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The Future of Parole Release

ABSTRACT

American parole boards have played a critical role in the formulation and administration of states' prison policies in recent decades—and could play an equally important part in helping end mass incarceration. Long neglected by academic, research, and policy communities, systems of discretionary prison release are in need of improvement, if not "reinvention." A plan for revitalization of parole release should lay out a comprehensive and aspirational model for the future. It must address the institutional structure of parole boards, how much release discretion they are given, the substantive grounds for release decisions, the use of risk assessments in the decisional process, decision-making tools such as parole release guidelines, the requirements of fair and reliable procedures, victims' rights at parole hearings, the need for parole supervision in some but not all cases, the intensity of parole conditions, and the length of parole supervision.

Parole boards occupy an influential, if little recognized, niche across the correctional landscape of the country today. They have experienced dramatic changes and substantial challenges, especially during the last quarter of the twentieth century. Starting in the 1970s and continuing through the 1990s, parole boards witnessed a precipitous loss of legitimacy and a sharp curtailment in their authority. At least 20 states abolished their parole boards outright (Rhine 2012). The rapidity of their demise led some scholars to conclude that their role and functionality within the criminal

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justice system was exhausted (Travis 2005). Not surprisingly, any lingering academic focus on or study directed at parole boards largely dissipated.

This loss of attention was unfortunate. For one thing, prison release systems have a large impact on prison populations that is seldom acknowledged. As a group, states with discretionary release experienced faster prison growth during the high-growth years of 1980–2009 than other states and today make up the great majority of the highest-prison-rate states (American Law Institute 2011). While these data run contrary to the conventional wisdom (that parole release equates with leniency), it is important to recognize that indeterminate systems are not all alike. During the prison expansion period, a minority of paroling jurisdictions, such as Rhode Island and Nebraska, fell into a "low-growth" category. A program of parole release reform should be attuned to these experiences and should be wary of the apparent vulnerability of many indeterminate sentencing structures to ungoverned prison growth.

In recent years there has been a notable change in the fortunes of paroling agencies, which underscores the policy importance of taking stock of their operations. For the past 15 years, no parole board has been abolished, and only one (in New York) has suffered a significant loss of discretionary release authority (New York State Permanent Commission on Sentencing 2014). At least one state, Mississippi, recently expanded its parole granting function for nonviolent crimes (JFA Institute 2010). Others are considering restoring parole release as part of a larger program to lower incarceration rates (e.g., Illinois, Virginia). An optimist might hope that discretionary prison release will be a critical tool in the nation's "decarceration" agenda in coming decades. Whether these developments represent a hiatus or a reversal in direction remains unknown. Time will tell.

A majority of states have retained parole release within "indeterminate sentencing systems" in which judges impose a maximum prison sentence and parole boards, alongside correctional officials, determine release dates for most prisoners. We view the parole decision as itself a "sentencing" decision, defining the severity of punishment and effecting the rehabilitative and crime-control purposes of the criminal law. From perspectives of fairness and public safety, the prison release decision should be approached with the same care and consideration given judicial sentencing.

There are varying "degrees" of indeterminacy, and the policy community requires analytic tools to identify and assess these differences. There are no purely indeterminate or determinate systems; every jurisdiction

combines elements of both. This raises the question of how discretion over lengths of prison terms should be apportioned between judges and parole boards. At the moment, we have no standards to guide us to an answer. Moreover, considerations of fairness must be raised in both settings in which "sentencing" decisions about the length of prison terms are made. The quality of procedures surrounding discretionary parole release should ensure both rigor and transparency in light of parole boards' power over offenders' lives. The greater the authority concentrated in the prison release decision, the greater the need for procedural regularity.

Parole boards in many jurisdictions have made changes aimed at achieving greater structure, consistency, and openness in their decision making. These changes call out for thoughtful evaluation. A majority of paroling authorities have adopted parole guidelines, policy-driven decision instruments, or risk assessment tools for use when granting or denying parole. Their use frequently falls short of creating a genuine presumption of release at first eligibility. They are advisory only in reach, permitting parole board members to depart from the presumption based all too often on a determination that the prisoner has not served sufficient time for punitive purposes. Of equal import, there has been a pronounced growth in parole boards' reliance on risk assessment tools. This practice should not be eliminated, but the adoption of risk instruments must engage serious challenges such as unreliable scoring, lack of transparency, and the serious possibility of race and social class biases in their design and administration. Improved processes would give prisoners the means to review and challenge their risk assessment scores in individual cases.

The decision-making milieu has been changing in important ways, some of which should be cheered and some of which should be controversial. For the past several decades, parole boards across the nation have "opened up" their decision-making process by granting victims, prosecutors, and judges the opportunity for input before a final decision is made. The most prominent voice has been that of the victim. Research shows that victims' input influences the outcome of a parole hearing, usually in the direction of denial of release. The appropriate role of the victim at the point of a prisoner's consideration for parole release should be reconsidered, taking into account their more expansive participation at the time of sentencing. In both forums, considerations of fairness and the objectives of the decision being made should shape victim engagement.

Though there is considerable variation by state, most offenders exit prison to parole or other postrelease supervision. In this domain as well,

current practices need reassessment. Supervision raises three interconnected issues: "who" should be supervised, "what" conditions should be ordered, and "how long" they should remain under supervision. There must be a defensible rationale for placing someone on supervision, and conditions should be parsimonious and tied to offenders' needs and the goal of public safety. The length of supervision should be decoupled from the term of imprisonment and should be driven solely by the purposes of supervision. These steps will reduce offenders' vulnerability to the vagaries of violation and revocation processes and facilitate more effective alignment of limited supervision resources.

The writers of this essay have taken sharply different positions on the fundamental question of whether contemporary determinate or indeterminate sentencing systems have been more successful. We have given different advice to jurisdictions on whether parole release should be retained, abolished, or reinstituted (e.g., Petersilia 2003; Reitz 2004; Rhine 2012). Nonetheless, we agree that discretionary parole release is an important feature of US sentencing and corrections that will not disappear in the foreseeable future, and we share a common interest in improving those systems as much as possible. Regardless of one's views on the "determinacy/indeterminacy" debate, it would be irresponsible not to give assistance to the majority of states that continue to vest meaningful authority over prison sentence length in paroling agencies.

This essay lays out a 10-point program for the improvement of discretionary parole release systems in America.[1]

Reinventing Parole Release

PROPOSAL 1.—*Institutional Structure:* The institutional structure and composition of parole boards should be reconstituted to ensure members possess the requisite education, expertise, and inde-

[1] We do not address the question of whether discretionary parole release is associated with lower recidivism rates than mandatory release. There is a limited empirical literature and the findings are mixed. The drafters of the *Model Penal Code* reviewed these studies and, finding them methodologically problematic, concluded, "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" (American Law Institute 2007, pp. 133–34).

pendence relative to release decision making. Such a system would include the following features, or others equally effective. Parole board members should be recommended for appointment by a special nonpartisan panel subject to gubernatorial approval. Their terms of appointment should be defined by law, with conditions for removal governed by a protocol administered by the special panel.

PROPOSAL 2.—*Range of Discretion:* The amount of release discretion given parole authorities should not eclipse the sentencing discretion of courts and for most cases should not exceed 25–33 percent of the maximum term. For extremely long sentences, release eligibility should occur no later than 15 years. The relative amounts of discretion held by sentencing courts and releasing agencies should reflect the different goals and considerations operative at the sentencing and prison release stages.

PROPOSAL 3.—*Grounds for Release:* There should be a meaningful presumption of release at first eligibility, so that the majority of prisoners are released at that time. Parole boards should not be authorized to deny release on the ground that the prisoner has not served sufficient time for punishment purposes. Denial of release should be based on credible assessments of risk of serious criminal conduct and readiness for reentry.

PROPOSAL 4.—*Risk Assessment:* The use of risk assessment instruments for parole release should be fully examined but not eliminated. Paroling authorities should be required to validate their instruments on their local offender populations and consider how actuarial predictions of recidivism are inexorably connected to race and social class. The risk assessment items and scoring should be transparent. As a first step, states should open their risk assessment tools to vigorous, public challenges of their statistical underpinnings and their applications to individual offenders.

PROPOSAL 5.—*Decision-Making Tools:* Decision-making tools should be structured, policy-driven, and transparent. Parole boards should adopt parole guidelines systems that govern consideration of offenders for release. They should establish presumptive release dates tailored to offenders' varying risk levels and readiness for reentry. Paroling authorities should develop capacities to pro-

mulgate, monitor, revise, and enforce compliance with the guidelines system.

PROPOSAL 6.—*Process; Prisoners' Rights:* Parole release decision processes should more closely resemble those in sentencing hearings. Prisoners' procedural rights should be given increasing weight if they are denied release on successive occasions. The adequacy of release procedures should be assessed in terms of resources per decision, meaningfulness of hearings, prisoners' ability to prepare and present cases, rules for victim participation, quality controls on fact finding, decision rules, and reviewability of decisions.

PROPOSAL 7.—*Victims' Rights:* Victims should have the right to submit impact statements or appear at parole hearings, but their input should be limited to the future risk potential of the inmate and conditions of release. Victims should not make recommendations to grant or deny parole.

PROPOSAL 8.—*Supervision:* A period of parole or postrelease supervision should be required for many, but not all, individuals leaving prison. Supervision should be reserved mainly for those who present higher risks of reoffending and those incarcerated for serious, violent, or predatory sexual crimes, regardless of risk level. It should also be made available to low-risk offenders, who should be given the choice to "opt in" or "opt out" of supervision altogether.

PROPOSAL 9.—*Conditions of Supervision:* Parole supervision conditions should be as few in number as is necessary given public safety concerns and tailored to specific needs and risks associated with the individual offender. Supervision conditions and resources should be concentrated on the first few months after release, and supervision agents should have greater authority than they currently do to modify conditions. Parole supervision fees should be abolished or severely limited.

PROPOSAL 10.—*Supervision Term:* The length of supervision should be decoupled from the term of imprisonment. The maximum supervision period should be limited to no more than 5 years for higher risk levels and for a period not to exceed 12 months

for lower risk levels, except for those individuals convicted of serious, violent, and/or predatory sexual crimes for whom the longer 5-year maximum applies, regardless of level of risk. Those subject to parole or postrelease supervision should be able to earn an early discharge, and the courts should make frequent use of presumptive early termination.

Taken as a whole, our recommendations form an ambitious model that has never before existed in the United States. If adopted separately, our recommendations would foster substantial incremental improvements in the current practices of all paroling systems. This essay has 11 sections, one for each proposal and a conclusion.

I. Institutional Structure

PROPOSAL 1.—*Institutional Structure:* The institutional structure and composition of parole boards should be reconstituted to ensure members possess the requisite education, expertise, and independence relative to release decision making. Such a system would include the following features, or others equally effective. Parole board members should be recommended for appointment by a special nonpartisan panel subject to gubernatorial approval. Their terms of appointment should be defined by law, with conditions for removal governed by a protocol administered by the special panel.

In 2013, 340 parole board members in 46 states granted 187,035 discretionary entries to parole.[2] This small group exercises enormous power. In a majority of states, the work of paroling authorities includes a complex range of administrative tasks and decision-making responsibilities. Most boards determine the amount of time offenders spend in confinement, conditions of postrelease supervision, and whether violations result in

[2] The number of board members excludes four states: Maine and Minnesota (neither state reports discretionary entries to parole); four members from Alabama and five members from Delaware are excluded because of missing discretionary release data. The number of discretionary entries includes releases reported to the Bureau of Justice Statistics for 2013, except for the following states: Alabama and Delaware (no data reported); California shows zero for 2012; Maryland reported 3,424 in 2012 (Paparozzi and Caplan 2009; Lampert and Weisberg 2010; Maruschak and Bonczar 2013; Herberman and Bonczar 2014).

revocation. There is considerable variation in practice in how paroling authorities carry out their duties. There is a constant need for sound professional qualifications, knowledge-based expertise, and an independent institutional structure that supports fair, just, and informed decision making—particularly in the exercise of parole release discretion.

