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THE DECISION TO GRANT OR DENY PAROLE: A STUDY OF PAROLE CRITERIA IN LAW AND PRACTICE*

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Discretion is exercised at all stages of the criminal justice system. Police sometimes make decisions not to arrest suspects despite adequate evidence for doing so.¹ Prosecutors may not prosecute, or not fully prosecute, those against whom they have evidence sufficient to obtain a conviction. Trial judges sometimes dismiss cases or acquit defendants for reasons unrelated to guilt or innocence. After conviction, trial judges usually exercise great discretion in sentencing. And the decision to grant or deny parole lies almost entirely within the discretion of the parole board.

*This article is a by-product of my participation in the analysis phase of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. The ABF study, underwritten by a Ford Foundation grant, is concerned primarily with isolating and identifying critical problems in criminal justice administration. It is based upon detailed observation of the actual practices of police, prosecutors, courts, and probation and parole agencies in Kansas, Michigan, and Wisconsin during 1956-57. The conclusions of the article, as well as the numerous illustrations and interviews cited, are drawn from the material compiled for the Survey, although to avoid endless citation to it, this has not always been indicated.

For a brief discussion of the field research methods used see AMERICAN BAR FOUNDATION, *THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES* 38-44 (1955). Two volumes of the study, LAFAYE, *ARREST* (1965), and NEWMAN, *CONVICTION* (1966), have been published. Volumes on detection, prosecution, and the sentence will be published soon.

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1. For a detailed discussion of police discretion not to invoke the criminal process against the probably guilty see LAFAYE, *ARREST* 61-164 (1965); Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960).

The parole board's discretion, like the discretion exercised by other criminal justice agencies, is as a practical matter free of legal controls. It is virtually impossible in an individual case to challenge a parole board decision successfully by legal processes. Not only are provisions lacking for effective judicial review, but there are few legal standards to which the decisions must conform. When discretion has been granted, its exercise is often regarded as a matter not of concern to the law and lawyers—the law sets the boundaries of discretion; it does not interfere with decisions within those boundaries.

The fact that a decision-maker has discretion does not excuse a lawyer for abandoning inquiry into a decision-making process. It is important to understand how discretion is exercised, even when there is very little that can presently be done to challenge a given decision; the lawyer must know whether there is a need to create control devices, and if so, which are feasible and will produce the fewest unwanted side effects. Knowledge of a discretionary decision-making process cannot be obtained simply by reading appellate cases. Different research techniques must be employed to discover the factors that influence discretion. The purpose of this article is to report the results of field research into the exercise of discretion by parole boards in Kansas, Michigan, and Wisconsin, and to suggest some of the difficulties likely to face those who undertake the task of effectively controlling parole board discretion.

I. PAROLE DECISION-MAKING

The process of making parole decisions begins even before incarceration; the timing of release on parole is significantly and purposely affected by decisions made at the charging and adjudication stages of the criminal justice system. For a wide variety of reasons, including limitations upon enforcement resources and considerations of "public welfare," police and prosecutors frequently do not charge a defendant with all the offenses for which they have sufficient evidence of guilt, thereby limiting the use of consecutive sentences where those are permitted by law. Also, they frequently do not charge the most serious offense possible or may not invoke an habitual criminal statute against a defendant with a prior criminal record. The obvious effect of these decisions is to impose limits on the duration of incarceration which would not otherwise exist.

Similarly, the adjudication process has a significant impact upon the parole board's decision. The vast majority of convictions occur upon guilty pleas. A major reason for this is the practice of plea bargaining; the defendant agrees to plead guilty in exchange for leniency in the disposition of

his case, for example, probation consideration, a charge reduction, or a shorter sentence.² For those defendants who are incarcerated following a bargained plea of guilty, the adjudication process imposes limits on the parole board's ability to defer release.

Charging and adjudication decisions which affect the parole decision are made, in part at least, for that very purpose. For instance, there is considerable evidence that an important reason defendants bargain for guilty pleas is to eliminate the possibility of a long sentence which, although the parole board has the power of earlier release, would create the possibility of a long period of incarceration.

There are significant variations among the laws of the states concerning the extent to which the trial judiciary may participate in determining the length of incarceration.³ In many states, the trial judge has discretion to select the maximum sentence, within statutory limits, and may thereby limit the duration of incarceration.⁴ In other states, the trial judge has authority to select the minimum sentence and can thereby determine the parole eligibility of the offender.⁵ In either event, the trial judge's sentencing decision has a significant, direct impact on the parole decision.

Some states have attempted to eliminate trial judge participation in determining the length of incarceration by requiring imposition of a sentence provided by statute. In Kansas⁶ and Michigan,⁷ for example, the trial judge

2. See NEWMAN, CONVICTION 76-130 (1966); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L., C. & P.S. 780 (1956); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

3. See generally Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960).

4. For example, the trial judge in Wisconsin has discretion to select the maximum sentence within the limits imposed by the legislature. WIS. STAT. ANN. § 959.05 (Supp. 1966). The trial judge does not select a minimum sentence. Minima are provided by statute, and the inmate attains parole eligibility when he has served his statutory minimum sentence, one-half of his judicial maximum sentence, or two years, whichever is shortest. WIS. STAT. ANN. § 57.06(1) (Supp. 1965). First degree murder is punishable by life imprisonment, but the trial judge must impose the life sentence. WIS. STAT. ANN. § 959.05 (Supp. 1966). Parole eligibility is attained when the inmate has served twenty years, less allowances for good behavior within the institution (which may reduce the minimum to as low as 11 years and 3 months). WIS. STAT. ANN. § 57.06(1) (Supp. 1965).

5. In Michigan, for example, the trial judge has discretion to select the minimum sentence. MICH. STAT. ANN. § 28.1081 (Supp. 1965). Parole eligibility is attained when the inmate has served his judicial minimum sentence, less allowances for good behavior. MICH. STAT. ANN. § 28.2304 (Supp. 1965).

6. Kan. Laws 1903, ch. 375, § 1, the provision in effect at the time of the ABF field survey, required the trial judge to impose both the maximum and minimum sentences provided by statute. In 1957, the trial judge was authorized to select the mini-

is required to impose the maximum sentence provided by statute for the offense of which the defendant was convicted. The purpose of such provisions is to eliminate the possibility of trial judge imposition of maxima which force release of defendants prematurely. In part, attaining the objectives of such statutes is obstructed by the practice of charge reduction in exchange for guilty pleas; the statutory maximum attached to a less serious offense than that which the evidence supports is imposed instead of the longer statutory maximum attached to the offense originally charged.⁸ This practice diminishes the parole board's scope of discretion contrary to legislative intent.

In other situations, mandatory sentences are intended to restrict the discretion both of the sentencing judge and the parole board; this is the case with regard to the mandatory minimum sentence which is quite long. The usual response to such legislation is to reduce the charge (in exchange for a plea of guilty) to one which carries a lower mandatory minimum sentence or which permits the trial judge to exercise discretion in setting the minimum.⁹

In most states, there are statutory parole eligibility requirements which must be met before the parole board is authorized to release an inmate. Normally, parole eligibility is attained when the inmate has served his minimum sentence, his minimum sentence less allowances for good institutional behavior, or a percentage of his maximum sentence, depending upon the jurisdiction. In many states, certain offenders are excluded from the possibility of parole.¹⁰ These legislative restrictions on the authority of the parole board to release inmates from prison are subject to considerable administrative manipulation. If an inmate is ineligible for parole because he

imum sentence but was still required to impose the maximum provided by law. KAN. STAT. ANN. § 62-2239 (1964). The provision permitting the trial judge to select the minimum sentence has been declared void because of vagueness. *State v. O'Connor*, 186 Kan. 718, 353 P.2d 214 (1960).

7. For most offenses, the Michigan trial judge is required to impose the maximum sentence provided by statute and has discretion to select the minimum sentence, but for several offenses punishable by life imprisonment the trial judge is authorized to select both the maximum and minimum sentences. MICH. STAT. ANN. § 28.1031 (Supp. 1965).

8. For a detailed discussion of this response to mandatory sentencing provisions see Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

9. In Michigan, the offense of sale of narcotics is punishable by a mandatory minimum sentence of 20 years. MICH. STAT. ANN. § 18.1122 (1957). The routine response is to reduce the charge to possession of narcotics, which permits the trial judge to select the minimum sentence. MICH. STAT. ANN. § 18.1123 (1957).

10. For a brief but useful description of existing parole eligibility requirements see MODEL PENAL CODE § 305.10, comment (Tent. Draft No. 5, 1956).

is serving a life sentence or because he has not yet served a rather high minimum sentence, it is common for the executive clemency power of commutation of sentence to be used to give him immediate parole eligibility, thereby permitting his release when the parole board deems proper.¹¹ The obvious effect of these practices is to enlarge the parole board's discretion and to frustrate legislative intent in determining parole eligibility.

The information available to the parole board concerning an inmate whose case it is considering is of obvious importance. The parole board cannot give weight to factors in the case about which it has no information, and while a parole board may (and does) disregard certain information made available to it on grounds of irrelevancy, the availability of information at least creates the opportunity for its use in decision-making. In Kansas at the time of the field survey, the parole board had very little information upon which to base its decision. It had only a brief description of the offense, the sentence, a record of disciplinary violations while in the institution, and a notation of whether any detainers were on file against the inmate. By contrast, in Michigan and Wisconsin, the parole board was provided with a presentence report, inmate classification reports, progress reports by institutional personnel, reports on inmates participating in therapy, and an institutional summary and recommendation, as well as the basic information provided in Kansas. The information made available in the latter states permits the parole board to take into account factors which it could not were it given only the information provided the Kansas parole board.¹²

Once the parole board arrives at a decision, there is very little effective review. In two of the three states studied, there is, in a formal sense, administrative review of the parole board's decision. In practice, this amounts to little more than giving formal approval to the decision made by the parole board and, furthermore, only decisions to grant parole receive even this modicum of review.¹³ In none of the three states is there judicial review of parole board decisions.¹⁴

11. In Kansas, commutation of sentence occurred in 225 cases in an 18-month period; during approximately the same period about 750 inmates were paroled from the state penitentiary. KANSAS LEGISLATIVE COUNCIL, REPORT AND RECOMMENDATIONS: THE PENAL AND CORRECTIONAL INSTITUTIONS OF THE STATE pt. II, Special, at 19 (1956).

12. In Michigan and Wisconsin, one of the prime considerations in the decision to grant or deny parole is any change in the inmate's attitude toward himself, his offense, and persons in authority. In Kansas, since information of this kind is lacking, the parole board cannot base its decisions on that consideration. See text accompanying notes 18-24 *infra*.

13. In Kansas, the parole decision is made at the conclusion of the parole hearing. Parole board decisions made at the penitentiary were in theory recommendations to the governor because by statute his assent was necessary to make a parole grant valid. Kan.

II. PAROLE CRITERIA IN PRACTICE

In practice, the parole decision is based upon numerous considerations, only some of which are reflected in the statutes which provide the legal criteria for the decision.¹⁵ It is useful to group these considerations into three categories, although, admittedly, this introduces an element of artificiality into the analysis. In one category are the factors which a parole board considers for the purpose of determining the probability of recidivism by the inmate if released on parole. A parole board is vitally concerned

Laws 1903, ch. 375, § 9. The governor's consent is not necessary for paroles from the reformatory and women's prison. KAN. STAT. ANN. §§ 76-2315, -2505 (1949). In practice, however, the governor's consent was given automatically and there was no actual gubernatorial review of the parole board's decision. The 1957 revision of the Kansas parole laws eliminated the requirement of consent of the governor. KAN. STAT. ANN. §§ 62-2232, -2245 (1964).

In Michigan, legal authority to grant parole is placed in the five members of the parole board, to be exercised by a majority of the five. MICH. STAT. ANN. § 28.2305 (1954). Only two members of the parole board conduct parole hearings. Prior to the hearing, a third member has examined the case file and has voted to grant parole, deny parole, or defer to the judgment of the two hearing members. If he has voted to deny parole, a second board member reviews the case and votes. If the hearing members' votes combined with those who have reviewed the file constitute a majority vote of the board either for or against parole, that is the decision of the parole board and there is no further review. If a majority vote is not obtained after the hearing, the case is referred to an executive session of the entire parole board; it is discussed, and a vote is taken. There is no administrative review of a parole board decision.

In Wisconsin, legal authority to parole rests with the Director of the State Department of Public Welfare. WIS. STAT. ANN. §§ 57.06, .07 (1958). The parole board is an advisory group to the Director. Three members of the parole board conduct hearings. If the hearing members decide to grant parole, they forward that recommendation to the Director for his approval. If only two of the three hearing members vote to grant parole, the decision is reviewed by the Director of the Division of Corrections within the State Department of Public Welfare. A unanimous vote of the hearing members almost always receives approval from the Director of the State Department of Public Welfare. When there is a split vote, the Director of Corrections usually votes with the two affirmative votes and parole is ultimately granted. Parole board decisions to deny parole are not reviewed.

Administrative review of the parole decision performs almost none of the functions which are normally associated with administrative review. The reviewing authority is likely to consider only the effect of the grant on the public relations of the parole system. For example, in recent years only one Wisconsin parole board decision to grant parole has been "vetoed" by the Director and that was on the ground that a parole would result in great criticism of the parole system because of the extensive publicity surrounding the original offense and the relatively short time the inmate had been in prison. For a discussion of the impact of public criticism on the parole board's decision see text accompanying notes 91-94 *infra*.

14. MICH. STAT. ANN. § 28.2304 (Supp. 1965); see, *e.g.*, *Garvey v. Brown*, 99 Kan. 122, 160 Pac. 1027 (1916); *Tyler v. State Dep't of Pub. Welfare*, 19 Wis. 2d 166, 119 N.W.2d 460 (1963).

15. For a detailed discussion of statutory parole criteria see Part III *infra*.

with the probability of recidivism. That is viewed as the index of the extent to which the inmate has been rehabilitated; it is also some measure of the risk to society which his release would entail.

Recidivism probability is by no means the sole concern of a parole board. A second category of factors consists of those which, in the view of a parole board, justify granting parole despite serious reservations about whether the inmate will recidivate. Indeed, in some instances, a parole board may believe an inmate is very likely to commit a criminal offense if released but, for other reasons, may feel compelled to grant parole. A third category, the converse of the second, consists of those factors which, in the view of a parole board, justify a parole denial despite its own judgment that if released the inmate would be very unlikely to recidivate.

A. The Probability of Recidivism as a Consideration in the Parole Decision

A basic consideration in the decision to grant or deny parole is the probability that the inmate will violate the criminal law if he is released. If for no other reason, parole boards are concerned with the probability of recidivism because of the public criticism which often accrues to them when a person they have released violates his parole, especially by committing a serious offense.¹⁶ But they also regard the parole decision as an integral part of the rehabilitation process and consider the probability of recidivism to be an index of the extent to which the inmate is rehabilitated.

Parole boards do not use a fixed or uniform standard of recidivism probability to determine whether an inmate should be paroled. A parole board may demand a low probability of recidivism in some cases while it may be satisfied with a very high probability in others.

It is clear from the field study that in no case does a parole board require anything approaching a certainty of non-recidivism. Considering the nature of the judgment involved, that would be an unreasonably high standard. It is also clear that in all cases the parole board requires at least some evidence that the inmate may make his parole; it is difficult to imagine a parole following a statement by an inmate that he will immediately commit a new offense, no matter how minor. The standard varies, then, from great doubt as to parole success to great confidence that the inmate will make it through his parole period and beyond without a mishap.

16. A parole board is likely to think of the probability of recidivism in terms of the probability of parole success. A parolee who completes his parole period without revocation of his parole is a success; one who has his parole revoked—in most cases for conviction of or commission of a new offense—is a failure.

The standard varies depending upon a number of factors. It varies according to the seriousness of the offense which the parole board anticipates the inmate will commit if he violates his parole. If a parole board believes an inmate has assaultive tendencies and that if he violates parole he will do so by committing a physical assault, perhaps homicide, it will demand a great deal of proof that he will not recidivate before it releases him. If an inmate has limited his offenses to forgery, however, and it seems unlikely he will do anything more serious than violate parole by becoming drunk and forging a check, the board may use a considerably lower standard of likelihood of parole success. There are a number of other factors which raise or lower the standard.¹⁷

While the probability of success required varies from case to case, the factors to which the board looks to determine the probability remain relatively constant. Obviously not all of them are present in every case. A number recur with sufficient frequency to permit isolation and discussion.

1. *Psychological Change*

Illustration No. 1: The inmate, age twenty-three, had originally received a two to five-year sentence for auto theft. He was paroled and was returned to the institution within four months for parole violation. About three months after his return, he and two other inmates escaped from within the walls. He was apprehended quickly and was given a three to six-year sentence for the escape. Two and one-half years after the escape he was given a parole hearing. Despite his escape record, he was recommended for parole by the institution screening committee. The psychologist's report showed that he received frequent counseling and had apparently benefited from it. A parole board member asked him the usual questions concerning any altered viewpoint on his part or any change that had taken place within himself. The inmate was able to explain that he had begun to understand himself better after many talks with the psychologist and felt that his past behavior would not be repeated since he now understood how senseless it had been. The psychologist's report indicated the inmate had actually gained much insight into his motivation. The board unanimously decided to grant parole.

