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DEGREES OF PAROLE VIOLATION AND GRADED REMEDIAL MEASURES

Hans von Hentig¹

Whenever a man is convicted of murder, robbery or rape he is held responsible for a clearly defined set of doings. Sometimes generalities enter the criminal law, such as "vagrancy" or "disorderly conduct"; all lawyers, however, agree that this is bad juridical technique and, if possible, should be mended.

This imperfect method is followed, strangely enough, in the construction of one of the most modern implements of crime prevention: we mean the parole system and, incidental to it, parole violation. What is the legal aspect of parole violation?

According to the accepted theory the parolee serves a portion of his sentence outside the walls.² He is still a prisoner. He is released, but not free. He is supposed to remain in the custody of the warden of the institution from which he has been discharged.³ He may be returned for any violation of the conditions of his parole. These conditions differ widely in graveness and scope. The three principal distinctions are: absconding, failure to comply with parole conditions of any kind, and re-arrest.

Absconding

Absconding, whether caught or "whereabouts unknown", is a clear case. It is technically clear, albeit the psychological genesis may vary. Not a few men do abscond in order to rehabilitate themselves by the revealing or reversing interference of a parole officer.

Compliance with Parole Conditions

Failure to comply with parole conditions covers a much larger field.⁴ There is no end to such conditions. They are well meant, and ordained to keep the parolee going straight. They embrace an unlimited domain of doings and omissions. A few conditions imposed by our principal states follow:

The prisoner must abstain from the use of intoxicating liquors or narcotics.⁵

Borrowing money or articles of value, going into debt, purchasing on the installment plan or making unnecessary or expensive purchases are forbidden without the consent of the parole agent.⁶

¹ Director, Colorado Crime Survey. University of Colorado, Boulder, Colo.

² Spaulding in *Proceedings American Prison Association*, 1916 p. 464.

³ *Tenth Report* of the Division of Parole of the Executive Department, Albany 1940, p. 99.

⁴ The main groups of violation were distributed this way in New York State:

General violation of parole agreement..... 37.6 per cent

Absconded 12.0 per cent

Arrested 50.4 per cent

Computed from figures in 12th Annual Report, Division of Parole, State of New York for the year 1941, Albany 1942, p. 85.

⁵ Rule 5, State of Illinois.

⁶ Rule 5, State of Minnesota.

He must make a written report on the last day of each month. This report must state how much money he had at the beginning of the month; how much he has earned during the month; how much he has expended and for what, and how much he has on hand at the end of the month.⁷

Persons on parole are not permitted . . . to loaf, stay out at night, visit public dance halls, associate with doubtful or objectionable company.⁸

You are strictly forbidden to drive or operate an airplane while on parole, except with the written permission of the State parole officer.⁹

You are forbidden to engage in public speaking of any nature or be actively affiliated with any political party or group.¹⁰

I will not associate (the parolee has to affirm) with persons of questionable character, or with anyone on parole, or with any person having a criminal record.¹¹

Nor will I live with any woman not my lawful wife.¹²

I will not make application for a license to hunt.¹³

I will not engage in any illegal or illegitimate business.¹⁴

The parolee shall avoid evil associations and not frequent improper places of amusement, nor loiter upon the streets at night.¹⁵

The prisoner . . . must not be away from home after 9:00 o'clock unless granted permission by the Parole Agent.¹⁶

If I should be arrested in another state during the period of my parole I will waive extradition.¹⁷

In Louisiana¹⁸ the parolee promises that he "will work diligently and honestly for himself and his employer."

This concise survey of parole conditions in our best administered states shows that the released man is expected to lead a childlike and pastoral life for a series of years. In complying strictly with every one of these conditions he would at once draw the attention of his neighbours to his being either a crank or a convict who has been released on parole.

It has been decided that conditions imposed by the pardoning authorities¹⁹ or the judge who grants probation²⁰ should not be

⁷ Rule 4, State of Connecticut.

⁸ Rule 1, State of Minnesota.

⁹ Rule 2, State of California.

¹⁰ Rule 5, State of California . . . Why then give our convicts courses in "public speaking"? See Biennial Report of the Board of Corrections, State of Utah, Fiscal years 1939-1940, p. 31.

¹¹ Rule 4, State of Massachusetts . . . "If the fingerprints of these one-hundred and seventy thousand persons could be examined and compared with the criminal identification files of the Federal Bureau of Investigation, an irreducible minimum of more than four thousand and a maximum of fifteen-thousand so-called protectors of public safety would be found to have previous criminal records, ranging from larceny to murder." C. R. Cooper, *Here's to Crime*, Boston, 1937, pp. 7 and 8. Cooper's figures apparently rest on information forwarded to him by the FBI.

