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BOOK REVIEW

Standards Without Goals

TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM. BY PIERCE O'DONNELL,* MICHAEL J. CHURGIN,** AND DENNIS E. CURTIS.*** New York: Praeger Publishers, 1977. Pp. xvi, 137. \$16.95.

*Reviewed by Andrew von Hirsch*****

A considerable literature has developed since the beginning of this decade on the need for, and contents of, sentencing and parole release standards.¹ California has adopted sentencing standards,² and Minnesota and Pennsylvania are in the process of doing so.³ The federal system, Oregon, and Florida have adopted laws which call for guidelines for parole release decisions.⁴ More jurisdictions are expected to follow suit.

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1. See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); D. FOGEL, ". . . WE ARE THE LIVING PROOF . . ." (1975); M. FRANKEL, CRIMINAL SENTENCES (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); A. VON HIRSCH, DOING JUSTICE (1976); J.Q. WILSON, THINKING ABOUT CRIME (1975); Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 263 (1975).

2. CAL. PENAL CODE § 1170-6 (West Cum. Supp. 1978). The statute prescribes presumptive sentences for various offenses. For a description, see Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L. J. 5 (1978).

3. See Act of Apr. 5, 1978, ch. 723, 1978 Minn. Sess. Law Serv. 705 (West); Act of Nov. 26, 1978, Act No. 319, 1978 Pa. Legis. Serv. 1054 (Purdon) (to be codified in 18 PA. CONS. STAT. ANN. §§ 1321, 1381-1382 (Purdon)). Both statutes establish a sentencing commission, which is required to formulate sentencing guidelines.

4. Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 (1976); FLA. STAT. ANN. § 947.165 (West Cum. Supp. 1979); OR. REV. STAT. § 144.75 (1977).

Toward A Just and Effective Sentencing System is designed to promote and guide this movement.⁵ It is based on discussions at a clinical workshop, conducted in 1974 and 1975 at Yale Law School, which addressed problems of sentencing and parole in the federal system. The workshop included a number of distinguished scholars, judges and other officials⁶—and is, for that reason alone, worth examining seriously.

In analyzing the results, it is important to remember that the workshop was held more than four years ago, when it was still essential to make a reasoned case why standards for sentencing should exist at all. The first part of the book makes the case eloquently,⁷ an important contribution in itself.

Now that the idea of setting standards has gained momentum, however, it is critical to look carefully at *how* the standards should be constructed. The second part of the book⁸ is devoted to three specific proposals: a new “lockstep” procedure that judges would be required to follow in imposing sentences; a sentencing commission for setting guidelines; and elimination of parole release. I shall deal with the report’s recommendations as though they were being proposed today—recognizing that in the years since the workshop was held, some of the participants may have altered their views. Any criticism of the report’s proposals is not to minimize the service that the workshop has provided by placing its participants’ influence on the side of having standards.

THE PROPOSED “LOCKSTEP” PROCEDURE: WHY IT FAILS

The “lockstep” procedure⁹ is the book’s main recommendation for alleviating the problem of sentencing disparity. It requires judges successively to consider each of four purposes for sentenc-

5. The authors also propose a comprehensive federal sentencing statute, set forth in Appendix A to the study. P. 96 app.

6. The distinguished workshop participants included: United States District Court Judges Marvin E. Frankel (retired) and Jon O. Newman; Maurice H. Sigler, former chairperson of the United States Parole Commission; Peter B. Hoffman, research director of the Parole Commission; Ronald Gainer, a high-ranking official in the United States Department of Justice; and Professors Stanton Wheeler and Daniel J. Freed of Yale Law School. Preface, p. xii. The authors of this report, themselves participants in the workshop, endeavored “to arrive at a consensus position consistent with the views of individual workshop participants and responsive to the pressing need for reform legislation.” Preface, p. xii.

