The Hidden Dangers of Sentencing Guidelines

Kenneth N. Flaxman
THE HIDDEN DANGERS
OF SENTENCING GUIDELINES

Kenneth N. Flaxman*

Sentencing guidelines are the keystone of several contemporary proposals to eliminate the "national scandal" of unwarranted sentence disparity. The premise of guidelines theory is that it is not only possible but desirable to create a table which indicates the "customary sentence" for any combination of offense and offender characteristics. The judicial sentencing decision is simply whether to depart from the guidelines; any such departure is then subject to appellate review.

Sentencing guidelines have been voluntarily adopted by courts in several jurisdictions, and are included in S. 1437, the revision

3. See, e.g., P. O'DONNELL, M. CHURGIN & D. CURTIS, supra note 2, at 73.
4. Id.
6. S. 1437, 95th Cong., 2d Sess. § 124 (1978) (to be codified, if enacted, in 28 U.S.C. § 994(c)). This Article deals with §§ 101 and 124 of the bill. Id. §§ 101, 124. Section 101 of the bill, if enacted, will amend Title 18 of the United States Code regarding, inter alia, sentencing guidelines. All subsequent textual and footnote references to § 101 of the bill are to the proposed section numbers in Title 18 of the

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of the Federal Criminal Code passed by the Senate in the Ninety-Fifth Congress. None of these schemes provides an a priori definition of what the customary sentence should be for various combinations of offense and offender characteristics. On the contrary, they rely on statistical analyses of preguideline sentencing practices to show what has been the customary sentence for various combinations of offense and offender characteristics. This approach creates what are called descriptive guidelines. Such guidelines are intended to make explicit that which has previously been implicit and thereby insure that the same criteria are applied in future decisionmaking.

Some proponents of descriptive guidelines cite the federal parole guidelines as demonstrating the feasibility of such an approach. While experience with the parole guidelines shows that guidelines can effectively regulate the exercise of discretion, the parole guidelines have, until recently, escaped serious scrutiny.

It is the theme of this Article that experience with the federal parole guidelines fails to establish the feasibility of descriptive guidelines to insure that judicial sentencing decisions are made fairly. While the federal parole guidelines have been effective in bringing overall uniformity to decisionmaking, individual parole decisions are made with equal or greater arbitrariness than was formerly the case. In addition, analysis of the creation of the federal parole guidelines demonstrates how the descriptive approach re-
results in the delegation of policymaking from those entrusted with that duty to those who claim to be value-free social scientists.\(^3\)

After a brief discussion of the use of guidelines to regulate the exercise of discretion, a careful analysis of the genesis and application of the parole guidelines is undertaken to show how overall uniformity in decisionmaking has been achieved at the cost of equal or greater arbitrariness in individual decisions. This high cost is especially important in light of the complex set of sentencing guidelines contemplated in the Senate bill.\(^4\) The conclusion reached is that unless great caution is used in creating sentencing guidelines, the result will be the same: overall uniformity at the expense of individual fairness.

**STRUCTURING SENTENCING DISCRETION THROUGH GUIDELINES**

At the present time, a federal district judge has the power to “determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination.”\(^5\) Congress has yet to provide any guidance about how this discretion should be exercised.\(^6\) One result is that “sentencing in the Federal criminal justice system is marked by uncontrolled and unwarranted disparity among judges.”\(^7\)

Various proposals have been advanced to control the problem of unwarranted sentence disparity. One idea, rooted in the concept of indeterminate sentencing, would vest all sentencing decisions in a centralized tribunal, which would make decisions on a “scientific

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13. See text accompanying notes 62-72 infra.
16. The only limitation on how discretion should be exercised is the requirement that a decision not to commit a youth offender under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976), be accompanied by a finding that treatment would be of no benefit to the youth. Id. § 5010. See Dorszynski v. United States, 418 U.S. 424 (1974).
17. S. REP. No. 605, 95th Cong., 1st Sess. 883 (1978) [hereinafter cited as SENATE REPORT]. This finding of unwarranted sentence disparity is based on statistics which show, for example, that bank robbery sentences vary from an average of 30.7 months in the Southern District of New York to 176.4 months in the Southern District of Alabama. 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. 9227 (1977) (paper prepared by Karen Skrivseth, Office for Improvements in the Administration of Justice, U.S. Dep't of Justice) [hereinafter cited as Senate Hearings].
basis.” The difficulty in this approach, however, is the lack of a reliable basis for precisely determining when a prisoner has been rehabilitated. Another proposal is to redefine offenses to eliminate judicial discretion in fixing punishment. Such a system of “fixed price sentencing” has been criticized because it would merely move the problem of unstructured discretion from judges to prosecutors, and because it might require that penalties be minutely defined to maintain distinctions between offenses.

The guideline approach to controlling sentencing discretion in S. 1437 combines these two proposals. A centralized Sentencing Commission would promulgate sentencing guidelines based on objective measures of the total circumstances surrounding the offense and the offender’s background. These guidelines would set


19. A task force of the American Psychological Association recently concluded: It does appear from reading the research that the validity of psychological predictions of violent behavior, at least in the sentencing and release situations we are considering, is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgements. Task Force on the Role of Psychology in the Criminal Justice System, Report, 33 AM. PSYCHOLOGIST 1099, 1110 (1978).


