UNITED STATES PRISON LAW

SENTENCING TO PRISON, PRISON CONDITIONS, AND RELEASE—THE COURT DECISIONS

Selected and with Comments
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EDITOR'S NOTE

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CHAPTER 1

THE PLACE OF PAROLE IN THE PRISON SYSTEM

Theoretically parole originated and developed as a way of alleviating the harshness of prisons. It contrasted with the prison system in that although the parolee was said to be in constructive custody of the prison (or parole board) and was still serving his prison term, he was doing so in the free community. Because the parolee was serving part of his prison term on parole, it was said to be a way of shortening the time spent in prison. Parole, and the indeterminate sentence (see volume I, page 6 and page 597), were said to be a rehabilitative mode of correction.

The legislative development of parole is illustrated in the one case included in this chapter, *Commonwealth ex rel. Banks* v. *Cain.* Its discussion of parole and fines is considered below, chapter 7. The court defines parole, distinguishing it from pardon. It notes that although a court may be given parole authority (particularly on misdemeanor sentences, as some courts now have the power), it does not make parole a judicial function so as to invalidate boards having paroling power. The statement that the attempt to give power to the board to discharge a parolee before the expiration of the parole period is invalid, would very likely not now be held, and many boards have exercised this power, under statutory power, without challenge.

The idealized image of parole was stated as follows by the Utah Supreme Court: "The parole system is reformatory and founded upon a plan and policy of helping the inmate to gain strength and resistance to temptation, to build up his self-control, to adjust his attitudes and actions to social controls and standards; and it aims to extend his liberties and opportunities for normal living within the social fabric as his strength to meet new responsibilities grows and develops." —*McCoy* v. *Harris,* 108 Utah 407, 160 P. 2d 721 (1945). And a United States Court of Appeals said, "The parole system is an enlightened effort on the part of society to rehabilitate convicted criminals."—*Fleming* v. *Tate,* 81 U.S.App.D.C. 205, 156 F. 2d 848 (1946).

But the reality of parole is quite different from this idealized image. The same United States court continued: "Certainly no circumstance could further that purpose to a greater extent than a firm belief on the part of such offenders in the impartial, unhurried, objective and thorough processes of the machinery of the law. And hardly any circumstance could with greater effect impede progress toward the desired end than a belief on their part that the machinery of the law is arbitrary, technical, too busy, or impervious to the facts."

Unfortunately, at its current stage of development, parole conforms more to the latter fear of the court, than to the ideal. As we shall see in reviewing the cases, their holdings on the various phases of the parole process, parole is the most autocratic phase of the criminal justice system, with only primitive requirements of due process of law applicable to most of its procedures, the law of parole containing myths and legal fictions contradicted by reality.

Parole Myths and Fictions

One parole myth that is often repeated and never examined in court decisions is that parole shortens time spent in prison. The only way in which this view is sustained is to see current prison sentences isolated from the historical development of parole. Prison sentences do indeed provide for conditional release on parole prior to the completion of the term; but historically the introduction of parole and the indeterminate sentence (which is erroneously said to be essential to parole systems) was achieved by *adding* to then existing prison terms, so that while it was true that the new terms could be served partially outside prisons, the terms themselves were substantially lengthened by the statutes that introduced parole and the indeterminate sentence. And it must be remembered that not all prisoners are released on parole. In some jurisdictions it is less than half. On a national average one-third of prisoners are never paroled. Further, forty per cent of paroled prisoners are brought back for violations, often now new crimes, fully two-thirds for non-felony violations, that result in their serving the full terms, often with good time already earned in prison being forfeited. (See below, chapter 6.) (President's Commission on Law Enforcement and Administration of Justice, Task Force Report, Corrections, 60, 62 (1967).)

Two characteristics of the parole/indeterminate sentence system belie both the idea of parole shortening terms, and of parole as rehabilitative. The first of these is the common, although not universal, provision in indeterminate sentence statutes that when the defendant is sentenced to a prison term the term is for the maximum provided by statute, and may not be shortened by the sentencing judge. This results in many terms longer than would otherwise be imposed, and parole boards are not inclined to give early releases in the face of long maximum terms. Thus neither the judge nor the parole board individualizes these sentences. This reality or possibility is almost never considered or noted in the cases. The court's comment in *Scarpa* v. *United States Board of Parole,* below, chapter 3 (b), is typical: "If the Board refuses to grant parole, Scarpa has suffered no deprivations. He continues the sentence originally imposed by the court."

In a rare instance in which a court, aware that the indeterminate sentence lengthened the prisoner's term, was led to an exceptional decision to grant parole, it was reversed; *People ex rel. Castle* v. *Spivey,* in chapter 3 (c), below. Yet the implication of the ruling, that an indeterminate sentence is *not* for the maximum term provided by law or the court's sentence imposed, but for a reasonable period, is consistent with the stated purpose of the indeterminate sentence laws, while the view of *Scarpa* v. *United States Board of Parole,* is not.

The second characteristic is the almost universal requirement, by law and parole board practice, of service of minimum terms of parole eligibility. This means that even if a prisoner is, by all criteria and the opinion of the parole board, suitable for release, he may not be released if the minimum has not yet been served, in which case the opposite of rehabilitation results, bitterness and a sag in morale. To this may be added, sometimes by statute and sometimes by practice, that classes of prisoners may be entirely ineligible for parole (chapter 3, below); and that the filing of detainers deters both prison rehabilitation programs and parole (below, chapter 7). And of course, many prisoners are never paroled. (See also, below, chapter 6, "Parole Term.")

