The Future of Parole Release: A Ten-Point Reform Plan

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Abstract

American parole boards have played a critical role in the formulation and administration of states' prison policies in the past several decades—and could play an equally important part in helping to end the era of mass incarceration. Long neglected by academic, research, and policy communities, systems of discretionary prison release across the states are in need of improvement, if not "reinvention." This article offers a 10-point plan for parole release in the coming decades. These recommendations, taken together, lay out a comprehensive and aspirational model for the future. They address the institutional structure of parole boards, how much release discretion boards are given, the substantive grounds for release decisions, the use of risk assessments in the decisional process, other decision-making tools such as parole release guidelines, the requirements of fair and reliable procedures for release decisions, 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 terms.

INTRODUCTION

This article lays out a 10-point program for the improvement of discretionary parole-release systems in America (see Table 1).[1] Taken as a whole, our recommendations form an ambitious model that has never before existed in the US. If adopted separately, our

[1] It is important to note that this paper does *not* address the question of whether discretionary parole release is associated with lower recidivism rates than mandatory release. There is a limited empirical literature on the subject and the findings are mixed. The drafters of the Model Penal Code recently critically 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: 133-34).

recommendations would work substantial incremental improvements in the current practices of all paroling systems.

Parole boards occupy an influential, if unrecognized, niche across the correctional landscape of the country today. They have experienced dramatic change and substantial challenges to their operations, 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 to grant discretionary release. At least twenty 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 justice system was exhausted (Travis 2005). Not surprisingly, any lingering academic focus or study directed at parole boards largely dissipated.

This loss of attention was unfortunate. For one thing, different 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 to 2009 than states with other system types, and today make up the great majority of the highest-prison-rate states (American Law Institute 2011). While these facts run contrary to the conventional wisdom of parole (that parole release equates with lenity), it is equally important to recognize that indeterminate systems are not all alike. Over the prison-expansion period, a minority of paroling jurisdictions, such as Rhode Island and Nebraska, fell into a "low-growth" category relative to other states. 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 fifteen years, no parole board has been abolished, and only one (in New York) has suffered a significant loss of discretionary parole 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 revisiting the question of restoring parole release as part of a larger program to lower incarceration rates (e.g., Illinois; Virginia). Indeed, an optimist might hope that discretionary prison release will be a critical tool in the nation's "decarceration" agenda for the coming decades. Whether these developments represent a hiatus, or a reversal in direction relative to the future of parole release, remains unknown.

What is known is that a majority of states have retained the function of parole release housed within "indeterminate sentencing systems," in which judges impose a maximum prison sentence, while parole boards, alongside correctional officials, determine the actual date of release for most prisoners. We argue that the parole decision is 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 proceedings.

There are varying "degrees" of indeterminacy across indeterminate sentencing systems, and the policy community requires analytic tools to identify and assess these differences. As we note, there are no purely indeterminate or determinate sentencing 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 be tailored to 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 initiated reforms aimed at achieving greater structure, consistency, and openness in their decisionmaking. These changes call out for thoughtful evaluation. A majority of paroling authorities have now adopted parole guidelines, policy-driven decision instruments, and/or risk assessment tools when granting or denying parole. Their use, as we observe, 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, in our view, but the adoption of risk instruments must engage serious challenges such as unreliable scoring, lack of transparency, and the serious possibility of race-social class biases in their design and administration. We suggest processes that would give prisoners the means to review and challenge their risk assessment scores in individual cases.

The decision making milieu of parole release has also 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 parole decision is made. Of these stakeholders, 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 parole. As we suggest, the appropriate role of the victim at the point of a prisoner's consideration for parole release should be revisited, taking into account their more expansive participation at the time of

sentencing. In both forums, considerations of fairness and the objectives of parole release should shape victim engagement.

Though there is considerable variation by state, most offenders exit prison to parole or post-release supervision. In this domain, as well, American criminal justice systems could benefit from a reassessment of current practices. The question of supervision implicates three interconnected issues: "who" should be supervised, "what" conditions should govern their supervision, and "how long" they should remain under supervision. We argue that 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 the violations and revocation process, and facilitate a more effective alignment of limited supervision resources.

The article is written by three authors who have taken sharply different views on the fundamental question of whether contemporary determinate or indeterminate sentencing systems have been the more successful frameworks across American states. The authors have given different advice to jurisdictions on whether parole release should be retained, abolished, or reinstituted (e.g., Rhine 2012; Petersilia 2003; Reitz 2004). Nonetheless, the authors agree that discretionary parole-release is an important feature of U.S. sentencing and corrections that will not disappear in the foreseeable future—and all three share a common interest in improving those systems as much as possible. Indeed, 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.

The article below contains 11 parts: One part for each of our 10 recommendations, and a conclusion.

I. 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 decisionmaking. In pursuing these goals in the American context, 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.

Across the nation in 2013, a total of 340 parole board members in 46 states granted 187,035 discretionary entries to parole.[2] This small group clearly exercises enormous power over the nation's prison policy. 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 post-release supervision, and whether violations will result in revocation. There is considerable variation in practice across jurisdictions 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, as direct gubernatorial appointments, usually subject to legislative confirmation, account for membership on the majority of parole boards (N = 43), or appointment as chair (N = 37) (Paparozzi and Caplan 2009: 411-415; Lambert 2010: 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 hired.

It has been a longstanding criticism that there are few formal credentials for appointment to the parole board, whether educational, experience-based, or otherwise (National Commission on Law Enforcement and Observance: 1931; Rhine et al 1991; Paparozzi and Caplan 2009; Reitz 2012). The majority of states require at most vague (but more frequently nonexistent) educational requirements or relevant work experience (Schwartzapfel 2015). In the few states that specify qualifications for appointment, they are open-ended and the expectations mild (Paparozzi and Caplan 2009: 416-417).[4]

[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 due to 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 0 for 2012; Maryland reported 3,424 in 2012 (Herberman and Bonczar 2014; Maruschak and Bonczar 2013; Lampert 2010; Paparozzi and Caplan 2009).

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

[4] Only eight states called for a bachelor's degree for appointment to the board. A total of 23 states required some work experience, though only 15 states mandated that such experiences be tied to the criminal justice system or other relevant social services (Paparozzi and Caplan 2009: 416-417).

Notably absent are statutes calling for knowledge-based and/or professional expertise bridging corrections, criminology, and the growing literature on evidence-based practices and actuarial tools targeting the prediction of an offender's risk 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 (Robina Institute 2016; Morris 1974). The nearly forty-year growth of mass incarceration and the public's increased attention to crime policy have not been lost on parole boards. The 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 sizeable reduction in the percentage of those granted discretionary release, in no small measure due to parole boards' increasing reluctance to release prisoners before the expiration of their maximum sentences.[6]

The above factors, in combination, undermine the institutional structure necessary to support a reasonable measure of independence and insulation for paroling authorities. In our view, 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 US (van Zyl Smit and Corda, 2016;

[5] Such episodes have occurred in Pennsylvania, Massachusetts, and Connecticut. In Massachusetts in December 2010, for example, 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 (Petersilia 2011; Reitz 2012: 285-286; Clear and Frost 2014: 192).

[6] It is also the case that fairly dramatic departures are sometimes made in the opposite direction. Texas offers a state that has increased its parole release approval rate. Fabelo (2010) and the Texas Sunset Advisory Committee (2006) highlight that the participation of the state in the Justice Reinvestment Initiative took this issue on. Subsequently, during the past 6 to 7 years the rate of parole board release approvals moved upward. From 2007 to 2014, California, a determinate sentencing state, went from 119 to 902 parole releases granted to life-term inmates (personal correspondence, Jennifer Shaffer, Chair, CA Board of Parole Hearings).

Padfield et al., 2010). We thus concentrate on evolutionary changes to existing institutions in the U.S. rather than a "ground-up" building of new infrastructures. Also, though we tailor our recommendations to the American context, we would be open to alternative measures that could be undertaken in this country (or variations from the details below), provided they are equally effective in meeting our goals of strengthening parole boards as institutions.

(1) **The eligibility standards for becoming a parole board member should by statute require: (a) the possession of a college degree in criminology, corrections, or a related social science, or (b) a law degree; and, (c) at least five years of work experience in corrections, the criminal justice/community corrections field, or criminal law. Consideration should be given to balancing the relevant competencies of board members across the board as a whole, and the importance of including members with an expertise in victim awareness and the prison experience.**[7]

Parole board members are called upon to apply complex legal rules, as well as social science research findings in criminology and corrections across the whole of their decision-making. Impressive meta-analyses in the past several decades 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, inclusive of social work and clinical psychology, or the possession of a law degree, coupled with substantial real-world work experience in the field, would engender greater competency and balance in parole board memberships in most states. (Bing 2012).[8]

(2) **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 already include a provision for a special panel to screen and recommend suitable applicants for the parole board to the Governor, who is

[7] Numerous parole boards rely on panels consisting of board members and hearing officers, deputy commissioners or other 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 reference to the area of law and the possession of a law degree is premised on the recognition that some states' statutes already include this as a requirement for at least one of the board member positions.

then authorized to make an appointment. In many states, the appointment process concludes with confirmation by the legislature. Our recommendation eliminates the need for 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."[9] (Lambert 2010: 54). Florida relies on a five-member "Parole Qualifications Committee" to accomplish the same purpose, while Utah draws its nominations from the state's Commission on Criminal and Juvenile Justice.

The special panel, however it is constituted within the unique circumstances of a particular state, offers a critical buffer to direct gubernatorial appointments to paroling authorities. The membership of these panels may be broadly inclusive of representatives from across several (or all three) branches of government and the criminal justice system, as shown in Hawaii, or composed more narrowly of individuals drawn from the criminal and juvenile justice system, as in Utah. We think it 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 as institutions.

(3) **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 that of the Governor. The provision for fixed terms, and the possibility of reappointment for a second term, establishes 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 recommended processes for the selection and removal of parole board members resemble the analogous protocols for judges in many states. As a matter of practical

[9] Hawaii Rev. Stat § 353-61.

implementation, however, we envision that parole boards of the future will remain housed in the Executive Branch.

II. How Much Release Discretion?

The amount of prison-length discretion given releasing authorities should not eclipse the sentencing discretion of courts, and for most cases should not exceed 25 to 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 judicial sentencing and the prison-release stage.

The character of a discretionary prison-release system depends greatly on how much power the system gives to the releasing authority (or authorities) over the months, years, or percentages of prison terms that will actually be served in individual cases. Currently, and over the history of parole in America, "indeterminate" sentencing systems have varied dramatically in the *degree of indeterminacy* built into each system. This section poses the question of how much release discretion there should be in a model discretionary-release structure. To our knowledge, this critical issue of system design has never been addressed in the literature. The most important contribution of this Recommendation may be to insist 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.[10] Whenever there is a maximum prison term established by the judge or the legislature, for example, the system has an element of determinacy.[11] Most U.S. jurisdictions have composite systems that employ both determinate and indeterminate prison sentences for designated classes of offenders. Forty-nine states, for instance, authorize or mandate sentences of life without parole (or

[10] California and Washington at one time had systems with very high degrees of indeterminacy—but even they were not pure systems (Messinger and Johnson 1977: 15-17; Boerner and Lieb 2001: 73).

[11] In Europe, a numerically-specific maximum prison term is often enough to classify a given sentence as "determinate" (van Zyl Smit and Corda 2016). This usage is different than in the U.S. (see Reitz 2015).

