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Thomas Peters

David Norris

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# RECONSIDERING PAROLE RELEASE DECISIONS IN ILLINOIS: FACTS, MYTHS AND THE NEED FOR POLICY CHANGES†

THOMAS PETERS\* AND DAVID NORRIS\*\*

## INTRODUCTION

In 1989, the prison population in Illinois grew at a faster rate than the prison population of any other state in the country.<sup>1</sup> Nearly 29,000 inmates are now confined in Illinois prisons, an increase of over thirty-five percent since the end of 1988.<sup>2</sup> Most of these inmates eventually will be released.<sup>3</sup> Once released, many will be charged with new criminal offenses and will return to jail or prison.<sup>4</sup>

Given the likelihood of release and the potential for future criminal behavior, it is important to know when and why convicted felons are released on parole or on mandatory supervised release. Little, however, is known about the mechanics of these release decisions or the efficacy of parole or mandatory supervised release in

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† This is the first of two articles concerning some of the major forces affecting Illinois' prison overcrowding problem. This article addresses inmate release decisions and policy; the second article examines mandatory sentencing and its accompanying social costs.

\* B.S., MacMurray College, 1970; J.D., John Marshall Law School, 1975.

\*\* B.A., Indiana University, 1981; J.D., John Marshall Law School, January, 1992.

1. See UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, MIDYEAR RELEASE (October 1990). See also STATE OF ILLINOIS, ILLINOIS DEPARTMENT OF CORRECTIONS, STATISTICAL PRESENTATION 1990 (Apr. 1991) (Director of Illinois Department of Corrections, Howard A. Peters III, states "[t]oday, the prisons are holding over 4800 inmates more than the rated capacity. Prison population projections indicate that this situation will worsen if nothing changes.") [hereinafter STATISTICAL PRESENTATION 1990].

2. See Culleton, *Prison Chief Says State Must Revamp Sentencing*, Chicago Tribune, May 16, 1991, at 2, col. 1; UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 1989 2 (1990).

3. ILLINOIS DEPARTMENT OF CORRECTIONS, TRANSITION PAPER 28 (Nov. 1, 1990) ("Over 97% of the inmates sentenced to prison will eventually be released to their community.") [hereinafter TRANSITION PAPER].

4. TRANSITION PAPER, *supra* note 3, at 28 (44% of all released inmates will be returned to prison within three years of release); see also STATE OF ILLINOIS, PRISONER REVIEW BOARD, 12TH ANNUAL REPORT, 1989 8, 9 (1990); UNITED STATES DEPARTMENT OF JUSTICE, NATIONAL CORRECTIONS REPORTING PROGRAM, 1985 4 (rev. 1990) (according to a national study, approximately 30% of the parolees violated their parole terms).

Illinois. Theory does not match or even closely parallel reality. Instead, policy is based on unsubstantiated hunches, political concerns, and gut feelings, without reference to research studies and with little concern for the likely consequences.

The goal of this article is to describe and contrast the parole and mandatory release systems in Illinois, to ask a few relevant questions, and to propose some potential solutions. This article begins with a description of the parole release decision under indeterminate sentencing. Next, the statutory rules governing the parole release process and the practices of the Prisoner Review Board ("Board") are outlined. Then, focus is shifted to the practical effects of the Board's ad hoc decision-making with particular emphasis on the lack of a meaningful data base for parole release decisions. Some of the myths which the Board has traditionally relied on are discussed and criticized.

This article then turns to mandatory supervised release, the politically popular, tough on crime approach which has dominated the scene for the past decade. Mandatory supervised release is contrasted with parole, and the overcrowding problem which plagues Illinois is identified as a foreseeable consequence of determinate sentencing. Some of the fiscal problems of determinate sentencing also are examined.

Finally, this article examines the supervision of released inmates under each system. Since the terms of release are the same, parole supervision and mandatory supervised release supervision are discussed together. The article notes the dual role the supervising agent must play and the conflict of interest it often creates. Of greater importance, this article cites the lack of significant contact between the released inmate and the supervising agent as grounds to question whether any form of supervised release can accomplish the stated purpose of supervised early release. The authors conclude that abolishing all forms of post-incarceration supervision, or identifying the most significant recidivism risks and closely supervising these individuals, may serve the public better.

#### PAROLE V MANDATORY SUPERVISED RELEASE: AN OVERVIEW OF THE PROBLEM

Parole is a form of early release from a felony penitentiary sentence, designed, in theory, to reintegrate the prisoner into society while closely supervising him.<sup>5</sup> Parole originated more than a cen-

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5. *Greenholtz v. Nebraska State Inmates*, 442 U.S. 1, 13 (1979); *Morrissey v. Brewer*, 408 U.S. 471, 477-78 (1972); see generally S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 620-22 (2d ed. 1973); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise and the Demise of Mythology*, 22 AM. U.L. REV. 477 (1973).

ture ago<sup>6</sup> and in "the past 60 years . . . has become an integral part of the penological system."<sup>7</sup>

In Illinois, parole applies to those inmates who are serving indeterminate sentences.<sup>8</sup> These inmates receive parole hearings after they have served the minimum term of their sentence and, if paroled, they must serve the balance of their sentence under the supervision and control of the parole authorities.<sup>9</sup>

Mandatory supervised release replaced parole in 1978 when Illinois switched from indeterminate sentences to determinate sentences.<sup>10</sup> Although the conditions of mandatory supervised release are the same as for parole, mandatory supervised release differs significantly in other respects. Parole release hearings are not held for inmates with determinate sentences because the structure itself establishes release. The length of supervised release is set when the court imposes sentence.<sup>11</sup> An inmate with a determinate sentence can expect release when he has served one half of his fixed term sentence.

The difference between a release date established when sentence is imposed (the determinate sentence release date) and one set at the discretion of the Board is significant. Parole, properly used, can reward good conduct and penalize institutional violations, thereby assisting prison administrators in their efforts to control inmate behavior.<sup>12</sup> As a method of reducing prison overcrowding, parole can be used to advance the release of inmates, some of whom could be safely supervised on the street at a greatly reduced cost to the taxpayer.<sup>13</sup> In these respects, parole is more useful than mandatory supervised release. The determinate sentence, by its nature, is of little use in controlling inmate behavior within the prison

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6. See generally D. DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* (1951) (discussing the early history of parole); see generally L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 594-605 (discussing the history of probation and parole in the United States).

7. Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705 (1968)(as cited in *Morrissey*, 407 U.S. at 477).

8. ILL. REV. STAT. ch. 38, para. 1003-3-3 (1977); ILL. REV. STAT. ch. 38, para. 1003-3-2.1 (1990).

9. *Tiller v. Klincar*, 138 Ill. 2d 1, 561 N.E.2d 576 (1990); *Faheem-El v. Klincar*, 123 Ill. 2d 291, 527 N.E.2d 307 (1988).

10. Amendment Act of 1977, ILL. REV. STAT. ch. 38, para. 1003 *et. seq.* (1978).

11. See *infra* notes 95-98 and accompanying text for a discussion of supervised release for inmates with determinate sentences.

12. N. MORRIS, *THE FUTURE OF IMPRISONMENT* 49-50 (1974); Fields, *Illinois Parole and Pardon Board Adult Parole Decisions*, 62 ILL. B.J. 20, 20-23 (1973). See generally D. FOGEL, *WE ARE THE LIVING PROOF* 301-03 (1975); STATE OF NEW YORK, *THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA* (1972) (hereinafter "ATTICA REPORT").

13. *TRANSITION PAPER*, *supra* note 3, at 25; Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 232-236.

and exacerbates a prison's overcrowding problem.<sup>14</sup>

With the "war on drugs" threatening the implosion of the criminal justice system,<sup>15</sup> it is imperative to decide what role, if any, parole and mandatory supervised release should play in the criminal justice system. It is easy to be tough on crime until the bills are due. But inevitably the bills must be paid, and the cost of incarceration is high and going higher. In 1989, it cost taxpayers \$16,326 per inmate in the adult division of the Illinois Department of Corrections, an increase of \$868 per inmate since 1985.<sup>16</sup> In contrast, supervision of released inmates, including the cost of electronic monitoring, costs about \$9500 annually per inmate.<sup>17</sup> The savings amounts to almost five million dollars a year for every five hundred inmates who are released to field supervision.<sup>18</sup>

Illinois has built a dozen new prisons in the last fourteen years, has requested money for thirteen more, and may need to spend an additional 755 million dollars by 1996, just to keep up with current prison population growth.<sup>19</sup> Still, overcrowding is pressing the limits of the system. Each day courts, jails and prisons are being overwhelmed with new cases, new arrestees and new prisoners.<sup>20</sup> As of June 1990, Illinois prisons were forty-four percent above the capacity they were built to handle,<sup>21</sup> and the "Illinois prison system is more crowded today than at any point in the history of the

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14. Harris, *Prison Overcrowding — The Time for Policy Change Has Come*, 18 FLA. ST. U.L. REV. 489 (1991).