The relevancy of the myths that make up the idealized view of parole, as against its reality, is that the myths are utilized in the court decisions, standing as a barrier to the development of due process of law in parole, just as the myths courts utilize in looking at prison litigation stand in the way of a realistic view of them, hence limiting the development of due process and proper remedies in prison law. (See volume II, chapter 1, and *passim* volumes II and III.)

Parole a Part of the Prison System

One of the real issues in grasping parole concepts is the extent to which it is considered to be a part of the prison system, and the extent to which it is considered a separate part of the correctional system, as courts in their sentencing function are a part of the correctional system but independent of the prison system. As already noted, a parolee is said by statute to be in the constructive custody of the warden or the parole board. The concept was considered a requisite to the provision that the parolee is serving his prison term while on parole. But when the issue arises as to the capacity of a parolee to sue for a writ of habeas corpus, it is decided not on the basis of his still being a "prisoner," but on the ground that a parolee suffers other and substantial restraints on his freedom (*Jones* v. *Cunningham,* in chapter 5 (a)). Legally, then, the "constructive custody" concept is not essential to the provision that time on parole is time on the sentence, or to anything else except to tag a parolee as being "in custody."

Although it is said that probation and parole are to be treated the same for certain due process purposes (*Gagnon* v. *Scarpelli,* below, chapter 5), in practice, and thus far in law, important aspects of the two are treated quite differently. Whereas sentencing, and the decision to grant or deny probation, are done at a hearing, in open court, with the defendant represented by counsel, the decision to grant or deny parole is made after an interview, rather than a hearing, with the prisoner having no right to be represented by counsel, at a closed session in a prison office. It far more closely conforms to a prison classification interview and decision than to a sentencing hearing. On the other hand, although it was not so only a few years ago, the procedure on revocation of parole is reaching toward the probation revocation requirement of a right to representation by counsel; and the requirement of a hearing now applies to both (below, chapter 5 (b)). But search of a parolee (or a probationer) is not much more protected by the Fourth Amendment than is search of a prisoner (chapter 5 (a), below; and volume III, page 26).

One of the most important, perhaps the most important, element in the parole board's consideration of a grant of parole is the inmate's prison record. As we have noted (volume I, page 26 and cases set forth in chapter 2 (b)), much progress has been made on recognizing the right of a defendant being sentenced to see the presentence investigation report, but in marked contrast to that development, prisoners' claims to see their prison record or the record on which a parole board bases its decision is almost universally denied (volume III, page 320; below chapter 3 (b)). An important breach in the wall of secrecy is the newly recognized requirement that parole boards must advise inmates whose parole has been denied, of the reason for the denial (chapter 3 (b) below). The requirement may well be substantially expanded as time goes on, until the inmate's access to the report corresponds to the right of a defendant being sentenced to see, and challenge, the

presentence report. Meanwhile, parole potential is closely based on the prison record (e.g., *Garafola* v. *Benson,* in chapter 3 (a) below).

Aside from these legal holdings, the informal relationship of parole to the prison system is a close one. Parole granting being almost entirely unsupervised (chapter 3, below), a board may be liberal in granting paroles, in increased numbers granted and in early grants, or it may be conservative. Its policy in this regard may be independent, but often it is in accord with the policy of the prison administration, particularly as reflected in its disciplinary punishments. Most of the time parole policy is conservative (long terms) rather than liberal. As the court observed in *Menechino* v. *Oswald,* in chapter 3 (b) below, "The Board's determination as to whether a prisoner is a good parole risk represents an aspect of state prison discipline." One study finds that parole can and does neutralize sentence differentials associated with charge reductions (H. Joo Shin, "Do Lesser Pleas Pay? Accommodations in the Sentencing and Parole Processes," 1 Journal of Criminal Justice 27 (1973)).

The effect of the lack of due process in parole, and its intimate relationship with prisons as they exist, the failure of parole to alleviate prison life, has led to awareness that it shares with prison administration and prison legislation the blame for the sorry state of prisons today. Studies of prison riots reveal this responsibility, for example the studies of Attica prison after the riot and killings there, noted in volume II, chapter 2, e.g., "Attica, the Official Report of the New York State Special Commission on Attica," 1972, and other reports. In recent years for the first time responsible groups and individuals called for the abolition of parole or its substantial revision. Abolition was recommended in "Report on New York Parole," by the Citizens' Inquiry on Parole and Criminal Justice, Inc. (1974), and "Rehabilitating Parole, An Alternative Model," Criminological Research Associates, Berkeley, Calif. (1974). Revision was recommended in "Rehabilitation in Corrections: A Reassessment," by Judge Lawrence W. Pierce (Federal Probation, June, 1974).

Whether or not substantive changes occur in parole, a task of the legislatures, it is likely that the recent introduction of some due process elements by the courts will continue in the same direction; although the greater need—substantive change—will likely be slower, corresponding to the course of development in prison law.

Commonwealth ex rel. Banks *v.* Cain, Appellant.

Argued September 28, 1942. Before SCHAFFER, C. J.; MAXEY, DREW, LINN, STERN, PATTERSON and PARKER, JJ.

Appeal, No. 43, Jan. T., 1943, from decree of C. P. Delaware Co., June T., 1942, No. 327, in case of Commonwealth ex rel. Elmer Banks v. John J. Cain, Keeper.

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