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Carter H. White

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# SOME LEGAL ASPECTS OF PAROLE<sup>1</sup>

Carter H. White<sup>2</sup>

## I. INTRODUCTION

With public attention directed to the administrative side of the parole system in our criminal jurisprudence,<sup>3</sup> too little heed has been paid the legalistic side of parole and the direction, if any, that the law is taking in that regard. It is the purpose of this paper to indicate some of the legal problems necessarily or unnecessarily involved in the use of parole as a peno-correctional device and the treatment thereof by the courts.<sup>4</sup>

Of necessity, this paper will be confined to parole as that word is strictly construed in the criminal law, omitting absolute pardon, conditional pardon, commutation, reprieve, probation, and indeterminate sentence, except where they are necessary to the explanation of the problem. Likewise many isolated problems related to parole will be disregarded or only incidentally mentioned;<sup>5</sup> emphasis being placed on four or five main divisions.

The defects in a paper of this kind are several:

1. Data are necessarily limited to reported appellate court cases, which means the omission of many points that were never appealed for lack of money, connections, or an intelligent lawyer.

2. The courts often confuse parole with probation or conditional pardon, thus obfuscating the issues. .

3. Many cases deal only with the interpretation of various sections of a particular parole statute, with no enunciation of basic principles of parole. Similar statutes may be construed differently in different states.

4. Some of these problems of statutory interpretation are being solved or more obscured at each court session, but new problems are raised in their stead by legislative amendment.<sup>6</sup>

Notwithstanding these obvious defects, and probably others, this paper will attempt to categorize the major legal problems raised by parole, and at the same time serve as a reference work for those who desire to delve more deeply into any particular phase. Not all cases on each point will be cited, but reference will be made to the most complete compilation of notes available in legal publications. Possible reforms may be occasionally suggested, but this paper is primarily an analysis of existing law.

To begin with, *what is parole?* Webster defines it as<sup>7</sup> "conditional and revocable release . . . of a prisoner with indeterminate or unexpired sen-

<sup>1</sup> Prepared under the direction of Professor Sheldon Glueck of the Harvard Law School.

<sup>2</sup> Harvard University Law School, Cambridge, Mass.

<sup>3</sup> Recent publicity on the investigation into the Mass. parole racket.

<sup>4</sup> A similar, though less intensive, work was done for probation by Professor Sam B. Warner, "Some Legal Problems Raised by Probation," in *Probation and Criminal Justice*, edited by Pro-

fessor Sheldon Glueck.

<sup>5</sup> Special topics such as liability of a state for the torts of an insane parolee or whether it is reversible error for a prosecutor to stress at the trial or a judge to instruct the jury of the possibility of parole. See 51 H. L. R. 353 (1937).

<sup>6</sup> This paper does not pretend to be more modern than May, 1941.

<sup>7</sup> Webster's *Unabridged International Dictionary*, 2nd ed.

tence." This should be extended to say, "who has served a part of his sentence, the release to become absolute on the expiration of his sentence, provided no condition has been violated."

Although parole has often been confused with probation, there is a definite and obvious distinction. While probation frequently follows suspended sentence, it antedates imprisonment; parole, on the other hand, by its very definition, requires prior service of a portion of the sentence. Although both are peno-corrective devices, probation is granted by the sentencing judge and parole is granted by a peno-administrative board, or in some states by the governor.

Again, parole is often confused with conditional pardon. The distinction, in theory, is just as clear between these two as in the case of probation, but in practice it is another matter. In theory, a pardon on condition is an act of executive grace, subject to revocation by the executive at any time. Power to grant a conditional pardon is inherent in the pardoning power of the Constitution.<sup>8</sup> Occasionally, the executive can pardon before, as well as after, conviction or sentence. But these distinctions disappear in practice, particularly in those states where the governor is both the pardoning and the paroling authority. In addition, where the conditions attached to the pardon are similar in nature to those attached to parole, the two take on a marked resemblance. The writer will try to point out wherever the two are confused and

also where the arguments for one are almost equally sound for the other.

The legal problems of parole to be considered fall roughly into four groups. The first relates to the granting of parole. Is parole a vested right of the prisoner? When, by whom, and for how long can it be granted? What crimes and criminals are excluded from the benefits of parole?

The second set of problems relates to the conditions that may be attached to parole and what conditions are illegal, such as extension beyond the end of the sentence. Must the condition be reasonable?

The third set involves questions concerning the rights of a paroled prisoner, particularly with regard to the revocation of parole. If he is still a prisoner, does that mean that none of his civil rights are restored by parole? Is he subject to arrest or trial? Can his parole be revoked only for violation of the conditions of parole? If his parole is revoked, is he entitled to a hearing on the issues of whether he violated the conditions and whether the revocation was properly made by the proper authorities? What are the respective functions of the courts and the parole boards in this question of review of revocations? Does parole suspend sentence? Does sentence from crime committed on parole run consecutively or concurrently with first sentence?

Lastly, there are the questions involving the status of a parolee of one state who has gone to another state. How is extradition effected? As a conflict of laws problem, which law

<sup>8</sup> Cf. *U. S. v. Wilson*, 7 Pet. (U. S.) 150 (1833); *Ex parte Wells*, 18 How. (59 U. S.) 307, 15 L. Ed.

421 (1855); and *U. S. v. Klein*, 13 Wal. (80 U. S.) 128, 20 L. Ed. 519 (1871).

governs, that of the asylum state or that of the paroling state? What effect has the Uniform Out-of-State Parolee Act had on the whole problem?

Before advancing on these problems, the writer would like to digress slightly to give a short history of parole and parole statutes, and to show the extent today of the parole system. Also, as a preliminary to the main study, a short reference to the typical constitutional problems involved in parole statutes would seem to be in order. The constitutional problem is exhaustively treated in notes at 16 *J. Crim. L.* 40 (1925) and L.R.A. 1915 F. 531.

The most recent case involving the constitutionality of a state parole statute arose in Illinois in 1934. The arguments were that the statute discriminated between resident and non-resident convicts, that it violated the Illinois constitutional provision of no warrant without probable cause, and that it conferred judicial power on a government department. Although it was not necessary to the decision, the court answered each of the arguments, saying, in relation to the warrant argument, that the constitutional provision did not apply to paroled convicts still serving sentence for which they had been duly convicted.

## II. PAROLE HISTORY

The origins of modern parole<sup>9</sup> are found in the first part of the nineteenth

century almost simultaneously with commutation of sentence statutes in New York and Tennessee and with practical prison use of the "ticket of leave" in Australia, Bavaria, Spain, and Norfolk Island, the English penal colony under Maconochie. The theory and practice of outright and conditional pardons<sup>10</sup> also had their direct influences.

The first indeterminate sentence and parole law<sup>11</sup> was enacted in Michigan in 1867. Ten years later the New York legislature embodied the so-called Reformatory System in a statute relating to the newly established Elmira Reformatory. Both the indeterminate sentence and the parole system were elements of the statute. Ohio followed suit in 1884. Michigan altered its statute so as to copy Ohio, but the Michigan Supreme Court declared it unconstitutional in 1891,<sup>12</sup> necessitating a constitutional amendment.

However, by 1900 twenty states had adopted a parole system for prison or reformatory or both. In the succeeding decade, thirteen states and the federal government followed the trend. By 1922, Hawaii, the federal government, and forty-four states<sup>13</sup> had parole laws; while only thirty-seven states had indeterminate sentence statutes.

The remaining four states (Florida, Mississippi, Virginia, and Vermont) have not been converted entirely, although all but Mississippi make a prac-

<sup>9</sup> A complete history of parole is found in 16 *J. Crim. L.* 10 (1925). Cf. 24 *J. Crim. L.* 88 (1933).

<sup>10</sup> The governor of New South Wales was given power of conditional pardon as early as 1790. For complete histories of absolute and conditional pardons, see 59 *Am. Dec.* 572 and 576 (1853).

<sup>11</sup> Indeterminate sentence and parole seem to have had closely parallel careers, each complementing the other in an integrated reformatory system.

<sup>12</sup> *People v. Cummings*, 88 Mich. 256, 14 L. R. A. 285.

<sup>13</sup> See appendix for tabulation of the parole set-up in the 48 states and the federal government, classified by the author. For a similar work as to pardon, see 20 *J. Crim. L.* 364 (1929), to which list is only to be added Florida, which has a pardon board.

tice of granting conditional pardons in place of parole. In Mississippi the prison commission probably exercises some kind of parole power over the state prison inmates. Virginia had passed a parole statute in 1904, but it was later declared unconstitutional.

So it can be said that today some form of parole system exists in each of the forty-eight states, Hawaii, the District of Columbia, and the federal prison system, although several states still confuse parole with conditional pardon and confer parole power on the board of pardons or the governor.