15. TRANSITION PAPER, *supra* note 3, at 3 (report concludes that, "[t]he dominant factor in the increase in admissions to the Department is, without question, the rapidly growing number of drug law offenders being sent to the State prison system"); STATISTICAL PRESENTATION 1990, *supra* note 1, at 1 (Director of the Illinois Department of Corrections, Howard Peters III states that "[m]ainly because of drug offenders, the prison population increased by over 11% in calendar year 1990."). See also Chapman, *In the Drug War, Bigger Sentences for Smaller Crimes*, Chicago Tribune, June 9, 1991, at 3, col. 1 (drug offenders now constitute 43% of the federal inmate population and this figure is projected to rise to 70% by 1995); see generally *War on Drugs Straining Jails*, Chicago Tribune, Sept. 25, 1987, at 5, col. 1.

16. ILLINOIS DEPARTMENT OF CORRECTIONS, FISCAL YEAR 1989 ANNUAL REPORT 35 (1989); see also Karwath, *Taxpayers Foot the Bill for Packed Prisons*, Chicago Tribune, Apr. 2, 1991, at 1, col. 3 (article contains chart listing annual cost per inmate for each Illinois correctional institution for fiscal year 1990).

17. TRANSITION PAPER, *supra* note 3, at 25.

18. TRANSITION PAPER, *supra* note 3, at 25.

19. TRANSITION PAPER, *supra* note 3, at 7. See also Karwath, *State No. 1 in Increase of Inmates*, Chicago Tribune, Oct. 3, 1990, at 8, col. 1 (quoting Kenneth McGinnis, then Director of the Illinois Department of Corrections).

20. TRANSITION PAPER, *supra* note 3, at 3-8. See also Blumstein, *Planning For Future Prison Needs*, 1984 U. ILL. L. REV. 207, 207-212; See generally Karwath, *State Prison Crunch Spurs Talk of Lighter Sentences*, Chicago Tribune, Apr. 3, 1991, at 1, col. 5 (discussing effect of mandatory sentencing on overcrowded Illinois prison system).

21. Karwath, *State's New Policy Lets Parolees Skip Check-ins*, Chicago Tribune, June 11, 1991, at 1, col. 1.

system."<sup>22</sup>

In these respects some form of early release from felony prison sentences may be a financial necessity. Because it costs significantly less than incarceration, field supervision may take on added importance in an effort to continue high conviction rates while trying to control costs.<sup>23</sup> But many fundamental questions about the efficacy of supervised release are seldom asked, let alone answered. Little is known about how the release decision is made in Illinois, what factors are predictors of success or failure, or whether supervision helps the released inmate adjust to his newly acquired freedom while adequately protecting society.

Most of the important release decisions are, at best, informed hunches and, at worst, misguided prejudices. Information abounds, but meaningful statistics are not kept. Though supervision is an integral part of the supervised release theory, in practice it is almost totally absent.<sup>24</sup> Illinois' prisons are overcrowded, dangerous, and extremely expensive. Parole agents are overworked and underpaid and their caseloads are such that supervision is virtually nonexistent even for the most violent offenders.<sup>25</sup> It is long past time for action but few of the relevant players understand the system or the problems, and fewer still are willing to take steps to correct those problems. This article frames some of the relevant questions and identifies potential solutions.

#### INDETERMINATE SENTENCING AND PAROLE

Under the traditional indeterminate sentence, a convicted felon received a sentence with a minimum and a maximum range, ten to twenty years, for example.<sup>26</sup> Within this range, the minimum sen-

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22. TRANSITION PAPER, *supra* note 3, at 3.

23. TRANSITION PAPER, *supra* note 3, at 24-25.

24. TRANSITION PAPER, *supra* note 3, at 28-30.

25. See Recktenwald & Karwath, *Parole System a Bad Joke that May Get Worse*, Chicago Tribune, Apr. 7, 1991, at 1, col. 5 (currently Illinois parole officers monitor an average of 140 parolees each, which may soon increase to 800 parolees per parole officer due to budget cuts; national corrections experts say a manageable caseload is 45).

26. See *People v. Wall*, 3 Ill. 2d 11, 119 N.E.2d 780 (1954); *People v. Tice*, 89 Ill. App. 2d 313, 231 N.E.2d 607 (1967); *People v. McKinney*, 40 Ill. 2d 372, 240 N.E.2d 577 (1968).

Indeterminate sentencing was originally based on the theory that the sentencing judge could not determine, at the time of imposing sentence, when a criminal would be "cured." Friedman, *supra* note 6, at 597. Since a criminal should be incarcerated only "as long as he is 'unfit to be free,'" the judge would leave that determination to the prison officials who viewed the prisoner every day. *Id.* Thus, under this theory, a prisoner carried "the key of his prison in his own pocket." *Id.*

tence determined parole eligibility.<sup>27</sup> Good time credits were earned based on time served and meritorious behavior.<sup>28</sup> When the prisoner had served the minimum sentence, which was determined by adding time actually served to earned good time credits, he was eligible for parole.<sup>29</sup> From that time on the inmate had parole release hearings at least once every year.<sup>30</sup>

For most prisoners these hearings were a source of hope. Even those with minimum sentences in excess of twenty years knew that parole hearings were mandatory after serving eleven years and three months.<sup>31</sup>

Thus, with indeterminate sentencing, parole was a reward used to encourage inmates to follow prison rules, because the inmates knew parole board members scrutinized their prison records.<sup>32</sup> As a former Chairman of the Board explained, "there is no doubt that a man's attitude, conduct, and self improvement while in the institution are of great importance, and a man who does well is going to be paroled sooner than one who does not become involved in the programs that are available at the institution."<sup>33</sup> Anticipation of release was a strong motivation for prisoners to conform with prison regulations and to participate in educational and vocational programs.<sup>34</sup>

Determinate sentences, with fixed release dates and longer terms of imprisonment, are not as useful in controlling inmate behavior as the annual parole hearing. Since the change to determinate sentences, inmates have killed eight Department of Corrections employees and "many [Department employees] have been seriously injured."<sup>35</sup> Inmate-on-inmate violence also has increased in recent years with at least thirty inmates killed and scores more injured.<sup>36</sup> Of course, the violence within Illinois prisons can-

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27. ILL. REV. STAT. ch. 38, para. 1003-3-3 (1977); ILL. REV. STAT. ch. 38, para. 1005-8-1(d) (1978).

28. ILL. REV. STAT. ch. 38, para. 1003-3-2.1 (1977).

29. ILL. REV. STAT. ch. 38, para. 1003-3-3 (1977).

30. *Tiller v. Klinciar*, 138 Ill. 2d 1, 6, 561 N.E.2d 576, 578 (1990); ILL. REV. STAT. ch. 38, para. 1003-3-5(f) (1988).

31. Merritt, *Due Process in Parole Granting: A Current Assessment*, 10 J. MARSHALL J. PRAC. & PROC. 93-95 (1976); Fields, *supra* note 12, at 22; ILL. REV. STAT. ch. 38, para. 1003-3-3(a) (1978).

32. Fields, *supra* note 12, at 20-21; Merritt, *supra* note 31, at 93 para. 1 n.4 (and cases cited therein).

33. Fields, *supra* note 12, at 21.

34. Morris, *supra* note 12, at 32-40; Merritt, *supra* note 31, at 93 n.4.

35. TRANSITION PAPER, *supra* note 3, at 4.

36. TRANSITION PAPER, *supra* note 3, at 4. See also Smith, *State's Prisons Test the Limits — Potential for Trouble Grows*, Chicago Tribune, Mar. 31, 1991, at 1, col. 5 (lists the following reported attacks by inmates at the four maximum-security Illinois prisons in 1990: (1) Pontiac, population 1924; 257 attacks on inmates, 331 attacks on staff; (2) Joliet, population 1350; 62 attacks on in-

not be attributed solely to the change in sentencing procedures. But indeterminate sentencing, with its hope of early release, undoubtedly played a significant role in controlling inmate behavior.