21. The argument is that fixed-price sentencing would make the length of sentence dependent on two factors that are within the unreviewable discretion of the prosecutor—the offense to be charged, and whether a guilty plea should be accepted to a lesser included offense. See F. Zimring, Making the Punishment Fit the Crime 13-14 (1977) (occasional papers from University of Chicago Law School). In an attempt to meet this problem if sentencing guidelines are adopted, the Department of Justice has announced its intention to promulgate detailed guidelines for the exercise of prosecutorial discretion during charging and plea bargaining stages of a criminal case. See Senate Hearings, supra note 17, at 9221 n.167 (paper prepared by Karen Skrivseth, Office for Improvements in the Administration of Justice, U.S. Dep’t of Justice).

22. F. Zimring, supra note 21, at 13; Alschuler, supra note 5, at 560-61; O’Leary, Gottfredson & Gelman, Contemporary Sentencing Proposals, 11 CRIM. L. BULL. 555, 580 (1975).

23. Proposed 28 U.S.C., supra note 6, § 994(b)-(d), (f)-(m).

24. Id. § 991. The Sentencing Commission was fashioned after the concept put forward by District Judge Marvin Frankel. See Kennedy, Foreword to P. O’DONNELL, M. CHURGIN & D. CURTIS, supra note 2, at ix.

25. Proposed 28 U.S.C., supra note 6, § 994 (c)-(d). “[S]ound statistical studies on the effectiveness of certain sanctions or treatment programs” can be used in the creation of guidelines. SENATE REPORT, supra note 17, at 1160. The “principal determinants” of the guidelines, however, are to be “the prior records of offenders and the criminal conduct for which they are to be sentenced.” Id. at 1161.
out the average punishment for any combination of offender and offense characteristics. The trial judge would retain discretion in fixing sentence but any decision to impose a punishment different from that set by the guidelines in effect at the time of sentencing would be subject to review on appeal either by the defendant or by the government.

The guidelines contemplated in the Senate bill are highly complex. First, the appropriate form of punishment (probation, fine, or imprisonment) must be identified. Then an appropriate penalty must be determined (amount of fine, or duration of term of probation or imprisonment). Guidelines as complex as these are unprecedented. One witness before the Senate Judiciary Committee predicted that the entire Sentencing Commission would be "a nice exercise . . . in futility." At the very least, creation of sentencing guidelines will be "a complex [and] difficult task."

26. Proposed 28 U.S.C., supra note 6, § 994(b). This requirement is explained in the Senate Report: "The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors." Senate Report, supra note 17, at 1167.


30. Proposed 28 U.S.C., supra note 6, § 994(a)(1). Guidance for the judge in determining whether to sentence a convicted defendant to a sentence of probation, to pay a fine, or to a term of imprisonment . . . may prove to be one of the most important parts of the guidelines process, since current law provides no guidance or mechanism for guidance to judges on this crucial decision, leading to considerable unwarranted disparity which there is no mechanism to correct.

Senate Report, supra note 17, at 1163 (footnote omitted).

31. Senate Hearings, supra note 17, at 9141, 9143 (statement of John J. Cleary on behalf of the National Legal Aid & Defender Association).

32. Id. at 8930, 8934 (statement of Dean Don M. Gottfredson, School of Crimi-
Some of the problems which must be solved if fair sentencing guidelines are to be developed have been encountered under the parole guidelines examined below.

**Federal Parole Guidelines**

From the creation of federal parole in 1910\(^3\) until the adoption of the parole guidelines in 1973\(^4\), the Parole Board made virtually no attempt to articulate\(^5\) the policies it was implementing in discharging its broad statutory discretion: The Board was authorized to grant parole if there was a "reasonable probability" that a prisoner could "live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society."\(^6\) By 1973, the failure of the...
Parole Board to articulate its policies had become the subject of increasing criticism, culminating in Childs v. United States Board of Parole, a district court decision directing the Parole Board to enunciate release policies.

The parole guidelines were adopted in 1973 to comply with the Childs decision, and, with minor variations, have been used continuously thereafter. In general, a severity rating of the prospective parolee’s offense is used in the guidelines to determine the minimum customary range of imprisonment which must ordinary shall be released on parole, pursuant to guidelines, if “release would not deprecate the seriousness of his offense or promote disrespect for the law; and . . . would not jeopardize the public welfare.” 18 U.S.C. § 4206(a) (1976).


39. Id. at 1247-48.


41. The Parole Board acquiesced in that portion of the district court’s decision directing it to convey to prisoners a reasonably comprehensive explanation of criteria used to judge parole applications. Childs v. United States Bd. of Parole, 511 F.2d 1270, 1272 (D.C. Cir. 1974) (affirming other portions of district court’s decision).

42. Variations have been made in the “offense severity scale,” discussed infra at notes 44-48, and in the factors involved in the “salient factor scale,” discussed infra at notes 49-53. See 42 Fed. Reg. 12,045 (1977) (change in salient factor scale); 42 Fed. Reg. 31,786 (1977) (change in severity levels of several offenses); 42 Fed. Reg. 52,399 (subcasing “greatest” severity rating into “Greatest I” and “Greatest II”).