¹² Rule 9, State of Massachusetts.

¹³ Rule 10, State of Massachusetts.

¹⁴ Rule 6, District of Columbia.

¹⁵ Rule 10, State of Oregon.

¹⁶ Rule 6, State of Illinois.

¹⁷ Rule 12, State of New York.

¹⁸ Form D. Report of the Louisiana State Board of Parole for the period 1936-1940, p. 32.

¹⁹ Henry Weihofen and Hans von Hentig, *Pardon*, Vol. III, Attorney General's Survey of Release Procedures, Washington, 1939, pp. 198-201.

²⁰ Sam B. Warner in Sheldon Glueck, *Probation and Criminal Justice*, New York, 1933, pp. 32-39.

illegal, immoral or impossible of performance. It can easily be determined what conditions are illegal; there will, however, be much more uncertainty concerning what is to be regarded as "immoral" or "impossible of performance."²¹ There is a relative impossibility, by which we understand conditions to be opposite and contradictory to normal ways of life.

What we try to impose are rules that extend far into the realm of utopian perfection. The great majority of people in free life do not observe them. You find them in sermons and in the programs of reform groups, but not in the habits of the people.

We forget the sociological function of some factual modes of recreation. A beer parlor is not an ideal place nor is a dance hall. Their relative merit rests on the fact that these spots present a contrast to the deadly monotony of industrial life. Here is warmth, light, company—a good company and bad company—but after all some sort of companionship for the poor and lonely wretch. It would certainly be better if we could buy these people good and instructive books, gather them in clean and cheerful clubs or send them at night to the Metropolitan Opera House. Since we do not dispose of these reviving antipodes for everybody we should not reject completely the lower and common forms of leisure. It is their peculiar property to help us maintain average moral conduct in the meantime.

The fact is that we release a man from a place of the greatest monotony, from a place which has skillfully developed the art of being wearisome through sameness to a high degree. The parolee gets out into the world. He looks for a job. He might obtain or already have obtained a job, but he has to start low in the scale of occupations. His are the dirty, the dangerous, the underpaid, the tedious jobs. No wonder that more than any other man the parolee has a burning desire after cessation of work for a change of scene, for diversity, for excitement. All superior and certified forms of leisure are expensive, and closed to the ex-convict. When he now turns to things which we disdainfully call intoxication²² or cohabiting²³ we label it misconduct, violation of his parole agreement, and return him to prison as a man who has broken his pledge and has started on a new career of crime.

By setting down more or less reasonable conditions, an attempt is made to limit the unrestricted power of an individual or an

²¹ "He shall keep himself employed at some honorable work." (Rule 4, Parole Agreement, State of Idaho.) And just the ex-convict should be able to work this miracle in times of unemployment?

²² The Rules governing parole in the State of Washington are much more liberal than most of the other States. Rule 9 says: "That the parolee shall abstain from the excessive use of intoxicating liquor." This is a very recommendable way of handling the problem.

²³ A convict writes: "Say you come here with a three to ten years bit. You serve three years of it, and go out on your minimum sentence with a seven years parole time over your head. He hands you a set of rules that not even a

agency. However, the most arbitrary conditions are better than complete arbitrary discretion.

According to the Parole Agreement of the Colorado State Penitentiary²⁴ the situation of the parolee is this:

He shall be subject at all times to the penal rules and regulations of the State of Colorado, and shall be subject at any time to be taken back within the enclosure of the penitentiary for any reason which may be satisfactory to the Warden, and at his sole discretion, and upon his request the Governor may order him returned.

He shall also be liable to be retaken and confined within the enclosure of said penitentiary for any violation of this agreement, or for any other reason that shall be satisfactory to the Governor and Warden, until he receives a written notice from the Warden that his final release has been ordered.

There is no doubt that—at least theoretically—a parolee can be returned “for any reason which may be satisfactory to the Warden, and at his sole discretion.” The Governor in order to issue the revocation of parole has to rely on the request and the argumentation of the Warden.