Various surveys of the success of parole measured by statistics of violations reveal a gradual increase in the number of paroles granted and a decrease in the number of violations, records ranging from 5% to 35% violations.<sup>14</sup> Because of the variables in such a narrow survey, such as forty-nine different prison reformatory systems and parole practices, carelessness or dishonesty of parole boards and parole officers, practice in some states of automatic parole at the end of the minimum term, and inability to check after-life of discharged parolees, statistics of violations are of little value except to indicate that since the parole system has arrived as a permanent institution, a considerable number of violations have occurred, creating insuperable legal, as well as administrative problems.<sup>15</sup>

### III. GRANTING PAROLE

#### *Is Parole a Vested Right of the Prisoner?*

Almost universally the cases say it is not. Since it is a recent statutory method of penal treatment, this question turns on the wording of the particular statute, except in those states which treat parole as an off-shoot of pardon solely within the discretion of the executive.

Under the federal parole law, prior to the 1930 amendment,<sup>16</sup> the recommendation of the Attorney-General was a prerequisite to parole. *Cardigan v. White*, 18 F. (2d) 572 (1927)<sup>17</sup> held that a prisoner has no such vested right to parole that he could secure his release, in a habeas corpus proceeding, where the Attorney-General disapproved of the recommendation of the federal parole board that he be released on parole. In California similar effect was given to the California parole act in 1938.<sup>18</sup> The court said that there is no such thing as "on parole" until the prisoner is actually released from prison, and that where the statute places the power to grant parole solely within the discretion of the Board of Prison Terms, parole becomes a matter of grace, not of right. The actual holding was that, where the board has granted a parole to take effect at a future time, it can rescind its grant without allowing the prisoner a hear-

<sup>14</sup> See *Federal Offenders* (1939 ed.) U. S. Dep't of Justice, Bureau of Prisons. On June 30, 1939, there were 25,222 federal prisoners in federal, state, and local institutions and 2,399 more out on parole under supervision of federal parole board. During the year, 2,601 out of 8,915 cases considered were released on parole, and there were only 193 violations. For the past decade the percentage of violations under the carefully

supervised federal system has been only 6%. Cf. Glueck, S. and E. T., *500 Criminal Careers*, Boston, 1930.

<sup>15</sup> See: *People v. Mikula*, 357 Ill. 481, 192 N. E. 546 *supra*.

<sup>16</sup> 18 U. S. C. A. sec. 723a.

<sup>17</sup> Cert. den. 274 U. S. 755, 47 Sup. Ct. 770 (1927).

<sup>18</sup> *Ex Parte Allen*, 27 Cal. App. (2d) 447. 81 Pac. (2d) 168.

ing. A parole does not become a vested right upon granting.

In *Ex Parte Riley*,<sup>19</sup> the North Dakota court said that the pardon board was not required by the 1923 parole statute to act on its own initiative and parole a prisoner automatically on the expiration of his minimum term. The actual holding denied habeas corpus to a prisoner who had not served his minimum term. The court said that even if he had served his minimum term, he would still have to prove that he had been harmed by the inertia of the board.

Closely akin to this question of right to parole was the problem involved in *Seaton v. State*,<sup>20</sup> where the defendant committed burglary while one parole statute was in force, but was convicted and sentenced to from five to ten years under an amended statute, which was in force at the time of the trial. The former statute directed the judge to impose a sentence of from one to ten years; the latter directed him to raise the minimum to five years. Since the prisoner was eligible for parole at the end of the minimum term under both statutes, he was deprived of four years of eligibility by the five year sentence. The appellate court amended the sentence to a term of from one to ten years, thus enforcing the former statute.

On this question of eligibility for parole the statutes seem to differ, some being specific, others not. *Duehay v. Thompson*, 223 F. 305 (1915) involved construction of the federal act of 1913

which provided that prisoners serving definite terms were eligible for parole on service of one-third of the sentence. Defendant was sentenced to eight years, but President Wilson commuted to four years, and it was held that he was eligible for parole after serving one year and four months. Mandamus was issued to compel the federal parole board to consider his application for parole, although the actual granting was in the board's discretion. There is a vigorous dissent by Judge Ross to the effect that the statutory<sup>21</sup> phrase "one-third of the total of such term or terms for which he was sentenced" clearly means the original sentence imposed by the court, and not as commuted by the President.

The tendency of the courts seems to be to treat separate sentences on different counts of one indictment as a single term, rather than separate terms, for the purposes of pardon, parole, and suspension.<sup>22</sup> This means that a prisoner cannot be eligible for parole until he has served the minimum time specified by the parole statute in relation to the combined single term. Whether the sentences are concurrent or consecutive, of course, depends on the intent, express or implied, of the sentencing judge. This problem will be treated later.

An interesting legal sidelight on the subject of granting paroles is the validity of contracts to procure parole. The gist of two exhaustive legal notes<sup>23</sup> on the subject seems to be that a contract

<sup>19</sup> 52 N. D. 471, 203 N. W. 676 (1925). Cf. *Redman v. Duehay*, 246 F. 283 (1917) where the parole board was upheld in refusing to grant parole.

<sup>20</sup> 109 Neb. 828, 192 N. W. 501 (1923).

<sup>21</sup> 37 Stat. 650, Comp. St. 1913 sec. 10535, Fed. Stat. Ann. (Supp. 1914) p. 326.

<sup>22</sup> 107 A. L. R. 634 (1936).

<sup>23</sup> 46 A. L. R. 215 (1926) and 111 A. L. R. 35 (1937). Cf. *Gordon v. Gordon*, 168 Ky. 409, 182 S. W. 220, L. R. A. 1916 D, 576 (1916).

entered into by an attorney to use his legal services in putting the proper information before the paroling authorities in an effort to obtain a parole is valid unless the use of personal influence was contemplated. The inference is that a contract made by a layman to aid in securing a parole would be void as against public policy because of the personal element presumed to be present. Of course these contracts are legal only in those states which do not have express statutory prohibitions against attorneys interpleading for parole.

A 1926 Arizona case<sup>24</sup> provides another interesting side-light. The Arizona Supreme Court upheld a county superior court in punishing the superintendent of the state prison for contempt for releasing a prisoner on a parole which was illegally granted by the governor. The decision is severe on the superintendent who was only obeying orders. The case stands for two further propositions: that no convict can be eligible for parole in Arizona until he has completed his minimum sentence, and that the governor has no power to parole, it being vested exclusively in the parole board.

#### *Who Has the Power to Grant Parole?*

It is clear from the cases that in all but the four conditional pardon jurisdictions the power to grant parole is lodged exclusively in that body designated by the parole statute. In the federal system and in twenty-five states that power is vested in an

administrative board of which the governor may or may not be a member; in twelve states it is vested in the governor alone, sometimes with advisory power in a parole board, council or commissioner; in seven states the power is divided between the governor and a parole board, both of whom must concur in every parole.<sup>25</sup>

Ordinarily, the time of granting parole is discretionary with the paroling authority except that it cannot be prior to the minimum specified by the statute. If it is a definite sentence jurisdiction, the statute specifies a fraction of the sentence as a minimum; if an indeterminate jurisdiction, the statute specifies the minimum sentence, generally in the form of "the minimum sentence specified by statute for the particular crime."

The question of duration of parole involves the problems of when the parole can be revoked and whether it can be extended beyond the original term of sentence. These questions will be considered later under more appropriate headings.

#### *What Crimes and Criminals Are Excluded<sup>26</sup> by Statute from the Benefits of Parole, and Are These Provisions Constitutional?*

In some states only first offenders are eligible for parole; in others no discrimination is made against recidivists. Prisoners sentenced to life imprisonment are eligible after a specified term, generally fifteen years, as in the federal statute, or are not eligible at all. In

<sup>24</sup> State *ex rel. Attorney-General v. Superior Court*, 30 Ariz. 332, 246 Pac. 1033.

<sup>25</sup> See appendix. The remaining four are the conditional pardon states (Fla., Miss., Va., and Vt.).

<sup>26</sup> See 59 Am. Dec. 573 (1853) for list of crimes at common law for which the executive could grant pardon.

those states having an indeterminate sentence law, parole may not be had until service of the minimum term, unless there is no minimum term, as in New York for the Elmira Reformatory. In the same state the law may differ according to the penal institution. New York, for example, has different provisions for the prisons, the reformatory, the reform schools, and the first-class city prisons.

Those crimes which, almost universally, are excluded by statute from parole consideration are treason, first-degree murder, third conviction of felony, and very often those crimes which are subject to punishment by life imprisonment, such as rape, in the southern states, and kidnapping.

#### *What Provisions Are Made as to Race, Sex, or Age?*

No discrimination could be found against race, in specific terms, but as to age, several statutes exclude those over a certain age. Wyoming, for example, disqualifies from parole consideration all convicts over twenty-five. Most indeterminate and parole statutes apply only to men over sixteen or eighteen and women over eighteen. This leaves opportunity for specific juvenile delinquency legislation.