The indication of parole success most frequently searched for at parole hearings in Michigan and Wisconsin is evidence of a change in the inmate's attitudes toward himself and his offense. This is commonly referred to as an inmate's gaining "insight" into the problem which caused his incarceration. This criterion is based on the assumption the offense was the result of

17. For a discussion of many of these factors see section B, *The Decision to Grant Parole for Reasons Other Than the Probability of Recidivism*; and section C, *The Decision to Deny Parole for Reasons Other Than the Probability of Recidivism*; *infra*.

a personal problem, and unless some gains are made in solving that problem the likelihood of recidivism is high. Rehabilitation, then, becomes a matter of changing the problem aspects of the inmate's personality.¹⁸ There are some cases in which the parole board apparently feels the offense was truly situational—that is, the result of a peculiar combination of circumstances external to the inmate which are unlikely to recur.¹⁹ These are rare, however, and it is an unusual case in which a parole board becomes convinced of reformation without some basic personality change. Paroles are often granted without evidence of psychological change,²⁰ but it is clear the parole board considers it the best indication of successful adjustment on parole.²¹

In Kansas, evidence of psychological change is usually not a factor in the parole decision. This is not necessarily because the parole board considers it to be irrelevant. Rather, it seems to be based on the fact that at the time of the field survey the parole board had very little social and psychological data on parole applicants. There were also no programs in the institutions for aiding in changing attitudes, and the time spent in parole hearings was inadequate to permit questioning beyond cursory inquiry into disciplinary infractions and the parole plan.

The factor of psychological change is frequently expressed in terms of when the inmate has reached his peak in psychological development. The problem of parole selection becomes one of retaining the inmate until he has reached his peak and then releasing him; incarceration after this point is regarded as detrimental to adjustment on parole.²² Often the institutional summary and recommendation, prepared specially for the parole board, will indicate that further incarceration will not help the inmate—that the institution has done as much for him as it can. Conversely, when an inmate is receiving counseling or therapy and it is reported that he has made some

18. Probably the most dramatic examples of psychological change occur in the plastic surgery cases. In one case in Michigan, the parole board gave as the major reason for the parole of a long-time recidivist the fact that plastic surgery on his disfigured nose gave him an entirely different attitude toward life. For a description of the plastic surgery program at the Connecticut State Prison at Somers see National Council on Crime & Delinquency News, Jan.-Feb. 1965, p. 3.

19. See pp. 264-65 *infra*.

20. See section B, *The Decision to Grant Parole for Reasons Other Than the Probability of Recidivism, infra*.

21. The emphasis placed by parole boards on psychological change creates problems when dealing with mentally defective inmates because of the extreme difficulty of effecting change with present prison resources.

22. Often when the parole board releases an inmate who has served a long sentence, it will refer to psychological change in the inmate in terms of maturation. Some parole board members have remarked that for certain types of offenders the only hope of rehabilitation lies in the slow processes of maturation.

gains in insight but more can be done, the parole board is likely to take the position that the inmate has not reached his peak and will deny parole to permit further treatment. Alcoholics and narcotic addicts seem unique in that the parole board apparently takes the position that the longer the incarceration the better the chances of rehabilitation. These inmates will sometimes be denied parole at the initial hearing for this reason despite other favorable factors.

Parole board members recognize that it is often very difficult to apply the criterion of psychological change. A member of the Michigan parole board stated: "A parole board's most difficult task is to determine if any worthwhile change has taken place in an individual in order that he might take his place in society." In Michigan, the parole board frequently questions the inmate about his offense in order to determine whether he freely admits his guilt and has feelings of remorse for his conduct. These are regarded as favorable signs that an inmate has taken full responsibility for his offense and has begun the process of rehabilitation. Denial of guilt or lack of remorse does not preclude parole, because criteria other than probable success are considered, but it is an extremely unfavorable factor.

The difficulty which parole board members experience in attempting to determine whether there has been a change in the inmate's attitudes finds expression in a universal fear of being "conned."²³ The parole board shows considerable concern about the inmate who is too glib, who seems to have everything down pat and is so smooth that every detail of his story fits neatly into place. The board members resent inmates who seem to be trying to "con" them or to "take them in." One parole board member in Michigan showed considerable concern in particular over the difficulty which "psychopaths" cause a parole board which looks for signs of psychological change in inmates:

I believe the psychopath is especially adept at simulating rehabilitation and reformation and gives parole boards as much trouble as he does psychiatrists. I believe that they can be characterized only through a careful case history of their actions and that any standard description of them lacks a sharp focus unless it relates to their past behavior extended over many years.

Board members especially suspect simulation in the claims of inmates who report remarkable insight and gains from therapy. For this reason, they frequently question such an inmate on whether he found it difficult at first

23. This fear prevailed even among members of the Kansas parole board, which puts little emphasis upon psychological change in making its decisions. In one case, the inmate seemed to the parole board to be too glib, so it quickly dismissed him and denied parole on the ground he was a "con man."

to talk about his problems in therapy. They are much more favorably disposed toward the inmate who found insight hard to gain at first, rather than one who claims he found it easy to understand himself and to profit quickly from counseling or psychotherapy.

Illustration No. 2: The screening committee of the institution recommended granting parole in this case. The inmate had received intensive psychotherapy, four months in group therapy and ten months individual therapy. The committee felt it should concur with the psychiatrist who recommended parole because of the progress made in therapy. The parole board granted parole.

Difficulty discovering whether an inmate has made progress in understanding himself accounts in large part for the great reliance which parole board members place on the recommendations of the counselors and psychiatrists who treat inmates. The Michigan parole board pays close attention to psychological and psychiatric reports, when available. Because of personnel shortages, many inmates are not diagnosed or treated by psychologists, psychiatrists, or social workers. However, examinations are made on repeated offenders, those with case histories involving assaultive criminal acts, and those who exhibit some apparent psychological disturbance. The parole board very often follows the recommendation of the counselors or psychiatrists treating the inmate. In Wisconsin, both the institutional committees, which make recommendations to the parole board, and the parole board place considerable emphasis upon the recommendations of psychiatrists who have observed or treated particular inmates. If an inmate received therapy and the prognosis is hopeful, it weighs heavily in favor of parole, although this fact alone may not be sufficient reason to persuade the board to grant it. However, if an inmate makes no effort to obtain therapy, or worse, refuses it, he is almost certain to be denied parole unless other very important positive factors are present. A negative recommendation from a psychiatrist treating an inmate almost invariably results in denial of parole.²⁴

2. *Participation in Institutional Programs*

Illustration No. 3: The inmate, sentenced for forgery, had been a valuable asset to the institution because he was an experienced electrician. The institutional recommendation was for parole denial, characterizing him as a "chronic offender." The social services supervisor noted that no one had observed any change in him and he had not

24. In one Wisconsin case, the screening committee recommendation was as follows: "Paranoid psychosis. Thinks wife maneuvered him into murdering her. Psychiatrist reports too dangerous for release. Deny." The parole board quickly denied parole on the basis of the psychiatric recommendation.

requested psychotherapy. When he was called into the parole hearing room, the first question was whether he had a job plan if released. The prisoner indicated that he wanted to look for work as a refrigeration mechanic. A parole board member then noted the inmate's drinking problem and its possible effect in the future. The prisoner indicated he felt he could make it. The parole board member then asked the inmate if he had done anything about his alcohol problem while confined. The inmate indicated he could not do anything about it because he was working seven days a week in the institution. The parole board member asked which was more important, working at the institution or seeking psychiatric help concerning the very problem that would bring him back to the institution. He told him if he really wanted psychotherapy he could have received it despite the seven-day work schedule at the institution. The inmate was asked what in his present situation had changed that would make him a good parole risk. To this the prisoner replied that he would have to make it or give up. He claimed that if he works steadily he has no problems, and that as long as he has work on the outside he feels he can adjust on parole. A parole board member then noted to him that working was not the problem because he always had a good work record and was considered a very skilled person. He was told that this type of case was the most difficult to decide, principally because of the alcohol problem involved. After the hearing, the board unanimously denied parole.

In many institutions there are a number of programs and activities designed to assist the inmate in changing his attitudes and eliminating the problems thought to be causative of his criminal conduct. Examples of these are group and individual therapy, alcoholics anonymous, self improvement (Dale Carnegie) courses, academic education and vocational training, and opportunity for religious training and worship. One of the indications of probable parole success used by the board is the extent to which the inmate has availed himself of these programs. This is viewed as indicating that the inmate is making a serious attempt to rehabilitate himself. The inmate who participates in these programs is regarded as a better risk even if no noticeable personality change is effected than is the inmate who is just "serving his time" with no genuine effort at change.

If an inmate appears before the parole board with a problem which might be alleviated by participation in any of these programs, he may be urged to participate if parole is denied. He may in fact be told that in his case, participation is the surest way to be paroled.²⁵

25. Prison personnel may also foster the notion that participation in institutional programs is important for parole, as the following statement concerning prison academic and vocational education indicates:

Other kinds of corruption in prison schooling are stimulated by the fact that most correctional systems, appropriately, let their inmates know that participation in prison school will be rewarded. The main reward, an uncertain one, is that school-

One of the difficult problems in applying this criterion is the availability of institutional programs,²⁶ particularly psychotherapy. This is a problem of particular concern to the Michigan parole board because at the state prison the average caseload per counselor is 325. One parole board member stated:

What good does it do to select a good risk for a parole camp, thinking that fresh air and sunshine will automatically rehabilitate him, and not provide him with anyone to discuss his personal problems with over a period of three or four years? I have asked dozens of inmates if they have ever had an opportunity to discuss personal problems with anyone during a period of many years' imprisonment and most of them have said that they have not. I believe that psychological treatment, counseling, and guidance must begin with the inmate's entrance into an institution and should be a continuing process leading up to parole. I do not believe that custodial care alone ever led to any spontaneous rehabilitation of an inmate.

Concern over lack of adequate personnel for bringing about change in imprisoned offenders is illustrated by the statement of another board member: "It would almost be better not to have any counseling or psychotherapy available than to have a negligible amount and claim we have sufficient to cause any change for the better in an inmate."

The availability of programs is an important factor in the weight given to participation or failure to participate in programs. At the time of the field survey, Kansas had virtually no counseling or similar programs in its adult penal institutions. As a result, the parole board was unable to use this factor in its decisions. In Wisconsin's new medium security institution, however, many programs are available. At that institution, the parole board gives even more attention to participation in programs than it does at other Wisconsin institutions.

There is evidence that in some cases in which parole is denied, the parole board may be concerned about the effects on the other inmates of a parole grant to one who has not availed himself of any of the institutional programs. One parole board member in Wisconsin said that if an inmate appeared for parole and all prognosticating factors were in his favor for adjustment under supervision, and even if he, the parole board member,

ing may impress the parole board favorably. Although the validity of this belief varies, it usually is cultivated assiduously by prison staff. Glaser, *The Effectiveness of Correctional Education*, American J. Correction, March-April 1966, p. 4, 8.

26. A Michigan parole board member criticized the institutions for not taking advantage of awakening religious interests in inmates who have shown a desire for religious counseling and instruction. He said this is partially due to the "determinist" training of those on the institutional staffs with training in the social sciences.

thought the individual would successfully complete parole, he still would vote to deny parole if the inmate had made no effort at all to change himself by participation in institutional programs. Thus conceived, the parole decision becomes a means of encouraging participation in the institution's programs, much as it may be used to encourage compliance with the institution's rules of discipline.²⁷

3. *Institutional Adjustment*

Illustration No. 4: The inmate had received concurrent sentences totaling three to fifteen years for assault with intent to rob, assault and armed robbery, and larceny. He had served four years at the time of the hearing. Parole had been denied at two previous hearings. The inmate had maintained he was innocent. Institutional reports characterized him as a guardhouse lawyer who was always critical of other inmates, had a quick temper, and was difficult to get along with. His adjustment in his work assignment in the laundry was satisfactory, although he was always finding fault with the institution. The institutional committee recommended denial of parole because of the inmate's hostility to authority. At the hearing, the inmate still asserted his innocence. In denying parole, the board listed the following reasons: "resents institutional authority, jail house lawyer, denies offense, has a bad temper, has a generally poor institutional adjustment."

One factor in the parole decision is the way in which the inmate has adjusted to the daily life of the institution. In Michigan and Wisconsin, records of conformity to institutional disciplinary rules, of work progress and adjustment, and of other contacts by institutional personnel bearing on adjustment are contained in the case file. In Kansas, information on the inmate's institutional adjustment is limited to a record of disciplinary infractions.²⁸ The parole board in each of the states apparently regards the inmate's ability to conform to the institution's rules and to get along with other inmates, custodial personnel, and supervisors as some indication of his probable adjustment under parole supervision. Most inmates appearing for parole have a record of fairly good institutional adjustment. The fact that for many of them parole is denied indicates that good adjustment itself is not sufficient for a parole grant. It is likely that good adjustment is a minimum requirement for parole, one which must be met in order to qualify an inmate for favorable parole consideration but which is itself not sufficient for a favorable decision. In Kansas, where parole information is scanty, the fact that the board has a record of disciplinary infractions probably gives the factor of institutional adjustment greater weight than in the other

27. See text accompanying notes 78-82 *infra*.

28. See text accompanying note 12 *supra*.

two states. Also, both members of the Kansas parole board were former wardens, persons who would be expected to give more weight to institutional adjustment.

In all three states, poor adjustment can be a negative factor in the parole decision, sufficient in itself for a parole denial. For example, if an inmate with a record of assaultive behavior continues this pattern within the institution, it is regarded as evidence that there has been no personality change. It is often difficult to determine whether the board is interested in the inmate's disciplinary record as an indication of his probable adjustment on parole or whether it is concerned about the effect which parole of an inmate with a bad institutional record would have on the efforts of the institutional administrator to maintain discipline. In many cases it seems likely that the board is interested in both.²⁹

4. *Criminal Record*

Illustration No. 5: The inmate was a fifty-three year old man serving two concurrent terms of three to five years for forging and uttering. He was an eleventh offender. He had served almost two years of the present sentence and was appearing for his first parole hearing. He had made a good institutional adjustment, but the screening committee of the institution recommended a denial of parole because of his criminal record. His record began in 1927 and involved convictions and prison sentences for abduction, rape, larceny, and forgery. The interview did not last longer than two or three minutes, only long enough for the inmate to smoke a cigarette. He was asked if he had a final comment to make and, after he left the hearing room, the board briefly discussed his prospects if released. No parole plan had been developed. The board members unanimously denied parole without further discussion.

Most inmates appearing for parole hearing have had at least one criminal conviction prior to the one for which they were sentenced. The extent and nature of the criminal record is a factor of considerable importance in the parole decision.³⁰ The inmate's criminal record is regarded as evidence of his potentiality for "going straight" if released on parole. Other factors being equal, it will take more evidence of change in attitude to convince

29. For a discussion of the maintenance of prison discipline as a factor in the parole decision see notes 78-82 *infra* and accompanying text.

30. In a study of parole criteria used by the Wisconsin parole board, the inmate's prior criminal and juvenile record was the factor mentioned by the board most frequently as a strong reason for denial of parole. Hendrickson & Schultz, *A Study of the Criteria Influencing the Decision to Grant or Deny Parole to Adult Offenders in Wisconsin Correctional Institutions* 36-37, 1964 (unpublished thesis in University of Wisconsin School of Social Work).

the parole board that an inmate with a long record has reformed than one without.

Statutes in some states exclude the possibility of parole or greatly postpone the parole eligibility of inmates with prior convictions.³¹ A Kansas statute provided that inmates who have served two prior terms in a penitentiary are ineligible for parole.³² Even in a jurisdiction with liberal parole eligibility laws, an extensive prior criminal record may result in a routine denial of parole at the first hearing.³³ In the illustration case, the inmate received his first parole hearing under Wisconsin law³⁴ after two years. Although there would normally be a strong expectation that a forger would be released at the end of two years in Wisconsin,³⁵ parole was routinely denied because of the long criminal record. It could theoretically be asserted that routine parole denials because of prior record would be less likely to occur in a jurisdiction, like Michigan, where parole eligibility depends upon a judicially set minimum sentence,³⁶ because the trial judge could be expected to increase the minimum as a result of the prior criminal conduct. The Michigan parole board has frequently complained, however, that inmates sentenced from Detroit with long records are often given minimum sentences which are so short that they compel routine denial at the first hearing. This can be explained largely by the necessity for keeping minimum sentences low in Detroit in order not to interfere with guilty plea bargaining.³⁷

Although routine denials at the initial hearing because of prior record are common in Michigan, the parole board has consciously refrained from using a rule of thumb excluding parole consideration for serious recidivists. One member of the board said that he does not believe in any rule of thumb such as four-time losers cannot be rehabilitated, but believes that the

31. For a collection of these statutes see MODEL PENAL CODE § 305.10, comment (Tent. Draft No. 5, 1956).

32. Kan. Laws 1903, ch. 375, § 9, repealed by Kan. Laws 1957, ch. 331, § 37.

33. The supervisor of the Social Service Department at the Wisconsin State Reformatory and a member of the Wisconsin parole board agreed that although all inmates are given their initial parole hearings after serving nine months at the Reformatory, offenders with a long criminal record will not be released at the initial hearing unless there is a remarkable improvement in attitude.

