³ If, for example, a person who has apparently committed an armed robbery has been permitted to plead guilty to unarmed robbery or to larceny, the Commission nevertheless places his offense in the "armed robbery" category when it applies its guidelines. Although this practice has been upheld by several courts,¹⁴ it raises substantial issues of procedural fairness. First, a criminal defendant is likely to view the plea bargaining process differently from the way in which the Commission views it. The Commission apparently believes that the function of a plea agreement is merely to limit the range of punishment to which the defendant is exposed. If he has been confined no longer than the court has authorized for the lesser offense to which he has pleaded guilty, he has no basis for complaint merely because the Commission has viewed him as factually guilty of a more serious crime. The defendant, however, is likely to view his plea agreement as embodying a different sort of undertaking on the part of the government—an agreement not to treat him as guilty of the more serious offense whatever the historic facts. He may feel betrayed when this

13. UNITED STATES DEPARTMENT OF JUSTICE, GUIDELINE APPLICATION MANUAL app. 4.08 (United States Parole Commission Research Unit, at Report Sixteen, adopted by the Commission as Appendix 4, UNITED STATES PAROLE COMMISSION PROCEDURE MANUAL, May 1, 1978 [hereinafter cited as GUIDELINE APPLICATION MANUAL]).

14. *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976); *Bistram v. United States Board of Parole*, 535 F.2d 329 (5th Cir. 1976); *Lupo v. Norton*, 371 F. Supp. 156 (D. Conn. 1974); *Manos v. United States Board of Parole*, 399 F. Supp. 1103 (M.D. Pa. 1975).

understanding proves inaccurate.

A second problem is that the Commission's factual determinations may on occasion be incorrect, or at least they may seem less trustworthy than the factual determinations of a court. For example, a defendant may have believed that he had a substantial defense to the charge initially filed against him, but he may have agreed to compromise this defense by pleading guilty to a lesser crime. If the Parole Commission then proposes to treat him as guilty of the initial charge, he may feel cheated, not merely because the government departed from a fiction that it had apparently agreed to observe, but because he has in fact been deprived of a meaningful opportunity to present his defense. Although the Parole Commission may itself consider this defense, the defendant will not be able to present the same evidence that he could have presented in court; the requirement of proof beyond a reasonable doubt will not apply; and the safeguards of a trial will be absent. The defendant will be likely to conclude that he has been treated unfairly and, in the end, that the Commission reached the wrong conclusion in deciding that he was guilty of the more serious crime.

The apparent willingness of parole boards to "second guess" the courts has produced some hostility toward them. The statement of a defense attorney concerning the now disbanded California Adult Authority seems typical: "All the charges against a defendant may be dismissed except one. But if the defendant is sentenced to the penitentiary and comes before the Adult Authority, those super-judges will want to know all about the ten robberies."¹⁵ To this attorney, it seemed presumptuous for a parole board to "find" a defendant guilty of a particular offense when the court had refused to do so.

A somewhat similar problem arises when a jury has found a defendant not guilty of some of the charges against him or has convicted him of a less serious crime than that initially charged. The jury's verdict cannot fairly be read as a determination that the defendant was factually innocent of the charges filed against him; the jury found only that those charges had not been proven beyond a reasonable doubt. Because courts and parole boards are not restricted by a reasonable doubt standard in resolving the factual issues that may determine the length of an offender's confinement, it might be theoretically proper to consider charges of which the defendant had been acquitted in determining the length of his confinement on the charges of which he had been convicted. Nevertheless, the Commis-

15. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 96 (1968) (statement of Benjamin M. Davis).

sion's *Guideline Application Manual* expressly forbids this practice.¹⁶ The same sort of unfairness that the Commission saw in "counting" offenses of which a prisoner has been acquitted applies in lesser degree to "counting" offenses that were dismissed in the plea negotiation process. It is noteworthy, in addition, that in assessing an offender's prior record for purposes of applying the "salient factor" portion of its guidelines, the Commission considers only prior convictions and not arrests or charges that were dismissed as part of the plea bargaining process.¹⁷

Of course I have been sounding only one horn of a dilemma, and there are substantial reasons for the Commission's current practice. Judging the seriousness of a prisoner's offense while disregarding the historic facts of his crime is a mind-boggling task. A prisoner may have been permitted to plead guilty to unarmed robbery although his crime was apparently committed with a loaded shotgun. How, then, is the Commission to visualize his crime if it ignores the historic facts—as a "typical" unarmed robbery, as an "aggravated" unarmed robbery, as an unarmed robbery committed in the same circumstances as the armed robbery was in fact committed, or what?