#### PAROLE RELEASE HEARINGS: THE STATUTORY GUIDELINES

Inmates have very few rights at parole release hearings.<sup>37</sup> Parole is not itself a right,<sup>38</sup> and does not necessarily trigger a constitutionally protected liberty interest.<sup>39</sup> In fact, parole could be abolished without offending any constitutional standards, so whatever rights parolees have at these hearings are statutory creations.<sup>40</sup>

By statute, Illinois requires a release hearing at least thirty days before the inmate first becomes eligible for parole.<sup>41</sup> The inmate must submit a plan which outlines where he will be living, with whom, and what his employment opportunities are.<sup>42</sup> If he needs assistance in preparing his plan or obtaining relevant documents, Department of Corrections personnel are obligated to assist him.<sup>43</sup>

In addition to the parole plan, the Board also may consider the inmate's institutional record as it has access to the inmate's master record file.<sup>44</sup> The Board is required to consider records relating to the inmate's conviction, any material or testimony submitted by the State's Attorney or by the victim, any reports offered by the warden, available medical and psychological reports, the statements of the inmate concerning his parole plans, his institutional record, and any relevant documents or witnesses he has to offer.<sup>45</sup>

The release hearing is informal and nonadversarial.<sup>46</sup> Neither the right to counsel nor the right to confront and cross-examine

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mates, 171 attacks on staff; (3) Menard, population 2565; 81 attacks on inmates, 166 attacks on staff; and (4) Stateville, population 2118; 24 attacks on inmates, 62 attacks on staff).

37. *Greenholtz v. Nebraska State Inmates*, 442 U.S. 1, 9-11 (1979).

38. *People v. Hawkins*, 54 Ill.2d 247, 296 N.E.2d 725 (1973); *People v. Spivey*, 10 Ill.2d 586, 141 N.E.2d 321 (1957); *People v. Ragen*, 400 Ill. 191, 79 N.E.2d 479 (1948); *People v. Nowak*, 387 Ill. 11, 55 N.E.2d 63 (1944).

39. *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987) (parole statute creates a constitutionally protected liberty interest only where the statutory language is mandatory); *Greenholtz*, 442 U.S. at 11-12; see generally *Merritt*, *supra* note 31.

40. *Heirens v. Mizell*, 729 F.2d 449, 457-58, 460 (7th Cir. 1984).

41. ILL. REV. STAT. ch. 38, para. 1003-3-4(a) (1990).

42. ILL. REV. STAT. ch. 38, para. 1003-3-4(b) (1990).

43. ILL. REV. STAT. ch. 38, para. 1003-3-4 (1990).

44. ILL. REV. STAT. ch. 38, para. 1003-3-4(c) (1990).

45. ILL. REV. STAT. ch. 38, para. 1003-3-4(d) (1990).

46. *Tiller v. Klinciar*, 138 Ill. 2d 1, 13-18, 561 N.E.2d 576, 581-83 (1990); *Heirens v. Mizell*, 729 F.2d 449, 466 (7th Cir. 1984); *Merritt*, *supra* note 31, at 98-102.



witnesses apply at the release hearing.<sup>47</sup> However, the Board usually allows private counsel the opportunity to present witnesses and to argue the parolee's case. At least one member of the Board is present for the hearing, although the decision must be reached by a panel of three or more.<sup>48</sup> A report of the hearing must be prepared so absent Board members have a basis for casting their votes.<sup>49</sup>

Parole must be denied if the Board determines that (a) there is a substantial risk that the parolee will not conform to the parole conditions; (b) release would deprecate the seriousness of the offense; or (c) release would have a substantially adverse effect on institutional discipline.<sup>50</sup> Youthful offenders, who have been committed under the Juvenile Court Act, must be released on or before their twentieth birthday. Adult offenders, who have served the maximum term of their sentence, must be released.<sup>51</sup> All others who come before the Board for a release hearing are parolable at the Board's discretion.<sup>52</sup> The Board is required to render a decision within a reasonable time after the hearing.<sup>53</sup> It is also obligated to state the reasons for its decision in the record and in a notice of its decision, which is given to the inmate.<sup>54</sup>

The Board has frequently been criticized for paying too little attention to its reasons for denying parole.<sup>55</sup> Too often the Board lumps vastly different inmates into the same category or treats similarly situated inmates differently.<sup>56</sup> Illinois' statutory parole guidelines contribute to this problem. These guidelines seemingly limit the Board's options when it denies parole, to the three reasons cited in the statute.<sup>57</sup> Moreover, some Board members believe they can avoid being sued if they base their decisions on canned statutory reasons, rather than giving personalized reasons for denying parole.<sup>58</sup> This explanation, however, does not fully answer the criticism of the Board's lack of consistency because the Board members are immune from damage actions,<sup>59</sup> and judicial review of their de-

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47. *Tiller*, 138 Ill. 2d at 13-18, 561 N.E.2d at 581-83; *Heirens*, 729 F.2d at 466.

48. ILL. REV. STAT. ch. 38, para. 1003-3-5 (1990).

49. ILL. REV. STAT. ch. 38, para. 1003-3-5 (1990).

50. ILL. REV. STAT. ch. 38, para. 1003-3-5(c) (1990).

51. ILL. REV. STAT. ch. 38, paras. 1003-3-5(d),(e) (1990).

52. *Tiller v. Klinciar*, 138 Ill. 2d 1, 15, 561 N.E.2d 576, 582 (1990); *Heirens v. Mizell*, 729 F.2d 449, 463-66 (7th Cir. 1984).

53. ILL. REV. STAT. ch. 38, para. 1003-3-5(f) (1990).

54. ILL. REV. STAT. ch. 38, para. 1003-3-5(f) (1990).

55. *See, e.g., Tiller*, 138 Ill. 2d at 14, 561 N.E.2d at 580-81.

56. M. STURGIS, LET THE RECORD SHOW, MEMOIRS OF A PAROLE BOARD MEMBER 25-26 (1978).

57. ILL. REV. STAT. ch. 38, para. 1003-3-5 (1990).

58. Sturgis, *supra* note 56, at 25, 56-57.

59. *Trotter v. Klinciar*, 748 F.2d 1177, 1182 (7th Cir. 1984) (immunity from civil liability for parole board members in Illinois); *see also* *Gale v. Moore*, 763

cisions is extremely limited.<sup>60</sup>

Some inconsistency is inevitable, but it is also true that the Board does not have a systematic approach to this complex and sensitive issue. Instead of release decisions based on data, research findings, and personal observations, the Board too often relies on the instincts of its members. Decision by hunch frequently carries the day.<sup>61</sup>

#### THE NEED FOR A DATA BASE

Given the importance of the parole release decision to society and to the inmate seeking release, data must be kept and used to help guide the Board's decision making process. What little data are kept, however, are virtually meaningless, and the Board has never maintained a system of precedents.

For example, the Board does not routinely record and correlate information which could be used to identify parole success indicators. "In order to predict parole outcome we need reliable information which will help to separate the offenders with a high probability of success on parole from those with a high probability of failure."<sup>62</sup> Yet the Board persists in ad hoc decision-making.

It is important to know what, if any, correlation exists between success on parole and the parolee's family situation, his employment history, his age, his level of intelligence, the nature of the offense, his criminal history, his institutional record, and the number of years he has been incarcerated. Twenty years ago the Illinois Youth Commission gathered data on some of these factors, laying the groundwork for future studies.<sup>63</sup> Unfortunately, the last two decades have not seen meaningful follow-up studies, and the Board has not established a system for predicting success based on studies of parole behavior.<sup>64</sup> Instead, the Board relies on assumptions it makes about these and other factors and the gut feeling of individ-

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F.2d 341 (8th Cir. 1985) (immunity from civil liability for parole board members outside Illinois).

60. See, e.g., *Heirens v. Mizell*, 729 F.2d 449, 467 (7th Cir. 1984) (court refused to review Parole board's decision).

61. *Sturgis*, *supra* note 56, at 23-28.

62. L. OHLIN, *SELECTION FOR PAROLE, A MANUEL OF PAROLE PREDICTION* 47 (1951); see also J. ROGERS, *Parole Prediction in Three Dimensions: Theory, Prediction and Perception* (1966) (unpublished manuscript available in University of Chicago Library).

63. W. KLIMEK & N. MCHUGH, *RECIDIVISM AND REHABILITATION* (1967). See also P. BIGMAN, *DISCRETION, DETERMINATE SENTENCING AND THE ILLINOIS PRISONER REVIEW BOARD: A SHOTGUN WEDDING* (1979).

64. See D. GLASER, *GROSS PERSONAL CHARACTERISTICS AND PAROLE OUTCOME* (National Parole Institute 1964).

ual Board members.<sup>65</sup>

Without questioning the good faith or knowledge of Board members, this non-system invariably leads to random and inconsistent decisions. Differences in emotional, financial, and racial backgrounds cause Board members to see the same inmate quite differently. In her memoir, Margie Sturgis, a former Board member, recalls a typical release hearing where the male board member who was with her believed the inmate they interviewed was a poor risk because he was hostile to authority figures. Mrs. Sturgis saw it another way, "[h]e had sensed hostility, while I had sensed fear."<sup>66</sup>

Whether either of them was right, no one knows. Nor did they know whether hostility or fear were predictors of success or failure on parole. Perceptions are bound to vary but there should be a common base of information against which these perceptions can be gauged. The Illinois Board is not guided by a shared bank of information and does not correlate data necessary to create a schedule of success and failure predictors.