44. See 28 C.F.R. § 2.20 (1978). The “customary range of imprisonment” is said to have been derived from the median length of imprisonment served for each “severity/prognosis” level, to which was added an arbitrary “discretion range.” See P. Hoffman & D. Gottfredson, Paroling Policy Guidelines: A Matter of Equity 10 (NCCD Parole Decision-Making Project, Supp. Rep. No. 8, 1973). An independent researcher, however, has determined from an analysis of preguideline parole decisions that “it would be difficult to conclude that the ranges of time indicated on the guidelines were based on the past practice and policy of the board.” J. Schmidt, DEMYSTIFYING PAROLE 52 (1977).
narily be served before parole will be granted. The minimum customary range of imprisonment is independent of the maximum sentence which could have been imposed. It is, instead, determined in accordance with a unique classification of offenses into seven severity levels. The severity of a prisoner’s offense is classified on the basis of the offense originally charged, rather than on any lesser included offense for which a plea bargain might have been negotiated.

A prisoner’s “salient factor score” determines whether and by how much the minimum customary length of imprisonment is to be increased. The salient factor scale consists of seven factors which have been correlated to the likelihood of recidivism following release from prison. A prisoner’s salient factor score can be any number between zero and eleven. Scores of nine through

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45. 28 C.F.R. § 2.20 (1978). In fiscal year 1975, 91.3% of all prisoners were required to serve at least their “customary length of imprisonment” before being paroled. In fiscal year 1976 the percentage increased slightly to 93% and in fiscal year 1977 was virtually unchanged at 93.4%. B. Stone-Meierhofer, supra note 11, at R-10. (These figures are developed by combining, for each year indicated, the annual percentage of Commission parole decisions within and above the guidelines.)


47. The severity levels range from “low,” for offenses such as possession of small quantities of marijuana for personal use, to “greatest II,” for offenses such as kidnapping and homicide. See 28 C.F.R. 2.20 (1978). The guidelines are reproduced in Hoffman & Stover, Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function, 7 Hofstra L. Rev. 89, 104-06 (1978).


50. See 28 C.F.R. § 2.20 (1978). The salient factors are: prior convictions, prior incarcerations, age at first commitment, whether present offense involves auto theft or forgery or larceny, whether parole has been revoked, history of heroin or opiate dependence, and employment or full-time school attendance for at least six months during the last two years prior to incarceration. Id.

51. 28 C.F.R. § 2.20 (1978). The number of points possible for each “salient factor” varies from one to three. Id.
eleven are combined to form a "very good" rating; scores of six through eight are "good"; a score of four or five is "fair"; and scores of zero to three are "poor." The "very good" rating corresponds to the minimum customary length of imprisonment.

Unless there is good cause for a decision outside the guidelines, a prisoner will be granted parole at some date falling within the customary range of imprisonment. Approximately one-quarter of all prisoners, however, have sentences that are too short to allow them to serve the customary range of imprisonment: These prisoners are routinely denied parole.

An analysis performed by the Parole Board on statistics for prisoners released in 1972 shows that the "percentage favorable outcome" (the probability that a prisoner will perform satisfactorily upon release from prison) for each salient factor score is as follows:

<table>
<thead>
<tr>
<th>Salient Factor Score</th>
<th>Percent Favorable Outcome</th>
<th>Number in Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>100%</td>
<td>24</td>
</tr>
<tr>
<td>10</td>
<td>96%</td>
<td>49</td>
</tr>
<tr>
<td>9</td>
<td>92%</td>
<td>77</td>
</tr>
<tr>
<td>8</td>
<td>88%</td>
<td>101</td>
</tr>
<tr>
<td>7</td>
<td>87%</td>
<td>83</td>
</tr>
<tr>
<td>6</td>
<td>77%</td>
<td>105</td>
</tr>
<tr>
<td>5</td>
<td>72%</td>
<td>149</td>
</tr>
<tr>
<td>4</td>
<td>67%</td>
<td>148</td>
</tr>
<tr>
<td>3</td>
<td>61%</td>
<td>139</td>
</tr>
<tr>
<td>2</td>
<td>61%</td>
<td>90</td>
</tr>
<tr>
<td>1</td>
<td>39%</td>
<td>41</td>
</tr>
<tr>
<td>0</td>
<td>20%</td>
<td>5</td>
</tr>
</tbody>
</table>


Using the 1972 data set out in note 51 supra, the weighted average of the "percent favorable outcome" for each of the four ranges of salient factor scores is as follows:

<table>
<thead>
<tr>
<th>Rating</th>
<th>Weighted Percent Favorable Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good (9-11)</td>
<td>95.3%</td>
</tr>
<tr>
<td>Good (6-8)</td>
<td>83.7%</td>
</tr>
<tr>
<td>Fair (4-5)</td>
<td>69.5%</td>
</tr>
<tr>
<td>Poor (0-3)</td>
<td>57.0%</td>
</tr>
</tbody>
</table>

56. Information provided in discovery in proceedings in Geraghty v. United
An effort is made to minimize the number of cases finding good cause to depart from the guidelines. In fiscal year 1977, only 6.6% of all parole release decisions were below the guidelines, while 13.5% were above. Thus, it is obvious that the parole guidelines have effectively achieved uniformity by insuring that the overwhelming majority of decisions are made in the same way. What is not obvious is that while the parole guidelines were intended to perpetuate existing policies, they unintentionally created new policies, bringing equal or greater arbitrariness to individual parole release decisions.

