Parole As Post-Conviction Relief
The Robert Lewis Decision

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THE CRIME

EARLY in the evening of February 2, 1963, a young man stopped by his girlfriend's house in Camden County, New Jersey to pick her up for their planned date together. He was

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All "Transcript" quotes based on the following:
State of New Jersey vs. Robert Lewis and Esaw Mitchell
Camden Courthouse Camden, New Jersey
June 8, 9, 10, 11, 12, & 15, 1964
Indictments:

No. 488-62—Rape
489-62—A.A.B.
490-61—A.A.B.
491-62—Kidnapping
492-62—Att. Robbery
495-62—C.C.W.

Certified by: James M. Ruane and John E. Engel
Notaries Public of the State of New Jersey
March 12, 1965
Certification at p. 361

twenty and she was seventeen; they were both white. They were driving down a deserted dirt road near the girl's house when they got into a minor accident with another car during which the two vehicles locked bumpers. Several[1] black males emerged from the other car, at least one of whom the young man knew from high school[2] and a fight broke out. The young man was repeatedly punched and kicked and the girl was dragged from his car and forced into the other car. While the young man escaped and ran off to seek help, the girl was taken away in the other car and driven to a desolate area where she was forcibly assaulted and raped.[3] The young man located a state trooper who cruised the area looking for the girl and her abductors; he came upon the occupants of the second car and arrested four defendants,[4] one in the actual act of rape.[5] A fifth defendant was captured later that evening while fleeing the scene of the crime.[6] Two of the defendants arrested were women,[7] and three were males;[8] all were black and all in their teens or early twenties.[9] All five defendants were indicted for rape, kidnapping, atrocious assault and battery, and carrying a concealed weapon,[10] (a pistol found in the defendants' car immediately upon their arrest).[11] All five defendants were found guilty,[12] and were sentenced to a variety of penal institutions.[13] The Grand Jury also indicted two other black males who were *not* apprehended at or near the scene of the crime, charging them with the same offenses as the convicted defendants.[14]

THE VICTIMS

Both the young woman, who was viciously beaten and raped, and the young man, who was also badly beaten, were obvious victims of this crime. On June 8, 1964, the man who was to become the third victim of the crime went on trial in the Criminal Division of the Superior Court of New Jersey for Camden County.[15]

Robert John Lewis, nineteen years old at the time of the crime, was charged with precisely the same offenses as were the previously-convicted defendants.[16] The arresting officer[17] testified that he had never seen Lewis prior to their meeting in the courtroom and that Lewis was not one of those arrested on the evening of February *2,* 1963.[18] The female victim testified that Lewis was not one of the men who had raped her,[19] but that he was present at the *initial* scene of the fight.[20] Her identification was certainly less than specific:

> Direct examination of Victim of Rape:[21]
> Q: Did you see the—is there any other man that you saw there that you see today?
> A: No.[22]
> *****
>
> Q. And how many other men [were in the car with you]?[23]
> [Note: Victim has already testified that Male Defendant #1[24] (from the previous trial), was involved.]
> A: Three men.
> Q. What were their names, that you are sure of now [since the previous trial]?
> A: Lewis—*James* Lewis[25] and [Male Defendant #3].[26]
> *****
> Q: Will you take a look at the defendant in the blue shirt?[27]

A: Yes, I remember him being there but I don't remember— I don't remember, you know, what incident I seen him.

Lewis never disputed that he was present at the scene of the *original* incident, i.e., the fight. But he steadfastly maintained that he left prior to the kidnapping and rape of the victim.[28] However, even the identification placing him at the original scene is somewhat tainted as can be seen from the victim's own testimony above. If anything, the identification of Robert Lewis by the male victim was even more ambiguous:

Direct Examination of Male Victim:[29]
Q: Now, why is it you recognize the defendant Robert Lewis?
A: I went to school with some Lewis' and he looks like some of them. He has the same features, I believe. I can remember, anyway, I can't forget their faces.

This testimony, like a great deal of similar testimony, was free from objection by Lewis' assigned counsel.[30] This in spite of the fact that Lewis' brother James [Male Defendant #2 in previous trial] had been apprehended near the scene of the crime but had already been found guilty at the time of this trial.[31]

The only person to place Robert Lewis at the scene of the kidnapping and rape was a young woman friend of the other defendants who was also convicted of the substantive crimes[32] and was serving a sentence for this at the time of Lewis' trial.[33] Although this young woman repeatedly contended that she had nothing to gain from her testimony against Robert Lewis,[34] both her behavior at the time of the crime (as reported by the female victim)[35] and her release subsequent to Lewis' conviction[36] would seem to stand in direct contrast to her self-portrait of a young woman sincerely repentant and anxious to atone for her sins.[37]

One of the convicted rapists, who was caught in the act of rape or attempted rape by the arresting officer,[38] who later was found guilty of all the offenses charged,[39] and who was serving a prison sentence at the time of Lewis' trial,[40] also testified. His testimony clearly established that Robert Lewis was present during the fight, *resisted* attempts of the others to involve him in the battle, and left because he was powerless to prevent the completion of the crimes.[41]

Direct Examination of Male Defendant #3:[42]
Q: Was Robert Lewis there with you all this time or not?
A: For a little while.
Q: How long?
A: After we got to fighting.
Q: What did he do?
A: He left.
Q: Did you see him leave?
A: Yeah.
Q: When you left Schoolhouse Lane [the scene of the original automobile accident and fight] was it in an automobile or were you walking?
A: In an automobile.
*****

Q: Besides yourself who was there [in the car which left the fight scene with the female victim inside]?
A: [Male Defendant #1, Male Defendant #2, Female Defendant #1, and Female Defendant #2].[43]
*****
Q: Was Robert Lewis there [in the car]?
A: No.
Q: When is the last time you saw Robert Lewis that evening?
A: When we was fighting.[44]
*****
Q: Did Robert Lewis get into a fight with this boy [the male victim who was assaulted prior to the kidnapping]?
A: No, he was trying to stop me from fighting.
Q: What did he say to you?
A: Told me to leave the boy alone. I said no. So then he said he was leaving.[45]

Despite a vigorous cross examination by the District Attorney,[46] in which statements *allegedly* made (and never signed) by the witness following his arrest were freely used in an attempt to impeach his credibility,[47] his testimony clearly exculpating Robert Lewis remained unshaken throughout.

Robert Lewis took the stand in his own defense,[48] and his account of the events agreed with all testimony except that of [Female Defendant #1's], the previously-convicted woman in prison at the time of the trial.[49] As was typical for this particular trial, the District Attorney seemed to be allowed an unusual latitude in his questioning. The relevance of the exchange set out below is certainly open to question:

Cross Examination of Robert Lewis:
Q: Where are—where have you been the past two days?
COURT: What do you mean, where has he been?
Q: Where have you been during the evening the past two days?
COURT: Up in jail [located directly above the courtroom, in the same building], where do you think he has been?
D.A.: I don't think the record shows it yet, Your Honor.
COURT: Well, I don't know that the record should show it. You have been in jail, haven't you, son?
A: Yes.[50]

Although it is not possible to accurately inquire into motives at this late date, it would seem that the District Attorney was seeking to *accentuate* in the jury's mind that which the Judge has previously sought to *minimize* with the following instructions delivered *prior* to Lewis' taking the stand for cross examination:

The Court addressing the Jury:

Now I have another announcement and instruction to give you at this time. This morning before I left my home to come into the court I heard an announcement on the radio where

> in it was stated that one of these defendants in the case was allegedly involved in some type of altercation upstairs here in the jail where he was being confined. It was not with any of the jail personnel; it allegedly was with someone else who likewise was incarcerated in the County Jail. I don't know what was in the paper because half the time I don't read the paper anyway, and, of course, as I have already heretofore suggested to you, that as far as you are concerned read the paper as much as you want, but don't read the paper with anything concerning this trial. Decide the case on the testimony in the courtroom and not on anything you may have read in the newspaper.
>
> ¶
>
> In fairness to this defendant, and I won't *bother* mentioning the name, I tell you that whatever he may have done or not have done upstairs in the County Jail has nothing whatever to do with this case. *Maybe whatever he did upstairs* was perfectly justifiable; I don't know and I don't care.[51]

It is important to note at this point that Robert Lewis was tried together with the final co-defendant, Esaw Mitchell. In spite of the fact that the evidence placing Mitchell at the scene was much stronger than that implicating Lewis,[52] in spite of the fact that the testimony against Mitchell was not limited to that of [Female Defendant #1] as was that against Lewis;[53] in spite of the physical evidence[54] linking Mitchell to the crime which did *not* similarly implicate Lewis;[55] and in spite of the fact that Mitchell was *not* going to take the stand in his own defense,[56] (and thereby obviously prejudice *both* cases, given the apparent freedom from restraint which permitted the Prosecutor to comment upon this failure, see below), the two cases were not severed for trial.[57]

From the State's Summation:[58]

> *And what about the failure of Esaw Mitchell to take the stand?* Well, its nice for his lawyer to come up and say "Well, this was my decision," but, remember this, he is as smart as I am, and I think the purpose of it was exactly what I outlined to you, and this is that you wouldn't judge Esaw Mitchell, you would be judging what you heard from Robert Johnson [Mitchell's privately retained counsel], and here is the mark of an excellent advocate, *but I don't think he has fooled you. I don't think he has fooled you.* You are entitled also under the law of this State to consider, if you so desire, that Esaw Mitchell's failure to take the stand was because he couldn't deny the incriminating evidence proved against him, and, if I understand it, there is no evidence in *Mitchell's* defense, because I get the distinct impression that [Male Defendant #3, *see* notes 42-45, *supra*.] is *Lewis' witness*, and this is the way he has been referred to.[59]

The Prosecutor's remarks quoted above seem to be clearly violative of the rule of *Steward v. U.S.*, [60] which emphatically states that such commentary by the State's Attorney is prejudicial error. The leading case on the subject. *Griffin v. California*[61] was not decided until a year after this trial, but its holding that such commentary is forbidden by the Fourteenth Amendment through its incorporation of the Fifth Amendment privilege against self-incrimination may be applied retroactively to cases on *direct* appeal. A later case, *Chapman v. California*,[62] established that the burden is on the *State* to show that the error was "harmless" if a reversal is to be avoided, and also that *federal* constitutional standards must be adhered to in this area.

Taken as a whole, the Prosecutor's comments seem to clearly *exculpate* Lewis. If the jury is to accept the (admittedly unfounded) syllogism that guilty defendants do *not* take the stand, it would seem only logical that the jury similarly assume that innocent defendants *do* take the stand. Ironically enough, this was not Robert Lewis' first experience with such legal pyrotechnics. At the trial of the first five defendants,[63] a defense raised by Male Defendant #1 was his alleged similarity of appearance to Robert Lewis. The Prosecutor's comments on summation again would seem to exculpate Lewis:

> We will take first the crime of rape by [Male Defendant #1]. Of all the witnesses who testified who was in the best position to know who raped [Female Victim]? And I think the answer to that is self-evident, the victim herself. She never saw these men before. How would you be able to recognize them? What would you—what point of reference would you have? Well, in your deliberations you are entitled to think as intelligent human beings, and I say to you that the face leering over you, grasping at you, and penetrating you is the face you are going to remember. And was it [Male Defendant #1] or Robert Lewis? There is [Male Defendant #1]. There is [Male Defendant #1] sitting there. You look at him. You look at his clean cut features and I say to you look at Robert Lewis [photograph; State's Exhibit 13], a broad, stupid face that you would remember if that was the man that was on top of you. And in addition, he [Robert Lewis] had orange hair [resulting from an ineffectual hair "processing"]. Now, did you notice nobody said anything about that? This is something she would have remembered if it was the orange hair man.[64]

Of course, this "defense" of Robert Lewis to the charge of rape was not strictly necessary since the female victim was quite clear in stating that he was *not* one of her attackers.[65] However, speculation at this point in time is useless, and too many cases have been upheld in spite of obviously ineffective defenses by defendant's counsel; the courts apparently preferring to see such ineptness as less than fatal to the defendant's case,[66] or as "tactics."[67]

SUMMARY

Two young people were the victims of a connected series of particularly vicious and senseless crimes. Indictments were returned against seven defendants, two females and five males. Both females, and two of the males were apprehended at the scene of the crime. Another male was arrested nearby, allegedly in act of escape. The remaining two defendants, Esaw Mitchell and Robert Lewis, were brought to trial seven months later. Their cases were not severed. The male victim of the crimes placed Lewis at the original scene based on some highly dubious observatory techniques. The female victim of the crimes placed Lewis at the original scene, but *not* at the scene of the kidnapping and the rape which followed. One of the previously-convicted rapists placed Lewis at the original scene and also testified that Lewis left *prior* to the kidnapping and rape. One of the female defendants did place Lewis at the scene of the kidnapping and rape, (although it is surely doubtful that her observations were more accurate than those of the actual victims, *see* note 64, *supra*).

The State did not even contend that Lewis raped the victim, but charged that he could be convicted as an "aider and abettor" of the crimes.

Robert Lewis was convicted of atrocious assault on the male victim, of the kidnapping and rape of the female victim, and carrying a concealed weapon (found in the car of the other defendants when Lewis was *not* present).[68]

Robert Lewis did not plead guilty. He was sentenced to a maximum of fifty-seven years in the State Prison after the jury found him guilty of all the offenses charged.[69]

Robert Lewis, the third victim of the crimes, was formally sentenced on July 9, 1964, and entered Trenton State Prison the next day. His case was continually appealed to no avail.[70] Robert Lewis was released from Trenton State Prison on September 18, 1973.[71] He was released on parole after repeated denials.[72] How this happened, and why it took so long, is set out below.

LIFE IN PRISON AS PREPARATION FOR PAROLE

Robert Lewis entered Trenton State Prison bitter at his treatment and conviction, but totally resigned to adopting a standard of behavior that would insure his freedom as soon as possible.[73] The State of New Jersey prescribes a sentencing method which mandates a minimum and a maximum sentence to be imposed for each conviction;[74] the result is that the Parole Board eventually emerges as the final arbiter of length of sentence.[75] This is clearly what the legislature intended,[76] and the constitutionality of such statutes has been routinely upheld by the highest courts.[77]

The above information was readily available to Robert Lewis;[78] what was *not* available was instruction as to how to obtain a parole.[79] At no time after entering a New Jersey State Prison is an inmate put on notice as to what kind of behavior is specifically required to achieve release on parole.[80] Without this kind of specific notice, the prisoner knows only that he is expected to conform to some vague standard of "good behavior,"[81] and that punishment will be swift for the slightest infraction.[82] However, the prisoner is not given the least indication as to how the maintenance of this "good behavior" will produce an eventual parole.[83]

Upon entering Trenton State Prison, Robert Lewis was issued a copy of the *New Jersey State Prison Inmates Rule Book.*[84] This mimeographed manual makes even the vagueness of some statutes, (*see* comments on the *Model Penal Code,* note 247, *infra*), look highly specific when it comes to such subjects as parole

> The State Parole Board is the paroling authority for the prison complex. Eligibility for parole consideration is established by law. You will be scheduled for hearing before the board without application by you, or any person in your behalf. You should understand that an appearance before the parole board doesn't necessarily mean that you are to be paroled. The decision of the board will be forwarded to you in writing shortly after the hearing.[85]

This vagueness is particularly inexcusable in an environment such as a maximum security prison[86] where virtually everything is specified to the most extreme degree. Contrast, for example, the *Inmate Rule Book's* treatment of "Work Time":

> The law provides that inmates assigned to work receive time from their sentence. In accordance with legislation (N.J.S. 30:4-92 effective 7/1/59, not retroactive), inmates are granted one day from their sentence for each five days worked. If you are placed in Minimum Security status, you earn 3 extra days a month the first year and 5 extra days the second and subsequent years.[87]

In fact, in the New Jersey Prison System, it appears that the more trivial the topic, the more specific are the instructions regarding it. For example:

> Effective immediately, the following standards for inmate hair styles are approved:
> 1. Hair on the top of the head may not be worn longer than four (4) inches, if combed back. Hair worn in a natural style will not extend more than three (3) inches from the scalp. Hair will not extend below the top of the shirt collar in any instance. Hair will be neatly trimmed on the back and on the sides.
> 2. Sideburns shall be neatly trimmed and shall not extend below the bottom of the ear.
> 3. A mustache may be worn provided it is neatly trimmed and shall not extend beyond the corners of the mouth.
> 4. The tuft of hair beneath the lower lip may be worn provided it is neatly trimmed and does not extend down to the chin.
> 5. All other areas of the face are to be clean shaven. Inmates wearing long hair styles and mustaches will keep them neatly groomed and clean at all times.[88]

This lack of notice as to what constitutes proper behavior in preparation for parole approval is borne out in the interviews I conducted with prisoners in New Jersey's maximum,[89] medium,[90] and minimum security institutions.[91] In fact, virtually every prisoner I interviewed agreed in sum with the position that failure to provide prisoners with notice as to what constitutes acceptable progress for release on parole is perhaps the major cause of prison unrest.[92]

> When I came in here I couldn't hardly read. I got a G.E.D.[93] and almost a year of college in the Mercer Program.[94] I haven't had a charge[95] in almost two years; haven't been locked up[96] in almost four. I got a job and a home waiting for me . . . I see guys going out of here [on parole] that stabbed other guys; guys who did nothing but make trouble for everyone, did nothing to help themselves . . . and I see *me* still here. What in hell do I have to do to get a parole?[97]

> I've seen a lot of riots in prisons;[98] its mostly the guys with a lot of time[99] who get involved. There's always two kinds: those men who want more weights for the gym,[100] or the right to wear their hair long,[101] or to give interviews,[102] and those men who want the Parole Board to tell us what we have to do to get out of these hellholes. You can just forget about the men in the first group; they forgot about themselves already; they're just doing time. Give them a few little things and they're quiet. But the men in the second group are the dangerous ones because they *know* something stinks out there.[103]

> I've done everything a man can do in this prison [to help himself]; I went to Group;[104] I went to all the programs;[105] I went to school[106] I got no charges against me *ever;* I got people pulling for me on the outside;[107] all I'm doing now is *time* ... and they [the parole board] still won't give me a play.[108]

> I don't see any connection between how you behave and getting parole. They paroled [inmate X] and he spent most of his time in the hole[109] for playing on people with a shank;[110] and they *keep* [inmate Y] who shouldn't have been in here in the first place.[111] I'm so tired of trying. Its all a matter of luck the way I see it. The bastards [on the parole board] must flip coins to see who gets to walk.[112] I thing I'll be here forever.[113]

Besides the first-hand information gleaned from interviews, I have also received numerous affidavits from New Jersey prisoners which substantiate the above statements. A brief sampling is set out below:

> I have tried very hard and I am told [by the parole board in written denials] to keep trying. I wonder if it does any good to work hard. It appears as though I am going to do my maximum sentence no matter what I do. I think this type of situation is greatly responsible for many of the prison disturbances, and the frustration and bitterness that nearly everyone in prison experiences at one time or another.[114]

> I have been before the Parole Board three different times. Even when I do what they suggest to improve my chances for parole, their parole denials read the same as above, [referring to the standard parole denial, the same denial, word-for-word, as received by Robert Lewis, *see* APPENDIX 6]. Since there is really no parole criteria, tension is high. Inmates have nothing to look forward to. Fights and prison unrest is [sic] frequent due to this fact.[115]

> After being down a while[116] and seeing all the contradiction [sic] one begin [sic] to build up in there [sic] mind that they aren't going to make parole so they have that "don't care" attitude because there isn't nothing they can reach for. I believe that by a man not knowing what to do in order to return back to society have [sic] a lot to do with the unrest that is within the prison.[117]

Prisoners in other jurisdictions have written their agreement with this concept.[118]

> If the public fights against a liberal parole policy, the prisons will turn out dehumanized men who most certainly will return to crime in large percentages. They will also be extremely hard to manage while inside our prisons. What have they got to lose?[119]

It would seem that an agency created by specific legislation[120] could not possibly function in such an environment of vagueness as the above-quoted prisoners seem to be indicating. However, a review of the enabling legislation involved would seem to argue for the accuracy of the prisoner quoted at note 113, *supra*. The creation of the New Jersey State Parole Board was pursuant to statute:

> There is hereby created and established within the Department of Institutions and Agencies a State Parole Board which shall consist of three members: a chairman and two associate members.
>
> ¶
>
> The... [members] shall be appointed by the Governor with the advise and consent of the Senate, from persons of recognized ability in the field of penology, with special training or experience in law, sociology, psychology, or related branches of social sciences, for terms of six years.[121]

The Governor and the Senate have apparently considered that the "related branches of social sciences" provision applies to expertise in the field of organized religion. The Chairman who held office just prior to the current Chairman was a minister whose "special training or experience" appeared to be confined to his particular profession. In short, these are political appointees, pure and simple.[122] However, not all legislation regarding the New Jersey State Parole Board is disregarded in practice. The provision approving salaries of $27,000 annually for the Chairman and $25,000 annually for the Associate Members was highly specific.[123]

Also highly specific are *some* of the provisions detailing the parole-release procedure. "The release of a prisoner on parole shall be *solely* upon the initiative of the board."[124] "The Board shall reach its *own* conclusions as to the desirability of releasing the prisoner on parole and no release on parole shall be effected except by unanimous vote of the entire board."[125] However, any slight specificity the prisoner is able to extract from such statements is immediately blunted by such vague provisions as the following:

> No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned while under sentence, but only if the board is of the opinion that there is reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society."[126]

It cannot be doubted that parole considerations, (such as eligibility for initial hearing, criteria for release, etc.) have been and still are on virtually *every* prisoner's list of priorities.