Most of the information needed to set up a system of analysis based on the characteristics of successful parolees is already in the Board's possession. The Board knows who is on parole. It knows what crime the parolee committed, how old he was when he committed the offense and when he was released. It knows how far he went in school, how he handled himself in prison, whether he was employed before conviction, whether he has a job waiting for him when he is released, and much more.

The Board need only begin comparing these and other factors for those parolees who succeed with those who fail. Soon the Board

65. Sturgis, *supra* note 56, at 13, 36-37. One author cites the colloquy between parole board members and a hopeful inmate, from the motion picture "Raising Arizona," to depict parole release hearings:

H.I. McDunna stood before the three-member panel of the Arizona State Board of Pardons and Paroles. In this hearing, the Board would determine whether to release H.I. ("Hi"), a three-time armed robber, once again.

First Member: They got a name for people like you, Hi: Re-ci-di-vism.

Second Member: Re-peat o-f-fender.

First member: Not a pretty name, is it, Hi?

Hi: No sir. That's one bonehead name, but that ain't me anymore.

Second Member: You're not just telling us what we want to hear?

Hi: No sir. No way.

First Member: 'Cause we just want to hear the truth.

Hi: Then I guess I am telling you what you want to hear.

Second Member: Boy, didn't we just tell you not to do that?

Hi: Yes sir.

Second Member: (approving parole) Okay, then

Note, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241 (1988).

66. Sturgis, *supra* note 56, at 13.

will have a history of characteristics from which it can determine whether an inmate's chance of successfully adjusting to parole can be predicted. "By routine follow-up investigation of paroled cases and by carrying on a continuous program of research on parole problems, a predictor system can become one of the most effective and reliable aids available to the parole board . . ." <sup>67</sup> This invaluable tool has gone unused too long in Illinois. In its place is a veritable hodge-podge of guesswork and presumptions, some probably valid, others undoubtedly not. <sup>68</sup>

Careful evaluation of the data may prove that parole success cannot be predicted. For example, parole release for indeterminate sentence inmates is traditionally predicated on a good institutional record and evidence of a viable parole plan. <sup>69</sup> But there is reason to believe that a prisoner's institutional record has no bearing on the likelihood of success after release from prison. <sup>70</sup> Empirical studies have demonstrated that predictions of parole success are no more accurate after years of observing the inmate's institutional behavior than if made very early in the prison term. <sup>71</sup> These studies do not rule out the concept of parole success predictors, but they strongly suggest that the traditional reliance on an inmate's institutional behavior is misplaced.

This conclusion, if verified, does not reduce the need for meaningful statistical and philosophical analysis of the role of parole supervision once an inmate is released. It is better to know that a prisoner's institutional record is not an accurate indicator of an inmate's success on parole than to mistakenly assume it is. The current haphazard approach breeds contempt among inmates while providing little protection to the public. <sup>72</sup> It is long past time for the Board to gather usable data, establish parole predictors, if there are any, and create an open schedule of precedents based on its parole release decisions. <sup>73</sup> It is better to know that parole success cannot be predicated than to presume it can and then use false positives

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67. Ohlin, *supra* note 62, at 86.

68. There is no reason for an Illinois Board member to lament that, "I could not buy the idea of simply arriving at a decision based entirely on assumption without supportive evidence [a]fter reviewing some of the other members' decisions, I wondered often if they had been furnished with a crystal ball which I had not been privileged to receive." Sturgis, *supra* note 56, at 36-37.

69. Fields, *supra* note 12, at 20-21.

70. Morris, *supra* note 12, at 35.

71. R. HOOD & R. SPARKS, KEY ISSUES IN CRIMINOLOGY 183-92 (World University Library Series 1970).

72. Sturgis, *supra* note 56, at 25. See generally ATTICA REPORT, *supra* note 12.

73. If Board members "are found to be incapable of performing their intended function — the identification of prisoners ready for release — they will be employed to achieve other ends." F. ALLEN, DECLINE OF THE REHABILITATIVE IDEAL. PENAL POLICY AND SOCIAL PURPOSE 84 (1981)."

as reasons for granting or denying release. No one benefits from the delayed release of an inmate who can be safely and far less expensively monitored on the street, just as no one benefits from the early release of an inmate based on misconceptions about his alleged rehabilitation.

Parole can be used to control an inmate's behavior even if it has little or no residual effect once the inmate is released. The implementation of open and structured rewards, such as good time credits (which hasten the inmate's release date), encourages compliance with prison rules. Parole can also be used as a means of controlling the prison population. There is a point at which prison crowding becomes so onerous, to the correctional staff which is put at risk, and to the public which must pay the escalating costs of long term incarceration, that releasing the least dangerous inmates makes sense.

In the 1980's, Illinois had a de facto early release program for three years and during that time approximately 10,000 inmates were released before their legal outdate.<sup>74</sup> So far no one has studied the recidivism rate of these early releasees. But under similar circumstances the rate of recidivism in Florida for early releasees was less than the recidivism of the planned releasees.<sup>75</sup> The Florida study suggests that Illinois should provide some mechanism by which the Board, or some other appropriate agency, could release inmates as a means of controlling the prison population.

Parole can serve a useful function if the limitations of the system are admitted and accounted for from the beginning. If rehabilitation cannot be accurately predicted, parole can still be used to "reinforce institutional discipline", and to control an exploding prison population.<sup>76</sup> Meanwhile research must be renewed with the aim of finding any factors which might predict success or failure on parole. For example, employment throughout the first year of release seems to greatly reduce recidivism.<sup>77</sup> It may be possible to identify other circumstances which influence the probability of success on parole, and it certainly is worth some time and money to continue the search.<sup>78</sup>

Once the Board has accomplished this, it will not be as difficult to provide more precise statements of reasons when parole is denied. If research identifies predictors of parole success or failure,

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74. TRANSITION PAPER, *supra* note 3, at 3.

75. EICHMANN, IMPACT OF THE GIDEON DECISION UPON CRIME AND SENTENCING IN FLORIDA: A STUDY OF RECIDIVISM AND SOCIO-CULTURAL CHANGE 71-73 (1966).

76. Allen, *supra* note 73, at 84.

77. D. GLASER, CRIMINOLOGICAL PREDICTION 9-10 (1965).

78. Morris, *supra* note 12, at 31-34.

those factors can be cited by the Board in support of its parole release decisions. In the event the data prove that success on parole cannot be predicted, then the Board's decisions may be based on other legitimate concerns — such as to alleviate overcrowding or to reward good conduct.<sup>79</sup>

#### USING REASONS TO CHECK DISCRETIONARY POWERS

Providing reasons is always a sound policy when dealing with broad discretionary powers.<sup>80</sup> Reasons help structure discretion, and structured discretion improves the quality of justice.<sup>81</sup> Reasons help assure that the primary legal and factual issues are considered and reduce the likelihood of careless or capricious decisions.<sup>82</sup>

No system, no matter how fair and open, is fool proof.<sup>83</sup> Still, as long as reasons are given, there is a better chance that, in most cases, a system of structured discretion will be applied. In those cases where the reasons given are disingenuous, review by a higher administrative tribunal or by the courts may be the only answer.

The same principles hold true for a system of open precedents. Consistency promotes justice and adds credibility to any system of administrative discretion.<sup>84</sup> What is needed is a flexible approach: less rigid than judicial precedent yet predictable enough that, within categories of offenders and classes of crimes, consistency is achieved.<sup>85</sup> Discretion and a feel for the case must not be eliminated, but the release decision must be based on more than a Board member's hunch, no matter how well trained that hunch may be.

In summary, once the salient data are obtained, correlated, and interpreted, the Board should establish guidelines and precedents based on parole success predictors or other valid concerns. These guidelines should be published, although inmate names could be withheld from any precedent setting cases.<sup>86</sup> "It is an essential element of justice that the rules and processes for measuring parole readiness be made known to the inmate."<sup>87</sup> Society should be spared the damage of preventable criminal behavior and scarce re-

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79. Allen, *supra* note 73, at 83, 84.

80. K. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 97-98 (1976).

81. *Id.* at 98.

82. *Id.* at 104.

83. "When administrators realize that their motivating reasons are unlikely to win approval, they naturally do what they can to set forth reasons that will look better." *Id.* at 105.