34. WIS. STAT. ANN. § 57.06 (Supp. 1965). See note 4 *supra*.

35. See note 51 *infra* and accompanying text.

36. See note 5 *supra*.

37. The pressures to reward a guilty plea with leniency in sentencing appear to be greatest in the urban areas, apparently because that is where the problems of court congestion are most severe. It would be expected, therefore, that one would find shorter sentences from the urban areas of a state than from the rural. This expectation seems substantiated in all three states, although no systematic exploration of this thesis was made. For a brief discussion of guilty plea bargaining in the three states see text accompanying notes 2-9 *supra*.

process of maturation comes late with many persons and that rehabilitation can take place within the personality of a multiple offender as well as a first offender.

In many cases it seems clear the board is more concerned with whether an inmate has had prior penitentiary experience than with the criminal record itself. Indeed, an inmate with only a juvenile record, an adult arrest record, or adult conviction resulting only in probation will be regarded by the institution and the parole board as a "first" offender. Parole may be granted rather early despite prior failure under community supervision³⁸ on the theory that the inmate's first adult institutional experience may have had a shock value.

The parole board also considers offenses the inmate has admitted committing but for which he has not been convicted. In both Michigan and Wisconsin, an offender who has confessed to a number of offenses is normally charged only with the one or two most serious ones. The uncharged offenses are described in the presentence report for consideration by the trial judge in sentencing. The presentence report describing the uncharged offenses is normally included in the parole board case file. Doubtless, the uncharged offenses influence the board in its decision. Members of the Michigan parole board stated they consider the presentence report to be particularly valuable in determining the extent and nature of the uncharged offenses.

A member of the Wisconsin parole board said uncharged offenses are not, without more, an important factor in the board's estimation of probable parole success.³⁹ As an example, he cited a case of a young man who for the first time in his life went on a drinking spree and committed ten burglaries. The mere fact that he committed ten burglaries probably would not influence the parole board in its decision to grant parole. The parole board member added, however, he did not intend to say that if the numerous offenses committed by an inmate, whether charged or not, indicated a pattern of serious behavior and a seriously disturbed personality, they would not be taken into consideration. He concluded that what the offenses represent in terms of the individual's entire personality and the risk to the community is considered, rather than the isolated fact that he committed a certain number of offenses.

38. For a discussion of the inmate's performance under prior probation or parole supervision as a factor in the parole decision see notes 40-42 *infra* and accompanying text.

39. As an aside he added that whether sentences are imposed consecutively or concurrently has no influence on the parole decision if the inmate is legally eligible for parole.

5. *Prior Experience Under Community Supervision*

Illustration No. 6: The inmate was serving a one to four-year sentence for larceny. He was sentenced in December 1953, paroled in July 1955, and violated his parole in November 1955. The violation consisted of drinking and absconding. This was his first parole hearing since his return as a violator nine months ago. Prior to the sentence for this offense he had been on probation for a different offense and had violated probation. The Board unanimously denied parole. One member, in dictating his comments on the case, said the inmate had been back in the institution only nine months and while his institutional adjustment was good, he was a previous probation and parole violator, had an alcohol problem, and was not interested in treatment.

The inmate's experience under community supervision is an important consideration in the parole decision. Many of the inmates appearing for parole hearings have had probation, which they may or may not have violated, and some of them are serving a sentence imposed because they violated probation.⁴⁰ Many inmates with long criminal records have had experience on parole as well as probation; this is regarded as an especially important indication of what behavior can be expected of them if they are paroled.⁴¹

The extent the parole board should rely on the inmate's parole experience is a problem which inevitably arises when, as in the illustration case, an inmate who has been returned to the institution as a parole violator appears before the board in a hearing for re-parole. More evidence of a change in outlook is required to convince the board to parole him than when he originally was given parole. Parole boards in the states studied do not have a flat rule with regard to re-paroles. Many inmates are given second paroles and some even third paroles, although the board may warn

40. There is an indication that inmates committed to the Wisconsin State Reformatory for probation violation are routinely denied parole at their initial hearing, held after nine months in the institution. It is clear the nature of the probation violation is as important as the fact of violation. In one case at the Reformatory, an inmate who was appearing for his initial hearing on a probation violation commitment was denied parole. He had been placed on probation on a conviction for armed robbery. He violated probation by carrying a gun and the probation was revoked. He admitted to the parole board that he had intended to use the gun in a hold-up to get money to abscond from the state.

41. Again, it is clear that the nature of the violation is as important as the fact of violation, particularly whether the violation and the original offense form a pattern which seems to indicate a personality trait and whether there is any evidence of a change in the problem aspects of the inmate's personality. However, the supervisor of the Social Service Department at the Wisconsin State Prison stated that he believed that normally parole violated by a new offense is much more of a negative factor than is a technical violation.

them that this is their "last chance," and that a violation of this parole will result in service of the maximum sentence.⁴²

Illustration No. 7: The inmate was sentenced to two and one-half to five years for larceny by conversion. He had already served twenty months. He had a long criminal record and had previously been in three other prisons in various states on charges of breaking and entering. All of his prior sentences were "flat" sentences and he had never spent time on parole. The inmate demonstrated some signs of beginning to understand his problem. His case was continued for ten months, an indication that he probably would be paroled at his next hearing.

The absence of experience on parole may be a favorable factor. In the illustration case, one of the parole board members said they were in effect promising a parole grant because although the inmate had a long prior record, he had never had a parole from any institution and it was not actually known what he could do under supervision. The board is understandably unwilling to assume that recidivism without parole is a clear indication of a high probability of recidivism with parole.

6. Parole Plan

Illustration No. 8: The inmate, a youth, had no family to which he could return upon release. He indicated a desire to work as a machinist and live at the YMCA in a particular small city. The pre-parole report pointed out that it was probably impossible for a seventeen year old boy to secure employment as a machinist and, in any event, such positions in that particular small city were practically non-existent. The parole agent conducting the pre-parole investigation reviewed the inmate's long juvenile record and concluded that placement in a YMCA was unrealistic because he needed considerably more supervision. The agent felt the youth was not a proper subject for a group home because he had leadership qualities which might lead other boys into trouble. He was too old for a foster home and probably would not adjust in that setting. Therefore, the agent felt the only alternative available was to place the inmate on a farm until he reached an age when he could support himself fully without control and discipline. The board paroled the inmate to a farm placement.

42. Some of the re-paroles probably occur because the mandatory release date is approaching and the board prefers to give the inmate some community supervision even though he has shown a tendency not to profit from it in the past. See text accompanying notes 52-58 *infra*.

In Michigan, the parole board, with the consent of the sentencing judge, can parole an inmate prior to his legal eligibility under a statutory procedure called "special consideration." MICH. STAT. ANN. § 28.2303 (1954). There is an indication that a violation of such a "special parole" weighs particularly heavily against re-parole because the parole board has, in a measure, vouched for the inmate by securing special parole in the first place.

The inmate's parole plan—his employment and residence arrangements—is considered in some cases an important factor in determining the probability of parole success. It is considered a favorable sign if an inmate has made a serious attempt to develop a suitable parole plan because it indicates he is thinking about his future. Even when a parole plan has been developed and its feasibility verified by the pre-parole investigation, it is still necessary to determine whether it will help or hinder the inmate's adjustment on parole.⁴³

When an inmate's parole plan seems inadequate, the parole board may deny parole or defer it for a short time. If the original plan seems inadequate but an alternative has been developed by the field agent conducting the pre-parole investigation, or is otherwise available, the parole board may immediately grant parole on the condition that the inmate accept the new plan. Unlike other factors relating to probable parole success, then, the parole plan can be manipulated in order to increase the probability of success. In the illustration case, the job plan was not feasible and the residence plan was considered inadequate. A new job and residence plan was developed and parole was granted on the basis of it.

In Wisconsin, the Special Review Board, the release authority for persons incarcerated under the Sex Crimes Law,⁴⁴ makes extensive use of special parole plans for certain types of offenders. The Board's experience has been that the best solution in incest cases is to parole the inmate to a place other than that where the relative with whom he was having incestuous relations lives. Similarly, the Board has developed "protective placements" in rural areas of the state for higher risk indecent liberties cases.

The unavailability of employment for parolees and its general inadequacy causes problems. Statutes in some states require the inmate to have a job before he can be released on parole.⁴⁵ Parole boards and field agents find it difficult to comply with these statutes and often must be satisfied with only a vague promise of a temporary, unsubstantial job, or even with no job offer but only an expectation that some job can be found shortly after release. If the parole board feels unemployment may seriously jeopardize adjustment on parole, it may deny parole until the employment picture brightens. With many unskilled workers, this necessitates a denial of parole

43. The pre-parole report in Kansas simply verifies home and job arrangements, if any. No attempt is made to evaluate community sentiment or the suitability of the placement plan. Parole board members in Kansas complained frequently about the scanty information they received from the field.

44. WIS. STAT. ANN. § 959.15 (1958).

45. See, e.g., Kan. Laws 1903, ch. 375, § 5, repealed by Kan. Laws 1957, ch. 331, § 37. For a fuller discussion see notes 134-141 *infra* and accompanying text.

in the winter in the expectation that the possibility of securing unskilled employment will be greater in the summer and the inmate can be paroled then.⁴⁶ Normally, the parole board must be satisfied if the inmate has only a possibility of an unsubstantial job. In cases in which prior involvement with the law has repeatedly occurred during periods of unemployment, however, the board may refuse to parole the inmate unless he has a firm offer of substantial employment.⁴⁷

Normally, the inmate's residence plan is investigated to verify that he will be accepted in the home or institution and to determine what the physical conditions are and who the inmate's associates will be. The parole board usually attempts to persuade the inmate to return to his family, if he has one and they are willing to take him back, especially if he is young.⁴⁸

The attitude of the community in which the inmate wishes to reside and

46. Often, the lack of immediate available employment is adverted to, almost as an afterthought, as one of several reasons for denial of parole. For example, one institutional recommendation for denial read: "Repeater. He has done nothing toward self-improvement. His type of work is available in the spring." In another case, one reason given by a board member for denial of parole was that the inmate should be paroled in the summer because employment suitable to his defective mental ability would be easier to secure then.

47. In one case, the information before the parole board revealed that the inmate had a very unstable employment history and that all of his offenses, including the present burglary, were committed during periods of unemployment. One of the parole board members said he would not parole the inmate to another car washer, barber shop porter, or other tenuous and unsubstantial job. It was agreed that parole should be granted on the conditions of no drinking and a substantial and firm job offer before release.

48. In one case, the inmate, upon questioning as to his parole plan, responded that although he had a mother and two brothers living in another state he would like to be paroled in this state. One board member asked him if he didn't think it would be best for him to go back with his family. The inmate replied, "It makes me feel pretty bad to think of the way I've lived and I don't want to go back around them." The board member pointed out that the inmate would have a better chance if he had relatives to help him make his initial adjustment on parole. He explained that the parole board usually prefers to parole an individual where he has family ties because it finds the chances for success on parole are greater. The other board member intervened to say, "I'll go for parole but not if he stays in this state where he got into trouble due to drinking and bad associates." It was decided to parole the inmate to his family out of state, subject to approval of home conditions and employment plans.

In another case, the inmate, thirty-six years of age, had been convicted several times of check forgery. On most of these occasions, he had been placed on probation because his mother made restitution. The inmate's plan called for parole to the city where his mother lived. A parole board member asked the inmate if he felt he should return to the city in which his mother lived. The inmate replied that he would not let his mother interfere with his life this time. The other board member noted that perhaps such a long pattern of dependency on his mother would be hard to break and it would probably be best to consider placement elsewhere. It was decided to continue the case to investigate the possibility of placement with some of the inmate's other relatives.

work is sometimes considered an important factor in adjustment on parole. This is especially likely if the inmate plans to go to a small community, where the attitudes of a number of citizens may make a substantial difference. If the inmate plans to work and live in a large city, a negative attitude by some of its citizens may make less difference.⁴⁹

7. *Circumstances of the Offense*

Illustration No. 9: The inmate was convicted of armed robbery and was sentenced to two to fifteen years, of which he had served eighteen months at the time of the hearing. He had no previous convictions and only a few arrests for misdemeanors. The inmate's account of the offense was that he held up a bus and was arrested almost immediately. His file showed he had been destitute at the time of the offense, was unemployed, and had been sleeping in parks. The file also showed a good work record when he was employed. He had a letter to show the parole board verifying the fact that if there were an opening he could get his old job back. He was granted parole subject to home and employment placement.

The basic indication of probable recidivism used by the Michigan and Wisconsin parole boards is evidence of personality change during the period of institutionalization.⁵⁰ There are cases, however, in which the parole board may regard the offense as situational in nature and not necessarily the result of a personality defect. If the parole board has some assurance that the situational factors have changed during the period of incarceration, it may be willing to grant parole despite lack of evidence of personality change. In the illustration case, the offense seemed the result of the inmate's prolonged unemployment, and the parole board became convinced that the probability of success on parole would be high if the inmate were employed.

The number of cases in which the boards seem to regard the situational factors as predominating is small. Certainly, in comparison with the number of cases in which inmates explain their criminal conduct in situational terms—bad associates, drinking, unemployment, family disputes—the number of cases is small. It is difficult to determine whether the situational factors in the offense go exclusively to the probability of parole success or also to a judgment of the moral blame which the inmate should bear for his conduct. In the illustration case, one member of the board concluded that

49. The concern of the parole board with the attitude of the community toward the inmate goes beyond its effect on parole adjustment and reflects, in part at least, the board's desire to remain free of public criticism of its decisions. See notes 91-94 *infra* and accompanying text.

50. See notes 18-24 *supra* and accompanying text.

although there was no excuse for the offense, the inmate's circumstances did appear to be desperate at the time he committed it, implying that the offense was "understandable."

B. *The Decision to Grant Parole for Reasons
Other Than the Probability of Recidivism*

In practice, inmates are paroled who would not be released if the probability of recidivism were the sole criterion for the decision. Often, inmates are paroled despite the board's judgment that they are likely to commit new criminal offenses. That a parole board sometimes feels compelled to parole inmates who are not rehabilitated may in part reflect deficiencies in institutional treatment programs. It is clear, however, that even great advances in that area would not entirely eliminate the necessity for making decisions of this kind.

1. *Seriousness of the Anticipated Violation*

Illustration No. 10: The inmate, a fifty year old man, had served two years on concurrent sentences of one to five and one to seven years for forgery. No parole plan had been developed. He was a seventh felony offender. His record for forgery extended back to 1933. He had served two previous prison terms. The institution made the following parole recommendation: "Seventh offender. Chronic offender. Social adjustment in institution was good. Psychiatrist seemed to think superficial progress was being made, however, never accepted alcoholism as a problem. Deny." A parole board member began discussing with the inmate the necessity for accepting alcoholism as a problem and told him he knew he would be back as a parole violator if he did not stop drinking. He suggested the inmate join Alcoholics Anonymous after release. The board voted to grant parole.

Parole board interest in predicting behavior on parole does not end when the probability of the inmate's violating the law becomes apparent. The board is also deeply concerned with the type of violation likely to occur if the inmate does in fact violate. The board is willing to parole on less evidence of probable success when it is apparent that a violation, if it occurs, is not likely to be serious. In the illustration case, one of the parole board members said he was voting for parole because the inmate was the type of individual who just wrote small checks when drunk and who did not constitute a serious threat to the community. Another board member said he was voting to grant parole and added that "all were granting with tongue in check."⁵¹

51. In another case, the board paroled a twenty-four year old man convicted of check forgery. He had one prior conviction for the same offense on which he had been given

The potential benefit from further institutional treatment is also a factor in these decisions. Thus, although one inmate was clearly alcoholic and had a long record of arrests for public intoxication, he was paroled at his initial hearing. The parole board concluded he was a harmless person. It could see little point in keeping him in the institution any longer because he had shown little indication of having enough strength to quit using alcohol. The board concluded, therefore, not only had the institution been unable to do much for the inmate, but it was extremely unlikely he would ever be able to make significant gains in solving his problem.

Finally, the board is concerned in these cases about the effect of parole on the inmate's family. If the inmate is retained in the institution there is little opportunity for him to make significant contributions to the support of his dependents. If he is paroled, however, he at least has the opportunity to support his family. In Wisconsin, nonsupport offenders normally are paroled as soon as they are eligible. The parole board states there are three reasons for this policy: they are unlikely to commit a serious violation of the criminal law, the institutional program is of little aid in their rehabilitation beyond the first several months, and parole may provide financial support for the family for a time as well as the benefits which may accrue from having a father in the family again.

2. *Mandatory Release Date Near*

Illustration No. 11: The inmate was a nineteen year old girl serving a sentence of six months to one year for larceny. Her prior record consisted of one conviction for drunkenness, for which she successfully completed a one-year probation period. At the time of the hearing she had served eight months on the sentence. Her conditional release date would be reached in another three months. If parole were denied, she would be released then and, after one month under supervision, would receive an absolute discharge. The board decided to parole her.

Parole boards sometimes find themselves in the position of choosing between a need to retain the inmate in prison and a need for supervision and control over him after he is released. This occurs when at the time of the parole hearing the inmate has only a short period to serve until he must be released from the institution. These are all cases in which the maximum sentence, whether set by statute or by the trial judge, is, in the view of the parole board, too short under the circumstances. The parole board fre-

probation. There had been other forgeries but he was not convicted of them because he had made restitution. When he was paroled one of the institutional personnel remarked that the inmate looked like a good parole risk. To this a member of the parole board replied, "Nonsense. Statistics show that 70% of all forgers are repeaters."

quently paroles an inmate despite its estimate of a high probability of recidivism, if, in its view, parole supervision is needed more than continued institutionalization.