Whenever these provisions have been contested on constitutional grounds, they have been upheld on the basis of their being a general law applicable to all.<sup>27</sup>

In using their discretion to grant or not to grant parole, the parole boards, in practice, tend to emphasize, some-

times unduly, the nature of the crime and the sentence. Proper weight should, of course, be given to other factors, including the individual record and personal attitude of the prisoner. Criteria used by intelligent boards include these questions: Will the best interests of society be served by his release? Has he kept the institutional rules? Has he shown the ability and the desire to lead a law-abiding life? Have suitable work and decent surroundings been found for him? Was the nature of his crime such that he might be a menace to society? Did he use force in its commission? Were there extenuating circumstances? What is his previous criminal record? What is his status after examination by competent doctors and psychiatrists? Varying emphasis will be given to the different factors as the circumstances require. Court review of the weight that should be given to these factors is non-existent.

#### IV. CONDITIONS ATTACHED TO PAROLE *What Conditions May Be Attached to Parole?*

The general rule seems to be that any reasonable condition which is not immoral, illegal, or impossible of performance may be made a part of the parole.<sup>28</sup>

Conditions range<sup>29</sup> from vague generalities like "obey the law faithfully" to oppressive minutiae like "shall be off the streets nightly at 10 p. m." The three most frequent conditions are that the parolee shall be law-abiding, that he shall report monthly in detail as to

<sup>27</sup> Cf. *People v. Mikula*, 357 Ill. 481, 192 N. E. 546 (1934).

<sup>28</sup> Cf. 59 Am. Dec. 576 *et seq.* for conditions attachable to pardon.

<sup>29</sup> See 12 J. Crim. L. 554 (1921).



his working and leisure habits, and that he shall be subject to reimprisonment for violation of any of the prescribed conditions. Another is the territorial condition that he shall not cross a county or state line without permission from the paroling authorities. Often a board will impose detailed regulations which do more harm than good. For instance, it may require that the parolee attend church regularly, refrain from tobacco and liquor, and be at home every night before ten o'clock. Such unintelligent administration begs for minor violations without contributing to the reformation of the prisoner.

The statute or the parole instrument may state that, in the discretion of the board or governor, the prisoner may be unconditionally discharged after a certain term spent on parole, say one year; or the prisoner may be regarded as being within the constructive custody of the parole authorities until the expiration of his maximum term. As to whether a condition may subject the parolee to supervision beyond his maximum term, there seems to be a split of authority. Theoretically, the prisoner is serving time while on parole and should be unconditionally released at the expiration of his maximum term, less any time earned for good conduct under a specific statute. In practice, however, the cases vary widely. Some follow the true theory of parole;<sup>30</sup> others liken parole to conditional pardon and say that by accepting the condition the prisoner is bound forever, regardless of the expiration of the max-

imum sentence.<sup>31</sup> The cases under the federal law are a sort of hybrid of these two theories, holding that a prisoner is serving his sentence while on parole and will be unconditionally released at the end of the maximum term, but if he is retaken for violation of any condition prior to the end of the maximum term, he is subject to his unexpired sentence without credit for the term he served on parole.<sup>32</sup> These decisions are necessitated by the statutory words, "the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."<sup>33</sup>

In the Stephens case the parole document expressly set out the condition "that the defendant violate no laws of Kansas for a period of two years." This was upheld despite the fact that the defendant had been sentenced only for six months and had already served part of that when granted parole. The explanation is that by the law of Kansas a parole operates to suspend sentence so that the balance of the sentence hangs over the parolee's head until the fulfillment of the condition.

On the contrary, in *Ex Parte Prout* the Idaho Supreme Court, as early as 1906, recognized the general principle that no condition to a pardon or parole can be immoral or illegal. It held illegal a condition which provided that the parolee, on revocation of his parole for any violation of its conditions, would be subject to reimprisonment and service of his original unserved sentence without credit for the period spent on parole. The theory was that the condition was tantamount to an illegal

<sup>30</sup> *Ex Parte Prout*, 12 Ida. 494, 86 Pac. 275, 5 L. R. A. (N. S.) 1064 (1906).

<sup>31</sup> *Stephens v. Bertrand*, 151 Kan. 270, 98 Pac. (2d) 123 (1940).

<sup>32</sup> See *Zerbst v. Kidwell*, 304 U. S. 359, 58 Sup. Ct. 872 (1938) and *Anderson v. Corall*, 263 U. S. 193, 44 Sup. Ct. 43 (1923).

<sup>33</sup> 18 U. S. C. A. chap. 22, sec. 723c.

extension of sentence. The court reached the proper result, but it confused the true meaning of parole, construing it as an act of clemency rather than the modern idea of regulatory reformation. The court tacitly approved conditions of a minor nature, such as remaining within certain county boundaries and sending to the warden a monthly written report certified by the employer of the parolee, stating his employment, earnings, and itemized expenditures. In the instant case the prisoner had been sentenced to three years and was paroled after serving seventeen months. Five months later his parole was revoked for alleged violation of conditions and he was reimprisoned. After serving fifteen months more, he applied for habeas corpus on the ground that his sentence had expired, and the writ was granted.

Those cases holding the opposite view, like the Stephens case, *supra*, are distinguishable on the ground that they liken parole to conditional pardon so that sentence is suspended by the granting of parole<sup>34</sup> and the conditions remain in force indefinitely.

#### V. PAROLEE'S RIGHTS; REVOCATION *Are a Prisoner's Civil Rights Restored by Parole?*

The cases are silent, but the sensible answer would seem to be in the negative; that since parole is not a form of pardon (although many courts have so treated it), the parolee is still a prisoner

serving out his sentence, albeit in a less confining environment than prison, with the opportunity of being restored to society. He stands in no better position, with minor exceptions, than a convict still in prison, in relation to civil rights such as voting, holding public office, serving as a witness or a juror. As to property rights, he has advantage over the prison inmate only in that he is, to a certain extent, free to use or dispose of his property in the outside world; but parole, unlike pardon, does not restore any property rights forfeited by conviction.<sup>35</sup>

#### *Is a Parolee Subject to Arrest?*

Under some statutes a parolee is in the same position as a prison inmate in respect to arrest, and he cannot lawfully be taken and confined by police authorities for pending indictment<sup>36</sup> or prior conviction.<sup>37</sup> The theory seems to be that he is constructively within the prison walls and is thus immune from arrest. Although the court will not revoke his "parole" merely to allow the district attorney to arrest him under a pending indictment, *People v. Whitcomb* seems to say that the parole officer will produce the parolee at the trial of the indictment. But the parolee's immunity from arrest does not extend to crimes committed while he is on parole. Ordinarily, the parole board has first chance at the delinquent parolee, but if the board is slow, the arrest by police for crime committed on parole is

<sup>34</sup> For the various cases, see 5 L. R. A. (N. S.) 1064 (1906); 16 L. R. A. (N. S.) 304 (1908); 26 L. R. A. (N. S.) 110 (1910). Cf. *Wilborn v. Saunders*, 170 Va. 153, 195 S. E. 723 (1938).

<sup>35</sup> See 4 Black. Com. 402 for common law effect of pardon. Cf. *Ex parte Wells*, *supra*. For effect of conditional pardon as not restoring civil

rights, see 1 Bish *Crim. L.* sec. 898. Cf. 19 Tex. App. 635, 53 Am. Rep. 395 (1885).

<sup>36</sup> *People v. Whitcomb* 118 Misc. 615, 194 N. Y. Supp. 209 (1922). The court's opinion obscures the fact as to whether it is parole or probation.

<sup>37</sup> *State ex rel. Nicholson v. Bush*, 136 Tenn. 478, 190 S. W. 453 (1916).

condoned.<sup>38</sup> He may or may not be ordered to serve his second sentence before the unexpired part of his first sentence.

The parolee also has a right to freedom from unlawful arrest. In *People v. Bondoni*,<sup>39</sup> the Michigan prisoner, who had been convicted of armed robbery, was out on parole to a "next friend" in Pennsylvania on the condition that he stay outside Michigan until his sentence was served. The Michigan statute provided that the warden had the sole power to arrest and return parolee to prison upon violation of parole conditions. The parolee returned to Michigan one Christmas for the holidays to see his sister, under express written permission from the next friend. A policeman arrested him on sight, searched him at the station, and found a concealed revolver. He was tried, convicted, and confined to prison for carrying concealed weapons, his sentence to run after service of the unexpired part of his first term, which had been called into play by the paroling authorities. The Michigan Supreme Court reversed the conviction on the ground of unlawful arrest by the policeman, illegal search for evidence, and use of illegal evidence at the trial. But the prisoner was not sent safely back to Pennsylvania. Instead, the court remanded him to the tender mercies of the warden for disposition on the parole violation.

The parolee's right to freedom from arrest does not extend to freedom from indictment and trial for an offense com-

mitted prior or subsequent to the crime for which he has been paroled.<sup>40</sup> Since he can be put on trial for another crime while on parole, his freedom from arrest appears to be without substance in the pending indictment situation, and is only of value where he is wanted for prior conviction.