"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).[12]

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 actual 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, actual 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 actual length of term may be adjusted by one

[12] The inverse is also true. In all of the so-called determinate states, small subgroups of offenders serve indeterminate sentences. In Minnesota, for example, some murderers receive life sentences with release eligibility—and some sex offenders are given indeterminate sentences to allow for the prolonged detention of the most dangerous (Frase 2005). There are a miscellany of additional sources of indeterminacy in all U.S. sentencing systems, usually affecting tiny numbers of cases, and with no expectation of routine application (Love 2009). These include mechanisms such as 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 (American Law Institute 2011: § 305.7; Barkow 2009; Love 2009). In most jurisdictions, judges retain jurisdiction to revise their own sentences for a short period after they are imposed. In a handful of states, this power extends years into a prison term, and has been called "bench parole" (Klingele 2009: 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; 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 U.S. criminal justice professionals.

or more decisionmakers who exercise later-in-time release discretion in a way that is routinized and reasonably knowable in advance.[13]

To put these definitions to use, imagine two indeterminate jurisdictions: In one, a typical five-year maximum prison term includes parole eligibility after one year. There is a "gap" of four years between the minimum and maximum—or 80 percent of the maximum term. In the second jurisdiction, a prisoner serving a five-year term is not eligible for release until three years have passed. Here, the gap is two 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: 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 2016; van Zyl Smit and Corda 2016). Under the 85 percent rule that the federal government once required of states in order to receive prison-construction grants, the releasing authority only gets 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

[13] For instance, most U.S. academics and policymakers would concur that Minnesota has a determinate sentencing system, even though the typical judicial prison sentence 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, however, the overwhelming majority of prison terms in Minnesota 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 individual's misbehavior while institutionalized. With such limited range of motion, the de facto authority exercised by corrections officials to determine offenders' lengths of stay cannot be said to rival a sentencing court's. When a Minnesota judge contemplates or orders prison sentences, the actual durations of the sentences in question are highly predictable.

degree of indeterminacy. If we are searching for best practices, how will we know when we find them?

In the authors' view, the policy question of 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 forum as opposed to the other? Second, on fairness grounds, the appropriate degree of indeterminacy in a system should depend partly on the quality of procedures surrounding parole release decisions. (See Recommendation 6.) The larger the "gap" between 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 to 33 percent of the maximum prison term for the vast majority of cases. Our rule speaks to the *total* amount of release discretion in a particular system, which in some jurisdictions is allocated between the parole board and corrections authorities. It would be up to each state to distribute the respective portions of release discretion held by parole boards and agencies in charge of good-time credits. Perhaps in some systems the parole board would be given 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 decisionmakers who hold power over months or years of prison confinement call for multiple—and expensive—apparatuses for fair procedure (see Recommendation 6). Chances are, process values will be spread too thin.

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."

In arriving at these 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. (See Recommendation 3.) In a jurisdiction that adopted a 25 percent rule, releasing authorities would hold discretion to increase the judge's minimum term by one-third based on 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.[14]

The degree-of-indeterminacy question reaches back to first principles. To operationalize a theory of limiting retributivism (or "utilitarianism-within-limits-of-

[14] One of the three authors hesitates to go further than a "25 percent" rule, but also believes a "33 percent rule" would be an improvement over current practices in many indeterminate states.

proportionality") (see Recommendation 3), it is necessary to decide how tight the limits should be. 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? (See Zimring and Hawkins 1995.)

The formulas offered in this Recommendation 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 U.S. sentencing systems than has been true in the past several decades—yet, even so, substantial latitude should be built into future sentencing structures to allow for crime-reductive policies (American Law Institute 2007: § 1.02(2)).[15] 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 to 33 percent" rule cannot be applied to every sentence. We worry about larger maximum-minimum gaps on grounds of proportionality and procedural fairness, but large gaps are not entirely avoidable in American criminal justice systems, or in the context of mass incarceration. A 25 to 33 percent rule breaks down for extremely long maximum prison terms, which are unfortunately common in the U.S. In such cases, a 33 percent limit would have the unfortunate effect of mandating overlong 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 (see American Law Institute 2011: § 305.6).[16] We recognize that blanket eligibility at 15 years will in some cases increase the "gap" defining the discretion of release authorities well above our 33 percent.

[15] One of the authors, as Reporter for the Model Penal Code: Sentencing project, has advocated "incapacitation of dangerous offenders within limits of proportionality" as the sole utilitarian basis for prison sentences, and has proposed that the appellate courts of every jurisdiction should be given statutory power to review de novo every sentence for disproportionate severity (American Law Institute 2016).

[16] 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*).

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 will be very large indeed. We see this bulging of release discretion as a necessary evil in a society that regularly employs extremely long prison sentences—but also as a problem that can be moderated by appropriate attention to procedural regularity in the release decision. In Recommendation 6, for example, we will advocate increasingly rigorous procedures as denials accrue and the amount of time since first release eligibility lengthens.

III. Grounds for Release Decisions

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 rehearsing centuries of debate on the subject, we will simply put our cards on the table. Our views of punishment theory will translate directly into proposed release criteria to be used by parole boards or other releasing authorities.

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" (Frase 2013; Monahan, 1982). 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 punish people who have committed such serious crimes that lesser sanctions would be disproportionate.[17] The appropriate length of a prison stay should be determined with reference to these twin goals.

[17] Positions similar to ours, with more complete justifications than we can provide here, exist elsewhere in the policy literature (American Law Institute 2016; Horn 2001). 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 1985).

As posited by Norval Morris, 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" (Norval Morris 1974) to identify exact sentences that fit particular cases, but they have useful intuitions about the right ballpark.

For example, 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 other words: Sentences may serve utilitarian ends so 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; Frase 2013; Model Penal Code, 2007: § 1.02(2)). 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 the 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 a model 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 based on its belief that a longer sentence is necessary or better on retributive grounds.*

The parole board should also be entitled to assume, in a model system, that the maximum prison term included in the judge's sentence is not disproportionately severe. In the model system we envision, it is the trial court's job not to pronounce a disproportionate minimum or maximum sentence, and a sentence that is disproportionately excessive would be reversible on appeal (see American Law Institute 2016: §§ 7.XX, 7.09).

Rather than relitigate 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 (see Travis 2002). Based on 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).[18] (See Recommendation 4 below.) 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 authors take different views of the proven predictive value of dynamic factors—but we all agree that it would be desirable to incorporate such factors (now or in the future) whenever research has shown them to increase the predictive power of assessments of prisoners' future success (see Recommendation 4).

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 indicia 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 U.S. Most paroling authorities make use of risk assessment processes,[19] and we would seek to improve and scrutinize the use of such instruments rather than disallow their use (Recommendation 4).

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[18] Some argue that risk assessment is better done at the sentencing stage 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. For present purposes, the authors take no position on this question. We limit our analysis to jurisdictions that have chosen indeterminate systems.

[19] 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

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.[20] We recommend repeal of all such authorizations, or voluntary cessation by parole boards.

We would also reexamine release criteria that have grown up in some states that serve no clearly defensible purpose. To illustrate, we nominate the following provisions in current law for reexamination: New Hampshire includes among its official reasons for denial of parole "[t]he existence of adverse public concern or notoriety" (N.H. Admin. Code Rules, Par. 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. Perhaps most questionable of all, before releasing a prisoner, the New Mexico Parole Board is instructed by statute to consider "the inmate's culture,

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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)).

[20] In New York and a number of other systems, for example, the parole board must be satisfied that the release date "will not so deprecate the seriousness of his crime as to undermine respect for law" (Cons. Laws of N.Y. § 259-i(2)(c)(A); Tenn. Rules and Regulations § 1100-01-01-.07(4)(b); Wis. Admin. Code § PAC 1.04; accord Laws of R.I., § 13-8-14(a)(2)). In other states, the board is asked to weigh the "sufficiency" of the amount of time that has been served by each prisoner, or is instructed to respond to the "severity" or "nature" of the offense for which the inmate is imprisoned (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)). Grounds for departure from Utah's parole guidelines include "the nature and severity of the crime(s) committed" (Utah Board of Pardons and Parole). Boards also commonly consider the prisoner's criminal record, 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).

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

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 these tools' statistical underpinnings, as well as their applications to individual offenders.

Our Recommendation 3 argues that 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 implementation policy: What tools or faculties should be used for the assessment of recidivism risk? Given the arduous task of 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 (the degree to which the method predicts recidivism) of clinical assessments were inferior to more structured actuarial methods (Meehl 1954); Ægisdóttir, et al., 2006). Not only did statistical assessments outperform clinical judgments in accuracy, their use promoted uniformity and consistency between parole commissioners or even among the same commissioner over time. Actuarial tools also help insulate decisionmaking from politicization, and since the process is more objective, reduce the number of legal appeals due to adverse parole decisionmaking. 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 predictive accuracy and accelerated their development and use (for historical review, see Harcourt 2007). But as discussed below, the most widely used and researched LSI-R instrument produces an 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 (Andrews, Bonta and Wormith 2004). Predicting low recidivism risk is more accurate (error rates of just 2 to 3 percent) (Andrews, Bonta and Wormith 2004). So, if parole boards use risk assessment tools to deny release to "high risk" offenders, they will be overpredicting and systematically lengthening prison terms. Actuarial tools are better at predicting low- rather than high-risk behavior.

Today, recidivism prediction algorithms identify correlations between pre-existing 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 now an integral part of virtually all criminal justice decisionmaking, including pre-trial release, prosecution, sentencing, and parole decisionmaking. A recent survey found that 88% of paroling authorities report using an actuarial risk prediction instrument to guide decisionmaking (Kinnevy et al, 2008). The *Economist* reported that the Level of Service Inventory-Revised (LSI-R), the most popular tool in use today, was used to assess 775,000 parole applications in America in 2012.[21] The *Wall Street Journal* recently reported that officials in Michigan credit risk assessments introduced in 2006, "with helping to reduce their state's prison population by more than 15% from its peak in 2007 and with lowering the three-year recidivism rate by 10 percent points." (Walker 2013). Texas parole board members, using a rudimentary risk assessment with just ten factors, are now able to have offender data transmitted to their offices and can even 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 being used to decide who stays in prison. When the U.S. Supreme Court ordered California to reduce prison crowding, officials relied upon the California Static Risk Assessment (CSRA) and COMPAS to identify good candidates for community supervision.[22] 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,

[21] See "Prison Breakthrough: Big data can help states decide whom to release from prison," The Economist, April 19, 2014, at http://www.economist.com/news/united-states/21601009-big-data-can-help-states-decide-whom-release-prison-prison-breakthrough Harcourt (2007) reports that as of 2004, 28 states used a prediction instrument for parole decisions, with eight states using the RNR-based Level of Services Inventory-Revised (LSI-R).

[22] See for example, 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 page 14. Available at: http://www.cdcr.ca.gov/News/docs/3JP-May-2013/File-Endorsed-List-Plan-May-2.pdf.

and legislatures increasingly require them.[23] Social scientists are also championing their use, and such tools are seen as foundational for "evidence-based practices" and "smarter sentencing" strategies, which seek to expand community alternatives and reserve prisons for the most dangerous. Importantly, the American Law Institute's revisions to the Model Penal Code call 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."[24] As Michael Tonry succinctly put it, "The offender is disappearing from view. What's in focus is his risk of recidivism" (2014:175).