In Kansas and Michigan, the inmate must be released unconditionally when he has served his maximum sentence, less allowances for good time.⁵² No period of parole supervision follows release. When the inmate has only a short period to serve until his maximum, less good time, the parole board frequently feels it is forced to parole him to provide supervision and control over him when he is released. In Michigan,⁵³ the inmate must be discharged from parole supervision when he has served his maximum sentence, less good time earned in the institution and on parole, and in Kansas,⁵⁴ when he has served his maximum, less good time earned while incarcerated.

In Wisconsin, the inmate must be released from the institution when he has served his maximum sentence, less good time, but the release is conditional and a mandatory period of parole supervision follows during which the releasee is subject to the same conditions and possibilities of revocation which apply to parolees released by act of the parole board. He must be discharged from parole when he has served his maximum sentence without allowances for good time.⁵⁵ When, as in the illustration case, the maximum sentence is short, the period of mandatory parole supervision following release at the maximum, less good time, is, of necessity, quite short. In the illustration case, the period of supervision would have been one month had the inmate been kept until her mandatory release date. Nevertheless, the parole board felt that further incarceration would be useful in her case. Thus, it was forced to choose between what it regarded as an inadequate period of institutionalization and an inadequate period of post-incarceration supervision. It chose to lengthen the period of supervision at the expense of the institutionalization.

The position might be taken that this is one factor to consider in determining whether the maximum sentence should be fixed by the trial judge

52. KAN. STAT. ANN. § 76-2421 (1964); MICH. STAT. ANN. § 28.1403 (1954); Kan. Laws 1913, ch. 219, § 4, repealed by Kan. Laws 1957, ch. 331, § 37; Kan. Laws 1903, ch. 375, § 1, repealed by Kan. Laws 1957, ch. 331, § 37.

53. MICH. STAT. ANN. § 28.2312 (Supp. 1965). MICH. STAT. ANN. § 28.2308 (1954) provides in part: "A parole granted a prisoner shall be construed simply as a permit to such prisoner to go without the enclosure of the prison, and not as a release, and while so at large he shall be deemed to be still serving out the sentence imposed upon him by the court, and shall be entitled to good time the same as if he were confined in prison."

54. The Kansas good time laws apply only to prisoners confined in correctional institutions. Kan. Laws 1905, ch. 317, § 1, as amended, Kan. Laws 1957, ch. 472, § 30.

55. WIS. STAT. ANN. § 53.11(7) (1958). This provision is commonly referred to as the conditional release law.

or set by statute. Thus, it could be argued that paroles based on the approach of the mandatory release date would be less frequent when the maximum is set by statute than when set by the trial judge. One would expect to find, therefore, that this is more of a problem in Wisconsin than in Kansas and Michigan.⁵⁶ This does not seem to be the case. There may be any number of reasons for this, including, perhaps, the fact that the Wisconsin parole board may be more liberal in granting paroles than the boards in Michigan and Kansas. Another reason may be that in Wisconsin the mandatory release is followed by a mandatory period of supervision. Unlike the boards in the other two states, the parole board in Wisconsin must simply determine whether the period of supervision permitted by the good time awarded the prisoner is adequate.⁵⁷ It is only when the maximum sentence is quite short that there is any need for a parole to increase the length of the period of supervision. In Wisconsin, one finds such paroles when the maximum is short, while in Kansas and Michigan, one finds such paroles when the inmate has been denied parole in the past or has been paroled and returned for a violation.⁵⁸

3. *Length of Time Served*

Illustration No. 12: The inmate had received a sentence of three to twenty years for armed robbery, auto theft, and forgery. He was paroled after three years but shortly thereafter violated his parole and received a new sentence for operating a con game. He served three years since his last parole. His criminal career began twenty years previously and involved numerous convictions. The psychiatric report was that the inmate was "instinctively vicious. Any rehabilitative program will be futile." The institutional recommendation was that the inmate "has adjusted in excellent manner in institution. Has served lengthy sentence. Should be tried. Grant." The parole board decided to grant parole.

56. In Wisconsin, the maximum sentence is selected by the trial judge, while in Kansas and Michigan it is usually fixed by statute. See text accompanying notes 3-9 *supra*.

57. In Wisconsin, juvenile boys transferred from the training school to the reformatory are subject to the release jurisdiction of the adult parole board. Because they are still juveniles, however, the conditional release law does not apply to them. When they reach the age of twenty-one they must be released unconditionally. It is a common practice for the parole board to grant paroles to juveniles who are approaching age twenty-one simply to give them a period of supervision in the community, which would be denied them under release by operation of law.

58. The problem was particularly acute in Michigan due to an administrative directive which prohibited the parole board from forfeiting good time earned in the institution when an inmate violated parole. This resulted in a number of returned violators having only a short time remaining until their mandatory, unconditional release date. In some of these situations, the parole board felt it was forced to grant parole in order to provide the inmate with some community supervision.

Every decision to grant parole reflects the opinion of the parole board that the inmate has served enough time, but there are some cases in which the length of time served is itself the most significant factor in the case. This typically occurs when an inmate has received a relatively long sentence, but fails to respond to the rehabilitative programs at the institution. In addition, he may have been tried on parole once or twice and had his parole revoked. The parole board may then be faced with the choice of denying parole when it is evident that further institutionalization will not increase the probability of success on parole or of granting parole to an inmate who presents some risk of violation.

In the illustration case, one of the parole board members commented that "just maybe" the inmate will make parole after so long an institutionalization. He felt that in such cases institutionalization reaches a point when it serves no purpose in terms of rehabilitation. The only question remaining is that of protection of the community, he continued. In this case, the board members all felt they would have to try the inmate on parole sooner or later, but none expressed any confidence in his capacity for success.

A factor mentioned in many cases of this type is maturation. When a relatively young man receives a long sentence and serves a fairly long term before parole, the board may comment that despite the absence of any apparent effect of the institution's program, he may have matured enough to enable him to live a lawful life in the community.

4. *Parole to a Detainer*

Illustration No. 13: A twenty-seven year old man serving a one to five-year sentence for larceny appeared before the parole board for a hearing. He had a long criminal and juvenile record. While on parole in Ohio, he came to Wisconsin and committed the offense for which he was serving time. An institutional psychologist said the inmate had admitted using narcotics and drugs; he stated that the prognosis was poor. The institutional committee recommended parole to a detainer, partly because only about seven months remained until conditional release would be required; he had served approximately three years of a one to five-year sentence, and it was thought he might as well start on his Ohio sentence. The final decision of the board was to grant parole to the Ohio detainer. The chairman commented that he did not think Ohio would come after the inmate, in which event he would be detained at the prison until his conditional release date. None of the board members felt the inmate could possibly adjust on parole. The board rationale in this case was dictated by the chairman: "Claims he owes Ohio five years. He has been locked up for the past sixteen years except for twenty-nine months. Gullible, ambitionless, and no insight. Has used heroin. Practically hopeless."

The parole decision may be influenced by the fact that a detainer has been filed against the inmate. The prisoner against whom a detainer is filed may be charged with a crime for which he has not yet been tried, may be a probation or parole violator from another state, may be wanted for completion of a prison term which was interrupted by an escape, or may have been ordered deported by a court or administrative agency.

The effect of a detainer on the parole decision varies from state to state. In some states, a detainer automatically precludes the inmate from the possibility of parole.⁵⁹ Sometimes this position is based on the view that parole implies community supervision—that a “parole to a detainer” is not really a parole and, hence, not within the authority of the parole board. In the three states, the parole boards do parole to detainers, although this is specifically authorized by statute in only one of them.⁶⁰ However, the circumstances under which they parole to a detainer vary.

The problem of whether an inmate should be paroled to a detainer normally arises only when prior attempts to secure removal of the detainer have failed. Sometimes the trial judge may be successful in obtaining removal of a detainer at the sentencing stage. If a defendant whom the judge has sentenced to prison is wanted in other counties of the state, he may order that the defendant be taken to those counties and tried for the offenses before being transported to the correctional institution. If a defendant is wanted in another state or by federal authorities, the judge may arrange to increase the sentence in exchange for an agreement to drop the detainer, or he may grant the defendant probation or a suspended sentence and turn him over to the requesting authority.

In some correctional institutions, officials contact authorities which have lodged detainers against inmates in an attempt to discover their intentions. Effort is made to persuade the requesting authority to drop the detainer or at least to specify the circumstances, such as the number of years the inmate must serve, under which they would drop it.⁶¹

There are some circumstances under which an inmate of a correctional institution may demand disposition of a detainer against him as a matter of right. If the detainer represents an untried charge, the inmate may be able to require that he be taken from the institution and tried, or that the state be barred from ever trying him on that charge, on the ground that he is

59. TAPPAN, *CRIME, JUSTICE AND CORRECTION* 724 (1960): “In some states any prisoner who is wanted under a detainer for further court action or imprisonment is automatically rejected [for parole] unless or until the writ is lifted.”

60. MICH. STAT. ANN. § 28.2303(c) (1954).

61. See TAPPAN, *op. cit. supra* note 59, at 724 n.32.

enforcing his right to a speedy trial.⁶² In some states, statutes give an inmate this right.⁶³ Even in a state which contains full provision for mandatory removal of detainees, the problem of parole to a detainer remains with respect to detainees for revocation of probation or parole and deportation detainees. Unless institutional authorities are successful in negotiating their removal, the problem comes before the parole board.

In Kansas, the parole board grants parole to inmates who have detainees filed against them as soon as they are eligible. The board apparently does not distinguish between in-state, out-of-state, and deportation detainees, nor between detainees based on charges yet to be proved and detainees for revocation of probation or parole. During one day's hearings, seven inmates were paroled to detainees. In many of these cases, it was apparent that the inmate would not have been paroled had there not been a detainer lodged against him. In each instance, the board explained to the inmate that it could do nothing but parole him to the detainer. Apparently, no effort is made during the inmate's confinement to determine whether the requesting authority is willing to drop its detainer. When an inmate has been paroled to a detainer and the requesting authority fails to take custody of him at the institution, the detainer is dropped and the inmate is scheduled for the next parole hearing to be held at his institution to determine whether he should be paroled to community supervision.⁶⁴

The Wisconsin parole board's policy on paroles to detainees was detailed in a booklet published shortly after the field survey was conducted, but reflected practices in effect at the time of the survey:

Persons eligible for parole under Wisconsin Statute but against whom detainees have been filed by Federal, Immigration, Out-of-State or local authorities may be granted parole to the detainer. Normally, parole is not granted to a detainer unless the usual criteria for parole selection can be met.

Institutions will be responsible for correspondence on parole planning with authorities who file detainees except when the detainer has been filed by a paroling authority.⁶⁵ In such cases the Parole Board

62. *E.g.*, State *ex rel.* Fredenberg v. Byrne, 20 Wis. 2d 504, 123 N.W.2d 305 (1963).

63. *E.g.*, MICH. STAT. ANN. §§ 4.147, 28.969 (Supp. 1965); WIS. STAT. ANN. § 955.22 (Supp. 1966).

64. The Kansas parole board's practice of paroling inmates with detainees at the first hearing has caused some discipline problems at the institutions because inmates with detainees are certain they will be paroled to the detainer no matter what their behavior. Occasionally, the parole board has declined to parole a troublesome inmate to his detainer in order to enforce the institution's disciplinary code. See notes 78-82 *infra* and accompanying text.

65. An official in the Wisconsin Division of Corrections explained that the Social Service Departments of the various institutions have responsibility for requesting the other

will be responsible for the necessary correspondence. (Institutions should refer cases of this type to the Parole Board.)

Detainers from other states placed against persons serving sentences in Wisconsin Correctional Institutions normally fall within three groups:

1. Those cases in which the individual was under field supervision at the time he was received.
2. Those in which the individual had been previously convicted in another state and it is expected that he will, upon release from a Wisconsin Institution, go to an institution in the other state to serve his unexpired term. As a matter of practice, parole is usually not granted to this type of detainer until such time as the applicant has less time remaining to serve in Wisconsin than he will have to serve in the other state.
3. Those in which the individual has been charged with an offense in another state but has not yet been tried. In this situation, it is expected that the individual will be taken to court in the other state to face prosecution when paroled in Wisconsin.⁶⁶

In Michigan, paroles to detainers are specifically authorized. The statute provides: "Paroles-in-custody to answer warrants filed by local, out-of-state agencies or immigration officials are permissible, provided an accredited agent of the agency filing the warrant shall call for the prisoner so paroled in custody."⁶⁷ The effect of the detainer on the parole decision differs depending upon the type of detainer involved.

Detainers filed by agencies within the state of Michigan are usually for the purpose of having the inmate answer an untried felony charge. If an inmate who has such a detainer filed against him is not regarded as parolable at the time of his initial hearing, a "custody parole" is almost always given to allow disposition of the untried charges. If the local requesting

jurisdictions to remove detainers and do all the negotiating. The time when the Social Service Departments contact requesting authorities is in their discretion. Usually, they prefer to let the inmate serve long enough on the Wisconsin sentence so that the other state will be willing to release the detainer, particularly in cases of detainers for prosecution. Negotiation occurs because usually no plan can be developed for release and no effective program can be formulated for a prisoner who is not sure where he is going to be, or is not particularly motivated toward the prospect of a new sentence in another jurisdiction. All of these are administrative practices and are not a matter of statute. The same official indicated that with in-state detainers for prosecution, the Wisconsin institutions are successful in obtaining removal in about seventy-five per cent of the cases. Frequently, these detainers involve bad check charges, in which removal is easily effected by making arrangement for payment of restitution.

66. WIS. DEP'T OF PUBLIC WELFARE, PAROLE BOARD PROCEDURES AND PRACTICES 11 (Feb. 1959).

67. MICH. STAT. ANN. § 28.2303(c) (1954).

authority upon notice of the parole does not take custody of the inmate at the institution, the detainer is considered dropped. If the requesting authority takes custody, the inmate is not permitted to make bond while waiting trial or disposition, and, regardless of the outcome of the proceedings, he is returned to the institution after their completion. If a new prison term is imposed, he will become eligible for parole again when he serves the new minimum sentence, less good time. If no new prison sentence is imposed, he will be reconsidered for parole in the usual manner.⁶⁸

In acting on a detainer filed by another state to bring an inmate to trial in that state, the parole board decides whether the inmate should be paroled to the community. When an inmate is released on such a detainer it is with the intent that if he is found not guilty, or if the charges are dropped, he will be placed on parole supervision in the other state. Commenting on this type of parole to a detainer, one parole board member stated, "We must handle such cases with the expectation that the inmate may be released entirely from custody, and cannot afford to take the long risk if the person is deemed not a proper subject for return to society." The board apparently works on the assumption in this type of case that the inmate will be set free in the other state, although he may be convicted and sentenced to prison. Therefore, the board apparently requires that the inmate be parolable under the usual criteria.

If the detainer issued by another state is for the return of the inmate as a probation or parole violator or an escaped prisoner, the board has more indication of what treatment is to be accorded the prisoner by the requesting jurisdiction. Because the risk of the inmate's being freed is considerably less than when the detainer is based on untried charges, the parole board is likely to be considerably more liberal in its attitude toward parole. The board learns the length of the sentence remaining for the prisoner to serve and the character of the parole supervision in the state. If, for example, the parole board considers the inmate a menace to society and learns that the period of time remaining to be served in the requesting state is limited, it would decide against honoring the detainer. If the parole board believes the inmate is ready for community supervision, it may suggest to the requesting state that the inmate be released to that state for dual parole supervision.

The effect on the parole decision of a detainer filed for deportation of an inmate varies depending on the country to which the inmate is to be

68. The 1957 legislation providing for mandatory disposition of in-state detainees on untried offenses was designed to replace the practice of custody paroles. See note 63 *supra* and accompanying text.

deported. In considering deportation to Canada or Mexico, the board, aware of the ease with which the parolee can return to Michigan, tends to be somewhat cautious in granting parole. Nevertheless, even in these cases, the board is sometimes willing to grant parole when otherwise it would not. One parole board member noted:

In some quarters of this state, and particularly among some members of the judiciary, there is present a philosophy that we should not clutter up our institutions with persons who are deportable, and that we should, as a matter of fact, pursue a very liberal policy in such cases. I do not think that the board subscribes to this philosophy, nor does it operate under it to the extent that some would desire.

A greater degree of liberality is evident in considering paroles to detainees for deportation to countries overseas.

5. *Reward for Informant Services*

Illustration No. 14: The inmate had been convicted of assault with intent to rob, for which he was placed on probation. After one year on probation, he violated and received a prison sentence of one to ten years. This was his initial parole hearing. The sentencing judge and the prosecuting attorney both recommended a parole denial. He had a prior record of assault. His I.Q. was recorded as sixty-three. Shortly before his hearing, the inmate had learned of an escape plot involving four inmates who were hiding in a tunnel. He tipped off a guard and the inmates were apprehended. The board decided to grant parole.

In current administration, the services of informants are sought and rewarded by enforcement officials. Typically, the informant has engaged in criminal behavior himself. The most persuasive inducement and reward for information is lenient treatment of the informant. The leniency may take the form of failure to arrest for minor offenses,⁶⁹ refusing to charge an informant despite sufficient evidence, convicting him of a less serious offense, or probation or a lighter sentence.

