

1980

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Recommended Citation

Martin R. Gardner, *The Question of Parole: A Review*, 59 Neb. L. Rev. (1980)

Available at: <https://digitalcommons.unl.edu/nlr/vol59/iss1/6>

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By Martin R. Gardner*

The Question of Parole†: A Review

One of the more remarkable recent developments in criminal law thinking, advocated by theorists of diverse political persuasions,¹ is the dramatic shift away from justifying punishment systems in terms of the "rehabilitative ideal,"² with its attendant concern for individualized dispositions of offenders through broad judicial and administrative discretion and indeterminacy in sentencing, toward models embodying blatantly punitive considerations thought to promote justice or deterrence, or both.³ Because the rehabilitative ideal presently permeates most punishment schemes, the call to reform a variety of aspects of the criminal justice system has been sounded loudly.⁴ Much of the criticism centers on the perceived evils of current indiscriminate sentencing

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† THE QUESTION OF PAROLE. By Andrew von Hirsch & Kathleen J. Hanrahan. Cambridge, Massachusetts: Ballinger. 1979. Pp. 178. \$15.50.

1. The development discussed in text *infra*, toward retributive theories of punishment is advocated by thinkers ranging from Ernest van den Haag to Alan Dershowitz. See VAN DEN HAAG, PUNISHING CRIMINALS 176-77, 191-95 (1975); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976). As a member of the Twentieth Century Fund Task Force, Dershowitz apparently subscribes to its proposals for "presumptive sentencing" based heavily on desert considerations. *Id.* at 18-26. For a discussion of concerns leading to such proposals, see Dershowitz, *Background Paper*, in *id.* at 66.
2. The "rehabilitative ideal" characterizes the tradition of justifying incarceration in terms of its supposed beneficial effect of reducing crime through isolating and rehabilitating offenders. See AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 13, 20 (1971). The rehabilitative goal of prisons was strongly emphasized in the late 19th century as evidenced by the words of an influential spokesman of the movement:
[A]ll persons in a state, who are convicted of crimes or offenses before a competent court, shall be deemed wards of the state and shall be committed to the custody of the board of guardians, until, in their judgment, they may be returned to society with ordinary safety and in accord with their own highest welfare.
Z. BROCKWAY, FIFTY YEARS OF PRISON SERVICE 401 (1912).
3. See notes 1-2 *supra*. See generally N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); A. NEIER, CRIME AND PUNISHMENT (1976); J. WILSON, THINKING ABOUT CRIME (1975).
4. See notes 1-3 *supra*.

practices, viewed by the commentators as unprincipled and ineffective instruments to achieve rehabilitation, much less justice or deterrence. Not surprisingly, the institution of parole, virtually ubiquitous in America's penal system,⁵ has also come under fire.⁶

Perhaps the most thorough and systematic critique of parole in light of the new retributive thinking is Andrew von Hirsch and Kathleen J. Hanrahan's new book, *The Question of Parole*. The book is a natural outgrowth of von Hirsch's earlier work, *Doing Justice*,⁷ which develops a basically retributive theory of criminal punishment.⁸ The upshot of *Doing Justice* is that offenders should be punished if, and only if, they deserve to be.⁹ Because punishment entails blame, its imposition is justified and its duration measured in correspondence to individual blameworthiness, defined through assessing the seriousness of the offense and the culpability of the offender.¹⁰ Moreover, justice requires equality of treatment among similarly situated offenders committing the same crime.¹¹ Utilitarian concerns for rehabilitation, incapacitation of dangerous offenders, and general and special deterrence are inappropriate in allocating punishment under the Desert Model of *Doing Justice*.¹² Under this view, justice is more likely achieved through adopting systems of "presumptive" sentencing structured by well-defined rules proportioning punishment commensurate to the seriousness of crimes rather than relying on discretionary and individualized dispositions of offenders.¹³ While *Doing Justice* focuses on the general problems of providing morally acceptable theories justifying the institution and allocation of punishment, *The*