The institutional structure of paroling authorities is shaped profoundly by how members (and chairs) are appointed and by the absence of meaningful statutory qualifications informing their selection. Significant uniformity is found across most states. Direct gubernatorial appointments, usually subject to legislative confirmation, account for membership on the majority of parole boards (43) or appointment as chair (37) (Paparozzi and Caplan 2009, pp. 411–15; Lampert and Weisberg 2010, p. 2).[3] In most states, especially where the governor is the sole appointing authority, the chair and members of the parole board may be removed as easily as they are appointed.

It has been a long-standing criticism that few formal credentials are required for appointment to the parole board, whether educational, experience-based, or otherwise (National Commission on Law Observance and Enforcement 1931; Rhine et al. 1991; Reitz 2012). The majority of states specify at most vague educational requirements or relevant work experience (Schwartzapfel 2015). In the few states that specify qualifications, they are open ended and expectations are low (Paparozzi and Caplan 2009, pp. 416–17).[4] Notably absent are statutes calling for knowledge-based or professional expertise bridging corrections, criminology, and the growing literature on evidence-based practices and actuarial tools concerning predictions of recidivism.

Once appointed, institutional vulnerability and personal job insecurity push parole boards toward risk aversion in their decision making. The external scrutiny of parole decisions varies with time and can change quickly. Board members are acutely aware that there is little price to pay for keeping offenders in prison beyond their release eligibility dates and potential catastrophe if even one releasee commits a horrible crime

[3] In some states, more than one authority makes appointments to the parole board. In seven states, the chair is selected by a majority vote of the members (Paparozzi and Caplan 2009, p. 415).

[4] Only eight states called for a bachelor's degree for appointment to the board. Twenty-three required some work experience, though only 15 mandated that such experiences be tied to the criminal justice system or other relevant social services (Paparozzi and Caplan 2009, pp. 416–17).

(Morris 1974; Ruhland et al. 2016). The nearly 40-year growth of mass incarceration and the public's increased attention to crime policy have not been lost on parole boards. Boards experience immense public and political pressure to dramatically reduce their rates of parole release in the aftermath of tragic, albeit isolated, incidents of violence by parolees (Schwartzapfel 2015).[5] Burke and Tonry (2006) observed that, since 1999, there has been a sizable reduction in the percentage of those granted discretionary release, in no small measure as a result of parole boards' increasing reluctance to release prisoners before the expiration of their maximum sentences.[6]

Those considerations, in combination, undermine the institutional structure necessary to support a reasonable measure of independence and insulation for paroling authorities. The "reinvention" of a sound infrastructure will require dramatic change. Our recommendations below offer one model that would accomplish needed reforms. Other satisfactory models are possible to imagine, however, such as the better European systems, which embrace "judicially led parole decision making"—a reconfiguration unlikely to be given serious consideration in the United States (Padfield, van Zyl Smit, and Dünkel 2010; van Zyl Smit and Corda 2017). We thus concentrate on evolutionary changes to existing institutions rather than a "ground-up" building of new infrastructures. We would be open to alternative measures that could be undertaken, provided that they are equally effective in meeting the goals of strengthening parole boards as institutions.

> The eligibility standards for becoming a parole board member should by statute require a college degree in criminology, corrections, or a related social science or a law degree and at least 5 years of work experience in corrections, the criminal justice/community corrections

[5] Such episodes have recently occurred in Pennsylvania, Massachusetts, and Connecticut. In Massachusetts in December 2010, e.g., following the killing of a police officer by a parolee with a violent criminal past who had been released despite receiving a life sentence, the chairperson, board members who voted on his release, and the executive director resigned after an inquiry was ordered by the governor (Reitz 2012, pp. 285–86; Clear and Frost 2014, p. 192).

[6] Fairly dramatic departures are sometimes made in the opposite direction. Texas has increased its parole release approval rate. Fabelo (2010) highlights state participation in the Justice Reinvestment Initiative. During the past 6–7 years the rate of parole board release approvals moved upward. From 2007 to 2014, California, a determinate sentencing state, went from 119 parole releases of life-term inmates to 902 (personal correspondence, Jennifer Shaffer, chair, California Board of Parole Hearings).

field, or criminal law. Consideration should be given to balancing the relevant competencies of board members as a whole and the importance of including members with expertise in victim awareness and the prison experience.[7]

Parole board members are called on to apply complex legal rules, and social science research findings, across the whole of their decision making. Impressive meta-analyses elevate the importance of the literature on effecting offender change, especially the growing body of knowledge associated with evidence-based policy and practice (Cullen 2013). The requirement of a college degree in criminology, corrections, or related areas of social science, including social work and clinical psychology, or the possession of a law degree, coupled with substantial real-world work experience, would engender greater competency and balance in parole board memberships (Bing 2012).[8]

The process for appointment to the parole board should begin with a nomination and review of candidates by a special nonpartisan panel, followed by a recommendation of appointment, subject to affirmative action by the governor.

Statutes in several states provide for a special panel to screen and recommend suitable applicants for the parole board to the governor, who is then authorized to make an appointment. In many states, the process concludes with confirmation by the legislature. Our recommendation eliminates this step. Hawaii requires that nominations be forwarded by a panel "composed of the chief justice of the Hawaii supreme court, the director, the president of the Hawaii Criminal Justice Association, the president of the bar association of Hawaii, a representative designated by the head of the Interfaith Alliance Hawaii, a member from the general public to be appointed by the governor, and the president of the Hawaii chapter of the National Association of Social Workers" (Lampert and Weisberg 2010, p. 54). Florida relies on a five-member Parole Qualifications Com-

[7] Numerous parole boards rely on panels consisting of board members and hearing officers, deputy commissioners, or equivalent executive-level decision makers in determining suitability for release. It is reasonable to extend the eligibility requirements under discussion to these individuals as well.

[8] The references to law and possession of a law degree are premised on the recognition that some states' statutes already include this as a requirement for at least one board member.

mittee, while Utah draws its nominations from the state's Commission on Criminal and Juvenile Justice.

The special panel, however constituted, offers a critical buffer to direct gubernatorial appointments. The membership of these panels may be broadly inclusive of representatives from different branches of government and the criminal justice system, as in Hawaii, or composed more narrowly of individuals drawn from the criminal and juvenile justice systems, as in Utah. It is important that the panel not be captured by one political party and that it include a balance of law enforcement and "defense" viewpoints. The quality and credibility of the special panel itself, in addition to the statutory credentials needed for parole board membership, will go a long way toward strengthening American parole boards.

> The term of parole board membership should be established by law, including the possibility of reappointment. The board should be chartered as an independent authority housed in the executive branch, with a protocol for removal of board members adopted and administered by the special panel.

Though there is variation in the terms served by parole board members, there are states where the members' terms are coterminous with the governor's. The provision for fixed terms, and the possibility of reappointment for a second term, establish some insulation from the vicissitudes of election cycles. Even more critically, the adoption and administration of a protocol for removing parole board members by the special nonpartisan panel would offer a meaningful degree of insulation and independence to board members, fostering greater objectivity in their decision making.

Our proposed processes for selection and removal of parole board members resemble analogous protocols for judges in many states. As a matter of practical implementation, however, we envision that parole boards will remain housed in the executive branch.

II. Range of Discretion

PROPOSAL 2.—*Range of Discretion:* The amount of release discretion given parole authorities should not eclipse the sentencing discretion of courts and for most cases should not exceed 25–33 percent of the maximum term. For extremely long sentences, release eligi-

bility should occur no later than 15 years. The relative amounts of discretion held by sentencing courts and releasing agencies should reflect the different goals and considerations operative at the sentencing and prison release stages.

The character of a discretionary release system depends greatly on how much power is given to the releasing authority (or authorities) over the months, years, or percentages of prison terms that will be served in individual cases. Indeterminate sentencing systems have varied dramatically in their degree of indeterminacy. In this section, we consider how much release discretion there should be. To our knowledge, this critical issue of system design has never before been addressed in the literature. The most important implication of this proposal is that careful thought and study be given to the degree of indeterminacy that is wanted, or can be tolerated, in a sentencing system.

Measured by amount of release discretion, American states spread across a wide continuum. Probably no two states overlap at exactly the same spot. There is no such thing as an absolute determinate or indeterminate sentencing system anywhere; every jurisdiction reflects combinations of both. No American jurisdiction has ever employed a "pure" indeterminate sentencing system, in which the durations of all prison sentences were subject entirely to the discretion of a parole board.[9] Whenever a maximum prison term is established by the judge or the legislature, for example, the system has an element of determinacy.[10] Most US jurisdictions have composite systems that employ both determinate and indeterminate prison sentences for designated classes of offenders. Forty-nine states authorize or mandate sentences of life without parole (or LWOP) for a handful of serious offenses, even if their sentencing structure is otherwise indeterminate for the vast majority of crimes (Nellis and King 2009).[11]

[9] California and Washington at one time had systems with very high degrees of indeterminacy, but even they were not pure systems (Messinger and Johnson 1980, pp. 15–17; Boerner and Lieb 2001, p. 73).

[10] In Europe, a numerically specific maximum prison term is often enough to classify a given sentence as "determinate" (van Zyl Smit and Corda 2017). This usage is significantly different than in the United States (Reitz 2015).

[11] The inverse is also true. In all so-called determinate states, small subgroups of offenders serve indeterminate sentences. In Minnesota, e.g., some murderers receive life sentences with release eligibility, and some sex offenders are given indeterminate sentences to allow for prolonged detention of those deemed most dangerous (Frase 2005). Other

In our analysis, we use the terms "indeterminacy" and "determinacy" as general descriptions of how a particular sentencing system operates in most cases:

> An "indeterminate" prison sentence is one for which an offender's date of release cannot be predicted with fair accuracy from the court's sentence at the conclusion of a criminal trial. The length of term will be fixed by one or more decision makers who exercise later-in-time release discretion in a way that is neither routinized nor reasonably knowable in advance.
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> A "highly indeterminate" system is one in which, on the day of judicial sentencing, durations of prison stays cannot be predicted even approximately, with large ranges of possibility measured in months, years, or the percentage of the maximum term that is controlled by the parole board's discretion.
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> A "determinate" prison sentence is one for which an offender's date of release can be predicted with fair accuracy from the court's judgment at the conclusion of a criminal trial. The length of term may be adjusted by one or more decision makers who exercise later-in-time release discretion in a way that is routinized and reasonably knowable in advance.[12]

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sources of indeterminacy exist in all US sentencing systems, usually affecting tiny numbers of cases, and with no expectation of routine application (Love 2009). These include compassionate release or "medical parole," mainly available to inmates with disabling or terminal illnesses, and the executive's clemency powers, which in most jurisdictions are used sparingly (Barkow 2009; Love 2009; American Law Institute 2011, § 305.7). In most jurisdictions, judges retain jurisdiction to revise their own sentences for a short period. In a handful of states, this power extends years into a prison term and has been called "bench parole" (Klingele 2009, p. 500). New sources of indeterminacy may also be on the horizon. Current proposals for a revised *Model Penal Code* include a new vehicle for sentence modification by a "judicial decision maker" that would activate at the 15-year point of any prison sentence longer than 15 years, including life sentences (American Law Institute 2011, § 305.6; see also Frase 2010). Because they are employed in so few cases, the presence or absence of these "miscellaneous" release mechanisms has no bearing on whether a given jurisdiction is classified as determinate or indeterminate in the eyes of US criminal justice professionals.

[12] Most US academics and policy makers would concur that Minnesota has a determinate sentencing system, even though prison sentences may be reduced by one-third through the award of good-time credits administered by the state's Department of Corrections (Frase 2005). This one-third leeway could, in theory, produce a significantly indeterminate regime. In practice, the overwhelming majority of prison terms are shortened by the full allocation of good-time credits, which is generally treated as a matter of routine. Grounds for withholding credits are narrowly defined and are triggered only by an indi-

To put these definitions to use, imagine two indeterminate jurisdictions. In one, a typical 5-year maximum prison term includes parole eligibility after 1 year. There is a "gap" of 4 years between the minimum and maximum—or 80 percent of the maximum term. In the second jurisdiction, a prisoner serving a 5-year term is not eligible for release until 3 years have passed. Here, the gap is 2 years or 40 percent of the maximum. If all else is equal, we can say that the first jurisdiction is more indeterminate than the second.