Arrested Parolees

A third group of parole violations is represented by the parolees who have been arrested. We know that there is a long way from arrest to conviction. Such an authority as Raymond B. Fosdick²⁵ has declared that “the bare figure of arrests, even when classified according to crimes, is utterly meaningless.” Nevertheless, arrests suffice in many states to justify the re-confinement of a parolee. An arrest seems to indicate a more serious failure than a simple violation of parole conditions. But this is not true at all. A violation is a violation. Arrests are effected on mere suspicion and it is easy to show that thousands of innocent people are arrested daily and released after a brief detention. Some parole agreements drop a hint as to the real situation. They first threaten that the Board of Parole or the Superintendent of the Penitentiary:

Will vigorously follow and re-arrest him in event that he wilfully violates the conditions of his parole, sparing neither time or expense in doing so.²⁶

After having dispatched this thunderbolt they add the words which are ominous in their re-assurance:

“If he does right he need not have fear of being re-arrested.” It is not in the power of a Board of Parole to guarantee this ideal state of things. In fact, for obvious reasons, every parolee is likely

Y. M. C. A. faggot could live up to, and then expect a man who hasn't had a drink or a piece of a femme for years to keep those rules. Why, I'll bet he can't live up to them himself. Then if you get caught drunk, or out with a broad, any time before that seven years is up, he can take you back to Charlestown and make you serve the whole goddam seven years. Why a judge could not make you serve that much time for those offenses.” Victor F. Nelson, *Prison Days and Nights*, Boston, 1933, p. 29.

²⁴ Rules 5 and 6.

²⁵ *American Police Systems*, New York, 1920, p. 340.

²⁶ Rule 8, Parole Agreement, State of New Mexico; Rule 7, Parole Agreement, State of Idaho.

to be re-arrested, when a crime is committed in a small community and the perpetrator cannot be found immediately. He is the suspect *per se* and it is little to be wondered at his first being arrested on suspicion.²⁷

A great variety of moves by the police, the prosecuting attorney, the judge of the preliminary hearing, the Grand Jury and finally the Jury or the Court shapes the group of parolees who are designated as "arrested and returned." In many states exact figures are not available to show how this group has come about. In the State of New York, however, the outcome of arrests can be divided into four groups, for 1939, as follows:

NEW YORK STATE INDETERMINATE SENTENCE
STATE PRISONS, 1941
Parolees Returned.²⁸

Arrested and convicted of felonies.....	41.8 per cent
Arrested and convicted of misdemeanors.....	37.2 per cent
Arrested, charges dismissed.....	19.9 per cent
Arrested, cases pending.....	1.0 per cent

Total of parolees arrested and returned100.0 per cent

It must be added that in 10.7 per cent of all felony convictions and in 16.6 per cent of the misdemeanor convictions the sentences were suspended or deferred. Thus of a total of 201 parolees, arrested and returned, 60 or 30.0 per cent received suspended or deferred sentences or had their charges dismissed.

When the writer interviewed some time ago a large number of convicts, some of them complained of having been returned on mere suspicion. He was not able at this time to check the verity of these grievances. The writer later was able to study the executive records in the office of the Governor. No revocation of parole on "suspicion" during the period under examination could be found. There was, however, a great deal of revocations in former years for having been arrested on a more or less serious charge. If proved most of these charges would certainly have justified the revocation; the records, however, speak only of arrests and add in a few cases that the parolee has admitted the charge. Here are a few of these revocations:

Has violated his parole and that he has changed his residence without permission and also upon the complaint of the District Attorney and the Sheriff that several citizens have reported the loss of clothing.²⁹

Has violated his parole in that he had been arrested after he sold and delivered

²⁷ More than 10 per cent of the 609,013 people arrested were in 1940 arrested on suspicion; 50 per cent of these had previous fingerprint records. Obviously many more were arrested on mere suspicion, but in these 62,090 cases no offense could be charged. *Uniform Crime Reports*, Vol. XI, 1940, p. 214.

²⁸ Computed from figures in 12th Annual Report, Division of Parole, Albany, 1942, p. 85.

²⁹ Executive Records, State of Colorado, XXX, p. 227.

a gallon of whiskey to one of the agents of Federal prohibition.³⁰

Has violated his parole in that he has been implicated with others who were charged with aggravated robbery.³¹

Has violated his parole in that he had received a bullet wound for making improper advances toward a little girl.³²

Has violated his parole in that he had been arrested as general nuisance.³³

It is obvious that in small mountain communities the charge of having stolen chickens is shared equally by coyotes, hawks and human pilferers, and cannot be made a basis for such a serious step as the revocation of a parole. However, that is what happens not infrequently. On the other hand it cannot be said that arrest for "having a flashlight" or "burglary tools" in his possession is a safe piece of evidence in mining places where many miners carry flashlights and tools with them. What we object to is mere arrest as reason for being returned to the penitentiary.