> One area of complaint that recurs again and again in prisoners' lists of grievances, whether coming out of a riot, or in a petition, or in litigation, is that of parole.[127]

> Suitability [for parole] is the tricky problem, the horn of the dilemma for both offender and parole board. How do you judge suitability? What factors should be considered and how much weight should be given to the different factors considered? This is, without any doubt, the hottest issue debated in every yard and cellhouse of every prison in the country.[128]

The New Jersey Prison System is certainly not exempt from this prevailing attitude:

> In a recent news article, prisoners in Attica asserted that one of their major demands at this time is "to get reasons for parole denial." It is a point that has been raised frequently by inmate groups.
>
> ***
>
> We would like to point out that the struggle for prisoners' rights is filled with hollow victories and, if won, the parole triumph would be such an empty victory. New Jersey prisoners fought that battle [referring here to *Monks v. New Jersey State Parole Board,* note 176 *infra*] and having won, they have empty air in their clenched fists.[129]

Caged human beings with no perceived recourse to standard channels for the redress of grievances either submit or rebel. John Martin, in *Break Down The Walls*[130] attributes a number of major prison riots in the past to unrest generated by parole board practices,[131] and specifically blames this unrest for the infamous prison riots at Trenton State Prison in 1952.[132] In 1953, the American Prison Association appointed a special blue-ribbon committee to study and report on prison rioting in the United States. The committee included Richard A. McGee, Director, California Department of Corrections; Sanford Bates, Commissioner of the New Jersey Bureau of Institutions and Agencies; James V. Bennett, Director of the Federal Prison Bureau; Austin MacCormack, Director of the Osborne Association; Joseph Ragen, Warden of Illinois' Stateville Penitentiary; and Will C. Turnbladh, Director of the National Probation and Parole Association. Martin[133] described this group as "virtually a Who's Who of penology today."[134] The committee isolated seven major reasons for the recent wave of riots; among them was "unwise sentencing and parole practices."[135]

In New Jersey, the problem has been even more recent, and even more specific. The major demand to emerge from the riots at Rahway State Prison in November of 1971 was reform of the parole board. The Governor's response was swift:[136]

> Governor William T, Cahill, disappointed by the lack of progress in negotiations with prisoners following the Rahway disturbances on Thanksgiving Day, today announced recommendations for a series of sweeping reforms for parole....
>
> 1. Recommendations for legislation which will restructure the Parole Board to include three full-time members with sufficient staff. Presently, only the chairman is a full-time member with the other two members serving part time;[137]
> 2. Development of more equitable and rational parole criteria;
> 3. More frequent rehearings and review of decisions;
> 4. Individualized consideration for eligible inmates;
> 5. Assignment of "parole counselors" to each of the three prisons on a full-time basis to help prisoners prepare for parole hearings, make recommendations to the parole board and assist prisoners in their appearances before the board.[138]

The Inmate Committee proposed a variety of improvements in the parole situation in a memorandum to the Governor.[139] The Governor's response[140] specifically spoke to many of the prisoners' requests [*see* APPENDIX 9]. However, the major substantive changes requested by the inmate population were *not* enacted and have not been so to date.[141]

Tension arising from the lack of knowledge concerning which factors are *actually* considered by the parole board[142] in decision-making is a major problem for prison officials as

well as inmates. Dr. Syke's definitive work on Trenton State Prison[143] speaks directly to this point as follows:

> Unable to depend on that inner moral compulsion or sense of duty which eases the problem of control in most social organizations, acutely aware that brute force is inadequate, and *lacking an effective system of legitimate rewards and punishments which might induce prisoners to conform to institutional regulations on the grounds of self interest,* the custodians of the New Jersey State Prison are considerably weakened in their attempts to impose their regime on their captive population. The result, in fact, is ... a good deal of deviant behavior or noncompliance in a social system where the rules at first glance seem to possess almost infinite power.[144] (emphasis supplied)

The implications of the above statement are obvious; if the prisoner population cannot see a correlation between socially acceptable behavior within the institution and an eventual parole, their motivation to "conform" (which is slight at best, given the day-to-day bleakness of the environment), is so decreased as to appear almost non-existent.

Robert Lewis was not unaware of this attitude; yet he spent the first seven years in Trenton State Prison working towards what he naively thought would be a parole. Although he entered prison with a 6th grade reading level, Lewis had managed to obtain a General Equivalency Diploma,[145] to work diligently at his prison-assigned job,[146] to learn a variety of vocational skills,[147] and to even occasionally win the overt approval of the Administration.[148] Lewis' own perception of his relationship with the prison administration is set out in a personal letter he wrote in September of 1971 while awaiting word from the Parole Board following his first hearing:[149]

> [I]n eight years[150] the most serious incident that I have been in is two fights. Being confined within an area the size of a city block with 1500 men, this is exceptional ... Over the years I have been caught by circumstances in three riots, being in the right place at the wrong time. If these incidents were ever held against me, I am not aware of them for the administration has never confronted me about them. Something they [usually] don't hesitate to inform you of.[151]

In spite of several obviously good reasons to be considered for release on parole as enumerated above, (and also because of Lewis' age at the time of the crime,[152] the fact that this was his first conviction for any crime,[153] and the extremely dubious circumstances surrounding his conviction),[154] Lewis was emphatically *not* optimistic about his chances. The same letter quoted above continues:

> Considering the action of the parole board at this time would be mere speculation. But it is as you [the author] have said, they are required by law to furnish us with a *reasonable* and *valid* reason as to their denial, if [it be] so. For the last three months I have been riding shotgun on [observing first-hand] the parole return slips [notice of decisions of the Parole Board]. It is a nefarious joke. There are three categories by which inmates are classified and denied: (1) Not rehabilitated ... (2) Recalcitrant towards administration ... (3) Not suitable for society ... As you might guess, the courts are being bombarded with

> petitions to no avail. Among the inmates the futility of a situation like this seems to invoke the need for extreme measures[155] (emphasis in original)

A later letter[156] is even more pessimistic. This one describes the actual "hearing" in detail:

> Parole meeting: parole meeting lasted approximately sixteen seconds! The only exception being that I took the personal liberty of extending it to three minutes or more. It is common knowledge that parole decisions are made prior to interview. [M]y attempt to communicate was based on this knowledge, pointing out what I consider to have been substantial progress in terms of advancing educationally, (for education in here *is* rehabilitation), my demeanor in terms of relating to a hostile environment, the need for advanced education in an environment that would be conducive to learning [referring to the writer's desire to continue his college education if released on parole], and stressed the point that continual confinement would only serve the purpose of punishment, even though I didn't commit the crime.
> As of yet, I have not received any decision from the parole board but I am not optimistic ... I have been informed, via system [through the prison grapevine] that indeed it was a two year re-hearing.[157]

As he anticipated, Robert Lewis was denied parole at his first hearing, and he was given a rehearing date two years in the future.[158] As further anticipated, he was denied parole on the vague grounds outlined in his letter *(see above)*.[159] Lewis was only slightly comforted by the prevalent inmate perception that denial of *first* application for parole is routine and automatic and in no way speaks to the merits of the petitioner's claim. As one inmate interviewed said:

> You always get hit [parole denied with a new date set for a re-hearing] the first time up. Its just their [the Board's] way of showing you who's boss. Its not just you they're showing either; its also the administration here [in prison].[160]

Lewis' anticipation did not blunt the force of his feeling of outrage. Convinced that he *deserved* a parole, Lewis took the route taken by thousands of prisoners before him, and sought relief in the courts.

PAROLE AS POST-CONVICTION RELIEF

Assisted by two law students who had developed an interest in his case,[161] Lewis began to research the law as it applied to his particular situation. Certain cases were quite specific; *Ex parte Mahoney*[162] provided that appellate or review jurisdiction over the final decision or action of an administrative agency of the State (such as the Parole Board), exists in the New Jersey Superior Court, Appellate Division. This showed Lewis the road to travel, but it was far from smooth. The statutes left little doubt as to the absolute authority of the Board to make all final decisions[163] and the cases in point seemed clearly to prohibit court intervention in the absence of

gross abuse of discretion; *State v. Lavelle*[164] being specifically on point. The cases seemed unanimous in asserting that there was no *right* to parole regardless of the circumstances involved in the decision; parole was routinely characterized as a privilege in such recent cases as *Rose v. Haskins*[165] in other jurisdictions, and New Jersey's cases were even more disheartening, *see: Mastriana v. New Jersey Parole Board,*[166] *In re Adinolfi,*[167] *Ex parte Damato,*[168] *White v. Parole Board,*[169] *Fass v. Zink,*[170] *Ex parte Domako,*[171] and *Ex parte Fitzpatrick.*[172] The legal encyclopedias did not treat the subject with any more liberal interpretation:

> A parole is a mere matter of grace, favor or privilege, and a prisoner is not entitled thereto as a matter of right. Subject to the limitations imposed by statute, the question of whether a prisoner shall be paroled is a matter for the discretion of the paroling authority ... Under the statutes and decisions, the discretion of a parole board ... as to releasing or refusing to release a prisoner on parole is absolute and not subject to review by a court where the board ... acts according to law and without violation of, or departure from, positive statutory requirements.[173]

Even the strictness of judicial construction of the relevant statutes[174] did not grant the Parole Board completely unfettered discretion. In a line of cases generally beginning with *Puchalski v. New Jersey State Parole Board,*[175] the courts gradually began to insist on *some* standards in parole decision-making, if not for a decision to release, at least for a decision to *deny*. The culmination of this line came with *Monks v. New Jersey State Parole Board,*[176] in which the court clearly instructed the Board to provide prisoners with specific reasons for denial of parole, in direct contrast to previous "hands-off" rulings.[177] Lewis and his law student associates thought they saw a potential ray of hope in the *Monks* decision. If the Board could be made to give reasons for denial couldn't a prisoner, by addressing himself specifically *to* that denial eventually hope to win the support of the courts in his bid for freedom? Filing *pro se,* Lewis petitioned the Appellate Division of the Superior Court for an order to the Parole Board directing a rehearing.[178] But Lewis was not to get a court's decision on the merits on his individual claim. Prior to his appeal, a group of New Jersey prisoners had collectively attacked their parole denials in the same court, *Beckworth v. New Jersey State Parole Board*.[179] Deputy Attorney General Virginia Long Annich, as counsel for the respondent State, moved the Supreme Court of New Jersey for a:

> ... remand to the Parole Board of all cases presently pending before the Appellate Division, both *sub. nom. Beckworth et al. v. New Jersey State Parole Board*, Docket No. A-20l2-70 and such other cases as were stayed pending the outcome of that case.[180]

The Deputy Attorney General obligated the Parole Board to hear all cases so remanded within thirty days; Robert Lewis' case was one of the "pending" cases referred to in respondents brief.[181]

The resulting rehearing of June 1, 1972 resulted only in *another* denial, together with a decision to *again* rehear the case in July, 1973.[182] *This* time the Board, in compliance with court order, furnished "specific" reasons for denial. They are set out in full below:

PAROLE BOARD
STATE OF NEW JERSEY
NOTICE OF DECISION

The State Parole Board at its meeting on June 1, 1972 rendered the following decision in your case:

Parole has been denied regardless of the availability of a suitable parole plan. Your case has been scheduled for rehearing in July 1973. After consideration of the circumstances of your present offense, and in the absence of any statement by the sentencing court tending to indicate the contrary, the Board has concluded that there are certain punitive and deterrent aspects to your sentence. In the absence of any special or equitable circumstances or any affirmative evidence that you can avoid criminal behavior, and since your minimum sentence has not yet expired,[183] the Board feels that the punitive and deterrent aspects of your sentence have not been fulfilled and that, therefore, your release would not be compatible with the community welfare.

After consideration of all records relevant to your confinement, treatment, and efforts towards self-improvement while in the N.J. State Prison system, the Board is unable to conclude that there is reasonable probability that you will return to society without violation of law.

The Board notes that you have been incarcerated for kidnapping, Rape, and Atrocious Assault and Battery for over 8 years.

Although you were 19 years old at the time of the offense and had no prior criminal history, it does not appear that time has had much impact on the values and personality characteristics which first brought you to prison.

Although you obtained a GED certificate and were enrolled in group counseling, professional reports[184] describe you as still lacking insight and judgment. Your institutional conduct record supports those conclusions and indicates an assaultive and impulsive potential. This conduct record includes charges for attacking another inmate, disorderly conduct, and insolence as well as other charges stemming from homosexual involvements.[185]

Your insight as to why the present offense occurred apparently [is] limited to a belief that "fate" caused it to happen or that it was due to drinking and associating with the wrong crowd and that you were led into this situation.

You apparently have accepted little personal responsibility for planning your future in the community and represent that your plans are to get a job or do social work. There is no evidence that you are qualified to do any form of social work or that you have the skill necessary to maintain adequate employment.

The Board is encouraged, however, that you have recently been transferred to Leesburg and would suggest that you continue to improve in your work attitudes and educational skills.[186]

With psychiatric report[187]

It is blatantly obvious that the stilted language of the Board's denial was specifically drafted to comport with New Jersey statutes which underscored the Board's capacity to deny without a specific statement of valid reasons. For example, the statement that "your release would not be compatible with community welfare" (above) is almost a verbatim replay of N.J.S.A. 30:4-123.14; "after consideration of all records relevant to your confinement" is a similar rehash of N.J.S.A. 30:4-123.18; the "skill necessary to maintain adequate employment" is drafted directly from N.J.S.A. 30:4-123.19; the statements about consideration of the merits of

parole were a recapitulation of N.J.S.A. 30:4-123.9, etc. Although Lewis was in no way enlightened as to how he could behave to receive a parole in the future or why he had been denied once again, the Board's "reasons" for denial were apparently sufficient to satisfy the highly unspecific requirements set down in the *Monks* decision and apparently[188] upheld in *Beckworth*. The Board may have been "encouraged;" Lewis certainly was not.

Undaunted, Lewis decided to file again for relief. This time, however, he did not want to be put off by another vague decision based on standards even *more* vague. He asked me to prepare a factual affidavit in which I would assess his suitability for parole based on my own experience.[189] The affidavit was duly prepared and filed with the Parole Board[190] but no response was forthcoming in spite of what was apparently sufficient as a point-by-point rebuttal of the Board's position[191] to at least merit a written response.

Lewis once more seemed at a dead end. In discussions with Lewis and dozens of other inmates which followed, I confirmed that the lack of parole criteria (to grant and/or deny) was perhaps the *major* source of unrest in New Jersey's prisons. Goaded by the apparent absurdity of this situation, I began to investigate what the New Jersey Parole Board used to determine an individual prisoner's suitability for parole; what other jurisdictions used; and what *could* be used.

PAROLE CRITERIA; HOW AND WHY

The President's Commission on Law Enforcement and Administration of Justice[192] describes the proper role of the parole process as follows:

> Ideally, the parole process should begin when an offender is *first* received in an institution. Information should be gathered on his *entire* background, and skilled staff should plan an institutional program of training and treatment. A *continuous evaluation* should be made of the offender's progress in the program. At the same time, *trained staff* should be working in the community with the offender's family and [potential] employer to develop a release plan.
>
> ¶
>
> After *thoughtful* review, including a hearing with the offender present, the releasing authority would decide when and where to release [the offender].[193] (emphasis supplied)

But the President's Commission only stated the *ideal;* the *reality* is best stated as follows:

> In this continuum of post-conviction due process ... which begins with sentencing, extends to discipline in prison, and continues through the revocation of parole—there is one conspicuous void: the parole-granting decision itself. Release on parole remains a subject of *final, absolute, and thoroughly arbitrary administrative discretion*.[194] (emphasis supplied)

The "privilege doctrine[195] seems inexorably intertwined with the popular notion that court-ordered standards are not required in any matters regarding parole because the Board and the prisoner appearing before it are *not* adversaries. The United States Court of Appeals, in a 5-4 decision *against* permitting a parolee the right to confrontation and examination of witnesses appearing against him in a parole revocation "hearing," adopted this rationalization wholesale:[196]

> The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. *This is clearly what Congress intends.* Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is *not* the attitude of adverse, conflicting objectives as between the [potential] parolee and the Board inherent between prosecution and defense in a criminal case.[197] (emphasis supplied)

This pious ostrich-like attitude is sharply punctured by no less an authority than Professor Kenneth Culp Davis,[198] the author of the Administrative Procedure Act[199] which governs the actions of the United States Parole Board.[200]

> The court's assertation that the prisoner and the Board have a "genuine identity of interest" may have some plausibility concerning the Board's exercise of discretion *after* the Board has found the facts, but it has no reality at the point where the Board is finding facts that the prisoner is specifically denying [query: is the rehabilitation of a prisoner a "fact" which can be "proven" or "denied" by any evidentiary criteria *other* than a lack of recidivism *after* release?]; at that crucial point the interests are obviously *opposed.* ******* If the Board does not "adjudicate" when it finds facts from conflicting evidence, then the term "adjudicate" has lost its usual meaning.[201] (emphasis supplied)

Professor Davis goes on to state:[202]

> The essence of justice is largely procedural. ******* The law governing the extent of the requirement of opportunity for full hearing is *mostly judge-made law,* and the standards are essentially the same whether the judges are giving content to due process, where they are *giving meaning to inexplicit statutory provisions,* or whether they are developing a kind of common law.[203] (emphasis supplied)

Professor Davis is even more explicit when he speaks in terms of the relief that ought to be granted petitioners under circumstances such as those of Robert Lewis:[204]

> [W]hen the subject matter is within the competence of the courts and not *altogether* committed to another department, and when the concept of privilege is the only reason against judicial intervention, *the privilege doctrine becomes pernicious if it is used to prevent relief from palpable injustice.*[205] (emphasis supplied).

Even court decisions which have *refused* to review certain parole denials are in apparent agreement with Professor Davis' position. In *Beckworth,*[206] the court stated:

> Of course, if the Parole Board decision on the merits is palpably arbitrary or clearly erroneous, it would not be immune from judicial correction.[207]

The authorities are in consistent agreement that while an administrative construction of the statute under which the agency is operating is entitled to great weight, the agency itself may not finally decide the limits of its own power.[208] Although strict procedural due process and/or right to counsel has been routinely denied enforcement by the courts in the parole-release hearing,[209] the courts have also been quite clear in stating that standards of fundamental fairness are vital to the successful operation of *any* parole board.

> The need for fairness is as urgent in the parole process as elsewhere in the law and it is evident to us that ... the furnishing of reasons for denial would be the fairer course; not only much fairer but much better designed towards the goal of rehabilitation.[210]

It is equally well established that this "fairness" requirement is indicated from a therapeutic as well as from a procedural point of view. Ben S. Meeker, Chief United States Probation Officer[211] for the Northern District of Illinois, emphasized this point in his submitted statement to the House of Representatives Subcommittee Number 3 of the Committee on the Judiciary, Ninety-Second Congress:[212]

> I believe it is very important to the morale of an offender to have some idea when he is denied parole what he must do to receive favorable action at a later date. The prisoner who believes he has taken advantage of everything the prison offers to equip him for parole is entitled to some explanation when parole is denied.[213]

Morris H. Sigler, Chairman of the United States Parole Board, told the same House Subcommittee:[214]

> [S]upplying inmates with reasons for their parole denial makes it easier for them to understand what they must do to improve their chances and also removes the cloak of secrecy from the decision making process.[215]

The clear fact that the Parole Board's decisions have judicial *effect*, if not judicial authority, is underscored by the theme of "Due Process in Parole-Release Decisions:"[216]

> There are two fundamental flaws in the rationale which asserts that the parole board's task is merely administrative. First, the underlying factual assumption about the parole board's duties and methods of operation is false: *the board performs the same tasks, with the same discretion and power, in the same manner, and with the same effect on the offender as the sentencing judge*. Second, even if the factual premise were correct, it would not follow that the parole-release decision should be free from the rudimentary elements of due process, for due process attaches to "administrative" as well as "judicial" proceedings that vitally affect significant individual interests.[217] (emphasis supplied).

The President's Commission on Law Enforcement and Administration of Justice is even more explicit: "Parole legislation involves essentially a *delegation of sentencing power* to the parole board."[218] Disparity of sentencing has often been blamed for the negative attitude of incarcerated

prisoners towards the criminal justice system.[219] Recommendations have been made for utilization of specific criteria in sentencing,[220] for use of a professional "sentencing council" to aid judges,[221] and for a standardization of the sentencing process which still retains the benefits of individualization.[222] It has been strongly suggested that some courts have reviewed convictions only because of the grotesque sentences imposed by trial judges,[223] and the language of the Appellate Court in reviewing Lewis' conviction would seem to bear this out.[224] Finally, it has been suggested that because the sentencing area is largely discretionary, legal scholars have been deprived of both knowledge and precedent since judges do not normally give reasons for fixing a particular offender's sentence.[225] As parole boards gradually erode the sentencing power of the judges, logic and fairness would seem to strongly dictate the application of specific standards for parole-release decisions in line with the authorities quoted above.

Leaving the aforementioned analogy temporarily aside, there would be little disagreement, as a matter of judicial philosophy, that the use of *standards* in any form of decision-making is clearly mandated. Justice Black's famous dissent in *Shaughnessy v. Mezei*[226] speaks directly to this requirement: "No society is free where government makes one person's liberty depend upon the arbitrary will of another."[227] Contentions that the various "civil death" statutes take prisoners out of the realm of this most basic protection are easily invalidated by reference to the numerous decisions protecting the civil rights of prisoners in state[228] and federal[229] prisons. There is also a great deal of strong evidence to the effect that the use of such standards is promotive of the *intent* of legislatures in attempting to utilize penal institutions for the purpose of *rehabilitation*.[230] The United States Supreme Court's position provides an excellent overview of this philosophy:[231]

> Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[232]

Even outside the requirements of specific statutes, or their eventual interpretation by the courts, the authorities have consistently agreed on the goals of a viable parole system as it relates to the overall goal of rehabilitation. A survey of American parole practice[233] concluded:

> The problem of parole selection becomes one of retaining the inmate until he has reached his [rehabilitative] peak and then releasing him; incarceration after this point is regarded as *detrimental* to adjustment on parole.[234] (emphasis supplied)

There appears to be little dispute that parole is to be viewed as a specific tool, to be employed at the appropriate point along the rehabilitative continuum. Thus, the decision as to whether or not *to* parole is crucial and entitled to as much assistance towards reaching a proper determination as possible. Criteria for release or denial are therefore an invaluable aid to the Board, and to the citizens of the state,[235] as well as to the petitioning prisoner.

Parole Board decisions are routinely criticized by groups representing prisoners' interests such as the Fortune Society:[236]

> [T]he Parole Board procedure is totally geared to non-human, insensitive criteria. The Parole Board, today, makes its conclusions based on filed reports by individuals who

> have direct contact with the prisoner. The board members never see the prisoner until he sits before them in the board room.[237]

Dr. Karl Menniger[238] is perhaps more accurate in affixing the blame for inadequate decision-making by parole boards:

> *The real fault is that the board has so little data to go by*. There will be at hand usually a history of the offense, a record of the prisoner's performance in prison, a file of correspondence about him, work reports from some of his supervisors, and sometimes a physical examination report.[239] (emphasis supplied)

The single overwhelming consistency among the authorities is the need for the best possible information in parole decision-making.[240]

> The information available to the parole board concerning an inmate whose case it is considering is of obvious importance. *The parole board cannot give weight to factors about which it has no information* and while a parole board may (and does) disregard certain information made available to it on grounds of irrelevancy, the availability of information at least *creates the opportunity* for its use in decision-making.[241] (emphasis supplied)

"Parole decision making occurs within a framework that characteristically is vague as to basic objectives and specific criteria."[242] But, to an enlightened Parole Board properly respectful of its mandate to serve the citizens of its state, statutory vagueness is not fatal to the intelligent use of parole criteria. Although the New Jersey State Parole Board is not required by statute to utilize any specific criteria,[243] neither is it statutorily inhibited from such use.[244] With the validity of the need for some form of specific parole criteria established, we will now turn towards what has been used and what could be used in the future.