Taking some real-world examples, we can begin to classify systems in policy-relevant ways and frame normative questions. Should we approve of New Jersey's highly indeterminate system, for instance, in which a 10-year maximum sentence produces first release eligibility at 1 year, 11 months, and 5 days (New Jersey State Parole Board 2010, p. 35)? In such cases, discretion over more than 80 percent of the maximum term is held by releasing authorities; less than 20 percent of the term is controlled by the sentencing judge's decision. At a greater extreme, some sex offenders in Colorado receive indeterminate prison sentences of 1 year to life (Colo. Rev. Stat. §§ 18-1.3-1004; 18-1.3-401).

On policy grounds, should we prefer systems with lesser degrees of indeterminacy? In Pennsylvania, release eligibility in most cases is set at 50 percent of the maximum sentence pronounced by the sentencing court. In Canada and in many European systems, release is relatively assured at the two-thirds mark of the maximum term (Doob and Webster 2017; van Zyl Smit and Corda 2017). Under the 85 percent rule that the federal government once required of states in order to receive prison construction grants, the releasing authority gets only 15 percent of the pie (Reitz 1996). There is a wide continuum of policy choice, but little thought has gone into the question of the optimum degree of indeterminacy.

The degree of indeterminacy should be settled with reference to two underlying concerns. First, we must examine the relative competencies of courts and parole boards. What goals and inquiries are best resolved in one or the other forum? Second, on fairness grounds, the appropriate degree of indeterminacy should depend partly on the quality of procedures surrounding parole release decisions. The larger the "gap" between

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vidual's misbehavior while institutionalized. With such limited range of action, the authority exercised by corrections officials to determine lengths of stay cannot be said to rival a sentencing court's. The durations of Minnesota prison sentences are highly predictable.

minimum and maximum sentences, the more we should be concerned about whether a fair and accurate decision-making process is in place.

In our view, the scope of release discretion in a well-designed indeterminate sentencing system should be no more than 25–33 percent of the maximum prison term for the vast majority of cases. An example of a judicial sentence that would satisfy a "25 percent rule" is a 4-year prison term with first release eligibility at 3 years. A 3-year prison sentence with release eligibility at 2 years would reflect a "33 percent rule."

We refer to the total amount of release discretion in a particular system, which in some jurisdictions is allocated between the parole board and corrections authorities. Many states divide discretionary release authority and apportion it across parole boards and agencies in charge of good-time credits. In some systems the parole board has jurisdiction over both questions. If good behavior while institutionalized is an important factor in risk assessment at the release stage, for example, there may be no need to further incentivize good behavior through good-time discounts. In general, we favor one release authority over two, or many. Multiple decision makers who hold power over months or years of prison confinement call for multiple—and expensive—apparatuses for fair procedures. Chances are, process values will be spread too thin.

In arriving at our benchmarks, we begin with the assumption that the sentencing judge should have responsibility to choose a minimum-maximum range that falls within the "ballpark" of proportionate punishment for every case. In a jurisdiction that adopted a 25 percent rule, releasing authorities would hold discretion to increase the judge's minimum term by one-third on the basis of utilitarian considerations. Under a 33 percent scheme, the parole board would be empowered to add as much as 50 percent to the judge's minimum sentence.[13]

The degree-of-indeterminacy question reaches back to first principles. To implement a theory of limiting retributivism (or "utilitarianism within limits of proportionality"), it is necessary to decide how tight the limits should be (Frase 2013). In other words, what is a desirable balance between instrumentalism and proportionality in sentencing, especially given the tendency of utilitarian objectives to impose few limits on themselves (Zimring and Hawkins 1995; Sullivan and Frase 2008)?

[13] One of us hesitates to go further than a 25 percent rule but also believes that a 33 percent rule would be an improvement over current practices in many states.

Our proposals reflect our macro-policy preferences for the America of today: the nation whose existing practices have yielded the historic catastrophe of mass incarceration. In our view, meaningful and enforceable limits of proportionality should be mustered to play a greater role in US sentencing systems than has been true in recent decades; and yet, substantial latitude should be built into future sentencing structures to allow for crime-reductive policies (American Law Institute 2007, § 1.02(2)).[14] Within such a theoretical structure, the legislature, sentencing commission, trial courts, and appellate courts must work hard to arrive at sentences that are not disproportionate to the seriousness of the offense. These should be the dominant and overriding decisions of offense gravity. In comparison, a release decision rooted in utilitarian reasoning should operate within the "preset" boundaries of proportionality contained in the judge's sentence. Dividing judicial and paroling discretion by 3 : 1 or 2 : 1 is about as far as you can go without yielding a system in which the tail wags the dog.

Realistically, however, a 25–33 percent rule cannot be applied to every sentence. It breaks down for extremely long maximum terms, which are unfortunately common in the United States. In such cases, a 33 percent limit would have the unfortunate effect of mandating over-long prison stays before first release eligibility. On independent policy grounds, therefore, we join the new *Model Penal Code* in calling for release eligibility for all prisoners at 15 years or earlier, no matter how long the maximum sentence (American Law Institute 2011, § 305.6).[15] Blanket eligibility at 15 years will in some cases increase the "gap" defining the discretion of release authorities well above our 33 percent. For instance, in the case of a 40-year maximum sentence, first release eligibility at 15 years would give the parole board discretion over 62.5 percent of the possible maximum term rather than just 33 percent. For life sentences, the gap is not precisely calculable, but in many cases it will be very large indeed.

[14] One of us, as reporter for the *Model Penal Code: Sentencing*, has advocated "incapacitation of dangerous offenders within limits of proportionality" as the sole utilitarian basis for prison sentences and proposed that the appellate courts of every jurisdiction be given statutory power to review de novo every sentence for disproportionate severity (American Law Institute 2015, §§ 6.06, 6.09).

[15] There is no magic in a particular number. It is the basic concept that matters to us. We join the *Model Penal Code* in urging first release eligibility for everyone at a period no longer than 15 years. Like the code's drafters, we would have no argument with a shorter period such as 10 years (American Law Institute 2011, § 305.6, comment c).

This bulging of release discretion is a necessary evil in a society that regularly employs extremely long prison sentences—and is a problem that can be meliorated by appropriate attention to procedural regularity in the release decision.

III. Grounds for Release

PROPOSAL 3.—*Grounds for Release:* There should be a meaningful presumption of release at first eligibility, so that the majority of prisoners are released at that time. Parole boards should not be authorized to deny release on the ground that the prisoner has not served sufficient time for punishment purposes. Denial of release should be based on credible assessments of risk of serious criminal conduct and readiness for reentry.

No model paroling system can be envisioned without giving careful thought to the underlying purposes of carceral sentences. Rather than rehearse centuries of debate on the subject, we simply put our cards on the table. Our views of punishment theory translate directly into our proposed release criteria.

Simply stated, we want a system that always honors important values of justice and proportionality but also seeks to reduce the amount of crime and victimization in society. This framework has been called "limiting retributivism" or "modified just deserts" (Monahan 1982; Frase 2013). The recently revised *Model Penal Code* describes this approach as "utilitarianism within limits of proportionality" (American Law Institute 2007, § 1.02(2), comment b).

Utilitarian values of crime reduction and moral values of proportionality apply in specific ways to the use of imprisonment. In our view, prison sentences are justified to incapacitate dangerous offenders and to punish people who have committed such serious crimes that lesser sanctions would be disproportionate.[16] Depending on the case, the appropriate length of a prison stay should be determined with reference to one or both of these goals.

[16] Positions similar to ours, with more complete justifications, exist elsewhere in the policy literature (Horn 2001; American Law Institute 2015). Readers who adhere to a strong version of just deserts theory would see no basis for having a parole releasing authority (von Hirsch and Hanrahan 1979).

As posited by Norval Morris (1974), a "utilitarianism-within-proportionality" theory should recognize that there is rarely an exact sentence that a community of human beings can settle on as the deserved outcome in an individual case. Instead, it is useful to think of a range of punishments that are "not disproportionate" by community standards. Judgments about justice and proportionality vary across cultures and rest on widely prevalent moral intuitions within each society. Human beings may lack the "moral calipers" to identify exact sentences that fit particular cases, but they have useful intuitions about the right ballpark.

We hypothesize that most Americans would rule out a prison sentence for a speeding offense or a 5-year prison term for a first-time burglar, both on grounds of disproportionate severity. Most Americans would not rule out a police warning for a first speeding offense as disproportionately lenient, but they would rule out a police warning for a first-time home invader in the absence of extenuating circumstances. In the latter case, all sorts of outcomes might be available without offending the community's sense of proportionality: diversion from prosecution with probation and restitution, conviction without penalty, or conviction with community service or probation. We could also debate such things as the length of supervision term and intrusiveness of conditions within proportionality boundaries, but many different permutations and increments of severity would be possible for the first-time burglar without provoking a widely held judgment that the outcome was disproportionate.

Within the bandwidth of "not-disproportionate" penalties that might be given to particular defendants, the theory holds that governments should be free to craft sentences on utilitarian grounds. In sum, sentences may be crafted to serve utilitarian ends as long as the resulting punishment is not disproportionately lenient or severe by societal standards.

An axiom of the mixed theory we espouse is that criminal penalties should be no more severe than necessary to achieve their legitimate purposes (Morris 1974; American Law Institute 2007, § 1.02(2); Frase 2013). When there is no reasonable basis to think that a utilitarian benefit can be achieved by a particular sentence, the penalty should be set at the lowest severity level needed to serve society's retributive sentiments. In other words, decision makers should be aiming for the low end of the range of not-disproportionate penalties unless there is a reasonably plausible utilitarian reason to impose a more severe, but still proportionate, sentence.

We now boil this down and focus on the paroling decision: In our proposed system, after a judge has imposed an indeterminate prison sentence, the date of first release eligibility should be taken to reflect a prison term that is not disproportionately lenient on grounds of punishment. In other words, the parole board should be bound by the judge's determination that the minimum sentence is long enough to serve retributive values, and the parole board should have no power to deny release on the basis of its belief that a longer sentence is necessary or better on retributive grounds.

The parole board should also be entitled to assume that the maximum prison term included in the judge's sentence is not disproportionately severe. It is the trial court's job to pronounce minimum and maximum sentences that are not disproportionate, and in a well-designed system, a sentence that is disproportionately excessive would be reversible on appeal (American Law Institute 2015, §§ 7.XX, 7.09).

Rather than reevaluate the sentencing judge's decision as to proportionate punishment, the parole board should ask whether a prison stay beyond the date of first release eligibility is necessary to serve the goal of public protection. The only ground for denial of release should be the board's finding, based on credible evidence, that the prisoner presents an unacceptable risk of reoffending if released. A showing of good reason should be required for a denial, and this should be formalized in such a way that release decisions cannot be buffeted by political winds (Travis 2002).

On the basis of current behavioral science, we would rest the release determination on actuarial risk assessment (taking static risk factors into account) and findings of in-prison behavior that has been empirically associated with rehabilitation (looking to dynamic factors such as program completion, the absence of disciplinary violations, or preparation of a sound reentry plan).[17] Dynamic factors speak to a prisoner's readiness for release based on behaviors and activities during imprisonment. In the context of prison release decisions, the three of us take different views of the proven predictive value of dynamic factors; but we all agree that it

[17] Some argue that risk assessment is better done at the sentencing than at the discretionary release stage (Morris and Miller 1985; American Law Institute 2011, § 6B.09) and should be incorporated into a determinate sentencing structure. We take no position on this question. We limit our analysis to jurisdictions that have chosen indeterminate systems.

would be desirable to incorporate such factors whenever research has shown them to increase the predictive power of assessments of prisoners' future success.

A clear view of questions within the parole board's jurisdiction limits what factors the board should consider and the purposes for which they are considered. For example, we endorse the board's consideration of present and prior convictions for risk assessment purposes, but not as indications of whether the prisoner has received enough punishment.

Our framework would be a material change in the law of prison release in most indeterminate jurisdictions in the United States. Most paroling authorities already consider risk of recidivism.[18] We would seek to improve and scrutinize the processes for making risk determination rather than disallow the inquiry.

With respect to parole boards' weighing of just punishment in individual cases, however, our proposal would require a fundamental rethinking of the board's role. In most states today, parole boards have effective authority to reevaluate any and all aspects of the judge's original sentence, including how much time a prisoner deserves to spend in prison for his offense and his criminal record.[19] We recommend repeal of all such authorizations or voluntary cessation by parole boards.