Risk Assessment Tools Disproportionately Impact Racial Minorities and the Poor

While we understand the appeal of prediction instruments, we share the concerns of critics who have raised questions about their expanded use. In his seminal book, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007), Bernard Harcourt argues that the turn to actuarialism in criminal justice is morally problematic, 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 recently weighed into the debate. In a 2014 speech at the National Association of Criminal Defense Lawyers, and in a follow-up letter to the United States Sentencing Commission, he sharply criticized the growing use of data-driven predictions of defendants' future crime risk to shape sentences. He said:

> 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.[25]

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[23] For example, see *Predicting Criminal Recidivism: A Systematic Review of Offender Risk Assessments in Washington Stat*e, February 2014, Washington Institute for Public Policy, Olympia, WA.

[24] See American Law Institute, Model Penal Code: Sentencing – Tentative Draft No. 2 (approved 2011), Section 6B.09(2)

[25] See, "Holder: Base criminal sentences on facts, not "risk assessment," August 1, 2014 at http://www.cbsnews.com/news/holder-base-criminal-sentences-on-facts-not-risk-assessment/ and also Eric Holder letter to Judge Patti Saris, Chair, United States Sentencing Commission, July 29, 2014, available at http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf#page=1&zoom=auto,-134,742

Professor Sonja Starr, writing in the *New York Times*, observed that "in the new, profiling-based sentencing regime, markers of socioeconomic disadvantage increase a defendant's risk score, and most likely his sentence."[26] 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: 805)

The solution espoused by most legal scholars is to simply limit the factors used in risk assessment tools solely to those that represent personal culpability, i.e., prior criminal record. While that solution appears fairer, it is also problematic. Ideally, a risk assessment tool should predict future behavior based on past behavior. But the reality is that current risk assessments rely upon measures that are partly driven by individual behavior, and partly by where the justice system is looking for offenses and how it responds when it finds them. As Tonry (2014: 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 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 … 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 (e.g., Skeem et al, 2007; Baird, 2009). Studies find that reliability and interrater consistency can be low and that agencies too often adopt off-the-shelf instruments that fail to accurately predict the recidivism rates of their population. Reportedly, just 60 percent of the instruments being used by parole boards in 2008 had been validated on local populations (Kinnevy and Caplan 2008; 13). Overprediction is also a serious problem. The LSI-Revised manual admits to a "high (approximately 30 percent) false positive rate. This means that a fairly larger percent of individual identified by the LSI-R as 'high risk' will not actually present any present any problems." (Andrews, Bonta and Wormith 2004: 47). The false negative rate of the LSI-R is much better, "usually found to be 2 to 3 percent" (Andrews, Bonta and Wormith 2004: 47). Andrews, Bonta and Wormith conclude, "This means that when an individual

[26] Sonja B. Starr, "Sentencing, by the Numbers," *New York Times*, August 8, 2014. Available at http://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html .

is placed in low security based on an LSI-R score, there will rarely be any major problems with that individual (2004: 47).

Most instruments also 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. As a recent Associated Press study concluded: The instruments are "clouded in secrecy … shielding government officials from being held accountable for decisions that affect public safety." (Sullivan and Greene 2015)

The lack of publicly available information about these risk assessment tools means that offenders are often in the dark as to the basis for their risk prediction scores. Increasingly, states are relying on copyright law and gaps in state public records' statutes to bar individual offenders from review of their individualized risk assessment (see McGarraugh 2013).[27] Given the great weight parole boards afford risk assessment tools in making release determinations and setting supervision conditions, it is highly concerning that individual offenders in these jurisdictions lack the ability to meaningfully challenge their own risk assessment scores. Without a point-by-point breakdown of the factors that the risk assessor considered at each step, offenders have no means to dispute the accuracy of their score, and parole boards are left with a decidedly one-sided assessment. This lack of transparency all but ensures that mistakes will go unchecked (Sullivan and Greene 2015). (Our Recommendation 6 addresses these procedural shortfalls.)

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 specific subpopulation. Some of the validation studies were conducted decades ago, and may be time and generationally dependent. Being unemployed in the inner city today when the unemployment rate reaches 30% has a much different power to predict recidivism than when the unemployment rate was 5%. Similarly, being from a single parent family might have been more predictive when the stigma and economic implications were much more important than today when half of all children grow up in single-family households. As the use of such instruments spread, these methodological issues are concerning.

So how should parole boards move forward to use of risk assessment tools? As a first step, states should open their risk assessment tools to vigorous, public challenges of the tools' statistical underpinnings, as well as their applications to individual offenders. There is potential in risk prediction instruments to reduce unnecessary incarceration, but

[27] 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).

expanded use may exacerbate racial disparities in release policies. Certainly, we don't advocate going back to pre-risk-assessment decisionmaking, as unfettered discretion produced its own flaws and biases. But we do urge parole boards to make certain their instruments are methodologically sound, locally and recently validated, and to be more clear-eyed about the role that actuarial devices play in aggravating racial disparities in prison release. Agencies should also strive to develop and adopt third- or fourth-generation approaches, which emphasize both clinical judgments and statistical "risk" methods and, concomitantly, the inclusion of dynamic or criminogenic "needs" factors (See Recommendations 4-5 and Mears and Cochran 2015: 154-159).[28]

We also recommend that each parole board scrutinize their risk assessment tool through the lens of race, identifying how each factor differentially impacts racial minorities. Researchers can then determine whether the removal of the race-tainted variables reduces predictive accuracy, and by how much.[29] This bias reduction process might include selecting items with the smallest racial gaps or replacing potentially biased criteria with more race-neutral factors. Reducing racial disparities in actuarial risk prediction instruments is not a new issue. Petersilia and Turner (1987) used this technique to explore how certain 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% better than chance. They then removed the racially-tainted factors and found that the predictive accuracy for prisoners was reduced by about 5 percent.[30] With such data in hand, parole boards can then thoughtfully discuss 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 the biased criteria such as having a "good family structure" with a determination of whether there is a responsible adult willing to assist the parolee, or

[28] Among the three authors, there are differences in the amount of faith we place in existing 3rd and 4th generation instruments, and in our optimism that they will be improved in the near future. This is one of our very few areas of disagreement. We all agree that it would be desirable to develop such instruments, however, so long as they were empirically sound and could be administered in reliable and consistent ways.

[29] The U.S. Parole Commission has long been concerned with racial-skewing in the use of its Salient Factor Score. See Hoffman, Peter B. 1976. "Salient Factor Score Validation: A 1972 Release Cohort," *Journal of Criminal Justice* 6:69-76; Hoffman, Peter B. 1983, "Screening for Risk: A Revised Salient Factor Score (SFS 81)." *Journal of Criminal Justice* 11(6):539-47; and Hoffman, Peter B. 1995. "Twenty Years of Operational Use of a Risk Prediction Instrument: The United States Parole Commission's Salient Factor Score." *Journal of Criminal Justice* 22(6):477-94.

[30] Petersilia and Turner, 1987, p. 171. Figure 1.

dropping references to "gang affiliation," a designation that is 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 decisionmaking and will undoubtedly expand, fueled by states anxious to save money and proprietary interests in selling the software. Parole authorities need to scrutinize such instruments' predictive accuracy, while at the same time being cognizant of how the use of such actuarial tools may further concentrate race and class bias within our prison system.

V. Decision-Making Tools

Decision-making tools should be structured, policy-driven and transparent. Parole boards should adopt parole guidelines systems that govern the consideration of offenders for release. The guidelines should establish presumptive release dates tailored to the varying risk levels and readiness for reentry presented by offenders. 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, if not more openness and transparency to the release process, began with the design of a Salient Factor Scale by the U.S. 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.[31]

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, and/or risk assessment tools designed to foster greater structure when deciding whether to grant or deny an offender's discretionary release (Burke et al. 1987; 2003; Rhine et al. 1991; Runda et al. 1994; Kinnevy and Caplan 2008; Caplan and Kinnevy 2010). A recent survey, conducted in partnership 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)

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

of the same respondents, indicated that the release authority relied on a risk assessment tool.[32]

A scanning of the current literature, including a summary of the statutory rules and other decision tools driving parole releasing practices (Lambert 2010), illustrates that relatively few states use formal parole guidelines framed as an actual grid or matrix. Even more, among the different components that form the core of such assessments, it is unclear what impact each factor has on decisions to release. Despite the appearance of structured decision-making, parole guidelines turn out to be broadly permissive. In addition to guidelines of general application, separate parole guidelines are typically used for sex offender decisionmaking (e.g., Colorado), and there are sometimes special rules for designated violent offenders.

Three elements are typically 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 based on 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. There are exceptions to setting the initial or tentative release date recommended by the grid 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 by the Parole Decisional Instrument used by the Pennsylvania Board of Probation and Parole, and the Colorado Parole Board Administrative Release Guidelines Instrument, can include more factors than a traditional guidelines grid. Sequential guidelines can give weight to the individual's 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 the application of parole guidelines makes it very clear that guidelines' recommendations are wholly advisory. They carry no legally-binding effect, and can be overridden in the board's discretion. The relevant guidance for Georgia, Texas, and Pennsylvania is highlighted below.

[32] A total of 18 responses noted the use of an instrument constructed in-house, while another 12 stated they relied on the Level of Service Inventory-Revised (Kinnevy and Caplan 2008). Other risk assessments instruments were used far less frequently (e.g., COMPAS).

- The critical statutory provisions in Georgia for non-life sentences state that the Board of Pardons and Paroles may accept or reject the recommendation for Tentative Parole Months that result from its Parole Decision Guidelines assessment (Watts – Robina Legal Research Summary).

- Comparable language in Texas directs that the agency's guidelines are "not automatic nor is the parole guidelines score presumptive as to whether an inmate will be paroled. Board Members and Parole Commissioners retain the discretion to vote outside the guidelines when the circumstances of an individual case merits their doing so" (Lambert 2010: 177).

- "The Pennsylvania Board of Probation and Parole uses a Parole Decisional Instrument (PBPP 361) to analyze individual cases and promote consistency in decision making. The instrument is a guide to advise the decision maker. It does not replace professional discretion, nor does it bind the Board to grant or deny parole, or create a right, presumption or reasonable expectation that parole will be granted" (Pennsylvania Board of Probation and Parole 2014).

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 themselves are unenforced.[33] 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 enjoyed a significant measure of success through their reliance on judicial sentencing guidelines. According to most observers and law reform organizations, the better state guidelines systems result in enhanced transparency, consistency, fairness, proportionality, and effectiveness in sentences imposed on individual offenders. Judicial sentencing guidelines have also been used successfully in multiple states to manage correctional resources, by placing controls on prison growth and by anticipating the need for community corrections spots (Tonry 2016; Frase 2013; Weisberg 2012; American Law Institute 2007; Constitution Project 2006; American Bar Association 1994). The better sentencing guidelines systems also provide for appellate review from decisions that depart from guidelines recommendations—or from unreasonable *failures* to depart (Frase 2013; O'Hear 2010; Reitz 1997). Borrowing from the experience and best practices of state sentencing

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

guidelines, a well-designed parole guidelines systems could achieve comparable outcomes (and would be desirable in all states, with *or* without judicial sentencing guidelines).