7. Pp. 1-30.

8. Pp. 33-75.

9. Pp. 43-49, 52-53; Proposed Statute § 2302(d), pp. 107-10.

ing—deterrence, incapacitation, rehabilitation, and “denunciation”¹⁰—and to decide what penalty—fine, probation, or imprisonment—is necessary to accomplish each of the purposes for a particular defendant.¹¹ The judge, therefore, will make four separate determinations, each representing his or her perception of the punishment necessary to reach each sentencing goal. The sentence imposed would be the largest of the four amounts assigned to the four purposes.¹²

The purported advantage of this procedure is that it requires all sentencing judges to go through a similar reasoning process in deciding their sentences. The procedure avoids difficult moral judgments about which of the four penal aims are to be considered preeminent; instead, all four aims would be deemed worth taking into account.

Nonetheless, as a technique for ensuring consistency, the lockstep procedure has little value. An illustration reveals its inadequacies. Suppose two offenders, each with similar criminal histories and social backgrounds, are convicted of similar crimes—for example white-collar frauds. The two individuals come before different judges for sentencing. Under the lockstep procedure, each judge must successively consider the same four purposes of punishment. However, they are permitted to make their own, perhaps startlingly different, judgments about how much punishment is needed to accomplish each purpose. Suppose Judge *A* is a great believer in the efficacy of deterrence, while Judge *B* thinks imprisonment is useful principally as an incapacitant for offenders likely to return to crime. The two judges will, under the proposed procedure, impose quite disparate sentences. When considering the first purpose, deterrence, Judge *A* assigns two years imprisonment because he or she believes this will help deter white-collar frauds; Judge *B* opts for a noncustodial penalty, because he or she doubts imprisonment is a useful deterrent in such cases. When considering the second purpose, incapacitation, Judge *A* opts for a nonincarcerative penalty, because he or she thinks the criminogenic effects of prison generally outstrip its incapacitative value. Judge *B* doubts that pris-

10. The report defines “denunciation” as “the development of internal moral restraints and respect for law in members of the general population through the use of criminal sanctions as an educative, moralizing tool.” P. 48 (quoting Proposed Statute § 2302(a)(4), p. 107).

11. P. 44.

12. P. 52; Proposed Statute § 2302(d)(5), p. 109.

ons are "schools for crime" in the case of white-collar offenders, but thinks, nevertheless, that incapacitation is unimportant in this case because the defendant seems unlikely to recidivate. Both judges are skeptical of the rehabilitative and denunciatory value of imprisoning in such cases, and assign a nonprison disposition to these two purposes.

What is the result? The sentence is supposed to be the largest of the four amounts assigned to any of the four purposes. Judge A thus imposes a two-year prison term, reflecting the two years he or she assigned to deterrence; Judge B imposes a noncustodial sentence, since he or she did not assign a prison term to any of the four aims. Yet the two cases are *ex hypothesi* similar: The diverse outcomes stem only from differences in the two judges' outlook. Consistency is not achieved, and one wonders whether the procedure is really more "rational" since it does not illuminate *how* the various purposes are to be assessed.

THE SENTENCING COMMISSION AND ITS GUIDELINES: THE NEED FOR SYSTEMWIDE DECISIONMAKING

If the "lockstep" procedure cannot alleviate disparity, do the authors supply anything else? The report endorses another proposal made several years earlier by Judge Marvin Frankel: to establish a rulemaking body known as a sentencing commission to promulgate sentencing guidelines.¹³ Judges would be required to consider these guidelines in determining sentences.¹⁴ If the judge's proposed disposition fell within the guideline ranges, the judge would need only give a brief statement of his or her reasons;¹⁵ if it fell outside the guidelines, a fuller explanation would be required.¹⁶

Judge Frankel's suggestion of a sentencing commission is a valuable idea, which a number of penologists (myself included) have supported.¹⁷ However, if such a body is to be created, one must

13. Pp. 14, 35, 44, 73-75; Proposed Statute §§ 2501-2504, pp. 111-15. The idea of establishing a sentencing commission was first proposed in M. FRANKEL, *supra* note 1, at 118-23.

14. P. 53.

15. P. 59; Proposed Statute § 2302(d)(6)(A), p. 94.

16. Pp. 53, 59; Proposed Statute § 2302(d)(6)(B), p. 109.

17. For comments by various scholars and officials on the creation of a sentencing commission, see *Reform of the Federal Criminal Laws, Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Senate Hearings*]. My own comments on the proposal are set forth in *id.* at 8977-80.

address what kind of standards it should write. Here, the authors are strangely silent. What purpose or purposes should the guidelines seek to achieve? What offender and offense characteristics should normally determine outcome under the guidelines? How lenient or severe should the various penalty gradations be? How narrow or broad should the guideline ranges be? What kind of considerations make it appropriate to depart from the guidelines? There is no discussion or recommendations on any of these critical subjects—and that diminishes the report's value.