[18] The Colorado code states that "the primary consideration for any decision to grant parole shall be the public safety" (Colo. Rev. Stat. § 17-2-100.2). Statutory language in Connecticut gives the parole board discretion to release only if "there is reasonable probability that such inmate will live and remain at liberty without violating the law and ... such release is not incompatible with the welfare of society" (Conn. Gen. Stat. § 54-125). Similar provisions exist in many other parole release states (e.g., N.Y. Comp. Codes R. & Regs. tit. 9, § 8002.1; Vt. Stat. § 502a(b)(2); S.D. Codified Laws § 24-15-8(2)). Specialized provisions on recidivism risk are also found in some states. For example, in Tennessee, "No person convicted of a sex crime shall be released on parole unless a psychiatrist or licensed psychologist ... has evaluated the inmate and determined to a reasonable medical or psychological certainty that the inmate does not pose the likelihood of committing sexual assaults upon release from confinement" (Tenn. Code § 40-28-116(2)).

[19] In New York and other systems, the parole board must be satisfied that the release date "will not so depreciate the seriousness of his crime as to undermine respect for law" (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; Laws of R.I., § 13-8-14(a)(2)). In other states, the board is asked to weigh the "sufficiency" of the amount of time that has been served by each prisoner or to respond to the "severity" or "nature" of the offense for which the inmate is imprisoned (Alabama Board of Pardons and Parole 2009: 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)). Official grounds for departure from Utah's parole guidelines include a number of aggravating and mitigating factors surrounding the original offense or even prior allegations of violent offending that did not result in conviction (Utah Sentencing Commission 2015, p. 22). Boards commonly consider the prisoner's criminal record,

We would also reexamine release criteria in some states that serve no clearly defensible purpose. To illustrate, we nominate the following provisions. New Hampshire includes among its official reasons for denial of parole "the existence of adverse public concern or notoriety" (N.H. Admin. Code Rules, para. 302.01). In Utah, it weighs against early release if the prisoner has brought "a claim that [any state of federal] court finds to be without merit and brought or asserted in bad faith" (Utah Code § 77-27-5.3(2))—a draconian way to discourage frivolous legal arguments. In Georgia, "no person shall be . . . placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge" (Ga. Code Ann. § 42-9-42), making underemployment or welfare eligibility imprisonable offenses. Perhaps most questionable of all, before releasing a prisoner, the New Mexico Parole Board is instructed by statute to consider "the inmate's culture, language, values, mores, judgments, communicative ability and other unique qualities" (Code of N.M. Rules, R. 22.510.3.8(C)(2)(s)).

IV. Risk Assessment

PROPOSAL 4.—*Risk Assessment:* The use of risk assessment instruments for parole release should be fully examined but not eliminated. Paroling authorities should be required to validate their instruments on their local offender populations and consider how actuarial predictions of recidivism are inexorably connected to race and social class. The risk assessment items and scoring should be transparent. As a first step, states should open their risk assessment tools to vigorous, public challenges of their statistical underpinnings and their applications to individual offenders.

A parole board's release decisions should be based on prospective evaluations of whether individual prisoners are likely to commit serious crimes in the future. This leads to a decades-old question of implemen-

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anything contained in the original presentence report, and victim impact information (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).

tation policy: What tools or faculties should be used to assess recidivism risk? Given the difficulties in predicting human behavior, parole boards have historically been given a great deal of discretionary authority in determining release.

Early parole hearings were often haphazard, based primarily on brief interviews with each prisoner. Parole boards were guided by their experiences and gut-level instincts (referred to as "clinical" assessments). But studies of such methods revealed that the predictive validity of clinical assessments was inferior to more structured actuarial methods (Meehl [1954] 2013; Ægisdóttir et al. 2006). Not only did statistical assessments outperform clinical judgments in accuracy, but their use promoted uniformity and consistency between parole commissioners or for the same commissioner over time.

Actuarial tools also help insulate decision making from politicization and, since the process is more objective, reduce the number of legal appeals due to adverse parole decision making. While parole risk prediction devices have been used since the 1920s, the growth in computing power and analytic methods over the last decade has improved their accuracy and accelerated their development and use (for a historical review, see Harcourt [2007]). But as we discuss below, the most widely used and researched Level of Service Inventory-Revised (LSI-R) instrument produces estimated 30 percent false-positive error rates for high-risk offenders, meaning that many offenders who are predicted to fail (on various outcomes) do not. Predicting low recidivism risk is more accurate (error rates of just 2–3 percent; Andrews, Bonta, and Wormith 2004). So, if parole boards use risk assessment tools to deny release to high-risk offenders, they will overpredict and systematically lengthen prison terms. Actuarial tools are better at predicting low- rather than high-risk behavior.

Recidivism prediction algorithms identify correlations between preexisting offender background factors (e.g., age, marital status, unemployment, education, family background, criminal history) and recidivism not only for offenders generally but also for subgroups (e.g., sex offenders, females, the mentally ill). These statistical correlations are transformed into risk assessment instruments that identify an offender's predicted probability of recidivism. Parole board members can then separate higher-risk from lower-risk offenders, enabling a more efficient use of prison resources.

The use of actuarial risk assessment tools is an integral part of virtually all criminal justice decision making, including pretrial release, prosecu-

tion, sentencing, and parole. A recent survey found that 88 percent of paroling authorities report using an actuarial risk prediction instrument to guide decision making (Kinnevy and Caplan 2008). The *Economist* (2014) reported that the LSI-R, the most popular tool, was used to assess 775,000 parole applications in America in 2012.[20] The *Wall Street Journal* reported that officials in Michigan credit risk assessments introduced in 2006 "with helping to reduce their state's prison population by more than 15 percent from its peak in 2007 and with lowering the three-year recidivism rate by 10 percent" (Walker 2013). Texas parole board members, using a rudimentary risk assessment with just 10 factors, can have offender data transmitted to their offices and can vote remotely by computer, resulting in even greater cost savings (Walker 2013). Even in states without indeterminate sentencing and discretionary parole release, risk assessment tools are used to decide who stays in prison. When the US Supreme Court ordered California to reduce prison crowding, officials relied on the California Static Risk Assessment and Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) to identify good candidates for community supervision.[21] The hope is that risk assessment software will help empty America's prisons without endangering the public.

Statistical risk assessment tools now enjoy widespread political and public support, and legislatures increasingly require them (Drake 2014). Social scientists champion their use, and such tools are seen as foundational for "evidence-based practices" and "smarter sentencing" strategies. The *Model Penal Code—Sentencing* calls for sentencing commissions to develop "offender risk instruments or processes, supported by current and ongoing recidivism research of felons in the state, that will estimate the relative risks that individual felons pose to public safety through future criminal conduct" (American Law Institute 2011, § 6B.09(2)). As Michael Tonry succinctly put it, "The offender is disappearing from view. What's in focus is his risk of recidivism" (2014, p. 175).

Increased use of risk assessments, however, raises some troubling issues. Risk assessment tools disproportionately affect racial minorities and the

[20] Harcourt (2007) reports that 28 states in 2004 used a prediction instrument for parole decisions, with eight using the risk-need-responsivity-based LSI-R.

[21] See, e.g., California Defendants' Response to April 11, 2013, Order Requiring List of Proposed Population Reduction Measures; Court Ordered Plan, Division of Low-Risk Offenders to Community Corrections, at p. 14 (http://www.cdcr.ca.gov/News/docs/3JP-May-2013/File-Endorsed-List-Plan-May-2.pdf).

poor. Harcourt (2007) argues that the turn to actuarialism in criminal justice is morally problematic, is fundamentally flawed, and amounts to modern-day racial profiling. He asserts that in our enthusiasm to adopt such actuarial efficiencies, we have failed to see the harms and social costs of profiling the poor and racial minorities. Harcourt concludes that justice demands that we be "against prediction."

Former Attorney General Eric Holder weighed in on the debate. In a 2014 speech at the National Association of Criminal Defense Lawyers and in a follow-up letter to the US Sentencing Commission, he sharply criticized the growing use of data-driven predictions of defendants' future crime risk to shape sentences. He said that "basing sentencing decisions on static factors and immutable characteristics—like the defendant's education level, socioeconomic background, or neighborhood—may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society."[22]

Sonja Starr (2014*b*) observed that "in the new, profiling-based sentencing regime, markers of socioeconomic disadvantage increase a defendant's risk score, and most likely his sentence." She notes that courts in at least 20 states have implemented this practice, including some that require risk scores to be considered in every sentencing decision. She concludes, "As currently practiced, EBS [evidence-based sentencing] should be seen neither as progressive nor as especially scientific—and it is almost surely unconstitutional" (2014*a*, p. 805).

The solution espoused by most legal scholars is to limit the factors used solely to those that represent personal culpability, that is, prior criminal record. While that solution appears fairer, it is also problematic. Ideally, a risk assessment tool should predict future behavior on the basis of past behavior. But the reality is that current risk assessments rely on measures that are partly driven by individual behavior and partly by where the justice system looks for offenses and how it responds when it finds them. As Tonry (2014, p. 167) explains,

> Commonly used factors in prediction instruments include age at first arrest, custody status at the time of the offense, and total convictions or arrests. All of these adversely affect more minority than white

[22] See Holder (2014) and a letter from Holder to Judge Patti Saris, Chair, US Sentencing Commission, July 29, 2014 (http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf#page=1&zoom=auto,-134,742).

> defendants, and all raise troubling issues. Black men are arrested at younger ages and more often than white men for reasons that have as much to do with racially differentiated exercises of police discretion as with racial differences in offending behavior. ... Blacks more often commit and are more often arrested for violent crimes than whites. In a system where criminal history makes a big difference in sentencing, even that facially plausible explanation for differences in conviction rates means that criminal history factors disproportionately affect blacks.

Criminologists have additional concerns. Many suggest that the developers of the tools have oversold their predictive accuracy. Reliability and interrater consistency can be low, and agencies too often adopt off-the-shelf instruments that fail accurately to predict the recidivism rates of their population (e.g., Skeem and Eno Louden 2007; Baird 2009). Reportedly, just 60 percent of the instruments being used by parole boards in 2008 had been validated on local populations (Kinnevy and Caplan 2008, p. 13). Overprediction is also a serious problem. The LSI-R manual admits to a "high (approximately 30 percent) false positive rate. This means that a fairly larger percent of individuals identified by the LSI-R as 'high risk' will not actually present any problems." The false-negative rate of the LSI-R is much better, "usually found to be 2 to 3 percent." Andrews, Bonta, and Wormith conclude, "This means that when an individual is placed in low security based on an LSI-R score, there will rarely be any major problems with that individual" (2004, p. 47).

Most instruments rely on criminals to tell the truth, though jurisdictions do not always check to make sure the answers are correct. And offenders, the public, and government officials are often prevented from seeing the exact questions and scoring in the instruments. A recent Associated Press report observed that the instruments are "clouded in secrecy ... shielding government officials from being held accountable for decisions that affect public safety" (Sullivan and Greene 2015).

Increasingly, states rely on copyright law and gaps in public records' statutes to bar individual offenders from review of their individualized risk assessment (McGarraugh 2013).[23] Given the great weight parole boards accord risk assessment tools, it is highly concerning that individ-

[23] See, e.g., 2014 WL 7210749, Ky. Op. Atty. Gen. 14-ORD-244 (Ky. A.G. Dec. 10, 2014); *Malenchik v. State*, 928 N.E.2d 564, 575 (Ind. 2010).

ual offenders in these jurisdictions lack the ability to challenge their scores. Without a point-by-point breakdown of the factors that the risk assessor considered at each step, offenders have no way to dispute the accuracy of their score, and parole boards are left with a decidedly one-sided assessment. This all but ensures that mistakes go unchecked (Sullivan and Greene 2015).

Unfortunately, if agencies purchase packaged risk assessments tools, given the proprietary nature of the research, it is nearly impossible to find out where the instrument was validated, in what year, and on what subpopulation. Some of the validation studies were conducted decades ago and may be time and generation dependent. Being unemployed in the inner city when the unemployment rate reaches 30 percent may have a much different power to predict recidivism than when the unemployment rate is 5 percent. Similarly, being from a single-parent family may have been more predictive when associated stigma and economic implications were much more important than today when half of all children grow up in single-family households.