Occasionally, the parole decision may be used as a reward for informant services, especially for information about the activities of inmates in the correctional institution. In the illustration case, the inmate would not have been paroled on the basis of his rehabilitation. His informant services were not discussed during the parole hearing, but the board was told of them before the hearing and discussed them after the inmate left the hearing room.

In many states, statutes authorize the granting of special good time to inmates who perform extra work or other meritorious duties, including

69. See generally LAFAYE, *ARREST* 132-37 (1965).

giving information to prison officials.⁷⁰ It is not certain how often these provisions are used to reward inmate informant services and, if they are used, whether they are effective in eliminating the need to use the parole decision for the same purpose.⁷¹

The chairman of the Michigan parole board indicated in a speech the difficulty which the informant causes the board in reaching a decision:

Parole was designed to serve society as a means of assisting the individual to make the transition from prison confinement to existence in the free community. There are times, however, when offenders render great assistance to law enforcement or perform some valorous or meritorious act. Testifying against dangerous criminal offenders and thereby placing their own lives in jeopardy, saving the life of an officer or helping him in a serious situation, and giving information preventing a serious escape threat of dangerous persons are acts which seem to warrant special consideration. As valuable as these acts may be, they must be interpreted as to the intent of the individual in performing them. It is said that "virtue is its own reward," but sometimes people expect something more tangible—say, a parole! The motivation of the individual and the circumstances in which his valor was evidenced are as important here as they are in the crime for which he was sentenced. They may be sincere expressions of a better set of social values, or they may be selfish efforts to gain personal advantage even if it means taking a personal risk. Such acts can be a spectacular evidence of deep significance or only an exhibition of self-aggrandizement.⁷²

In some situations there may be a need, which parole can meet, for the removal of the informing inmate from the institution for his own safety. It is not clear whether this is an important consideration in the decision to grant parole to the informant and, if so, whether a transfer of the informant to another institution would be a satisfactory alternative.

C. *The Decision To Deny Parole for Reasons Other Than the Probability of Recidivism*

Parole is often denied to inmates for reasons other than perceived probability of recidivism. Often this decision is made despite the board's own estimate that the inmate would very likely complete his parole period successfully if he were released. That this should occur is surprising in view

70. The Kansas statute provided: "The board of administration is hereby empowered to adopt a rule whereby prisoners . . . may be granted additional good time for . . . giving valuable information to prison officials . . ." Kan. Laws 1935, ch. 292, § 1.

71. For example, it is probably true in Michigan that the great majority of prison inmates are routinely awarded the maximum possible good time and special good time.

72. Address by R. H. Nelson, Chairman, Michigan Parole Board, at a meeting of Michigan prosecutors, July, 1957.

of the chronic crowded conditions of most prisons. Ironically, however, in some situations prison overpopulation may be a factor contributing to a decision to deny parole despite a high probability of parole success. It might be argued, for example, that when a parole board denies parole to a good risk because it is enforcing prison discipline,⁷³ a major reason it feels compelled to do so lies in the strain on prison discipline created by overcrowding.

It has been contended that parole boards tend to be too "conservative" in their release practices. In part this contention goes to the point that parole boards may require too high a probability of parole success before granting parole, but it also may go to policy considerations upon which parole denials are based in cases in which the board's own requirements of probable parole success have clearly been met. This may be the situation, for example, with regard to denials because the inmate has assaultive tendencies⁷⁴ or because a parole grant would subject the correctional system to severe public criticism.⁷⁵

1. *Cases Involving Assaultive Behavior*

Illustration No. 15: The inmate, thirty-one years of age, was convicted of carrying a concealed weapon and sentenced to one to five years. When he was arrested on the present offense, he was believed to be trying to draw a gun on the arresting officer. His prior record consisted of convictions for "shooting another" and for felonious assault. He had been denied parole at a previous hearing because of several misconduct reports from the institution, one of which consisted of possession of a knife. Since his last hearing, however, he had received no misconduct reports. When the questioning of one of the board members revealed he was thinking of a parole grant, the other member interrupted him with: "I want a discussion on this." The first member replied that the record showed the inmate had greatly improved his attitude since the last hearing. Nevertheless, the inmate was told his case would have to be discussed with other members of the parole board and he would hear their decision in about a month.

Parole boards tend to be more conservative in their release practices when the inmate has demonstrated he is capable of assaultive behavior. Sometimes this consideration is regarded as sufficiently important to justify a denial of parole to an inmate who would otherwise be regarded as having a sufficiently high probability of parole success to justify release. The rationale is, of course, that the parole board has an obligation to protect the

73. See text accompanying notes 78-82 *infra*.

74. See text accompanying notes 76-77 *infra*.

75. See text accompanying notes 91-94 *infra*.

public from possible assaultive behavior which overrides its obligation to release inmates at the optimum point in their rehabilitative progress.⁷⁶

The Michigan parole board has a practice of refusing to grant parole to an inmate with a demonstrated capacity for assaultive behavior until the case has been discussed by the full five-man membership of the board in executive session. In the illustration case, one of the two parole board hearing members said after the inmate left the room that he did not believe parole was appropriate because of the inmate's history of assaultive conduct. He said he believed a further psychiatric evaluation would be necessary since on at least three occasions the inmate had proved himself capable of serious assaultive behavior.

Shortly after the field survey was conducted, the Wisconsin parole board adopted the policy of requiring a discussion in executive session before an inmate with a history of assault may be paroled. In these cases, the two members of the board conducting the parole hearing tell the inmate a discussion with a third member is necessary before a decision can be made. The director of the Social Service Department of one of the institutions noted that both institutional authorities and the parole board are more cautious in cases involving assault, particularly in cases of murder, because although the probability of recidivism may be low, the probable seriousness of the new offense, if one is committed, is great.

Normally, the board determines whether the inmate is capable of assaultive behavior on the basis of his prior record and the offense for which he is serving time. The board may also have the benefit of a psychiatric evaluation. In such cases, the latter is given great weight. An evaluation which concludes that the inmate is still capable of assaultive behavior or is still too dangerous for release will almost automatically result in a denial of parole.⁷⁷

2. *Supporting Institutional Discipline*

Illustration No. 16: The inmate, twenty-six years of age, was convicted of larceny in a building and received a sentence of one and one-half to four years. This was his first parole hearing. A parole board member questioned the inmate about his institutional record, which showed he had three institutional reports, two for being "lazy" and refusing to work and one for having dice in his possession. He had several misdemeanor arrests and at one time had been arrested on a narcotics investigation charge. An immediate parole was not granted

76. The board is especially unlikely to release inmates who appear to be directing aggression against particular persons. In one case, for example, an inmate was continually denied parole because he persisted in sending threatening letters to his wife.

77. For example, an institutional recommendation such as the following is virtually certain to result in a parole denial: "Paranoid psychosis. Thinks wife maneuvered him into murdering her. Psychiatrist reports too dangerous for release. Deny."

but the case was continued for office review in six months. It was explained to the inmate that his institutional record had been poor and that if he corrected this and tried to obtain some help from his counselor, he would be given consideration again in six months.

Maintaining discipline among inmates is a major concern of all prison administrators. Although there are wide variations among penal institutions as to the degree to which the details of daily living are regulated by the administration, even in relatively permissive institutions there are disciplinary rules and sanctions for their infraction. Infractions of prison discipline are often interpreted by the parole board as signs of what the offender is likely to do when he is released on parole. They suggest an inability of the offender to adjust to his position and to respect authority.⁷⁸ Quite a different consideration is primary, however, when the board denies parole because of the effect its decision may have on prison discipline. The major interest shifts from a concern with the future adjustment of the offender to a concern with order and control in the penal institution. Parole becomes an incentive for good behavior and a sanction against undisciplined conduct by inmates.⁷⁹

It is frequently not easy to distinguish between actions of the board which are designed to have an impact on the discipline of the institution and those which relate to the offender's future adjustment. It is likely that even the parole board members are unable to articulate clearly their reasons for reacting as they do to inmates with disciplinary problems. In Kansas, a parole board member may sometimes say, "How can you expect to be paroled when you can't even behave in the institution?" which might be interpreted by the inmate to indicate the board feels he lacks sufficient control. On the other hand, the board member will sometimes say, "I can't parole anyone who has become involved in so serious a breach of prison discipline," which might more readily be interpreted as supportive of prison discipline. Treating misbehavior during confinement as an unfavorable sign for future parole success leads in most cases to the same decision which would be made if the order of the institution were the sole consideration.

Parole is only one of many sanctions which are used to maintain discipline in penal institutions. Violations of disciplinary rules may result in denial

78. See text accompanying notes 28-29 *supra*.

79. Mich. Admin. Code ch. II, rule 6, p. 191 (1944): "No prisoner shall be released on parole . . . merely as a reward for good conduct or efficient performance of duty during his incarceration, but only when the board feels that it is reasonably certain that the parole will not be violated, and that as a parolee he will not become a menace to society or to the public safety."

of certain privileges or in solitary confinement. Repeated disciplinary violations may result in a transfer of the inmate to a less desirable institution. In most states, good time laws permit reduction of the maximum or minimum sentences, or both, as a reward for infraction-free conduct, and permit revocation of reductions already given for disciplinary violations.⁸⁰ In some states, parole eligibility may be specifically contingent on the existence of no recent disciplinary infractions.⁸¹

That parole is used to support institutional discipline may reflect the failure of these other devices to provide the necessary controls. This may be particularly true of the good time laws. In some institutions, it seems clear that good time laws have degenerated into automatic reductions of sentence, possibly as a result of the heavy release pressures of prison overpopulation, and thus have little, if any, effect on the conduct of inmates. A member of the Michigan parole board indicated that in practice the good time system has broken down and that it is an exception for an inmate to appear before the parole board who has not earned all possible regular and special good time. The board member indicated that in order to be denied good time, an inmate would have to "spit in the warden's eye."

It is difficult to determine whether it is possible, assuming for the moment it is desirable, to strengthen other control devices enough to enable the parole decision to remain free of the necessity for its use as a disciplinary device. It is probably true that, assuming administration of the good time laws has resulted in their uniform application without regard to conduct, the parole decision is currently a necessary device for control within the institution. Certainly the Model Penal Code regards it as a proper use of parole because it authorizes a denial of parole when the inmate's "release would have a substantially adverse effect on institutional discipline."⁸² It is impossible to know whether this reflects a judgment that parole must inevitably be used as a control device, or whether, given current conditions, it must be so used. It would be possible to devise a system whereby the institution did preliminary screening of parole applicants and had the power to postpone parole hearings several months on the basis of institutional misconduct. This would have the effect of retaining the parole decision as a sanction for nonconformance to the institution's code, while at the same time relieving the parole board from the necessity of taking prison discipline into account when it makes parole decisions.

80. See MODEL PENAL CODE § 305.9, comment (Tent. Draft No. 5, 1956).

81. See note 106 *infra*.

82. MODEL PENAL CODE § 305.9(1)(c) (Proposed Official Draft 1962).

3. *Minimum Amount of Time*

Illustration No. 17: The inmate, age twenty-two, had been convicted of unlawfully driving away an auto, for which he received two years' probation. After he had served twenty-one months on probation, it was revoked for failure to report, failure to pay costs and restitution, and involvement in an auto accident. The judge imposed a prison term of six months to five years, stating to the inmate that he would probably be back home in about four and one-half months. He spent two months at the main prison and was then transferred to the prison camp where he had served almost a month by the time of his parole hearing. The camp recommended a short continuance of the case on the ground little was known about the inmate. Most of the hearing was consumed by the parole board attempting to explain to the inmate that he had been in the institution "too short a time for the offense" and, further, that the institution knew little about him. The board explained it could not conscientiously recommend parole for him in light of its lack of knowledge of his case. The case was continued for discussion in executive session.

A problem which some parole boards must frequently face occurs when an inmate appears for his initial parole hearing after he has served only a short length of time, normally under six months. Whatever the reasons, the parole board is likely to be quite reluctant to give serious consideration to the case until the inmate has served more time. The normal disposition when such a case appears is to schedule a rehearing, or sometimes only a conference in executive session, in several months, at which time the decision to grant or deny parole will be given usual consideration.

Because of its sentencing structure, the problem is particularly noticeable in Michigan. There, the maximum sentence for most offenses is fixed by statute but the judge has discretion to set any minimum sentence he wishes.⁸³ Regular and special good time are deducted from the judicially set minimum to determine parole eligibility,⁸⁴ and the inmate normally receives his first parole hearing one or two months before he becomes eligible for parole. As a result, when the judge sets a minimum sentence of six months, the inmate is eligible for parole after he has served about four months and appears for his first parole hearing after he has served only three months. The typical disposition of such cases is a continuance for six months or a year, at which time he will be given usual parole consideration.

It is possible, of course, to have a judicial minimum system which does not as readily lead to the difficulties experienced in Michigan. Under the judicial minimum system proposed in the Model Penal Code, the judge

83. MICH. STAT. ANN. §§ 28.1080, .1081 (1954).

84. MICH. STAT. ANN. § 28.2304 (1954).

may not set the minimum sentence at less than one year.⁸⁵ With the necessary allowances for deducting good time and scheduling the hearing a month in advance of parole eligibility, this would normally result in an inmate's not receiving his first parole hearing before he has served nine months.

A potential problem of the same type was handled by parole board policy in Kansas and Wisconsin. There, inmates of the reformatories and women's prisons are by statute eligible for parole as soon as they arrive at the institution.⁸⁶ In each state, the inmate, although statutorily eligible for parole immediately, does not normally receive his first parole hearing until he has served nine months of his sentence. This doubtless reflects a judgment that about that much time is necessary before it makes sense to consider the question of parole.

While there seems to be a consensus that a minimum time, probably between nine months and one year, is necessary before serious consideration should be given to parole, there is lack of agreement as to why this is true. One reason given is that the institution is incapable of having any rehabilitative effect on the inmate in less time. The assumption is that all persons sentenced to prison are in need of rehabilitation, which takes time, or at least that it takes time to determine whether they are in need of rehabilitation.⁸⁷ A related reason sometimes given is that the parole system and institution are incapable of formulating sound post-release programs for inmates in less time. Further, parole boards sometimes contend that adequate information on the inmate cannot be obtained in less time and, therefore, a short continuance is necessary in order to obtain information.⁸⁸ At other times, however, parole boards have indicated a certain minimum time is necessary in order to justify the risk entailed by every decision to grant pa-

85. MODEL PENAL CODE § 6.06 (Tent. Draft No. 2, 1954).

86. WIS. STAT. ANN. § 57.07 (1958); Kan. Laws 1949, ch. 461, § 1, as amended, Kan. Laws 1957, ch. 331, § 37; Kan. Laws 1901, ch. 355, § 17, as amended, Kan. Laws 1957, ch. 472, § 12. Although inmates committed under the Wisconsin Sex Crimes Act are immediately eligible for parole, WIS. STAT. ANN. § 959.15 (10) (1958), in practice release is not considered until they have served one year.

87. In one case, the parole board denied parole to an inmate who had served only three months, commenting: "He has only been in the institution for three months and I believe this is too short a time to expect a change in him if it is possible for any change to occur in such an individual."

88. A similar basis exists for the provision that female misdemeanants may be committed to the Wisconsin Home for Women instead of local jails, but only if the sentence is six months or longer. WIS. STAT. ANN. § 959.045(4) (Supp. 1966). An official in the Wisconsin Division of Corrections said that the six months requirement exists because the board of parole and the institution could not develop enough information to formulate a program for them in less time.

role. The assumption in such cases is that the inmate has served such a short length of time that the parole board can afford to be more conservative in its release decision. Also implicit is the fear that if an inmate were granted parole after serving only four or six months and violated parole in a spectacular fashion, the parole board would be subject to more than the usual amount of criticism.⁸⁹

4. *To Benefit the Inmate*

Illustration No. 18: The inmate, a young man who appeared to be in his late teens, had come from what many would describe as a "good home." He had two brothers, both of whom were ordained ministers, and his parents were respected members of the community. The inmate's father constantly demanded more of the inmate than the latter thought he had the ability to accomplish and continually compared him unfavorably with his older brothers. This comparison was also made by the inmate's school teachers because the inmate, although of high average intelligence, did rather poorly in school. Nevertheless, he had completed all but part of his senior year in high school by the time he had been sentenced to the reformatory. In its pre-parole summary, the classification committee of the institution recommended that the inmate be permitted to complete his high school education, on the ground that it would aid him in the achievements of which he was capable. Some members of the parole board believed that if the inmate finished high school, he might go to college. The parole board decided to defer the case for five months to permit the inmate to complete his high school education prior to his release.

Cases sometimes arise in which it may appear to the parole board that a denial of parole would bring a benefit to the inmate which would be unobtainable if parole were granted. It is arguable, of course, that whenever the board denies parole because it believes the inmate has not reached the optimum time for release in terms of rehabilitation, this is, in reality, a benefit to the inmate. But there are other cases in which the benefit obtainable only through a parole denial may be at least as real, but may have no direct connection with the inmate's rehabilitation. Perhaps the clearest examples are those in which the inmate is suffering from a physical illness which is correctable in the prison but which release to the community would aggravate, or those in which the inmate would benefit from devices, such as dental plates or a hearing aid, which could be provided at no cost to him if he remains an inmate but which may not be as readily obtainable on

89. In denying parole to an inmate who had served only four months before the hearing, a parole board member commented: "There has not been a sufficient period of time to warrant the parole risk in this case."

the outside.⁹⁰ The illustration case is one in which the benefit accruing to the inmate by remaining in the institution is related both to his rehabilitation and to his more general welfare. The parole board may sometimes be faced with the dilemma of having an inmate who in terms of its rehabilitation standard might best be released, but who in terms of the interest of the institution in the inmate's total welfare ought to be retained to receive a special benefit which the institution can provide.