84. Davis, *supra* note 80, at 106-11.

85. *Id.* at 126-33.

86. *Id.*

87. PORTER, CRITERIA FOR PAROLE SELECTION 227 (Proceedings of American Correctional Association 1958).

sources must be used to maximize its protection. A system guided by research, data, and personal experience is more likely to meet these goals than the current practice which relies too heavily on the intuition and personal prejudices of Board members.

If it turns out that parole success cannot be predicted, then the Board should base its decisions on other legitimate concerns, such as controlling inmate behavior or reducing overcrowding. But no purpose is served by continuing the present system, which is more mystical than scientific, more gut reaction than informed prediction.

That is not to say the Board will be infallible if it establishes a more systematic approach — based on information rather than speculation. Even with all the relevant data and a structured system of discretion, the Board has an unenviable task. There are bound to be failures, and the successes will seldom be known, let alone applauded. Parole decisions usually are more a tangle of midnight shadows than a shining bright line. But thanklessness and uncertainty are not valid reasons to ignore important facts and the trends those facts reveal. Society loses when an inmate is too long in prison or too early on the streets. "It is, at least, less hazardous if one separates facts from fancy when weighing what the available information means."<sup>88</sup>

#### DETERMINATE SENTENCES AND PAROLE

During most of the 19th and the early part of the 20th century, determinate sentencing was commonplace. However, with the hope that prisoners could be rehabilitated, states shifted their sentencing policy to indeterminate sentencing. But when recidivism rates showed no signs of improvement, after "rehabilitation," many states, including Illinois, returned to determinate sentencing.<sup>89</sup>

Liberals criticized indeterminate sentencing because disparity was an almost unavoidable consequence.<sup>90</sup> Prisoners who committed the same offense and had similar criminal records often served vastly different sentences.<sup>91</sup> Release dates were largely a function of institutional records,<sup>92</sup> even though institutional records are not indicators of success on parole. This led Marvin Frankel, a well respected law professor and federal judge, to remark that, "the al-

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88. O'Leary & Glaser, *The Assessment of Risk in Parole Decision Making*, reprinted in *THE FUTURE OF PAROLE* 139 (1972).

89. See generally Morris, *supra* note 12, at 30; Aspen, *New class X Sentencing Law: An Analysis*, 66 ILL. B. J. 344, 344-45 (1978).

90. See, e.g., M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 7 (1963).

91. *Id.*

92. Fields, *supra* note 12, at 20-21.

most wholly unchecked and sweeping powers we give to judges in the fashioning of [indeterminate] sentences are terrifying and intolerable for a society that professes a devotion to the rule of law."<sup>93</sup>

Recidivism was not reduced by indeterminate sentencing. Conservatives viewed this as evidence that discretionary releases had to be reduced. It was time to stop treating criminals with kid gloves and get tough; prisoners should serve longer sentences and fewer convicted felons should be placed on probation.<sup>94</sup>

By definition, a determinate sentence has no minimum or maximum length; it is for a specific term of years, ten *or* twenty years, not ten *to* twenty years.<sup>95</sup> Parole, officially called mandatory supervised release under the determinate sentence law, is fixed by the sentence itself.<sup>96</sup> Once the sentence is served (day-for-day good time credits ensure, with rare exceptions, that every prisoner will be released after serving one-half of his sentence) release is mandatory.<sup>97</sup> Then a fixed period of supervision begins.<sup>98</sup>

While the change from the uncertainty of the indeterminate sentence to the fixed release date of the determinate sentence had the benefit of clarity, it may have caused more trouble than good. In 1977 the Illinois prison population was 10,982; by the end of 1990 it exceeded 28,800.<sup>99</sup> Much of this increase is attributable to determinate sentencing, and there is no relief in sight from this alarming trend.<sup>100</sup> The most recent data indicate that the sharpest increases

93. Frankel, *supra* note 90, at 5.

94. November 1, 1987, the federal government implemented the federal sentencing guidelines. These guidelines mandate determinate sentences within an extremely narrow range and limit probation to a small number of offenses. See UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES 1, 213, 216-24 (1988).

95. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977); Aspen, *supra* note 89, at 344-47. Anyone with a minimum sentence of twenty years or less when the legislature changed from indeterminate to determinate sentences was given the option of accepting a fixed release date or having periodic parole hearings. ILL. REV. STAT. ch. 38, para. 1003-3-2.1(a) (1978). Those prisoners serving indeterminate sentences with a minimum of greater than twenty years do not have that option, but they continue to receive periodic parole release hearings. ILL. REV. STAT. ch. 38, para. 1003-3-2.1(b) (1990).

96. ILL. REV. STAT. ch. 38, para. 1005-8-1(d)(1) (1987).

97. ILL. REV. STAT. ch. 38, para. 1003-6-3(a)(2) (1977).

98. ILL. REV. STAT. ch. 38, para. 1005-8-1(d) (1977).

99. TRANSITION PAPER, *supra* note 3, at 3, 4; Karwath, *supra* note 21, at 1, col. 1 (the current Illinois prison population is 28,806, 44% over designed capacity).

100. TRANSITION PAPER, *supra* note 3, at 3-5; STATISTICAL PRESENTATION 1990, *supra* note 1, at 2 ("This section [of the report] demonstrates how determinate sentencing contributes to the continuing increase in the prison population. At the end of 1977 [when determinate sentencing began] the population was 10,982. The December 31, 1990 population was 27,516, an increase of over 150% in the past 13 years.").

The only prisoners who have parole hearings now are those who were serving lengthy indeterminate sentences in 1978 when the determinate sentencing



in the prison population have occurred in the last few years.<sup>101</sup>

As the prison population increases, more prisons, more guards, and more money are needed. The 1991 fiscal budget for the Department of Corrections is 596 million dollars.<sup>102</sup> Although politically popular, the tough on crime motivation for determinate sentences carries a heavy financial burden. Studies indicate that the cost of incarceration can run as much as twenty times more than the cost of probation or parole supervision.<sup>103</sup> In Illinois, the cost of incarceration is almost double the cost of field supervision, even when electronic monitoring is included in the cost of field supervision.<sup>104</sup>

Moreover, rapid expansion of prison facilities is extremely costly and cannot keep pace with the influx of new determinate sentence inmates.<sup>105</sup> "Court admissions, which had averaged 5% growth annually over the last ten years, grew by 11% in FY [fiscal year] 89 and by 32% in FY 90."<sup>106</sup> Built in 1981, the relatively new Centralia Correctional Center's sewer system cannot accommodate the current inmate population. The Centralia prison population exceeds its design limit by 450 inmates.<sup>107</sup> This might seem like a trivial matter for those whose immediate response is "who cares—let the inmates suffer the inconvenience." But the real world cost is a dramatic increase in the Department's sewage and water bills.<sup>108</sup> Packed prisons also recently led to a \$331,000 expenditure for locks at two medium security prisons which had not expected to replace locks for another ten years.<sup>109</sup> According to Department of Corrections' reports, without major new construction or a change in admissions policy "the bed shortfall will grow to catastrophic proportions . . ."<sup>110</sup> Yet "in terms of cost, it would appear extremely difficult for the State to build its way out of the projected

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law took effect. *Tiller v. Klincar*, 138 Ill. 2d 1, 6-7, 561 N.E.2d 576, 578 (1990). Although in 1990 more than twenty-seven thousand inmates were serving felony prison sentences in Illinois, there were less than a hundred parole release hearings. *TRANSITION PAPER*, *supra* note 3, at 3, 28. As time passes fewer parole release hearings will be held because the number of indeterminate sentence inmates remaining in prison dwindles each year. *STATISTICAL PRESENTATION 1990*, *supra*, note 1, at 8 (Table 5). Fifty-two indeterminate sentence inmates were released in 1990. *Id.* at 3.

101. *STATISTICAL PRESENTATION 1990*, *supra* note 1, at 2-3, 36.

102. *TRANSITION PAPER*, *supra* note 3, at 1.

103. N. SINGER & V. WRIGHT, *COST-ANALYSIS OF CORRECTIONAL STANDARDS, INSTITUTIONAL BASED PROGRAMS AND PAROLE* 68 (1976).

104. *TRANSITION PAPER*, *supra* note 3, at 25.

105. *TRANSITION PAPER*, *supra* note 3, at 2.

106. *TRANSITION PAPER*, *supra* note 3, at 3.

107. *State Sees Overcrowding Push Prisons to Limit*, Chicago Tribune, May 1, 1990, at 6, col. 5.