REIFICATION OF UNDESIRED POLICIES

When descriptive guidelines are created by analyzing pre-guideline decisionmaking, the underlying assumption is that unstructured decisionmaking has produced a fair result in the average case; guidelines are needed to reduce the number of cases in which the average decision is not made. If, however, these assumptions are erroneous, either because the average decision is arbitrary or because decisions are made on the basis of impermissible criteria, descriptive guidelines will perpetuate this unfairness. This problem is reflected in the parole guidelines and will arise if

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57. Parole hearings are conducted by two hearing examiners. 28 C.F.R. § 2.23 (1978). The Parole Commission maintains statistics on the number of cases in which each hearing examiner has voted to make a decision outside of the guidelines, and meetings are periodically held with all of the hearing examiners to review these statistics. Record at 18, Geraghty v. United States Parole Comm’n, No. 76-1467 (M.D. Pa. Aug. 22, 1978) (hearing), on remand from 579 F.2d 238 (3d Cir. 1978), cert. granted, 99 S. Ct. 1420 (1979) (No. 78-572) (testimony of James C. Neagles, chief hearing examiner, U.S. Parole Commission). This procedure is plainly designed to produce greater uniformity in decisionmaking.

58. B. Stone-Meierhoefer, supra note 11, at R-10.

59. See D. Gottfredson, L. Wilkins & P. Hoffman, supra note 2, at 137.

60. See Singer, In Favor of “Presumptive Sentences” Set by a Sentencing Commission, 24 CRIME & DELINQUENCY 401, 413-17 (1978).

61. This problem was noted in an early case dealing with the parole guidelines, but was viewed as unimportant because of the Board’s power to depart from the guidelines. See Battle v. Norton, 365 F. Supp. 925, 929 & n.3 (D. Conn. 1973). Subsequent experience with application of the guidelines, however, shows that this power is used only in exceptional cases. See note 129 infra and accompanying text.
The parole guidelines are created to model present sentencing practices.

The parole guidelines are the product of a study of actual decisionmaking in Federal Youth Corrections Act cases, where incarceration is generally for no longer than six years of treatment. The determination of when a Youth Corrections Act offender is to be released rests solely with the Parole Board, a judge has no power to control the length of treatment.

The study of Youth Corrections Act decisionmaking tested the hypothesis that four factors controlled decisionmaking: offense severity, parole prognosis, institutional program participation, and institutional discipline. The study concluded that the most important of these factors was a judgment of the severity of the prisoner's offense. Of the other factors, only parole prognosis, a judgment of the likelihood that the offender could successfully complete a parole term, was found to contribute significantly to decisionmaking. These two factors were then chosen as the basis for decisionmaking in future cases, and are loosely related to the offense severity scale and the salient factor scale of the present parole guidelines.

The problem with structuring prospective decisionmaking on
these two factors is that the Board's heavy reliance on offense severity was directly contrary to congressional mandate. In 1972, when the Youth Corrections Act study was conducted, the primary factor intended by Congress to determine when an offender should be released was whether the prisoner had been rehabilitated.\textsuperscript{73} Offense severity was to be of minimal importance: The essence of the Act was that "execution of sentence was to fit the person, not the crime for which he was convicted."\textsuperscript{74} Thus, fashioning guidelines which described the Board's implicit Youth Corrections Act policies, with their heavy reliance upon severity, perpetuated this policy in direct contravention of the congressional mandate.\textsuperscript{75}

Current sentencing practices similarly provide a poor basis for prospective decisionmaking. While it cannot be said that the average sentencing decision is unlawful,\textsuperscript{76} there is no assurance that the average sentencing decision is fair. When judges in the same circuit assert that they would impose sentences ranging from probation to twenty years of imprisonment in an identical case,\textsuperscript{77} there

\textsuperscript{73} Dorszynski v. United States, 418 U.S. 424, 433 (1974). The release criteria in the Federal Youth Corrections Act, 18 U.S.C. \$ 5017(a) (1976), were amended as part of the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 (1976). The purpose of the amendment was "to provide for parallel parole release criteria for all eligible prisoners." H.R. REP. No. 838, 94th Cong., 2d Sess. 19, 36, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 583, 601. This amendment has been read as repealing the rehabilitative purposes of Federal Youth Corrections Act commitments. \textit{See, e.g.,} De Peralta v. Garrison, 575 F.2d 749, 751 (9th Cir. 1978). If this was the intent of Congress, however, it was not clearly expressed in the legislative history of the Parole Commission and Reorganization Act. \textit{Cf.} Muniz v. Hoffman, 422 U.S. 454, 470 (1975) ("To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that provision is unsupported").

\textsuperscript{74} Id. at 434.

\textsuperscript{75} Application of the guidelines to Youth Corrections Act prisoners sentenced prior to the 1976 amendments, \textit{see note 73 supra}, has been held to be unlawful in several cases. \textit{See, e.g.,} De Peralta v. Garrison, 575 F.2d 749 (9th Cir. 1978); United States v. Fletcher, 425 F. Supp. 918 (D.D.C. 1976); United States \textit{ex rel.} Mayet v. Sigler, 403 F. Supp. 1243 (M.D. Pa. 1975), aff'd mem., 556 F.2d 570 (3d Cir. 1977). In a series of cases, the Second Circuit has criticized the heavy reliance on offense severity in the guidelines as contrary to the rehabilitative purposes of the Youth Corrections Act. United States v. Jackson, 550 F.2d 830, 833 (2d Cir. 1977); United States v. Cruz, 544 F.2d 1162, 1164-65 & n.6 (2d Cir. 1976); United States v. Torun, 537 F.2d 661, 664 (2d Cir. 1976).