5. *To Avoid Criticism of the Parole System*

Illustration No. 19: The inmate had been convicted of embezzling \$25,000 from a veterans' service group. He had absolutely no prior criminal record. Before the offense he had been a prominent member of the community and was well liked. This was his initial parole hearing. When the parole board learned that as a result of the offense the attitude of the community was very much against the inmate, it voted to deny parole.

There is a feeling shared among many parole board members that the success of the parole system depends in part on whether it achieves public approval and confidence. In some states the parole board publishes literature on the parole system for the public, and members make speeches or give demonstrations of parole hearings to civic and social groups. The parole board may also invite community leaders to be present at parole hearings and observe how the board functions.

While a desire to be free of public criticism and to gain the confidence of the public is a characteristic probably common to all criminal justice agencies, the parole board seems particularly sensitive. Whatever the reasons for this concern, it is sometimes reflected in the parole decision. Parole boards are often reluctant to release assaultive offenders despite their own estimate of the high probability of parole success.⁹¹ One reason for this is the board's concern for the safety of the community—that while the probability of recidivism may be low, the seriousness of the violation, if it occurs, is likely to be quite great. But another reason for the board's reluctance to release

90. The Model Penal Code authorizes denial of parole to obtain a benefit for the inmate which is related to his rehabilitation. MODEL PENAL CODE § 305.9(1) (Proposed Official Draft 1962) provides in part:

Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, it shall be the policy of the Board to order his release, unless the Board is of the opinion that his release should be deferred because:

(d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life when released at a later date.

91. See text accompanying notes 73-74 *supra*.

assaultive offenders is its concern about adverse public reaction if the offender violates parole in a spectacular manner.⁹²

The concern about public criticism is even more clearly an important factor in the trust violation cases. The parole board normally views public or private officials who have embezzled funds as good parole risks in terms of the likelihood of parole success. One parole member even said that he thought these persons should not be sent to prison since, because of the usual publicity surrounding their apprehension and conviction, they are very unlikely to repeat the same or a similar offense. Nevertheless, the question whether they should be paroled raises the difficult problem of determining what weight the parole board should give to community attitudes. If the attitude of the community toward the inmate is good, he is likely to be paroled as soon as he is eligible. When the community attitude is negative, parole is likely to be denied. One reason may be that a negative community attitude is likely to seriously hamper the inmate's efforts to adjust.⁹³ Another reason, and probably the more important one, is that parole of such an inmate would expose the board and the parole system to public criticism. One parole board member expressed his attitude toward the trust violation cases in terms of a dilemma, stating that to some extent a parole board must defer to certain community attitudes but that no parole board member can go beyond a certain point without violating his own conscience.

The board's concern with public criticism of the parole system also affects the parole decision in cases in which the inmate or a member of his family has attempted to put unusual pressure on the parole board for his release. This normally occurs in cases in which the inmate has received a long sentence, often a life sentence. The inmate may write letters to influential persons in state government or to anyone else whom he thinks might be able to influence the board. Sometimes, the inmate or his family may hire attorneys whom they think have unusual influence with the board. The attitude of the parole board in such cases toward the release of the inmate is likely to be extremely negative. In one case, a member of the board said that if a lifer who wrote great numbers of letters trying to get someone to influence the board would cease writing for six months, he would be released, but so long as he persisted in his present behavior the board member was deter-

92. One member of a parole board indicated that although parole prediction studies have shown that murderers, sex offenders, and men who have committed assaults are among the best parole risks, the fact remains that if one is paroled and repeats the same type of crime, the unfavorable publicity is many times that when a sixth forgery offender is paroled and again forges checks.

93. See text accompanying notes 43-49 *supra*.

mined that he "do it all."⁹⁴ If the board were to grant parole to such an inmate on the merits of the case, it would expose itself to the accusation that the parole grant was the result of special influence. The board prefers to keep the inmate in prison rather than incur that risk.

III. STATUTORY PAROLE CRITERIA

Perhaps the most notable characteristic of current statutory parole criteria is the absence (with only a few exceptions) of provisions that deal with the difficult decision-making problems which parole boards must face daily. There is, for example, no statutory provision presently in effect which indicates when, if ever, it is proper for a parole board to deny parole despite its own judgment that the inmate is unlikely to commit a new offense if released, yet parole boards must constantly face this difficult question.⁹⁵ Nor is there any statutory consideration of the circumstances under which it might be proper for a parole board to release an inmate despite its own judgment that he is likely to recidivate—indeed, most statutes flatly prohibit such decisions⁹⁶—yet in practice they are made daily, and often under circumstances which one might suppose would lead a legislature to concur in their propriety.⁹⁷

Closely related to the unsuitability of current legislation as a practical guide for parole decision-making is the fact that much of it relies heavily on the Standard Probation and Parole Act.⁹⁸ The language of two provisions of section 18, often with minor variations, appears in the statutes of a large number of the states:

[T]he board shall release on parole any person confined in any correctional institution administered by state authorities, when in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself.

. . . .

A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sen-

94. One parole board uses a special investigator attached to the corrections department to investigate suspected attempts to secure parole through unethical pressure.

95. See text accompanying notes 74-94 *supra*.

96. See text accompanying notes 108-117 *infra*.

97. See text accompanying notes 51-73 *supra*.

98. The Standard Probation and Parole Act is the product of the National Council on Crime and Delinquency. It has been revised a number of times. The latest revision was in 1955.

tence or a pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.⁹⁹

While it is not clear that the availability of the Standard Act was a major contributor to legislative failure to come to grips with the practical problems of parole decision-making, the Act clearly served as a model for legislative action, and perhaps without it draftsmen would have been forced to face some of the problems.

A. *Statutory Criteria Related to the Inmate's Conduct Within the Correctional Institution*

In practice, the inmate's conduct while incarcerated is considered relevant to the timing of release on parole. Parole boards consider the inmate's adjustment in prison—his conformity to inmate conduct requirements and his attitude toward officials in authority in the prison—as an indication of his willingness and ability to adjust to life in the free community if released on parole.¹⁰⁰ Furthermore, parole boards regard inmate participation in voluntary educational and rehabilitation programs as an indication of favorable adjustment on parole.¹⁰¹ Parole boards sometimes grant parole, despite an estimated high probability of recidivism, to an inmate who has informed prison authorities of illicit activities by other inmates or who in some other way has performed meritorious services for prison authorities.¹⁰² Finally, parole boards sometimes deny parole to an inmate whom it believes to be ready for release when, because of his recent misconduct, it believes a denial is necessary to deter misconduct by other inmates.¹⁰³

Current statutory criteria speak only to some of these problems. The statutes of five states presumably would prohibit the use of parole as a reward for informant services: "No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison . . ."¹⁰⁴ Statutes in other states indicate that the inmate's

99. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD PROBATION AND PAROLE ACT § 18 (1955 rev., reprinted 1964).

100. See text accompanying notes 28-29 *supra*.

101. See text accompanying notes 25-27 *supra*.

102. See text accompanying notes 69-72 *supra*.

103. See text accompanying notes 78-82 *supra*.

104. ALA. CODE tit. 42, § 7 (1958); FLA. STAT. ANN. § 947.18 (1944); MASS. ANN. LAWS ch. 127, § 130 (1965); N.J. REV. STAT. § 30:4-123.14 (1964); TENN. CODE ANN. § 40-3614 (Supp. 1966); Ind. Acts 1953, ch. 266, § 33, at 944, repealed by Ind. Acts 1961, ch. 343, § 43.

MICH. STAT. ANN. § 28.2303(1) (Supp. 1963) provides: "In determining a prisoner's

conduct while incarcerated should be considered by the parole board.¹⁰⁵ Still other statutes provide that in order to be eligible for release on parole an inmate must not have violated any of the disciplinary rules of the institution for a specified period of time.¹⁰⁶

*B. Statutory Criteria Requiring a Prediction
of the Inmate's Conduct if Released on Parole*

In practice, one of the parole board's major concerns is predicting the conduct of the inmate if he is released on parole. It considers not only the

fitness to be released on parole, the parole board may give consideration to instances of voluntary assistance to medical and other scientific research and blood donations." The Public Health Service is conducting malaria research by using volunteers from the inmates of the federal penitentiary at Atlanta, Georgia. Each inmate volunteer receives five days good time for each month in which he participates in the research program. See "Prisoners Who Serve More Than Time," *Parade*, April 3, 1966.

105. GA. CODE ANN. § 77-514 (1964) provides: "Good conduct and efficient performance of duties by a prisoner shall be considered by the board in his favor and shall merit consideration of an application for pardon and parole." See ORE. REV. STAT. § 144.250 (1964); R.I. GEN. LAWS ANN. § 13-8-14 (1956); S.C. CODE ANN. § 55-612 (1962). N. C. GEN. STAT. § 148-60 (1964) requires the parole board to give "due consideration" to whether "the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners. . . ."

106. N.H. REV. STAT. ANN. § 607:39 (Supp. 1963) provides: "Any convict . . . whose record of conduct shows that he has faithfully observed all the rules of said prison, and has not been subjected to punishment, shall be entitled to release from said prison upon the expiration of the minimum term of his sentence. . . ." W.VA. CODE ANN. § 6291(20) (1961) provides: "Any prisoner of a penitentiary of this state, to be eligible for parole . . . (2) Shall not be under punishment or in solitary confinement for any infraction of prison rules; (3) Shall have maintained a record of good conduct in prison for a period of at least three months immediately preceding the date of his release on parole" WYO. STAT. ANN. § 7-325 (1957) provides that a convict "who has made an assault with a deadly weapon upon any officer, employee or convict of any institution or has attempted to escape, escaped or assisted others to escape from any institution shall not be eligible for parole."

New Hampshire at one time apparently required that if an inmate served his minimum sentence without disciplinary violation he must be released on parole, while if he engaged in misconduct, the parole board was authorized to release him after he has served his minimum sentence. N.H. Laws 1909, § 120:2, amended by N.H. Laws 1961, § 62:1.

Kentucky statutes at one time apparently required a determination of administrative eligibility for release on parole based on conduct within the institution:

If the department, after careful consideration and in the full exercise of its discretion, deems the application reasonable and timely, it shall ascertain from the records of the penitentiary where the applicant is confined and from other trustworthy sources whether he has been of good demeanor and has been sufficiently meritorious and has earned sufficient grade or rank for good conduct by obedience to the regulations of the institution in which he is confined, for the period of time to be fixed by the regulations of the department, next preceding the date of his application. Ky. Rev. Stat. § 439.120 (2) (1942), repealed by Ky. Laws 1956, ch. 101, § 34.

probability that the inmate will violate the law if released, but also the probable seriousness of the violation if it occurs.¹⁰⁷ Statutory criteria, however, typically do not distinguish between degrees of seriousness of future conduct and, indeed, most of them seem to prohibit release if there is a probability of commission of even a minor criminal offense.

Most statutory criteria speak to future violations of the criminal law, but some speak as well to future violations of the parole conditions by non-criminal conduct, and a few imply higher standards of conduct for the parolee.

1. *Future Violations of the Criminal Law*

Most states have statutes which require the parole board to determine the probability that the inmate will violate the criminal law if released on parole. A number of statutes authorize the parole board to release an inmate only if "there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law"¹⁰⁸ Several states have made minor alterations to this basic provision. North Carolina requires the parole board to give "due consideration . . . to the reasonable probability that the prisoner will live and remain at liberty without violating the law"¹⁰⁹ Colorado statutes authorize release only if there is a "strong and reasonable probability" of no further criminal law violations.¹¹⁰ On the other hand, Ohio statutes merely require a "reasonable ground to believe that, if . . . the prisoner is paroled, he will be and remain at liberty without violating the law"¹¹¹ Another large group of statutes follows

107. For a discussion of this aspect see text accompanying notes 16-51 and 77-78 *supra*.

108. ALA. CODE tit. 42, § 7 (1958); *accord*, 18 U.S.C. § 4203(a) (1964); ALASKA STAT. § 33.15.080 (1962); ARIZ. REV. STAT. ANN. § 31-412 (1956); CONN. GEN. STAT. REV. § 54-125 (1958); D.C. CODE ANN. § 24-204 (1961); HAWAII REV. LAWS § 83-67 (1955); MD. ANN. CODE art. 41, §§ 112, 124(b) (1957); MASS. ANN. LAWS ch. 127, § 130 (1957); N.H. REV. STAT. ANN. § 607:39 (Supp. 1963); ORE. REV. STAT. § 144.240 (1963); PA. STAT. ANN. tit. 61, §§ 293, 304 (1964). See also DEL. CODE ANN. tit. 11, § 4347 (Supp. 1964); IND. ANN. STAT. § 13-1609 (Supp. 1966).

109. N.C. GEN. STAT. § 148-60 (1964).

110. COLO. REV. STAT. ANN. § 39-17-3(2)(b) (Supp. 1960).

111. OHIO REV. CODE ANN. § 2965.09 (Page 1953). Among other minor variations are the following: S.C. CODE ANN. § 55-612 (1962) provides that "[N]o such prisoner shall be paroled until it shall appear, to the satisfaction of the Board . . . that, in the future, he will probably obey the law"; TENN. CODE ANN. § 40-3614 (Supp. 1964) authorizes release only when the inmate "will live and remain at liberty without violating the law"; W. VA. CODE ANN. § 6291(20) (1961) requires that the prisoner "shall have satisfied the board that, if released on parole, he will conduct himself in a lawful manner"

the language of the Standard Probation and Parole Act¹¹² and provides: "A person shall be placed on parole only when the Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen."¹¹³

Each of these provisions prohibits parole if there is a probability that the inmate will commit a new violation of the criminal law. They do not make clear whether concern with new violations is limited to the parole supervision period, or, as the language seems to support, extends beyond the time when the inmate is released from parole supervision.¹¹⁴ But most importantly, these provisions do not distinguish between degrees of seriousness in criminal law violations, while parole boards, as a matter of necessity, have made such distinctions. The provisions, literally applied, would prohibit the parole of a person if there were a likelihood that he would commit a violation, no matter how trivial, despite the fact that legitimate goals could be achieved by granting parole. In practice, these provisions are violated regularly, especially in cases of chronic check forgers, nonsupport violators, and other minor property offenders, which cases comprise a large percentage of those heard by the parole board.¹¹⁵

The Michigan statute seems to authorize release of the probably minor parole violator by its provision that "no prisoner shall be given his liberty on parole until the board has reasonable assurance after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that he will not become a menace to society or to the public safety."¹¹⁶ It could be argued that the existence of that provision accounts for the instances of paroles of probably minor offenders in Michigan which were found in the field data. It should be noted, however, that a similar pattern of decision-making was found in Wisconsin, where statutes apparently would prohibit such paroles.¹¹⁷

112. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD PROBATION AND PAROLE ACT § 18 (1955 rev., reprinted 1964). See text accompanying note 99 *supra*.

113. DEL. CODE ANN. tit. 11, § 4347(a) (Supp. 1964); IDAHO CODE ANN. § 20-223 (1947); IND. ANN. STAT. § 13-1609 (Supp. 1965); KAN. GEN. STAT. ANN. § 62-2245 (Supp. 1961); KY. REV. STAT. ANN. § 439.340(2) (Supp. 1965); MISS. CODE ANN. § 4004-08 (1942); MO. REV. STAT. § 549.261(3) (1959); MONT. REV. CODES ANN. § 94-9832 (Supp. 1965); N.M. STAT. ANN. § 41-17-24 (1964); Tex. Acts 1957, ch. 266, § 12.

114. As a practical matter, it may make little difference which construction of the statutes prevails, since it is likely that if a violation occurs it will be shortly after release from the correctional institution. It is conceivable, however, that the construction of the statutes might make some difference in a case involving an extremely short parole period.

115. See text accompanying note 51 *supra*.

116. MICH. STAT. ANN. § 28.2303 (1954).

117. WIS. STAT. ANN. § 57.07(1) (Supp. 1965) provides: "The department may

2. *Violations of Parole Conditions*

When an inmate is released on parole, his liberty is conditioned upon his meeting a number of requirements. These tend to be numerous and to regulate behavior which is not prohibited by the criminal law. The standards of behavior required by parole conditions tend to be so high that it is doubtful whether any parolee has ever refrained from at least once violating one of them. In practice, violations occur with some frequency, but the vast majority of them are not serious enough to result in revocation of parole, although revocation is clearly authorized for even a single violation. Nevertheless, the statutes of two states authorize parole only if there is a "reasonable probability" that the prisoner will not violate his parole conditions.¹¹⁸ That such a requirement cannot be met in even a fraction of the paroles granted must be evident. It should also be clear that real compliance with such a requirement might be far from desirable.