108. See, Karwath, *Taxpayer's Foot the Bill for Packed Prisons*, Chicago Tribune, Apr. 2, 1991, at 1, col. 3.

109. Karwath, *supra* note 108, at 1, col. 3.

110. *TRANSITION PAPER*, *supra* note 3, at 7.

overcrowding problem.”<sup>111</sup>

Determinate sentences are also a disincentive for many prisoners who might otherwise participate in educational or therapy related programs. Previously, an inmate was encouraged to participate in “rehabilitation” programs, if for no other reason than it looked good when he appeared for his parole release hearing.<sup>112</sup> Even though this participation usually did not lead to rehabilitation, it was an effective way of controlling inmate behavior within the prison. There is no fast track for release with determinate sentencing. As a result, it does not matter whether one tries to get a high school diploma or learn a trade, release comes to all determinate sentence inmates on exactly the same schedule.

At the same time, hope is obliterated for many. Why should an undereducated 25 year old man serving a sixty year determinate sentence see reason to abide by prison rules or “rehabilitate” himself. He knows that he cannot be released until he has served thirty years. If he had no job, little money, and a broken family when he came in at age 25, why should he believe things will be better thirty years later? And how are prison administrators to deal with him in the meantime? These questions are not answered by determinate sentencing and probably were not carefully considered by those who pushed for it as a “crime control” package.<sup>113</sup>

Today, Illinois’ maximum security prisons are so overcrowded that they have been described as a “predator’s paradise dominated by gangs . . .”<sup>114</sup> There were 257 inmate attacks on inmates and 331 inmate attacks on correctional staff at the Pontiac Correctional Center in 1990, and the State paid more than \$500,000 dollars in workers’ compensation claims as a result of this inmate violence.<sup>115</sup> The union president for the Menard correctional staff noted that, “[i]nmates with long sentences are always causing us problems because we have nothing to hold over their heads if they cause trouble.”<sup>116</sup> His counterpart at the Pontiac Correctional Center recently complained that, “there is no control at Pontiac, the inmates have more control over the institution than the staff.”<sup>117</sup>

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111. TRANSITION PAPER, *supra* note 3, at 1.

112. Fields, *supra* note 12, at 20-23; Sturgis, *supra* note 56, at 21-22.

113. Casper, *supra* note 13, at 237.

114. Smith, *supra* note 36, at 1.

115. *Id.*

116. *Id.* at 13.

117. *Id.* Although the statistics on prison violence for 1991 are not yet available, the situation appears to be worsening. The union representing prison guards and other prison workers recently requested Governor Edgar to set up an emergency panel to deal with prison violence. Merrifield, *Guard Union Calls for Prison Summit*, Chicago Tribune, July 23, 1991, at 5, col. 5. On July 22, 1991, Steve Cullen, executive director of Council 31 of the American Federation of State County and Municipal Employees which represents 10,000 prison work-

To a great degree the burgeoning prison population and the concomitant problems of controlling a larger number of inmates, with no realistic hope of release, are the direct result of mandatory sentencing laws. When Governor Thompson signed the determinate sentence law, which he called Class X, he conceded that it was unlikely to reduce crime much, if at all.<sup>118</sup> Those familiar with the legislation knew that it drew its political appeal from the harsher sentences it required for violent crimes and repeat offenders.<sup>119</sup> They also knew that it was likely to result in prison overcrowding and that it would not promote rehabilitation.<sup>120</sup> Now even former Governor Thompson, one of the chief proponents of determinate sentencing, admits that determinate sentencing has contributed greatly to prison overcrowding.<sup>121</sup>

#### RELEASE DECISIONS UNDER DETERMINATE SENTENCING LAWS

Most of the convicted felons presently incarcerated in Illinois prisons will be released simply because they have served one-half of their fixed term sentence. Even for these determinate sentence inmates, it is important to identify those who are most likely to violate the conditions of their mandatory supervised release.<sup>122</sup> By identifying high risk releasees, scarce resources can be used to more effectively monitor this group.

Nothing about the determinate sentence process suggests that it is a better predictor of success than the more traditional parole release hearings. At least with indeterminate sentences, parole plans were taken into account by the Board before parole was authorized. With determinate sentences a judge, based on skimpy

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ers, requested that a panel composed of several interest groups be set up to consider certain "stopgap measures" to help protect prison workers. *Id.* The request was in response to a statewide lockdown of all maximum security prisons caused by the stabbing of two guards and the taking of several guards as hostages. *Id.* The union leader stated that "[w]hile we believe these steps will help improve security, we are certain that they will not resolve the underlying problem in the Illinois prison system — severe overcrowding." *Id.*

118. Chicago Daily L. Bull., Dec. 28, 1977, at 1, col. 7 (U.P.I. dispatch).

119. Aspen, *supra* note 89, at 347.

120. *Id.* at 351.

121. Thompson, *Introduction: Illinois' Response To Prison Overcrowding*, 1984 U. ILL. L. REV. 203-06. The Illinois General Assembly recently sent a plan to Governor Jim Edgar to reexamine the state's mandatory sentencing structure. Ramsey, *Lawmakers Take Middle Road on Crime as Prisons Overflow*, Chicago Daily L. Bull., July 22, 1991, at 1, col. 1. The plan would create a 24-member panel of various groups to make recommendations on possible changes in mandatory sentencing, including returning more discretion to the sentencing judge. *Id.*

122. "For example, a man who falls in a group having only one chance in twenty of violating obviously requires less supervision than one whose chances are fifteen out of twenty." Ohlin, *supra* note 62, at 12-13.

pre-sentence evaluations, is expected to accurately predict behavior patterns ten, twenty, or more years down the road.

It is unrealistic to believe judges are prescient to the degree assumed by the determinate sentencing procedure.<sup>123</sup> Trial judges rely on presentence investigation reports. These reports are not prepared by professionally trained staff with diagnostic skills, and the court personnel who prepare the reports do not "observe their subjects long enough to be able to make diagnoses."<sup>124</sup>

A typical presentence report in Cook County, for example, contains little more than the biographical information provided by the defendant. The person preparing the report does not conduct an outside investigation verifying this information. If the defendant says he does not use drugs, his answer is seldom checked with family members or others who might know the truth.<sup>125</sup>

Determinate sentencing does not reduce the odds against recidivism. Therefore, release success indicators, if there are any, must be identified. By doing this, high risk releasees can be supervised more closely with less time and money spent monitoring low risk groups.

#### PROPOSED ILLINOIS PAROLE PLAN

Illinois should seriously consider a return to indeterminate sentencing within the offense classification scheme already in place. Sentences should be in accord with the current range of punishment for a given offense. Since the existing classification scheme generally is viewed as "tough on crime,"<sup>126</sup> the political overtones of a change to indeterminacy would be muted. A Class 1 offense would still be punishable for a term of years of not less than four nor more than fifteen.<sup>127</sup> The trial court, under this proposal, would fix the sentence at a specific number of years, consistent with the offense classification guidelines.

However, once the inmate served the statutory minimum for the class offense (four years in the case of a Class 1 offender), he would be eligible for parole. By retaining the fixed ranges for each class of offense, much of the arbitrariness of prior indeterminate sentencing would be eliminated. At the same time, the Board

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123. R. GOLDFARB AND L. SINGER, *AFTER CONVICTION* 146-150 (1973).

124. *Id.* at 148.

125. *Cf.* AMERICAN CORRECTIONAL ASSOCIATION, *THE ORGANIZATION AND EFFECTIVENESS OF CORRECTIONAL AGENCIES* 696-698 (1966); TAPPAN, *CRIME, JUSTICE AND CORRECTION* 556 (1960) (*citing* SEIGLER, *PRE-SENTENCE AND PRE-PAROLE INVESTIGATION*, NATIONAL PROBATION ASSOCIATION YEARBOOK 155 (1946)).

126. Aspen, *supra* note 89, at 344-45.

127. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(4) (1990).

would have a mechanism by which it could (a) release inmates who demonstrate an ability to return to free society based on the Board's evaluation of parole success indicators; (b) alleviate overcrowding problems as needed; and (c) encourage inmate compliance with prison rules by holding out hope of an early release.

This modest proposal would result in millions of dollars saved annually. Approximately 11,000 inmates are serving sentences for Class 2 through Class 4 felonies.<sup>128</sup> A ten percent parole rate for this group would result in eleven hundred releases annually. A five percent parole rate for Class 1 felons adds another two hundred to the number of early releases, and a two and one half percent parole rate for the more serious Class X classification adds another two hundred early releases.<sup>129</sup> Thus, without paroling any murder sentence inmates, the Department of Corrections would release approximately fifteen hundred inmates under this hypothetical model.<sup>130</sup>

A fifteen hundred person reduction of the Illinois prison population saves millions of tax dollars, even if the inmate is subject to electronic monitoring upon release. The difference in cost between incarceration and electronic monitoring is roughly \$9500 per inmate per year, for a net annual savings of over fourteen million dollars.<sup>131</sup> Releasing the same fifteen hundred inmates without any supervision saves taxpayers more than twenty-four million dollars

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128. STATISTICAL PRESENTATION 1990, *supra* note 1, at 5 (Table 1; based on 1990 figures).