Where a person, on conviction of a crime, is sentenced and fined at the same time, a later parole will not relieve him from payment of the fine, unless the parole instrument so states. But where, by operation of statute, a parolee becomes unconditionally discharged through failure of the paroling authorities to take appropriate action within the prescribed statutory time, he is thereby also relieved from payment of the fine, which was part of the original punishment.<sup>41</sup> But a distinction seems to be drawn between fines and costs, and the parolee remains liable for the latter,<sup>42</sup> even though they were a part of the original punishment.

#### *By Whom and for What Reasons Can Parole Be Revoked?*

Ordinarily the statutes provide that the same authority which granted parole has the power to set the conditions and to revoke the parole, in its discretion, for violation of those conditions. The problems arise where the statutes are ambiguous or silent. Must the parole board give reasons for revoking? Some statutes require, not only that reasons be given, but, more important, that the parolee be given an opportunity to refute those reasons at a hear-

<sup>38</sup> See *Anderson v. Corall*, *supra*, and *Stockton v. Massey*, *infra*.

<sup>39</sup> 263 Mich. 295, 248 N. W. 627 (1933).

<sup>40</sup> See L. R. A. 1915 E, 363 and 41 L. R. A. (N. S.) 1095 (1913).

<sup>41</sup> *Badgley v. Morse*, 132 Kan. 544. 296 Pac. 344 (1931).

<sup>42</sup> See 74 A. L. R. 1121 (1931) for the effect of pardon on fines and costs.

ing. The serious questions arise where no such provision is made.

### *When Can Parole Be Revoked?*

In all but the "conditional pardon" jurisdictions, the answer is any time prior to, but not later than the end of the maximum sentence. A federal case<sup>43</sup> held that, inasmuch as revocation had been made before the end of the maximum term, the arrest could be deferred until the prosecution, conviction, and sentence for a separate crime were completed, even though this was beyond the maximum sentence term. But in *Ex parte Ridley*<sup>44</sup> the Oklahoma court treated the parole as a conditional pardon suspending sentence and held that the governor could revoke a parole after the expiration of the maximum term. The prisoner had been sentenced to four years and paroled after serving two years and a half. He committed the violation about a week after his four years was up, and the governor immediately revoked the parole without a hearing. In a habeas corpus proceeding the parolee was held to have the right to a court hearing on the issue of his violation. The court found that he had violated the condition not to frequent liquor establishments, and so remanded him to prison, thereby upholding a seemingly illegal condition.

The "conditional pardon" cases involving the imprisonment of the parolee beyond his maximum sentence fall roughly into two groups: those in

which the parole instrument, itself, subjects the parolee to unfulfilled conditions extending beyond his maximum term,<sup>45</sup> and those in which the parole is revoked and the parolee retaken despite the silence of the instrument.<sup>46</sup>

### *Is the Parolee Entitled to a Hearing on Revocation of His Parole?*

There are three possible situations: The statute is specific as to hearing or summary revocation, the parole document itself is specific, or neither is specific. The general rule seems to be that in the absence of any specific provision to the contrary he is entitled to a court hearing on the issue of violation of conditions.<sup>47</sup> *Ex parte Ridley*, *supra*, and *State v. Wolfer*,<sup>48</sup> although both involve conditional pardon language, illustrate the labored arguments for protection of the individual from arbitrary bureaucratic action by the right to a hearing in court. The latter case indicated that the prisoner might be entitled to a jury trial<sup>49</sup> if his identity were in issue. In the final analysis, the blame for these decisions lies with the legislature in failing to make the statute specific.

Where the statute provides for summary revocation at the discretion of the board, it is generally upheld on the ground that a parole violation is not a new crime nor is return to prison a new punishment, for a parolee has already been accorded all his rights and has been duly convicted, so that he

<sup>43</sup> *Stockton v. Massey*, 34 F. (2d) 96 (1929). Cf. *Platek v. Aderhold*, 73 F. (2d) 173 (1934).

<sup>44</sup> 3 Okla. Crim. 350, 106 Pac. 549 (1910).

<sup>45</sup> *Stephens v. Bertrand*, *supra*. Contra: *Ex parte Prout*, *supra*.

<sup>46</sup> *Ex parte Ridley*, *supra*; *Ex parte Patterson*, 94 Kan. 439, 146 Pac. 1009 (1915); Contra: *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047 (1890).

<sup>47</sup> For cases, see 54 A. L. R. 1474 (1927) cf. *Fleenor v. Hammond*, 28 F. Supp. 625 (W. D. Ky. 1939).

<sup>48</sup> 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783 (1893).

<sup>49</sup> See dictum in Kennedy's case, 135 Mass. 48 (1883).

stands in the position of a prisoner, at large in the discretion of the board.<sup>50</sup> The California statute in *In Re Tobin* was interpreted to mean that no hearing is required on the issue of revocation, but that one is required before the parole board on the issue of forfeiture of credits. Under the Parole Commission Law for First Class Cities in New York State, revocation of parole is not subject to judicial review, but is exclusively in the hands of the parole commission, whether the issue be violation of conditions,<sup>51</sup> or legal grant of parole in the first place.<sup>52</sup>

Where the statute or the parole instrument expressly provides for a hearing, it is generally interpreted to mean hearing before the paroling authority.<sup>53</sup> But where there is no specific provision, as already explained, the courts insist on a hearing in court. The distinction apparently arises from the courts' overzealous anxiety to preserve their place in the protection of the individual wherever the legislature was silent. It seems that the court will not inquire into the nature of the hearing given by the board, unless the parolee can produce substantial contradictory evidence. In *U. S. ex rel. Rowe v. Nicholson*<sup>54</sup> it was held that the federal parole board's formal certificate that a hearing was given could not be collaterally upset in a habeas corpus proceeding merely by the parolee's verbal contradiction.

In the third situation, where the parole instrument expressly reserves to the paroling authority the power of summary revocation without hearing, the parolee is generally held to be bound by the express provision.<sup>55</sup> One line of reasoning seems to be that the waiver of hearing was made a condition to the parole contract, and the parolee, by his acceptance of the condition, is bound thereby. Although the analogy to contracts is subject to attack,<sup>56</sup> the result of these cases is correct except where the question arises of keeping the prisoner beyond his term. It would seem that no degree of willingness on the part of the prisoner could bargain him beforehand into a longer term of imprisonment than that imposed by the sentencing court, but apparently that is just what is done in those jurisdictions treating parole as conditional pardon suspending sentence until reconfinement, often after the original term of sentence has expired.

*Ex parte Prout and Woodward v. Murdock*, *supra*, and the federal cases cited previously are among those upholding the true parole theory that the parole cannot be revoked after the original term of sentence has expired. These cases uphold the condition of summary revocation before the end of the term, not on the theory of contracts, but on the ground that the paroling authority has the power to impose

<sup>50</sup> *In Re Tobin*, 130 Cal. App. 371, 20 Pac. (2d) 91 (1933); *Ex parte Patterson*, *supra*; *People ex rel. Romain v. N. Y. C. Parole Commission*, 116 Misc. 758, 191 N. Y. Supp. 410 (1921).

<sup>51</sup> *People ex rel. Romain v. Commission*, *supra*.

<sup>52</sup> *People ex rel. Rabiner v. Warden of City Prison*, 209 App. Div. 795, 205 N. Y. Supp. 694 (1924).

<sup>53</sup> The federal statute expressly says, "hearing before the parole board."

<sup>54</sup> 78 F. (2d) 468 (1935): cert. den. 296 U. S. 573, 56 Sup. Ct. 118. Cf. *Shearer v. Sanford*, 115 F. (2d) 214 (1940).

<sup>55</sup> *Owen v. Smith*, 89 Neb. 596, 131 N. W. 914 (1911); *Ex parte Collins*, 32 Okla. Crim. 6, 239 Pac. 693 (1925). See *Ex parte Woodward*, 58 Okla. Crim. 333, 53 Pac. (2d) 288 (1936) affirming the rule in the Collins case.

<sup>56</sup> See 39 H. L. R. 112, n. 12 (1925) for the same problem in relation to conditional pardon.

any reasonable condition.<sup>57</sup> *Fleanor v. Hammond*, *supra*, which involves a conditional pardon, illustrates the rule that where the pardon or parole instrument fails clearly to reserve arbitrary power of revocation, it will be interpreted most favorably to the parolee so as to entitle him to a hearing.

It is apparently the law that in all situations, even where the statute or the parole instrument expressly abolishes any hearing, the parolee is entitled to a hearing before a court of competent jurisdiction on three issues: 1. Confinement beyond his term,<sup>58</sup> 2. Authority of the persons revoking to revoke,<sup>59</sup> 3. Parolee's identity.<sup>60</sup> As noted above, however, the question whether there has been a violation of parole conditions is seldom reviewable except in the first situation where there is an absence of specific provisions.<sup>61</sup>

*Is Violation of the Conditions of Parole  
a Separate Crime Subject to Court  
Trial, Conviction, and  
Separate Sentence?*

Pennsylvania produces this anomaly by a statute providing that a parole violation is a misdemeanor. Such a statute results from the failure to understand that the efficacy of a parole system depends on authority being lodged solely in one administrative board with disciplinary power to deal with parole violations.