So how should parole boards use risk assessment tools? As a first step, states should open their risk assessment tools to vigorous, public challenges of the tools' statistical underpinnings and of their applications to individual offenders. There is potential in risk prediction instruments to reduce unnecessary incarceration, but expanded use may exacerbate racial disparities in release policies. We do not advocate going back to pre–risk assessment decision making, as unfettered discretion produced its own flaws and biases. Parole boards should, however, make certain that their instruments are methodologically sound and locally and recently validated and be more clear eyed about the role that actuarial devices play in aggravating racial disparities. Agencies should strive to develop and adopt third- or fourth-generation approaches, which emphasize both clinical judgments and statistical "risk" methods and the inclusion of dynamic or criminogenic "needs" factors (Mears and Cochran 2015, pp. 154–59).[24]

[24] Second-generation instruments provide static risk assessments of risk. Third- and fourth-generation tools combine static and dynamic assessments. We differ in how much faith we place in existing third- and fourth-generation instruments and in our optimism that they will be improved in the near future. We agree that it is desirable to develop such instruments as long as they are empirically sound and can be administered reliably and consistently.

Each parole board should scrutinize its risk assessment tools through the lens of race, identifying how each factor differentially affects racial minorities. Researchers can then determine whether removal of the race-tainted variables reduces predictive accuracy, and by how much.[25] This might include selecting items with the smallest racial gaps or replacing potentially biased criteria with more race-neutral ones. Reducing racial disparities in actuarial risk prediction instruments is not a new issue. Petersilia and Turner (1987, fig. 1) used this technique to explore how various factors in sentencing guidelines adversely affected minority offenders. They first predicted recidivism using all available factors and found that the models predicted recidivism about 20 percent better than chance. They then removed the racially tainted factors and found that the predictive accuracy was reduced by about 5 percent. With such data in hand, parole boards can then consider whether the improved accuracy is worth the sacrificed fairness (the "equity versus accuracy" debate). The Annie E. Casey Foundation reports success in reducing racial disparities in incarceration by first identifying racially tainted factors in risk assessments and then replacing biased criteria such as having a "good family structure" with whether a responsible adult is willing to assist the parolee, or by dropping references to "gang affiliation," a designation sometimes attributed to minority youths simply on the basis of where they live (Mendel 2007).

Actuarialism and the use of risk assessment tools have become ubiquitous in parole decision making and will undoubtedly expand, fueled by states anxious to save money and by proprietary interests in selling the software. Parole authorities need to scrutinize such instruments' predictive accuracy, while at the same time being cognizant of how their use may further concentrate race and class bias within our prison system.

V. Decision-Making Tools

PROPOSAL 5.—*Decision-Making Tools:* Decision-making tools should be structured, policy-driven, and transparent. Parole boards should adopt parole guidelines systems that govern consideration of offenders for release. They should establish presumptive release dates tai-

[25] The US Parole Commission has long been concerned with racial skewing in the use of its Salient Factor Score. See Hoffman (1976, 1983, 1995).

lored to offenders' varying risk levels and readiness for reentry. Paroling authorities should develop capacities to promulgate, monitor, revise, and enforce compliance with the guidelines system.

Parole boards have taken steps for over three decades to introduce greater structure into their decision making. The initial effort to bring more consistency to the release process, if not more openness and transparency, began with the design of a Salient Factor Scale by the US Parole Commission, eventuating in the development of parole guidelines in the 1970s (Gottfredson, Wilkins, and Hoffman 1978). Parole guidelines systems were adopted shortly thereafter by the commission, as well as in three states: Minnesota, Oregon, and Washington.[26]

Since then, and in response to continuing concerns about the closed and arbitrary nature of their actions, a majority of parole boards have adopted parole guidelines, formal decision instruments, or risk assessment tools designed to foster greater structure when deciding whether to grant or deny release (Burke et al. 1987; Rhine et al. 1991; Runda, Rhine, and Wetter 1994; Burke 2003; Kinnevy and Caplan 2008; Caplan and Kinnevy 2010). A recent survey, conducted with the Association of Paroling Authorities International, reports that over 80 percent of 44 respondents claimed to use a parole decision-making instrument of some kind. Many, 32 of 37 (86.5 percent), indicated that the release authority relied on a risk assessment tool (Kinnevy and Caplan 2008).[27]

Relatively few states use formal parole guidelines framed as a grid or matrix (Lampert and Weisberg 2010). Among the different components that form the core of such assessments, it is unclear what effect each has on decisions to release. Despite the appearance of structured decision making, parole guidelines are broadly permissive. In addition to guidelines of general application, separate parole guidelines are typically used for sex offenders (e.g., Colorado), and there are sometimes special rules for designated violent offenders.

[26] A subsequent evaluation showed that the parole guidelines contributed to greater consistency relative to release dates, and time served in two of the jurisdictions (the federal system and Minnesota), with less impressive results in Oregon and Washington (Arthur D. Little Inc. and Goldfarb and Singer, Esqs. 1981; Tonry 2013).

[27] A total of 18 responses noted the use of an instrument constructed in-house, while another 12 stated they relied on the LSI-R. Other risk assessment instruments were used far less frequently (e.g., COMPAS; Farabee et al. 2010).

Three elements are usually embedded within traditional parole guidelines systems: the time to be served, the severity of the presenting offense, and an assessment of risk. Together these factors are intended to produce a "presumptive period of time" to be confined on the basis of the "parole prognosis" score (risk of reoffending), combined with a "crime severity or seriousness" ranking. The lower the crime severity level and level of parole risk, the less the presumptive duration of imprisonment, albeit with exceptions based on the presence of aggravating and mitigating factors. Reliance on enumerated factors, when documented, offers a measure of transparency, if not a rationale for a board member's override.

A more recent version of parole guidelines, adopted by a smaller number of releasing authorities, is known as a "decision tree" or sequential model (Burke 2003). This approach, illustrated in the Parole Decisional Instrument used by the Pennsylvania Board of Probation and Parole (2014) and the Colorado Parole Board Administrative Release Guidelines Instrument, can include more factors than a traditional guidelines grid. Sequential guidelines can give weight to individuals' offense, risk and needs assessments, participation in institutional programming, and behavior during confinement. They can also include input from judges, prosecutors, and corrections officials.

The statutory and policy language used to govern application of parole guidelines makes it clear that guidelines' recommendations are wholly advisory. They carry no legally binding effect and can be overridden.

Parole boards may rely on "other factors," outside the guidelines, in reaching their decisions (e.g., allegations of criminal conduct for which the offender has not been convicted). In some cases, these may be more determinative of outcomes than the official guidelines factors. This departure power is effectively unregulated, which means that the guidelines are unenforced.[28] There is no provision in any parole guidelines jurisdiction for prisoners to appeal an adverse outcome, nor is there meaningful oversight of boards' release decisions.

Since 1980, a number of determinate sentencing states have achieved significant success through their reliance on sentencing guidelines. The better systems result in enhanced transparency, consistency, fairness, proportionality, and effectiveness in sentences imposed on individual offenders (Frase 2013; Tonry 2016). Guidelines have also been used success-

[28] Some states require parole board members to supply a reason for departures from release guidelines, but the adequacy of reasons provided is not a basis for appeal.

fully in multiple states to manage correctional resources, by placing controls on prison growth and by anticipating needs for community corrections spots (Weisberg 2012; Cullen, Jonson, and Mears 2017). The better systems provide for appellate sentence review from decisions that depart from guidelines recommendations—or from unreasonable failures to depart (Reitz 1997; O'Hear 2010). Well-designed parole guidelines systems could achieve comparable outcomes (and would be desirable in all states, with or without judicial sentencing guidelines).

> Parole boards should adopt parole guidelines systems that govern consideration of offenders for release, whether designed as a grid, matrix, or sequential model. The guidelines should incorporate two primary dimensions: a formal risk assessment and a readiness for reentry or release.

Nationwide adoption and implementation of well-designed, structured, policy-informed parole guidelines, if properly administered, would contribute to greater rationality, fairness, and consistency in release decision making. When governed by a commitment to presumptive parole release, parole guidelines provide a transparent system for effectively assessing offenders by risk levels. When combined with evidence-based tools for assessing offenders' readiness for reentry, parole guidelines foster a sensible and defensible approach to recidivism reduction and successful desistance.

The two dimensions of risk and readiness for release require effective offender assessments and a range of programs or treatment options within the prison setting. Some states (e.g., Ohio) have embraced third- and fourth-generation assessment tools. In contrast to static risk assessments, often referred to as second-generation instruments, third- and fourth-generation tools combine static and dynamic assessments of risk, producing information for matching programs to the criminogenic needs of individual offenders. To work best, such instruments should be reassessed (rescored) annually for a majority of offenders. Many correctional systems and parole boards rely on second-generation tools, if they use any at all. Third- and fourth-generation instruments, far less frequently deployed, provide timely information proximate to the offender's potential release date. However, they are more difficult to implement, present more complex protocols for scoring, and demand more in terms of staff training and board member understanding.

> Parole guidelines should be presumptive and create an enforceable presumption of release for low-risk offenders. The same presumption should extend to moderate- to high-risk offenders unless substantial reasons can be documented on the record to override the presumption. The legal force of parole guidelines' presumptions should heighten for individual prisoners at each successive eligibility. The parole board should establish annual reviews for the majority of offenders, with intervals up to 2 years in clearly specified exceptional circumstances.

Adoption of the features we identify would provide prisoners greater certainty about when they will likely be released. Nonetheless, if low-risk offenders are to be granted presumptive release, exceptions may occur (e.g., concerning involvement in violent behavior in prison). Moderate- and higher-risk offenders may be granted presumptive parole followed by a period of postrelease supervision with services and links to additional programming proposed in their reentry plans.

Honoring presumptive parole release in practice will require that prison systems dramatically expand opportunities for higher-risk prisoners to enroll in and complete prison-based programs responsive to their assessed criminogenic needs. Most prisons offer programming of some kind, albeit with limited exceptions. Very few draw on evidence-based policy and practice.

Effective institutional programs have been found to reduce recidivism (Aos, Miller, and Drake 2006; Davis et al. 2014).[29] For decades meta-analyses have shown that the best programs targeting offenders' criminogenic needs have measurably reduced recidivism, though such interventions tend to be more successful in the community than in prison (French and Gendreau 2006; Smith, Cullen, and Latessa 2009; Andrews and Bonta 2010; Latessa, Listwan, and Koetzle 2014).

There remains a substantive gap, if not a "black box," relative to our knowledge of what programs exist inside prisons, their quality, and the integrity of their implementation (Mears and Cochran 2015). We know that there are numerous barriers to program participation by offenders

[29] Two comprehensive evaluations of community-based correctional facilities in Ohio, housing moderate- to high-risk offenders in secure residential settings for up to 6 months, demonstrated effective results (Lowencamp and Latessa 2002; Latessa, Lovins, and Smith 2010).

who wish to enroll. These include shortages of programs and program slots within most correctional facilities and marked differences in program availability across prisons within the same state (Useem and Piehl 2008, pp. 111–13). The security level of a facility, especially close, maximum, or supermax, can place especially sharp limits on the variety and delivery of programs.

The guidelines framework also requires that defensible grounds be established for deferring presumptive parole release dates in a manner that balances public safety concerns, prison officials' interests in maintaining order and control, and commitments to fairness and transparency.[30] The most fundamental reasons for rebutting such presumptions are statutory restrictions on certain crimes or categories of crime. Other reasons may pertain to misconduct and violent or aggressive behavior during confinement.

A sparse body of research has produced mixed results on the relationship between misconduct in prison and recidivism. Several recent studies have found a positive association (Cochran et.al. 2012; Valentine 2012; Mears and Cochran 2015). One study observed that inmates who engage in misconduct are more likely to recidivate (Cochran et al. 2012). Another found a nexus between violent misconduct and violent recidivism, and drug misconduct and drug recidivism (Valentine 2012). However, there is significant variability in how prison staff respond to disciplinary violations and aggressive inmate behavior such as fighting, which may dramatically affect offenders' prospects for presumptive parole release.

> Paroling authorities should develop an administrative unit or create an interagency partnership to promulgate, revise, and monitor ongoing compliance with the decision rules or standards embedded in the parole guidelines system.

It is essential that presumptive release dates be normative and enforceable. The rules must have reasonably binding authority on parole board decision making, while providing justifiable grounds to override the presumption. The decision rules or standards must be routinely subject to meaningful review, monitoring, and corrective action.