(1) Decision-making tools should be structured, policy-driven, and transparent. Toward this end, parole boards should adopt parole guidelines systems that govern the consideration of offenders for release, whether designed as a grid, matrix, or sequential model. The guidelines structure should incorporate two primary dimensions: a formal risk assessment, and a readiness for reentry or release.

The nationwide adoption and implementation of well-designed, structured, policy-informed parole guidelines would, if properly administered, contribute to greater rationality, fairness, and consistency in release decision-making. When governed by a commitment to presumptive parole release (see Recommendation 3), parole guidelines provide a transparent system for effectively assessing offenders by risk levels (see Recommendation 4). 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 3rd and 4th generation assessment tools. In contrast to static risk assessments, often referred to as 2nd generation instruments, 3rd and 4th generation tools combine static and dynamic assessments of risk, producing information relative to what programs match the criminogenic needs of individual offenders. To best measure offenders' behavioral change while in confinement, and readiness for reentry, such instruments should be reassessed (rescored) for a majority of offenders on an annual basis. Many correctional systems and parole boards rely on 2nd generation tools, if they use any at all. 3rd and 4th 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.

(2) Parole guidelines should be "presumptive," not advisory. They should 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 to release 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 exceptional circumstances that are clearly specified.

Establishing presumptive release dates at initial eligibility, requiring periodic reviews annually for most offenders, and heightening the presumption at each successive eligibility, serves to provide those in confinement with more certainty about when they will likely exit prison. Nonetheless, if low risk offenders are to be granted presumptive release, exceptions may occur (e.g., involvement in violent misconduct directed at staff or another inmate). Moderate and higher risk offenders may be granted presumptive parole followed by a period of post-release supervision with services and linkages to additional programming captured in their reentry plan upon exiting prison (see Recommendations 8 and 9).

Honoring presumptive parole release in practice will require that prison systems across the country expand dramatically the opportunities for higher risk prisoners to enroll in and complete prison-based programs responsive to their assessed criminogenic needs, given the goal of reducing their likelihood of reoffending post-release.

Most prisons offer programming of some kind, albeit with limited exceptions. Very few of these draw on evidence-based policy and practice. Effective institutional programs have been found to reduce recidivism (Aos 2006; Davis et.al. 2014). Two comprehensive evaluations of community-based correctional facilities in Ohio, housing moderate to high risk offenders in secure residential settings for up to six months, demonstrated effective results (Lowencamp and Latessa 2002; Latessa et.al. 2010). 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 settings (Andrews and Bonta 2010; French and Gendreau 2006; Smith et.al. 2009, Latessa et.al. 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 there are numerous barriers to program participation by offenders should they wish to enroll at all. These include a notable shortage 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: 111-113). The security

level of a facility, especially close, maximum, or super-max, 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' interest in maintaining order and control, and a commitment to fairness, and transparency.[34] The most salient reasons for rebutting such presumptions include statutory restrictions on certain crimes or categories of crime that are found in a given jurisdiction. Other reasons may exist pertaining to in-prison misconduct, and violent or aggressive behavior during confinement. The relative paucity of research that exists has produced mixed results on the relationship of misconduct in prison and recidivism. Several recent studies, however, have found a positive association between misconduct and recidivism (Cochran et.al. 2012; Mears and Cochran 2015; Valentine 2012). One such study observed that inmates who engage in misconduct are more likely to recidivate (Cochran et.al. 2012). Other research found a nexus between violent misconduct and violent recidivism, and drug misconduct and drug recidivism (Valentine 2012). Nonetheless, it is important to note there is significant variability in how the staff at a particular prison respond to disciplinary violations and aggressive inmate behavior (e.g., fighting), differences that may impact dramatically on offenders' prospects for presumptive parole release.

(3) 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 embedded within parole guidelines systems shift from being advisory only to becoming normative and enforceable. The rules driving such systems must exercise a reasonably binding authority on parole board decision-making, while providing justifiable reasons to override the established presumption. However, it is vital that the decision rules or standards driving the releasing authority's reliance on parole guidelines are subject routinely to meaningful review, monitoring, and corrective action.

[34] The use of parole guidelines systems targeting risk, and establishing eligibility presumptions, also offers an efficient and economical mechanism by which to assist the state's department of corrections in strategically managing resources relative to the ebb and flow of the prison population.

The creation of an administrative unit within the parole board (where such a unit is feasible), or one formed through a partnership with another agency (e.g., a state's Sentencing Commission) offers a vehicle for accomplishing these objectives. This body would focus on the importance of generating information and research aimed at the ongoing monitoring of patterns of guidelines compliance and departure, reasons for departure, and other assessments focused on improving the understanding and use of the guidelines by key decision-makers. High departure rates should not automatically signal improper decision making by board members; they could just as easily signal a problem of design in the guidelines. With an established capacity for exercising oversight and accountability in place, the guidelines will contribute to effectiveness, fairness, coherence, and transparency of parole release decisions.

VI. Process; Prisoners' Rights

Processes for parole release decisions should be improved to more closely resemble an original sentencing hearing. Prisoners' procedural rights should be given increasing weight if they are denied release on successive occasions. The adequacy of parole release procedures should be measured by: resources per decision, meaningfulness of hearing, ability of prisoner to prepare and present a case, rules for victim participation, quality controls on factfinding, administrable decision rules, and reviewability of decisions.

The premise of our procedural analysis is that the parole release determination is as much a "sentencing decision" as the original judicial sentence. Judges impose sentences within the parameters of their authority under statutes and guidelines. Parole boards pass sentences within the bookends of minimum and maximum terms contained in an indeterminate sentence (see Recommendation 2).

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."[35]

[35] Thus, we do not rest our model on Supreme Court precedents like 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 cannot go.

If parole release is a sentencing decision, then the procedural safeguards at judicial sentencing proceedings are a relevant benchmark for comparison when evaluating the adequacy of the rules that apply to paroling decisions.[36]

We will 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 factfinding, administrable decision rules, and reviewability of decisions.

Resources per decision. Contemporary parole boards do not have resources comparable to state court systems—and the question is not even close. Parole boards are small agencies averaging a total of 5 or 6 members in each state, with an even smaller support staff. The number of prisoners considered for release by the average state parole board in 2006 was 8,355—about 35 cases for each working day, and this comprises only one part of a board's responsibilities (Kinnevy and Caplan 2008: 9). Studies of actual parole-release practices have found decision-making times of 3 to 20 minutes per case (Rothman 1980: 164-65; Dawson 1966: 301; see also Schwartzapfel 2015).

In a model system, greater institutional investment is needed. Almost certainly, parole agencies must grow in size and funding in order to give adequate attention to individual cases. Our test is a functional one: Adequate resources are those sufficient to support reasonably good substantive decisions within the procedural standards outlined in the next several paragraphs. (For additional thoughts on the institutional structure of paroling agencies, see Recommendation 1.) We recognize that a significant "ramping up" of procedural regularity at release hearings will be costly, but the exercise of creating a model system should not be unduly constrained by the intermittent circumstance of tight state budgets. Throughout, our recommendations are forged by our philosophical view that release decisions are *sentencing* decisions, comparable in importance with judicial sentencings.

Meaningfulness of hearing. Parole-release "hearings" in existing American systems are often no more than brief interviews of the prisoner. The prisoner's role at the hearing varies across states, but is often limited to responding to questions from one or more board members. Sometimes there is no hearing or no right for the prisoner to be present;

[36] This is not to say that the authors regard present-day judicial sentencing procedures as a gold standard. The procedural rules at judicial sentencing vary across the states, but have sometimes been criticized as "second-string" protections (Lynch 1998: 338). If we are considering what should be happening in a real-world system of parole release, as opposed to a model or "wish list" system, however, the benchmark of "second-tier" judicial sentencing procedures is arguably the most powerful. In an ideal system, we would argue that a *model* judicial sentencing process is the point of reference for a model paroling process.

the case is decided solely on the papers (Cohen 1999: vol. 1, 6-27; Fla. Stat. § 947.06; Vt. Stat. § 502(a); *Mahaney* 1992 (Me.)).

Summary process should not be a feature of a model prison-release system or, if it is, it should be employed only when the amount of prison time at issue is modest. Absent waiver, there should be a hearing in every case in which 6 months or more of prison time is at stake, and the prisoner should have the opportunity to participate in the hearing. Further, 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. Today, prisoners' interests are seldom effectively represented at parole hearings. Few prisoners are competent to raise the best legal and factual arguments on their own behalf. In the criminal courtroom, defendants have or are provided lawyers, but such assistance is far from the norm in the parole milieu. Some states prohibit representation by counsel outright (Code of N.M. Rules, R. 22.510.2.8(A)(3); *Franciosi* 2000 (Mich.); *Holup* 1976 (Conn.)). For the few prisoners who can afford to hire attorneys, most states permit only limited representation, such as allowing counsel to submit written statements (Laws of R.I. § 13-8-26; Utah Admin. Code R. 671-303-1(2); Vt. Stat. § 502(d)). Only a tiny handful of states provide counsel for indigent prisoners at state expense (Hawaii Rev. Stat. § 706-670(3)(c); *Carson* 2002 (Mont.) (former Montana law)).

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 (Ga. Code § 42-9-53; Ky. Rev. Stat. § 439.510; S.D. Codified Laws § 24-15-1), some routinely permit it (Ind. Code § 11-13-3-3(i)(2); Md. Code, Art. 41, § 4-505), while most give the board discretion to disclose some or all of the file on a case-by-case basis (Cohen 1999: vol. 1, 6-23, 6-32 to 6-33). Court challenges to rules barring access have generally failed (e.g., *Jennings* 1999 (E.D. Va.); *Ingrassia* 1993 (8th Cir.); *Counts* 1985 (Pa.)).

Without adequate legal assistance, many prisoners will be mystified by the discretionary-release process and only the most resourceful inmates will do an effective job of advancing their side of the case. 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, it would be a vast improvement in the landscape of American parole if appointed counsel were provided to prisoners for all subsequent hearings after an initial denial of presumptive release.

Also, prisoners should be given access to their dossiers in advance of their hearings. Most importantly, the prisoner (with or without counsel) should have meaningful opportunity to contest any facts, opinions, or recommendations relevant to the release

decision, and should be given the rights to make written submissions, call friendly witnesses, and cross examine adverse witnesses.[37] 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. In our model system (see Recommendation 7), victim participation should be permitted when a victim has information relevant to the prison-release decision, but the victim's input should be limited by principles of relevancy.

Quality controls on factfinding. In many states, there is no formal burden of proof a parole board must apply for its factual determinations. For example, in Tennessee, release is permitted only when the board is "*of the opinion* that there is reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the prisoner's release is not incompatible with the welfare of society." (Tenn. Code § 40-28-117(a).) A minority of states define the applicable burden as the "preponderance of the evidence" standard (e.g., N.H. Admin. Code Rules, Par. 210.02; N.J. Stat. § 30:4-123.53). Rules of evidence, and safeguards against the use of hearsay, are inapplicable at parole hearings (*Davis* 2004 (D.C.); *Hubbard* 2004 (Kan.)). 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 factfinding be consistent with the facts established when the prisoner was convicted, or those found by the sentencing court. "Real-offense" decisionmaking—that is, consideration of alleged crimes for which there has been no conviction—is the norm in American parole proceedings (Dawson 1966: 259; Tonry 1981; *Hemphill* 1991 (Ohio); Wis. Admin. Code § DOC 331.08).[38]

In a model parole-release system, there should be an articulated burden of proof for contested factual issues. Rights of challenge of adverse evidence, confrontation, and cross-examination are likewise integral. Parole boards should be prohibited from

[37] 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).