<sup>57</sup> See *Lime v. Blagg*, 345 Mo. 1, 131 S. W. (2d) 583 (1939) for failure of life's argument that "sick parole" amounted to commutation not revokable without court review.

<sup>58</sup> A strong minority of cases, using "conditional pardon" language, holds that confinement beyond the term is not in issue where the parolee has accepted that condition to the parole contract.

<sup>59</sup> See *Ex parte Collins*, *supra*, holding that the arbitrary power of revocation devolved on the

The granting of parole to a convicted person, pending appeal of his conviction, seems to operate as a waiver of his appeal according to the only reported case directly involving that point.<sup>62</sup> The Oklahoma court went on the theory that an appeal was inconsistent with acceptance of parole.

*Does a Parole Operate to Suspend the  
Running of the Parolee's Sentence?*

Does the time served out on parole fall to the parolee's credit in the computation of the service of his sentence? These are questions of particular importance to the parolee when the paroling authority attempts to revoke his parole. Theoretically, the indeterminate sentence and parole system is designed to confine the criminal for a reformatory period within the institution and a subsequent, though less confining, reformatory period outside the institution. This means that the prisoner is still serving his sentence while on parole, under the supervision of the parole board. However, the variety of statutes in force during the past few decades has given all kinds of weird effects to the original purpose. And where the legislature has been confused, the court has taken it upon itself to put meaning into the ambiguity, thus adding to the confusion.

The cases fall roughly into three groups:<sup>63</sup> 1. Those in which parole suspends sentence, with or without

lieutenant-governor after the impeachment of the governor.

<sup>60</sup> Dicta in two cases. See notes 48 and 49 *supra*.

<sup>61</sup> See *People v. Murphy*, 274 N. Y. 281, 8 N. E. (2d) 861 (1937) for statutory jury trial only on question of fact as to violation.

<sup>62</sup> *Rogers v. State*, 62 Okla. Crim. 349, 71 Pac. (2d) 635 (1937).

<sup>63</sup> For cases see 68 L. Ed. 247 (1923); 28 A. L. R. 947 (1922); and 116 A. L. R. 811 (1938). Cf. *Wilborn v. Saunders*, 170 Va. 153, 195 S. E. 723 (1938).

statutory expression, 2. Those in which it does not, with or without enlightenment from the statute, and 3. Cases under the hybrid federal statute, which provides that parole does not suspend sentence, but that time served on parole is not credited to the parolee if he is reimprisoned for a violation committed before the expiration of his sentence.

The Oklahoma, Kansas, and Vermont cases<sup>64</sup> seem to fall in the non-statutory section of the first group. The Idaho and Indiana cases fall into the non-statutory section of the second group.<sup>65</sup> *Anderson v. Corall* and *Stockton v. Massey, supra*, and similar cases fall under the third group.

The question generally arises in a habeas corpus proceeding brought by the parolee to determine the legality of the revocation and the length of his legal confinement. The cases are in confusion because of the failure of the courts to distinguish the three situations: 1. Where the parole violation occurred after the expiration of the maximum sentence, 2. Where it occurred after the expiration of the maximum sentence less the statutory time for good behavior, and 3. Where it occurred before the end of the maximum term while the prisoner was still on parole. In all these cases the parole board is trying to confine the prisoner for the balance of his unserved sentence without credit for time served on parole. Obviously, under the first situation, the board has lost its jurisdiction over the parolee,<sup>66</sup> except in those juris-

dictions which analogize parole to conditional pardon<sup>67</sup> suspending sentence indefinitely.

To what ridiculous extremes a court can go in revoking parole beyond the maximum term is evidenced by the Oklahoma case of *Ex parte Butler*.<sup>68</sup> Here, the prisoner was convicted of adultery, sentenced to eighteen months, and paroled after serving seven months. Twelve years later he was convicted of driving under the influence and was sentenced to one year. During his service of that sentence the governor revoked the original parole. The court upheld the governor's contention that the prisoner was subject to the unexpired eleven months of the adultery sentence after the completion of his second sentence. This is the logical result *ad absurdum* of following the earlier Oklahoma cases that parole suspends sentence indefinitely.

The second situation requires the existence of a statute providing for a reduction in time for good behavior. *Woodward v. Murdock, supra*, held that the governor had lost his jurisdiction to revoke the parole after the prisoner had served his sentence, as reduced by the statutory good time allowance and time on parole. In *Ex parte McKenna, supra*, it was held that the statutory deduction would be applied in the final computation, but that the prisoner was still subject to his unserved term, even though more time had elapsed than the maximum term.

Under the third situation, it is clear that the parole board still has juris-

<sup>64</sup> Cf. *Ex parte Collins, supra*; *Stephens v. Bertrand*, 151 Kan. 270, 98 Pac. (2d) 123 (1940); *Ex parte McKenna*, 79 Vt. 34, 64 Atl. 77 (1906).

<sup>65</sup> *Ex parte Prout* and *Woodward v. Murdock, supra*. Cf. *Crooks v. Saunders*, 123 S. C. 28, 115

S. E. 760, 28 A. L. R. 940 (1922).

<sup>66</sup> Cf. *Ex parte Prout, supra*.

<sup>67</sup> Cf. *Ex parte Ridley* and *Ex parte McKenna, supra*.

<sup>68</sup> 40 Okla. Crim. 434, 269 Pac. 786 (1928).

diction, and it seems equally clear that upon recommitment the prisoner should be credited with the time served on parole, unless there is a statutory provision to the contrary, such as the federal one.

*Is the Second Sentence Consecutive or Concurrent?*

When a prisoner commits a crime while on parole and is convicted and sentenced, does his second sentence run consecutively or concurrently<sup>69</sup> with the unexpired portion of his first sentence? Where a statute expressly provides for this situation, there is seldom any legal problem.<sup>70</sup> In *Re Daniels*<sup>71</sup> the court held that a parolee convicted of another crime who did not inform the sentencing judge of the first sentence and parole, could not later, by availing himself of the statute requiring the judgment to state whether consecutive or concurrent, evade the remainder of his first sentence.

Nor is there any problem where the judgment expressly states that the second sentence shall run consecutively or concurrently with the first sentence.<sup>72</sup>

In the absence of statute or express provision in the second judgment to the contrary, the general rule seems to be that the second sentence runs concurrently with the unserved part of the first.<sup>73</sup> This was the rule followed in *White v. Kwiatkowski*,<sup>74</sup> although the

federal parole statute was subject to the opposite interpretation<sup>75</sup> as well. Should this general rule be applied to parole situations? Theoretically, the parolee is subject only to the disciplinary action of the parole board. For an appellate court to declare the sentences concurrent, especially where the offenses were committed in different jurisdictions, seems to be an unwarranted extension of judicial power and a nullification of the purpose of the parole system.

In *Zerbst v. Kidwell*, the United States Supreme Court, speaking through Justice Black, resolved the chaotic federal situation and held that the federal parole statute meant the sentences to be consecutive. Section 723c of the statute was interpreted<sup>76</sup> to mean that the unexpired portion of the first sentence does not begin to run on imprisonment for the second crime, but only on reimprisonment on the original sentence at the behest of the parole board. The effect of the second crime was to suspend the sentence for the first crime during the imprisonment for the second crime. Because of the additional factor under the statute that time on parole is not counted in the final computation, the prisoners were forced to serve out their original sentence as if no parole had been granted. The decision amounts to overruling *White v. Kwiatkowski*, although the latter case was not specifically mentioned. As a

<sup>69</sup> See 116 A. L. R. 811 (1938).

<sup>70</sup> See N. Y. Correction Law sec. 218, 219, requiring first sentence, first service. Cf. *People ex rel. Block v. Warden*, 252 App. Div. 825, 299 N. Y. Supp. 357 (1937); *People v. Loveless*, 140 Cal. App. 291, 35 Pac. (2d) 574 (1934).

<sup>71</sup> 110 Cal. App. 638, 294 Pac. 735 (1930).

<sup>72</sup> *People v. Loveless*, n. 70 *supra*.

<sup>73</sup> See 5 A. L. R. 380 (1919); 53 A. L. R. 625

(1927). *Ex parte McDonald*, 178 Wis. 167, 189 N. W. 1029 (1922).

<sup>74</sup> 60 F. (2d) 264 (1932) Tenth Circuit.

<sup>75</sup> *Zerbst v. Kidwell*, 304 U. S. 359, 58 Sup. Ct. 872 (1938).