[30] Parole guidelines systems targeting risk and establishing release presumptions offer a mechanism to assist departments of corrections in managing resources strategically.

Creation of an administrative unit within the parole board, or in partnership with another agency such as a state sentencing commission, offers a vehicle for accomplishing these objectives. This body would focus on generating information and research on guidelines compliance and departures, reasons for departures, and other topics relating to improved understanding and use of the guidelines. High departure rates do not necessarily signal improper decision making; they could signal design problems in the guidelines. By facilitating oversight and accountability, guidelines can contribute to effectiveness, fairness, coherence, and transparency in parole release.

VI. Process; Prisoners' Rights

PROPOSAL 6.—*Process; Prisoners' Rights:* Parole release decision processes should more closely resemble those in sentencing hearings. Prisoners' procedural rights should be given increasing weight if they are denied release on successive occasions. The adequacy of release procedures should be assessed in terms of resources per decision, meaningfulness of hearings, prisoners' ability to prepare and present cases, rules for victim participation, quality controls on fact finding, decision rules, and reviewability of decisions.

Parole release determination is as much a "sentencing decision" as the original judicial sentence. Judges impose sentences within their authority under statutes and guidelines. Parole boards pass sentences within the limits set by an indeterminate sentence.

The degree of care and procedural regularity that ought to attend paroling decisions is a question of fairness and public policy. It should not be keyed to the minimum requirements of constitutional law. It is rarely good policy to design a system so flawed that it nearly violates the Due Process Clause, that is, a system that is "almost but not quite fundamentally unfair."[31] If parole release is a sentencing decision, then the procedural safeguards at judicial sentencing proceedings are a relevant bench-

[31] We do not rest our model on Supreme Court precedents such as *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and *Swarthout v. Cooke*, 562 U.S. 216 (2011), which set procedural floors below which states may not go.

mark for evaluating the adequacy of the rules governing paroling decisions.[32]

We examine parole release procedures along seven dimensions: resources per decision, meaningfulness of hearing, ability of prisoner to prepare and state a case, rules for victim participation, quality controls on fact finding, administrable decision rules, and reviewability of decisions.

Resources per Decision. Parole boards do not have resources comparable to those of state court systems; the comparison is not even close. Parole boards average five or six members per state, with even fewer support staff. The number of prisoners considered for release by the average state parole board in 2006 was 8,355—about 35 per working day—and this is only one of a board's responsibilities (Kinnevy and Caplan 2008, p. 9). Studies of release practices have found decision-making times of 3–20 minutes per case (Dawson 1966, p. 301; Rothman 1980, pp. 164–65; Schwartzapfel 2015).

Greater institutional investment is needed. Parole agencies must grow in size and funding if they are to give adequate attention to individual cases. Our test is functional. Adequate resources are whatever is sufficient to support reasonably good substantive decision making within the procedural standards outlined in the following paragraphs. A significant "ramping-up" of procedural regularity at release hearings will be costly, but creation of an adequate system should not be unduly constrained by the intermittent circumstance of tight state budgets.

Meaningfulness of Hearing. Parole release "hearings" often consist of no more than brief interviews of prisoners. The prisoner's role varies between states but is often limited to responding to questions. Sometimes there is no hearing or no right for the prisoner to be present; the case is decided solely on paperwork.[33]

Summary process should not be a feature of a prison release system, or if it is, it should be employed only when only modest prison time is at issue. Unless a prisoner waives the right to a hearing, there should be

[32] We do not regard contemporary judicial sentencing procedures as a gold standard. Procedural rules at sentencing vary between states but have sometimes been criticized as "second-string" protections (Lynch 1998, p. 338). However, in a real-world system of parole release, the benchmark of "second-tier" judicial sentencing procedures is probably appropriate. In an ideal system, a model judicial sentencing process should be the point of reference.

[33] Cohen (1999, vol. 1, p. 6-27); Fla. Stat. § 947.06; Vt. Stat. § 502(a); *Mahaney v. State*, 610 A.2d 738 (Me. 1992).

one in every case in which 6 or more months of prison time is at stake, and the prisoner should have the opportunity to participate. A prisoner who has been denied presumptive release on one occasion should be entitled to a hearing and the right of participation at subsequent considerations.

Ability of Prisoner to State a Case. Prisoners' interests are seldom effectively represented at parole hearings. Few are competent to raise the best legal and factual arguments on their own behalf. In the courtroom, defendants retain or are provided lawyers, but such assistance is far from the norm in parole proceedings. Some states prohibit representation by counsel outright.[34] For the few prisoners who can afford attorneys, most states permit only limited representation, such as submission of written statements.[35] Only a handful of states provide counsel for indigent prisoners at state expense.[36]

The prisoner's ability to respond to adverse information can be severely limited. Some states refuse the prisoner access to the contents of his dossier.[37] Some routinely permit it.[38] Most give the board discretion to disclose some or all of the file on a case-by-case basis (Cohen 1999, vol. 1, pp. 6-23, 6-32–6-33). Court challenges to rules barring access have generally failed.[39]

Without adequate legal assistance, many prisoners will be mystified by the process. Only the most resourceful will effectively advance their cause. This reality must be matched against the enormous costs of providing counsel at state expense to all indigent prisoners. On principle, all prisoners eligible for release should have the right to effective representation by a lawyer just as they do at a judicial sentencing hearing. Short of that, however, appointed counsel should be provided at least for all subsequent hearings after an initial denial of release.

[34] Code of N.M. Rules, R. 22.510.2.8(A)(3); *Franciosi v. Mich. Parole Bd.*, 604 N.W.2d 675 (Mich. 2000); *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976).

[35] Laws of R.I. § 13-8-26; Utah Admin. Code R. 671-303-1(2); Vt. Stat. § 502(d).

[36] For example, Hawaii Rev. Stat. § 706-670(3)(c); *State v. Carson*, 58 P.3d 844 (Mont. 2002).

[37] Ga. Code § 42-9-53; Ky. Rev. Stat. § 439.510; S.D. Codified Laws § 24-15-1.

[38] Ind. Code § 11-13-3-3(i)(2); Md. Code, Art. 41, § 4-505.

[39] For example, *Jennings v. Parole Bd. of Virginia*, 61 F. Supp. 2d 462 (E.D. Va. 1999); *Ingrassia v. Prukett*, 985 F.2d 987 (8th Cir. 1993); *Counts v. Commonwealth, Pennsylvania Bd. of Probation and Parole*, 487 A.2d 450 (Pa. Comm. 1985).

Prisoners should be given access to their dossiers in advance of their hearings. Most importantly, with or without counsel they should have meaningful opportunity to contest facts, opinions, or recommendations and should be allowed to make written submissions, call friendly witnesses, and cross-examine adverse witnesses.[40] Prisoners must be given access to any risk assessment scoring in their cases and must have a meaningful opportunity to challenge any errors that may have been made or the validity of the instrument itself.

Victim Participation. Victim participation should be permitted when a victim has information relevant to the prison release decision, but victims' input should be limited by principles of relevancy (see proposal 7).

Quality Controls on Fact Finding. In many states, there is no formal burden of proof a parole board must apply. 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" (Tenn. Code § 40-28-117(a)). A minority of states define the applicable burden as "preponderance of the evidence."[41] Rules of evidence, and safeguards against the use of hearsay, are inapplicable at parole hearings.[42] Basic rights to cross-examine 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" (Vt. Stat. § 507(b)). There is no requirement that the parole board's fact finding be consistent with facts established when the prisoner was convicted or that were found by the sentencing court. "Real-offense" decision making—that is, consideration of alleged crimes for which there has been no conviction—is the norm.[43]

[40] See Utah Admin. Code R671-303-1 (parole board is required to provide the inmate with all information used to consider his or her release and give the inmate an opportunity to respond).

[41] For example, N.H. Admin. Code Rules, Par. 210.02; N.J. Stat. § 30:4-123.53.

[42] *Davis v. Brown*, 311 F. Supp. 2d 110 (D.D.C. 2004); *Hubbard v. Simmons*, 89 P.3d 662 (Kan. App. 2004).

[43] Dawson (1966, p. 259); Tonry (1981); *Hemphill v. Ohio Adult Parole Authority*, 575 N.E.2d 148 (Ohio 1991); Wis. Admin. Code § DOC 331.08. This lack of rigor 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

Administrable Decision Rules. Fair process requires identifiable and enforceable decision rules. While some jurisdictions have adopted statutory presumptions or guidelines for 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 up to the parole boards to decide whether they should be heeded or disregarded (Rhine 2012). Standards for decision tend to be expressed as long lists of factors, with few or no rules of exclusion.

States should create presumptive parole release guidelines comparable to judicial sentencing guidelines systems in Minnesota, Washington, Kansas, and North Carolina (Bergstrom et al. 2009). Release guidelines must be enforceable; they must be more than advisory in nature, although departures should be allowed in unusual cases.

Reviewability. Decision standards have little integrity if they are immune from meaningful review, which is lacking in American parole systems (e.g., Utah Code § 77-27-5(3); Vt. Stat. § 454). In some systems, administrative review is technically available, but it almost never operates as a real check (Tenn. Code § 40-28-105(11); Davis 1969, p. 130). Oversight of any kind is hindered by the absence in many states of transcripts or verbatim records of parole proceedings and the general absence of requirements of reasoned explanations for decisions.[44]

There should be a mechanism for substantive review of departures from parole guidelines or on the ground that the guidelines were improperly applied. This should be a meaningful process, comparable to appellate sentence review in states that have it (Reitz 1997; O'Hear 2010; Frase 2013; American Law Institute 2015, § 6.09). To conserve resources, it may be acceptable to limit or withhold review from first denials of release, although this would weaken the reality of any "presumption" of release at first eligibility. Even so, provision of meaningful review for subsequent denials would be a large improvement over cur-

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done) in his or her life, but particularly while in prison, may be recorded in the file" (Cohen 1999, vol. 1, p. 6-31).

[44] Cohen (1999, vol. 1, p. 6-52); *Freeman v. State, Comm'n of Pardons and Paroles*, 809 P.2d 1171 (Idaho App. 1991); *Glover v. Michigan Parole Board*, 596 N.W.2d 598 (Mich. 1999). Some jurisdictions require that reasons be given but are not rigorous about the content of the explanations. Boilerplate is often good enough (*Goins v. Klincar*, 588 N.E. 2d 420 [Ill. App. 1992]; *Walker v. N.Y. State Div. of Parole*, 610 N.Y.S.2d 397 [N.Y. App. Div. 1994]; N.M. Stat. § 31-21-25(C)).

rent arrangements. The standard of review should become increasingly demanding for successive denials of release.

VII. Victims' Rights

PROPOSAL 7.—*Victims' Rights:* Victims should have the right to submit impact statements or appear at parole hearings, but their input should be limited to the future risk potential of the inmate and conditions of release. Victims should not make recommendations to grant or deny parole.

Victim participation in criminal justice proceedings until recently ended with the imposition of sentence. Correctional authorities assumed responsibility for offenders sentenced to prison. Victims were neither consulted nor informed about release decisions. But victims' rights advocacy in the 1980s changed that, and the United States became the first country to permit crime victims or next of kin to appear before parole boards (Morgan and Smith 2005; Roberts 2009). Today, crime victims have a wide range of rights, including being notified of all public proceedings in criminal cases and participating in many proceedings, including parole. Van Zyl Smit and Corda (2017) concluded that victims in American jurisdictions have much greater influence on prison release decisions than in European practice.[45]

The federal Crime Victims Rights Act (2004) enumerated rights afforded victims in federal criminal courts, including "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." The federal parole board is now required to notify victims of parole hearings, allow victims to attend parole hearings and provide input, and notify victims of release decisions. All 50 states now provide for similar rights and authorize victims to submit impact statements to paroling authorities (Kinnevy and Caplan 2008).

[45] In Europe, victims are generally given substantial rights to participate in criminal trials, including being represented by counsel and seeking restitution, but strongly held values of proportionality and human dignity preclude victim input in sentencing, including the prison release decision (Joutsen 1994; Pizzi 2000; Kerner 2013; van Zyl Smit and Corda 2017).

Paroling authorities report considering input from a variety of sources, but more states consider input from the victim (94 percent) than from any other source (e.g., district attorneys, law enforcement, judges; Kinnevy and Caplan 2008). Roberts (2012, p. 120) concluded, "The days when victims played a peripheral role as witnesses for the prosecution and were excluded from decisions taken at sentencing and parole are long over."