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5. At least one state, Maine, has abolished parole. A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE* 1 (1979). See also ME. REV. STAT. ANN., tit. 17-A, chs. 47-53 (1978) (no discussion of parole in the general sentencing provisions).
 6. See, e.g., J. MITFORD, *KIND AND USUAL PUNISHMENT* 294 (1973).
 7. A. VON HIRSCH, *DOING JUSTICE* (1976) [hereinafter cited as *DOING JUSTICE*].
 8. See Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wis. L. Rev. 781.
 9. Punishment, even if deserved, is unjustified if it is administered through inhumane prison conditions. See *DOING JUSTICE*, *supra* note 7, at 107-17.
 10. The "seriousness" of a given offense is measured in terms of its harm: the actual injury done or risked by the conduct. *Id.* at 79-80. "Culpability" is defined as "the degree to which [an offender] may justly be held to blame for the consequences or risks of his act." *Id.* at 80.
 11. See *id.* at 72-74.
 12. *Doing Justice* does allow for crime prevention as an appropriate goal for punishment in general, *id.* at 47, but the allocation of punishment to individuals is to be based on desert considerations. *Id.* at 52, 70, 74-76.
 13. Some minor deviations from the presumptive sentence for a given crime are permitted if justified by aggravating or mitigating circumstances in particular cases. *Id.* at 99-101. The range of permissible deviation from the presumptive sentence is also fixed by rules. *Id.* at 100-01.

Question of Parole examines the narrower issue of whether parole would have a place in punishment systems built upon considerations of justice.

Parole is assessed in terms of two justice-oriented conceptual schemes, described as the "Desert" and "Modified Desert" models.¹⁴ The Desert Model, propounded in *Doing Justice* and favored by von Hirsch and Hanrahan, rigorously follows the "principle of commensurate deserts" in requiring equal punishment of those whose criminal conduct is equally blameworthy. The Modified Desert Model permits some limited relaxation of the commensurate deserts principle in particular cases in order to take into account such considerations as the perceived need of incapacitation, the possibilities of rehabilitation, or the likelihood of deterrence.¹⁵ Thus, under the Modified Desert Model, equally deserving offenders may receive slightly different punishments if utilitarian concerns are thought to be promoted thereby. The reason for positing the Modified Desert concept as well as the preferable Desert Model is to allow von Hirsch and Hanrahan to more fully examine parole, not simply in terms of its justice, but also in terms of its effectiveness in achieving its traditional goals—essentially utilitarian in nature.¹⁶

von Hirsch and Hanrahan provide a sketch of how the parole system operates, noting that parole boards, not judges or legislatures, generally determine the actual duration of an offender's incarceration. The practice in most jurisdictions is for the court to impose a maximum sentence consistent with legislatively defined punishment for the respective crime with the understanding that the parole board is empowered to release the offender prior to the expiration of the judicial maximum. In some jurisdictions the release may occur at any time prior to the expiration of the imposed maximum, while in others it may occur only after the inmate has served a specified fraction of the maximum sentence. Traditionally, offenders are not even considered for parole until after they have served substantial periods of confinement. Thus the inmate does not know when to expect to be paroled until well into his or her prison sentence. Moreover, the possibility of early knowledge of the length of one's actual sentence is virtually eliminated by the largely discretionary nature of the parole decision-making process. Parole boards generally operate without explicit guidelines for re-

14. A. VON HIRSCH & K. HANRAHAN, *supra* note 5, at 15-19.

15. The Modified Desert Model gives primacy to desert considerations in setting the range of penalties applicable to conduct of a given degree of seriousness, but utilitarian factors may be considered in fixing the specific penalty within the range. *Id.* at 18.