More important than this conundrum is the fact that the Commission's practice does serve a useful purpose. An offender's punishment should indeed turn on the historic circumstances of his crime and on his personal characteristics, not on whether he made a deal to plead guilty to a lesser charge or instead exercised his right to trial. The Commission's practice tends to reduce the inequality and irrationality that plea bargaining has introduced into our system of criminal justice, and it emphasizes the kinds of factors that should be emphasized in a just sentencing system. Nevertheless, there exists substantial tension between "contractual fairness" in a plea bargaining system and "substantive fairness" in sentencing, and the Commission has pursued the latter goal to the detriment of the former. Moreover, the Commission is ill-equipped to remedy the substantive defects of the plea bargaining process, for it cannot offer the careful adjudication of the factual circumstances relevant to sentencing that a court could provide. It may, indeed, make substantial errors. In my view, there can be no satisfactory resolution of this problem without the abolition of plea bargaining. In default of this solution, I believe that the Commission should not judge a prisoner guilty of an offense of which the courts should *probably* have convicted him but, owing to the plea bargaining process, did not. I should add that this problem

16. GUIDELINE APPLICATION MANUAL, *supra* note 13, at app. 4.08.

17. *Id.* at app. 4.19.

seems substantially less intense in the federal system than in many state courts. Although federal prosecutors are often willing to dismiss some of the charges in a multiple-count indictment in exchange for a plea of guilty, my impression is that they usually require a defendant to plead guilty to a charge that fairly reflects the seriousness of his conduct.¹⁸

Finally, a few words about a problem that is the special concern of this hearing—the problem of grading the severity of offenses in a guidelines system. To the extent that grading turns on facts not adjudicated by a court, the process poses a problem of procedural fairness—a problem of the extent to which the Commission can accurately determine the facts that it has made critical. But to the extent that the Commission relies on traditional crime categories, its grading is likely to pose a different problem—one of substantive fairness in sentencing. The crime categories that legislatures create in defining the conduct that they wish to prohibit may be different from the classifications that should determine the extent of an offender's punishment.

In the area of property offenses, legislative classifications of crime often seem too detailed to be helpful for sentencing purposes. Under the proposed guideline revision, for example, "theft" of property valued at less than \$1,000 is a "low" severity offense, and so is the evasion of less than \$1,000 in taxes. But "theft from the mail" of less than \$1,000 is a "low moderate" offense, and so is the theft of less than \$1,000 by fraud or embezzlement.¹⁹ I see no reason for these fine-gauged distinctions.

With offenses against the person, the problem is usually the reverse. Legislative classifications are likely to be too broad for sentencing purposes, and the Commission should often seek narrower categories. Under the Commission's guidelines, for example, forcible rape is placed in the "greatest I" category.²⁰ Yet forcible rape can involve a brutal attack against a disabled stranger by a gang armed with weapons, and it can also involve a threat to twist the arm of a person who had voluntarily engaged in intercourse with the offender on prior occasions and who had been receptive to his advances, up to a point, on the occasion in question. Similarly, the guidelines classify armed robbery as of "very high" severity without regard to the number or character of the victims, the amount of property taken, the motivation for the crime, the extent of the defendant's participa-

18. See Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1078-79 (1976).

19. 43 Fed. Reg. 46,859, 46,861.

20. *Id.* at 46,865.

tion, the type of weapon used, or a variety of other factors that might easily become relevant.²¹ All varieties of armed robbery and all varieties of rape may not belong in the same category; the Commission might seek finer classifications than the legislature has employed.

No one has devised rules for sentencing on the basis of a detailed consideration of the types of situations likely to arise within particular offense categories. It might be useful, however, to conduct studies for the purpose of determining the extent to which generalization regarding particular offenses is possible. One set of studies, for example, might be devoted specifically to the crime of armed robbery. An agency might begin by gathering historical data on the amount of time that armed robbers in each of the "salient factor" categories have been required to serve—the same sort of historical data that were used to construct the present guidelines. The agency might also sample public opinion regarding the severity of particular crimes. Then the agency might go beyond these data to examine the variety of factual situations that have in fact arisen. Are some situations so recurrent that specific rules should be promulgated for these situations alone? What factors influence our reaction to the variety of cases, and can they be quantified? Discussion of particular cases and their proper resolution might provide benchmarks from which a pattern could be discerned, or it might be decided that any generalization would work unfairly in so many cases as not to be worth the effort. The inquiry would be both descriptive and prescriptive, and the point of the exercise would be to create "armed robbery experts" who would understand the world of conduct that they were punishing when they ultimately drafted their guidelines. Similar sets of studies might concern theft offenses, rapes, burglaries, and so on. The task would be long and difficult, but not as long and difficult as might at first appear, and it would increase our sense that we knew what we were doing when we finally wrote the rules. We could then promote certainty in sentencing without the sense of arbitrariness that has accompanied many of the current efforts to accomplish that goal.

In conclusion, a final virtue of the guidelines system should be emphasized. The problems of grading the severity of offenses and of factual adjudication in sentencing have always been present, but they were long submerged in the amorphous, lawless, open-ended decision-making that characterized both parole and judicial sentencing. The guidelines system has brought these issues into the open and focused attention upon them, and that is all to the good.

21. *Id.* at 46,864.