\textsuperscript{76} As long as a sentence is within the statutory limits, it is lawful. \textit{See} Gore v. United States, 357 U.S. 386, 392-93 (1958); Townsend v. Burke, 334 U.S. 736, 741 (1948); Blockburger v. United States, 284 U.S. 299, 305 (1932).

must be serious doubt whether the average of such disparate treatment is fair. The same is true for geographical sentence disparities: Is the average term of imprisonment for bank robbers of 78.7 months imposed in the Southern District of New York fairer than the average of 181.2 months imposed in the Western District of Missouri? Or is this disparity justifiable because bank robbery is considered a more serious crime in Missouri than in New York?

An additional problem is apparent when sentencing decisions are analyzed to determine which factors contribute to disparate treatment. One careful analysis of sentencing statistics concludes that certain factors, which should have no place in the sentencing decision, do in fact have an impact on the type and length of sentence imposed. The most objectionable of these factors are the race and economic status of the defendant. First offenders who are black receive harsher sentences than do first offenders who are white. Defendants who are convicted at bench trials and who are represented by retained counsel receive more lenient sentences than similarly convicted defendants represented by appointed counsel. In addition, harsher sentences are imposed upon defendants convicted at jury trials than those convicted at bench trials.

True descriptive guidelines would not eliminate this problem, but would only perpetuate it. One answer is to eliminate undesirable factors, such as race and type of counsel, from the objective measures used in the guidelines. But this would result in guidelines which are no longer descriptive and, as in the creation of the parole guidelines, might result in new policies less fair than preguideline decisionmaking.  

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78. These statistics are based on prisoners discharged in fiscal years 1974 and 1975. See Senate Hearings, supra note 17, at 9201 n.8.
80. Id. at 387-88.
81. Id. at 386-87.
82. Id. at 379-80.
83. Descriptive guidelines "summarize expected ... decisions ... on the basis of recent practice, and indicate the relative weights given to what apparently are the most important factors considered, [but] they tell neither what the decisions nor the criteria ought to be." D. Gottfredson, C. Cosgrove, L. Wilkins, J. Wallerstein & C. Rauh, Classification for Parole Decison Policy 19 (July 1978) (paper prepared under grant from National Institute of Law Enforcement and Criminal Justice, LEAA, U.S. Dep't of Justice) (emphasis in original).
84. See D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, supra note 2, at 141.
85. See text accompanying notes 87 & 88 infra.
86. A second flaw in this approach is that reliance upon an impermissible fac-
UNINTENTIONAL CREATION OF NEW POLICY

Once existing policies have been analyzed, the next step in creating descriptive guidelines is to fashion objective means for measuring factors found to control decisionmaking.87 A second problem then arises: It is likely that the attempt to create a mathematical model for existing policies will be unsuccessful and, instead, new, unconsidered policies will be created.

The parole guidelines illustrate two ways in which descriptive guidelines can fail to accurately represent existing policies. The first is through failing to completely analyze decisionmaking; the second is because of methodological flaws in the creation of the objective measures needed for guidelines.

The Parole Board's attempt to apply its implicit Youth Corrections Act policies to cases involving adult prisoners88 demonstrates the Board's failure to completely analyze its preguideline decisionmaking. Length of sentence could not have been a factor in Youth Corrections Act release decisions because there is no sentence. Youth Corrections Act commitments are generally for an indeterminate period of up to six years,89 and a youth offender is eligible for release immediately upon imprisonment.90 Had the Parole Board studied its implicit policies in cases involving adult prisoners, however, it would have found the length of sentence to be a factor in deciding whether to grant or deny parole: Most prisoners are not eligible for parole until they have served one-third of their sentence.91 This was true before adoption of the guidelines and re-

87. “A disadvantage of subjective measures is that they may reflect rationalizations for decisions rather than determinants of them.” Paroling Policy Feedback, supra note 63, at 11.

88. The only difference between the guideline table created for adult prisoners and Federal Youth Corrections Act prisoners is the use of different customary lengths of imprisonment. The Parole Commission has explained this difference as reflecting “the goals” of the Federal Youth Corrections Act. See 41 Fed. Reg. 37,316-17 (1976).

89. See 18 U.S.C. § 5017(c) (1976). See also note 64 supra.


91. For example, of the 11,071 persons sentenced to imprisonment in 1970, 6,688, or 60%, received regular sentences, i.e., sentences where parole eligibility came at the one-third point of sentence under 18 U.S.C. § 4203 (1970). Administra-
The guidelines are directed solely to parole release, not to parole eligibility, which, for adults, is generally controlled by statute. The Parole Board apparently failed to appreciate the statutory release criteria when it based its adult guidelines on Youth Corrections Act policies. As a result, more than one-quarter of all prisoners receive sentences which are too short to allow them to serve the customary length of imprisonment dictated by the guidelines. Another twenty-five percent of prisoners receive sentences of such length that they are not eligible for parole until after they have served more time than their customary length of imprisonment. The guidelines “predict” release before these prisoners are eligible under the statute by which they were sentenced! These results are more than anomalous; that only “approximately 50 percent of the defendants sentenced to imprisonment. . . are eligible for parole at the time recommended in the guidelines” graphically illustrates that the guidelines do not accurately describe preguideline decisionmaking.