CRITERIA IN CURRENT AND PROPOSED USE

Recommendations for parole criteria encompass the whole range, from statutory improvement such as the Model Penal Code[245] to specific systems that could be implemented comfortably within *current* statutory schemes.[246] The Model Penal Code's recommendations are as follows:[247]

> Before making a determination regarding a prisoner's release on parole, the Board shall cause to be brought before it all of the following records and information regarding the prisoner:
> (1) a report prepared by the institutional parole staff, relating to his personality, social history, and adjustment to authority, and including any recommendations which the institutional staff may make;
> (2) all official reports of his prior criminal record, including reports and records of earlier probation and parole experiences;
> (3) the pre-sentence investigation report of the sentencing Court;

> (4) recommendations regarding his parole made at the time of sentencing by the sentencing judge or the prosecutor;
> (5) the reports of any physical, mental, and psychiatric examinations of the prisoner;
> (6) any relevant information which may be submitted by the prisoner, his attorney, the victim of his crime, or by other persons;
> (7) the prisoner's parole plan;
> (8) such other relevant information concerning the prisoner as may be reasonably available.[248]

The Code's section quoted above has yet to be formally enacted in any jurisdiction[249] so we have not been treated to judicial constructions of words like "relevant" and "reasonably." The Code's failures are not confined to mere vagueness, however. The proposed statute gives no indication whatever as to the relative *weight* to be assigned to each of the enumerated items; the statute provides that the Board shall "cause to be brought before it" certain information; it does *not* state how such information is to be obtained, how it will be used, or even that it be used at *all!* The Code's insistence on the inclusion of recommendations made by the judge or prosecutor "at the time of sentencing"[250] is a refutation of the principles upon which parole *should* be granted or denied as set out *supra*.[251] If prison is to be assumed an inherently rehabilitative process,[252] it is further to be presumed that the prisoner will be a *changed human being* upon achieving eligibility for parole.[253] It may be many years between sentencing and a prisoner's eligibility for parole,[254] yet the Code gives no method by which recommendations that are many years old should be weighted in the Board's determination.[255] Even assuming that there was *some* value in the Code's insistence on taking the sentencing judge's recommendation into consideration, any possible value is immediately lost unless the sentencing judge is *made aware* that the Board plans to use such information! Judge John B. Molineux, a particularly enlightened jurist of the Middlesex County Court of New Brunswick, New Jersey, clearly illuminated this deficiency in a letter to the New Jersey State Parole Board regarding a petitioner for parole who was denied: [256]

> Gentlemen:
> I have received a letter from [petitioner], who is presently incarcerated in the State Prison at Rahway. He quotes an alleged communication from you to the effect that parole was denied "in the absence of any statement by the sentencing court tending to indicate the contrary the Board has concluded that there are certain punitive and deterrent aspects to your sentencing."
> ¶
> I sentenced this defendant on February 16, 1971. I frankly do not understand the above-quoted passage. I would assume that all sentences are punitive. However, I certainly do not wish that parole be denied simply because I failed to express the nature of the sentence, if you will advise me as to what the Parole Board has in mind, I am willing to review the probation report and express to the Board what I meant at the time of the sentence.[257]

The perception that Parole Boards, in reality, rarely pay any heed to the wishes of the sentencing court is borne out by one prisoner's analysis:[258]

> Thieves[259] in Indiana have been known to bargain with the prosecutor to obtain a ten-year flat sentence rather than a one to ten because they would rather have the certainty of going home in six years eight months[260] than take a chance on the parole board's releasing them sooner than that. A quick check at the records department would show you that it's a good gamble. Many men have done every day of that one to ten in spite of a spotless prison record. Indiana judges have often expressed their amazement upon learning that men whom they have sent here [to Indiana State Prison] with a one- or two-year minimum have served five or more years without being offered a parole.[261]

In addition, if anyone involved in the criminal justice spectrum running from arrest to parole-decision is apt to be uninfluenced by the broader social goals of rehabilitation, it is the *victim* of the crime. The Code's inclusion of the victim's recommendation simply makes no sense, especially when (as mentioned previously) the Code does not specify the *weight* to be attached to this category. It should also be noted that the flabby nature of the Code's proposed enactments is such that, even if adopted *in toto,* there would be absolutely *no* guarantee of improved parole decision-making. Indeed, New Jersey's system, which has been repeatedly assailed as arbitrary,[262] would *easily* fit within the Code's loose parameters.[263]

An example of a parole-criteria scheme that *has* been adopted is that of E.W. Burgess[264] now in use in the Illinois State Penitentiary System. Probably the best known interpreter and analyst of such criteria is Professor Lloyd Ohlin,[265] writing in *Selection for Parole: A Manual of Parole Prediction*.[266] As part of my original investigation, I applied the Burgess-Ohlin criteria to Robert Lewis to see how he would have fared under another parole system *on the same facts*.

This system's basic requirement is the use of twelve separate *predictive* categories. The prospective parolee is assigned either a positive [+1], neutral [0], or negative [—1] rating in each category and his probability for success, (i.e., non-recidivism),[267] is predicted on the basis of the resulting raw score. Violations of parole are divided into "major" (commission of a new criminal offense) and "minor" (failure to live within parole conditions *not* amounting to criminal behavior) areas and a predictive rate is given for each, as well as for the probabilities of either occurring within a parolee's period of release on supervision.[268] The method was originally field-tested on a representative random sampling of approximately five thousand (4,941) inmates previously released.[269] The method predicts that a positive score between [+5] and [+10] will produce an amazingly low "major" violation rate of 0.8%; while a negative score between [—3] and [—4] will produce a "major" violation rate of 22%, an increase of more than 2700%!

If we were to apply these specific predictive categories to Robert Lewis, we would obtain the following result:

1. *Type of Offense*: [+l] is given for homicide, assault, and all sex offenses. All other crimes are [0], except for burglary which is assigned a [—1]. Keeping in mind the *caveat* that Lewis has continued to protest his innocence throughout arrest, pre-trial detention, trial, and incarceration[270] (the effect of which on parole board decisions will be discussed at note 408, *infra*), we must still deal with whether the offense for which he was sentenced is to be considered as a sex offense or as an assaultive offense[271] in order to obtain the best possible diagnosis of future behavior and adjustment. At least one would so *assume;* however, the criteria being employed here would make this point moot.[272] Lewis would receive a [+1] in this category.

2. *Sentence*: a [+1] is assigned to all definite sentences; a [0] to all other types. Lewis' sentence has characteristics of both the definite[273] and the indefinite[274] and it would be impossible to clearly determine what value to assign to this category.
3. *Type of Offender*: First offenders are assigned a [+1]; recidivists and habitual offenders[275] are assigned a [—1]; all others receive a [0]. The predictors are most concerned with previous penitentiary incarceration[276] for this category and Lewis would receive another [+1] here.
4. *Home Status*: a [+1] is assigned *only* to a home described as "superior" by independent investigation;[277] all others rate as [0]. Lewis' proposed home was never investigated, (*see* APPENDIX 1), so he would be assigned a [0] by default.
5. *Family Interest*: a [+1] is assigned to interest described as "very active;" a [— 1] to interest described flatly as "none." Considering the long-term outside contacts Lewis had successfully maintained,[278] the fact that his relatives were willing and eager to have him return home,[279] and the great number of visits and letters he regularly received,[280] Lewis would be given a [+ 1] in this category.
6. *Social Type*: ratings in this category are based on extremely brief "personality profiles" (of gross stereotypes). The "erring citizen," "marginally delinquent," "farmer," and "socially inadequate" types are all given a [+1]; the "ne'er-do-well" is assigned a [0]; and the following types all receive a [—1]: "floater," "socially maladjusted," "drunkard," "drug addict," and "sex deviant." That such "profiles" are markedly *not* relevant to social types predominating today is apparent from the following description:[281]

> floater: a man who drifts about the country, rides freights, lives in [hobo] jungles, gets tagged for vagrancy, and frequently commits crimes en route.[282]

Even if this description *were* relevant; it is decidedly not typical to Lewis' behavior prior to incarceration and his obvious ability to form close ties both inside[283] and outside[284] the prison community would seem to directly rebut any attempt to place him within this narrow category. Additionally, any parolee can have his movements restricted by the Board,[285] so the genuine "floater" could be expected to violate parole rather early in supervision without commission of a new crime ("minor" violation).

> socially maladjusted: a person who cannot adjust himself to conventional society by virtue of strong criminal orientation or serious personality disturbances.[286]

There was no clinical,[287] social,[288] psychiatric,[289] or biographical[290] evidence to indicate that Lewis even remotely resembled this description. Indeed, a young black male raised in Lewis' home community[291] who had *not* been known to the courts prior to his twentieth birthday would probably be an exception to the norm.[292]

> drunkard: an offender who continually loses his job because of drinking, frequents saloons constantly, and works only to keep drinking. Generally, he has a reputation for being an alcoholic and his crime is related to drinking.[293]

Although Lewis has attributed his peer involvement with the other defendants before the crime for which he was sentenced[294] to drinking *on that particular day,*[295] there is no indication

whatever of habitual drinking on Lewis' part.[296] Lewis neither presented intoxication as a defense to the charges[297] nor has he ever blamed alcohol for his difficulties. Conversely, the price Lewis has paid[298] for the aforementioned use of alcohol would certainly seem to mitigate *against* any future involvement.

> drug addict: a person who has acquired the habit of using narcotics and whose crimes are generally related to that habit.[299]

There is not even an allegation that Lewis ever used narcotics, much less that he was addicted, or that he has an addictive personality.[300]

> sex deviant: a man who engages in recognized deviant sex behavior as a common practice.[301]

Lewis' current sentence was for his first conviction of *any* kind and it was not for a sex act *per se* but for "aiding and abetting" such an offense by others.[302] Prisoners are, as a class, perhaps more sensitive to, (and less tolerant of), sexual deviates than any other,[303] yet Lewis was immediately returned to the general population of the prison[304] after his discharge from the Diagnostic Center[305] and has often been *elected* to represent the inmate population by his fellow prisoners.[306] This kind of acclaim is never, in my experience, visited upon anyone who is remotely perceived of as being a sexual deviant of any type. In addition, no psychiatric workup has ever characterized Lewis as being a sex *offender,* much less a sexual *deviant*.[307]

> ne'er-do-well: an irresponsible person who seldom seeks work, lives by the easiest way possible, and is considered to have a bad reputation in the community as a thief, gambler, drunkard, etc.[308]

Such material is implicitly descriptive *only* of a person of sufficient chronological age to have acquired this kind of reputation. It was obviously not meant to apply to a teenager, (which Lewis was prior to arrest),[309] since "irresponsible" means vastly different things when applied to youth of eighteen and men of thirty.

On the above basis, I would contend that Lewis has functionally been eliminated from all the [—1] categories as well as the single [0] category. The inescapable conclusion is that he should therefore be assigned to a [+ 1] category since there is no showing to the contrary.[310] If this be so, for the purposes of this analysis there is no point in a further determination as to which of the *positive* categories is most feasible.

7. *Work Record*: a [+1] is assigned only to a "regular" record of employment. Lewis, if only by virtue of his age at first incarceration, would be precluded from claiming a "regular" work record and therefore is assigned a [0] here.

8. *Community*: either a rural *or* an urban community is given a [0]; a [—1] is assigned only to the "transient;" no [+1] is awarded in this category. Lewis would be assigned a [0].

9. *Parole Job*: either an "adequate" job, or no job at all, is considered as a [0] here; only an "inadequate" job (i.e., one likely to promote the very difficulties causing the offender's previous incarceration; e.g., allowing Ohlin's "drunkard" to work in a bar) is assigned a [—1]. Since the

Board can refuse to grant parole solely because of the lack of an adequate job,[311] Lewis can automatically be assigned a [0] here; *(see* APPENDIX 6).

10. *Number of Associates*: the system gives a [0] rating to any offender with less than three associates in the crime for which he was sentenced; a [+1] is assigned to any offender with three or more associates involved. In my opinion, this was an (albeit meager) attempt to give specific recognition to the "peer pressure" aspect of criminality, especially among urban youth and young adults; at least a reading of Ohlin yields no other reason for this particular assignment of criteria points. Given the action of the court, Lewis can be presumed to have had no less than six "associates,"[312] and therefore would be assigned a [+1] here.

11. *Personality*: a [+1] is assigned to a "normal" (i.e., no gross defects)[313] personality and a [0] to all others. In a lengthy private interview with the psychiatrist assigned to Lewis in l973[314] I learned that the "no gross defects" category would be the most appropriate of the categories for Lewis.[315] He would be assigned a [+1] here.

12. *Psychiatric Prognosis*: only a "favorable"[316] prognosis is assigned a [+1] in this category; all others are [0]. The last psychiatrist assigned to Robert Lewis would certainly seem to indicate such a favorable prognosis.[317] Unfortunately, the "psychiatric report"[318] used by the Board in making its determination on rehearing was prepared by the now-infamous Dr. William R. King.[319] Subsequent to his preparation of Lewis' evaluation, Dr. King was arrested and jailed on charges of attempted murder[320] and, while bail was being set,[321] it was learned that he had previously (and involuntarily) been committed to mental institutions.[322] Although the Chairman of the New Jersey State Parole Board[323] publicly promised to review all parole denials inspired by a psychiatric report from Dr. King,[324] there was a general attitude of cynicism among prisoners at the state prisons[325] which would seem to have been well-merited.[326] It is hardly necessary to state that Dr. King's evaluation of Robert Lewis was worthless and could not be relied upon in any way.

A summary of the Burgess-Ohlin criteria as applied to Robert Lewis would show an absolute minimum of [+6][327] up to a maximum of [+8] by the inclusion of the categories possibly open to dispute.[328] He received *no* negative ratings. This placed Robert Lewis squarely within the group of potential parolees which Ohlin predicts will exhibit the least possible risk of recidivism.[329]

The Illinois State Penitentiary System parole-predictive criteria have generally been favorably received by other authorities in the field as a *base upon which to build.* Professor von Hirsh has stated:[330]

> Based on the Illinois experience, several noted criminologists have advocated more extensive and systematic use of prediction tables in sentencing and parole decisions.[331]

The California Department of Corrections, (which has been operating under a sophisticated parole system since 1913),[332] has also experimented with predictive criteria in parole decision-making. As reported by Gottfredson,[333] this system calculated Base Expectancy Raw Scores[334] by simply totaling points for various criteria; no negative points are given. The California criteria are as follows:

IF	ADD
No Prior Record	10
Limited Prior Record (Not More than two jail or juvenile or one prison commitment)	4
Homicide, Assault, or Sex as most serious commitment offense under this serial number	6
Not Burglary, Forgery, or NSF Checks as most serious commitment offense under this serial number	2
Age 30 or Older in year of release to parole	3
No History of any Opiate Use	8
Original Commitment	1
Total Possible Score	34 [335]

In this study, a scale was devised using 2,181 parolees selected at random; the same scale was re-tested on another random sampling of 2,132 men. On re-test, it was found that those released inmates with a Base Expectancy Raw Score from 30-34 had an 80% successful adjustment to parole,[336] while those with a score of 0-4 had a 26% favorable adjustment.[337]

If the above criteria were applied to Robert Lewis, his score would be 31; the only favorable criteria points he would not receive in computing a Base Expectancy Raw Score would be his "age in year of release to parole" since Lewis would not be thirty until 1974.

Although the California method was devised many years after the Burgess-Ohlin criteria, it should be noted that there are many points of *specific* similarity[338] and the general tone of the criterion are markedly similar in all other respects.

Some of the more specific proposals for improvement in this area generally show a profound respect for Ohlin's *concept* but find fault with his actuarial methodology.[339] Glaser[340] is quick to point out that the profession needs better *categories*, not just superior statistical methods. As an evaluative mechanism, he proposes the use of "Mean Cost Rating"[341] as opposed to an equal-weighting system as used by Ohlin.[342] In his report,[343] Glaser provides us with some highly significant information. For example: of those he studied, parole violation rates ranged from a high of 52.8% for those released with a 4th grade education or less, down to a low of 21.1% for those released possessing a high school education or better.[344] Most of the factors studied and isolated by Glaser show the anticipated progression from lower to higher rates of recidivism on parole.[345] However, one unexpected deviation is shown in the Measured Intelligence Indicator.[346] Here the range, from best possibility for parole success (non-recidivism) to worst possibility is as follows:

INTELLIGENCE	RECIDIVISM
High Average	least likely to violate parole
Dull	
Low Average	
Superior	approximate median
Average	
Very Superior	

Borderline
Defective most likely to violate

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The anticipated low violation rate for the "Very Superior" intelligence simply does not materialize. This is possibly inherent in the fact that "white collar criminals" are among the most chronic of recidivists,[348] and, while such individuals may be no more intelligent than other criminals, their social class probably would indicate a greater propensity to "test well."[349]

Glaser would eliminate many of Ohlin's categories and utilize only the following: Age at First Leaving Home, Social Development Pattern, Work Record, Most Serious Previous Sentence, Total Criminal Record, School, and the Use of Prison Time. He would also expand the Ohlin range into a five-factor matrix as follows: [+2]—[+1]—[0]—[—1]— [—2].[350] The general method employed by Glaser and other formulators of predictive criteria[351] was to sample a *prior* selection of released prisoners (parolees) and use this data to predict behavior of a *future* released population. Using this method, error was 0.9% for predicting 1942-1944 violation rates from 1940-1941 experience; and 1.8% for predicting the 1945-1949 rates from the 1942-1944 experience.[352]

In the case of Robert Lewis, as in any other case of a young man who literally "grew up in prison"[353] some of Glaser's categories as shown above would tend to merge. For example: with Robert Lewis, it is impossible to distinguish between "Schooling" and "Use of Prison Time" simply because he *used his prison time to attend school*![354]

All parole criteria system, regardless of the lip service paid to progressive penological philosophy, are concerned with one thing: recidivism. If the criteria utilized enable the Board to come up with a good track record in terms of a smaller percentage of those they release on parole eventually committing fresh crimes in the community, predictability criteria should be accepted with open arms. "Despite the difference in statutes, *the major criterion of all boards is the probability of recidivism*."[355] So the issue is *prediction,* not diagnosis. If the individual is likely to be a "successful" parolee, he is to be released. If he is not; he is to be retained. Even leaving aside such pregnant questions as "If the prison hasn't rehabilitated the prisoner so that he can safely be released, what *is* a valid disposition when the prisoner has served his full sentence?" the public will still want assurances that the predictors utilized by the Board are the best possible.

It is important to note at this point that a simple assignment of values as described by Ohlin, Gottfredson, and Glaser will only result in linear factor correlation. That is, each category not only has equal weight,[356] but is presumed to vary independently of the others.[357] Moreover, it is apparent that if such factors do not *actually* vary independently of one another, gross errors in prediction can result.[358] Sociologists such as Kirby[359] have addressed themselves specifically to this point in parole prediction.[360]

While the sociologist-actuaries have been battling over the validity[361] and reliability[362] of collected predictive data, other social scientists have preferred to concentrate on *attitudes* of potential parolees. This group of scientists tends to label predictive criteria such as that utilized by the Illinois State Penitentiary System as static.[363] A leading proponent of this latter school is Laune[364] who first outlined his approach in 1936.[365]

> Any system of parole supervision which has but one policy and one set of practices for all parolees is, upon its face, inefficient. So long as individuals differ so greatly from one to another, policies with regard to those individuals must, if they are to be effective, be

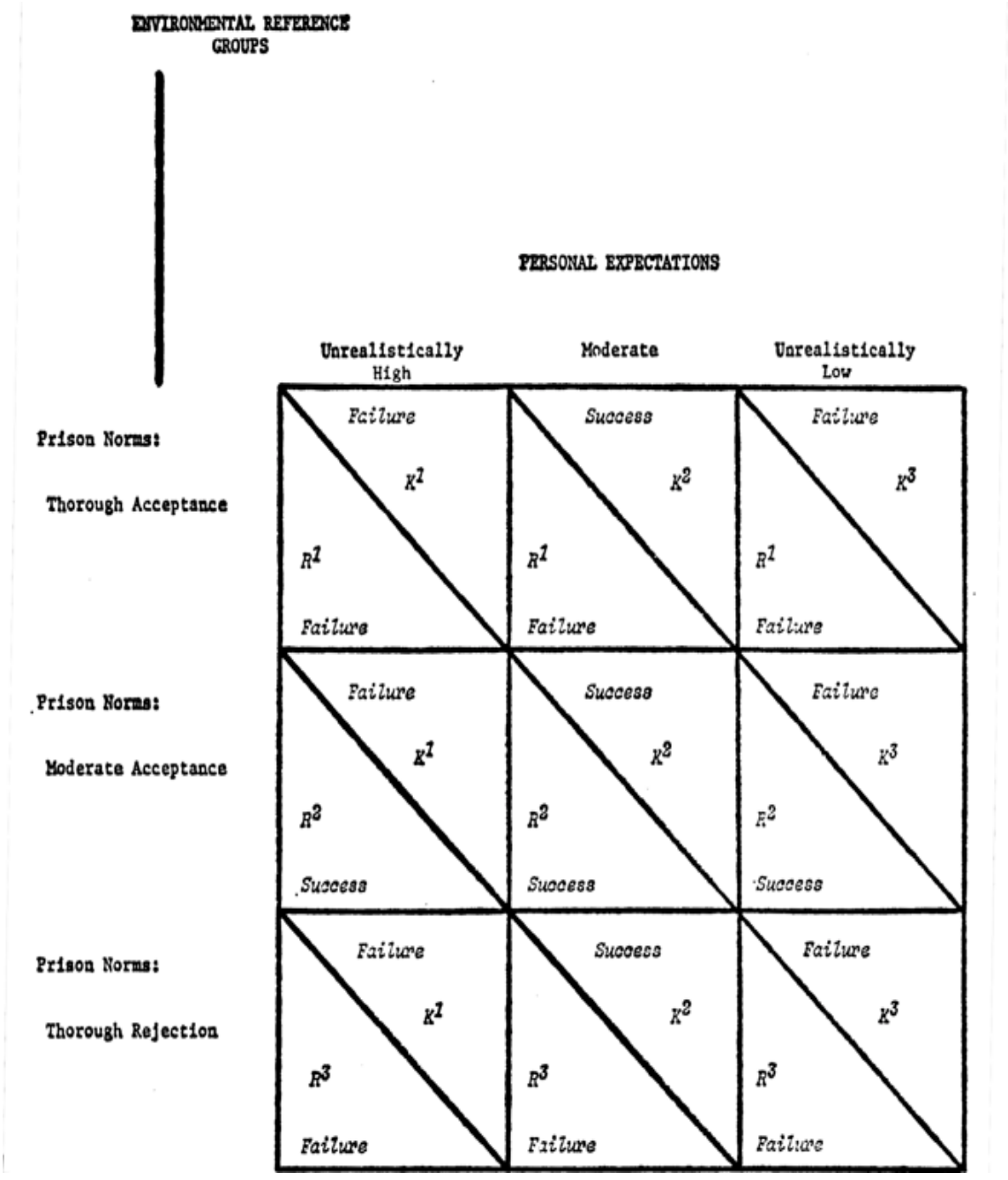
> capable of individualization so that they may be made to fit the needs of particular cases.[366]
> *********
> A prognostic system based on [fixed, static and thus unalterable, criteria] leaves no room for the *possibility of change* in the personality which we term "reformation."[367] (emphasis supplied)
> *********
> If we are to succeed in determing the optimum point of parolability we must, in some way, *measure the attitudes involved* in the situation *rather than the fixed, external facts* [e.g., Past Criminal Record] relating to the subject.[368] (emphasis supplied)
> *********
> That we cannot accurately fortell economic conditions is obvious [i.e., read the future]; *neither can we accurately fortell the environment in which the parolee will find himself.*[369] (emphasis supplied)

Laune is certainly not without his supporters; Skolnick's[370] work, which antedated Laune's by more than two decades, adopts the position that attitudes are vitally important but that their importance is proportional to the way in which they are used and the environment in which they will be exercised upon release. Skolnick, therefore, proposes a form of multiple factor correlation in the use of attitudinal data collected from prisoners awaiting parole hearings.[371] Skolnick points out that pre-parole outlook is vital to success on parole; he postulates that an individual's personal expectations of life as a parolee are critical to his success or failure on parole and that environmental reference groups are a vital factor in the same equation.[372] Subject to the general guidelines proposed by Kirby,[373] Skolnick correlates the three general ranges of *each* of the two criteria against each other, with the resulting pay-out matrix shown below.