[38] 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. … [A]nything that an inmate may have done (and perhaps even some things that an inmate may not have done) in his or her life, but particularly while in prison, may be recorded in the file (Cohen 1999: vol. 1, 6-31).

litigating alleged offenses that are different from, or additional to, the convictions entered in court.

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

In our model system, states should create presumptive parole release guidelines comparable in spirit to the best presumptive sentencing guidelines, e.g., those in use in Minnesota, Washington, Kansas, and North Carolina (see Bergstrom et al. 2009). A key element is that release guidelines must have a measure of legal enforceability—they must be more than advisory in nature. Parole guidelines should be simple and straightforward, however, and (consistent with Recommendations 3 and 5) should incorporate only behavior in the institution predictive of successful reentry, an actuarial risk score, or both.

Reviewability of decisions. Decision standards have little integrity without a meaningful review process. This is lacking in virtually all current American parole systems (e.g., Utah Code § 77-27-5(3); Vt. Stat. § 454). In some systems, administrative review is technically available, but almost never operates as a real check on the board's discretion (Tenn. Code § 40-28-105(11); Davis 1969: 130). Oversight of any kind is hindered by the fact that many states do not require a transcript or verbatim record of parole proceedings (Cohen 1999: vol. 1, 6-52), and the general absence of requirements of reasoned explanations for decisions (*Glover* 1999 (Mich.); *Freeman* 1991 (Idaho); Georgia State Bd. of Pardons and Paroles 1982).[39]

A model system should provide 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 that of appellate sentence review in states that have instituted such a practice (see Frase 2013; O'Hear 2010; Reitz 1997). For conservation of resources, it may be acceptable to limit or withhold review from a first denial of release. Even with this concession, the provision of meaningful review for second and later denials would be a large improvement in the American law of parole. The standard of

[39] Some jurisdictions do require that reasons be given, but are not rigorous about the content of the explanations. Boilerplate, or a slight improvement on boilerplate, is often good enough (see Walker 1994 (N.Y.); Goins 1992 (Ill.); N.M. Stat. § 31-21-25(C)).

scrutiny applied by the reviewing court should become more and more searching for prisoners who are repeatedly denied release.

VII. Victims' Rights

Victims should have the right to submit impact statements or appear at parole hearings, but victim 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. To do otherwise violates the parole boards' primary objectives and undermines the prisoner's right to a fair hearing.

Victim participation in criminal justice used to end with the imposition of sentence. Correctional authorities assumed the responsibility for offenders sentenced to prison, and victims were neither consulted nor informed about conditional 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 (Roberts 2009; Morgan and Smith 2005). Today, crime victims have a wide range of rights, including being notified of all public proceedings in criminal cases, and the right to participate in many of those proceedings, including parole. In their comparative study, van Zyl Smit and Corda (2016) concluded that victims in American jurisdictions have much greater impact on prison release decisions than in European practice.[40]

The Crime Victims Rights Act (2004) enumerated the rights afforded victims in federal criminal cases, including "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." As such, the federal parole board is now required to: (1) notify victims of parole hearings; (2) allow victims to attend parole hearings and provide input; and (3) notify victims of release decisions. All fifty states now provide for similar rights, and virtually all states and the federal system now authorize victims to submit impact statements to paroling authorities (Kinnevy and Caplan 2008).

Paroling authorities report considering input from a variety of sources but more states consider input from the victim (94%) than any other source (e.g., district attorney, law enforcement, judge) (Kinnevy and Caplan 2008). As Morgan and Smith (2005) concluded: "The days when victims played a peripheral role as witnesses for the

[40] In Europe, victims are generally given substantial rights of participation in criminal trials, which often surpass victims' trial rights in the U.S., but strongly held values of proportionality and dignity in sentencing are thought to preclude most victim input at any stage of the sentencing process, including the prison-release decision (van Zyl Smit and Corda 2016; Kerner 2013; Pizzi 2000; Joutsen 1994).

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 also been argued that the submission of an impact statement at parole may achieve therapeutic outcomes for both the victim and the offender (Verdun-Jones and Tijerino 2005). But the principal reason victims submit a statement or attend a hearing is to oppose inmates' requests for parole. Many states allow victims to make parole recommendations, although this is prohibited outside the U.S. (Reeves and Dunn 2010).[41]

Research shows that very few victims actually submit an impact statement or appear at parole hearings, as most victims don't want to have to relive the crime (Roberts 2009). But research shows that as victim participation increases, parole denials also increase (McLeod 1989; Parsonage et al. 1994; Morgan and Smith 2005). In fact, several studies have found that victim testimony is more influential at parole hearings than at sentencing hearings (Roberts 2009). Morgan and Smith's (2005) rigorous study of parole decisionmaking 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." (pp. xx)

A recent survey of releasing authorities in the U.S. found that 40 percent of respondents acknowledged that victim input was "very influential" in their decisions to grant or deny release on parole (Kinnevy and Caplan 2008). Prisoners also appear to believe that the presence of the victim influences outcomes. Polowek (2005) found that almost a third of parole board interviewees believed that prisoners postponed or waived a hearing because of the likely presence of the victim.

[41] Most states also allow victims the opportunity to comment on the offender's request for parole. The NCVC overview says that as of 2000, 46 states allow victims to submit impact testimony in person, 42 states permit written victim impact statements to be submitted, six states authorize the submission of audiotaped statements, seven states permit victims to submit videotaped statements, three states allow victims to be heard via teleconferencing, and eight states authorize the victim's counsel or representative to present a statement on the victim's behalf. National Center for the Victims of Crime. 2000. "Victim's Rights at Parole: A Statutory Overview Summary."

It is now generally accepted that victim input can impact parole decisionmaking. As a result, victim advocates continue to push for expanded legal rights at parole hearings, and with advances in video-conferencing and other technology, victim participation is likely to increase.

But legal scholars have raised a number of concerns about the influence of crime victims in prison-release decisions. While most acknowledge the legitimate role victims have to play in the *sentencing* decision – since it is appropriate for the court to base the choice of sentence partly on the harm caused the victim – their input into *parole* decisions should be more limited. As Roberts (2009:xx) 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.* (italics added)

Allowing victims to testify also raises a number of practical and constitutional issues. Parole authorities should not "punish" inmates merely because a victim has chosen to appear and present an impact statement. If two inmates, convicted of the same crime, were both eligible and equally suitable for parole, the proper outcome would be for both to be paroled. However, if one victim is strongly opposed to parole, then they may be able to convince the Board to deny release. States run the risk of violating inmate's due process rights or interests by treating inmates differently merely because a victim statement is present in one case and not in another. Moreover, in cases of serious violence, when the offender has been sentenced to a long period of custody, the victim and the offender have probably had no contact for years. The victim probably does not know of the programs the inmate has participated in. The parole board is supposed to judge the inmates' future risk of violence, and on that calculation, the victims' description of the past harm suffered is less relevant.

And with a growing move to risk assessments, how are parole authorities to "score" a victims' input? How is the Board to incorporate unquantifiable information – such as fear of the inmate or disapproval of his or her release on parole – into its analysis? Is the Board to assume the absolute validity of any facts provided by the victim? If the victims' testimony is allowed to influence decisionmaking (e.g., is used as a reason for "departure") from the recommended risk-assessment, then again this produces inequity in parole release.

There are also serious concerns about due process. Due process safeguards are weaker at parole, where crime victims in many jurisdictions may offer opinions on the release of the prisoner in the absence of any opportunity for rebuttal (see Recommendation 6). The inmate is not usually represented by an attorney, has no ability to discover statements made against their release, and has no ability to respond or challenge the validity of the victim statements. To allow the victim, in essence, to "retry" the case – without any of the procedural protections present in the original court proceedings – seems to violate principles of procedural fairness.

These and other concerns lead us to recommend a limited role for victims at parole hearings. We believe that victim testimony should *not* include a recommendation for denial or release on parole, but rather be limited to comments on the conditions that might be imposed if parole *is* granted. We recommend specifically:

1. Parole boards should encourage victim participation for felonies involving victim injury. Victims and their families should receive notification well in advance of the hearings, and be encouraged to appear in person, by video conferencing, or through a written statement. Parole boards should consider the current trend to make victim impact statements "forever" so that the trauma and effort required for victims to make their views known is minimized. The victim could withdraw their prior formal statements from the parole proceedings—or add to them—but until they did so, their statement would remain in the file to be considered at each subsequent parole hearing. Better information and assistance should lead to a higher rate of participation, helping reduce differences attributed to the social class of the victims or their ability to articulate their experiences.
2. Each parole board should develop an information packet that clearly articulates the type of information the parole board is looking for. They should tell victims they are to provide information about the crime that is absent from an inmate's case files *and* relates to an inmate's parole risk. Victims should be told to focus on the degree to which the inmate may threaten the victim or others upon release. A clear statement should be given to the victim stating that the parole board is *not* looking for a recommendation for release. Victims should be told that the parole board is concerned with risk and rehabilitation and is not able to "re-sentence" the offender to reflect the victim's suffering. A clear statement of the purpose of the hearing should benefit victims by making the process more transparent and not raising expectations. Surely it must exacerbate victim frustration if they think their release recommendations were ignored.
3. Parole boards should standardize written impact statements by developing forms that victims are to remit to them. This is common practice around the world. Such standardization could help ensure that victim input occurs in virtually all cases, that no one victim impact statement inflames the minds of the paroling authorities,

and that every parole case receives comparable review and consideration. The forms might include questions such as:

- Has your offender (or his/her family or colleagues) attempted to contact you in any way that poses intimidation, harassment or potential harm?
- Do you have any suggestions that can help you feel more safe or secure if the offender is released to the community?
- Do you have any suggestions to the paroling authority that can hold the offender accountable, such as victim restitution or other legal/financial obligations?
- If the offender is released to community supervision, do you have suggestions for special conditions of release? These may include that the parolee be required to live in another city or county, or that the parolee has restricted contact with you.

The question is not whether victims should be heard at parole hearings—they certainly should—but rather how to direct and consider their testimony. By focusing the victims' testimony on setting appropriate supervision conditions *if* released, rather than on the release decision itself, we hope to balance respect for victims with respect for offenders and the rule of law.

VIII. Selective Use of Supervision

A period of parole or post-release supervision should be required for many, but not all, individuals leaving prison. Placement on supervision should be reserved mainly for those who present higher risks of reoffending, and those incarcerated for serious, violent, and/or predatory sexual crimes, regardless of risk level. It should also be made available to low risk offenders, who should be given the choice of "opting-in" or "opting-out" of supervision altogether.

It is well-known that the nation's incarceration rate has grown dramatically during the past 40 years, albeit with a modest decline in some recent years (Carson 2014; Travis and Western 2014). Often overlooked are two parallel developments: Alongside the prison boom, there has been a decades-long expansion in parole or "post-release" supervision populations and, simultaneously, an escalating growth in the number and proportion of offenders leaving prison unconditionally, having "maxed-out" their terms (Travis 2005; Herberman and Bonczar 2014; The Pew Charitable Trusts 2014). Policies and practices concerning "who" should be supervised after release (Recommendation 8),

and for "how long" (Recommendation 10), are primary contributors to the overall size of parole supervision populations.[42]

At yearend 2013, a total of 853,215 persons were on parole supervision, reflecting a rate of 350 per 100,000 adults. Of these, 111,226 were under federal jurisdiction, while 741,989 were supervised by state field services agencies with rates of 46 and 304 per 100,000 adults, respectively. Despite some variation in rates, the parole population has shown a mostly upward trajectory since 2000 with over 825,000 individuals under some form of post-release supervision on a yearly basis since 2007 (Herberman and Bonczar 2014).[43] Prior to the turn of the century, rates of expansion of parole populations were much greater (Ruth and Reitz 2003: 22-25).