16. Traditionally, parole has been supported as a means of achieving rehabilitation and special deterrence. *Id.* at xiv.

lease decisions, preferring to consider all "relevant" factors on a case-by-case basis.¹⁷ Once the board grants "parole release" ending actual incarceration, a system of "parole supervision" operates to regulate the parolee's conduct for the remainder of the unserved sentence by requiring that the offender comply with the agreed-upon conditions of parole.¹⁸ A parolee's violation of any of these conditions of parole supervision, discovered by parole officials through a variety of surveillance techniques,¹⁹ can result in the parole board's revocation of parole and the parolee's return to prison for the remainder of his or her original sentence. While some procedural protections are required in revocation proceedings,²⁰ much of the process remains unstructured by guidelines defining the board's revocation policies.

The hope for parole release prior to the maximum possible period of confinement is thought to encourage inmates to cooperate in prison rehabilitation programs. Parole board discretion in the release decision supposedly assures that each inmate will be released only when his or her particular rehabilitative progress indicates that commission of future crime is unlikely. Parole supervision is believed to deter crime and crime-producing situations as well as to further rehabilitation.

von Hirsch and Hanrahan begin their critique of parole by condemning the practice of deferring the decision on actual sentence length until the prisoner has served a substantial portion of the sentence. This "deferred time-fix"²¹ process finds no support from the Desert Model. Deferring the decision creates undue suffering by requiring the inmate to await information on the length of his or her confinement when such decision, properly based entirely on desert considerations knowable at the time of sentencing, could be made at the very beginning of incarceration. No consideration of justice is promoted by deferring the decision fixing sentence length since no new knowledge pertaining to blameworthiness is

17. The concept of "relevance" is seldom defined. *Id.* at 2-3.

18. In addition to the obligation to abide by the law, parole conditions often include a variety of provisions requiring the parolee to engage in certain activities believed conducive to the development of a law-abiding nature and to avoid others thought to be criminogenic. *Id.* at 3.

19. Unannounced visits by parole officers to the parolee's home or place of work and report-gathering from his or her acquaintances are common methods of assuring compliance with conditions of parole. *Id.* at xii.

20. Parolees are entitled to "probable cause" hearings to determine whether parole violations have occurred. The parolee must receive written notice of the hearing and its purpose, and of the alleged violations. He or she may call witnesses and introduce evidence but need not necessarily be afforded counsel. *Id.* at 50-51.

21. This useful phrase is coined by von Hirsch and Hanrahan. *Id.* at 27.

likely to come to light after judicial sentencing.²² Ordinary concerns for decency, a fundamental moral obligation,²³ require that the time-fix be made as early as possible and its terms immediately conveyed to the prisoner.

An early time-fix is also required under the Modified Desert Model. Early determinations of sentence length can be made even if sentencing is based on the perceived need to incapacitate dangerous offenders since the information needed to make actuarial predictions, the most reliable indicator of dangerousness,²⁴ is available at the time of initial sentencing. The relevant information necessary for clinical predictions of recidivism is also available at the sentencing stage should such evaluations be thought necessary. Moreover, a delayed time-fix is not justified if rehabilitative concerns are thought relevant to sentencing because, in the first place, little evidence exists to support the effectiveness of prison rehabilitation programs.²⁵ Even if such programs were successful, there would not necessarily be any reason to affect the duration of confinement in order to administer the programs since the relationship between duration of confinement and success in rehabilitation is not known. Furthermore, if such a relationship could be shown, the factors establishing it would likely be known at the time of sentencing. Finally, considerations of deterrence do not support delaying the time-fix because there is no reason to suppose that new knowledge about a penalty's deterrent effect could be gained by waiting to fix the penalty until part of the sentence is served. In short, deferring the time-fix achieves no utilitarian purpose²⁶ and offends human dignity by causing the prisoner unnecessary anxiety and suffering awaiting notice of his or her sentence.