129. *Id.* (this report shows a total inmate population for Class 1 felonies of 4008 and for Class X felonies of 8398).

130. The authors do not suggest that the release decision should be based on a specific percentage of the prison population. The Board, or some other body, should determine parole success predictors and apply them in determining which inmates to release. *See supra* text accompanying notes 62-71. If there are no identifiable predictors, then release should be predicated on other valid considerations. *See supra* and *infra* text accompanying notes 123-33. The stated percentages are chosen merely to demonstrate the cost savings.

The modesty of this proposal is evident when compared to the parole rate in 1978, the first year of determinate sentencing. In 1978 there were 10,982 adult inmates in Illinois prisons. STATISTICAL PRESENTATION 1990, *supra* note 1, at 2. The Board considered 6684 of these inmates for parole. STATE OF ILLINOIS, ANNUAL REPORT - 1ST YEAR OF PRISONER REVIEW BOARD 20 (1979). The Board granted 3823 of these parole requests, or approximately 35% of the total prison population. *Id.* By comparison, the authors' proposal would release some 1500 of the 28,800 inmates, or approximately 5% of the total prison population. This modest plan would not only ease Illinois' prison overcrowding and fiscal difficulties, but would also be consistent with the State's offense classification guidelines.

131. The Department of Corrections places the annual cost of incarceration at \$16,176 per inmate and the cost of electronic monitoring at \$6600 per person. TRANSITION PAPER, *supra* note 3, at 25. Since field supervision is a "bad joke," *see* Recktenwald & Karwath, *Parole System a Bad Joke that May Get Worse*, Chicago Tribune, Apr. 7, 1991, at 1, col. 5, paid for by taxpayers, a strong case can be made for release with no supervision.

annually. This proposal, or some similar plan which restores to the Board the ability to release determinate sentence inmates, is needed now to alleviate the prison overcrowding crisis as well as Illinois' fiscal difficulties.<sup>132</sup>

#### PAROLE SUPERVISION

Parole terms vary in length. Under determinate sentencing, those convicted of murder or a Class X felony will serve three years on parole; for Class 1 and Class 2 convictions two years; and for Class 3 and Class 4 felonies, one year.<sup>133</sup> Prisoners who were sentenced before the advent of determinate sentencing (1978) are subject to varying periods of parole. For these prisoners, parole terms can last from the date of release on parole to the expiration of the maximum term of the sentence.<sup>134</sup> A prisoner, for example, sentenced to 10-20 years and released on parole after 7 years can be held on parole for 13 years.<sup>135</sup>

Illinois parolees and mandatory supervised releasees are governed by an elaborate and exhaustive set of rules.<sup>136</sup> Two conditions are mandatory: (1) they must not violate any criminal laws; and (2) they may not possess a firearm or other dangerous weapon.<sup>137</sup> In addition to these mandatory conditions, the Board may impose special conditions. Parolees and releasees may be required to work, or to pursue a course of study or vocational train-

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132. There are a number of alternative parole plans which would introduce a measure of indeterminacy to the present determinate sentencing scheme while permitting the Board to alleviate the prison overcrowding crisis. One such plan, formerly used by the federal system, is to make inmates eligible for parole after completing one third of their determinate sentence. See 18 U.S.C. § 4205(a) (1987). Under this system, the sentencing judge also had the option of permitting parole at some time prior to the one-third date. See 18 U.S.C. §§ 4205(b), (c) (1987). Under the former federal plan, the one-third date was determined by an inmate's actual time served, excluding good time credits. See 18 U.S.C. § 4205(a) (1987).

In creating an appropriate Illinois parole plan, legislators might consider alternatives which combine this article's proposal with the former federal scheme. An example of such a hybrid plan is to permit parole eligibility upon an inmate's completion of one-half (or two-thirds) of his determinate sentence including good time credits. This plan would have the same advantage of this article's proposal, that is, to tie an inmate's institutional behavior to his parole eligibility date. In addition, it would delay the eligibility date of the inmate sentenced at the high end of an offense classification. This proposal would more closely correlate the eligibility date to the actual determinate sentence imposed by the trial judge.

133. ILL. REV. STAT. ch. 38, para. 1005-8-1(d) (1990).

134. *Faheem-El v. Klinicar*, 123 Ill. 2d 291, 527 N.E.2d 307 (1988).

135. See *id.* at 295-97, 527 N.E.2d at 311; see also ILL. REV. STAT. ch. 38, para. 1003-3-9(i)(A) (1975).

136. See ILL. REV. STAT. ch. 38, para. 1003-3-7 (1990).

137. ILL. REV. STAT. ch. 38, para. 1003-3-7 (1990).

ing.<sup>138</sup> They may be ordered to undergo medical or psychiatric treatment or treatment for drug addiction or alcoholism.<sup>139</sup> They can be told where to live and with whom.<sup>140</sup> They can be directed to support their dependents, report to their parole agent, or allow their agent to visit them in their homes.<sup>141</sup>

Parolees can be told not to associate with other parolees or ex-convicts, not to write to inmates, and not to leave a designated county.<sup>142</sup> They may need permission from their parole agent to drink alcohol, own a car, change jobs or residences, or to get married.<sup>143</sup> The Board's power to regulate their life is probably limited only by the Eighth and Fourteenth Amendments, and any restriction which arguably advances a legitimate penological or rehabilitational goal is likely to be upheld.<sup>144</sup>

The actual supervision of parolees and releasees, however, is not one of the Board's duties. In fact, the agents who are assigned to assist and supervise parolees and releasees are not employed by the Board and are not accountable to it.<sup>145</sup> The agents work for the Department of Corrections, not the Board, and their allegiance to the Department sometimes puts them at odds with the Board.

Parole agents have a two-fold function: a) to assist the parolee with his problems and help him adjust to his new freedom; and b) to protect the public from criminal behavior by the parolee.<sup>146</sup> "Many observers feel these two tasks of the parole agent are incompatible and irreconcilable, that he cannot be at once a policeman and caseworker."<sup>147</sup> While this tension deserves further study to determine which role, if either, should predominate, a bigger problem must be faced first.

There are more than fourteen thousand parolees and releasees in Illinois and only about one hundred and twenty parole agents.<sup>148</sup> In 1987, the average caseload was approximately one hundred and

138. ILL. REV. STAT. ch. 38, para. 1003-3-7(b)(1) (1990).

139. ILL. REV. STAT. ch. 38, para. 1003-3-7(b)(2) (1990).

140. ILL. REV. STAT. ch. 38, paras. 1003-3-7(b)(3),(4) (1990).

141. ILL. REV. STAT. ch. 38, paras. 1003-3-7(b)(5),(7) (1990).

142. STATE OF ILLINOIS, ILLINOIS PRISONER REVIEW BOARD RULES 15-17 (1985); see generally ILL. REV. STAT. ch. 38, para. 1003-3-7(a) (1990).

143. PRISONER REVIEW BOARD RULES, *supra* note 142, at 17.

144. *Greenholtz v. Nebraska State Inmates*, 442 U.S. 1 (1979); cf. *Hewitt v. Helms*, 459 U.S. 460 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976).

145. ILLINOIS DEPARTMENT OF CORRECTIONS, FISCAL YEAR 1988 ANNUAL REPORT 41 (1988) (hereinafter "Fiscal Report").

146. *Id.* at 42; C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE, AND PAROLENS 277 (2d ed. 1964).