<sup>76</sup> 18 USCA chap. 22, sec. 723c: "The unexpired term of imprisonment shall begin to run from the date he is returned to the institution, and the time he was on parole shall not diminish the time he was originally sentenced to serve."



result, the Tenth Circuit reversed its position in two later cases.<sup>77</sup> The supreme court had already led the way in 1923 in *Anderson v. Corall*, *supra*, so that no other result could logically have been reached in the Zerbst case.

The law in the federal jurisdictions is now clear in the field of consecutive versus concurrent sentence for convicted parolees, but the state law is still a jumble. The case of *Canfield v. Parole Commissioner*<sup>78</sup> illustrates that Michigan, at least, has a definite position. The case serves as a good example of the various aspects of the rights of a paroled convict which can be put in issue in one litigation, with particular reference to the interpretation of Michigan statutes. Here, the prisoner was convicted in December, 1926, of breaking and entering, and was sentenced to an indeterminate sentence of from two to five years, although the statute called for a maximum of fifteen years. In August, 1928, he was paroled, but was hardly out when he was convicted of armed robbery, and sentenced in December to from twenty to forty years. In March, 1929, the parole commissioner revoked the parole without a hearing and ordered the parolee to serve out his unexpired first term before commencing his second sentence. This procedure was in strict compliance with the statute. In February, 1936, the commissioner invoked his statutory authority to annul the remaining portion of the first sentence, in order to enable the prisoner to start service of his second sentence. The prisoner brought mandamus to compel the commissioner to correct the prison

records so as to show that his second sentence began to run in December, 1928, at the time it was imposed. But the Michigan Supreme Court unanimously refused the writ, upholding the commissioner's contention that the second sentence began in February, 1936. It said that the original sentence was void and should be treated as for a maximum of fifteen years, as the statute required. It ran until annulled in February, 1936, when the second sentence came into force. On the point of revocation without hearing, the court held that the parole statute refused the privilege of hearing to the prisoner where he was convicted of a felony while on parole.

*When There Are Two Possible Parole Statutes to Be Applied, Which Is the Governing One?*

If the later statute is enforced, is it unconstitutionally retroactive? In *People ex rel. Tower v. Hunt*, 36 F. Supp. 49 (1940), the district court held that the parolee was subject to the revocation procedure prescribed by the statute in force when he violated his parole, not when he was convicted and sentenced, or paroled. Here the New York statute prior to 1930 gave a parolee the right to a jury trial on the question of violation of parole conditions and provided that the arrest warrant should be issued by a magistrate. The amendment of 1930 placed sole power in the hands of the parole board. The prisoner was convicted and paroled before 1930, but violated his parole in 1937. He was held subject to the amendment on the theory that he was in the constructive

<sup>77</sup> *Aderhold v. Ashlock*, 99 F. (2d) 67 (1938) and *Aderhold v. Murphy*, 103 F. (2d) 492 (1939).

<sup>78</sup> 280 Mich. 305, 273 N. W. 578 (1937).

custody of the prison warden until the end of his maximum term and so was subject to the law which was in effect when he violated his parole.<sup>79</sup>

## VI. EXTRADITION OF PAROLEES

### *When a Parolee of One State Goes to Another State, Can He Be Extradited for Violation of His Parole?*

As a conflict of laws problem, which law governs? Theoretically, the law of the paroling state should govern, and the only reasonable requirement for rendition should be that the parolee has an unexpired sentence in the demanding state which the parole board feels that he should finish. In practice, that seems to be the general rule, although it has been held that where the violating act occurred in the asylum state, the courts of the latter state can determine whether it actually was a violation. Such was the holding in *People ex rel. Pahl v. Pollack*,<sup>80</sup> where the New York Supreme Court, Appellate Division, refused to grant extradition of a Pennsylvania parolee on the ground that the alleged violative act had not been shown and that the Pennsylvania parole board would fail to accord the parolee a fair hearing on this issue. Here, the parolee had been granted permission by the Pennsylvania Board of Pardons to return to his native state of New York. Upon a charge of being accessory to an abortion, he was arrested by the New York State Parole

Board and later released. Then the Pennsylvania board requested the Governor of Pennsylvania for the parolee's extradition, and his requisition was honored by the New York Governor, who had the parolee arrested. On a habeas corpus hearing, the New York court found no evidence of guilt of the abortion charge, after the original complaining witness withdrew her accusation, and granted the writ. The court's theory, apparently, was that the Pennsylvania parole board would be prejudiced against the parolee and thus would not give him a fair hearing. New York seems to be the only jurisdiction to hold that the courts of the asylum state can look behind the extradition warrant for an out-of-state parolee, and inquire into the nature of the alleged violation.<sup>81</sup> It is clearly the only case to use the ground of probable prejudice of the foreign parole board. The general rule is that the courts of the asylum state will neglect or refuse to go into the propriety of the parole revocation.<sup>82</sup> There is an intimation, however, in *Ex parte Carroll*, 86 Tex. Crim. 301, 217 S. W. (2d) 382 (1920), that the court might be slower to refuse habeas corpus if the parolee could show by conclusive evidence that he had not violated his parole and was not a fugitive from justice.

The cases can be divided conveniently into two groups, those in which the parolee entered another state with

<sup>79</sup> Cf. *Magistro v. Wilson*, 253 App. Div. 48, 300 N. Y. Supp. 1216 (1937).

<sup>80</sup> 174 Misc. 981, 22 N. Y. Supp. (2d) 413 (1940); cf. 54 H. L. R. 508 (1941).

<sup>81</sup> Cf. *Ex parte La Vere*, 39 Nev. 214 156 Pac. 446 (1916), where the Nevada Court declared that the evidence clearly showed that the prisoner was not a fugitive from New Jersey, intimating that if the evidence had been conflicting, it would have left the matter to the demanding state. No

parole was involved. See *Glass v. Becker*, 25 F. (2d) 929 (C. C. A. 9th, 1928).

<sup>82</sup> *State ex rel. Cooney v. Hoffmeister*, 336 Mo. 682, 80 S. W. (2d) 195 (1935); *Ex parte Foster*, 60 Okla. Crim. 50, 61 Pac. (2d) 37 (1936); *Ex parte Walton*, 133 Tex. Crim. 534, 112 S. W. (2d) 467 (1937); *Ex parte Gordon*, 105 Vt. 277, 165 Atl. 905 (1933). Cf. 18 USCA sec. 662, note 61, pp. 329, 330, 331. *Reed v. Colpoys*, 69 App. D. C. 163, 99 F. (2d) 396 (1938).

the permission or at the request of the parole board, and those in which he violated his parole by his very act of entering the second state. As to the latter situation, it has been clear since 1896, when the Connecticut court in the case of *Drinkall v. Spiegel*<sup>83</sup> refused habeas corpus to a New York parolee, that extradition cannot be questioned. Properly authenticated requisition papers are all that seem to be necessary.<sup>84</sup> In regard to the situation where a condition of the parole is that the parolee reside and work in another state, it seems equally clear that he is subject to extradition and the court of the asylum state will not inquire into the violative act.<sup>85</sup> Where the parolee has secured the later permission of the board to enter another state, it has now become the settled law that he is subject to extradition at the duly authenticated request of the paroling state,<sup>86</sup> although some of the courts had trouble interpreting the word "flee" in Article IV, Section 2 of the federal Constitution to apply to the situation where the parolee left with the board's permission and blessing.

The word "flee" has two components: voluntary departure, and intent to flee. The widespread adoption of the Uniform Criminal Extradition Act<sup>87</sup> seems to be eliminating the intent to flee as a prerequisite to extradition, but the issue of voluntary departure is still open.<sup>88</sup> However, the New Jersey court has taken a lone stand in the interests

of justice and held a parolee extraditable even though he was involuntarily forced across the state line by police authorities.<sup>89</sup> Here, a New York parolee was convicted in New York of a federal offense and taken to New Jersey to serve his sentence in the federal prison. Leaving New York state was a violation of one of the parole conditions. Upon his release in New Jersey, he petitioned for habeas corpus, but the court refused to grant his freedom, holding the motives and causes of his leaving New York immaterial.

In order to bring within the definition of "fugitive from justice," the Illinois court in *People ex rel. Mark v. Toman*<sup>90</sup> did some fancy talking. Here, the Illinois Supreme Court declared the parolee extraditable to New York and dismissed the appeal of a second habeas corpus proceeding, after a lower court had twice granted the parolee's release and uttered dire threats at the persistent New York parole agents. The reasoning of the appellate court was that the parolee became extraditable, not as a parole violator, but as a "fugitive from justice" the moment that the New York parole board revoked his parole and invoked his unexpired sentence. The case is also interesting for the proposition that a habeas corpus judgment in an extradition case does not go to the merits sufficiently to render it *res judicata*, but further extradition proceeding is possible.

<sup>83</sup> 63 Conn. 441, 36 Atl. 830, 36 L. R. A. 486.

<sup>84</sup> See *Ex parte Gordon*, *supra*, n. 82, and *Ex parte Carroll*, *supra*.