3. *Provisions Implying a Higher Requirement*

A number of statutes require a prediction that in addition to not violating the criminal law, the inmate will, if released, be a "good citizen" or its equivalent. New Hampshire, for example, requires a "reasonable probability that [the inmate] will remain at liberty without violating the law and will conduct himself as a good citizen."¹¹⁹ New Jersey requires a "reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society . . ."¹²⁰ The provisions discussed previously which require that the inmate be "able and willing to fulfill the obligations of a law-abiding citizen"¹²¹ might be interpreted to require more than simply an absence of criminal law violations. Missouri provides that "no inmate shall be paroled from the reformatory until he has given evidence that he is fit to be paroled into the life of the community,"¹²² and Wisconsin pro-

parole prisoners in the state reformatory and the home for women whenever . . . their conduct for a reasonable time has satisfied the department that they will be law-abiding, temperate, honest and industrious."

A particular manifestation of the same concern which perhaps motivated the Michigan provision occurs in the North Carolina statute, which requires as a condition to granting parole that "the prisoner harbors no resentment against society or the judge, prosecuting attorneys, or jury that convicted the prisoner." N.C. GEN. STAT. § 148-60 (1964).

118. ALASKA STAT. § 33.15.080 (1962); N.D. CENT. CODE § 12-55-15 (1960). The latter provides as a requirement for granting parole that "the board of pardons is convinced that the applicant will conform to all the rules and regulations adopted by said board."

119. N.H. REV. STAT. ANN. § 607:39 (Supp. 1963). Similarly, Florida and Georgia require a finding of a "reasonable probability" that if the inmate is paroled "he will live and conduct himself as a respectable and law abiding person." FLA. STAT. ANN. § 947.18 (1941); GA. CODE ANN. § 77-514 (1963).

120. N.J. REV. STAT. § 30:4-123.14 (1964).

121. See text accompanying notes 112-13 *supra*.

vides that reformatory inmates may be released when "their conduct for a reasonable time has satisfied the department that they will be law-abiding, temperate, honest and industrious."¹²³ Statutes in Idaho and Washington provide that no prisoner shall be released from the penitentiary unless his rehabilitation has been complete and he is a fit subject for release.¹²⁴ South Carolina requires that "the prisoner has shown a disposition to reform and that, in the future, he will probably obey the law and lead a correct life . . .,"¹²⁵ and Rhode Island requires that the "prisoner has shown a disposition to reform."¹²⁶

Many of these provisions are vague and some require the parole board to judge the moral worth of the parole applicant, an evaluation it may not be qualified to make. Furthermore, the standard of conduct required by most of these provisions seems unrealistically high.

C. *Statutory Criteria Related to the "Welfare" of Society or of the Inmate*

A number of statutes direct the parole board to consider the welfare of society in making its decisions. In most instances, this provision is in addition to the requirement that the inmate must be unlikely to recidivate if released. A number of states use the language of the Standard Act providing: "A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon."¹²⁷ The differentiation between parole and the forms of executive clemency is probably made to save the parole law from invalidity as an invasion of the power of executive clemency posited by most state constitutions exclusively in the governor.¹²⁸

122. MO. REV. STAT. § 216.360(3) (1959).

123. WIS. STAT. ANN. § 57.07(1) (Supp. 1965).

124. IDAHO CODE ANN. § 20-230 (1947); WASH. REV. CODE ANN. § 9.95.100 (1961). Similarly, South Dakota permits parole only when the proper authority "is satisfied that any convict has been confined in the Penitentiary for a sufficient length of time to accomplish his reformation . . ." S.D. CODE § 13.5301 (Supp. 1960).

125. S.C. CODE ANN. § 55-612 (1962).

126. R.I. GEN. LAWS ANN. § 13-8-14 (1956).

127. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD PROBATION AND PAROLE ACT § 18 (1955 rev., reprinted 1964). See text accompanying note 99 *supra*. Similar provisions appear in DEL. CODE ANN. tit. 11, § 4347(a) (Supp. 1964); IDAHO CODE ANN. § 20-223 (1947); IND. ANN. STAT. § 13-1609 (Supp. 1966); KAN. GEN. STAT. ANN. § 62-2245 (1963); KY. REV. STAT. ANN. § 439.340(2) (1963); LA. REV. STAT. § 15:574.3 (1950); MISS. CODE ANN. § 4004-08 (1942); MO. REV. STAT. § 549.261 (1959); MONT. REV. CODES ANN. § 94-9832 (Supp. 1965); N.M. STAT. ANN. § 41-17-24 (1953).

128. In Michigan, for example, initial difficulty with the parole law was encountered on that basis. *People v. Cummings*, 88 Mich. 249, 50 N.W. 310 (1891), invalidated the

A number of statutes authorize the parole board to grant parole to an inmate only if the board is of the opinion that his release is not incompatible with the welfare of society.¹²⁹ Following the language of the Standard Act, a number of statutes authorize the board to parole "when in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself."¹³⁰ Delaware statutes provide that the parole board must be of the opinion that "parole supervision would be . . . an aid to rehabilitation of the offender as a law-abiding citizen."¹³¹

The provisions speaking to the welfare of society and of the inmate are too general to be helpful in making concrete parole decisions. In all probability, their sole effect is to increase the amount of discretion permitted the parole board in making its release decision by making the decision more difficult to challenge. It is also doubtful whether provisions relating to the welfare of society are necessary in view of the provisions requiring a finding that the inmate would be unlikely to recidivate if released.

indeterminate sentence and parole law enacted by the Michigan legislature in 1889 on the ground, *inter alia*, that it violated the governor's exclusive power of executive clemency because it permitted an administrative board to grant what amounted to conditional pardons. The Michigan Constitution was amended in 1903 to permit the legislature to enact a parole law. Mich. Pub. Acts 1903, at 452 (now MICH. CONST. art. IV, § 45). See *In re Southard*, 298 Mich. 75, 298 N.W. 457 (1941).

This same difficulty may account for the provision found in a number of states which places ultimate authority to grant parole in the governor. See, e.g., Kan. Laws 1903, ch. 375, § 9, repealed by Kan. Laws 1957, ch. 331, § 37.

129. 18 U.S.C. § 4203(a) (1964); ALA. CODE tit. 42, § 7 (1958); ALASKA STAT. § 33.15.080 (1962); CONN. GEN. STAT. REV. § 54-125 (1958); DEL. CODE ANN. tit. 11, § 4347 (Supp. 1964); IND. ANN. STAT. § 13-1609 (Supp. 1966); MD. ANN. CODE art. 41, § 112 (1957); MASS. ANN. LAWS ch. 127, § 130 (1965); N.J. REV. STAT. § 30:4-123.14 (1964); N.C. GEN. STAT. § 148-60 (1964); ORE. REV. STAT. § 144.240 (1965); TENN. CODE ANN. § 40-3614 (Supp. 1966). S.C. CODE ANN. § 55-612 (1962) permits parole upon a finding that "the interests of society will not be impaired thereby" Several states require a finding that parole is consistent with the public safety. HAWAII REV. LAWS § 83-67 (1955) ("not incompatible with the welfare and safety of society"); OHIO REV. CODE ANN. § 2965.09 (Page 1953) ("consistent with the welfare and security of society"); S.D. CODE § 13.5301 (Supp. 1960) ("without danger to society").

130. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD PROBATION AND PAROLE ACT § 18 (1955 rev., reprinted 1964); DEL. CODE ANN. tit. 11, § 4347(a) (Supp. 1964); KAN. GEN. STAT. ANN. § 62-2245 (Supp. 1961); MO. REV. STAT. § 549.261 (Supp. 1965); N.M. STAT. ANN. § 41-17-24 (1953). Slight variations of this same idea appear in several statutes. VA. CODE ANN. § 53-253 (1950) ("compatible with the interests of the prisoner and of society"); FLA. STAT. ANN. § 947.18 (1944) ("compatible with his own welfare and the welfare of society"); GA. CODE ANN. § 77-514 (1964) (same); PA. STAT. ANN. tit. 61, § 331.21 (1964) ("the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby").

131. DEL. CODE ANN. tit. 11, § 4347(a) (Supp. 1964).

D. *Statutory Criteria Related to the Inmate's Parole Plan*

In practice, a parole board gives careful consideration to the inmate's parole plan in making its release decision. It is interested in the inmate's employment and residence arrangements primarily to determine whether they will be helpful or harmful in his adjustment to life in the free community.¹³² A number of statutes impose employment or residence requirements; some speak to the problem of parole to a detainee.¹³³

1. *Employment and Residence Requirements*

Several states provide that no prisoner shall be released on parole "until the board shall have made arrangements or have satisfactory evidence that arrangements have been made for honorable and useful employment while on parole in some suitable occupation."¹³⁴ It is, of course, evident that such a requirement has a rational relationship to the probability that the parolee will not violate the criminal law when he is released. It seems clear in a number of states, however, that this is not the sole motivation for the requirement. Many statutes evidence a concern for keeping parolees off public assistance rolls; for example, a number of statutes provide that "no prisoner shall be released on parole . . . unless the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge if so released."¹³⁵

Several states require employment but face the possibility that the inmate may be unable to work. For example, Idaho requires that "a prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care."¹³⁶ Michigan provides that "no prisoner shall be released on parole until the parole board shall have

132. See text accompanying notes 43-49 *supra*.

133. For a discussion of the practices in Kansas, Michigan, and Wisconsin regarding paroles to detainees see text accompanying notes 59-68 *supra*.

134. NEB. REV. STAT. § 29-2623 (1956); N.J. REV. STAT. § 30:4-123.19 (1964); N.D. CENT. CODE § 12-55-15 (1960); S.C. CODE ANN. § 55-612 (1962); UTAH CODE ANN. § 77-62-14 (1953); Kan. Laws 1903, ch. 375, § 5, repealed by Kan. Laws 1957, ch. 331, § 37. New Mexico recognizes the possibility that the inmate may be able to support himself out of accumulated assets. See N.M. STAT. ANN. § 41-17-24 (1953). Oklahoma requires employment as a prerequisite to parole but provides that "the Pardon and Parole Officer shall render every reasonable assistance to any person making application for parole, in helping to obtain for said applicant suitable and fit employer and employment. . . ." OKLA. STAT. ANN. tit. 57, § 332.8 (1950).

135. ALA. CODE tit. 42, § 8 (1958); *accord*, FLA. STAT. ANN. § 947.18 (1944); GA. CODE ANN. § 77-514 (1963); MO. REV. STAT. § 216.360(3) (1959); R.I. GEN. LAWS ANN. § 13-8-14 (1956).

136. IDAHO CODE ANN. § 20-223 (1947); *accord*, IND. ANN. STAT. § 13-1609 (Supp. 1966); KY. REV. STAT. ANN. § 439.340(2) (Supp. 1966); MISS. CODE ANN. § 4004-08 (1942); Tex. Acts 1957, ch. 266, § 12.

satisfactory evidence that arrangements have been made for such honorable and useful employment as he is capable of performing, or for his education, or for his care if he is mentally or physically ill or incapacitated."¹³⁷

Several states at one time not only required employment before release, but required some evidence that the employment would last for a specified duration.¹³⁸ Missouri continues to require that employment last for a specified duration: "No inmate shall be paroled . . . until he has submitted satisfactory evidence to the board of probation and parole that arrangements have been made for his honorable and useful employment for at least six months in some suitable occupation. . . ."¹³⁹ South Dakota statutes provide: "No person shall be admitted to parole until and unless employment has been secured for him by the Department or the beneficial occupation of his time has been otherwise assured. The Department should be assured that the employment will have some permanence and that it will be reasonable to believe that the parolee will be able to continue in the same employment until the end of the period of his parole. . . ."¹⁴⁰ The difficulty of

137. MICH. STAT. ANN. § 28.2303(c) (1954).

138. See IOWA CODE § 247.8 (1946) ("employment or maintenance for at least six months") amended by Iowa Acts 1957, ch. 118, § 1; Ky. Rev. Stat. § 439.120(2) (1942), repealed by Ky. Acts 1956, ch. 101, § 34, provided:

The department shall also ascertain whether the applicant has secured or has had secured some respectable employment with a solvent, reputable person, at a compensation sufficient to render the applicant self-sustaining after parole. The employment shall be for . . . at least six months, but prisoners under the age of sixteen and female prisoners may be paroled without contract for stipulated wages, where a home for such a prisoner has been secured in a reputable family or the prisoner has been apprenticed to a solvent and reputable person under a written contract for proper support, care and moral supervision. No contract shall be necessary for the employment of a prisoner owning an estate sufficient to yield enough income or proceeds to make him self-sustaining. The department shall, by its regulations, provide proper forms of contract and may, in its discretion, require surety for the faithful performance of the contract.

Ind. Acts 1953, ch. 266, § 29, repealed by Ind. Acts 1961, ch. 343, § 43, provided: "No particular period of assured employment shall be required in releasing prisoners on parole, but each board of parole may adopt rules and regulations with respect thereto."

139. MO. REV. STAT. § 216.360(3) (1959).

140. S.D. CODE § 13.5304 (Supp. 1960). At one time it was common to require a parolee to obtain a sponsor, a reputable citizen who was willing to vouch for him. This requirement to a large extent antedates the development of professional parole supervision services. It appears that only two states retain sponsorship requirements. See OKLA. STAT. ANN. tit. 57, § 332.8 (1950); PA. STAT. ANN. tit. 61, § 315 (1964). The latter provides:

From and after the passage of this act, no prisoner, who has been sentenced to a minimum and maximum imprisonment, after such prisoner has served the minimum sentence, shall be detained in any penal institution because of the inability of such prisoner to procure a sponsor who shall be satisfactory to the board of inspectors or trustees of such penal institution; and that, in any case in which such prisoner shall be unable to secure such satisfactory sponsor, the inspectors or trustees of such penal institution may procure a sponsor for such prisoner, or may require reports from such paroled prisoner in lieu of a sponsor, as the board of inspectors or trustees may see proper.

obtaining employment of any kind for convicted felons while they are incarcerated in a prison has already been discussed.¹⁴¹

Missouri¹⁴² and Nebraska¹⁴³ require "arrangements . . . for a proper and suitable home free from criminal influence . . ." before parole may be granted. Kansas formerly had such a requirement.¹⁴⁴

2. Parole to a Detainer

Detainers cause considerable difficulty to correctional personnel and parole boards. Whether the detainer requests custody of the prisoner upon release for an untried offense or for violation of probation and parole, it creates uncertainty as to the inmate's future and makes the planning of rehabilitation programs extremely difficult. Although a parole board may parole inmates to the custody of an agency holding a detainer against him without specific statutory authorization,¹⁴⁵ in several states parole boards have been given specific statutory authorization to parole inmates to detainers.¹⁴⁶

IV. CONTROLLING PAROLE BOARD DISCRETION

One of the important problems in corrections is finding ways to accommodate the need for discretion and flexibility in making decisions with society's need to assure itself that fair and sensible decisions are indeed being made—to control discretion without destroying it.

If one regards discretionary decision-making and controlled decision-making as completely incompatible, this must seem an impossible task; either the person making the decision has discretion or he applies rules, and there is no middle ground. However, there are many subtle differences among kinds of decisions measured by the extent to which the decision-maker decides according to his own norms or is subject to legal controls and checks.¹⁴⁷ It is important to re-examine our thinking to de-

141. See text accompanying notes 43-49 *supra*.

142. MO. REV. STAT. § 216.360(3) (1959).

143. NEB. REV. STAT. § 29.2623 (1956).

144. Kan. Laws 1903, ch. 375, § 5, repealed by Kan. Laws 1957, ch. 331, § 37.

145. For example, the parole boards in Kansas and Wisconsin paroled inmates to detainers although there was no specific statutory authority for doing so. See text accompanying notes 59-68 *supra*.

146. See 18 U.S.C. § 4204 (1964) (deportation detainers only); IOWA CODE ANN. § 247.5 (Supp. 1965); MICH. STAT. ANN. § 28.2303 (1954); MO. REV. STAT. § 549.271 (Supp. 1965).

147. Professor Davis asserts that it is possible to place all official action on a scale extending from the most clearly uncontrolled discretionary decisions through numerous subtle gradations to those decisions most governed by legal rule. See DAVIS, ADMINISTRATIVE LAW 81-82 (1965).

termine to what extent discretion and legal control are compatible and whether they can work together.

Control of discretion is often thought of exclusively in terms of *legal* control. Some persons may not trust controls which are neither legislative nor judicial; to them they may seem illusory or, at best, less than adequate. Yet, when one examines the parole decision it becomes clear it is subject to controls despite the fact that legal controls are almost totally lacking. If it is a mistake to regard legal controls and discretion as completely incompatible, it is perhaps an even greater mistake to regard the legal system as the only means of controlling discretion.

It is important (1) to re-examine our thinking about legal control of discretion and (2) to explore means of control other than traditional legislative and judicial ones.¹⁴⁸

A. *Legislative and Judicial Controls*

Concern with individualization is an important reason legislatures have failed to provide meaningful standards for correctional decision-making and courts have refused to review actions of the decision-makers.¹⁴⁹ Indeed, Professor Kadish has remarked that the emphasis upon individualized decision-making in corrections "has resulted in vesting in judges and parole and probation agencies the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system."¹⁵⁰

It is apparent from a comparison of statutory parole criteria with decisions made in practice that there is very little relationship between them and that statutory criteria do not, in fact, provide meaningful guides for the parole board. Some criteria, such as those requiring consideration of the welfare of society and of the inmate,¹⁵¹ are too general to have any real effect on the decision. Other criteria are specific, but a parole board is likely not to consider itself bound to conform to them when the individual case seems to require a contrary result. This is clearly true, for example,

148. Although all of what will be said concerns the parole decision, much of it is applicable to other correctional decisions and, indeed, to other discretionary decisions in the criminal justice system.