A guidelines system is likely to succeed only if it adopts an approach quite different from the "lockstep" procedure which the book suggests judges should use. Instead of focusing on the purposes to be achieved in the case of this or that individual defendant, the drafters of the guidelines should address the purposes *the system as a whole* should seek to achieve. How much weight should be given to the blameworthiness of offenders' conduct—and how much should be given to the likelihood of their returning to crime—are matters to be considered in constructing the *system*. The guidelines must prescribe a consistent body of principles; they must provide an overview, not just recipes for case-by-case decisions.

Once the rulemaker has determined the system's purposes, it should develop specific criteria to implement them. Those criteria, instead of inviting the judge to interpret this or that purpose in the individual case, should call on him or her to consider designated items of information about the offender and offense. The guidelines would indicate how much weight ought ordinarily be given the various items, and what penalties or ranges of penalties should presumptively be imposed. This will preserve judicial discretion for dealing with the unusual cases and yet promote consistency in ways the "lockstep" cannot: each judge will be utilizing similar criteria, and giving *prima facie* consideration to similar items of information.

Recalling our illustration of the two white-collar offenders,¹⁸ the question of purposes should thus be resolved at a systemwide level. Judges A and B would be called upon, not to make individualized judgments about what will deter or rehabilitate these criminals, but to consider specified factors (relating to the seriousness of their crimes, the extent of their criminal histories and—depending on the system's rationale—perhaps other factors) to which the

18. See text following note 12 *supra*.

guidelines would assign a specified degree of importance.

Which factors the guidelines should utilize would depend on the assumed purposes of the system. One could, as I have urged elsewhere,¹⁹ utilize a "just deserts" model, in which the blameworthiness of the criminal conduct would be given paramount consideration. Another possibility would be the more "mixed" model that Norval Morris has proposed: Desert, that is, gravity of the criminal conduct, would determine the upper and lower bounds of the amount of punishment; within those limits, the specific penalty would be chosen on other grounds, such as deterrence.²⁰ Still another model would be the one developed by the United States Parole Commission, where presumptive durations depend on two major factors: the seriousness-ranking of the crime and the statistical likelihood of recidivism.²¹ Despite the theoretical differences among these schemes, and possibly others that weigh the system's purposes differently, they have one common virtue: They deal with the purposes to be achieved, the factors to be considered in sentencing decisions, and the suggested levels of penalties on a *systemwide* basis. This is essential if even a modicum of consistency is to be achieved.

ABANDONMENT OF A PRINCIPLED SOLUTION

Underlying the deficiencies of the "lockstep" procedure (and perhaps also, the lack of substantive recommendations on the content of the guidelines), is the authors' judgment that principled solutions are unachievable and unnecessary. In explaining the rationale of the "lockstep" procedure, the report explains:

This book does not judge the merits of each sentencing goal. On the basis of current knowledge, we have found that we can neither dismiss any of the goals as invalid nor embrace any one of them as a panacea for present sentencing ills. Like many other students of the sentencing process, we are uncertain as to what does and does not work, what is right and what is wrong, and what is necessary and what is unnecessary.²²

19. A. VON HIRSCH, *supra* note 1.

20. See N. MORRIS, *supra* note 1, at 74, 80; N. Morris, Punishment, Desert and Rehabilitation 15 (Nov. 12, 1976) (bicentennial lecture presented at University of Denver College of Law), *reprinted in Senate Hearings, supra* note 17, at 9306, 9323.

21. For the current guidelines of the United States Parole Commission, see 28 C.F.R. §§ 2.1-.38 (1978). For a description of how the guidelines were developed, see D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* (1978).