Note that the "Success" vectors are present throughout the "Moderate" range of *both* Personal Expectations and Environmental Reference Groups but that only a *correlation* of both "Moderates" produces an overwhelming indicator of parole success. Of course, the major problem with this particular form of analysis is that the only people who have actually *experienced* the parole process who are available to prisoners are those who have *failed* on parole, (i.e., parole violators who have returned to prison). McCleery[375] emphatically underscores this point: "The oracle on parole [to inmates] is the man who failed on parole the greatest number of times."[376] Those who have had a successful parole experience are rarely available to current prisoners either as role models or as sources of accurate information.[377] It is no wonder that measurements of Personal Expectations vary as widely as they do.

[PLEASE SEE PAGE FOLLOWING FOR SKOLNICK'S CHART]

Toward A Developmental Theory of Parole
Jerome H. Skolnick
28 American Sociological Review 542, 548



In the case of Robert Lewis, his personal expectations could only be described as "Moderate;" he was not without hope for a successful adjustment in the community since he had been promised a good job,[378] a place to live,[379] was welcome in his relatives' home,[380] and had many friends on the outside who believed him to be innocent of any wrongdoing and totally deserving of freedom. But any tendency towards unrealistic optimism was easily tempered by Lewis' own cynicism about the world in general, a hardly surprising attitude given the circumstances. The "Moderate" category would also seem to best fit Lewis' environmental reference groups; upon release he was planning to live with people who would accept him and value him for what he was and what he could be;[381] he was not going to live with a group of criminals or return to his former environment,[382] nor was he planning to live or associate with highly judgmental people who would never forgive him his "sins."[383] The Skolnick pay-out matrix would indicate that Lewis had a maximum chance for success on parole.

But even assuming that the Board would lack any of the resources necessary (the most valuable of all resources being a simple willingness to innovate in the interests of justice), to implement a system whereby the individuals it would evaluate for release would be graded according to specific pre-determined criteria, there is a great amount of purely statistical information *readily available* which could have been directly applied to even the bare minimum of facts before the Board in the Lewis decision. For example, Mangus[384] states that:

> Sex offenders convicted of felonies have comparatively low rates of recidivism either in sex offenses or in other offenses ... only 9.3% of the 568 sex offenders [in the sample] committed new criminal offenses while on parole and were convicted and sentenced to at least a six-month additional prison term, as opposed to 24.7% of all parolees.
>
> *****
>
> This evidence shows that imprisoned sex offenders are not recidivists to the same degree as are other types of offenders ... [b]ecause on the average they are not habitual criminals, they are better parole risks.[385]

The Psychology of Sex Offenders[386] also speaks to this point:

> [T]he highest rates of recidivism were found in regard to offenders convicted of exhibitory acts and homosexual relations [as the crime for which the recidivating parolee was *originally* incarcerated], while the lowest rates were for those convicted of sexual assault and forcible rape.
>
> *****
>
> This would seem to indicate that while those convicted of exhibitory acts and homosexual relations are *true* sex offenders, who are often psychiatrically as well as sexually deviated, those convicted of sexual assault, forcible rape, and statutory rape are more sexually and psychiatrically normal individuals whose offenses are partly an offshoot of their generally anti-social behavioral patterns.[387]

The Board needs only to know the offense for which the parole candidate was sentenced to make use of such scientific research,[388] even without a criteria system in a formal sense. Assuming *arguendo* that Lewis was guilty of the crime for which he was sentenced, the above statements would indicate that he was involved in the crime through peer pressure on him to conform to the

generally anti-social characteristics of his environment.[389] Such individuals are generally seen as being able to take maximum advantage of rehabilitative treatment programs within a variety of institutions:

> Prominent among one-crime "success" cases is the reformation of individuals *who may have led disorderly lives, but whose only clearly felonious action was followed by a severe prison sentence*. This is a familiar pattern in murder or rape cases. In most prison systems, such offenders are among those with the lowest parole violation rate.[390] (emphasis supplied).

This is quite obviously the kind of solid, factual, impartial information which the Board could apply in its decisions without resorting to complicated criteria formulas. It would seem to be a minimum requirement for proper performance of its duties.

Additional examples are found in the most authoritative and well-documented sources; a comprehensive study of parole recidivism was completed by Pennsylvania's Department of Corrections.[391] This study covered fifteen years between 1946 and 1961 and almost thirty thousand (29,346) cases. The results pertinent to the Lewis decision are summarized below:

Probabilities: Commission of a *New* Crime (Other than that for which originally sentenced)	
All Parolees	18.4%
Sex Offenders	8.8%
Assaultive Offenders	12.3%

Probabilities: Commission of the *Same* Crime (For which originally sentenced)	
All Parolees	6.8%
Sex Offenders	2.9%
Assaultive Offenders	3.6%

[392]

The application of such data to the Lewis decision is all too obvious; regardless of whether the Board perceives Lewis as a sexual offender or an assaultive offender, his probability of recidivism is *substantially lower* than that of the average individual granted parole.

The most comprehensive and definitive research in this area of predictability was conducted by the National Council on Crime and Delinquency.[393] Statistics on parolees were collected from all jurisdictions, with every state but Mississippi participating to some extent.[394] New Jersey's participation in this effort was a full 100%[395] so there can be no valid contention that the resulting statistics were weighted against an accurate reflection of conditions prevalent in

that state. The Federal Bureau of Investigation also provided nationwide arrest records so that there was no opportunity for the "out of state recidivist" to lower the overall figures by his *apparent* compliance with home-state regulations. The ensuing report[396] revealed the following information directly on point in the Lewis decision:

Percentage of Parolees Who Committed No Violations of Any Kind By Type of Offense and Year—Males

	1968	1969
Forcible Rape	80%	83%
All Other Sex Offenses	84%	83%
Aggravated Assault	75%	78%

Percentage of Parolees With Major Violations (New Crimes) Returned to Prison
By Type of Offense and Year—Males

Forcible Rape	3.5%	1.5%
All Other Sex Offenses	2.5%	2.5%
Aggravated Assault	4.0%	2.5%

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Again it becomes obvious that, however he would be classified by Type of Offense, Robert Lewis represented a sub-minimal risk statistically in terms of potential recidivism, *especially* in terms of commission of the crime(s) for which he was sentenced.

The United States Parole Board[398] has clearly shown, by its practices, its recognition of the fact that certain categories of criminal offenses are, in its opinion, a better risk in terms of recidivism. *Table XII, Paroles Granted, Adult Prisoners, By Type of Offense, Fiscal Year, 1970*[399] shows that the Board made almost seven thousand (6,894) such decisions within the measured period and granted parole in 45.5% of all cases.[400] Parole candidates whose criminal offenses were in the following categories: counterfeiting, embezzlement, fraud, income tax violations, liquor laws, forgery, auto theft, postal theft, and interstate commerce theft were granted paroles at rates ranging from 56.2% down to 28.l%;[401] while those convicted of "All Crimes of Force" were granted paroles at the rate of 71.2%.[402] This grossly disproportionate granting of paroles by type of offense illuminates the United States Parole Board's reliance on at least one predictive criterion,[403] and the courts have been sensitive to prisoners' contentions that such static criteria actually deprive some inmates of a fair hearing if this is the *only* criteria utilized.[404] The United States Parole Board's reliance on type of offense as a predictive category is particularly apparent when it is considered that serious felony offenders are *less* likely to be paroled because of the negative feelings that their crimes inspire in the public.[405] Additionally, those in the "crimes against property" category are more likely to be able to affect restitution and thus mitigate their sentences, while those in the "crimes against persons" category are far less likely to be able to do so.[406]

It also cannot be doubted that the personal feelings of Board members, even if *confined* to a reflection of the larger society's attitudes, play a large role in the decision-making process. A leading criminologist described the Board's position as follows:[407]

> Each man [going before the Board] has to admit to the crime for which he was convicted *before he's eligible for parole.* If one doesn't admit his crime, the Parole Board takes the stand that since its a matter for the courts to determine guilt, the Board, therefore, can't make a decision regarding parole.[408] (emphasis supplied)

Professor Davis flatly states that "[I]deas of deterrence and retribution still have great force [in parole decisions]."[409] Robert Lewis was in an impossible position when facing an administration tribunal with untrammeled powers committed to the concepts laid out above. Lewis was innocent and continued to maintain his innocence. The Board's response to Lewis' claims of innocence was that he had "failed to show sufficient remorse for [his] acts."[410] Lewis tried to explain his position in a personal letter following another abortive interview with the Board:[411]

> [E]ven though I didn't commit the crime, I have a deep feeling about what happened to the girl involved. What, if anything, could I do for her? Common sense tells me that she wants no part of me regardless; that [the Parole Board] would not answer this question, silence separted us more than distance.[412]

Another of the Board's treasured "criteria" is "seriousness of offense."[413] Rational scientists have advanced theories calling for the actual testing of just this concept:

> The application of scaling techniques from the measurement literature may lead to a greater understanding of the concept, "serious offense." Scales may be constructed to assess how much of certain variables determined *a priori* to be components of "seriousness" must be present for a criminal offense to be considered serious.[414]

But Robert Lewis needed no scientific studies to enlighten him from his unique vantage point:

> Serious nature of offense: No one in their right mind could refute the serious nature of the offense. The judge sentenced me for the seriousness of the offense almost nine years ago. It stands to reason that if it was serious *then,* it is serious *now,* and will be so fifteen years from now. This kind of statement from the system tells me nothing! If I permitted myself to look at things like that [pessimistically], this could imply that as long as the offense remains serious, I will remain in prison...[415] (emphasis in original)

It is well documented that the genuine fact-finding process can always benefit (and always *seeks* to benefit), from scientific assistance. Ever since *Frye v. United States*[416] in 1923, the courts have been looking for possible scientific aid in arriving at the truth.

> It seems that in respect to certain types of cases and issues, the use of experimental evidence has far greater possibilities for aiding the court [or any other trier/finder of fact!] in the true determination of facts than have yet been realized. This seems to be due to the

> failure of courts and lawyers to recognize that the adversary system of party-presentation of evidence must continually be modified, *to keep it in step with the march of justice*.
> *****
> Also worthy of consideration is appointment by the court [or the Parole Board!] of an *impartial* person to conduct or supervise an experiment.[417] (emphasis supplied)

The above-cited section from *McCormick on Evidence*[418] could well be suitable to parole board determinations, especially in light of the evidence previously quoted on the "judicial" nature of the Board's role.[419] Calculating tables and statistical results are often admitted in civil and criminal trials "directly, under an exception to the Hearsay rule."[420]

The particular advantage of admitting statistical information as quoted herein[421] into Parole Board deliberations is that it has specificity and impartiality.[422] Not all reasons for denial given by the Parole Board are good and valid reasons. This may be either from a desire to evade the thrust of court decisions like *Monks, supra,* or ignorance of the basic teachings of criminology and penology. An excellent illustration of the choice between these two evils is the Board's denial of parole for "Poor Institutional Adjustment."[423] In view of the many inmates who have been retained and denied parole in spite of a clean institutional record,[424] this kind of blanket, vacuous statement tells a prisoner less than nothing. However, such denials may be sincere, albeit, ignorant assessments of the situation on the Board's part. Criteria such as "poor institutional adjustment" have come under heavy fire from the top professionals in the field. Ralph C. Collins, President of the Association of Paroling Authorities, directly confronts this problem in *The Parole Selection Process*:[425]

> At all times, the Board must keep in mind the negatives accruing to the inmate through prolonged incarceration. Some of these negatives are:
> (1) Loss of progress made in institutional training and treatment programs through the discouragement which goes with a long period of incarceration.
> (2) Acclamation to highly regimented living and the accompanying loss of capacity for self-direction and decision making.
> (3) Breakdown during long confinement of contacts with socially healthy people on the outside and increasing dependency on inmates for companionship and acceptance.
> (4) Assimilation of distorted social values and general embitterment.
> (5) Financial loss to the taxpayer who is supporting the offender in confinement and frequently his family on the outside.
> (6) The emotional damage and physical hardship caused spouses, children, and other relatives.
> An inmate's deportment in the institution has been *grossly overstressed* by the inmate, his family, often the courts, and the general public. They seem to feel that good behavior in the institution is the best predictor of future successes, or at least, it is a complete justification for parole. *Those of us in correctional work have learned that some of the greatest parole risks are the best behaved inmates in the institution. And some of those persons who aggressively reject the artificial life of the institution and others who amass [negative] behavior records do the best on parole*.[426] (emphasis supplied)

An outspoken prisoner I interviewed said much the same thing as Mr. Collins, although he was considerably more to the point:

> Poor institutional adjustment is a goddamned farce! This place is a cesspool; its full of degenerates, rats, and bastards who'd shank you for a couple of packs.[427] The day I learn to "adjust" to this joint is the day they should *leave* me here;[428]

ROBERT LEWIS AND THE CASE FOR PAROLE CRITERIA

After my investigation was completed, I submitted a lengthy affidavit to the Parole Board in the form of an *amicus* brief on Lewis' behalf. At his next hearing, Robert Lewis was granted a parole.[429] Since Lewis was surely the same exact human being who had been denied parole 12 months earlier, the inescapable conclusion is that the Board evaluated the material I submitted and logically concluded that its earlier judgments regarding Robert Lewis were incorrect or invalid. The Board's release not only contains *none* of its previous negative allegations concerning Lewis' potential, it contains no stipulations of any kind! This abrupt about-face by the Board operates as the strongest of rebuttals to any contention that it makes "individual" decisions. We are left with the result that, upon receiving factual, documented information, an individual formerly denied parole was set free. How many other Robert Lewises are unnecessarily rotting in our state and federal prisons?

Robert Lewis is almost as free[430] as if he had been granted a more traditional form of post-conviction relief, such as *habeas corpus*. But the Robert Lewis decision apparently failed to become precedent for the New Jersey State Parole Board; the Board continues to make the same guesswork decisions,[431] in the same inappropriate setting,[432] and with the same lack of standards.[433]

One more viable overall solution would be the *Parole Improvement and Procedures Act of 1972*.[434] The government's analysis of a particular section clearly points up the major problem with parole boards today:

> **BILL: Section 4205***
> This section in effect "shifts the burden" which now exists. Now, the Board denies parole unless the prisoner can establish that he should be paroled. Then, once he can establish that, the Board "may in its discretion" (18 USC: §4203) authorize release on parole. The bill established that the Board *shall* release on parole unless it determines that the prisoner should not be released.
> *****
> Note that, of course, the Board can still deny parole. The only point made here is that it will have to give good reasons for doing so (see *infra*), comporting with statutorily stated standards which place the burden on the Board.[435] (emphasis in original)
> *** 18 U.S.C. §4205**

When this burden is *actually*, (not just statutorily) shifted, the Board will naturally begin to look towards a criteria system to better effectuate its work. There is no doubt that the State of New

Jersey *uses* parole as a correctional-rehabilitative technique. By 1964, over 80% of all felons released from New Jersey State Prisons were released by virtue of parole grants.[436] The problem is to use the tool of parole *rationally, intelligently,* and *fairly.*

To those who have hailed cases like *Morrisey v. Brewer*[437] as opening the door to due process in the parole setting,[438] I would like to conclude with the flat statement that the use of attorneys in the parole decision-making process will do nothing whatever to enhance the quality of that process, nor will it insure prisoners even a scintilla more justice than they currently receive. New Jersey *already* grants counsel to inmates at parole hearings, subject (of course) to the "discretion" of the Board.[439] But even a *guarantee* of counsel would add nothing. It is a cardinal rule of Administrative Law that the more regulations by which an agency is bound, the more strict its standards, the better the setting for the advocate. An attorney without access to specific procedural rules is reduced to the status of a pleader; a mere supplicant before the Board as the prisoner already is. The one thing a Star Chamber certainly does not need is additional supplicants.

The door to the courts is *already* open in parole-denial cases. As Parole Boards are forced more and more into standardization of criteria by the increasing size of their caseload,[440] the courts will look more and more to the fairness that *must* be implicit in such standardization. Parole as post-conviction relief has been largely ignored by the practitioner; it need not be so.

As a final rebuttal to the premise that assistance of counsel would, *per se,* improve the parole decision-making process, I would ask advocates of such a positions where the funds will come from? If I get the expected answer, that is, from the "government," I would then ask if the state-appointed parole lawyers could reasonably be expected to do a better job than their state-appointed brethren do in the trial courts.[441] It is not possible to plea-bargain with a Parole Board. The following excerpt is from a group discussion held with inmates from Trenton State Prison in August of 1973:[442]

> Q: What does "due process" mean in parole board decisions anyhow? You want the state to appoint you a lawyer the next time you go before the Board?
> A: Hell, no! I might get the same one that got me in *here!*

The attitude of the prisoner speaking here, that his *lawyer* got him into prison, is *not* comical. It is all-too-characteristic of a system which seems designed to breed only bitterness and hate in those it purports to "help." Whether such attitudes are based on objective analysis of the true facts or upon institutionally-induced delusion, they are nevertheless an operant fact of life in all our country's prisons. A major roadblock in the path of rehabilitation is this (perhaps justifiably) cynical attitude of most prisoners toward the criminal justice system, especially as regards this system's seemingly insatiable appetite for selective law enforcement. The introduction, and intelligent use, of a viable, rationale, and equitable parole-grant criteria system would go a long way towards dispelling some of this cynicism, thereby promoting the goals of reformation and eventual re-entry our nation's prison system *claims* to champion.

APPENDIX

1. Personal letter to Robert Lewis from his Aunt Beatrice.
2. Affidavit of Walter Lee McGhee, Sr. #40474, inmate of the New Jersey State Prison Farm at Leesburg. Mr. McGhee is an accomplished writer and poet, author of the forthcoming *The Forgotten Society,* an officer in the prison Jaycees, and has been furloughed from the institution on numerous occasions to keep speaking engagement commitments for which he is much in demand. He is currently a candidate for Executive Clemency.
3. Affidavit of David Lagerman. former anti-narcotics counselor and Military Police Officer, currently a pre-medical student.
4. Parole Board Denial of Robert Lewis; September 27, 1971.*****
5. Statement Summarizing Interview With Prison Officials By Two Legal Researchers; November 24, 1971.
6. Parole Board Denial of Robert Lewis; June 1, l972.******
7. Affidavit of Andrew Vachss, in support of Brief filed *pro se* in the New Jersey Superior Court, Appellate Division, seeking a parole rehearing. Page #2 and #3 of 4 pages total.
8. Parole Board Grant of Parole to Robert Lewis; July 27. l973.*******
9. Memorandum to Governor's Committee on Negotiations from Governor William T. Cahill, January 31. 1972.

***** Note: rehearing date given is *subsequent* to date Lewis was actually paroled.

****** Note: two of three Board members have been changed; Mapson no longer Chairman.

******* Note: two of three Board members again changed; Mapson no longer a member. The decision erroneously lists the charge of "Carrying Concealed Weapon;" this conviction was reversed prior to the Board's decision.

B'KLYN, N.Y. 11208
August 19, 1972

Hi Rob,
I hope this letter finds you well. What's going on? I thought your parole board was suppose to get in touch with me. I haven't heard from them yet.
I thought you would be on your way home by now. We were all looking forward to your home coming. I had the house fixed up. We have plenty of room for you. I'm back at the house now. Give me a call sometime next week or drop me a line and let us know what's happening. Everyone said Hello. All the Gd are now settle in their own apts. Take care

your Aunt
Beatrice.

Walter Lee McGhee, Sr. #40474
Lock Bag R
Rahway, New Jersey 07065
Rahway Camp
July 29, 1972

The New Jersey State Parole Board:
Trenton, New Jersey
To Whom it may concern:

I pray that this letter will be taken as an *affidavit* to support Mr. Robert Lewis in obtaining a rehearing.