One hope in allowing victims participatory rights in parole hearings is that they will feel heard. It has been argued that submission of impact statements at parole may achieve therapeutic outcomes for victims and offenders (Verdun-Jones and Tijerino 2005). But the principal reason victims submit a statement or attend a hearing is to oppose inmates' petitions for release. Many states allow victims to make parole recommendations (Reeves and Dunn 2010).[46]

Very few victims submit impact statements or appear at parole hearings, as most do not want to have to relive the crime (Roberts 2009, 2012). But as victim participation increases, parole denials also increase (McLeod 1989; Parsonage, Bernat, and Helfgott 1994). Victim testimony is more influential at parole hearings than at sentencing hearings. Morgan and Smith's (2005) study of parole decision making in Alabama found that "victim participation was a highly significant predictor of parole decisionmaking: when the victim submitted impact evidence, the prisoner was less likely to be granted parole. This finding existed independently of the influence of other factors related to the parole decision.... The more letters of protest in an offender's file, the more persons protesting at an offender's hearing, the more likely that parole will be denied" (p. 357).

A recent survey of releasing authorities found that 40 percent of respondents acknowledged that victim input was "very influential" in decisions to grant or deny release (Kinnevy and Caplan 2008). Prisoners appear to believe that the presence of the victim influences outcomes. Polowek (2005) found that almost a third of parole board interviewers

[46] Most states allow victims the opportunity to comment on the offender's request for parole. The National Center for the Victims of Crime (2000) reports that as of 2000, 46 states allowed victims to submit impact testimony in person, 42 permitted written victim impact statements to be submitted, six authorized submission of audiotaped statements, seven permitted victims to submit videotaped statements, three allowed victims to be heard via teleconferencing, and eight authorized the victim's counsel or representative to present a statement on the victim's behalf.

believed that prisoners postponed or waived hearings because of the likely presence of the victim.

Legal scholars have raised a number of concerns about the influence of crime victims in prison release decisions. While most acknowledge that victims have legitimate roles to play in sentencing decisions—since it is appropriate for the court to know about harm to the victim—their input into parole decisions should be more limited. Roberts (2009, pp. 385–86) argues, "When the offender applies for release on parole, sometimes years after the sentencing hearing, the decision, the factors determining the decision, and the objectives of the process are very different.... The decision to grant parole usually depends upon the response of parole authorities to two principal questions: does the prisoner represent a significant risk to the community, and will his release on conditions promote his rehabilitation?" From sentencing to parole, the justice system therefore changes from one concerned with retribution to one preoccupied primarily with risk and the rehabilitation of the offender. This raises questions about the relevance of information derived from the victim.

Allowing victims to testify raises practical and constitutional issues. Parole authorities should not "punish" inmates merely because a victim has chosen to appear and present an impact statement. States run the risk of treating inmates differently merely because a victim statement is presented in one case and not in another.

There are also serious due process concerns. The inmate is not usually represented by an attorney, has no ability to discover statements made against his or her release, and has no ability to respond or challenge the validity of victims' statements.

These and other concerns lead us to recommend a limited role for victims at parole hearings. First, parole boards should consider making victim impact statements permanent documents in parole files in order to minimize traumatic effects and effort. Victims could withdraw prior statements or add to them, but until they did so, the statement would remain in the file. Second, victims should be told that the parole board is not looking for a recommendation on release, that the parole board is concerned with risk and rehabilitation and is not able to "resentence" the offender to reflect the victim's views. Third, parole boards should standardize written impact statements by developing forms to be used by victims who wish to submit them.

Victims' participation in parole hearings should be limited. The question is not whether victims should be heard at parole hearings—they certainly should—but how and concerning what. By focusing victims' testimony on appropriate supervision conditions rather than on the release decision, we hope to balance respect for victims with respect for offenders and the rule of law.

VIII. Selective Use of Supervision

PROPOSAL 8.—*Selective Use of Supervision:* A period of parole or postrelease supervision should be required for many, but not all, individuals leaving prison. Supervision should be reserved mainly for those who present higher risks of reoffending and those incarcerated for serious, violent, or predatory sexual crimes, regardless of risk level. It should also be made available to low-risk offenders, who should be given the choice to "opt in" or "opt out" of supervision altogether.

The American incarceration rate has grown dramatically since 1973, albeit with a modest recent decline (Carson 2015). Often overlooked are two parallel developments: a decades-long expansion in parole or "postrelease" supervision populations and an escalating growth in the number and proportion of offenders who leave prison unconditionally after "maxing out" (Travis 2005; Herberman and Bonczar 2014; the Pew Charitable Trusts 2014).[47]

At year-end 2013, 853,215 persons were on parole supervision—a rate of 350 per 100,000 adults. Of these, 111,226 were under federal jurisdiction; 741,989 were supervised by state agencies. The parole population increased annually by 1.3 percent between 2000 and 2012. More than 825,000 individuals have been under some form of postrelease supervision every year since 2007 (Herberman and Bonczar 2014).[48] Before 2000, parole populations grew faster (Ruth and Reitz 2003, pp. 22–25).

[47] Revocation of parole or postrelease control (and probation) is a third parallel development. Since the 1980s, high percentages of prison admissions, more than half in some states, have been based on parole and probation revocations (Rhine 2012; Klingele 2013).

[48] Van Zyl Smit and Corda (2017) note that the highest rates of parole supervision in Europe at year-end 2012 were comparable to the lowest in the United States.

From the mid-1920s to the mid-1960s, 50–60 percent of all offenders granted parole were subject to a term of community supervision (Travis 2005, p. 45). During the 1960s–90s, the proportion was larger (Travis and Lawrence 2002). Paroling authorities were abolished or lost authority to grant discretionary release, and many states adopted determinate sentencing laws. The decision to release was decoupled in many states from the decision to supervise. However, new determinate sentencing laws usually incorporated provisions for mandatory supervised release (Glaze and Bonczar 2011). Conditional releases reached a high of 87 percent in 1990 and subsequently declined to 78 percent in 2000 and 75 percent in 2008.

Unconditional releases, mainly of prisoners who max out, increased for several decades and accounted for more than one in five releases in 2012. The Pew Charitable Trusts reported that 47,519 prisoners maxed out in 43 states in 1990 compared with 103,831 in 2012. There is enormous variation: 64 percent of releasees maxed out in Florida in 2012 and less than 10 percent in eight states. Much of the growth has been among nonviolent drug and property offenders (Pew Charitable Trusts 2014, pp. 1, 14).

Too many offenders are placed on parole or postrelease supervision in the absence of plausible reasons for doing so. This exposes them, especially low-risk offenders, to the "contingent liability" of future reimprisonment (Klingele [2013, p. 1059], citing Scott-Hayward [2011]). Yet significant numbers of releasees who max out have great need for reentry services and supervision. These strategic anomalies strain and misalign supervision resources, obstructing parole's core missions of promoting public safety and positive reentry.

A period of parole or postrelease supervision should be required mainly for ex-prisoners who present moderate to high risks of reoffending and those incarcerated for serious, violent, or predatory sexual crimes, regardless of risk level. A low probability of future violence may justify concentrated use of resources even though the same low probability of future nonviolent crimes would not justify supervision at all.

Some commentators call for a limited period of universal supervision for all offenders leaving prison (e.g., Travis 2005). Others argue that postprison community supervision is not always needed, is sometimes harmful, and frequently results in waste of scarce resources (Petersilia 2008; Scott-Hayward 2011; Klingele 2013; American Law Institute

2014). Some urge abolition of postrelease supervision altogether (Horn 2001).

People released from prison differ in their current offenses and criminal histories and in where they fall on continuums of risks and needs (Petersilia 1999, 2003, 2008; Mears and Cochran 2015). For some, going to prison is an episode that happens once, perhaps for a low-level offense, and they reintegrate into the community with relative ease. First-time releasees are far less likely to reoffend than are those who have been repeatedly imprisoned (National Research Council 2007). Decisions about parole supervision should be responsive to individual risks of reoffending (American Law Institute 2014).

Low-risk releasees should be allowed to opt in or opt out of supervision. A sizable number of low-risk individuals require assistance during their transition from confinement and should have access to reentry services (Rhine and Thompson 2011; Scott-Hayward 2011; Mears and Cochran 2015). Low-risk offenders who opt in should be immune from revocation for technical violations.

IX. Conditions of Supervision

PROPOSAL 9.—*Conditions of Supervision:* Parole supervision conditions should be as few in number as is necessary given public safety concerns and tailored to specific needs and risks associated with the individual offender. Supervision conditions and resources should be concentrated on the first few months after release, and supervision agents should have greater authority than they currently do to modify conditions. Parole supervision fees should be abolished or severely limited.

Released prisoners placed under the supervision of a parole agency must observe certain conditions. Discretionary parole release, the US Supreme Court long ago held in *Ughbanks v. Armstrong*, 208 U.S. 481 (1908), is a privilege and not a right.[49] Release has always been accom-

[49] In *Escoe v. Zerbst*, 295 U.S. 490 (1935), the Court observed that parolees accordingly should neither expect nor seek due process. Then-Judge Burger in *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963), explained that the parole board's function is to assist the prisoner's rehabilitation and restoration to society and there is no adversary relationship between the board and the parolee.

panied by conditions (National Parole Resource Center 2013). Even in jurisdictions without parole release, paroling authorities retain the primary role of setting supervision conditions. Although parole boards are making fewer release decisions, 70 percent of state prisoners are released to some type of conditional community supervision (Carson and Golinelli 2013). A few jurisdictions authorize supervising field agents to modify or change conditions, but most do not.

Parole boards have broad discretion, although in many jurisdictions some conditions must be imposed (e.g., sex offender registration). Any condition that can reasonably be said to contribute to rehabilitation or public protection is likely to be held to be permissible. An exception might be a condition requiring church attendance, which would conflict with the First Amendment guarantee of free exercise of religion (del Carmen et al. 2001).

Setting release conditions is a core parole board function, as they specify responsibilities and obligations of offenders and parole officers (Stroker 2010). Conditions can shape and incentivize positive behavior or, if too numerous or unrealistic, can increase the failure rate.

Parole conditions vary throughout the country, although "standard" conditions typically include reporting to a parole officer, refraining from criminal activity, not possessing firearms, not traveling beyond a specified distance, maintaining lawful employment and a residence, and refraining from drug and alcohol use. Most states prohibit association with known felons. "Special" conditions—tailored to the offender's needs and risks—often require participation in substance abuse and recovery programs, community service, GPS monitoring, attendance at education programs, and payment of restitution and various fees. These and other conditions are set out in contracts that affirm that parolees understand and accept them. Failure to satisfy conditions can result in revocation and return to prison.

Parolees may also have "no-contact orders" prohibiting their association with victims, and a growing number are now required to register with the police upon release. Registration began with sex offenders but is now required of people convicted of many behaviors including arson, crimes against children, gang-related crimes, domestic violence, and stalking.

All parolees must agree to submit to searches of their residence, vehicle, or person at any time. Parole agents have authority to carry and use firearms; to search places, persons, and property without obtaining war-

rants; to order arrests without probable cause; and to confine without bail. The power to search applies to the household where a parolee lives and the business where he or she works.

Criminal justice policy has become progressively more punitive since the 1980s. The number of conditions has increased, they often incorporate more surveillance than treatment, and agents devote greater percentages of their time to monitoring compliance (Petersilia 2003). Travis and Stacey (2010) identified 127 separate standard parole conditions that are imposed nationally, with an average of 19 per jurisdiction. These are larger numbers than were reported in earlier time periods (Hartman, Travis, and Latessa 1996; Travis and Latessa 1984). Travis and Stacey (2010) observed a growth in conditions that increase the level of supervision but have not been shown to reduce reoffending, including increased drug testing, home confinement, intensive community supervision, and unannounced visits to home and work.