22. P. 44 (footnote omitted).

In other words, since it is so difficult and controversial to decide among the various purposes, the most practical solution is to seek all four aims at once.²³

However, the issues of principle are not evaded so easily. By ignoring them, the report does not achieve the "neutrality" which it claims. Instead, it merely espouses, without analysis, a particular—and I believe mistaken—theory: that the various purposes of punishment are cumulative or mutually reinforcing.²⁴ Underlying the "lockstep" procedure is the assumption that the offender should receive as his or her sentence the amount of punishment needed, respectively, to deter, incapacitate, rehabilitate, or denounce. The largest sentence assigned to any of these purposes becomes the offender's actual sentence, since it presumably encompasses all the relevant purposes.

But are the purposes really cumulative in this fashion? To the extent there is tension among them, they are not. One crime-control aim may conflict with another: The best deterrent may be counter-rehabilitative; and if it is, one must decide which of the two aims is more important, as the report refuses to do. Still more important are the tensions between the moral and crime-control purposes. The book speaks of the denunciatory effects of punishment. If punishment does ascribe blame, then it is a requirement of justice that the amount of punishment, and hence of implied blame, be commensurate with the degree of blameworthiness of the conduct.²⁵ If a long prison sentence would effectively deter or incapacitate, but would visit excessive censure on the individual given the blameworthiness of his or her acts, one must confront which purpose—deterrence or incapacitation on one hand, or commensurateness of penalty to offense on the other—should be given priority. If fairness requires that the latter be given preeminence, then the aims are no longer cumulative. How much weight should

23. P. 13.

24. See p. 52.

25. A. VON HIRSCH, *supra* note 1, at 66-76. The report mentions the principle of commensurateness-of-penalty-to-offense, but assigns it a peripheral role. The authors propose that, in addition to deterrence, incapacitation, rehabilitation, and denunciation, the court should consider two penal purposes: Providing just punishment for the offense and/or reflecting the relative gravity of the offense. Pp. 53-54; Proposed Statute § 2302(b)(5), (6), p. 109. But the exclusion of these added factors from the lockstep progression, the vagueness with which they are stated, and the absence of any instruction on how much weight they should receive, would tend to minimize their effect on sentencing decisions. Why the principle of commensurateness is given so small a role in the report's sentencing scheme is never discussed.

be given to this notion of commensurateness? The more weight it is given, the more it restricts the other purposes—and thus the more indefensible becomes the authors' assumption about the cumulativeness of the aims.

The authors justifiably emphasize the importance of parsimony in punishing.²⁶ Yet they seem unaware of the potential severity of treating the four purposes as cumulative. Each purpose, considered by itself, supplies reason for imprisoning in some cases and not imprisoning in others. Incapacitation gives reason for confining if the offender is likely to recidivate, but for not confining if recidivism is unlikely, irrespective of the gravity of the offense. "Denunciation" gives reason for confining if the crime is serious, but for not doing so if the crime is relatively minor, irrespective of the likelihood of recidivism.

Similar reasoning holds for the other two aims, deterrence and rehabilitation. If the four purposes are cumulated, however, an offender can be imprisoned if any one of the four purposes so mandates, even if imprisonment is inappropriate or unfair in light of the three remaining aims. Heads or tails, the prisoner loses: If the crime was not particularly serious but the prisoner supposedly can be deterred or incapacitated or rehabilitated by a prison sentence, he or she goes to prison; if prison serves none of these ends, but the crime is allegedly serious enough to call for "denunciation," he or she still goes in.

The assumption of cumulativeness thus seems mistaken.²⁷ If there are any counterarguments in its support, they would have to be made explicitly. What cannot be justified is to do what the authors have done: simply adopt such a debatable penal philosophy in the name of "neutrality" among philosophies.

PROSPECTS OF A PRINCIPLED SOLUTION

The authors' pessimism about reaching principled solutions also seems exaggerated. True, the question of aims has been long

26. See, e.g., pp. 35, 38, 40, 41.

27. At one point, the report seems to suggest that lockstep serves chiefly to help the judge decide whether to follow or depart from the guidelines: "[E]ven with a guideline system, the judge would still be required to engage first in the lockstep progression procedure. He would then compare his conclusion with the recommended range to determine whether he finds the recommended guideline range appropriate—the guideline range being presumptively applicable in most cases." P. 53. But if the assumption of cumulativeness is as conceptually flawed as this analysis suggests, the lockstep procedure is of doubtful use for this comparison, since the sentences derived from the process are themselves of questionable worth.

and strenuously debated, but there are some considerations which suggest that a rulemaking body such as a sentencing commission could, if it gave enough effort to the task, develop a coherent conceptual model for its guidelines.