I am under the impression that Mr. Robert Lewis was denied because he has done nothing to help himself since his incarceration. I can't agree with the Board's decision, having lived with Mr. Lewis while in Trenton State Prison and also Rahway State Prison for several years.

I know for a fact that Mr. Lewis attended school and was at one time participating in the Mercer County Community College program. He also took up typing and learned Upholstery. He has twice been elected by the inmate population as their representative. This was done with the approval of the administration. Mr. Lewis has established himself as a creative and productive individual among us. He is a man that has helped his fellow inmates with their family and other personal problems. He has taught inmates how to read and write and he himself has increased his own ability to deal with the ever-growing problem of constructive prison reform.

I am a long time friend of Mr. Lewis and know him to have a meaningful purpose in life. He is not one to start trouble. In fact. he has often assisted the administration in calming down the other inmates several times during the stabbing of four white inmates at Trenton a few months ago. Just how much can be considered in this man's case?

I wish to thank the Board for its time and consideration in this matter; hoping that it will rehear Mr. Robert Lewis's case.

Yours Truly
/s/ Walter Lee McGhee

:SS.
State of New Jersey
County of Mercer

Affidavit

David Lagerman, being duly sworn, deposes and says:

That I, David Lagerman, live at 41-11 Gleane Street, Elmhurst, New York. I am now a full-time student at the Borough of Manhattan Community College and have previously worked at ELMCOR Narcotics Program as a drug rehabilitation counselor. Prior to this, I was with the United States Military Police Corps: serving in Korea and at the U.S. Military Academy at West Point.

I have been acquainted with Robert Lewis (inmate #42061, Leesburg State Prison) for more than a year. It is my belief that Mr. Lewis' denial of parole was based mainly on his record of conduct as a member of the Inmate Committee. Mr. Lewis is a duly elected representative of the Inmate Committee at Trenton State Prison. He was elected to this position because of the years of help and service to his fellow inmates when any injustice has been committed on them and himself. Robert Lewis accepted this responsibility and tried to do his job well: because Robert Lewis tried to bring about some meaningful change to the punitive institutions of New Jersey; because Robert Lewis cares about his fellow man, the Parole Board has seen fit to deny him a chance at parole.

Mr. Lewis has recently been transferred to Leesburg and is continuing his education as best he can under the circumstances under which he is forced to exist.

August 7, 1972

Sincerely,
/s/David Lagerman

STATE PAROLE BOARD STATE OF NEW JERSEY NOTICE OF DECISION

NAME ROBERT LEWIS NO. 42061 INSTITUTION STATE PRISON

The State Parole Board at its meeting on SEPTEMBER 27, 1971 rendered the following decision in your case

☐ Decision of _____ rescinded

☐ Parole is approved effective _____

☐ Parole is approved at the expiration of your minimum sentence

☒ Parole has been denied regardless of the availability of a suitable parole plan. Your case has been scheduled for rehearing in OCTOBER 1973

SERIOUS NATURE OF OFFENSE AND POOR
INSTITUTIONAL ADJUSTMENT

☐ Parole has been denied regardless of the availability of a suitable parole plan. You are to serve your adjusted maximum sentence

☐ You will then revert to _____

☐ _____

Effective date of release on parole is subject to the approval of parole plan by the New Jersey State Parole Board and the following special condition(s), if any:

STATE PAROLE BOARD
Reverend Jesse W. Mapson, *Chairman*
Harold W. Hannold, *Associate Member*
Thomas C. Swick, *Associate Member*

friends of
walter lee mcghee
committee

1334 West Carmen Avenue #2W
Chicago, Illinois 60640
(312) 728-6681
(212) 335-9070

"No one should be subjected to the personal revenges of learned people. It is the handicaps one must endure while confined behind prison walls, the deceptions, the lies, the contradictions, hurt, frustration and daily routine which haunt the sane ... which play a great part in man's rehabilitation or irreparable destruction that should be ended. Prisons are HELL ..."
Walter Lee McGhee
1970

STATEMENT SUMMARIZING INTERVIEW WITH PRISON OFFICIALS BY TWO LEGAL RESEARCHERS:

On November 24, 1971, Miss Brooke Whiting and myself made a visit to New Jersey State Prison at Trenton to speak with Superintendent Howard Yeager concerning inmate Robert Lewis, #42061. The interview had been prearranged and was to include other members of the Superintendent's staff who had supervised inmate Lewis.

Upon our arrival at 10:00 a.m., Mr. R. Hatrak, Director of Individual Treatment informed us that Superintendent Yeager was unavailable and that he would speak to us instead. We explained that we represented a citizens group working with certain inmates who had gone through a self-development process while incarcerated. We then began asking questions about the prison record, performance, and development of Lewis at Trenton.

Upon being asked if Lewis had improved his education, Hatrak answered "no" but then called the educational division and discovered Lewis had received his high school diploma. He had been unable to determine this from Lewis' prison folder to which he constantly referred during the interview. This prison folder is the only source of information used by the Parole Board. Mr. Hatrak informed us that Lewis had not committed an infraction at Trenton since May 10, 1967. He stated that the only work report submitted to the Board was that of Lewis' supervisor during the time he was at Rahway [December 9, 1970 to May 12, 1971]. He did not understand why the report of the job supervisor at Trenton was not in the folder. He also stated that only the latest reports were sent to the Board. This, despite the fact that the New Jersey Statute states specifically: "the board shall have the report of the warden, keeper, or chief executive of the institution wherein the prisoner is confined with a detailed [italics added] statement of his institutional record of behavior....". (N.J.S.A. 30:4-123.18). One of his concluding statements was that, in his professional opinion, he felt that the job supervisor at Trenton would be the best judge of Lewis' institutional adjustment.

We were unable to interview Mr. Montgomery, the job supervisor at Trenton, as he was occupied on this date. Since that date, we have contacted Mr. Montgomery both personally and by mail by he has failed to reply in any form.

The original cooperation of the prison officials seems to have ceased since we served notice on the Parole Board of intent to appeal their recent decision re: Robert Lewis.

Ramon Jimenez, Jr.

RJj/cw
cc:

STA PAROLE BOARD STATE OF NEW JERSEY NOTICE OF DECISION

NAME Robert Lewis , NO 42061 INSTITUTION State Prison

The State Parole Board at its meeting on June 1, 1972 rendered the following decision in your case:

☐ Decision of rescinded

☐ Parole is approved effective

☐ Parole is approved at the expiration of your minimum sentence

☒ Parole has been denied regardless of the availability of a suitable parole plan. Your case has been scheduled for rehearing in July 1973

After consideration of the circumstances of your present offense, and in the absence of any statement by the sentencing court tending to indicate the contrary, the Board has concluded that there are certain punitive and deterrent aspects to your sentence. In the absence of any special or equitable circumstances or any affirmative evidence that you can avoid criminal behavior, and since your minimum sentence has not yet expired, the Board feels that the punitive and deterrent aspects of your sentence have not been fulfilled and that, therefore, your release would not be compatible with the community welfare.

☐ Parole has been denied regardless of the availability of a suitable parole plan. You are to serve your adjusted maximum sentence

☐ You will then revert to

☐

Effective date of release on parole is subject to the approval of parole plan by the New Jersey State Parole Board and the following special condition(s), if any:

After consideration of all records relevant to your confinement, treatment and efforts towards self-improvement while in the N.J. State Prison system, the Board is unable to conclude that there is reasonable probability that you will return to society without violation of law.

With psychiatric report

Ronald C. Lippincott, Acting Member

STATE PAROLE BOARD
Nicholas D. Heil, *Chairman*
Reverend Jesse W. Mapson, *Associate Member*

The Board notes that you have been incarcerated for kidnapping, Rape and Atrocious Assault and Battery for over 8 years.

Although you were 19 years old at the time of the offense and had no prior criminal history, it does not appear that time has had much impact on the values and personality characteristics which first brought you to prison.

Although you have obtained a GED certificate and were enrolled in group counseling, professional reports describe you as still lacking insight and judgment. Your institutional conduct record supports those conclusions and indicates an assaultive and impulsive potential. This conduct record includes charges for attacking another inmate, disorderly conduct, and insolence as well as other charges stemming from homosexual involvements.

Your insight as to why the present offense occured apparently limited to a belief that "fate" caused it to happen or that it was due to drinking and associating with the wrong crowd and that you were led into this situation.

You apparently have accepted little personal responsibility for planning your future in the community and represent that your plans are to get a job or do social work. There is no evidence that you are qualified to do any form of social work or that you have the skill necessary to maintain adequate employment.

The Board is encouraged however that you have recently been transferred to Leesburg and would suggest that you continue to improve in your work attitudes and educational skills.

AFFIDAVIT OF ANDREW VACHSS IN SUPPORT OF BRIEF

In the matter before the Court, Robert Lewis (current inmate at Leesburg State Prison, #42061) was denied parole regardless of the availability of a suitable parole plan. The denial was based on the following points;

1) "Certain punitive and deterrent aspects to your (Lewis') sentence." This statement by the Parole Board could equally apply to *any* convicted offender. Mr. Lewis has been confined for over eight (8) years, which have run consecutively since the age of nineteen and my experience is that too much punishment (incarceration) has the opposite intended effect. Punishment, unlike medication, is not dose-related; in other words, if a little punishment is good, there is nothing to indicate that more punishment is axiomatically better. There is much evidence to indicate that repeated punishment eventually evokes a "negative learning curve" in that punishment loses its value as a deterrent. The difference between eight years and eighteen years tends to blur, especially to one as completely institutionalized as an inmate in a maximum security prison. Therefore, I feel that the "punitive and deterrent" aspects intended by the Court would be *violated*, rather than enhanced, by continued incarceration of this individual. Prison has done all it can for this individual and mere repetition of a process will not add to its chances for success; in my considered opinion, based on years of observation, repetition in this case will be distinctly counter-productive.

2) "... (evidence that) you can avoid criminal behavior." Mr. Lewis has existed, without society's normal behavioral options, in a closed setting where physical violence is routine. The Court is familiar with the numerous incidents of violence at Trenton State Prison, including several homicides. How is Mr. Lewis to demonstrate his ability to avoid criminal behavior when he is surrounded by nothing but criminals, many of whom are serving the time of sentence (e.g.: life) that would force them to adapt a life style to the *institution*, not to the outside world? Trenton lacks any sort of community-based treatment program and Mr. Lewis' ability to properly conduct himself in society can *never* be tested in the absence of a parole.

3) The Board maintains that Mr. Lewis' crime indicates aspects of his personality that have not altered while imprisoned. It should be noted that: a) Mr. Lewis has maintained his innocence throughout his incarceration and, b) the others involved in the crime, those who pleaded guilty, have been released on parole. The Board seems to feel that "proper remorse" can only be displayed by an admission to the Board of criminal behavior. This would seriously compromise a person claiming to be innocent and would, in effect, be totally inconsistent with Mr. Lewis' contentions of the past eight years.

4) If Mr. Lewis is indeed an assaultive and impulsive personality, why has he been transferred to Leesburg from Trenton? In normal correctional thinking, such a transfer is a reward for good behavior and a clear indication of a *reduced* risk inherent in such behavior.

5) The Board states that Mr. Lewis has shown "little personal responsibility for planning" his future in the community. How could Mr. Lewis be expected to do so? Of necessity, he has relied on those who have an interest in him; he obviously cannot personally investigate employment, housing, or resocialization plans when he lacks access to anything other than written or spoken information and cannot present himself for evaluation to anyone other than those willing to visit the prison.

6) "... it does not appear that time has had much impact on the values and personality characteristics which first bought you to prison." If this statement is valid, and I do not

necessarily agree that it is, how can the Parole Board justify a continued treatment plan which contains nothing more than additional doses of the time they have already described as valueless?
7) "... (no evidence that) you are qualified to do any form of social work or that you have the skill necessary to maintain adequate employment." Mr. Lewis is herein being penalized by the Board's obvious prejudice against para-professional employment. I have personally employed, in the course of my work, over twenty different former prisoners, most of whom have intellectual and personal qualifications far more limited than those of Mr. Lewis. However, they have all, with personal attention, worked very well and maintained employment. It is a question of finding the most appropriate level for the individual, not a question of categorically denying an individual's ability to perform something as nebulous as "social work." I sincerely believe that I know much more about the employability of ex-offenders that the Parole Board and I am further in a position to exercise a great deal of personal control over Mr. Lewis' work environment.
8) The Board's denial of any improvement on Mr. Lewis' part is refuted by their own words (italics added):

> "The Board is encouraged however that you have recently been transferred to Leesburg and would suggest that you *continue to improve in your work attitudes* and *educational skills*."

9) The Board's denial is wholly without scientific or even professional criteria. Its inability to find evidence that Mr. Lewis will return to society without additional violations of the law is not based on any *outside* performance (e.g.: Mr. Lewis is a first offender) and this individual has not been evaluated in terms of anything other than his institutional adjustment. In my experience, the individual who adjusts to prison life without incident is the poorest possible risk for reentry; there is ample evidence to refute the ability of the totally institutionalized personality to conform to society's norms.

STATE PAROLE BOARD STATE OF NEW JERSEY NOTICE OF DECISION

NAME ROBERT LEWIS NO. 42061 INSTITUTION STATE PRISON

CRIME KIDNAPPING; ATROCIOUS ASSAULT & BATTERY; CARRYING CONCEALED WEAPON

SENTENCE 36-42 YRS. DATE SENTENCED 7-9-64 DATE RECEIVED 7-10-64

FIRST HEARING _____ DECISION _____

SECOND HEARING JUNE 1, 1972 DECISION REHEAR JULY 1973

THIRD HEARING _____ DECISION _____

THE STATE PAROLE BOARD AT ITS MEETING ON JULY 27, 1973 RENDERED THE FOLLOWING DECISION IN YOUR CASE:

☐ DECISION OF _____ RESCINDED.

XXX ☑ PAROLE IS APPROVED EFFECTIVE SEPTEMBER 18, 1973 .

☐ PAROLE IS APPROVED AT THE EXPIRATION OF YOUR MINIMUM SENTENCE.

☐ PAROLE HAS BEEN DENIED, BUT YOU HAVE BEEN RESCHEDULED FOR REHEARING IN _____ SEE REASONS BELOW.

☐ PAROLE HAS BEEN DENIED, AND YOU ARE TO SERVE YOUR ADJUSTED MAXIMUM SENTENCE. SEE REASONS BELOW.

EFFECTIVE DATE OF RELEASE ON PAROLE IS SUBJECT TO THE APPROVAL OF PAROLE PLAN BY THE NEW JERSEY STATE PAROLE BOARD AND THE FOLLOWING SPECIAL CONDITION(S), IF ANY:

STATE PAROLE BOARD
Nicholas D. Heil, *Chairman*
Verner V. Henry, *Associate Member*
Mario R. Rodriguez, *Associate Member*

MEMORANDUM

TO: Governor's Committee on Negotiations
FROM: Governor William T. Cahill

January 31, 1972

I have received your recently submitted proposals concerning the parole system, and would offer the following comments:

First, there is no doubt that the Parole Board as presently constituted is inadequate to its important responsibilities. I, therefore, agree with recommendations that membership on the Board be a full-time position. I am also convinced that parole decisions must be reached with sensitivity to cultural differences and without any taint of racial prejudice.

However, rather than the 7 member categorically selected Board proposed, I believe that we should begin reform efforts with a fully staffed three-member Board. If, after initial experience, this proves inadequate, I will consider the addition of more members. Selection of Board members will be based upon qualifications, concern, and fairness. I will further solicit recommendations for membership from appropriate community groups and organizations.

In terms of staffing and professional consultation, whatever is necessary will be provided. Immediate effort will be directed to utilizing existing State resources more efficiently and through new liaison. In addition, the advisory assistance of professional organizations will be sought.

Second, as stated in my Annual Message, I concur with the recommendation that formal notification of the criteria and general factors in parole decisions should be made to all inmates.

Third, as also noted last month, I concur with the principle that those denied parole should be given a valid statement of reasons for such denial.

Fourth, the parole counsellors I have previously proposed seem to fit the description of the "designated representatives" outlined in your recommendations. They would have full-time offices at each of the institutions in the State prison complex and would have complete access to parole candidates records and files.

Fifth, it is agreed that parole decisions should be made on the basis of majority rather than unanimous vote. I will therefore submit legislation implementing this recommendation.

Sixth, the establishment of a parole criteria is most critical to a system which insures fairness to individuals and protects society. The factors and guidelines recommended will be taken under advisement. I view this as a priority area which must receive broad consideration.

Seventh, I agree that "parole plans" must be carefully formulated and more adequately evaluated by the Board. In addition, I will direct the restructured Board to work closely with the Bureau of Parole to establish direct liaison. In my opinion, the entire system including the parole counsellors, the Board and the Bureau of Parole, must be oriented to finding out what kind of person a parole candidate is, what his family and community resources are, and what degree of supervision he may require.

Eighth, the Division of Correction and Parole is now conducting training programs for corrections officers. I would take under consideration any evaluation and comments on this.

Ninth, I would agree that NJSA 30:4-123:12 has inherent inequities and is not in total accordance with established concepts of rehabilitation. The entire area of "offender status" as it relates to parole eligibility will therefore be taken under advisement. Again, I view this as a priority area.

Tenth, I agree that parolees should have legal counsel while appearing before the Board of Parole during parole revocation proceedings. Appropriate arrangements will be made.

Eleventh, the alleged lack of coordination and policy uniformity between the Rahway Sex Offender Treatment Unit and the Parole Board will be investigated and indicated remedial action taken. I would agree in principle that sex offenders should be treated in facilities separate from the Rahway institution. However, in view of the pending recommendations for a bond issue to fund new prison construction, any commitment on this would be premature.

Twelfth, the parole eligibility of persons with a life sentence is a subject which is of concern and is included in general proposals concerning eligibility requirements. In this connection, an expression of the U. S. Supreme Court's views as to the constitutionality of the death sentence in contemporary society will provide important guidelines.

Thirteenth, again the committee's concept of a "parole counsellor" is essentially the same as that outlined in my Annual Message.

Fourteenth, the proposals concerning the need for bi-lingual personnel and Spanish interpretors are agreed to as written.

NOTES

1 Testimony of Male Victim, *Direct*, p. 24.
2 *Id*. at p. 28.
3 Testimony of Female Victim, *Direct*, pp. 92-98.
4 Testimony of Arresting Officer, *Direct*, pp. 66-67, 69-70.
5 *Id*. at p. 68.
6 *Id*. at 70-71.
7 Hereinafter referred to as: Female Defendant #1 and Female Defendant #2.
8 Hereinafter referred to as: Male Defendant #1, Male Defendant #2, and Male Defendant #3.
9 Ranged in age from sixteen (Female Defendant #1) to twenty-two (Male Defendant #3).
10 *Indictments* set out above.
11 Testimony of Arresting Officer, *Direct*, p. 73.
12 Trial of November 4-15, 1963, Camden County Court, Criminal Division.
13 Clinton Reformatory for Women, Bordentown Reformatory, Rahway State Prison, Trenton State Prison.
14 Listed on same *Indictments* as other Defendant, *see* above; but not apprehended in time to be tried with the others.
15 *See* above for complete court information.
16 *See* Indictments.
17 Arresting Officer identified by name in actual transcript.
18 Testimony of Arresting Officer, *Direct*, p. 78.
19 Testimony of Female Victim, *Direct*, pp. 96, 98.
20 *Id*. at 91.
21 *Id*. at 82 ff.
22 *Id*. at 88.
23 *Id*. at 90.
24 Named in all original indictments; arrested at the scene behind the wheel of the car in which the Female Victim was raped.
25 Brother of defendant Robert Lewis; arrested near the scene the evening of the crime. Constant problem in distinguishing between James Lewis and Robert Lewis in the testimony; *see* p. 96, Transcript.
26 Apprehended at the scene; caught in the act of attempted rape; pleaded guilty to all charges in the indictments.
27 Prosecutor, speaking to witness Female Victim, *Direct*, p. 91. An example of the grossly leading questions permitted on Direct Examination by the State; the witness was anything but hostile!
28 Robert Lewis, Testimony: on *Direct*, p. 175 ff; on *Cross*, p. 189 ff.
29 Testimony of Male Victim, *Direct*, p. 29.
30 No objection here; *note* no objection at note 27 either.
31 And was serving a prison sentence of 56-64 years as this trial was in progress.
32 Female Defendant #1, indicted on all charges; pleaded guilty to all charges.
33 At the Womens' Reformatory in Clinton, New Jersey.

34 Testimony of Female Defendant #1, *Cross*, pp. 53-54.
35 Testimony of Female Victim, *Direct*, p. 93.
36 In 1964.
37 Testimony of Female Defendant #1, *Cross*, p. 54.
38 Male Defendant #3; *see* testimony of Arresting Officer, *Direct*, pp. 66-67.
39 At the same trial as Male Defendants #1 and #2; *see* note 12.
40 At the Bordentown Reformatory; see testimony of Male Defendant #3, *Direct*, p. 140.
41 Testimony of Male Defendant #3. *Direct*, pp. 140 ff.
42 *Id*. at 144.
43 *Id*. at 145.
44 *Id*.
45 *Id*. at 145-146.
46 *Id*. at 152-170.
47 Testimony of Male Defendant #3, *Cross*, pp. 162-169.
48 Testimony of Robert Lewis, *Direct*, pp. 175 ff; *Cross*, pp. 189 ff.
49 *See* notes 7. 32. 34, 37.
50 Testimony of Robert Lewis, *Cross*, p. 208.
51 COURT, *Transcript*, p. 187 (emphasis added).
52 Testimony of Female Victim, *Direct*, p. 87.
53 *Id*. at 89, 95.
54 *Id*. at 89.
55 Testimony of Arresting Officer, *Direct*, p. 80.
56 Perhaps a wise tactical decision from *Mitchell's* point of view; a reading of the transcript, however, clearly reveals that the two defendants did *not* have an equal interest in establishing (or failing to establish) ownership of a certain coat.
57 Severance could only have been to Lewis' benefit. Since the dual defense was conducted by two attorneys, the jury treated Lewis and Mitchell as a coupled entry. Therefore, if convinced that one defendant was more credible than the other, the jury could either *extend* the presumption of reasonable doubt and *free* both, or *retard* the presumption and *convict* both. It was an all-white jury; both the victims were white; the defendants were all black. It was 1964. Regardless of such considerations, it simply appears that the evidence against Mitchell was far stronger and more complete than the evidence against Robert Lewis.
58 *Transcript*, p. 300 ff.
59 Prosecutor's Summation, pp. 306-307.
60 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961).
61 380 U.S. 609, 95 S.Ct. 1229, 14 L.Ed.2d 106 (1965).
62 386 U.S. 18, 87 S.Ct. 1283, 17 L.Ed.2d 705 (1967), reh. den. 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241.
63 *See* note 12, *supra*.
64 *Transcript* of trial at note 12, *supra* pp. 912-913.
65 *See* note 19, *supra*.
66 The test for inadequacy of counsel (sufficient to sustain a reversal) has been stated as the requirement that the defense attorney's services be

> "so inadequate as to amount to no counsel at all and to reduce the trial to a sham and a mockery of justice."