There has been a dramatic increase in fees and restitution. More agencies are collecting supervision fees (usually $25–$40 per month). Ring (1988) identified more than 26 kinds of fees. Many parolees are ordered to pay fees for drug and alcohol testing and community service.[50]

Not surprisingly, most parolees do not succeed. In 1984, 70 percent successfully completed their terms without violating a condition of release, absconding, or committing a new crime. Today, only 48 percent do. As a result, nearly 200,000 parolees return to prison each year (Glaze and Bonczar 2011). Of these, one-third were returned for committing new crimes and two-thirds for violating conditions. Nationally, parole revocations have been the fastest-growing category of prison admissions, and parole violators in recent years accounted for about one-third of all admissions (Carson and Sabol 2012). Worse yet, many parolees return to prison repeatedly, never being able to discharge their parole terms. In inmate parlance, they are "doing life on the installment plan."

In recent years, professional organizations have begun to focus on the need to set appropriate conditions. The National Parole Resource Center is engaged in a nationwide effort to educate paroling authorities on

[50] Diller, Greene, and Jacobs (2009) found that Maryland parolees, on average, were ordered to pay $753 in supervision fees during their parole terms, even though most were unemployed and unable to pay them. Nine out of 10 were unable to pay their fees by the time parole ended. The debt was transferred to the state's Central Collection Unit, which adds a one-time 17 percent surcharge and continues to pursue collection.

appropriate condition setting. Conditions of release should reflect what Carl Wicklund (2005), executive director of the American Probation and Parole Association, refers to as the three Rs: *realistic*—few in number and attainable; *relevant*—tailored to individual risks and needs; and *research-based*—supported by evidence that they can change behavior and improve public safety and offender reintegration.

Paroling authorities must rethink relations between conditions and successful reentry. Conditions should be imposed sparingly and only when they correspond with offenders' risk and needs. Imposing far fewer conditions on lower-risk parolees—and granting agents more authority to modify conditions and terms—would make communities safer, as field agents see decreases in caseloads and increases in their ability to watch and assist medium- and higher-risk parolees.

X. Supervision Term

PROPOSAL 10.—*Supervision Term:* The length of supervision should be decoupled from the term of imprisonment. The maximum supervision period should be limited to no more than 5 years for higher risk levels and for a period not to exceed 12 months for lower risk levels, except for those individuals convicted of serious, violent, and/or predatory sexual crimes for whom the longer 5-year maximum applies, regardless of level of risk. Those subject to parole or postrelease supervision should be able to earn an early discharge, and the courts should make frequent use of presumptive early termination.

There are large variations in how long parolees are expected to spend under community supervision. Periods of postrelease supervision often extend far beyond the period spent in confinement (Klingele 2013). In some states, postrelease supervision may last for 10 or more years, with lifetime supervision required for some offenses (most notably, sexual crimes).

Though the period of postrelease supervision in some states is entirely separate from the prison term, most require a supervision period equal to the unserved balance of the prison sentence (American Law Institute 2014). In some jurisdictions, mandatory periods of supervision are specified by the class or level of the underlying felony conviction. A sampling of states illustrates that variation.

Pennsylvania. The length of supervision is attached to the maximum prison sentence ordered by the sentencing court: "The parolee is to remain in the legal custody of the Board until the expiration of his maximum sentence, or until he is legally discharged" (37 Pa. Code § 63.2).

Colorado. Postrelease supervision terms are determined according to a schedule based on the inmate's underlying sentence and level of classification (Colo. Rev. Stat. Ann. § 18-1.3-401). Mandatory periods of parole range from 1 year to 5 five years depending on this designation.

Missouri. The length or term of postrelease supervision cannot exceed the maximum sentence imposed at the time of sentencing for the original offense, although lifetime parole or supervision is possible for certain dangerous felonies and sexual offenses. The parolee must be on supervision for 3 years before the board can issue a final discharge, unless the sentence would expire before that date (Mo. Rev. Stat. § 217.730 [1–2]).

The American Law Institute (2014, pp. 91–92) recommends that the length of supervision be decoupled from the original term of imprisonment and that postrelease supervision be limited to a maximum of 5 years for moderate- to high-risk offenders. Requiring parolees to serve the unfinished portion of their prison sentences or be subject to supervision for 10 or 20 years or life accomplishes little of value. It does, however, expose parolees to the vicissitudes of parole violation and revocation processes.

For lower-risk offenders, opting in to no more than 12 months allows enough time to address transitional reentry needs for services and support. This decoupling and these maximums are based on the premise that parole or postrelease supervision should serve clearly identifiable public safety and rehabilitative purposes. These proposals target the majority of offenders subject to a term of supervision. There are notable exceptions, including individuals convicted of serious, violent, or predatory crimes, or concerning whom the gravity of the crime committed may not be reflected in the offender's risk level. Crime severity levels and the levels of assessed risk are not invariably correlated.[51]

Deciding the length and intensity of supervision and specifying conditions appropriate for individual parolees must take account of experiences associated with "doing time" and difficulties offenders encounter

[51] Risk assessment tools have been constructed and validated for sex offenders, including the Static-99 and the Sex Offender Risk Appraisal Guide. We presume that these tools will be applied to individuals convicted for sexual crimes, regardless of whether other instruments assess offender risk.

in overcoming barriers to successful reentry (Mears and Cochran 2015). The goals for individual parolees can be chosen more strategically than is now common. A sizable literature justifies focusing resources on parolees who present the greatest likelihood of recidivism and on periods in which reoffending is most likely (Solomon et al. 2008).

The probability of reoffending is highest early during parole or postrelease supervision. Individuals released from prison represent a significant risk to reoffend, and they tend to do so quickly (Travis 2005; National Research Council 2007). There are, however, diminishing returns associated with each successive year of supervision (American Law Institute 2014).[52] The first year is the period of greatest risk, accounting for nearly two-thirds of all recidivism in the 3 years following release (Langan and Levin 2002). Recidivism increases only moderately during the second and third years.

Opportunities should be available to earn an early discharge or termination (Petersilia 2007; Solomon et al. 2008; Scott-Hayward 2011; Klingele 2013). Some states do this on the basis of the parole board's decision that the offender has been sufficiently rehabilitated or through accrual of earned-time credits. The possibility of early discharge offers offenders an important incentive to comply with conditions, particularly in the first year, when risks of violating conditions or reoffending are greatest. The requirements for earned discharge should be reasonable, clearly specified, and communicated to those under supervision.

Parole and postrelease supervision remain the dominant infrastructure for managing the "inside-out" continuum associated with reentry. The targets include not just reducing reoffending but also addressing the challenges returning prisoners must face and overcome.[53] Addressing the immediacy of reentry needs will require a significant reorientation of most parole agencies given their prevailing emphases on monitoring,

[52] The likelihood of recidivism does not disappear completely. Over three-quarters (76.6 percent) of a cohort of prisoners released in 2005 were rearrested within 5 years (Durose, Cooper, and Snyder 2014). However, 36.8 percent were arrested within the first 6 months. After 6 or 7 years, offenders' risk levels approximate "the risk of new offenses among persons with no criminal record" (Kurlychek, Brame, and Bushway 2006, p. 483; Blumstein and Nakamura 2009).

[53] One primary purpose of supervision is public safety. The other is promoting positive reentry outcomes. There has been notable recent growth in commitment to prisoner reentry (Petersilia 1999, 2003; Travis 2005; Rhine and Thompson 2011). It is evident, however, that experiences of imprisonment leave many offenders ill-prepared to cope after release (Mears and Cochran 2015).

surveillance, and control (Scott-Hayward 2011; Rhine 2012). The realignment must target moderate- to high-risk offenders. However, it must also be available for individuals who present lower risks but have opted in.[54]

XI. Conclusion

Momentum to abolish discretionary parole release has receded, but the credibility of paroling agencies remains fragile. A recent national survey documented serious shortcomings (Schwartzapfel 2015). The New York State Permanent Commission on Sentencing (2014) recommended elimination of discretionary parole release and promoted determinate sentencing. In Virginia, opposition surfaced immediately when the governor in 2015 created a Parole Review and Update Commission to consider restoration of traditional parole release.

There is emerging recognition of the need to rethink discretionary parole release (Paparozzi and Caplan 2009; Paparozzi and Guy 2009). The National Parole Resource Center engages paroling authorities across the nation, shares research-driven knowledge, provides tools tied primarily to evidence-based practice, and provides site-specific technical assistance. The Bureau of Justice Assistance entered into a partnership between the National Governors Association Center for Best Practices and the National Parole Resource Center to assist parole boards and other state executives in strengthening parole systems and enhancing collaboration between governors' offices and paroling authorities. In 2014, the Robina Institute of Criminal Law and Criminal Justice of the University of Minnesota launched a multiyear project to study prison release practices across the country while working with selected states to improve their systems.

It is an auspicious time to rethink the future and functions of parole boards. There has been a discernible shift in the national discourse about criminal justice policy. Support for mass incarceration has diminished, prison population growth has ebbed, the president and congressional leaders of both parties have called for a softening of federal sentencing laws, and legislation has been adopted in many states under the Justice Reinvestment Initiative (Clear and Frost 2014; Travis, Western, and

[54] This is a serious concern that may require shifts within an agency's division of labor. It may be necessary to create reentry specialist positions (Scott-Hayward 2011).

Redburn 2014; Petersilia and Cullen 2015). Paroling authorities are well positioned to play crucial roles in engineering new approaches.

Any reconfiguration of paroling authorities must acknowledge current sobering shortfalls while framing new and more credible ways forward. A sustained effort of this kind has long been needed. For decades parole boards operated in the background, eclipsed by new sentencing laws and systems. Improvements to indeterminate sentencing systems have remained a blind spot for lawmakers, courts charged with constitutional review, and many academics (Reitz 2015). One early reviewer of this essay said that he found it "quaint" to be asked to comment on a paper on parole release—a subject he thought had long ago fallen to the wayside.

Our 10 proposals offer long-term, systemic guidance centering on institutional reforms. They meet the most telling criticisms of indeterminate sentencing systems (Frankel 1973; American Law Institute 2007, app. B). Some proposals require statutory changes. Others require significant revisions in the policies and tools of release decision making. Our proposals more clearly define the respective jurisdictions of sentencing judges and parole boards and if acted on will go a long way toward achieving foundational goals of fairness, effectiveness, efficiency, and restraint in the use of incarceration.

For these or similar recommendations to succeed, they must be supported by a new body of research that facilitates the capacity of parole boards to move beyond aspiration to implementation. Historically, the transparency of paroling systems and knowledge about their performance have been distressingly low, leading to a "black box" of parole release. There is urgent need to create common metrics for indeterminate sentencing systems and a normative scorecard that incorporates research across jurisdictions and includes international comparisons (Reitz 2015). As with other major criminal justice institutions, paroling agencies need improved capacities to monitor, evaluate, and improve their operations.

A number of key issues present themselves for future study: Is victim testimony a significant factor in release decision making? Does it help or harm victim satisfaction and recovery? Are validated risk instruments used, and is the level of risk a significant factor in release decision making? What steps have been taken to address risk variables associated with race and social class? What is the ratio of program availability to offender needs within an institution? Is program participation a significant factor in release decision making? Does the presence of an attorney, public or private, increase the chances of parole release? Are some programs

more effective than others in reducing the likelihood of recidivism after release? Are some parole conditions more effective in reducing recidivism (or more associated with failure)? What information is available to parole boards that contributes to more effective release decision making that was not available to the judge at sentencing? Other inquiries might look to the procedural and institutional architecture of the parole release process.

A "reinvented" indeterminate sentencing system that implements our proposals could be recommended to all states that want to maintain systems of judicial sentencing authority shared with substantial parole release discretion (Chanenson 2005; Tonry 2017; Wright 2017). A well-designed indeterminate system could rival the success of the current "Minnesota model" sentencing systems, which combine the abolition of parole release discretion with presumptive sentencing guidelines and controls on prison population growth.

Future decades may call for new models as the needs of state sentencing systems change. Recent decades were characterized by strong pressures toward prison growth—an unprecedented phenomenon for any society. In that environment, the "better" American sentencing systems created mechanisms to inhibit, accurately project, and exert a measure of control on prison expansion.[55] In coming decades, if the stated intentions of political leaders in both parties are to be believed, the nation's most important criminal justice project may be "mass de-incarceration." Pressures felt by actors throughout the criminal justice system may be thrown into reverse. That will require states to develop new or expanded release capacities. We hope American paroling agencies will rise to this challenge.

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[55] All of the Minnesota model systems experienced below-average amounts of per capita prison growth during the expansionist period of 1980–2009 (American Law Institute 2011, app. B).

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