Rulemakers in some jurisdictions, despite the authors' pessimism, have been able to agree on a rationale. Oregon's parole reform law, passed in 1977, supplies a specific set of principles, giving primacy to desert, which the parole board must follow in setting its standards for duration of confinement.²⁸ The new California sentencing statute uses a somewhat similar rationale,²⁹ although the sentencing standards are set by the legislature itself.³⁰ How well these schemes will work in practice, and what their specific problems are, remains to be seen.³¹ Nevertheless, they illustrate that it is not impossible to adopt a definite penal philosophy.

In addition, different conceptual models of punishment may partially "overlap" (that is, yield similar results from different theories), thereby facilitating agreement. Compare, for example, the model used by the United States Parole Commission in its guidelines with a "deserts" model. Theoretically, there are important differences: The Parole Commission's model is derived from

28. See OR. REV. STAT. § 144.780 (1977). The statute provides that the parole board's standards for duration of confinement be designed to impose "[p]unishment which is commensurate with the seriousness of the prisoner's criminal conduct." *Id.* § 144.780(2)(a). Deterrence and incapacitation may be considered, but only to the extent "not inconsistent" with the requirement of commensurateness. *Id.* § 144.780(2)(b). The statute further states that the parole board, in setting its standards, "shall give primary weight to the seriousness of the prisoner's present offense and his criminal history." *Id.* § 144.780(3).

29. See CAL. PENAL CODE § 1170-.6 (West Cum. Supp. 1978); see also Cassou & Taugher, *supra* note 2. The statute states that "the purpose of imprisonment for crime is punishment," CAL. PENAL CODE § 1170(a)(1) (West Cum. Supp. 1978), and makes the severity of penalties depend primarily on the gravity of the offense. *Id.*

30. For criticism of California's choice of the legislature as the standard setter, see A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE: RETENTION, REFORM OR ABOLITION?* 83-86 (1979) [hereinafter cited as *THE QUESTION OF PAROLE*]. A summary of this discussion appears in the executive summary of that report, published as a monograph by the National Institute of Law Enforcement and Criminal Justice under the title A. VON HIRSCH & K. HANRAHAN, *ABOLISH PAROLE?* (1978). See also Foote, *Deceptive Determinate Sentencing*, in NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *DETERMINATE SENTENCING—REFORM OR REGRESSION?* 133 (1978); Messinger & Johnson, *California's Determinate Sentence Statute: History and Issues*, in *id.* at 13.

31. Sheldon Messinger, Richard Sparks, and this author are now beginning an LEAA-funded research project to evaluate the effects of the Oregon and California systems. (Project on Strategies for Determinate Sentencing, NILECJ Grant Nos. 78-NI-AX-0081, -0082).

historical practice, and relies upon predictions of recidivism as well as upon judgments about the seriousness of offenses;³² a “deserts” model, however, is developed from theoretical arguments about fairness, looks to the gravity of the offender’s criminal conduct, and does not rely on prediction.³³ Yet it has been pointed out—by Gottfredson, Wilkins and Hoffman in their recent book on parole and sentencing guidelines³⁴—that in practice there may be considerable congruence between the two models. They argue that this is because the best (known) predictor of recidivism is the offender’s prior criminal history—which is also a factor in assessing the offender’s blameworthiness (at least according to some proposed versions of the desert model³⁵).

How much congruence there actually is, and what tensions still exist between the two models, is difficult to estimate since there has been little discussion of precisely *how* a defendant’s criminal history bears upon the two models. Nevertheless, to the extent that potential overlap exists, it may facilitate compromise. The members of a sentencing commission who prefer a desert-oriented conception and those who advocate a role for prediction may be able to agree, if their respective approaches lead to convergent results.