Flowers v. State, 43 Wis.2d 352, 365, 168 N.W.2d 843, 850 (1969), *citing State v. Cathey*, 32 Wis.2d 79, 83, 145 N.W.2d 100, 103 (1966) with approval.

But *see State v. Harper*, 57 Wis.2d 543, 205 N.W.2d 1 (1973) which, in specifically overruling the previous cases, adopted *the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function*, APPROVED DRAFT, 1971. §§ 3.2. 3.6, 3.9, 4.1. and 5.2.

67 *See* Waltz, J.R. *Inadequacy of Trial Defense As A Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. L. REV. 289 (1965), *especially notes* 157-167, *and Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

68 Testimony of Arresting Officer, *Direct*, p. 69.

69 Verdict of Jury, *Transcript*, pp. 358-360. The savagery of this sentence, however, can only be attributed to the judge. I term this sentence savage not only because of the obviously conflicting testimony in Lewis' case, but also because such sentences are *contrary* to the best interest of all society in that they materially *increase* the probability of a given offender's future criminal activity. Robinson and Smith, writing in the January 1971 issue of CRIME AND DELINQUENCY, speak to this point:

> It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for crime-free future adjustment and that regardless of which "treatments" are administered in prison, *the longer he is kept there the more he will deteriorate and the more likely it is that he will recidivate*.

The Effectiveness of Correctional Programs, pp. 71-72, (emphasis supplied).

70 On April, 26, 1966, the Superior Court of New Jersey, Appellate Division, affirmed the verdict of the original trial court, but called for the imposition of sentence on rape to be *concurrent*, rather than consecutive, with that for kidnapping, while leaving the atrocious assault and battery sentence to be served as a separate entity. For the specific language of the reviewing court, *see* note 224, *infra*.

State v. Lewis, 93 N.J.Super 212, 225 A.2d 582 (1966): the Superior Court, Appellate Division, on remand from the New Jersey Supreme Court, vacated the C.C.W. charge.

Lewis v. New Jersey, cert. den. 386 U.S. 986, 87 S.Ct. 1297, 18 L.Ed.2d 238 (1967); Memorandum Case No. 1272, Misc., March 27, 1967.

Lewis v. Yeager, 285 F.Supp. 780 (D.N.J. 1968), petition for writ of *habeus corpus* denied; aff'd *Lewis v. Yeager*, 411 F.2d 414 (C.C.A.3d Cir. 1969).

Lewis v. New Jersey, cert. den. 396 U.S. 923, 90 S.Ct. 256, 24 L.Ed.2d 204 (1969).

The practical effect, from the sum total of *all* these appeals, was to reduce Lewis' sentence from 50-57 years to 36-42 years.

71 Pursuant to Order and Decision of the New Jersey State Parole Board, received by Robert Lewis in August, 1973.

72 Sept. '71-Oct. '73; June 1972.

73 Interview with Robert Lewis (New Jersey State Prisoner #42061), August 16, 1973, recalling entrance to prison and attitudes at the time. From author's notes.

74 N.J.S.A. 2a:l64-l7.

75 N.J.S.A. 30:4-123.14, 123.15, 123.17, 123.19.

76 *See*: *Construction and Application*, N.J.S.A. 30:4-123.14 (p. 221), 30:4-123.15 (p. 222), 30:4-123.19 (p. 225).

77 *State v. Moore*, 21 N.J.Super. 419, 91 A.2d 342 (1952); *In re Larson*, 44 Cal.2d 642, 283 P.2d 1043 (1955), app. dism. 350 U.S. 928, 76 S.Ct. 312, 100 L.Ed. 811 (1956).

78 Mostly through jailhouse gossip, the "grapevine," and the grossly inadequate (based on author's personal observation and knowledge of a pending lawsuit demanding a minimum quota of books) Prison Law Library at Trenton State Prison.

79 And this can be found nowhere in the New Jersey Statutes Annotated, regardless of how closely read.

80 *See*, for example: *New Jersey State Prison Inmates Rule Book.*

81 *Id*. at 14-16, "General Rules," revised May, 1972.

82 *Id*. at 17, "Infraction of Rules."

83 *Id*. at 14-16, "General Rules."

84 *Id*.

85 *Id*. at 8.

86 Trenton is New Jersey's (and one of the nation's) oldest prisons; it is also the state's most "secure," even including a maximum-maximum "Administrative Segregation Unit" to which inmates can be confined, without a semblance of due process, for an "indefinite period." *See*: *Inmates Rule Book, supra*, p. 19 *and* cases such as *Urbano v. McCorkle*, 334 F.Supp. 161 (D.N.J. 1971) which, while paying lip service to need for due process in such a situation, provide no genuine remedy to prisoners injured by its absence. Notice in writing of (vague) charges and an opportunity to explain them away (before a tribunal consisting of one's accusers *and* one's judges in their same persons) as hardly even the "minimal" due process the Court required in this case.

87 *Inmates Rule Book*, p. 7.

88 *Id*. at 27-28.

89 Trenton State Prison; Rahway State Prison.

90 Leesburg State Prison.

91 Rahway Camp; Leesburg Farm.

92 *See* "We find that dissatisfaction with the parole system in Connecticut is a *major cause* of unrest among inmates." (emphasis supplied), *Parole in Connecticut 1957, A Comment and Proposal, State of Connecticut, A Unified System of Correction, Final Report of the Prison Study Committee* (April 1957), as quoted in Donnelly, Goldstein, and Schwartz, *Criminal Law*, The Free Press, New York (1962) , p. 207. In fact, it appears that the less the prisoner knows about his chances for release, the more tension results. The following is a statement by a prisoner in the California system, (in which the paroling authority is often the sole arbiter of length of sentence):

> Under the California Penal System, a prisoner has no idea at all as to when he will be released to parole supervision. And this guessing game only infuriates him and increases his distrust of the penal system. ******* Perhaps if he knew the exact date of his release from prison, his wife and family would have something concrete to look forward to, not to mention the fact that *he would be less inclined to do anything that might cause him to get his release date taken away from him*.

Hassan, A. THE PIT, *in* Pell, E., ed. *Maximum Security*, New York, New York: E.P. Dutton & Co., Inc., Inc. (1972), p. 17-18.

See also, note 144, *infra*.

93 General Equivalency (High School) Diploma.

94 A college-level program set up by cooperation between Mercer County Community College and the New Jersey Bureau of Institutions and Agencies, financed with a grant from the

Law Enforcement Assistance Administration, utilizing "electronic" teaching via closed circuit television beamed into the two maximum and one medium security prisons. Utilization by prisoners was not high because of frequent breakdowns in the equipment and lack of sufficient personal feedback. However, some prisoners did earn college credits which were accepted towards graduation when they left the prison. *See* 7 NEW JERSEY CORRECTIONS 1 (1971), the official publication of the New Jersey Department of Institutions and Agencies.

95 That is, *accused* of violating one of the myriad institutional rules. *Note*: accusal is virtually tantamount to "conviction," given the lack of procedural due process and the unique prison method of having an inmate's case tried by his own accusers.

96 Placed in "segregation" or some form of solitary confinement as punishment for infraction of institutional rules.

97 Interview with (deliberately) unnamed prisoner, Rahway State Prison, June, 1972.

98 The speaker has been in *all* of New Jersey's prisons, maximum, medium, and minimum, during the past thirteen years.

99 Referring to prisoners with long sentences, mostly "lifers."

100 This focus on athletic equipment is common among a class of prisoners known, with varying degrees of respect, as "iron freaks."

101 *See Inmate Rule Book*, pp. 27-28.

102 A common negotiating demand during and following most prison riots. Also, a point often litigated; *see Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971) and *Burnham v. Oswald*, 342 F.Supp. 880 (W.D.N.Y. 1972).

103 Interview conducted at Leesburg State Prison, July, 1972.

104 Refers to Group Counseling (Group Therapy), a program which is strictly "voluntary" (in spite of the speaker's obvious belief that participation is prerequisite to parole consideration!).

105 Ranging from Group Discussion to Stamp Club to Inmate's Forum.

106 Mercer County Program; *see* note 94, *supra*.

107 Verified by letters and phone calls from speaker's friends and supporters to author.

108 Interview at Trenton State Prison, August, 1973.

109 In solitary confinement.

110 Stabbing other inmates and/or custodial personnel.

111 Leesburg Prison Farm. June, 1973.

112 Receive a parole.

113 Interview at Rahway State Prison, May, 1971.

114 *Affidavit* of Charles Culver, N.J.S.P. #48075, October 16, 1973.

115 *Affidavit* of Elon Gonzales, N.J.S.P. #47132, October 16, 1973.

116 Incarcerated.

117 *Affidavit* of Charles Cook, N.J.S.P. #49985, October 16, 1973.

118 Griswold, Misenheimer, Powers, & Tromanhauser, *An Eye For An Eye*, New York: Holt, Rinehart & Winston (1970).

119 *Id*. at 250.

120 N.J.S.A. 30:3-123.1.

121 *Id*.

122 This is certainly the rule, not the exception. *The National Advisory Commission on*

Criminal Justice Standards and Goals, Task Force on Corrections, Washington, D.C. (1973), p. 399 speaks to this problem:

> Some type of device must be employed if competent [parole] board personnel are to be selected. Each State should require by law that nominees for parole board positions first be screened by a committee broadly representative of the community. Representatives of groups such as the State bar and mental health associations should be included, as well as representatives of various ethnic and socioeconomic groups. The law should require that appointments be made only from the approved list of nominees.

123 N.J.S.A. 30:4-123.2.

124 N.J.S.A. 30:4-123.17 (emphasis added).

125 N.J.S.A. 30:4-123.19 (emphasis added).

126 N.J.S.A. 30:4-123.14.

127 Rubin, S. *The Burger Court and the Penal System*, 8 CRIMINAL LAW BULLETIN 31, 35 (1972). *Also*: consensus of interviews, personal contacts by, and letters to the author.

128 Griswold et al., *Id*. at 250.

129 *Parole and Hollow Victories*, in FORTUNE NEWS, October 1972, p. 9. The following excerpt is from the complete document "Convict Proposals Accepted by the State" which came out of the pre-massacre Attica negotiations. It was introduced into Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninety-Second Congress, First Session on Corrections, November 10, 1971, by Congressman Herman Badillo (New York). It is reproduced here exactly in the order given:

> 1. Provide adequate food, water, and shelter for all inmates.
>
> 2. Inmates shall be permitted to return to their cells, or to other suitable accommodations or shelter under their own power.
>
> 3. Grant complete administrative amnesty to all persons associated with this matter. By complete administrative amnesty the state agrees:
>
> A. *Not to take any adverse parole actions* ... [emphasis supplied].

I believe the presentation is self-explanatory as to priorities.

On November 3, 1970, the prisoners at Folsom State Prison in California went on "strike." They listed 31 demands, the *first* of which was as follows:

> 1) We demand the constitutional rights of legal representation at the time of all Adult Authority [Parole Board] hearings, *and the protection from the procedures of the Adult Authority* whereby they permit no procedural safeguards such as an attorney for cross-examination of witnesses, witnesses in behalf of the [potential and current] parolee at parole revocation hearings.

Pell, E., ed. *Maximum Security*, New York, New York: E.P. Dutton & Co., Inc., (1972), p. 181 (emphasis supplied).

See also Fox, *Why Prisoners Riot*, 35 FEDERAL PROBATION 9 (1971).

130 Martin, J. *Break Down the Walls*, New York: Ballantine Books (1954).

131 *Id*. at 93-94.

132 *Id*. at 209.

133 *Id*.

134 *Id*. at 222.

135 McGee, Richard A., Chairman of the American Prison Association Committee on Riots, *A Statement Concerning Causes, Preventive Measures, and Methods of Controlling Prison Riots and Disturbances*, (May 1953).

136 *Press Release,* from the Office of the Honorable Governor William T. Cahill of the State of New Jersey, January 3, 1972.

137 *Id*. at 2.

138 *Id*.

139 *Inmate Committee Proposal to Honorable Governor William T. Cahill*, January 27, 1972.

140 *Memorandum*; To: Governor's Committee on Negotiations, From: Governor William T. Cahill, January 31, 1972.

141 Of the 14 proposals acknowledged by the Governor, 11 have definitely *not* been enacted.

142 Prisoners who do not believe that the *stated* criteria are the *utilized* criteria cannot be said to have been put on notice. *Scarpa v. U.S. Board of Parole*, 453 F.2d 891 (5th Cir. 1971) order of dismissal; dismissal set aside 468 F.2d 31 (5th Cir.1972); rehearing denied 477 F.2d 278 (5th Cir. 1973):

> Of course, courts cannot reverse a denial of parole nor order a parole granted, but I suggest that no member of this court would hesitate a second to join in court action invalidating either a regulation by the Board or a proceeding by it if it were acknowledged that its action was a result of a policy or regulation to the effect that no consideration for parole would be given to any particular class of prisoners or to any person convicted of a particular crime. Such a course of action would be so obviously arbitrary and an abuse of discretion that it would be stopped in a moment. Tuttle, J., *dissenting* from final denial of rehearing at 285-286.

Scarpa maintained that he was denied a parole simply because of his prior criminal record; his appeal was finally lost by a 4-3 decision.

143 Sykes, Gresham M., *The Society of Captives, a study of a maximum security prison*, Princeton, New Jersey: Princeton University Press, 1971.

144 *Id*. at 52-53. This principle has been strongly endorsed by the country's leading organization of correctional authorities:

> An essential procedure in the prevention of institutional disturbances is having the inmates informed of their status, rights, and opportunities for self-improvement.

Causes, Preventive Measures, and Methods of Controlling RIOTS & DISTURBANCES in Correctional Institutions, Washington, D.C.: American Correctional Association (1970), p. 27.

145 Beginning with a 6th grade reading level at entrance to prison!

146 Lewis was eventually assigned to work in the Inmates Store Room, a position of great trust and responsibility since opportunities for graft are numerous. The ideal inmate for such a job must not only be honest enough to resist temptation, but strong enough to resist threats. Lewis was there for more than five years, with excellent reports. Confirmed by personal interviews with his Supervisor, Mr. Montgomery (conducted by Ramon Jimenez, hijo, *see affidavit* in preparation for Lewis' appellate brief, November, 1972).

147 Furniture upholstery, typing, store inventory.

148 The following mimeographed letter is in Lewis' file:

Office of the Principal Keeper
New Jersey State Prison
July 2, 1968

Inmate Robert Lewis
#42061 2 Left
New Jersey State Prison

Dear Robert:*****

A grateful prison administration extends sincere thanks to you for your help in extinguishing the fire that occured in the Prison Storeroom on Monday, June 17, 1968.

By your action you assisted in averting what could have become a very serious incident.

A copy of this letter is being forwarded to the Classification Department for inclusion in your record.

Sincerely yours,
/s/ H. Yeager
Principal Keeper

HY:eg
cc: Inmate's Folder.

*****This word was the only individually typed portion of the letter.

149 In September of 1971.

150 Speaker is counting the time spent in County Jail awaiting trial; this "county time" is traditionally "credited" towards the final sentence pronounced, which works out fine if the prisoner is found guilty but extracts an unconscionably high price from an individual found innocent who "served a sentence" merely because he could not obtain bail.

151 Letter from Robert Lewis, September 5, 1971, author's personal file.

152 *See* Parole Denial, APPENDIX 6.

153 *Id*.

154 *See* generally *Transcript*.

155 Letter from Robert Lewis, September 5, 1971, author's personal file.

156 Letter from Robert Lewis, October 2, 1971, author's personal file.

157 *Id*.

158 In October of 1973. Compare Lewis' "hearing" with the standards proposed by *The National Advisory Commission on Criminal Justice Standards and Goals* (note 122. *supra*.)

> Development of guidelines for desirable parole hearings should attend to several concerns simultaneously. First, such hearings should provide parole authorities with as much relevant and reliable information about each case as possible. Second, *the hearing process itself should carry the hallmark of fairness*. Not only should it be a fair determination in substance, but to the extent possible *it should also be perceived by the inmate as fair*. Third, as far as practicable the hearing *should enhance the prospects for an inmate's successful completion of his parole [requirements]*.

p. 401, (emphasis supplied).

The prevailing view of the prisoner population as to the "fairness" of a typical parole grant hearing is brutally exemplified in a 1939 movie of the gangster genre of that period: *Each Dawn I Die*, with James Cagney and George Raft. Cagney is a crusading newspaper reporter trying to expose a corrupt ring of state politicians. He becomes such a menace to the power brokers that he is framed and sent to prison for a crime he didn't commit. After months of undeserved ill treatment (including 6 months in solitary), he is finally brought before the Parole Board only to find that the man he was trying so hard to expose is now the *Chairman* of the Board. This individual asks Cagney:

> Do you still contend that you're innocent?
>
> Yes!
>
> Then you have no use for us; we're only here to help men who admit their guilt [*see* note 408, *infra*].

When Cagney finally breaks down under the gross unfairness of his whole situation, he is blithely told "We'll do what we can for you," by a pompous Board member.

What the Board can do for the hapless Cagney turns out to be a 5-year "hit" [*see* note 160, *infra*].

Although this ancient movie is generally seen as a parody by modern observers, those same observers would be horrified at the movie's accuracy if they but knew the truth!

159 *See* note 155, *supra*.

160 Interview at Trenton State Prison, May, 1973.

161 Ramon Jimenez, hijo and James Spencer, Harvard Law School, 1974.

162 17 N.J.Super. 99, 85 A.2d 338 (1952).

163 N.J.S.A. 30:4-123.5.

164 54 N.J. 315, 255 A.2d 223 (1969).

165 388 F.2d 91 (6th Cir. 1968), *see dissent* of Celebreeze, J. at p. 99, cert. den. 392 U.S. 946, 88 S.Ct. 2300, 20 L.Ed.2d. 1408.

See also: *Ughbanks v. Armstrong*, 208 U.S. 481, 487-488, 28 S.Ct. 372, 374-375, 52 L.Ed. 582, 583-584 (1908), *People ex rel. Kurzynski v. Hunt*, 25 F.Supp. 647 (W.D.N.Y. 1938), *Fleming v. Tate*, 156 F.2d 848 (D.C.C. 1946), *U.S. ex rel. Holderfield v. Ragen*, 170 F.2d 189 (7th Cir. 1948), cert. den. 336 U.S. 906, 69 S.Ct. 485, 93 L.Ed. 1071 (1949), *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880, 71 S.Ct. 192, 95 L.Ed. 639 (1950), reh. den. 340 U.S. 907, 71 S.Ct. 277, 95 L.Ed. 656 (1950*), U.S. ex rel. McNelis v. Pennsylvania Board of Parole*, 141 F.Supp. 23 (W.D.Pa. 1956), *Latham v. U.S.*, 259 F.2d 393 (5th Cir. 1958), *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965), *Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968*), Godoy v. United States Board of Parole*, 345 F.Supp. 1292 (C.D.Cal. 1972).

166 95 N.J.Super. 351, 231 A.2d 236 (1967).

167 43 N.J.Super. 262, 128 A.2d 513 (1957).

168 11 N.J.Super. 576, 78 A.2d 734 (1951).

169 17 N.J.Super. 580, 86 A.2d 422 (1952).

170 48 N.J.Super. 309, 137 A.2d 575 (1958), aff'd. 25 N.J. 500, 138 A.2d 42.

171 9 N.J. 443, 88 A.2d 606 (1952), cert. den. 72 S.Ct. 1085, 343 U.S. 987, 96 L.Ed. 1374.

172 9 N.J.Super. 511, 75 A.2d 636 (1950), aff'd. 14 N.J.Super. 213, 82 A.2d 8.

173 67 C.J.S. § 20.

174 *See* for example: *Adinolfi* and *Damato*, *supra*, notes 167, 168, construing N.J.S. 30:4-123.5.

175 104 N.J.Super. 294, 250 A.2d 19 (1969), aff'd. 55 N.J. 113, 259 A.2d 713, cert. den. 398 U.S. 938, 90 S.Ct. 1841, 26 L.Ed.2d 270.

176 58 N.J. 238, 277 A.2d 193 (1971).

177 *See also Tate v. Henderson*, 453 F.2d 358 (5th Cir. 1971), vacated and remanded 470 F.2d 971 (1972), cert. den. (as to another form of relief sought)—U.S. —, 93 S.Ct. 1515, — L.Ed.2d — (1973). Here petitioner was a federal prisoner denied parole; he claimed this was *solely* on the basis of his former status as a narcotics addict [a thought-proving assertation, especially in light *of Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)], and that he had not been permitted to apply for a "Certificate of Non-Addiction" to counteract this label. The court directed the Board to give specific reasons for denial *or* reveal if petitioner's alleged narcotics dependency had affected his chances for parole. The Board furnished the certification of non-addiction but did *not* grant parole; the court then ordered the Board to conduct an immediate rehearing in which petitioner's non-addictive status would be given consideration in its deliberations. In *Barradale v. U.S. Board of Paroles and Pardons*, 362 F.Supp. 338, 340 (M.D.Pa. 1973), the court held that disclosure of reasons for parole denial was not *constitutionally* mandated. However, the court *in U.S. ex rel. Harrison v. Pace*, 357 F.Supp. 354, 356-357 (E.D.Pa. 1973) stated:

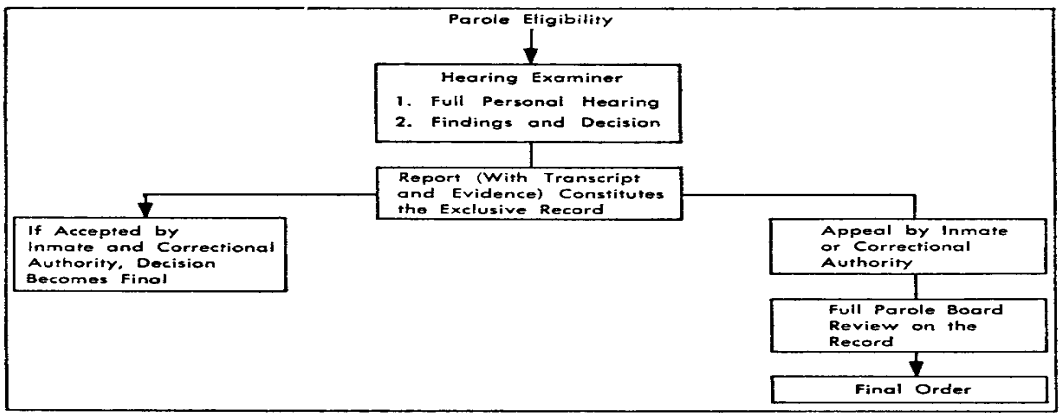
> [W]e hold that a prisoner's interest in the grant or denial of parole is entitled to constitutionally protected due process considerations, limited to a statement of reasons upon denial of each parole.

