



Probation And Parole

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Background

The use of [PROBATION](#) and [PAROLE](#) is governed in part by competing philosophies, classicalism and positivism. In short, classicalists believe that offenders choose their actions and, therefore, in order to prevent (or deter) future criminal acts, such individuals should be punished. Conversely, positivists believe that individuals are forced into the choice of committing crime through no fault of their own and, therefore, the conditions and/or behaviors that caused the action should be remedied, ultimately resulting in rehabilitation of the offender.

Legislative acts and public sentiment further dictate the application of probation and parole. Therefore, universal and consistent definitions and applications of probation and parole are not available as the methods of punishment and governing philosophies have evolved and moved toward the twenty-first century.

While these factors contribute to a lack of consistency when dealing with probation and parole, the primary obstacle to detailing specific state protocols is that the practice of granting probation and/or parole at the state level is dependent on the discretionary powers of select individuals, such as the [PROSECUTOR](#), the judicial authority, and the parole board, to name just a few. Information can be obtained regarding state-level agencies governing probation and parole from the American Probation and Parole Association (www.appa-net.org) or federal level parole practices from the U. S. Parole Commission (www.usdoj.gov/uspc/rules_procedures/2-2.pdf).

Probation

Definition

Probation is a court-imposed [SANCTION](#) that "releases a convicted offender into the community under a conditional suspended sentence." This practice assumes that most offenders are not dangerous and will respond well to treatment. In fact, the average [PROBATIONER](#) is a first time and/or non-violent offender who, it is believed, will be best served by remaining in the community while serving out the sentence.

History

Historically, probation does not involve [INCARCERATION](#), making it a front-end solution to address the overcrowding problem in U. S. prisons and jails. While the immediate goal of any probation program is rehabilitation—in reality, it is more a necessity than an instrument. As a result, other programs have been

developed under the umbrella of community corrections that utilize elements of conditional release resulting in the expansion of probation-type programs.

Probation developed as a result of the efforts of philanthropist, John Augustus, to rehabilitate convicted offenders, although references to similar practices exist as early as 437-422 BC. It was favored because it allowed judicial authorities a great deal of discretion when imposing sentences, thereby providing the opportunity to tailor sentences to a particular offender, in theory allowing for the greatest possibility of rehabilitation. While sentences of probation vary widely across and within jurisdictions, the maximum length of time that one can be under supervision is 5 years (60 months).

The functions of probation are difficult to state definitively. It is known that at its inception, John Augustus' goal was behavioral reform. This reflects the sentencing goal of rehabilitation. Fundamentally, it is believed that by allowing the offender to remain in the community, the system is providing a second chance. Further, support and guidance from probation officers may achieve the aim of guiding the offender towards a law-abiding existence.

Given that probation is no longer limited to first-time, non-violent offenders who pose minimal risk to the community, the reality is significantly different. Coupled with low confidence in the effectiveness of rehabilitative success and a burgeoning offender population, actual practices tend to be dictated by conflicting goals on both an individual and administrative level. In an aggressive bid to prevent jail or prison overcrowding, several alternatives to incarceration have developed. Some such programs enable offenders traditionally incarcerated to be released into the community, thereby forcing a shift in focus from rehabilitation to control and supervision.

Intensive Supervised Probation (ISP)

ISP is a form of release into the community that emphasizes close monitoring of convicted offenders and imposes rigorous conditions on that release, such as the following:

- Multiple weekly contacts w/officer
- Random and unannounced drug testing
- Stringent enforcement of conditions, i.e.,: maintaining employment
- Required participation in treatment, education programs, etc.

Individuals on ISP are those who most likely should NOT be in the community. The restrictions placed on them are often excessive and the level of direct, face-to-face contact required is believed to significantly deter, or at least interfere, with any ongoing criminal activity.

Shock Probation and Split Sentencing

Shock probation/split sentencing is a sentence for a term of years, but after 30, 60, or 90 days, the offender is removed from jail or prison.

While these terms are used interchangeably, they are actually two different activities. In shock probation, the offender is originally sentenced to jail, then brought before the judge after 30, 60, or 90 days and re-sentenced to probation (Ohio scheme). In split sentencing, probation is part of the original sentence requiring no additional appearance before the judge (California scheme). Nonetheless, the terms refer to the same outcome—some jail, some community.

Revocation

Since probation is a conditional release, it can be revoked, or taken away, if the conditions governing release are not met (technical violation) or if a new crime is committed during the probationary period (new offense).