The time-fix means that the prisoner will serve the sentence stipulated. *The Question of Parole* allows for several situations,

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22. Blameworthiness is a backward-looking consideration based on the seriousness of one's actions in light of his or her state of mind at the time the offense is committed.
 23. The argument for the early time-fix is based on obligations to uphold human dignity rather than on principles of justice. *The Question of Parole* posits a fundamental right to be treated with decency which takes priority over all other moral obligations and penal goals. *Id.* at 9, 40.
 24. *Id.* at 31-32.
 25. *Id.* at 32-33.
 26. If future evidence were to establish that information gathered during one's incarceration did indeed enhance predictions of dangerousness, some deviations from the early time-fix might be justified under the Modified Desert, but not the Desert Model. Still, the offender could be given an early "presumptive time-fix" which would be deviated from only if subsequently available information strongly altered the estimated probability of the offender's recidivism. *Id.* at 35.

however, in which deviations from the stipulated sentence are justified. If the serious-rating of an offender's crime is reduced and the penalties for the offense greatly diminished during the time the inmate is incarcerated, there is justification for reducing the length of sentence since the redefinition of the crime makes it doubtful that the offender *ever* deserved the original sentence. Early releases are also justified if prisons become so crowded that continued incarceration constitutes cruelty since the obligation to avoid cruelty takes priority over all other considerations—even the obligation to do justice.²⁷ Early releases to avoid overcrowding should be based on explicit guidelines defining overpopulation for various types of institutions. Moreover, the practicalities of maintaining prison discipline may require adopting administrative systems of "good-time" which reduce the length of sentence if the inmate refrains from specified rule infractions.²⁸ Minor rule violations could result in loss of accumulated good-time and perhaps even in slight extensions of the offender's initial term. Maximum limits should be set on the amount of good-time that may be lost (or "bad-time" that may be gained) so that an alleged violator cannot be punished severely through administrative proceedings. Serious crimes committed inside the institution deserve serious additional punishment but should be dealt with as criminal, not administrative, matters. If systems of good-time or bad-time are adopted, they should be carefully detailed through specific guidelines defining how much good-time can be lost for which kinds of infractions (or how much bad-time can be accumulated for which kinds of infractions). The offender should be notified of the guidelines at or near the time of sentencing, thus respecting the requirement of an early time-fix. Thus, one would know at the beginning of his or her sentence the date of release, which could be altered only if one's offense is decriminalized, if severe overcrowding of the prison occurs, if good-time credit (defined in specific rules) supports an early release, or if subsequent violations of prison rules and accumulated bad-time justifies extending the release date.

The argument for an early time-fix does not necessarily mean the immediate abandonment of parole release, however. While the adoption of a system of early time-fixing could be adopted at sentencing, thereby eliminating the present system of "dual time" with purported judicial sentences and generally shorter "real" sentences set by the parole board, political considerations preclude a sudden embracing of a "real-time" model. Such a move

27. *Id.* at 9, 40.

28. It is essential that such infractions be specifically defined by rules in order to put inmates on notice of conduct prohibited within the institution.

would create the illusion of shifting toward leniency, while in fact the system would be doing no more than fixing the actual confinement usually served under the dual-time model. But the appearance of leniency, to a public unsophisticated in matters of sentencing and parole, might make the immediate switch to a real-time approach unrealistic. For this reason, *The Question of Parole* suggests retaining parole release, with an early time-fix based on desert-based durational standards, until a gradual transition to real-time can be effectuated.

von Hirsch and Hanrahan do not stop with suggesting reforms of present parole release practices. Various aspects of parole supervision also come under fire, particularly the practice of administratively revoking parole when parolees are found committing new crimes. Such administrative dispositions with lower standards of proof and less adequate procedural protections than the criminal process,²⁹ are inappropriate because they create a greater risk of punishing the innocent than does the criminal process. Therefore, the pursuit of justice requires that criminal charges brought against parolees (while on parole) should be dealt with through the criminal courts. Convictions, rather than revocations of previously granted parole, would result. Punishment would continue to be proportioned to the gravity of the offense. This would avoid the possibility, present under current administrative revocation proceedings, of minor crimes triggering disproportionately severe punishment in the form of reincarceration for the remainder of a lengthy, unexpired prior sentence from which parole had been granted.