Finally, in *U.S. ex rel. Johnson v. New York State Parole Board*, 363 F.Supp. 416, 418 (E.D.N.Y. 1973):

> [O]nly if a statement of reasons is given can the denial of parole serve its legitimate function, to direct the prisoner toward effective rehabilitative effort, and avoid becoming *meaningless and unenlightening castigation.* (emphasis supplied).

178 Following his initial parole denial in September, 1971, *see* APPENDIX 4. If the recommendations of *The National Advisory Commission on Criminal Justice Standards and Goals* (notes 122, 158, *supra*) were followed, an inmate would have a goodly number of *administrative* steps at his disposal which might well resolve any difficulties *without* the need for recourse to the courts. The *Commission's* model is set out below: notice that an inmate would only see the full Board if there was a dispute concerning its decision; if the full Board were to sit, it would be furnished a *transcript* of the initial hearing, which would later be available to the prisoner should he wish to contest the "Final Order" in the courts.

HEARING EXAMINER MODEL
Figure 12.1 Page 404



179 63 N.J. 348, 301 A.2d 727 (1973).

180 *Notice of Motion for Remand, Supporting Affidavits and Brief.*

181 *Id*. at 5.

182 *See* Parole Denial, APPENDIX 4.

183 This kind of statement from the Board is sheer hypocrisy. The clear intent of *all* minimum-maximum sentencing is to provide a sentence tailored to the rehabilitative needs of the individual and of society.

> The purpose and object of a parole system is to mitigate the rigor of the old [fixed sentence], and ... to provide a more humane management and prison discipline under which there is extended to those who may show a disposition to reform and whose reformation may reasonably be expected, *a hope and prospect of liberation from the prison walls*, under the restrictions and conditions of a parole.
>
> *Roberts v. Duffy*, 167 Cal. 629, 637, 140 P. 260, 263 (1914). (emphasis supplied).

The Board's position that Lewis' *sentence* had not yet expired when his parole *eligibility* had already been established is a perversion of the enabling legislation that gave it life!

184 The only report that could remotely be described as "professional" received by the Board was that of the thoroughly-discredited Dr. William R. King, *see* notes 319-326, *infra*.

185 Typical language for the Board. In reality, all the items listed in this sentence arose out of a *single* incident in which Lewis *protected* a weaker inmate from a homosexual attack by another! However, if Lewis, or any *other* inmate *had* engaged in homosexual behavior, or as the Board usually puts it, "homosexual incidents," what would this prove in terms of the inmate's suitability for parole? Sykes, *see* note 143, *supra* described the situation at Trenton State Prison as follows:

> [A] fairly large proportion of prisoners engage in homosexual behavior during their period of confinement. [F]or many of those prisoners who do engage in homosexual behavior, their sexual deviance is rare or sporadic rather than chronic. [A]s we have indicated before, much of the homosexuality which does occur in prison is not a part of a life pattern existing before and after confinement; rather, it is a response to the particular rigors of imprisonment.

Footnote 11 (author's) at p. 72. The Board's vagueness is completely inexcusable here: it either gives a viciously distorted picture of the inmate and his personality, or it displays an ignorance of the day-to-day deprivations of a maximum security prison that taxes credulity.

186 This kind of platitude has never been a comfort to an incarcerated individual, *see* notes 114-117 *supra*.

187 The Psychiatrist was Dr. King, *see* notes 319-324, *infra*.

188 The word "apparently" is used here because, in this writer's opinion, the *Beckworth* decision never reached the real issues of *standards* in parole decision-making. It appears to this author that *Beckworth* only failed to reach the essential issues because it was *not asked to by the petitioners!* The most recent federal case on the subject, *Childs v. U.S. Board of Parole*, — F.Supp. — (USDC D.C. 1973), 14 CR.L. 2135, seems more than willing to expand the *Monks* [note 176, *supra*], and *Morrisey* [note 437, *infra*] holdings into a workable pattern of judicial enforcement as regards the rights of an applicant before the Parole Board:

> When we examine the nature of the interest of the parolee facing revocating and that of the parole applicant in the light of the ultimate effect of the Parole Board's determination, *it appears obvious that the difference is not enough to exclude the applicant from due*

process protections. This is so simply because the stakes are the same, incarceration or conditional freedom. *Contra, Scarpa v. U.S. Board of Parole* [citation omitted, *see* note 142, *supra*].

****

The court also observes that the implementation of the requested protections will case a comparatively light burden on the defendant [Parole Board]. *******

In view of the foregoing the court concludes as follows: 1. Defendants must provide narrative written statements of reasons *based upon salient facts or factors* in each case to all prisoners whose applications for parole are acted upon and not granted commencing no later than 90 days hence. 2. Defendants are to submit to the court within 60 days proposed regulations governing access by a prisoner to the information which will [be] before the Board and the submission of responses on behalf of parole applicants, and 3. Defendants are to submit to the court within 60 days proposed procedures for conveying to prisoners *reasonably comprehensive explanatory guidance as to be criteria to be considered in passing upon applications for parole*.

****

Findings of Fact: 1. The Board does not presently provide, on a routine basis, statements of its reasons for not granting parole. 2. The Board's failure for its reasons to convey decisions not to grant parole has an impact upon parole applicants which *includes both the appearance and reality of lacking fundamental fairness*. 3. Under the Parole Board's present practices and procedures there exists *a substantial danger that a significant number of decisions not to grant parole are made without reasoned consideration of the relevant facts and factors in each case* and are, therefore, arbitrary and capricious. 4. The Board's failure to require that decisions not to grant parole include stated reasons of any kind *fails to provide reasonable assurance that such decisions will be reasoned decisions, based upon the facts of each case, rather than arbitrary or capricious decisions*. 5. The sources of said danger of error include evidence of filing errors and omissions; confusion stemming from instances of mistaken identity; possible reliance upon outdated and superceded information; reliance upon unsubstantiated assertions; reliance upon conflicting, unclear, and in some instances not apparently reliable psychological testing data and similar information; and the like.

ld at 2136 (emphasis supplied).

189 Letter from Robert Lewis, July 9, 1972, in author's personal files.

190 Set out in full, APPENDIX 7.

191 *Id*.

192 *Task Force on Corrections*, Washington, D.C.: U.S. Government Printing Office, (1967).

193 *Id*. at 62.

194 Parsons-Lewis, Harold S., *Due Process in Parole Release Decisions*, 60 CAL. L. REV. 1518, at 1520 (1972).

195 *See* notes 164-172, *supra*.

196 *Hyser v. Reid*, 115 U.S. App. D.C. 254, 318 F.2d 225 (D.C.Cir. 1963).

197 *Id*. at 233.

198 Author *of Administrative Law Treatise* in 6 volumes and numerous other works on Administrative Law. Generally acknowledged to be the leading authority in this field.

199 5 U.S.C. § § 500 ff.

200 Davis, Kenneth Culp, *Discretionary Justice, A Preliminary Inquiry*, Chicago: University of Illinois Press (1971), p. 129.
201 Davis, *Administrative Law Text*, 3d ed. (1972), p. 187.
202 Davis, *1 Administrative Law Treatise*, §7.20.
203 *Id*. at 506.
204 *Id*. at § 7.20.
205 *Id*. at 508.
206 *See* note 179, *supra*.
207 *Id*. at 738.
208 *See*: *Brannan v. Stark*, 185 F.2d 817 (D.C.Cir.), 87 U.S.App.D.C. 388, aff'd. 342 U.S. 451, 72 S.Ct. 433, 96 L.Ed. 497 (1950) *in* U.S.C.A. §551, Note 8 "Agency Powers," p. 53.
209 *See*: *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970). Accord: *Alverez v. Turner*, 422 F.2d 214 (10th Cir. 1970), cert. den. sub. nom. *McDorman v. Turner*, 399 U.S. 916, 90 S.Ct. 2221, 26 L.Ed.2d 574 (1970).
210 *Monks*, note 176, *supra*, at 197; Sullivan, P.J.A.D. (concurring).
211 "Probation Officers" in the federal jurisdictions serve as both probation and parole officers.
212 In the Second Session of HR 13118, Identical and Related Bills, to Improve and Revise the Procedures and Structure of the Federal and State Parole System, February 1972.
213 *Id*. at 105.
214 13 Cr.L. 2491 (1973).
215 *Id*.
216 Parsons-Lewis, note 194, *supra*.
217 *ld*. at 1533.
218 *Task Force on Corrections*, note 192, *supra*, p. 86.
219 Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1465-1466 (1960).

> No matter how the sentencing decision is reached, and no matter how many times it is reviewed, the average defendant is likely to base his judgment of its fairness on a shallow comparison of his sentence with the sentence that others have received for similar offenses. The concept of punishment tailored to the offender as well as the offense is unlikely to be appreciated.

In Miller, Dawson, Dix, and Parnas, *Criminal Justice Administration and Related Processes*, THE CORRECTIONAL PROCESS, Mineola, New York: The Foundation Press (1971), p. 1000.
220 Bennett, *Countdown for Judicial Sentencing*, in OF PRISONS AND JUSTICE, S.Doc. No. 70, 88th Cong., 2d Sess. 328, 331 (1964). Levin, *Toward A More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966).
221 Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, 11 PRAC. LAW 12 (Feb. 1965). Doyle, *A Sentencing Council in Operation*, FED. PROB. Sept. 1961, p. 27.
222 Kennedy, *Justice is Found in the Hearts and Minds of Free Men*, 25 FED. PROB. 3 (Dec. 1961).
223 Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 264 (1952).

> [T)here is probably more appellate review [of sentencing) than appears on the surface where courts reverse on what would otherwise be dismissed as harmless error because the record shows extreme severity or prejudice in sentencing.

224 Superior Court of New Jersey, Appellate Division, Docket No. A-284-64, April 26, 1966:

> [W]e agree that the consecutive sentences of 30-35 years for kidnapping, 14-15 years for rape, and 6-7 years for atrocious assault, a total of 50 to 57 years, were excessive. He was 19 years old at the time of the offense; his only prior record was an arrest [no conviction] for auto larceny; and the victim did not identify him as one who actually raped her.

225 Miller, et al., note 219, *supra* pp. 1002.

> (T]he requirement that the sentencing judge articulate the basis for his sentence will assist him in developing for himself a set of consistent principles on which to base his sentences; and the articulation in written opinions of the basis for a modification by an appellate court should lead to similar development on a more widely applicable scale.

226 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953) (dissent).

227 *Id*. at 217, 632, 966.

228 *See*: *Landman v. Royster,* 333 F.Supp. 621 (E.D.Va. 1971*); Inmates of Attica v. Rockefeller,* 453 F.2d 12 (2d Cir. 1971); *Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971).

229 *See,* for example, *Howard v. Warden,* 348 F.Supp. 1204 (E.D.Va. 1972); *United States v. Gaines,* 449 F.2d 143 (2d Cir. 1971).

230 *See* note 210, *supra*.

231 *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

232 *Id*. at 248, 1084, 1343, [footnote to another source omitted].

233 Dawson, Robert O., *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* WASHINGTON UNIVERSITY LAW QUARTERLY. Vol. 1966, No. 3 (June 1966).

234 *Id*. at 251.

235 Presumably the primary consumers of the benefits and detriments of any criminal justice system.

236 29 East 22nd Street. New York City, New York 10010.

> The Fortune Society has as its basic purpose to create a greater public awareness of the prison system in America today. We also hope to help the public realize the problems and complexities confronted by the inmates during their incarceration and when they rejoin society.

Fortune News, (in every issue, under the group's logo).

227 *Parole and Hollow Victories,* FORTUNE NEWS, October 1972, p. 9.

238 Dr. Menninger is the author of *The Crime of Punishment,* New York, The Viking Press, 1968 and numerous other books and articles on criminological subjects.

239 *Id*. at 82.

240 Dawson, note 233, *supra*.

241 *Id*. at 247.

242 Cohen, Fred *The Legal Challenge to Corrections,* (Consultant) Chapter III of JOINT COMMISSION OF CORRECTIONAL MANPOWER AND TRAINING.

243 N.J.S.A. 30:4-123.17. 123.18.

244 *Id*.

245 *Report—Proposed Official Draft*, May 4, 1962.

246 *See* Ohlin et al, *infra* notes 264, 266, 333, 340, 359, 364, 370.

247 Model Penal Code, Proposed Official Draft, 1962 §305.10.

248 *Id*. at (292).

249 Although it has been cited with approval in such recent cases as *Beckworth*, *see* note 179, *supra*.

250 *Id*. at (4). And *see*: Teitelbaum, W.J. *The Prosecutor's Role in the Sentencing Process: A National Survey*, I AMERICAN JOURNAL OF CRIMINAL LAW 75 (1972).

> Though prosecutors generally believe that their participation [in the sentencing process by way of recommendations to the judge] contributes to the effectiveness of the criminal justice system, the value of their contribution remains questionable. The significance of deterrence and retribution as goals of the criminal law [*see* Affidavit, APPENDIX Number 4 *and* note 182. *supra*] probably diminishes at the final stages of the judicial process while the rehabilitative goal becomes an increasingly central concern. The widespread practice of prosecutorial sentence recommendations, however, *detracts from rehabilitation's importance as a goal of the criminal law exactly at the time when it should be emphasized*.

Id. at 82, (emphasis supplied). Query as to whether (4) of § 305.10 should be eliminated altogether.

251 *See*: Dawson, *supra* note 233.

252 And if it is *not* so assumed, it is merely revenge, and this discussion is irrelevant.

253 Even if only more mature, as the petitioner is certainly *older*. And this "rehabilitation" should happen relatively quickly if it is to happen at all.

> The reason for this section [recommended changes in 18 U.S.C. §4205] stems from the large and respectable body of knowledge which has concluded that extended confinement produces clearly adverse effects—institutionalization and psychological deterioration, chiefly. The rule of thumb in the field seems to be that confinement for more than 3-5 years doubtfully can produce any benefits. If the prisoner has not been "rehabilitated" by that time, all that faces him is deterioration.

Analysis of "Parole Improvement and Procedures Act of 1972" *and Comparison to Existing Law and Regulations*; Subcommittee No. 3, Committee on the Judiciary, House of Representatives. Washington, D.C. Section: "Release on Parole," p. 2.

254 Example: Robert Lewis waited 8 years.

255 Unless we take them in order of numerical mention and assume they are to be so weighted. But it would be difficult to conceive the recommendation of a sentencing judge (4) in the *past* would be considered a more important factor in parole determination than a *current* psychiatric report (5).

256 Copy sent to the Office of the Public Defender, State of New Jersey.

257 *Id*.

258 Griswold et al., note 118, *supra*.

259 A term of approval among inmates: a "good thief" is to be distinguished from a non-professional ("citizen" or "farmer") and a sexual deviant ("skinner") by his adherence to a convict code of "do your own time" and his commitment to a life-style of criminality.

260 When "good time" is subtracted from a fixed sentence, the prisoner is able to calculate to the exact day when he will be released, even if never paroled. This is called "wrapping up" (in

areas like Massachusetts), "maxing out" (in areas like New Jersey) and has similar descriptive terms in other jurisdictions.

261 Griswold et al., note 118, *supra*, p. 80.

262 By organizations such as the Fortune Society *see* note 236, *supra* and various reformers in and out of prison, *see* APPENDIX 2, 3.

263 *Compare* Model Penal Code §305.10, note 247, *supra* and N.J.S.A. 30:4-123.17, 123.18, note 124, *supra*.

264 Burgess Ernest W., *Factors Determining Success or Failure on Parole*, *in* THE WORKING OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS, Bruce, A.B., Harno, A.J., Burgess, E.W., and Landesco, J. Springfield: Illinois State Board of Parole, 1928, pp. 205-249.

265 Currently the Co-Director of the Harvard Law School Center for Criminal Justice, Cambridge, Massachusetts.

266 New York: Russell Sage Foundation (1951).

267 In spite of *parens patraie* euphemisms, recidivism and its prediction is apparently the sole concern of the Board, *see* note 355 *infra*.

268 Ohlin. *Selection for Parole*, p. 130.

269 *Id*. at 70.

270 Following his conviction, Lewis was sent to the State Diagnostic Center in Menlo Park, New Jersey, pursuant to N.J.S.A. 2a:164-3 (*see Transcript*, p. 360) so that a pre-sentence report could be prepared. If Lewis had been diagnosed as a "sex offender," the statute would have mandated his confinement in a psychiatric facility, since the purpose of the Act is to give those who come within it treatment, *not* punishment. [*State v. Mickschutz*, 101 N.J.Super. 315, 244 A.2d 318 (1968)]. Lewis was *not* so diagnosed and the state's true intentions in regards to him were made apparent by his assignment to Trenton State Prison. Sykes, note 143, *supra* quotes official sources in describing Trenton State Prison

> ... as an institution for the detention of "older, more serious, and more recalcitrant male offenders with poor records and long sentences." Author's footnote 10, quoting from: NEW JERSEY, DEPARTMENT OF INSTITUTIONS AND AGENCIES RESEARCH BULLETIN No. 18, *Two Thousand State Prisoners in New Jersey*, Trenton, New Jersey, May, 1954.

This description is so obviously out of touch with the realities of Robert Lewis' case that we must wonder if this prisoner wasn't suffering an additional punishment for his refusal to plead guilty. The confinement at Trenton makes it clear that Lewis is not a "sex offender;" and the trial evidence strongly indicates that he is not *any* kind of offender.

271 And even types of sex offenders have to be distinguished, *see* note 387, *infra*.

272 Ohlin assigns an equal (positive) weight to either category here.

273 In that it has a set *maximum* term of years.

274 In that it may be cut well short of the *minimum* term of years by unilateral action of the Board. However, it does not approach the California Model of the indefinite sentence ("One Year to Life Imprisonment").

275 New Jersey law sets different parole eligibility dates for different categories of offender, ranging from one-third of maximum, less credits (for "work time," "good time," etc.), for first offenders, up to four-fifths of maximum, less credits, for fourth and subsequent offenders. *See*: *Inmates Rule Book*, p. 4.

276 That is: convictions *and* sentences, pointing out the value of Probation as a dispositional option.
277 As provided for by N.J.S.A. 30:4-123.9.
278 Some for the entire period of his incarceration.
279 *See*: APPENDIX 1.
280 Lewis' Prison (Approved) Correspondence List showed 24 individuals; he has been visited a minimum of once weekly by one or another individuals on that list for the past several years.
281 Donnelly, Goldstein, and Schwartz *Criminal Law, problems for decision in the promulgation, invocation, and administration of a law of crimes,* New York: The Free Press, (1962), p. 237. *See* note 92, *supra*.
282 *Id*. at 235.
283 *See*: APPENDIX 2. Also within author's personal knowledge based on observations and interviews at Trenton and Leesburg State Prisons.
284 *See*, APPENDIX 3.
285 N.J.S.A. 30:4-123.6.
286 Donnelly et al, *Criminal Law, supra*, note 82, p. 237.
287 Report of Diagnostic Center, Menlo Park, July 1964.
288 None indicated in any relevant records.
289 Interview with Dr. Carmen Cerullo, May 31, 1973 at Trenton State Prison.
290 Personal interviews, letters, and subject's autobiography (prepared as contribution to privately-conducted diagnostic workup conducted by personnel outside the New Jersey Prison System, results not published).
291 New York's infamous Bedford-Stuyvesant.
292 This is admittedly a guesstimate, but is based on author's personal experience as a consultant to the Massachusetts Department of Youth Services and work with juveniles-young adults in Ohio, Illinois, New York, and Connecticut.
293 *Criminal Law, supra*, p. 237.
294 *Note*: *prior* to the kidnapping and rape at which Lewis was not present. *See*: Testimony of Arresting Officer and Female Victim, notes 3, 4, 5, 6, 11, 18, 19, 20, 21, 22, 23, 35, 52, 55, *supra*.
295 Lewis acknowledged drinking with the other defendants earlier in the day, *prior* to the crimes.
296 *See*: previous histories, notes 287-290, *supra*.
297 Lewis' defense to *all* charges was *innocence*.
298 With almost ten years of his life!
299 *Criminal Law*, note 281, *supra*, p. 237.
300 *See*: Interview with Dr. Carmen Cerullo, note 289, *supra*.
301 *Criminal Law*, note 281, *supra*, p. 237.
302 The prosecution's own witness exculpated Lewis from the charge of rape; an analogy was drawn to a charge of "felony murder" for this conviction.
303 Based on interviews conducted in all of New Jersey's prisons, as well as in numerous other penal institutions in Pennsylvania, New York, Illinois, Ohio, and Massachusetts. *See also*: Sykes, note 143, *supra*, pp. 95-99.