As for the three crime-control aims—deterrence, incapacitation, and rehabilitation—there is empirical research that might help the rulemaker. If, after debating the conceptual and moral issues, the members of the sentencing commission are still uncertain whether and to what extent to give deterrence a role in deciding the amount of penalties, it can be asked: “Can we measure deterrent effects sufficiently to warrant making deterrence such a decisive factor?” While the matter is not free from controversy, the bulk of the evidence would suggest not. The best recent assessment of the state of the art, made by a panel sponsored by the National Academy of Sciences, reaches quite pessimistic conclusions about our current capacity to measure the magnitude of deterrent

32. See 28 C.F.R. § 2.20 (1978); see generally D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 21.

33. A. VON HIRSCH, *supra* note 1, at 66-76, 124-31; see also J. KLEINIG, PUNISHMENT AND DESERT (1973); Harris, *supra* note 1.

34. D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 21, at 136.

35. A. VON HIRSCH, *supra* note 1, at 84-88. Some writers argue, however, that a “just deserts” model should only consider the offender’s current offense, and not his or her past convictions; see, e.g., G. FLETCHER, RETHINKING CRIMINAL LAW 459-66 (1978).

effects.³⁶ Such research might help persuade the commission that it is not feasible to base decisions about the amount of punishment on its potential power to deter. The same would hold for rehabilitation as a major factor in determining the level of sentences, given how little is known about effective treatment.³⁷

It still will not be easy, admittedly, to develop a coherent conception for the guidelines—as I myself have seen when attending sessions where guidelines have been written. However, principled solutions have been adopted in some places, and are not beyond human capabilities. There is no reason to despair of even trying, as the authors would have us do.

ABOLITION OF PAROLE RELEASE?

The report recommends elimination of parole release. An offender sentenced to prison would not be eligible for parole, and would have to actually serve his or her full sentence, subject to a brief, one-tenth reduction for good behavior.³⁸

Much of parole boards' traditional practice does seem indefensible today. There were no standards for parole release; the decision about the date of release was needlessly delayed; and, as the authors argue, undue emphasis was given to rehabilitative and predictive notions of when the offender is supposedly "ready" for release.³⁹

There are, however, defects that could be remedied. The parole board could be required to adopt standards for its release decisions, and to follow a rationale that stresses that decisions be made on other than rehabilitative factors, such as the seriousness of the criminal conduct. The board could be called upon to inform

36. NATIONAL RESEARCH COUNCIL PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, DETERRENCE AND INCAPACITATION 19-63 (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

37. See, e.g., D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975); Bailey, *An Evaluation of 100 Studies of Correctional Outcomes*, in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 733 (2d ed. N. Johnston, L. Savitz & M. Wolfgang 1970); Greenberg, *The Correctional Effects of Correction*, in CORRECTIONS AND PUNISHMENT 111 (D. Greenberg ed. 1977); Robinson & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971). For a critique of some of these studies, see Palmer, *Martinson Revisited*, 12 J. RESEARCH CRIME & DELINQUENCY 133 (1975).

38. P. 70.

39. Pp. 27, 68.

the offender of his or her release date shortly after imprisonment begins subject to subsequent postponement only if he or she is disruptive in prison. Oregon's new parole release statute requires the parole board to do precisely these things.⁴⁰

If parole can thus be reformed, why should it be eliminated? Before opting for its elimination, it is worth bearing in mind how parole affects the way time in prison is calculated. There is now a dual system of reckoning time. Judges are accustomed to imposing lengthy sentences of confinement—which participants in the process do not expect to be carried out; which could not be carried out given the limitations of prison resources; and which would be disproportionately severe were they carried out. The parole board's function—perhaps its most important practical role—is to assign shorter actual durations of imprisonment. The prisoner who gets a six-year sentence can, depending on the parole board's policy, expect to be paroled after two or three years.

Were parole release abolished, there would be a single reckoning: real time in prison. The judge's sentence would determine the period actually served. This transition from the present dual time to "real time," however, could easily give rise to misunderstanding. The appearance of a shift toward leniency can be created, even when there has been no change in the real quantum of punishment. Suppose the practice in a given jurisdiction has been to give persons convicted of a given felony six years in prison, and to parole them in most cases after about one-third of their sentence has expired. Suppose parole is abolished, and a two-year presumptive sentence is prescribed in the standards for such conduct; little actual change in the average stay in prison would result: it remains at two years. However to most people accustomed to hearing sentences expressed in the old manner it will *seem* to be a large sentence reduction: two years instead of six. Explanations by the sentencing commission of why there has been no real change may well go unreported and unheeded, and there may be considerable political pressure to raise the levels of prison time.