Not surprisingly, *The Question of Parole* also condemns as an unjustified infringement of parolee liberty the practice of revoking parole for technical violations of non-criminal parole conditions. Evidence is lacking to establish that parole supervision of such matters as the parolee's failure to seek employment prevents recidivism or assists rehabilitation. Even if it could be shown that parole supervision achieved deterrent or rehabilitative effects, revocation for violations of non-criminal conditions of parole constitutes violation of the principle of commensurate deserts. This is the case since the reimprisoned parolee is more severely punished than a similarly situated offender who has been convicted of and paroled for the same crime but who complies with parole conditions and thus avoids reimprisonment. Treating the violation of the parole conditions as *itself* worthy of punishment is, of course, problematical since it is difficult to see how such "offenses" (*e.g.*,

29. A lower standard than "proof beyond a reasonable doubt" is applied in revocation proceedings. *Id.* at 52. For a review of procedural protections afforded in revocation proceedings, see note 20 *supra*.

failure to seek employment), even if committed by a parolee, warrant imprisonment. Hence, under the Desert Model, reimprisonment for violation of non-criminal conditions of parole constitutes unjust punishment and must be avoided. Parole supervision and revocation must therefore be abandoned under the Desert Model.³⁰

A somewhat different conclusion is reached when parole revocation for non-criminal parole violation is scrutinized in terms of the Modified Desert Model. If it could be shown that parole supervision is effective in achieving special deterrence or rehabilitation, minor deviations from the principle of commensurate deserts could be tolerated. Thus, consistent with the "Modified Desert Model," violators of technical parole conditions might be given brief periods of reconfinement if such could be justified on utilitarian grounds.

The Question of Parole recommends that special non-legislative sentencing commissions be delegated responsibility for setting the standards for duration of deserved confinement because legislatures typically lack the time, resources, and expertise to carefully draft adequate sentencing guidelines. Moreover, typical legislative sympathy for the often emotional desires of many voters to "get tough" with criminals through inflated penalties renders the task of defining appropriate desert-based standards difficult at the legislative level.

von Hirsch and Hanrahan are careful to point out that their suggested parole reforms are viable only if the total desert-oriented theory of punishment is implemented. Explicit standards governing confinement which parsimoniously prescribe imprisonment, particularly lengthy terms, are a precondition for the implementation of the parole reforms. Otherwise, fixing terms at an early date may result in an inflexible system of harsh punishment untempered by mercy.

One wonders whether mercy is given adequate input even if all the reforms of *Doing Justice* and *The Question of Parole* are adopted. Suppose, for example, that a previously dangerous and seemingly incorrigible offender experiences a religious conversion and suddenly dedicates himself or herself to a life of good works (an increasingly common phenomenon) shortly after beginning to serve a prison sentence imposed through the early time-fix. Assuming that at least some of these conversions are genuine, utilita-

30. The elimination of parole supervision must not detract from efforts to provide social services assisting released prisoners' return to the community. Ex-prisoners incur special social disabilities which require special services if readjustment to normal social life is to be realized. No penalty should be imposed if an ex-prisoner desires not to accept the services offered. *Id.* at 73-80.

rian considerations seem to support the immediate release of the "born again" individual. Incapacitation and special deterrence would no longer be necessary and rehabilitation would have been achieved. Early release of the truly converted should not adversely affect general deterrence since it is doubtful that potential offenders would be induced to commit crimes with a plan of feigning religious conversions in order to receive minimal punishment. Even if such inducement did exist in a few cases, the pretended conversion could often be detected. If it were not detected, the term of punishment would effectively be reduced only once since the feigner would be identified as such if incarcerated again subsequent to the "conversion."

Neither the Desert nor Modified Desert Models permits release of inmates on the basis of information coming to light subsequent to the time when sentence is fixed.³¹ Such late information is deemed irrelevant to punishment as desert, and unnecessary in structuring sentencing in light of utilitarian considerations. However, the example of the religiously converted inmate suggests problems with the conclusion that the Modified Desert Model precludes deviation from the period set by the time-fix even in light of facts subsequently arising.