Probation revocation is initiated by the probation officer's belief that a violation warranting revocation has occurred. As a result of the 1973 case *Gagnon v. Scarpelli* (411 U.S. 778), the Supreme Court decided that where "liberty interests" are involved, probationers are entitled to retain certain due process rights. Such rights include: (1) written notification of the alleged violations; (2) preliminary (or [PROBABLE CAUSE HEARING](#)) at which a judicial authority will determine whether sufficient probable cause exists to pursue the case; and (3) if warranted, a revocation hearing.

If a revocation hearing is scheduled, probationers have the right to [TESTIFY](#) in their own behalf, may present witnesses, and may have an attorney present. While the Gagnon court was vague regarding the right to court appointed [COUNSEL](#) at a revocation hearing, most jurisdictions do provide the right to appointed counsel.

The standard of proof required at a revocation hearing is a "preponderance of the evidence", lower than that required at a criminal trial. Possible outcomes include return to supervision, reprimand with restoration to supervision, or revocation with [IMPRISONMENT](#).

Parole

Definition

Parole is the "conditional early release from prison or jail, under supervision, after a portion of the sentence has been served." This practice assumes that the offender successfully demonstrated conformity to the rules and regulations of the prison environment and shows an ability to conform to society's norms and laws.

History

The word, parole, derives from the French "parol" meaning "word of honor" and references prisoners of war promising not to take up arms in current conflict if released. How that concept came to apply to the early release of convicted, often violent, offenders is less clear. The first documented official use of early release from prison in the United States is credited to Samuel G. Howe in Boston (1847), but prior to that, other programs using pardons achieved basically the same outcome. In fact, as late as 1938, parole was simply a conditional [PARDON](#) in many states.

Alexander Maconochie (England) ran the Norfolk Island prison. During his tenure, he instituted a system whereby inmates would be punished for the past and trained for the future. He believed that inmates could be rehabilitated so he implemented an open-ended sentencing structure where inmates had to "earn" their release by passing through three stages, each stage increased their liberty and responsibilities. Inmates had an open time frame in which to earn the next level. Compliance advanced them; infractions resulted in a return to the previous stage, thereby lengthening the sentence. The open-ended sentences (today known as indeterminate sentencing) allowed the administration to ensure that when finally released, an offender's behavior had been successfully reformed. Eventually, Maconochie was removed from his position under criticism that his program "coddled" criminals.

At about the same time, Sir Walter Crofton was developing a similar program in Ireland using "tickets of leave". The "Irish System" as it came to be known, employed a similar practice of allowing inmates to earn

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credits towards early release. However, once the "ticket of leave" was achieved, release from [CUSTODY](#) was conditional. The releasees were supervised in the community by either law enforcement or civilian personnel who were required to secure employment and to conduct home visits. These "supervisors" represented the forerunner to today's parole officer.

In the United States, Zebulon Brockaway (Superintendent) employed elements from both the Irish and Great Britain models in managing the Elmira Reformatory during the 1870s. Brockaway is credited with the passage of the first indeterminate sentencing law in the United States as well as introducing the first good time system to reduce inmates' sentences. However, releasing the offenders was only part of the problem and initially, the greatest challenge was providing adequate supervision once release had been granted.

By 1913, it was clear some independent body was required to supervise inmates in the community and by 1930, Congress formally established a United States Board of Parole. It appeared, at least for awhile, that initiatives and programs were developing that could make parole a viable and useful tool of the criminal justice system. But unfortunate timing contributed ultimately to its downfall.

In 1929, the Great Depression hit the United States. An immediate result was a sharp increase in prison populations. However, the high cost of maintaining prisons as well as a lack of available personnel to staff them made new construction prohibitive and contributed to the popularity of parole. While alleviation of the overcrowding problem is often cited as a secondary (or latent) goal, the reality is that as a back-end solution, parole is vital to the maintenance of the correctional system.

With the onset of the twentieth century, philosophers began to examine the social and psychological aspects of criminal behavior. This heralded a shift from classicalist thinking towards positivism. Under positivism, actions are believed to be caused by forces beyond one's control (such forces could be psychological, biological, or sociological in origin). Therefore, parolees were now viewed as "sick" and the parole department was charged with the responsibility of "fixing" them.