149. There are other reasons: unwillingness to face the tough problems of formulating adequate standards; little or no information about the decisions that are actually made in practice; lessened concern about the potentiality of injustice to the individual because of his status as a convicted criminal; desire to defer to the expertise of correctional personnel; and, with respect to judicial review, fear that the courts will be flooded by requests for review from petition-minded inmates.

150. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 916 (1962).

151. See notes 127-31 *supra* and accompanying text.

with respect to the decision to parole the minor property offender and the nonsupport violator despite parole board expectation of recidivism,¹⁵² and the decision to parole an inmate who has been unable to obtain employment in a state which imposes that as a prerequisite to parole.¹⁵³

One reason parole boards may be willing to ignore statutory criteria is that the legislature has frequently indicated, in effect, that it is entirely proper to do so. Typically, parole statutes are careful to state that the matter of parole is entirely within the "discretion"¹⁵⁴ of the parole board or that whether the statutory standards are met is a matter for its "opinion."¹⁵⁵ Some statutes specifically state that the parole board's decision is not subject to judicial review;¹⁵⁶ even in the absence of such a provision, courts uniformly hold that they will not review the decision to determine its conformity with statutory criteria.¹⁵⁷

Furthermore, statutory parole criteria do not speak to many significant issues, most importantly, the circumstances under which a parole board may deny release despite its opinion that the inmate is unlikely to recidivate.¹⁵⁸

The inadequacy of current statutory criteria was recognized by the drafters of the Model Penal Code,¹⁵⁹ and an effort was made to provide criteria which would be meaningful guides to the parole board:

Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, it shall be the policy of the Board to order his release, unless the Board is of the opinion that his release should be deferred because:

(a) there is substantial risk that he will not conform to the conditions of parole; or

152. See note 51 *supra* and accompanying text.

153. See notes 43-49 and 134-41 *supra* and accompanying text.

154. See, *e.g.*, CONN. GEN. STAT. REV. § 54-125 (1958).

155. See, *e.g.*, N.J. STAT. ANN. 30:4-123.14 (1964).

156. See, *e.g.*, MICH. STAT. ANN. § 28.2304 (Supp. 1965), which provides: "The time of his release on parole shall be discretionary with the parole board. The action of the parole board in releasing prisoners shall not be reviewable if in compliance with law."

MODEL PENAL CODE § 305.19 (Proposed Official Draft 1962) provides: "No court shall have jurisdiction to review or set aside, except for the denial of a hearing when a right to be heard is conferred by law: . . . (2) the orders or decisions of the Board of Parole regarding . . . the release or deferment of release on parole of a prisoner whose maximum prison term has not expired . . ."

157. See note 14 *supra* and accompanying text.

158. See notes 73-94 *supra* and accompanying text.

159. MODEL PENAL CODE § 305.14, comment (Tent. Draft No. 5, 1956):

Under present parole practice, the release of eligible prisoners is purely discretionary and no formal criteria have been established in the statutes, aside from general principles relating to public safety. Nor has there been any standardized administrative policy in the matter: parole decisions rest on the intuition of the paroling authority, largely unguided by the laws that establish this broad grant of power or even by specific board standards. . . .

- (b) his release at that time would depreciate the seriousness of his crime or promote disrespect for law; or
- (c) his release would have a substantially adverse effect on institutional discipline; or
- (d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life when released at a later date. . . .¹⁶⁰

Although this formulation is a great improvement over present statutes, the manner in which it is intended to function is troublesome. The Code specifically precludes judicial review to enforce compliance with the statutory criteria.¹⁶¹ The draftsmen nevertheless felt that a careful statutory formulation of release criteria would be helpful on the theory that if the statutory criteria are realistic, parole boards will be guided by them without judicial enforcement.¹⁶² Although much depends upon the attitudes of parole board members, experience under present statutes strongly indicates that the most likely parole board reaction to this provision would be to ignore it.

There is considerable difficulty in providing effective judicial review of the parole decision, even if legislatures or courts¹⁶³ desired to provide it. A verbatim record of the parole hearing would probably have to be kept,¹⁶⁴ and the court would have to be given access to the parole board case file, which contains information regarded by many as confidential. But even more importantly, while the inmate can be depended upon to challenge parole denials, there are problems in obtaining review of parole grants. The inmate is certainly unlikely to challenge a grant of parole, and it is

160. MODEL PENAL CODE § 305.9 (Proposed Official Draft 1962).

161. See note 156 *supra*.

162. MODEL PENAL CODE § 305.13, comment (Tent. Draft No. 5, 1956):

Although the timing of release is governed by the "opinion" of the Board upon these points, and so not subject to judicial review, we consider that the consistency, equality and soundness of release decisions will be enhanced by thus focusing attention of the Board on these specific grounds for the postponement of release. . . .

163. Courts have demonstrated great reluctance to review parole decisions; this is curious since many of them have apparently been able to overcome a similar reluctance to review the exercise of discretion by trial judges in sentencing. For example, in the same year, the Wisconsin Supreme Court declined to review a decision not to grant parole, *Tyler v. State Dep't of Pub. Welfare*, 19 Wis. 2d 166, 119 N.W.2d 460 (1963), but decided for the first time to review a sentence which was within the statutory limits, *State v. Tuttle*, 21 Wis. 2d 147, 124 N.W.2d 9 (1963).

164. Under present procedure, a verbatim record is not kept; at most the chairman of the parole board may dictate the rationale for the board's decision for inclusion in the case file. The court in *Tyler* mentioned the lack of a record as a reason for denying review. *Tyler v. State Dep't of Pub. Welfare*, *supra* note 163, at 174-75, 119 N.W.2d at 465-66.

doubtful whether under present procedures any public official can be expected to have sufficient interest in the parole grant to challenge it.¹⁶⁵ It is, nevertheless, difficult to arrive at the position that parole denials should be subject to judicial review without also taking the position that grants should be subject to similar review.

Even if these problems could be overcome, there are perils in providing legal supervision of the parole decision. One of the major purposes of having official discretion is to permit individualized decision-making. Nowhere in the criminal justice system is the propriety, and even necessity, of individualized decision-making more clearly recognized than in the parole decision. The risk is that legal supervision would destroy the ability of the parole board to consider each case fully upon its own facts.

The individualized nature of each parole decision is best seen in the board's judgment about the rehabilitation of an inmate considered for parole. This is, admittedly, a difficult judgment to make under the best of circumstances. Even with predictive devices and elaborate parole success studies, determination of the probability of recidivism is virtually a matter of intuition based on experience but unaided by rules or even firm guidelines. It would obviously be inappropriate for a court to substitute its judgment for the parole board's on this question.

Yet observation of practice clearly indicates that many parole decisions—probably even a majority of them—do not rest entirely upon the board's estimate of the probability of recidivism. Many also rest upon factors which can best be termed "policy considerations"—fairly easily applicable value judgments developed by the parole board from long experience. Indeed, in many cases, an inmate may be released on parole because of a policy consideration despite an estimated high probability of recidivism,¹⁶⁶ or may be denied parole despite an obviously low probability of recidivism.¹⁶⁷ A

165. In some states, the prosecuting attorney and the sentencing judge must be notified when an inmate is to be given a parole hearing. See, e.g., WIS. STAT. ANN. § 57.06(1) (Supp. 1965) (requiring ten days notice to prosecuting attorney and sentencing judge of initial parole hearing and notices of subsequent hearings if they request). Although the purpose of the notice requirement is to give those officials an opportunity to recommend for or against parole, in practice it is rare for them to respond to the notice at all. It is difficult to conceive of the prosecutor or sentencing judge taking sufficient interest in the case to challenge a grant of parole. However, in *State ex rel. Zabel v. Hannan*, 219 Wis. 257, 262 N.W. 625 (1935), the prosecutor who participated in the trial of the parolee successfully secured judicial reversal of the parole on the ground that he had not been notified of the parole hearing as required by statute.

It would, perhaps, be possible for a legislature to designate someone in the attorney general's office to review parole board decisions and to petition for judicial review of either grants or denials.

166. See notes 51-72 *supra* and accompanying text.

167. See notes 73-94 *supra* and accompanying text.

value judgment which a parole board is likely to make is that offenses against the person are far more serious than offenses against property. This judgment is reflected in the practice of readily releasing minor property offenders despite an estimated very high probability of recidivism,¹⁶⁸ and the reluctance to release assaultive offenders despite an estimated low probability of recidivism.¹⁶⁹ In other cases, a parole board may grant parole to an inmate solely because he has performed valuable services to the institution¹⁷⁰ or may deny parole to enforce institutional discipline¹⁷¹ or to avoid public criticism of the parole system.¹⁷²

To the extent parole decisions are based on these policy considerations they are not fully individualized decisions. It is possible to isolate many of these factors and to make judgments about their propriety which would result in legal approval or disapproval. But it would be a mistake for a legislature or court to make a judgment about the propriety of a particular policy consideration without detailed understanding of the reasons the parole board has for it and of the context in which it appears. Considerable knowledge of the nature of the parole decision-making process is essential. Assuming the necessary knowledge, however, a generalized decision can be made about whether particular policy considerations ought to influence the parole decision, and this judgment can be legally enforced without doing damage to the goal of individualized parole decisions and without destroying parole board discretion.

It would be illusory, however, to believe that the formal legal system is capable of controlling all the subtle variables which make the difference between sound and unsound discretionary decision-making. Of necessity, much needs to be left to the administrators and to the development of administrative self-control.

B. *Administrative Self-Controls*

Although the parole decision is not subject in any significant degree to formal legal controls, it would be incorrect to assume that, therefore, it is subject to no control. In fact, in some states it is subject to fairly significant control imposed by the administrators of the parole system without legal compulsion. But there are important differences among the states in the degree to which the parole decision is subject to administrative self-controls.

Six parole board practices found in one or more of the three states studied

168. See note 51 *supra* and accompanying text.

169. See notes 76-77 *supra* and accompanying text.

170. See notes 69-72 *supra* and accompanying text.

171. See notes 78-82 *supra* and accompanying text.

172. See notes 91-94 *supra* and accompanying text.

exert significant control over the parole decision: board members subject themselves to persuasion by all interested parties; formulate and explain reasons for particular decisions; voluntarily disqualify themselves for bias; impose administrative review on themselves; test the bases for decisions by encouraging empirical research; and publish the criteria to be used.

One of the most important occasions for self-control is the parole hearing. A hearing is required by statute in Michigan,¹⁷³ but not in Kansas¹⁷⁴ or Wisconsin. Nevertheless, parole hearings are held regularly in each of these states. They differ significantly, however. In Michigan and Wisconsin, parole hearings last for ten to twenty minutes; they are conducted in a leisurely fashion and the inmate is given opportunity to make virtually any statement he wishes. In fact, one of the major objectives in the parole hearing in those states is to have the inmate talk about himself and his offense as much as possible. In Kansas, on the other hand, parole hearings last for two or three minutes each. The parole board may conduct as many as 135 hearings a day;¹⁷⁵ there is time only to ask the inmate a few brief questions and to dismiss him. He is not permitted to make statements except in response to questions posed by board members.

In Kansas, the parole board permitted attorneys and members of the inmate's family to be present at the parole hearing and to make brief statements.¹⁷⁶ In Michigan and Wisconsin,¹⁷⁷ friends, relatives, and attorneys

173. MICH. STAT. ANN. § 28.2305 (1954). Despite the fact that many states do not by statute require parole hearings, they are regularly conducted in virtually all of the states. See MODEL PENAL CODE § 305.10, comment (Tent. Draft No. 5, 1956).

174. After the field survey, the Kansas statutes were amended to require a parole hearing. KAN. STAT. ANN. § 62-2245 (1964).

175. The Kansas parole board attempted to hear all the cases at a particular institution in one day, while in Michigan and Wisconsin, the board often spent a week or more per month hearing cases at each of the institutions.

176. It was rare for an attorney to appear at a parole hearing. Because there was no provision for appointing counsel for the indigent, one member of the Kansas parole board stated that he felt it was unfair to permit retained attorneys to appear at the hearing.

The 1957 revision of the Kansas parole laws provided:

The board shall not be required to hear oral statements or arguments by any person not connected with the correctional system. All persons not connected with the correctional system presenting information or arguments to the board shall submit their statements in writing, and shall submit therewith an affidavit stating whether any fee has been paid or is to be paid for their services in the case, and by whom such fee is paid or to be paid, and stating that the amount of any fee which has been paid or which is to be paid for their services in the case was not or is not to be determined on the basis of the granting or denial of parole. Such affidavit shall be a public record. KAN. STAT. ANN. § 62-2248 (1964).

177. The Wisconsin policy prohibiting the appearance of attorneys at parole hearings is stated in WIS. DEP'T OF PUBLIC WELFARE, PAROLE BOARD PROCEDURES AND PRACTICES 10 (Feb. 1959): "Attorneys, members of inmates' families, or others are not permitted to make appearances either for or against parole at parole hearings. Such persons may, if they wish, make their views known to the Parole Board by letter or can ar-

are not permitted to attend parole hearings. They may present their views to a member of the parole board prior to the hearing. A memorandum of the conversation is prepared by the member contacted for the parole board's case file.

In Michigan and Wisconsin, the parole boards are careful to explain to the inmate the reason for the decision reached. They are especially careful to explain parole denials and to suggest what, if anything, the inmate can do to improve his chances for parole later. Furthermore, they record a brief statement of their reasons for the decision for the inmate's case file. Although these statements are quite brief,¹⁷⁸ the necessity for making them requires some reflection on the grounds for the decision.

On several occasions in Wisconsin, various parole board members disqualified themselves from participating in the decision. One parole board member stated he did not participate in cases involving sex offenses against children or the use of weapons because he "saw red" in those cases.

In Michigan, two members of the parole board conduct hearings, but a third member reviews the case file before the hearing and votes for or against parole. In Wisconsin, under present procedures, two members of the parole board conduct the parole hearing and make the decision to grant or deny parole. However, if the two hearing members vote to parole an inmate serving a life sentence or one incarcerated for assaultive conduct, a third member reviews the case and must concur with the hearing panel before parole can be granted.¹⁷⁹ In Kansas and in other cases in Wisconsin, there is no real administrative review of the decision reached by the parole board members who conduct the parole hearing.¹⁸⁰

In Wisconsin, the parole board has encouraged research into its practices and procedures, and especially the criteria it uses.¹⁸¹ On one occasion, it

range to see the Board at its offices in Madison." In a revision of that pamphlet, the parole board states: "Persons representing prospective parole applicants may appear before the Parole Board by appointment in the Madison Office of the Board. Special arrangements can be made to see Board members at places other than the Madison Office. However, the Board does not make appointments to see persons representing parole applicants at the institution of confinement during the month of the applicant's hearing." WIS. DEP'T OF PUBLIC WELFARE, PAROLE BOARD PROCEDURES AND PRACTICES 16 (June 1963).

The Model Penal Code once contained a provision authorizing the appearance of retained counsel at the parole hearing. Later, that provision was eliminated. See MODEL PENAL CODE § 305.7, status of section (Proposed Official Draft 1962).

178. For examples of parole board statements of reasons for decisions in these cases see Illustrations 4 and 13 *supra*.

179. See WIS. DEP'T OF PUBLIC WELFARE, PAROLE BOARD PROCEDURES AND PRACTICES 16 (June 1963).

180. See note 13 *supra* and accompanying text.

181. See Hendrickson & Schultz, A Study of the Criteria Influencing the Decision

encouraged research into the empirical bases of assumptions it made in paroling nonsupport offenders. The board which is authorized to release offenders committed under the Wisconsin sex crimes law¹⁸² encouraged research into the efficacy of its use of special protective placements on farms.

The Michigan Department of Corrections published a pamphlet which describes the entire parole system and contains a brief statement of parole criteria used by the parole board.¹⁸³ The Wisconsin Department of Public Welfare published such a pamphlet in 1959¹⁸⁴ and revised it in 1963.¹⁸⁵

Although it is possible to control discretion without destroying it, a continuing effort is required. It is not enough simply to provide legal mechanisms for setting decision standards and reviewing decisions made. The persons who exercise discretion must be encouraged to engage in a constant process of self-examination and critical review and improvement of their practices and procedures. Only when this occurs can society be assured that official discretion is being exercised fairly and sensibly.

to Grant or Deny Parole to Adult Offenders in Wisconsin Correctional Institutions 36-37, 1964 (unpublished thesis in University of Wisconsin School of Social Work).

182. WIS. STAT. ANN. § 959.15 (Supp. 1966).

183. MICH. DEP'T OF CORRECTIONS, PAROLE IN MICHIGAN 4-5 (undated).

184. WIS. DEP'T OF PUBLIC WELFARE, PAROLE BOARD PROCEDURES AND PRACTICES, (Feb. 1959).

185. WIS. DEP'T OF PUBLIC WELFARE, PAROLE BOARD PROCEDURES AND PRACTICES, (June, 1963). In *Tyler v. State Dep't of Pub. Welfare*, 19 Wis. 2d 166, 119 N.W.2d 460 (1963), the Wisconsin Supreme Court quoted extensively from the pamphlet. It stated that an administrative order of the Director of the State Department of Public Welfare requires the parole board to follow the statements made therein. *Id.* at 169, 119 N.W.2d at 462-63.