While the parolee population has displayed a relatively steady growth during the past decade or so, the overall percentage of annual increase seems to have stabilized. Though the figure cited above for the 2013 yearend parole population is the second highest it has ever been, the annual average percentage of growth from 2000 to 2012 shows a slight change of roughly 1.3 percent per year (Herberman and Bonczar 2014). The shift from 2012 to 2013 equals only 0.2 percent, or an absolute change of 2,000 additional parolees.

From the mid-1920s to the mid-1960s, Travis (2005: 45) reports that 50%-60% of all offenders granted parole were subject to a term of community supervision. During the 1960s-1990s, the proportion of prisoners released conditionally was larger than in any of the preceding six decades (Travis and Lawrence 2002; Travis 2005). The percentage of conditional releases started growing as paroling authorities were abolished or lost much of their jurisdiction to grant discretionary parole, and as states began introducing sentencing reforms and moving towards determinate sentencing codes. During this time, the decision to release was decoupled from the decision to supervise in many states (Travis 2005; see Recommendation 10). Yet, the sentencing changes associated with greater determinacy at the federal and state level usually incorporated provisions for mandatory supervised release (Glaze and Bonczar 2011). Conditional release grew to a high of 87% in 1990. Since then there has been a slight decline to 78% of offenders in

[42] Though it is not a focus of this chapter, the revocation of parole or post-release control (and probation) represents a third parallel development. Since the 1980s, a very high percentage of prison admissions, more than half in some states, has been based on parole and probation revocations (Klingele 2013; Rhine 2012).

[43] Van Zyl Smit and Corda (2016) note that at yearend 2012 the very highest rates of parole supervision in Europe are comparable to the very lowest end of parole supervision rates in the United States. Most countries reporting data do not show any overlap revealing stark differences with the United States occupying the very high end of the continuum relative to its rates of post-release or parole supervision.

2000 to 75% leaving prison under conditional release in 2008 while fluctuating slightly since then.

Conversely, the share of unconditional releases, mainly prisoners who "max out" by serving their entire term in confinement, has shown a steady and pronounced increase for several decades, accounting for more than one in five releases in 2012 (Pew Charitable Trusts 2014: 1). The Pew Charitable Trusts reported that the number of offenders who maxed out in 43 states in 1990 totaled 47,519, while exceeding 103,831 in 2012, for an increase of 119 percent. Roughly one in seven offenders saw their prison sentence expire in 1990 (14 percent), while the comparable figure for 2012 was more than one in five (22 percent). There is enormous variation across states' max-out rates. In 2012, Florida released more than 21,000 offenders with no supervision in support, totaling 64 percent of all releasees. At the other end of the continuum, eight states had rates of less than 10 percent. Moreover, since 1990, much of the apparent growth of offenders who max out has been among non-violent drug and property offenders, not those convicted of serious or violent crimes (Pew Charitable Trusts 2014: 14).

The recommendations below reflect our conclusion that too many offenders are placed on parole or post-release supervision in the absence of a defensible rationale for doing so. Their presence, especially low risk offenders, exposes them to the "contingent liability" of future re-imprisonment (Klingele 2013: 1059 citing Scott-Hayward 2011), a well-documented trend that has exacerbated the nation's reliance on mass incarceration (Rhine 2012). At the same time, there are significant numbers of releasees who have maxed out, yet present great needs for reentry services and supervision. The failure to address in a strategic manner "who" is supervised strains and misaligns limited supervision resources, obstructing parole's core missions to promote public safety and positive reentry outcomes.

(1) A period of parole or post-release supervision should be required mainly for individuals exiting prison who present moderate to high risks of reoffending, and those incarcerated for serious, violent, and/or predatory sexual crimes, regardless of risk level.

Well-recognized scholars and organizations have called for a limited period of universal supervision for all offenders leaving prison (e.g., Travis 2005), some citing research that a period of supervision, "when implemented with fidelity to evidence-based practice, can reduce crime and corrections costs" (The PEW Charitable Trusts 2014: 6). Other highly-regarded academicians argue that post-prison community supervision is not always needed and is sometimes harmful. These authors note that supervision frequently results in the wasteful or criminogenic use of scarce resources, and some have urged the abolition of post-release supervision altogether (compare Horn 2001; Petersilia 2008; Scott-Hayward 2011; Klingele 2013; American Law Institute 2014).

Those released from prison display a variegated profile, not only in their current offenses and criminal histories, but where they fall on the continuum of risks and needs (Petersilia 1999; 2003; 2008; Mears and Cochran 2015). For some individuals, going to prison will be an episode that happens once in their lives, perhaps for a low level felony conviction, and they will return to the community with relative ease. Evidence shows that offenders who are first-time releasees are far less likely to recidivate than those with lengthy criminal histories who have been imprisoned on repeated occasions (National Research Council 2008).

It is important that the use of parole supervision be sensitive to the great heterogeneity among prison releasees, in a manner responsive first and foremost to their individual risk of reoffending (American Law Institute 2014). As a general matter, a term of post-release supervision should be reserved for individuals who present a moderate to high likelihood of reoffending following release. We would allow exceptions for those who have been convicted of serious sexual or violent crimes, where a low statistical probability of recidivism may be paired with a demonstrated propensity to victimize other people in especially harmful ways. For example, a low probability that an offender will commit one or more rapes may well justify the concentrated use of supervision and surveillance resources, even if the same low probability of repeated nonviolent crimes would not justify supervision at all.

(2) A period of parole or post-release supervision should be made available to low risk offenders who should be given the choice of "opting-in or "opting-out" of supervision altogether.

Low-risk releasees should be allowed to "opt-in" or "opt-out" of an abbreviated period of supervision, giving them the opportunity to exit prison without further state control. A sizeable number of low-risk individuals require assistance during their transition from confinement, and should be able to access reentry services through the field services agency (Scott-Hayward 2011; Rhine and Thompson 2011; Mears and Cochran 2015). We add one critical caveat to this plan: Low-risk offenders who "opt-in" should be held immune from revocation for technical violations.

IX. Conditions of Supervision

Parole supervision conditions should be as few in number as necessary given public safety concerns, and tailored to the specific needs and risks associated with the offender. Supervision conditions and resources should be concentrated for each person on the first few months after release, and supervision agents should have greater

authority than they currently do to modify conditions to facilitate offender motivation. Parole supervision fees should be abolished or severely limited.

When a prisoner is released and placed under the supervision of a parole agency, he or she must observe certain conditions of supervision. Discretionary parole release is, as conceived by the U.S. Supreme Court,[44] a privilege and not a right, and the release of an individual on parole has always been accompanied by certain conditions that the parolee must agree to abide by after release in order to remain at liberty in the community (National Parole Resource Center 2013). Even in determinate sentencing jurisdictions, where the parole board does not decide on the release date, paroling authorities still retain the primary role of setting conditions of postrelease supervision.[45] A few jurisdictions authorize supervising field agents to modify or change conditions, but most jurisdictions do not.

Parole Boards have broad discretion to set terms and conditions of release, although in many jurisdictions there are conditions that must be imposed because of the language in a statute or regulation (e.g., sex offender registration). As long as a condition can reasonably be said to contribute to either rehabilitation or the protection of society, the condition is likely to be held permissible unless it infringes on a parolee's basic constitutional rights. For example, a condition requiring church attendance would fall into the prohibited category because of a potential conflict with the first amendment's guarantee of the free exercise of religion (del Carmen 2001).

Defining the conditions of release is one of the most important roles of the parole board, as these conditions outline the responsibilities and obligations of all parties, and create an intended "roadmap" for future actions by the offender and the parole officer (Stroker 2010). Established conditions can be tools to shape and incentivize positive behavior, or if the conditions are too numerous or unrealistic, they may increase the failure rate.

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[44] Ughbanks v. Armstrong, 208 U.S. 481 (1908) held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In Escoe v. Zerbst, 295 U.S. 490 (1935), the Court's premise was that as a matter of grace the parolee was being granted a privilege and that he 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), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

[45] Although fewer release decisions are being made by parole boards, the majority of state prisoners (70%) are still released from prison to some type of conditional community supervision (Carson and Golinelli 2013).

Parole conditions vary throughout the country, although "standard" conditions—those routinely imposed on all parolees—typically include reporting to a parole officer, refraining from criminal activity, not possessing firearms, not traveling beyond a set distance, maintaining lawful employment and a residence, and refraining from drug and alcohol use. Most states also prohibit parolees from associating with known felons. "Special" parole conditions—tailored to the offender's specific needs and risks—often require the parolee to participate in substance abuse and recovery programs, perform community service, be monitored by GPS, attend education programs, and pay restitution and a variety of fees.

Parolees may also have "no contact orders" prohibiting their association with victims, and a growing number of parolees are now required to register with the police upon release. Originally begun for sex offenders, criminal registration is now required of many other classes of offense (e.g., arson, crimes against children, gang members, domestic violence, stalking). Importantly, all parolees must also agree to submit to searches of their residence, vehicle, or person at any given time by parole officers. Parole agents are equipped with legal authority to carry and use firearms; to search places, persons, and property without the requirements imposed by the Fourth Amendment (the right to privacy); and to order arrests without probable cause and to confine without bail. The power to search applies to the household where a parole is living and business where a parolee is working.

These and other conditions are often piled on top of one another and spelled out in a type of contract, which the parolee must sign stating that they understand and accept parole subject to all of the prescribed conditions. Failure to meet the imposed conditions can result in revocation of parole and a return to prison to serve out the remainder of their prison term.

Criminal justice policy has become progressively more punitive since the 1980s. As a result, the number of parole conditions has increased, the conditions imposed reflect surveillance more so than treatment, and a greater percentage of field agent time is devoted to monitoring compliance with the ever-increasing number of terms and conditions (Petersilia 2003). In a survey of parole authorities, Travis and Stacey (2010) identified 127 separate standard conditions of parole being imposed nationally, with an average of 19 standard conditions per jurisdiction. These standard conditions were greater in number than those reported in earlier time periods by Hartman et al (1996) and Travis and Latessa (1984). Travis and Stacey (2010) also found an increase in conditions that simply increase the level of supervision, such as increased drug testing, home confinement, intensive community supervision, and unannounced visits to the parolee's home and work, even though those strategies have not been found to reduce re-offending (Petersilia 2003).

Researchers have also documented a dramatic increase in the requirements that parolees pay fees and restitution. Not only were a greater number of agencies collecting parole supervision fees (usually $25-$40 per month), but agencies were ordering multiple fees from each offender. Ring (1988) identified more than 26 kinds of fees being used in the U.S. Many parolees are now ordered to pay supervision fees as well as fees for drug and alcohol testing and community service.[46]

Taken together, these parole conditions may be unrealistic and difficult to meet for any individual, but they are especially difficult for those with serious mental and physical deficits and who are already struggling to hold a job, support their family, and stay sober (Solomon 2008). As Jacobson (2005:150) so aptly put it, "Given all the social, economic, and health deficits of those coming out of prison, it becomes less than surprising that so many parolees are sent back to prison for rule violations. When one combines these problems with conditions that are routinely set for parole—no drug use, having a permanent address, having or actively pursuing employment, keeping all reporting and treatment appointments—a recipe for failure results."