40. See OR. REV. STAT. §§ 144.775(8), 144.780 (1977). For a description of the rationale which the Oregon parole board must follow in setting its parole release standards, see note 28 *supra*. The statute requires the board to decide, within six months after the offender enters prison, his or her expected date of release. *Id.* § 144.120. This date may be substantially postponed if the board makes a finding that the prisoner has engaged in serious misconduct in prison, as "serious misconduct" is defined by the board. *Id.* § 144.125(2). For a fuller analysis of the Oregon law, see THE QUESTION OF PAROLE, *supra* note 30, at 92-96.

Is parole abolition, then, worth the risk? Conceivably, it might be if sufficient precautions were taken. If a system of "real time" sentences is created, the agency setting the standards would need a clear directive that it adjust sentence durations downward to reflect that it is dealing with actual, not apparent, time in prison. For example, the 1977 proposal of Senators Hart and Javits, which eliminates parole and creates a Sentencing Commission to set the standards, would set strict limits on the amount of confinement which the commission is permitted to prescribe.⁴¹ The bill that was eventually passed by the United States Senate in early 1978,⁴² has considerably weaker limits;⁴³ this is why I have argued elsewhere against its provisions on parole abolition.⁴⁴ But it at least contains some language that deals with the issue.⁴⁵

Which, then, is preferable: keeping parole release on a reformed basis, as Oregon has done, or eliminating it with appropriate directions for scaling down sentences? I have tried to address this rather complex question elsewhere.⁴⁶

One thing should be apparent, however. It would be potentially disastrous to eliminate parole release *without* adding safeguards concerning the reckoning of sentence durations. Yet this is what the present report would do. It calls for a system in which judges impose nonparoleable "real time" sentences, but makes no serious attempt to develop any mechanism that would reduce sentence durations to reflect that judges would now be dealing in real, not apparent, time.⁴⁷ The dangers of a precipitous increase in

41. S. 204, 95th Cong., 1st Sess. (1977). For analysis of this proposal and its problems, see *THE QUESTION OF PAROLE*, *supra* note 30, at 83-86.

42. S. 1437, 95th Cong., 2d Sess. (1978).

43. Section 124 of S. 1437 provides that the Sentencing Commission, in promulgating the guidelines for imprisonment, be guided by "the length of . . . terms actually served, unless the Commission determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described in subsection 101(b)." S. 1437, 95th Cong., 2d Sess. § 124 (1978) (to be codified, if enacted, in 18 U.S.C. § 944). Since § 101(b) includes virtually all the purposes of punishment, the escape clause is a wide one, and almost any sentence length can be justified.

44. For an argument against the parole provisions of S. 1437, 95th Cong., 2d Sess. §§ 101, 124 (1978) (to be codified, if enacted, at 18 U.S.C. §§ 2301-2303 and 28 U.S.C. § 994), see *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on Judiciary*, 95th Cong., 1st & 2d Sess. 1322 (1977-1978) (testimony of Professor Andrew von Hirsch).

45. See note 43 *supra*.

46. *THE QUESTION OF PAROLE*, *supra* note 30, at 83-86.

47. The authors' only suggested safeguard is to reduce by one-half the sentence durations provided in S. 1, 94th Cong., 1st Sess. (1975), predecessor to S. 1437. See p.

prison time are evident. By ignoring the complexities involved in eliminating parole, the authors, despite their talk of "parsimony,"⁴⁸ have offered a formula for escalating imprisonments.

* * *

The report performs a valuable service in urging that there be standards on how much punishment to impose, and in supporting the idea of a specialized rulemaking body to help set them. However, its specific proposals—on how the standard-setting task should be undertaken—seem to me to be flawed.

54. Since these durations are extremely high, such reduction provides little protection. The report compounds these difficulties by recommending that parole release be abolished immediately, p. 55, before the sentencing commission has had time to organize and issue its guidelines. During this interim, there would be virtually no constraints on judges' imposing much longer durations of actual imprisonment.

48. *See, e.g.*, pp. 37-42.