Positivism is consistent with a less punitive approach to sentencing and generally involves an indeterminate sentencing structure allowing for the possibility of early release if the offender demonstrates that they have been successfully rehabilitated. As such, it fit well with the Elmira system and the timing afforded officials the opportunity to use parole as a means to relieve the overcrowded conditions that had developed during the depression.

The fact that parole involves some incarceration suggests that the average parolee has committed a more serious crime than the average probationer and, hence, poses a greater risk to the community. Therefore, primary goals of parole must include crime deterrence and offender control. And given that most offenders will eventually return to the community, a rival goal is reintegration, or the facilitation of an offender's transition from incarceration to freedom.

Unfortunately, it appeared during the 1980s that parole was failing. Street crime rates during this period skyrocketed and in many cases, the crimes were perpetrated by individuals who were released into the community prior to the official expiration of their sentence. This reality led to the development of penal philosophies espousing "tough on crime" approaches and demanding "truth in sentencing". Such philosophies warned criminals, "do the crime, do the time" and resulted in radical changes to sentencing practices across the country that indicated a return to a more punitive sentencing structure.

Revocation

Since parole is a conditional release, it can be revoked or taken away, if the conditions governing release are not met (technical violation) or if a new crime is committed during the probationary period (new offense). In

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this manner, it is similar to probation; however, it differs in that probation is governed by judicial decisions whereas parole is governed by administrative procedures. As a result of the administrative nature of parole, the revocation process is so varied among the jurisdictions.

In large part, however, most minor infractions are dealt with by the parole officer and may not necessitate involvement of the parole board. Some jurisdictions empower the parole officer to immediately take a parolee into custody for 24 (New York) to 48 hours (Pennsylvania) for purposes of obtaining an [ARREST WARRANT](#). This practice is typically employed when the offender represents an immediate threat to public safety.

With respect to the legal protections afforded to parolees, the first case to explore this issue was *Morrissey v. Brewer* (1972). The *Morrissey* case explored the extension of due process rights of (1) written notice to parolee prior to general revocation proceeding; (2) identification of the violations being presented and any [EVIDENCE](#) being used to prove that the violation took place; (3) the right of the parolee to confront and cross-examine accusers (subject to exceptions) and (4) a written explanation for the decisions regarding the revocation of the parole and what evidence was employed in making that decision. Perhaps the greatest contribution of the *Morrissey* case was the creation of a two-stage process wherein first, probable cause that violations had occurred had to exist in order to go to the second stage, which was the actual revocation hearing.

Interestingly, the Supreme Court did not choose to create a bright line rule for the right to court-appointed counsel at a revocation hearing. For the most part, however, most jurisdictions have followed the decision in *Mempa v. Rhay* (1967). While this case specifically dealt with the rights of probationers, it has been applied recently to parolees as well. Basically, the Supreme Court wrote that "any indigent is entitled at every stage of a criminal proceeding to be represented by court-appointed counsel, where substantial rights of a criminal [ACCUSED](#) may be affected." In sum, the Supreme Court considered the liberty interests of the probationers and decided that a probation revocation hearing constituted a "critical stage" which dictated adherence to due process protections. This rationale has consistently been extended to include parole revocation hearings as well.

Abolishment

As of 2001, 15 states (Arizona, California, Delaware, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, Ohio, Oregon, New Mexico, North Carolina, Virginia and Washington) and the Federal government have eliminated parole programs in lieu of a determinate model of sentencing reflective of a more retributive approach to punishment. (New York Gov. George Pataki proposed making New York the sixteenth state)

Such an action may seem warranted given the apparent inability of the system to guarantee the protection of the citizens—but the end result is predictable. Overcrowding still represents the greatest challenge to the correctional industry. In fact, three states (Connecticut, Colorado, and Florida) reinstated the parole boards after eliminating them due to the unforeseen overcrowding problems. The reality is that removal of parole ultimately leads simply to a shift in power from parole boards to prosecutors, in that the option most often exercised in states without parole, is probation (see above).

Additional Resources

History of the Federal Parole System, Part I (1910-1972) Hoffman, Peter, Federal Probation, Sept. 1997, pp. 23-31.

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History of the Federal Parole System, Part II (1973-1997) Hoffman, Peter, Federal Probation, Dec. 1997, pp. 49-57.

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Probation, Parole, and Community Corrections, 3rd Edition. 3rd ed., Dean J. Champion, Dean J., Prentice Hall, 1999.

Organizations

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