<sup>85</sup> *Ex parte Nabors*, 33 N. M. 324, 267 Pac. 58 (1928).

<sup>86</sup> 54 H. L. R. 508 (Jan. 1941) lists the cases. Cf. 78 A. L. R. 422 (1931); *Ex parte Garvey*, 133 Tex. Crim. 500, 112 S. W. (2d) 747 (1938); *Bartel v.*

*O'Grady*, ... Neb. ..., 292 N. W. 383 (1940).

<sup>87</sup> 9 Unif. Laws Ann. (Supp. 1938) 39-40.

<sup>88</sup> Cf. 40 H. L. R. 902 (1927); 51 H. L. R. 1446 (1938).

<sup>89</sup> *Re Cohen*, 104 N. J. Eq. 560, 146 Atl. 423 (1928). This is in accord with the United States Supreme Court's interpretation of "flee" in *Appleyard v. Mass.*, 203 U. S. 222, 27 Sup. Ct. 122.

<sup>90</sup> 362 Ill. 232, 199 N. E. 124 (1935).

Some courts have had difficulty with the phrase "charged with crime" in the Constitution. But in 1905 the Circuit Court of Appeals decided that this included conviction as well as the technical charge or indictment before conviction.<sup>91</sup>

It seems to matter little whether the act alleged to be a parole violation occurred in the asylum state or the paroling state. Other than the two exceptions already noted,<sup>92</sup> the court of the asylum state will not look into the evidence to determine the justification for extradition.<sup>93</sup> Even where the total time elapsed from conviction exceeds the sentence, the court will refuse to usurp the function of the foreign parole board of determining the validity of the revocation,<sup>94</sup> provided that the violation itself occurred before the end of the maximum sentence.

When the parole was obtained by fraud, the parolee is subject to extradition even though he was granted permission to go to the asylum state. In *People ex rel. Hutchings v. Mallon*,<sup>95</sup> the extradition of "Big Hutch," bunco artist extraordinaire, by Governor Al Smith was upheld by the New York Court of Appeals, where it appeared that a parole had been fraudulently obtained from the California parole board by concealing relevant facts as to Hutch's past activities through connivance of various politicians. The parole gave permission to go to New

York, but this provision received little attention from the New York court. The California governor requested extradition, attaching his reasons for revoking the parole, and extradition was granted. The court gave liberal construction to the word "flee," abiding by the Supreme Court's authority in *Appleyard v. Mass.*<sup>96</sup>

The problem of what would happen if the governor of the asylum state should refuse extradition at the request of the governor of the demanding state arose as early as 1860, when the Supreme Court decided that the courts of the demanding state had no power to issue mandamus to compel the governor of the asylum state to extradite.<sup>97</sup> The federal extradition statute<sup>98</sup> has been so construed up to the present. By analogy, this rule would apply to the extradition of a paroled convict, although no cases have arisen on this issue. The purpose of the Uniform Act for Out-of-State Parolee Supervision<sup>99</sup> is to prevent such a situation from arising by abolishing the governor's discretion and other extradition formalities.

A troublesome problem which may often arise is whether a prisoner out on parole in the paroling state is subject to extradition for a pending indictment or conviction of another crime in another state. *Carpenter v. Lord*<sup>100</sup> holds that the paroling state has control over the parolee until the end of his term and should not extradite be-

<sup>91</sup> *Hughes v. Pflany*, 71 C. C. A. 234, 138 Fed. 980.

<sup>92</sup> The New York and Nevada cases. *supra* n. 80 and 81.

<sup>93</sup> *Ex parte Carroll*, *supra*, (violation in paroling state); *State ex rel. Cooney v. Hoffmeister*, *supra*, (in asylum state).

<sup>94</sup> *Reed v. Colpoys*, *supra* where the violation occurred before the end of the maximum sentence.

<sup>95</sup> 218 App. Div. 461, 218 N. Y. Supp. 432 (1926), *aff'd* 245 N. Y. 521, 157 N. E. 842 (1927).

<sup>96</sup> See n. 89, *supra*.

<sup>97</sup> *Kentucky v. Dennison*, 24 How. 66.

<sup>98</sup> Rev. Stat. sec. 5278 (1875), 18 U. S. C. sec. 662 (1934). Cf. 67 U. S. L. Rev. 58 (1933); 69 Minn. 104, 72 N. W. 53 (1897).

<sup>99</sup> *Infra*, n. 105.

<sup>100</sup> 88 Oregon 123, 171 Pac. 577 (1918). Cf. L. R. A. 1918 D, 680.

fore then. A somewhat analogous situation occurred in *State ex rel. Nicholson v. Bush*,<sup>101</sup> where a felon-parolee was held to be in the custody of the parole board so as to preclude arrest and confinement in a county jail in the same state for a misdemeanor of which he had been convicted simultaneously with the felony. Where an out-of-state parolee commits a crime in the asylum state, this rule of first jurisdiction-completion of jurisdiction is rarely applied. The usual practice is for the asylum state to dispose of the new crime by conviction, sentence, and imprisonment, and then listen to the demands of the paroling state.<sup>102</sup> The argument for this practice is that the evidence should be used while fresh and sentence completed in order to avoid double extradition. The argument against it is that the parole board still exercises control over a parolee even when beyond the state line, and this jurisdiction should be completed before action by the second state.

The question of extradition becomes more complex when three states are involved: the paroling state, the asylum state, and the demanding state. In *Von Walden v. Geldes*,<sup>103</sup> the Connecticut Supreme Court held that a prisoner paroled by California with permission to reside in Connecticut could not defeat his extradition to Michigan to answer a charge of crime committed there by setting up the defenses that his parole had three years to run and that the Michigan authorities knew

about his parole and acquiesced therein. The court said that the inchoate right of California to reclaim him should not serve to secure in Connecticut an asylum from the just demands of Michigan.

As to extradition between foreign countries, such right exists only by virtue of treaty provisions. In *U. S. v. Allison*<sup>104</sup> the Canadian court held that a person found in Canada who had been convicted in the United States of an extraditable crime and subsequently paroled to Canada, and who had violated his parole while in Canada, could be extradited to the United States. The ground was, not that he had violated his parole, which is not an extraditable crime, but that he was a fugitive under the Canadian Extradition Act, which defined a fugitive as a "person being in Canada who is accused or convicted of an extraditable crime committed within the jurisdiction of a foreign state."

What effect has been had on this problem of extradition of paroled convicts by the passage of the Interstate Crime Commission's Uniform Act for Out-of-State Probationer and Parolee Supervision? Since its introduction in 1937, thirty-two states have passed the enabling act and thirty-four have become signatory to the interstate compact.<sup>105</sup> The advantage of this act over the Uniform Criminal Extradition Act,<sup>106</sup> which to date has been enacted by thirty states, is that the former waives all extradition formalities and

<sup>101</sup> 136 Tenn. 478, 190 S. W. 453 (1916).

<sup>102</sup> But see *State v. Hoffmeister*, *supra* where the parolee was extradited to Illinois although under arrest in Missouri for a misdemeanor committed there.

<sup>103</sup> 105 Conn. 374, 135 Atl. 396 (1926).

<sup>104</sup> ... N. S. ..., 42 D. L. R. 595 (1918).

<sup>105</sup> *Handbook on Interstate Crime Control* (1940 ed.), Interstate Commission on Crime. Alabama, which became signatory in October, 1940, has been included in the figure 34.

<sup>106</sup> Sec. 22 treats fugitive parolees.

enables officers of the paroling state to enter other signatory states, for the purpose of retaking a parolee, without being subjected to the cumbersome and tedious habeas corpus proceeding. The only requirement is that the parole officer be properly identified with duly authenticated papers. That the act has been widely used in its some three years of existence is evidenced by caseload statistics in the commission's handbook, p. 72. As of September, 1938, the number of out-of-state parolees under supervision, in accordance with the provisions of the compact, was 1,691, with Illinois and New Jersey having over 300 apiece, mostly from adjacent states. New York has supplied a considerable caseload to New Jersey, although the former is not a signatory state.

The constitutional legality of these interstate compacts on crime is established.<sup>107</sup> They were legalized by the Crime Control Consent Act of 1934 (18 U. S. C. A. 7), which eliminated the objection of Article I, Section 10, clause 3 of the Federal Constitution that "no state shall, without the consent of Congress, enter into any agreement or compact with another state."

The case of *People ex rel. Pahl v. Pollack, supra*, involving the denial by a New York court of a request by the Pennsylvania parole board for extradition of a parolee, could not have arisen if New York had been a fellow signatory of Pennsylvania. It is likely that the body of extradition law as to out-of-state parolees will entirely disappear as the remaining fifteen or more

states pass the uniform act and sign the compact. In the meantime, the effect of the Pollack case may be to discourage parole boards of signatory states from permitting parolees to go to non-signatory states.