Even if the Youth Corrections Act policies had been the same as in adult cases, the manner in which the severity of a prospective parolee’s offense and the subjective judgment of his or her parole prognosis were transformed into the offense severity and salient factor scales resulted in policies unrelated to those found to have been controlling Youth Corrections Act release decisions. The judgment of offense severity in the Youth Corrections Act study

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94. See note 56 supra.
95. Only about one-half of all prisoners are eligible for parole at the time recommended in the guidelines. See note 96 infra and accompanying text. If approximately one-quarter of these prisoners fall outside the guidelines because their sentences are too short to allow them to serve their customary length of imprisonment, see note 56 supra, the remainder of these prisoners must be ineligible because their sentences are so long that the guidelines blindly indicate release before statutory eligibility is achieved.
96. Senate Hearings, supra note 17, at 8995, 9000 (statement of Ronald L. Gainer, Acting Deputy Assistant Attorney General for Improvements in the Administration of Criminal Justice, U.S. Dep’t of Justice).
97. This is consistent with an independent analysis of the Board’s decisionmaking practices prior to adoption of the guidelines. This study concluded that the two most important factors in decisionmaking were time served and length of sentence. See J. SCHMIDT, supra note 44, at 62.
was analogous to the decision of a judge in imposing sentence. Just as a judge has the discretion to impose any sentence within statutory limits,\textsuperscript{98} the Parole Board members in the Youth Corrections Act study were free to assign whatever severity rating they deemed appropriate, regardless of the type of offense involved.\textsuperscript{99} To make this subjective judgment, the Parole Board members had access to all the facts and circumstances of the prospective parolee's offense.\textsuperscript{100} In addition, the prisoner was afforded an opportunity to speak in mitigation.\textsuperscript{101}

The offense severity scale created for the parole guidelines bears no relation to this subjective judgment of the severity of an individual prisoner's offense. Possibly because of a desire to rationalize the parole decision,\textsuperscript{102} the offense severity ratings created for the parole guidelines are based on the name of the offense involved,\textsuperscript{103} rather than on the nature and circumstances of the offense.

As originally fashioned, the severity scale classified offenses into six levels of severity.\textsuperscript{104} These classifications were determined by distributing sets of index cards, each card containing the name of an offense,\textsuperscript{105} to members of the Parole Board, who were asked to sort the cards into six piles of varying severity levels.\textsuperscript{106} The resulting severity scale was constructed from the average severity ratings which had been assigned to the various offenses.\textsuperscript{107} It is obvious

\textsuperscript{98} See text accompanying note 76-78 supra.
\textsuperscript{99} Offense severity was rated at the conclusion of each Federal Youth Corrections Act hearing by circling one of six descriptions of offense severity. Paroling Policy Feedback, supra note 63, at 28 app. The only direction for affixing the severity rating was that it should correspond "to [the examiner's] evaluation of the severity of the offense behavior for which this subject was committed." \textit{Id.}

\textsuperscript{100} 28 C.F.R. § 2.14 (1973).
\textsuperscript{101} \textit{Id.} § 2.15.
\textsuperscript{102} \textit{See note 87 supra.}

\textsuperscript{104} The levels were labeled "low severity," "low/moderate severity," "moderate severity," "high severity," "very high severity," and "greatest severity." P. Hoffman \& J. Beck, \textit{supra} note 103, at 26-27. The "greatest severity" level was divided into "Greatest I" and "Greatest II" levels in 1977. 42 Fed. Reg. 52,399 (1977).

\textsuperscript{105} The cards contained "short statements explaining the offense behavior (e.g., armed robbery, embezzlement less than $20,000, possession of 'heavy narcotics' by addict less than $500)." \textit{Id.} at 3.

\textsuperscript{106} \textit{Id.} at 27.
\textsuperscript{107} \textit{Id.}
that this system ignores facts which could justify granting probation to one offender and imposing a twenty year sentence upon another, each of whom had been convicted of the same offense, or of involvement in the same conspiracy.108

This system of offense severity rating implements a “just deserts” policy: Persons who commit the same offense are treated in the same way, regardless of individual differences which would justify disparate treatment. While this policy has been advanced by some sentencing reformers,109 it was not deduced from the study of Youth Corrections Act decisionmaking, nor was it explicitly adopted by the Parole Board.110 Instead, this policy was the inevitable result of the decision by the Board’s researchers to replace a subjective rating of the severity of an individual’s offense with predetermined severity ratings which ignore the actual sentence imposed and any facts which could enhance or mitigate the severity of a given offense.111

The measure of parole prognosis created for the guidelines is also quite different from the estimation of parole prognosis which was used in the Youth Corrections Act study. There, the judgment of parole prognosis was an ad hoc decision based on the facts and circumstances of each case: What is the likelihood that this prisoner, released at this time, will be able to successfully complete a parole term?112 A decision to deny release because of a