Symptoms of Decay

The institution of parole laboriously built up through decades shows symptoms of decay. The prisoner is increasingly antagonistic toward everything in the system except the fact of an earlier release. It is evident that no system can function when the principal person refuses to play his part.

In Washington, D. C., "more than half the prisoners fail to apply for parole. Of the 897 prisoners eligible for parole during the past year only 408, or 46.6 per cent, applied. This means that more than half, 53.4 per cent, failed to apply."³⁴ Besides other reasons,³⁵ the prisoner considers our present methods of supervision, the conditions imposed on him and our practice of return as a handicap and a risk. He prefers to stay in prison.

These facts prove that something must be wrong with our parole system. We think that the failure to develop a sound treatment of the parole violator or to restrict the sphere of parole violations is the fundamental defect of the system.

Already twelve years ago the Illinois Crime Survey³⁶ demanded that a distinction should be made between major and minor violations of parole. We want to go further. Since there is a long series of graded parole violations it is necessary that our counter-measures, instead of using the weapon of reincarceration,

³⁰ *Ibid.*, XXIX, p. 45. Here the problem of entrapment comes up which has given occasion to many discussions in the Federal Courts. "Frequently a court in effect will direct an acquittal." Sears and Weihofen, *May's Law of Crimes*, Boston, 1938, p. 10.

³¹ *Ibid.*, XXVIII, p. 371.

³² *Ibid.*, XXVII, p. 382.

³³ *Ibid.*, XXX, p. 533.

³⁴ Annual Report of the Board of Indeterminate Sentence and Parole, District of Columbia, for the fiscal year ending June 30, 1939, p. 1.

³⁵ For instance, the short time intervening between eligibility date and conditional release date, fear of publicity, fear of having no chance of release with a bad record and so forth.

³⁶ Bruce, Burgess and Harno, *The Probation and Parole System*, Illinois Crime Survey, Chicago, 1929, p. 521.

react according to the relative gravity of the violation.

Two changes are badly needed, if we expect "parole" to assume its place among the most progressive means of crime curtailment and crime prevention: First, an exact procedure of handling the serious delinquent parolee is required. And further, we must develop graded remedial measures in order to counteract parole violations of the most diverse degree.

In many States hearings are provided at which the parole violation is discussed. These hearings, however, are mostly discretionary with the paroling and parole-retracting authorities.³⁷ In many states violators are returned somewhat automatically.

The writer has tried hard to explore the mind of hundreds of convicts regarding their attitude toward parole and parole violations. The prisoner thinks that in general the release practice cannot be complained of very much, but that our return methods spoil everything. The more formally wrong he is, the more he is embittered, and the more he feels trapped between the clear words of the written parole agreement and the enormous disproportion of cause and effect when he happens to violate one of the parole conditions. This conflict of formal right and factual wrong works day and night on his mind and renders the returned parole violator a peculiarly society-made problem.³⁸

There are many legal problems in the procedure of return which never have been contemplated. We have mentioned already the parolee who might have been entrapped by a prohibition agent and who might have been acquitted by a court. There are many other instances of doubtful legal nature. We happened to have known a case where a parolee was returned because he had been arrested for resisting an officer. The subject of arrest and resisting is, according to our law books, "considerably confused,"³⁹ and resistance is only offered when an officer is *rightfully* engaged in making an arrest. The simple fact that resistance has taken place, cannot suffice. In another case the parolee was returned because he had been residing with a known prostitute, had been living off her earnings and then had beaten her up when she tried to leave him. Here again the parolee has fallen completely

³⁷ Paul Raymond and William Hurwitz, *Parole*, Vol. IV, Attorney General's Survey of Release Procedures, Washington, 1939, p. 245.

³⁸ In a small unpublished pamphlet, written by Reg. 16210 of Colorado State Penitentiary, the prisoner writes of the "unsociables": "This is the class into which all other classes eventually degenerate, if the punishment is too severe or the offender repeat too often. It is the grist mill for the underdog with the real or the fancied wrong. Here is bottled up more dynamite in the form of hatred for the law and society than can be readily imagined.

The majority of these men are the oft-time repeaters who have graduated from the other classes. Many are habitual criminals who realize too late in life the futility of a life of crime. They think it too late to change because of their age or their records. In this class too will be found many parole violators who have been returned to finish their maximum sentence."