The only reported case under the uniform act is that of *Martin v. Sullivan*, which arose in an Iowa inferior court in January, 1938.<sup>108</sup> Here, Martin had been paroled from Illinois in 1931 on agreement that he could be returned without formality whenever he violated the conditions of his parole. In 1932 he was convicted of a crime in Iowa and committed to the Iowa penitentiary. On his release in December, 1937, he was arrested by Illinois parole officers. On a habeas corpus hearing, the Iowa court delivered him to the Illinois officers on proof that both Illinois and Iowa had become signatories to the interstate compact by September, 1937.

## VII. SUMMARY

Some form of parole system exists in all of the forty-eight states, and the federal government. Legal problems arising out of this situation depend necessarily on the particular statute as presently existing, so that as a result no integrated body of law has grown up. In addition, although parole has been a penal treatment for over half a century, the law on the subject is in its infancy, most of the problems having arisen in the last two decades.

The constitutionality of parole statutes has been established, many states avoiding objections by placing dual power in the governor and a parole

<sup>107</sup> This constitutional history is set out in the Handbook, *supra* p. 73.

<sup>108</sup> See Handbook, *supra* p. 77.

board. With two exceptions,<sup>109</sup> no constitutional issue has been considered since the Ughbanks case in 1908.

A prison inmate is not entitled as a matter of right to a parole even though he meets the eligibility requirements, but he may be able to force the parole board to consider his case. Eligibility for parole depends entirely on the parole statute, varying from first offenders under 25, only, to no discrimination except service of minimum sentence. Treason, first degree murder, and life imprisonment crimes are usually excluded from parole consideration. Court review is not available as to the procedure or the factors considered by the board in refusing to grant parole.

Any reasonable condition that is not immoral, illegal, or impossible of performance can be legally attached to a parole. The only objectionable condition which is upheld in certain jurisdictions<sup>110</sup> is that of restricting the parolee beyond his maximum sentence, although some criminologists might also object to detailed conditions such as attending church regularly and refraining from the use of tobacco.

A convict's civil rights, such as voting or holding office, are not restored by parole; on the contrary, a parolee is like a prison inmate. He is immune from arrest and imprisonment, except for an offense committed while on parole, but he is subject to trial for any crime committed prior or subsequent to parole.

Ordinarily, a parolee cannot be held beyond the expiration of his maximum sentence, although a few "conditional

pardon" jurisdictions allow this whether or not the parole instrument has an express condition to that effect.<sup>111</sup> Most parole statutes specifically provide that a parolee is entitled to a hearing before the parole board or commissioner if his parole is revoked; some provide for summary revocation without hearing. Sometimes the parole instrument itself makes specific provision. Where both are silent, a court hearing is generally held to be the parolee's right. Since a parole may not be revoked except for violation of its conditions, or illegal and unwarranted grant in the first place, the hearing is on one of these issues, generally the former. The hearing accorded by the parole board is seldom reviewable in court. However, the reconfined parolee is always protected by his right to a court hearing on the issues of confinement beyond his term, his identity, and the authority to revoke of the officials who did revoke.

Whether parole operates to suspend sentence depends on the particular statute or judicial decisions. The orthodox view, followed by a majority of the states and the federal courts, is that it does not. Whether time served on parole counts to the credit of the re-imprisoned parolee also depends on the particular state statute and decisions. The orthodox view here seems to be that, contrary to the federal statute, time on parole does count for the prisoner. Where a parolee has been convicted and sentenced for a crime committed while on parole, the parole statute ordinarily provides that the

<sup>109</sup> *Woods v. Tenn.* and *People v. Mikula*, *supra*, n. 9 and 16 J. Crim. L. 40.

<sup>110</sup> This condition is upheld in only a few "con-

ditional pardon" states.

<sup>111</sup> These few states generally have a statute providing that parole suspends sentence.

prior unexpired sentence is separate and shall be served first, or it provides that the second sentence shall state whether it is to be served consecutively or concurrently with the first. In the absence of express provision, the rule is that the sentences are concurrent.

As to which of two statutes governing revocation procedure a parolee is subject, the sound view is that he is subject to the statute in force when he violates his parole.

Ordinarily, in extradition proceedings, the court of the asylum state will not inquire into the issue of parole violation, but will grant extradition where the demand of the paroling state meets all the formal requirements. A few courts will, however, investigate the substantive problem. The Uniform Out-of-State Parolee Supervision Act, in force in about thirty-five states, has eliminated these procedural and substantive problems by waiving extradition formalities.

The most urgently needed reform in the whole field of parole is a pure indeterminate sentence law, with no maximum or minimum sentence provision, and a parole statute incorporating a prison reformatory system and placing sole power to grant or revoke parole and fix conditions in a parole board of five, seven, or nine men and women, depending on the size of the state, who will be appointed for good behavior on a merit basis and will devote their whole time to parole matters, at an adequate salary. The law and the courts should steer clear of the parole field, which is a specialized branch demanding specialized training. Until this Utopia is attained, hope must be pinned

on a gradual enlightenment of legislators and a gradual improvement in the personnel of the judiciary and prison and parole officialdom. Other matters, such as closer cooperation between prison officials, parole officials, and psychiatrists, are better left to the criminologists.

### VIII. APPENDIX

#### *Table of Paroling Authorities in the Several States and the Federal Government*

Separate parole board created for that purpose alone: (12)

Federal, Arizona, Delaware, Georgia, Iowa, Louisiana, Minnesota, New York, Ohio, Oregon, Washington, Florida (pardon board—conditional pardon).

Parole board within a governmental department: (2)

Illinois (Public Safety Department), Massachusetts (Department of Correction).

Parole duties added to others already incumbent on a pardon board or board of prison commissioners: (4)

Arkansas, California, Maine, Montana.

Separate parole board for each penal institution consisting of the board of trustees of that institution: (2)

Connecticut, Florida (only boys' and girls' industrial schools).

Board of pardons or paroles of which the governor is one member: (7)

Idaho, Nebraska, Nevada, New Jersey, North Dakota, Rhode Island, Utah.

Parole power in governor only on recommendation of the parole board, or in parole board only with approval of governor: (7)

Kansas, Kentucky, Missouri, New Mexico, Pennsylvania, Texas, Wisconsin.

Governor alone, with advisory power in a parole board: (2)

Alabama, Oklahoma.

Governor, with the help of a commissioner: (4)

Maryland, Michigan, North Carolina, West Virginia.



**Governor alone: (6)**

Colorado, South Carolina, South Dakota, Virginia and Vermont (governor—conditional pardon), Wyoming (parole only of convicts under twenty-five, 'first offenders').

**Miscellaneous: (4)**

Indiana (parole by Board of Public Welfare on recommendation of trustees).

Mississippi (no parole statute, but probably power in the board of prison commissioners to grant restricted release, or in the governor to grant conditional pardon).

New Hampshire (governor with advice of council).

Tennessee (commissioner alone).

**Notes on Parole Statutes**

Only Mississippi and Virginia are without legislation as to parole, and in Virginia the governor grants conditional pardon under the state constitution. Florida and Vermont, by statute, confuse conditional pardon and parole, the former placing conditional pardon power in a board of pardons, the latter in the governor. New Hampshire uses the statutory term "permit" rather than parole. Every other state has a statute specifically creating a parole system, *eo nomine*.

The parole board may be called by various names, such as board of pardons and paroles, board of prison terms, prison commission, clemency commission, and the like. Personnel, as provided by statute, ranges from governor to superintendent of public instruction, from prison warden to private citizen of good repute, from supreme court judge to physician, from secretary of state or attorney-general to chairman of the public works and highway department or president of the board of agriculture. The number of members may vary from a commissioner of one to a

board consisting of eight. New Jersey is unique in having a "Court of Pardons" composed of the governor, the chancellor, and the six judges of the Court of Errors and Appeals, who act only for the state prison. The board of managers of every other penal institution is the parole authority in collaboration with other agencies. Washington, by 1935 statute, provides for a maximum sentence law with sole power in the Board of Prisons, Terms, and Paroles to set the definite minimum term and time for parole. Georgia is alone in its 1938 statutory experiment of creating a Prison and Parole Commission of three members to be elected by the people.

The board may be a separate entity created solely for parole purpose, or it may be an already existing pardon board, or it may be part of a governmental department as in Massachusetts and Illinois. Unanimous vote of its members may be necessary, or only a majority. New York has created, besides its state parole board, a Parole Commission for First Class Cities, whose revoking acts are subject to court review only if the sentence was for more than three years.

Final discharge from parole is possible, in more than one-half the states, before the expiration of the maximum sentence. Some statutes allow, others forbid application for parole by the prisoner or his attorney or friends.

By a bill passed by the Illinois State Legislature, July 1, 1941, the Parole Board and its duties have been transferred from the Department of Public Welfare to a newly created Department of Public Safety. The new Parole Board is now called: "The Division of Correction" and is composed of five members: The Superintendent of Prisons, Superintendent of Paroles, Superintendent of Supervision of Parolees, Superintendent of Crime Prevention, and the State Criminologist.