108. See id. at 4.
109. See, e.g., TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, supra note 20; A. VON HIRSCH, supra note 20, at 98-106.
110. The Parole Board’s explanation for the “just desert” model is that it is the result of the need to correct sentence disparity. 40 Fed. Reg. 41,350 (1975). This, however, appears to be an after-the-fact rationalization because sentence disparity was not considered in the Youth Corrections Act study. See Paroling Policy Feedback, supra note 63, at 10.
111. This system of rating severity ignores the teachings of attribution theory that the perceived severity of crimes is influenced by “attribution judgments”: To what extent was this person responsible for this act, and to what extent does this act reflect a disposition to engage in crime? See, e.g., Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 AM. SOC. REV. 224 (1974). For example, a public official who accepts a bribe may be viewed as having committed a less serious offense if the bribe is an isolated incident, motivated by a need to pay costly medical bills for a sick child, than if the bribe is simply one of many, all of which were motivated solely by personal greed. Under the offense severity system created for the parole guidelines, however, the severity rating for each bribery offense would be identical.
112. The question asked in the Federal Youth Corrections Act study was: Rate on a scale ranging from zero to 100, in increments of 10, the estimate of likely parole outcome. Paroling Policy Feedback, supra note 63, at 29 app.
poor parole prognosis could have been based on the belief that additional incarceration was needed before the committed youth offender would be rehabilitated.\textsuperscript{113} If rehabilitation for a particular prisoner was considered impossible, denying release because of a poor parole prognosis would continue to incapacitate a person who, when released, would again violate the law.\textsuperscript{114}

In contrast with this subjective judgment of whether, after a given amount of imprisonment, a particular prisoner has been rehabilitated, the objective measure of parole prognosis created for the parole guidelines, the salient factor scale, is unrelated to the likelihood of rehabilitation.\textsuperscript{115} Its dictate is constant, regardless of whether a prisoner has been confined for one day or twenty years.

The salient factor scale was derived from an analysis of the impact of sixty-six factors on the postrelease behavior of federal prisoners who had been discharged from custody during the first six months of 1970.\textsuperscript{116} Omitted from these factors was the recommendation for or against parole made by the prisoner's case worker.\textsuperscript{117} Included was background data, virtually all of which was known at the time of sentencing, such as information about the present offense, prior criminal record, age, education, employment record, past and projected living arrangements,\textsuperscript{118} and prison conduct.\textsuperscript{119}

\textsuperscript{113}. This, of course, would have been consistent with the "treatment" rationale of the Federal Youth Corrections Act. See H.R. REP. NO. 2979, 81st Cong., 2d Sess. 2-3, \textit{reprinted in} [1950] U.S. CODE CONG. SERV. 3983, 3985.

\textsuperscript{114}. Denying release because rehabilitation was adjudged to be impossible would have been in accord with the early goal of parole to provide "an opportunity to relieve the prisoner whose reform has been effected and who gives promise of future good conduct." \textit{Parole of United States Prisoners, Hearings on S. 870 and H.R. 23016 Before Subcomm. of the House Comm. on the Judiciary, 61st Cong., 2d Sess., 27 (1910) (testimony of Judge W.H. DeLacy).


\textsuperscript{116}. D. \textsc{gottfredson}, L. \textsc{wilkins} & P. \textsc{hoffman}, \textit{supra} note 2, at 41.

\textsuperscript{117}. A study of parole decisionmaking in Illinois concludes that the recommendations of a correctional sociologist are a powerful predictor of the parole decision. Heinz, Heinz, Senderowitz & Vance, \textit{Sentencing by Parole Board: An Evaluation, 67 J. CRIM. L. & CRIMINOLOGY} 1, 13 (1976).

\textsuperscript{118}. Reliance upon projected living arrangements as a factor predictive of successful parole was abandoned in 1977. 42 Fed. Reg. 12,043, 12,043 (1977). As the acting chairman of the Parole Commission subsequently indicated, reliance upon this factor gave rise to a number of "meretricious relationships." Letter from Dorothy Parker to Sen. Edward M. Kennedy (June 20, 1977), \textit{reprinted in Senate Hearings, supra} note 17, at 9028, 9031.

\textsuperscript{119}. P. \textsc{hoffman} & J. \textsc{beck}, \textit{Parole Decision-Making: A Salient Factor Score}, at B-3 (U.S. Board of Parole Research Unit Rep. No. 2, 1974).
Nine of these items were selected to form the salient factor scale, which has a range of possible scores from zero to eleven, based on the presence or absence of the nine factors from the background of a particular prisoner. This scale was subsequently divided into four levels of salient factor scores, as in the present guidelines.

A "very good" salient factor score, any score between nine and eleven, corresponds to the minimum customary length of imprisonment for a given offense severity rating. Lower scores mandate a longer customary length of imprisonment. The result is to increase the customary length of imprisonment as the actuarial probability of recidivism increases. Making the length of imprisonment dependent upon the likelihood that the prisoner may commit crimes in the future is possibly unlawful, and probably unjust. This policy, like the policy of just deserts implemented in the offense severity scale, was not deduced from the study of Youth Corrections Act decisionmaking and was not explicitly adopted by the Parole Board. It was instead the inevitable result of the desire of the Board's researchers to replace a subjective estimation of parole prognosis with an actuarial calculation of postrelease behavior which was unrelated to the type of release or to the length of time spent in custody.

The power of the Parole Board to grant parole irrespective of the guidelines has not cured the potential unfairness of individual decisions. Decisions outside the guidelines are made infre-

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120. Id. In 1977 the Board reduced the number of salient factors from nine to seven. 42 Fed. Reg. 12045 (1977). See note 50 supra.

121. In the original salient factor scale, a maximum of one point was awarded for seven of the salient factors; two points could be earned for each of two factors, resulting in a maximum total score of eleven. See 40 Fed. Reg. 41,328, 41,337 (1975). In the present guidelines, one point is awarded for four factors, two points for two factors and three points for one factor. See 28 C.F.R. § 2.20 (1978).