This is not the whole of it. Beyond their set parole conditions, parolees will also face a series of obstacles as a result of a number of civil sanctions and collateral consequences associated with their felon status. In the last two decades, Congress and many state legislatures passed a host of laws and regulations restricting the kinds of jobs for which parolees can be hired, and restricting their access to public welfare and housing subsidies. For instance, those convicted of a felony drug offense may not reside in federally-funded public housing, or receive funding for public education. Since 1985, the number of jobs that convicts are barred from working in has increased dramatically – and ironically, the mostly commonly barred jobs are in the fields of childcare, education, nursing, and health care – exactly the same jobs that economists show are increasing the fastest (Petersilia 2003). In fact, it was estimated that 40% of the jobs in Florida were legally off limits to ex-offenders (Stinchcomb 2011). More jobs are also becoming unionized, and some unions flatly exclude ex-convicts from joining. Even where offenders can surmount these practical and legal challenges, two thirds of employers will refuse to hire them (Travis 2005).

The expansion of legal barriers has also been accompanied by an increase in the ease of checking criminal records due to new technologies and expanded public access to

[46] Diller et al. (2009) found that Maryland parolees, on average, were ordered to pay $753 in supervision fees over the course of their parole terms—despite the fact that most parolees are unemployed and unable to afford the fee. Nine out of ten parolees were unable to pay their supervision fees by the time parole ended, and the paper debt was transferred to the state's Central Collection Unit, which adds a one time 17 percent surcharge and continues to pursue collection.

criminal records through the Internet. Historically, criminal records were restricted to law enforcement and those with a "need to know." Today, as Jacobs (2015) documents, those restrictions have been lifted and, for all practical purposes, one's criminal past is public. The stigma associated with being a parolee severely limits housing, jobs, and pro-social relationships—all aspects necessary for successful reentry.

Not surprisingly, most parolees do not succeed. In 1984, 70 percent of parolees successfully completed their parole term. Today, less than half (48%) of all parolees successfully complete parole without violating a condition of release, absconding, or committing a new crime (Glaze and Bonczar 2011). As a result, nearly 200,000 parolees return to prison each year (Glaze and Bonczar 2011). For those parolees returned to prison, one third were returned for committing a new crime, and two thirds for violating their supervision conditions (Carson and Sabol 2012). Nationally, parole revocations have been the fastest growing category of prison admissions, and parole violators now account for about one third of all prison 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."

The reentry movement of the last decade has brought attention to the challenges parolees face (Petersilia 2003; Travis 2005). Scholars have noted that despite the fact that inmate needs have *increased*—more are mentally ill, illiterate, and addicted to substances—and rehabilitation programs in many prisons and communities have *decreased*, parole authorities are imposing *more* restrictions over a longer period of time.[47] Clearly, policies are needed that reflect the state's legitimate interest in public protection, but they should not, in and of themselves, diminish a parolee's motivation and ability to succeed.

In the last few years, several professional organizations have begun to focus on the importance of setting appropriate parole conditions. The National Parole Resource Center, funded by the U.S. Department of Justice in 2010, is currently engaged in a nationwide effort to educate paroling authorities on appropriate condition setting. Legal scholars involved in rewriting the Model Penal Code are also tackling this weighty issue (American Law Institute 2014; Klingele 2013), as are criminologists and practitioners interested in advancing evidence-based supervision practices. Fortunately, a review of the recommendations advanced by these disparate groups shows a great deal of overlap.

Many in the field agree that conditions of release should reflect what Carl Wicklund (2005), executive director of the American Probation and Parole Association, refers to as the "three R's" of supervision: They should be *realistic*—few in number and attainable;

[47] The mean time served on parole (in months) has been increasing, from 17 months in 2008 to 22 months in 2013 (Herberman and Bonczar 2014).

relevant—tailored to individual risks and needs; and *research-based*—supported by evidence that they will change behavior and result in improved public safety and reintegration outcomes. Expanding on these basic principles, we recommend the following:

1. **Standard conditions should be limited** in number, perhaps only including prohibitions against "committing any new crime," "reporting to the parole agent," "agreeing to warrantless search conditions," and "carrying a weapon." Blanket conditions go against proven evidence-based practices.
2. **A case-by-case review** should accompany the imposition of all other conditions. The selected target goals should be identified with a **validated risk-need assessment tool.**
    a. Low risk offenders might be released without any formal supervision or parole conditions. For these offenders, the sentence has ended.
    b. Resources should focus on high or moderate risk offenders. Matching interventions with assessed criminogenic needs of medium and high-risk offenders is a significant strategy for risk reduction and enhanced use of resources.
3. **Services and surveillance should be "front-loaded"** the risk of recidivism and need is the highest (i.e., first 6 to 12 months). Standard parole contracts should include commitments to parolees that, following a designated period of compliance, specified conditions of supervision will be removed or lightened, including forgiveness of some or all economic sanctions (American Law Institute 2014: § 6.09), and lengths of supervision terms will be shortened (see Recommendation 10).
4. All conditions should be limited to **two to three target goals at any time,** as behavior research suggests that human beings are only able to handle this more limited number.
5. Parole agencies should **take account of the available services** and resources in a parolee's community of return.
6. Conditions should include only those rules that the **parole authorities are prepared to consistently monitor and enforce**—in other words, realistic for parole officers as well as parolees.
7. Agencies should **abolish the parole supervision fee** outright in light of the inability of most parolees to afford it. As an alternative, agencies might implement a sliding scale fee tailored to individuals' financial circumstances, but no economic sanction should be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction (Reitz 2015a; Ruback 2015).
8. Parole authorities should allow **parole field agents greater flexibility** to modify certain conditions of release to incentivize parolees to change behavior. Rewards

or incentives should include modification of the conditions of supervision, forgiveness of economic sanctions, and shortening of length of supervision (i.e., earned discharge).

9. States should **eliminate the use of prison to punish technical (no new crime) parole violations unless they can be shown to be clear signs of dangerousness** (e.g., a child molester hanging around a school yard). California has done this since 2011 as a result of its Public Safety Realignment legislation, and the policy dramatically decreased prison and parole populations without significant increases in the state's overall reported crime rate (Petersilia 2014).

Most parolees fail to complete the terms and conditions assigned to them upon release from prison. Clearly the parole board has an obligation to assign conditions that protect the public, but the move away from a casework model and toward a crime control model in recent years may have increased parolees' vulnerability and worsened recidivism. Parole conditions should not be so burdensome that they prevent parolees who wish to go straight from doing so.

Paroling authorities must rethink intelligently and compassionately the relationship between parole conditions and successful reentry, starting with the presumption that parole conditions should be imposed sparingly and only when they correspond with the offenders' risk and needs. Imposing far fewer conditions on lower-risk parolees—combined with granting field agents more flexibility to modify those conditions and terms—should actually make communities safer, as field agents will see caseloads decline and their ability to watch and assist medium- and higher-risk parolees increase.

X. Length of 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 five years for higher risk levels, and for a period not to exceed twelve months for lower risk levels, except for those individuals convicted of serious, violent and/or predatory sexual crimes for whom the longer five-year maximum applies, regardless of level of risk. Those subject to parole or post-release supervision should be able to earn an early discharge, and the courts should make frequent use of presumptive early termination.

Any discussion about those who may be subject to parole or post-release supervision must invariably address the length of time attached to the term of conditional release. There is a rather sizeable variation associated with how many years individuals are expected to spend under community supervision following their incarceration in prison. However, as Klingele (2013) points out, in numerous instances periods of post-release supervision now extend far beyond the months and years spent prior to an offender's

release from confinement. In some states, the duration of post-release supervision may last for ten or more years, with lifetime supervision required for certain categories of offenses (most notably, sexual crimes).

Though a number of states regard the period of post-release supervision as separate from the balance of the prison term that remains, most states require a period of supervision equal to the unserved balance of the prison sentence (American Law Institute 2014). Additionally, in several jurisdictions, mandatory periods of supervision are specified by the class or level of felony conviction that resulted in the original sentence. A sampling of states illustrates the variation that is found drawn from the Parole Release and Revocation Project under the Robina Institute of Criminal Law and Criminal Justice.

- *Pennsylvania:* The length of supervision is attached to the maximum prison sentence ordered by the sentencing court. In essence, "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:* Post-release supervision terms are determined according to a schedule based on the inmate's underlying sentence and level of classification as delineated in Colo. Rev. Stat. Ann. § 18-1.3-401. Mandatory periods of parole are required ranging from one year to five years depending on this designation.

- *Missouri:* The length or term of post-release supervision cannot exceed the maximum sentence imposed at the time of sentencing on the original offense, although there is the possibility of lifetime parole or supervision for certain dangerous felonies and sexual offenses. *See* Mo. Rev. Stat. § 217.730(1). The parolee must be on supervision for three years before the Board can issue a final discharge, unless the sentence would expire before that date. *See* Mo. Rev. Stat. § 217.730(2).

The proposals that follow consider "how long" the period of post-release supervision should be, while at the same time, they revisit the "unserved balance of the prison term" requirement still in place in many jurisdictions.

(1) The length of supervision should be decoupled from the term of imprisonment, with the maximum statutory period limited to no more than five years for moderate to high risk levels, and for a period not to exceed

twelve months for lower risk levels. An exception is found limited to those convicted of serious, violent, and/or predatory sexual crimes for whom the longer term of five years applies, regardless of level of risk.

A recent report by the American Law Institute (2014: 91-92) recommends that the length of supervision be decoupled from the original term of imprisonment that was imposed, served or unserved. It also states that the period of post-release supervision should be limited to a maximum of five years for moderate to high risk offenders, though in a majority of cases, it is likely that one or two years will be all that is necessary. The reality of directing offenders to serve the unfinished portion of their prison sentence, or remain subject to the demands of supervision for 10 years, 20 years, or for a lifetime, accomplishes very little of public policy value (other than expose supervisees to the vicissitudes of the parole violations and revocation process). For offenders returning home who are lower risk, "opting-in" to no more than twelve months offers a sensible window of time to address transitional reentry needs for services and support.

This decoupling and the maxima associated with the issue of length are grounded in the requirement that parole or post-release supervision serve clearly identifiable public safety and rehabilitative purposes. The policy choices reflected herein pertain to the majority of offenders that may be subject to a term of supervision. There are notable exceptions in assigning the maximum length of supervision to those individuals leaving prison having been convicted of serious, violent, and/or predatory crimes in recognition that there are occasions where 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 presented by offenders are not invariably correlated with each other.[48]

Addressing the amount or dosage of supervision that is appropriate also acknowledges the unique experiences associated with "doing time" and the difficulties offenders encounter in navigating the myriad barriers embedded in prisoner reentry transitions (Mears and Cochran 2015). It also recognizes that the purposes driving an offender's duration on supervision should and can be made in a more strategic manner than is presently the case. There is a sizeable literature that points the way to aligning resources so they are concentrated on those

[48] There are risk assessment tools that have been constructed and validated for sex offenders, including the Static-99, and the Sex Offender Risk Appraisal Guide (SORAG). This discussion presumes these tools will be applied to individuals convicted for sexual crimes, regardless of whether the jurisdiction or agency in question uses other instruments for assessing offender risk.

presenting the greatest risk of recidivism, and the period of time when the likelihood of reoffending is at its greatest (Solomon 2008; See Recommendation 9).