The example also raises some interesting problems under a strict desert system. If an individual becomes a "new person" through a genuine conversion, in what sense does he or she "deserve" to be punished for acts committed by the old self? Even if one concludes punishment is still somehow deserved, should not compassion and mercy be permitted to temper the demands of justice in cases in which facts coming to light after sentencing indicate a significant change for the better in the character of the inmate?

Of course, such criticism could be leveled at any system of fixed sentencing. There is always the danger that attempts to limit discretion and to do justice through rule-oriented punishment structures will result in rigid and harsh systems which unduly sacrifice mercy and forgiveness, "unprincipled" virtues which escape capture through *a priori* rules.³² Justice, after all, is but one of the values which should shape the institution of punishment.

To the credit of *The Question of Parole* and its precursor, *Doing*

31. The Modified Desert Model allows for deviation from the fixed sentence based upon information coming to light after sentence is fixed. See note 26 *supra*.

32. Mercy, compassion, forgiveness and their legal analogue, pardon, are matters of grace, not of entitlement. Hence, they are necessarily *ad hoc* and discretionary and cannot appropriately be defined through rules. See Morris, *Percussions and Punishment*, in *PHILOSOPHY OF LAW* 572-73 (1975).

Justice, the primacy afforded the value of justice does not seem to be exaggerated to the extent that other values are overridden. Charity and compassion are reflected in the requirement of parsimony in punishment. Peace and social order are promoted by encouraging special and general deterrence as well as incapacitation of offenders through the system of fixed and certain punishment. If examples like the religious conversion case expose imperfections in the von Hirsch and Hanrahan proposals, that should not be surprising. Inevitably, there will be defects and weaknesses in any punishment theory created by human minds in an imperfect world. Presumably, von Hirsch and Hanrahan would be the first to recognize as much.³³

A more fundamental difficulty should be noted. Yet to be worked out by either *Doing Justice* or *The Question of Parole* is the problem of defining criminal responsibility in a desert-oriented theory of criminal punishment. If all punishment must be deserved to be justified, it seems necessary to reexamine substantive criminal law defenses. For example, must the present medical model of insanity be abandoned in favor of a broader responsibility inquiry exculpating a defendant for social and economic depravity as well as mental illness?³⁴ Does punishment as desert require modifying the traditional view that ignorance of the law is generally no excuse? To what extent should the character of the actor as well as the quality of his or her crime be taken into account in assessing responsibility?

It is hoped von Hirsch and Hanrahan will soon address such problems,³⁵ for until a sound responsibility theory is worked out, the theory of punishment espoused in *The Question of Parole* can at best be only cautiously embraced.

However, if one shares the basic philosophical predicates of *The Question of Parole*, its insistence that punishment be deserved, parsimoniously administered and premised on strict requirements of proof, the book's suggested reforms will likely seem sound and acceptable. To others still committed to the rehabilitative ideal or convinced that "get tough" attitudes need be adopted toward criminal offenders, the suggested tamperings with parole will, at least in part, appear undesirable. In any event, von Hirsch and Hanra-

33. Colleagues of von Hirsch on the *Doing Justice* project expressed their proposals as follows: "What we offer are partial solutions, while awaiting more insights, greater knowledge, and more complete answers in some hoped-for future." *DOING JUSTICE*, *supra* note 7, at xxxix.

34. The author of this review has made such recommendations. See Gardner, *supra* note 8, at 807-11.

35. A recent paper by von Hirsch discusses some of these problems. von Hirsch, *Prior Criminal Record* (September 15, 1979) (unpublished memorandum to Determinate Sentencing Project in possession of the author).

han have produced a book which makes important contributions in sharpening understanding and discussion of the role the increasingly controversial institution of parole should play in the criminal justice system.