122. See note 52 supra and accompanying text.

123. The table for determination of a prisoner's salient factor score is reproduced in Hoffman & Stover, supra note 47, at 107. For the guidelines, see id. at 104-06.

124. See note 51 supra; text accompanying notes 49-53 supra.

125. It has been suggested that because the salient factor scale is unrelated to the length of confinement, the guidelines are contrary to the "release [would] not jeopardize the public welfare" standard of 18 U.S.C. § 4206(a) (1976). F. O'Donnell, M. Churgin & D. Curtis, supra note 2, at 29 n.20.


127. 18 U.S.C. § 4206(c) allows the Parole Commission "to grant or deny release on parole notwithstanding the guidelines . . . if it determines that there is good cause for so doing." 18 U.S.C. § 4206(c) (1976).
The Parole Board's analysis of such decisions shows that they are made only in extreme situations. It would be difficult to convince those prisoners, twenty-six percent of the entire prison population, who are denied parole because their sentences are too short to allow them to serve the customary length of imprisonment, that the guidelines have brought greater rationality to parole release decisionmaking. It would be equally hard to explain to a prisoner with a salient factor score of five that he or she must serve more prison time before being paroled than a prisoner with a salient factor score of six because twenty-eight percent of all prisoners with a salient factor score of five will be unable to complete a parole term, compared with twenty-three percent of all prisoners with a salient factor score of six. All that can be said to these prisoners is that regardless of how arbitrary the denial of parole may be in their case, the guidelines have succeeded in bringing overall uniformity to parole decisionmaking. More must be required of guidelines: In addition to promoting uniformity in decisionmaking, guidelines must insure that individual decisions are made in a fair and rational manner.

CONCLUSION

Experience with the parole guidelines shows that descriptive guidelines can effectively insure that the overwhelming majority of sentencing decisions are made uniformly. However, increased uniformity may not increase the fairness of individual decisions.

Uniformity in decisionmaking can be easily achieved. For ex-

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128. See note 11 supra.

129. One analysis of decisions outside of the guidelines shows that in only 34 out of 1080 cases was a decision made above or below the guidelines because of institutional progress, and that factors relating to the offense committed by the prospective parolee resulted in a departure from the guidelines in only 9 of those 1080 cases. P. Hoffman & L. DeCostin, Parole Decision-Making: Structuring Discretion, at E-10 to 11 (U.S. Board of Parole Research Unit Rep. No. 5, 1974).

130. See note 56 supra.

131. Seventy-seven percent of prisoners with a salient factor score of six will successfully complete a two-year parole term. See note 51, supra. Seventy-two percent of persons with a salient factor score of five will successfully complete that same parole term. Id. This means that for prisoners with a salient factor score of six, 23 of every hundred will be unable to complete a parole term, while 28 of every hundred with a salient factor score of five will be unable to complete a parole term. Thus, because five more persons, of every hundred, will be unable to complete a parole term, all prisoners with a salient factor score of five are required to serve a longer customary length of imprisonment.
ample, it could be determined that parole will be granted to prisoners whose surnames begin with the letters A through K, and denied to all others. Such a guideline system would insure that all discretionary decisions are made in the same way, but would be plainly arbitrary—even if a decision to depart from the guidelines could be based on a finding of good cause.

The difference between the federal parole guidelines and this crude alphabetical guideline system is only one of degree. While not based on an obviously arbitrary division of prisoners, the parole guidelines are based on an equally arbitrary classification of offenses and offender characteristics, which effectively makes the parole decision dependent upon whether a lenient or harsh sentence has been imposed.

It is only recently that there has been serious judicial or scholarly analysis of the policies actually implemented in the parole guidelines. 132 Although it is difficult to understand how a prisoner with a two-year sentence could be expected to serve a “customary length of imprisonment” of twenty-six to thirty-six months, judges and commentators have apparently been reluctant to question the claim that complex statistical methods have produced true descriptive guidelines. This reluctance to question the policies actually implemented by guidelines underscores the need for caution in the creation of guidelines. Such caution, however, is lacking in the sentencing guideline system contemplated by the Senate bill, which, in addition to delegating to a Sentencing Commission the task of creating guidelines, would entrust that body with the duty of creating a nationwide sentencing policy. 133 Given the complexity of the guidelines required by the Senate bill, the temptation would be great for the Sentencing Commission to follow the lead of the Parole Board and create guidelines first, and rationalize policy later. 134 As the history of the parole guidelines indicates, the creation of descriptive guidelines runs a major risk that the social scientists developing the guidelines will make important policy decisions while ostensibly creating objective measures.

Experience with the federal parole guidelines indicates that the goal of individual justice may not be achievable by descriptive

132. See Geraghty v. United States Parole Comm’n, 579 F.2d 238 (3d Cir. 1978), cert. granted, 99 S. Ct. 1420 (1979) (No. 78-572); J. SCHMIDT, supra note 44.
133. SENATE REPORT, supra note 17, at 1159.
134. See note 110 supra.
guidelines. Certainly, before such guidelines are adopted, other approaches should be investigated for an answer to the "national scandal" of unwarranted sentence disparity. If, notwithstanding, descriptive guidelines are ultimately adopted, extraordinary care must be taken in their creation. Too much is at stake in sentencing to adopt a system which brings equality for all but justice for none.