³⁹ Sears-Weihofen, *loc. cit.*, p. 65.

into the servitude of the prostitute who can get rid of him whenever she wants by reporting him to the police. A similar situation frequently arises between the parolee and his wife. Nothing is easier than to drop a parolee-husband; the slightest fight, cunningly provoked, will satisfy the parole agencies.

There are other legal problems which we can but indicate slightly. Is criminal intent required in parole violations or will negligence do? Will the attempted parole violation do or must it be consumed? Do the rules of insanity, coercion, ignorance of fact, defense and compulsion bear upon parole violations? Do the rules which we have developed through the ages regarding the State's witness apply to the parole violator? All these questions remain unanswered under the present loosely shaped rules and practices.

A much graver defect of the system which looks so modern, so flexible and so fully alive to human cares and needs is its reliance on the antiquated mechanisms of deterrence. It is true that we dispose of the poor excuse: the parolee has signed an agreement. Here it is. He has not kept the conditions of this pledge. And so we return him to the penitentiary, albeit the whole meaning of parole is to keep him out of the degrading influences of confinement. We have an excuse toward him, but not toward ourselves. The written agreement cannot release our conscience of a greater and vaster responsibility toward the whole of society. There is no doubt that any serious offense must be followed by strong protective moves. But is "absconding" in any case the symptom of anti-social behavior? Is our world not constructed so queerly that by absconding and not being recognized as ex-convicts many men have a better chance to succeed than by complying strictly to the rules? Is driving a motor-car or being out after 9 o'clock or visiting a dance-hall a reason for returning a man for 3, 5, or 7 years?

We think that the rigidity of the present system should be dropped and that all minor infractions should result in other measures: an extension of the parole period,⁴⁰ stricter supervision, fines, probation or extension of help and guidance and adequate corrective measures. We do not believe that it would do harm to introduce the idea of reform and prevention into the parole period and to stick to it as long as is feasible.

The parole conditions should be reduced to an indispensable minimum; their boundless extension breeds the parole violator.

Sometimes it happens that the conditions imposed upon the parolee and the violation construed according to these ideas betray little knowledge of the casualties involved in this specific type of crime. A recent New York Report⁴¹ regarding the sex criminal on parole explains what we mean. Sex delinquents were

⁴⁰ See, for instance, the Iowa practice. *Parole*, p. 239.

⁴¹ Tenth Report, Albany, 1940, pp. 25 and 26.

returned as parole violators for "cohabiting" for "paying attention to a married woman" and for "associating with the original complainant." Possessing obscene literature has been regarded as parole violation in the case of a former rapist.⁴²

In contrast to current popular beliefs the sex offender is mostly an individual with weakened, inhibited or heat-like temporarily increased sex impulse. We cannot cut him off from every sexual activity. The only thing we can do is to drain these urges into legal or quasi-legal channels and to replace the violent and unhindered outbursts by the installation of regulated outlets.

It could easily be that by cutting the former sex offender forcibly off from what the report calls "cohabiting" or "paying attentions" or turning over the pages of "obscene literature" he will be thrown back to forms of sexual discharge which might be much more injurious to society. Do only sex offenders cohabit, or pay attention to a married woman? Do only criminals "annoy young girls"?⁴³ While admitting that we move on delicate grounds we think that the problem should be reconsidered and the discussion reopened. The imperfection, sometimes the absurdity of the present state of things, is veiled by the insight of many parole officers and boards and of law enforcing agencies who refrain from reporting futilities and use milder means of censure.

It cannot be doubted that the prevailing methods endanger the effectiveness of the whole parole system. We want to rehabilitate the prisoner, yet by wrong procedures of return we render him unmanageable and a permanent charge to the moral and material account. By differentiating and refining our procedures we would lay a solid foundation for the system of releasing and keeping out on parole. Today, many returned parolees receive the compassion of their fellow-prisoners, their relatives and friends and, sometimes, of the impartial observer. With a reformed system of return the whole blame and the whole heavy responsibility would rest on the returned man. There would be no loophole and no shift for him and his group to lay the guilt on other's shoulders. By being handled more carefully and more sparsely the deterrent virtue of a return would be augmented.

It has often been suggested that between prison and free life there should be gradual and progressing transition.⁴⁴ If we had such intermediate institutions or camps, not prison and yet not full freedom with all its stress, pressure and temptations, they could be used as a corrective measure for minor parole violators. They would offer immunity from the mischief of freedom and exemption from the ravages of the penitentiary.

⁴² *Ibid.*, p. 28.

⁴³ *Ibid.*, p. 25 or "abscond with married woman," p. 25.

⁴⁴ See the trusty camps in the State of Washington.