This is because the probability of reoffending occurs early during the period of parole or post-release supervision. As a group, individuals released from prison not only represent a significant risk to reoffend, they tend to do so rather quickly (Travis 2005; National Research Council 2007). A well-known Bureau of Justice Statistics study found that the first year represents the period of greatest risk, accounting for nearly two-thirds of all recidivism subsequent to a three-year period following release (Langan and Levin 2002). The prevalence of recidivism showed progressively smaller percentage increases during the second and third years. These findings highlight that there are diminishing returns associated with each successive year of supervision relative to the proportion of ex-offenders subject to surveillance and treatment (American Law Institute 2014).[49]

(2) Those subject to parole or post-release supervision should be able to earn an early discharge, with opportunities provided for the granting of a presumptive early termination.

For those subject to parole or post-release supervision, opportunities should be provided to earn an early discharge or termination (Solomon et al. 2008; Petersilia 2007; Scott-Hayward 2011; American Law Institute 2014; Klingele 2013). Some states already make this option available based on the parole board's decision that the offender has been sufficiently rehabilitated, or alternatively, through the accrual of earned-time credits (e.g., Colorado; NC; ND; NV). The provision of early discharge offers offenders an important incentive to comply, perhaps most significantly, over the course of the first year (or two) of supervision when the likelihood of violating the conditions of supervision and/or recidivism is greatest. The requirements for obtaining an earned discharge should be reasonable, clearly specified, and communicated to those under supervision. The expectations should

[49] It is evident, however, that the likelihood of recidivism does not disappear completely. A recent Bureau of Justice Statistics study found that in extending the period from three to five years' post-release, over three quarters (76.6%) of a cohort of offenders released in 2005 were rearrested (Durose et al. 2014). However, this same report confirmed that more than one-third (36.8%) of this same cohort were arrested within the first six months following release, with the percentages falling each year thereafter to 13.3% in the fifth year. Other research suggests that after six or seven years offenders' risk levels begin to approximate "the risk of new offenses among persons with no criminal record" (Kurlychek, Brame and Bushway 2006; Blumstein and Nykamora 2009).

be inclusive of, but not limited to, offenders whose risk shows evidence of decline from a higher to a lower level due to prosocial behavior. Even more, presumptive early termination from parole or post-release supervision should be granted to individuals who achieve behavioral criteria that have been set forth requiring full and sustained compliance over a pre-established period of time.

It often goes unnoticed that the reliance on parole and post-release supervision remains the dominant infrastructure presently in place to manage the "inside-out" continuum associated with reentry; not just the risk of reoffending, but of even greater importance, the transitional needs returning prisoners must negotiate upon release.[50] Acting in a manner that is responsive to the pronounced immediacy of offenders' reentry needs at release will require a significant rebalancing in most parole agencies given their prevailing commitment to a philosophy of supervision emphasizing monitoring, surveillance, and control (Scott-Hayward 2011; Rhine 2012). The realignment of agencies' post-release infrastructure must, of necessity, target moderate to high risk offenders. However, it must also be available for those individuals presenting a lower risk level, yet have "opted-in" to take advantage of transitional assistance while under supervision.[51]

CONCLUSION

Although the momentum to abolish discretionary parole release has receded, the credibility of paroling agencies across the U.S. remains fragile. A recent national review of parole boards documented serious shortcomings in policy and performance (Schwartzapfel 2015). A report issued by the New York Permanent Commission on Sentencing (2014) recommended the elimination of discretionary parole release while promoting a determinate sentencing structure. In Virginia, opposition surfaced immediately when the Governor created a Parole Review and Update Commission to

[50] If one of the primary purposes driving supervision is attending to public safety, the other, interrelated purpose, is promoting positive reentry outcomes. The past decade and more has experienced a notable growth in the commitment to prisoner reentry across the field of corrections (Petersilia 1999; 2003; Travis 2005; Rhine and Thompson 2011). It is evident, however, that the experiences associated with imprisonment leave many offenders ill-equipped and poorly prepared to cope post-release (Mears and Cochran 2015).

[51] This represents a serious concern, one that may require shifts within an agency's division of labor. It may be necessary, as Scott-Hayward (2011) suggests, to create a reentry specialist position, bifurcating the roles to ensure the outcomes that are sought.

consider the restoration of traditional parole release (Office of the Governor, Press Release, June 24, 2015).

There is emerging recognition by parole boards and leading practitioners of the need to rethink processes of discretionary parole release (Paparozzi and DeMichele 2008; Papparozzi and Guy 2009). The relatively new National Parole Resource Center engages paroling authorities across the nation, sharing research-driven knowledge, and tools tied primarily to evidence-based practice, while lending site-specific technical assistance. The Bureau of Justice Assistance recently 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 designing strategies for strengthening their state's parole system, inclusive of enhancing collaboration between governor's offices and paroling authorities. In 2013, The Robina Institute of Criminal Law and Criminal Justice launched a multi-year project to study prison-release practices across the country, while working directly with selected states to improve their systems.

It may be an auspicious time to rethink the future of parole boards. Recently there has been a discernible shift in the national discourse of criminal justice policy. Support for the reigning paradigm of mass incarceration has diminished, prison population growth has ebbed, the President and members of both parties of Congress 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; Petersilia and Cullen 2015; Travis 2014; Travis and Western 2014; Brennan Center for Justice 2015). Though much of the infrastructure associated with mass incarceration is still intact (Tonry 2014), paroling authorities are well positioned to play a crucial role in the engineering of a new prison policy during the coming decades.

Any reconfiguration of paroling authorities must acknowledge the sobering shortfalls in current practice, while framing a new and more credible narrative for the work they do. A sustained effort of this kind has been needed for some time. For decades parole boards have operated in the background, eclipsed by the attention paid to the development of determinate sentencing structures. Prospects for improvement of indeterminate sentencing systems have remained "a blind spot for lawmakers, courts charged with constitutional review, and many academics" (Reitz 2015). Indeed, one early reviewer of this paper said that he found it "quaint" to be asked to comment on a paper focused on parole release—a policy area he thought had fallen to the wayside long ago.

Our 10 Point Plan offers paroling authorities long-term, systemic guidance centering on major institutional reforms. We believe that it meets the most telling criticisms of indeterminate sentencing systems (Frankel 1973; American Law Institute 2007:

Appendix B). Some of the proposals will require statutory changes, while others will necessitate significant revisions in the policies and tools used to effect release decision-making. The reforms, if adopted, will clearly define the respective jurisdictions of sentencing judges and parole boards. They will go a long way toward achieving foundational goals of fairness, effectiveness, efficiency, and restraint in the use of incarceration.

For our recommendations (or any similar proposals) 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 has been distressingly low in most states, leading to what might be referred to as the "black box" of parole release. There is an urgent need to create a framework of common metrics for indeterminate sentencing systems, and a normative scorecard that incorporates research across jurisdictions—including international comparisons (Reitz 2015). As with other major criminal justice institutions, model paroling agencies should have the capacities to monitor, evaluate, and improve their operations over time.

A number of key issues present themselves for future study, including the following: 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 within an institution to offender need? 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 post-release? Are some parole conditions more effective in reducing recidivism (or 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 (see, e.g., Recommendation 6).

Taken as a whole, we believe that a "reinvented" indeterminate sentencing system that satisfies our 10 requirements could be recommended to all states that wish to maintain a structure of judicial sentencing authority shared with substantial parole-release discretion (Tonry this volume; Chanenson 2005). We believe that a well-designed indeterminate system could rival the success of the current "Minnesota-model" sentencing systems, which rely on a determinate structure (the abolition of parole release discretion) together with presumptive sentencing guidelines and engineered controls on prison population growth. Future decades may call for new models as the needs of state

sentencing systems change. The last several decades were characterized by strong nationwide pressures toward prison growth—an unprecedented phenomenon for any society. In that historical environment, the "better" American sentencing systems were those that created mechanisms to inhibit, accurately project, and exert a measure of control on the runaway process of prison expansion.[52] In the coming decades, if one credits the stated intentions of political leaders in both parties, the nation's most important criminal justice project may be one of "mass de-incarceration." The directionality of pressures felt by actors throughout the criminal justice system may be thrown into reverse. Such a changed landscape may call upon states to develop new or expanded release capacities to help unwind the punitive policies of the past. We hope that American paroling agencies will help rise to this challenge.

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Table 1. Ten-Point Plan for Improvement of Parole Release Systems

Recommendation 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 decisionmaking. In pursuing these goals in the American context, 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.*
Recommendation 2. How Much Release Discretion? *The amount of prison-length discretion given releasing authorities should not eclipse the sentencing discretion of courts, and for most cases should not exceed 25 to 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 judicial sentencing and the prison-release stage.*
Recommendation 3. Grounds for Release Decisions. *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.*
Recommendation 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 these tools' statistical underpinnings, as well as their applications to individual offenders.*
Recommendation 5. Decision-Making Tools. *Decision-making tools should be structured, policy-driven and transparent. Parole boards should adopt parole guidelines systems that govern the consideration of offenders for release. The guidelines should establish presumptive release dates tailored to the varying risk levels and readiness for reentry presented by offenders. Paroling authorities should develop capacities to promulgate, monitor, revise, and enforce compliance with the guidelines system.*
Recommendation 6. Process; Prisoners' Rights. *Processes for parole release decisions should be improved to more closely resemble an original sentencing hearing. Prisoners'*

procedural rights should be given increasing weight if they are denied release on successive occasions. The adequacy of parole release procedures should be measured by: resources per decision, meaningfulness of hearing, ability of prisoner to prepare and present a case, rules for victim participation, quality controls on factfinding, administrable decision rules, and reviewability of decisions.
Recommendation 7. Victims' Rights. *Victims should have the right to submit impact statements or appear at parole hearings, but victim 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. To do otherwise violates the parole boards' primary objectives and undermines the prisoner's right to a fair hearing.*
Recommendation 8. Selective Use of Supervision. *A period of parole or post-release supervision should be required for many, but not all, individuals leaving prison. Placement on supervision should be reserved mainly for those who present higher risks of reoffending, and those incarcerated for serious, violent, and/or predatory sexual crimes, regardless of risk level. It should also be made available to low risk offenders, who should be given the choice of "opting-in" or "opting-out" of supervision altogether.*
Recommendation 9. Conditions of Supervision. *Parole supervision conditions should be as few in number as necessary given public safety concerns, and tailored to the specific needs and risks associated with the offender. Supervision conditions and resources should be concentrated for each person on the first few months after release, and supervision agents should have greater authority than they currently do to modify conditions to facilitate offender motivation. Parole supervision fees should be abolished or severely limited.*
Recommendation 10. Length of 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 five years for higher risk levels, and for a period not to exceed twelve months for lower risk levels, except for those individuals convicted of serious, violent and/or predatory sexual crimes for whom the longer five-year maximum applies, regardless of level of risk. Those subject to parole or post-release supervision should be able to earn an early discharge, and the courts should make frequent use of presumptive early termination.*