304 As opposed to the standard institutional practice of isolating notorious sex offenders because of the negative (and occasionally violent), attitude of the rest of the inmate population towards such individuals.
305 N.J.S.A. 2a:164-3, 164-4.
306 *See*, Affidavit, APPENDIX 2.
307 This includes even the presumably-incompetent "diagnosis" of Dr. King, *see* notes 319-324, *infra*.
308 *Criminal Law*, note 281, *supra*, p. 237.
309 Age 19.
310 In line with the "shifting the burden" philosophy in parole hearings; *see* note 435, *infra*.
311 N.J.S.A. 30:4-123.19.
312 Whom Lewis emphatically does *not* acknowledge. However, it would be senseless for him not to take advantage of this favorable criteria since he was incarcerated on the assumption that he *was* involved.
313 *Criminal Law*, note 281, *supra*, p. 239.
314 Interview with Dr. Carmen Cerullo, May 31, 1973.
315 *Id*.
316 *Criminal Law*, note 281, *supra*, p. 239.
317 Interview with Dr. Carmen Cerullo, *see* notes 289, 300, 314, *supra*.
318 *See* Board Denial APPENDIX 6.
319 *N.Y. Times*, Feb. 7, 1973, p. 83, col. 3.
320 *Id*., Feb. 3, 1973, p. 61, col. 6.
321 *Id*., Mar. 10, 1973, p. 66, col. 8.
322 *Id*., Feb. 9, 1973, p. 70, col. 5.
323 Nicholas D. Heil.
324 *N.Y. Times*, Feb. 6, 1973, p. 77, col. 6.
325 Trenton, Rahway and Leesburg State Prisons.
326 To date, there has been no indication of any reviews of parole decisions, nor even an indication as to which denials had been inspired by psychiatric reports prepared by Dr. King; *see* note 142, *supra*.
327 Type of Offense, Type of Offender, Family Interest, Social Type, Number of Associates, and Personality.
328 *Add*: Sentence and Psychiatric Prognosis; *also see*: note 435, *infra*.
329 Ohlin, *supra*, p. 130.
330 von Hirsh, Andrew *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, BUFFALO LAW REVIEW, Spring 1972, p. 717.
331 *Id*., at 721. Professor von Hirsh is certainly not alone. Don M. Gottfredson, in "Assessment and Prediction Methods in Crime and Delinquency," *Task Force Report: Juvenile Delinquency, President's Commission on Law Enforcement and the Administration of Justice*, Appendix K, Washington, D.C., p. 187, states:

> *Prediction methods should be built into the information system of each social agency responsible for custody, treatment, or release of offenders*. This can permit necessary, repeated validation studies, or necessary modifications, of available prediction tools. It can permit programs for systematic feedback to decision makers concerning the predictive relevance of information used in arriving at individual decisions. It can provide

helpful tools for evaluations of programs, thereby enabling administrators to assess the probable consequences of program decisions. (emphasis supplied)

332 *West's Annotated California Codes*, PENAL CODE, chapter 3, § 5077.

333 Gottfredson, Don M. "A Shorthand Formula for Base Expectancies," California Department of Corrections, Research Division, *Research Report No. 5*, (July 1972) in *The Sociology of Punishment and Correction*, Johnston, Savitz, & Wolfgang, ed., New York: John Wiley & Sons, Inc., 1970.

334 Literally: to what extent is the parolee expected to fail (i.e., recidivate) on parole?

335 Gottfredson, *supra*, p. 808.

336 *Id*., at 809.

337 *Id*.

338 *Such as*: Type of Crime. Type of Offender.

339 Glaser et al; *see* notes 359, 370, *infra*.

340 Glaser, Richard *A Reconsideration of Some Parole Prediction Factors*, 19 AMER. SOC. REV. 335 (1954). *See also* Glaser, *The Effectiveness of a Prison and Parole System*, Indianapolis, Indiana: The Bobbs-Merrill Co., Inc. (1964), pp. 290-292.

341 Mean Cost Rating refers to the balance between *utility* and *cost* in parole prediction work. If research would, for example, indicate that 40% of all offenders previously incarcerated twice or more would recidivate while on parole, then by denying parole to *all* such offenders we achieve a certain guaranteed utility. If the sample group is 100 individuals, the *utility* of such a blanket denial is the prevented release of 40 recidivists. However, it is also axiomatic that such a procedure would have the social-economic *cost* of unnecessarily retaining 60 individuals in prison!

342 Burgess-Ohlin simply presupposes that Type of Offender is *exactly* equal (in predictive value) to Psychiatric Prognosis, etc. *See* notes 264-266, *supra*.

343 Glaser. note 340, *supra*.

344 *Id*. at 339.

345 It would be all-too-easy to *assume* this kind of "logical" progression; however, research indicates that it seldom holds up in practice.

346 It is not difficult to postulate theories to explain why a highly intelligent person does not do as well on parole as a dull one. Regimentation and institutionalization, especially in the absence of valid justifications, come more easily to a dull mind.

347 *See* Glaser, note 340, *supra*.

348 *See*, for example, United States Parole Board, notes 399-403, *infra*.

349 Since traditional intelligence tests are geared to a white and middle class lifestyle and language pattern. *From*: Interview with Michael C. Shea, M.A., Missouri State University, Sociologist; subject: Intelligence Testing, September 9, 1973. *See also*: Miner, J. *Intelligence in the United States*, New York: Springer Publishing Co., 1957, p. 77; Sarason and Gladwin, *Psychological and Cultural Problems in Mental Subnormality: A Review of Research*, AMERICAN JOURNAL OF MENTAL DEFICIENCY, May 1968, pp. 1169-1182; Kolko, G. *Wealth and Power in America, An Analysis of Social Class and Income Distribution*, New York: Frederick A. Praeger, 1969, pp. 114-115.

350 Which produces a wider, but still limited range.

351 Ohlin et al, *see* notes 264-266, 331, 333, 340, *supra*.

352 *Note*: it appears that the accuracy of this method *decreases* as the width of the sampling period *increases*.
353 Lewis entered prison at age 19, and was not released until age 29.
354 Unless the author means "Schooling" to refer to education *prior* to imprisonment; this is to be doubted as it would place that particular measurement squarely within the "static" category.
355 *The Parole System*, 120 U. PENN. L. REV. 282, 305 (1972).
356 *Example*: A=B.
357 *Example*: A does not affect B; as when coins are flipped simultaneously, whether one lands heads or tails does not in any way affect the results of the other flip.
358 *See*: *People v. Collins*, 68 Cal.2d 319, 438 P.2d 33, 66 Cal.Rptr. 497, 36 A.L.R.3d 1176 (1968), the famous "Magic Couple" case. *Also*: Liddle, *Mathematical and Statistical Probability as a Test of Circumstantial Evidence*, 19 CASE W. RES. L. REV. 254 (1968).
359 Kirby, Bernard C. *Parole Prediction Using Multiple Correlation*, 59 AM. JOURN. SOC. 539 (1954).
360 *Id*.
361 "Essentially [empirical] validity refers to the relation between test scores and a criterion, the latter being an independent and direct measure of that which the test is designed to predict." Anatasi, A. *Psychological Testing*, New York: MacMillan (1957), pp. 127-131. *In*: Ward, *Validating Prediction Scales—The Case of the False Technique*, BRITISH JOURNAL OF CRIMINOLOGY, 7:1:36-44 (1967).
362 "The . . . requirement is that of repeatability. ******* No variation in the prediction derived should arise when computed by different persons of average intelligence nor should any different result occur when the computation is carried out by quite inexperienced personnel." Mannheim, H. and Wilkins, L.T., *The Requirements of Prediction, in The Sociology of Punishment and Correction*, Johnston, Savitz, and Wolfgang, ed. (1970), p. 774.
363 *Example*: categories such as Type of Offense remain the same throughout an individual's incarceration, regardless of whatever changes occur in his personality, attitudes, or behavior.
364 Laune. Ferris F. *The Application of Attitude Tests in the Field of Parole Prediction*, 1 AMER. SOC. REV. 781 (1936).
365 *Id*.
366 *Id*. at 782.
367 *Id*. at 786.
368 *Id*. at 792.
369 *Id*. at 795.
370 Skolnick, Jerome H. *Towards a Developmental Theory of Parole,* 25 AMER. SOC. REV. 542 (1960).
371 Although based on attitude measurement from sampling of *former* parole candidates and parolees, as in Ohlin, Gottfredson et al.
372 Actually, multiple correlation along the simplistic lines of the diagram at note 374, *infra* is factually impossible. For example, the factors that comprise an individual's expectation are almost infinite, including, at a minimum, his social background, his financial and family situations, his intelligence, his age, and his individual temperament.
373 Kirby, note 359, *supra*.
374 *From*: Skolnick, *supra*, note 370.

375 McCleery, *Richard The Strange Journey, A Demonstration Project in Adult Education in Prison*, UNIVERSITY OF NORTH CAROLINA EXTENSION BULLETIN XXXII, No. 4 (March 1953).
376 *Id*. at 253.
377 Wardens are traditionally reluctant to allow former prisoners to return to the institution for the purpose of visiting friends or in any other capacity. In addition, of those prisoners who are returned as parole violators, only a small percentage are "available" as informational resources to the general population, primarily because of advanced clique-inspired behavior prevalent in penal institutions.
378 Thanks to Mrs. R. Grace Jung, Court Administrator of Atlantic City, New Jersey, who became interested in the case and prevailed upon the Mayor's Office in Atlantic City to find suitable employment for Robert Lewis. This effort was coordinated from the Mayor's Office by Mr. W. Massey.
379 With friends in Camden, convenient to the employment he had been offered, note 378, *supra*.
380 *See*: APPENDIX 1.
381 That is: people who were familiar with his past incarceration, including some who had been in prison with him and had come out, re-entered society, and become parole "successes."
382 Lewis never really considered this "option" although the Board repeatedly insisted that he had no other place to go in spite of easily-available evidence to the contrary; *see*, APPENDIX Number 1.
383 This question of "sin" was repeatedly invoked by the former Chairman of the New Jersey State Parole Board, Rev. Jessee W. Mapson. Rev. Mapson was later demoted to Associate membership and is no longer associated with the Board.
384 Mangus, A.R. *California Sexual Deviation Research Final Report*, XX (1954).
385 *Id*. at 63.
386 Ellis, Albert Ph.D. and Brancale, Ralph M.D., Springfield, Illinois: Charles C. Thomas (1956).
387 *Id*. at 26, 33, 37.
388 And given its incredible reliance on such factors as "Seriousness of Offense," the observer can rest assured that such knowledge, even if no other, is always available to the Board.
389 *See*, generally, Testimony of Male Defendant #3, Female Defendant #1. et al, *Transcript*.
390 Glaser, Daniel *Parole Successes and Failures*, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION, Johnson, Savitz. and Wolfgang, ed. (1970), p.709.
391 *A Comparison of Releases and Recidivists from June 1, 1946 to May 31, 1961*, December 1961.
392 *Id*. at 788.
393 *National Council on Crime and Delinquency Uniform Parole Reports of the National Probation and Parole Institutes*, N.C.C.D. Research Center, Brinley Building, Davis, California 95616 (1968).

Objectives: Reliable nationwide statistical reports on parole based upon (1) uniform definitions of items and (2) individual persons paroled.

Sponsors: Association of Paroling Authorities; Inter-state Compact Administrators Association for the Council of State Governments; United States Board of Parole; Advisory Council on Parole of the National Council on Crime and Delinquency.

> *Participating Agencies*: Fifty-five agencies in fifty states; the Federal Government, and Puerto Rico contribute data at their own expense.
>
> From: *Introduction*.

394 *Id*.

395 *Id*.

396 *Id*. at Table I, Part I, National Male (1968) and Table I, Part I, National Male (1969).

397 *Id*.

398 Presumably conducted according to the highest possible standards since there is immediate access to the federal courts guaranteed a federal prisoner or parolee. But Professor Davis (*see* notes 161-168, *supra*) is apparently not enthused:

> An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is that of the United States Parole Board. In granting or denying parole, the Board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents; the degree of openness of proceedings and records is about the least possible; and procedural safeguards are almost totally absent. Moreover, checking of discretion is minimal; board members do not check each other by deliberating together about decisions; administrative check of board decisions is almost non-existent; and judicial review is customarily unavailable.
>
> *****
>
> The board has never announced rules, standards, or guides. The most specific standard is the statutory provision, repeated by the board's regulations, that the board "may in its discretion" release a prisoner on parole if the board finds "a reasonable probability that such prisoner will live and remain at liberty without violating the laws" and that "such release is not incompatible with the welfare of society." [quotes from 18 U.S.C. §4203]

It is blatantly obvious that the federal statutes and those governing the administration of parole in New Jersey were cut from the same threadbare cloth. Far from setting a good model for the states to follow, the federal government seems to have provided statutory language specifically designed to evade the goals and responsibilities of a viable parole system. *See* notes: 160, 182, *supra*.

From: Davis, *Discretionary Justice, A Preliminary Inquiry*, Baton Rouge: Louisiana State University Press (1969), pp. 126-127.

399 *Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives*, Ninety-Second Congress, Second Session on H.R. 13118, Identical and Related Bills to Improve and Revise the Procedures and Structure of the Federal and State Parole Systems, Corrections Part VII—B, Feb. 29, Mar. 1, 2, 3, 20, 22. 23, 27, 29, Apr. 12, 13, 14, 17, 20, 21, 24, 26, 27, and May 3, 1972, Serial No. 15, p. 1453.

400 *Id*.

401 *Id*.

402 *Id*.

403 Even without a formal admission that such criteria are used, it is obvious that *some* procedure is operating to give preference to certain parole candidates based on a "Type of Offense" criteria if nothing else. But criteria not revealed to the inmate population hardly satisfy even basic notice requirements, and any potential gain is thereby lost.

404 *See Scarpa v. U.S. Board of Parole*, note 142, *supra*.

405 It would be difficult to imagine a public outcry over a "wave of embezzlement" sweeping the country.
406 An embezzler can always return the money; what can a murderer return?
407 Charles Murray, *in*, *The Time Game*, by Anthony Manocchio and Jimmy Dunn (pseudonyms), Beverly Hills: Sage Publications, (1970).
407(a) Manocchio, A. and Dunn, Jimmy (pseudonyms), *The Time Game*, Beverly Hills, California: Sage Publications (1970); speaker is Charles Murray, criminologist ("Anthony Manocchio"), p. 69.
408 *Id*. at 69.
409 Davis, *Administrative Law Text*, 3d ed., p. 188.
410 This has been a recurrent attitude of the Board; to insist upon "remorse" when the petitioner has not even acknowledged guilt is not only ridiculous but raises strong *opposing* arguments when petitioner is also appealing his *conviction*.
411 Letter from Robert Lewis, November 8, 1971, author's personal files.
412 *Id*.
413 *See* Parole Denial, APPENDIX Number 4.
414 Flanagan. Michael F. *Legal Research in a Psychological Setting*, Paper presented at the symposium: Psychological Research in Legal Settings. American Psychological Association Convention, Miami Beach, Florida, September 5. 1970, p. 2.
415 Letter from Robert Lewis, August 20, 1972, author's personal files.
416 54 U.S. App.D.C. 46, 293 Fed. 1013 (D.C.Cir. 1923).
417 *McCormick on Evidence*, 2d ed. (1972), §202 at p. 487.
418 *Id*.
419 *See*: Davis, *supra*, note 398.
420 *2 Wigmore on Evidence*, 3d ed. (1940), §665a, at pp. 783-4.
421 *Id*.
422 Automatic tension reducers; *see* note 92, *supra*. The consensus of all prisoners interviewed (notes 89-91, *supra*) was that the New Jersey State Parole Board decisions routinely *lacked* both these qualities. And there appears to be little point in blaming this negativeness on the inmates; a policy statement by the Board, or (better yet), some *real* law-making by the legislature, or (most probable) some much-needed judicial interference (*see* note 205, *supra*) by our courts could clear up the matter within days. Paranoia only exists where the individual has nothing to fear; it seems to be that the State of New Jersey cannot, in good conscience, make such a statement to any parole candidate under its jurisdiction.
423 *See*: Parole Denial, APPENDIX Number 4.
424 Consensus of all interviews; *see* notes 89-91, *supra*.
425 AMERICAN JOURNAL OF CORRECTION, May-June 1972.
426 *Id*. at 309.
427 Stab you for a couple of packs of cigarettes, the common medium of exchange in maximum security prisons where "soft money" is among the most restricted forms of contraband.
428 *Interview* at Rahway State Prison, September, 1970.
429 July, 1973; although, in keeping with the Board's practice, he was not notified of this decision until more than one week later, which is *quicker* than the usual practice. Perhaps if the Board were to utilize a criteria system, they would not be so reluctant to face the inmate with the results of his hearing immediately after the decision, and in person.

430 There were *no* conditions of parole set, *see* APPENDIX, 8. However, Lewis can still be returned to prison without being convicted of another offense [and he *already* knows he can be sent to prison without *committing* an offense!], or even being arrested and charged, so his freedom is certainly less unqualified than the average citizen's. The New Jersey Legislature is apparently not unaware of the difficulties facing an individual "free on parole." *See,* for example, Assembly Bill No. 2303 "An act relating to employment qualifications of rehabilitated convicted offenders" and Assembly Bill No. 2505 "An act concerning discrimination against eligibles certified for appointment in the competitive class in civil service," both introduced March 22, 1973 by Assemblymen Deverin, Bassano, Veit, Kennedy; Assemblywoman A. Klein, and Assemblyman Rys. Both bills were referred to Committee on Institutions and Welfare.

> We point out that *complete* liberty is not at stake [in a parole release hearing]. If [petitioner] were able to persuade the board to act favorably, he would remain in technical custody, and subject to restrictions, though outside the walls. *United States ex rel. Campbell v. Pate,* 401 F.2d 55 (7th Cir. 1968).

431 If the New Jersey Board has initiated any form of criteria for its decisions, it has managed to keep this secret from the prisoner population and the general public.

432 Interviews continue to be incredibly brief and de-personalized, with stock questions and (from what I learned in the interviews, *see* notes 89-91, *supra*), probably stock answers. There are still only three Board members, and a unanimous vote is still required.

433 No one can be certain of adherence to *unpublished* standards. And even the most exacting standards are still applied by human beings, and are thus subject to human emotions, prejudices, and value judgments.

> Research is neither moral nor immoral. It is amoral. Its findings can just as easily be used to defeat as to achieve any currently selected correctional ends. There is nothing about research, as such, that insures its findings will be properly understood and interpreted, or even used to serve one particular goal.
>
> ******* A parole board can use [previously proven as valid research] information to reduce the recidivism rate of parolees to a minimal level, for example, by releasing only those men who are almost certain to be successful [non-recidivists], allowing the rest to serve out their sentences. This may, of course increase the *over-all* recidivism rate of the correctional system [by failure to release prisoners at the proper point along the rehabilitative continuum, *see* p.38]; but it will also make the parole board . . . appear to be very good. This appearance, naturally would be specious **...** ******* [A] parole board can use the same information to maximize recidivism by releasing only men who are almost certain to fail. Although such use is not probable, it could happen particularly if, by a curious set of circumstances, there were one parole board member, or a whole parole board, who would like to *discredit parole in the public eye through high failure rates*.

Schnur, A. *Some Reflections On The Role of Correctional Research*, 23 LAW AND CONTEMPORARY PROBLEMS 772, 774-775 (1958). (emphasis supplied).

434 On H.R. 13118, *see* note 399, *supra*.

435 *From*: *Subcommittee No. 3, Committee on the Judiciary, House of Representatives*, Analysis of "Parole Improvement and Procedures Act of 1972" and comparison to existing Law and Regulations.

436 President's Commission on Law Enforcement and the Administration of Justice, Report of "Parole and Aftercare," *Task Force on Corrections,* (1971), pp. 60-61. Figure 24-1.

437 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).
438 Case Comment, 8 N. ENG. L. REV. 86 (1972).
439 N.J.S.A. 30:4-123.25.
440 Porter, *Criteria for Parole Selection*, PROC. AM. CORR. ASSN. 227 (1958) points out that over 80% of all jurisdictions hear from 20 to more than 40 parole cases per *day*. Given that the New Jersey Board has only three members, it is obvious that little personal, individual attention is given to parole decisions.
441 *See*, for example, Wilkerson, G. *Public Defenders as Their Clients See Them*, I AMERICAN JOURNAL OF CRIMINAL LAW 141, 141-147, 154-155 (1972).
442 With a group of (deliberately) unnamed individuals; it would be impossible to hold such interviews in the future if confidentiality were breached.

WHERE ARE THEY NOW?

Kamau Marcharia (formerly known as Robert Lewis):

For 25 years, Kamau Marcharia has taken the lead in organizing disenfranchised communities, from prisoners in the Northeast to low-income African-Americans in the South. Kamau worked for six years as organizer, and then director, of the grassroots African-American organization Fairfield United Action (FUA) in rural, Fairfield County, South Carolina. FUA's efforts led to the total reform of the county's grand jury selection procedures, which had systemically discriminated against African-Americans. Kamau also initiated a project to bring running water to unserved areas of the county. Since 1990, Kamau has been Director of Rural Organizing at Grassroots Leadership, a regional resource and organizing center that provides training and leadership development assistance to grassroots groups in the Southeast. He has also worked in partnership with other organizations on race, class, gender and sexual orientation issues.

During the summer of 1995, Marcharia served as the associate director of Union Summer for the AFL-CIO. This program connects college age young adults with union organizing efforts across the United States. Marcharia was responsible for training for Union Summer interns, mentoring and supervision of site coordinators, and on-site problem solving and crisis intervention.

Marcharia was a 1991 recipient of the Petra Foundation Award for his achievement in community organizing. In granting him the award, the Petra Foundation board said that Kamau has "overcome extraordinary barriers to work for the rights of his neighbors, and has changed the system in every place he has lived … leaving behind a newly enfranchised community in each location."

Marcharia was the recipient of a 1993 Charles Bannerman Award and has traveled to Northern Ireland as part of an organizer exchange. He also spent a six week sabbatical in rural India traveling and learning with organizers from Awareness, an organization working with the rural poor in the state of Orissa. In 1999 Marcharia received the Public Citizen of the Year Award from the South Carolina Chapter of the National Association of Social Workers. In recognizing Marcharia, the organization pointed to his lifelong efforts to aid and develop low-income communities in Saluda and Fairfield Counties, as well as his work throughout the south with Grassroots Leadership.

In November 2000, Marcharia was elected to his second term as County Council Representative for District 4 in Fairfield County, South Carolina. He chairs the Facilities and Public Transportation Committees.

A BOMB BUILT IN HELL (Andrew Vachss' first novel):

If you're looking for Andrew Vachss' first novel, *A Bomb Built in Hell*, then you're in the right place. Amazon.com recently serialized the novel, which had remained unpublished since it was written in 1973. (For the full background, read the news clips from CNN.com and *The Oregonian*.)

That serial has run its course, but we're making the novel available for free for a limited time as a pdf file; click here to download.

Consistent feedback throughout the recent tour for *Dead and Gone* convinced us that folks want *A Bomb Built in Hell* available through formats other than download. But, with all the possibilities out there, we need your input. Do you want to see the novel surface as a special "limited-edition," a standard hardcover, a paperback (trade or mass-market), an ebook ... or something completely different. Email your suggestions to lb@10ap.com.

CREDITS

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