147. LESTER, PAROLE TREATMENT AND SURVEILLANCE-WHICH SHOULD DOMINATE 53 (82nd Annual Congress of Corrections 1952).

148. TRANSITION PAPER, *supra* note 3, at 28; see also ILLINOIS DEPARTMENT OF CORRECTIONS, HUMAN SERVICES PLAN, FISCAL YEARS 1985-1987 60 (1988).

fifty parolees per agent. "In FY 1988, the layoff of 60% of the parole agents caused the average caseload to triple. It rose to 306 cases per agent, with some urban-area agents supervising more than 400 parolees each."<sup>149</sup> The parolee population (parolees plus releasees) has "grown by 61% in the last ten years,"<sup>150</sup> and the number of released inmates is expected to increase by another 5,000 within the next two years.<sup>151</sup> Average caseloads are triple the American Correctional Association (ACA) standard. Without dramatic increases in the number of parole agents, the case overloads could reach five times the ACA standard by 1994.<sup>152</sup>

A study of federal parole officers, with substantially smaller caseloads than Illinois parole officers, showed that parolees received an average of seven minutes per week of supervision.<sup>153</sup> Only two to three minutes of this time constituted actual face-to-face contact with the agent. The Georgia Department of Corrections concluded that its agents, with caseloads of one hundred parolees, spent, on the average, eight minutes per week with each parolee.<sup>154</sup>

These studies cannot be superimposed on the Illinois system because the agents' duties, though similar, are not identical to the duties of Illinois agents. Also, it is possible that Illinois parole agents are more efficient or work longer hours. It is just as possible, on the other hand, that parole agents in Illinois are less efficient or work fewer hours, in which case the figures would be even worse. But at "these caseload levels, no effective supervision of parolees can take place."<sup>155</sup>

The efficacy of parole must be questioned, irrespective of whether the proper role of the agent is that of caseworker or policeman. Neither of the agent's primary functions can be served if his contact with the parolee amounts to less than an hour or two each month. Moreover, some studies suggest that "parole is largely a random process in terms of the impact of supervision on parole success."<sup>156</sup> In 1963, the State of Florida released more than one thousand inmates as a result of the *Gideon v. Wainwright* decision.<sup>157</sup>

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149. Fiscal Report, *supra* note 145, at 42.

150. TRANSITION PAPER, *supra* note 3, at 28.

151. *Id.*

152. *Id.*

153. Singer & Wright, *supra* note 103, at 68 (citing UNITED STATES FEDERAL JUDICIAL CENTER, PROBATION TIME STUDY (1973)).

154. MEGATHALIN, GEORGIA DEPARTMENT OF OFFENDER REHABILITATION, PROBATION AND PAROLEE CASELOAD REVIEW (1973).

155. TRANSITION PAPER, *supra* note 3, at 29.

156. Singer & Wright, *supra* note 103, at 69.

157. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that indigent defendants in non-capital criminal trials have the right to the assistance of counsel. On remand, the Florida Supreme Court provided an ave-



None of these releasees were predetermined as acceptable risks for release; they were released suddenly and arbitrarily by operation of the Supreme Court decision. This group of "unplanned" releasees was then compared with another group which consisted of inmates released in accordance with normal release procedures in Florida.<sup>158</sup> The research team tracked the recidivism rates of the two groups and concluded that the rate of recidivism for the planned release group was substantially higher than for the unplanned releases.<sup>159</sup>

Other studies show that parole supervision can make a difference with the right parolees.<sup>160</sup> Because Illinois does not track this issue or record relevant data, it is impossible to decide whether parole supervision makes a difference. However, available data indicates that most recidivism occurs within the first nine months.<sup>161</sup> If the parolee makes it through the first year and has a job, then recidivism is far less likely to occur.<sup>162</sup> These studies support a reduction in the length of Illinois' parole and mandatory supervised release terms; a one third reduction in the length would reduce the current parolee population by 2300.<sup>163</sup> By reducing the period of supervision, more time can be spent with parolees during the critical first year and more time can be spent on the highest risks.

Since field supervision is far less expensive than incarceration, there is much to be gained from incorporating new programs or shifting already limited resources. For example, electronic monitoring enables parole agents to more effectively police a greater number of parolees.<sup>164</sup> Incorporated correctly, electronic monitoring would permit a smaller number of parole officers to monitor the same number of releasees. Policymakers confront a dilemma with any policy to ease prison overcrowding, since parole agents are already overloaded with cases.<sup>165</sup> Either more money must be spent

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nue of post-conviction relief for the many who were denied their right to counsel. See *Gideon v. Wainwright*, 153 So. 2d 299 (Fla. 1963).

158. EICHMANN, *supra* note 75, at 71-73.

159. *Id.* An American Bar Association Project noted these findings could support the conclusion that "if we, today, turned loose all of the inmates of our prisons without regard to the length of their sentences and, with some exceptions without regard to their previous offenses we might reduce the recidivism rate . . ." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 59 (approved draft 1968).

160. H. SACKS & C. LOGAN, DOES PAROLE MAKE A DIFFERENCE 24 (1979); Martinson & Wilks, *Save Parole Supervision*, 41 Federal Probation 23 (1977).

161. TRANSITION PAPER, *supra* note 3, at 29.

162. Glaser, *supra* note 77, at 9; Rogers, *supra* note 62, at 6.

163. TRANSITION PAPER, *supra* note 3, at 29.

164. *Id.* at 24-26.

165. *Id.*

on prisons, the most costly alternative, or more money must be spent on the release programs.

### CONCLUSION

When it comes to correctional policies and criminal justice, symbolic politics and unintended consequences are the norm. Today's reform was yesterday's disaster and may well appear again as tomorrow's failure.<sup>166</sup> Illinois abandoned indeterminate sentencing in the 1970's for the popular appeal of determinate sentencing and its "tough on crime" posture. Indeterminate sentencing had failed in its mission and was properly criticized for arbitrariness and inconsistency.<sup>167</sup> Moreover, determinate sentencing reduced randomness, at least within categories of offenses, and had great political appeal. But the cost of determinate sentencing has been extremely high.

It is long past time to realize that Illinois cannot build its way out of current prison overcrowding problems.<sup>168</sup> However, releasing inmates from prison is politically risky, as the Willie Horton affair proved to Michael Dukakis. Political honesty and the financial bottom line dictate that this risk must be assumed. The vast majority of Illinois' felony sentence inmates will be released.<sup>169</sup> The only real question is when and under what circumstances release will occur.

To maximize the safety of citizens while reducing costs, or at least holding them in check, Illinois must begin to correlate and evaluate the data on successful transition from prison to field supervision or to unsupervised freedom. Whether Illinois retains its determinate sentencing laws or returns to a measure of indeterminacy, there still must be a working knowledge of which factors, if any, lead to an inmate's successful transition to free citizenship. The starting point must be a determined and thorough review of the existing relevant data so that release decisions are based on information rather than inspiration.

If there are identifiable predictors of successful transition, these predictors must replace the current ad hoc approach to release decision-making. In the event a thorough search proves that it is impossible to determine which factors predict a successful transition from prison to life in the free community, then release decisions should be based on other, equally valid, criteria. Controlling inmate behavior within Illinois prisons is one such legitimate con-

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166. Casper, *supra* note 13, at 233.

167. Frankle, *supra* note 90, at 7-8.

168. TRANSITION PAPER, *supra* note 3, at 1.

169. TRANSITION PAPER, *supra* note 3, at 1.

cern. Thus, a return to a measure of indeterminacy would aid prison officials in their efforts to minimize the risk of violence to guards and inmates alike.

Another legitimate use of a measure of indeterminacy is to control the overcrowding problem which has plagued Illinois for years and threatens to worsen. By using some form of indeterminate sentence system, Illinois can reduce the burgeoning and inevitable cost to taxpayers resulting from the current determinate sentencing laws. Without examining the relevant data, however, it is too early to prescribe the exact contours of a return to indeterminate sentencing. What is clear is that determinate sentencing is overloading Illinois prisons and imposing a substantial financial burden on the state. Something must be done to alleviate this problem. A return to some measure of indeterminate sentencing, perhaps within the range of sentence by class of offense as already established by Illinois' determinate sentence law, is necessary. Under this approach, the arbitrariness of Illinois' prior indeterminate sentencing law would be controlled by the limited range of sentences permitted under the current classification system. This approach is worth additional research and consideration because the substantial monetary savings are indisputable.

Finally, Illinois must end the cruel hoax of release supervision. There are too many releasees and too few supervisory agents for meaningful supervision to occur. Using current figures, an Illinois releasee is unlikely to spend more than a few hours a year with his supervising agent. Given these limits, no agent can be expected to monitor the releasee's conduct, provide employment counseling, or assist the releasee in adjusting to life beyond the prison walls.

As a short term measure, Illinois should reduce the length of release supervision terms to one year since most violations occur within the first year.<sup>170</sup> In addition, Illinois should consider eliminating all field supervision or limiting this supervision to a small fraction of the total number of releasees. The charade of supervision must be ended soon. The only way to end this charade is to eliminate supervision or focus these efforts on a limited number of releasees who are the most violent or the most likely to recidivate.

Illinois is already a grossly overstocked warehouse for prisoners, and this warehouse is a monstrous financial burden. By standing pat, Illinois falls further behind. It is time for Illinois to take immediate action. Only by taking action, guided by information and political honesty, can this problem be checked. And political honesty demands that policymakers gather and use the existing infor-

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170. TRANSITION PAPER, *supra* note 3, at 29.

mation to implement viable programs without succumbing to the partisan political pressures surrounding this volatile issue.

