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THE BOARD OF PRISON TERMS AND PAROLES: CRITERIA IN DECISION MAKING

George W. Johnson*

The functions of the Board of Prison Terms and Paroles¹ are to set minimum terms of prison confinement for convicted persons² and to grant³ or revoke⁴ parole. In the past, parole and sentencing boards have been criticized for alleged arbitrariness in making decisions⁵ because prisoners in like circumstances have not always been treated alike. The Washington Board of Prison Terms and Paroles is trying to overcome this image and establish objective guidelines upon which it can rely in making its decisions.

I. SENTENCING

The following is a summary of the mechanics of the Board's operation in the sentencing process, after which the policies underlying its decision-making process will be examined. The State of Washington has a modified indeterminate sentence structure. The maximum term for each felony is limited by statute and, if the arrestee is convicted, the court must impose a maximum term within the statutory guidelines.⁶ The minimum term is generally fixed by the Board. Neither the

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1. The Board of Prison Terms and Paroles is a relatively small, independent agency composed of seven members and a staff of twenty-five. The Board members are appointed by the Governor with the consent of the Senate and serve staggered terms of five years each. WASH. REV. CODE §§ 9.95.001-.003 (1974).

2. *Id.* §§ 9.95.040, .052. *See also id.* § 9.95.080 which empowers the Board to revoke its previous order determining the length of imprisonment where the convicted person has committed an infraction of the rules and regulations of his place of incarceration. *See* notes 17-24 and accompanying text *infra* describing crimes for which the Board cannot set a minimum term.

3. WASH. REV. CODE §§ 9.95.110, .115 (1974).

4. *Id.* §§ 9.95.120-.125.

5. *See, e.g.,* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 90-96 (1971).

6. WASH. REV. CODE § 9.95.010 (1974). The statute excepts certain crimes such as treason, murder in the first degree, and carnal knowledge of a child under ten years

court-imposed maximum nor the Board-determined minimum actually indicates the length of time necessarily spent in prison, however, because Washington has a good time law⁷ which grants credit for up to one-third⁸ the Board-determined minimum sentence for good behavior. The time spent in prison may be even further reduced if the Board lowers the minimum sentence after finding that the person is rehabilitated and fit for release.⁹ This conditional release prior to expiration of the court-imposed maximum sentence is termed parole.

The Board's procedure for determining minimum terms is clear. The Board must fix a minimum term within six months after the admission of a convicted person to a state correctional institution¹⁰ or within thirty days of that person's return to prison as a parole violator.¹¹ Whenever a person is convicted and sentenced to prison, the prosecuting attorney and sentencing judge must furnish a statement to the Board of all the facts concerning the convicted person's crime and any other relevant information they possess.¹² They must also suggest the duration of imprisonment they deem appropriate.¹³ The Board will not schedule a minimum term meeting with the convicted person until it has received the proper court papers, the aforementioned recommendations, and a social history of the person prepared by the Department of Social and Health Services. After receipt of the proper documents the Board must thoroughly inform itself as to the facts of the convicted person's crime and also as to his or her personality.¹⁴

from the court's maximum sentencing responsibility. In enacting the new criminal code, *id.* tit. 9A (Supp. 1975) (effective July 1, 1976), and a new rape statute, *id.* ch. 9.79 (Supp. 1975), the legislature failed, however, to relate the sentencing statute to the new substantive criminal law changes. The crimes excepted from court authority carried mandatory sentences under the old criminal code, but only murder in the first degree (life imprisonment, *id.* § 9A.32.040) and aggravated murder in the first degree (death, *id.* § 9A.32.046) carry mandatory penalties under the new criminal code. *But see* *Gregg v. Georgia*, 44 U.S.L.W. 5230 (U.S. July 2, 1976). Carnal knowledge of a child under the age of ten years is subsumed under the definitions of rape and statutory rape contained in *id.* ch. 9.79 and the penalties therein prescribed. Treason, as defined in *id.* ch. 9.82 (1974), carries a death penalty, but the death penalty as imposed under that statute was declared unconstitutional in *State v. Vidal*, 82 Wn. 2d 74, 508 P.2d 158 (1973), *citing* *Furman v. Georgia*, 408 U.S. 238 (1972).

7. WASH. REV. CODE § 9.95.070 (1974).

8. *Id.* § 9.95.110.

9. *Id.* § 9.95.052.

10. *Id.* § 9.95.040.

11. *Id.* § 9.95.125.

12. *Id.* §§ 9.95.030-.032.

13. *Id.* § 9.95.030.

14. *Id.* § 9.95.170 provides that:

To assist it in fixing the duration of a convicted person's term of confinement.

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Two members of the Board then meet with the convicted person and determine the minimum term. If the two members disagree, the decision is made by a majority vote of all seven members.¹⁵ Although no interested parties (including family members, friends, relatives, attorneys, and advocates) may be present at this determination, both advocates and adversaries may submit written correspondence for consideration. Because minimum term fixing is not an extension of sentencing,¹⁶ there is no constitutional right to representation by counsel at the meeting.

The Board recognizes that certain mandatory minimum terms are required by law. For example, if there is a finding of fact by the court that a person was armed with a deadly weapon while committing the crime, the Board must fix a mandatory minimum term of five years for the first felony conviction and seven and one-half years for a second felony conviction.¹⁷ The Board may waive mandatory minimum terms, however, by a vote of four of the seven members, except for the offenses of first and second degree murder.¹⁸ As another example, persons convicted of first degree rape must now serve a mandatory three-year term that cannot be reduced by the Board.¹⁹

The Board does not set the minimum term in a life conviction for first degree murder.²⁰ The prisoner may, however, be paroled after having been continuously confined for a period of twenty years, less

prescribing treatment for such person while in confinement and supervising and regulating his or her activities while on parole, it shall not only be the duty of the board of prison terms and paroles to thoroughly inform itself as to the facts of such convicted person's crime but also to inform itself as thoroughly as possible as to such convict as a *personality*. . . .

(emphasis added).

15. *Id.* § 9.95.007.

16. The setting of the minimum term, *i.e.*, the date of parole availability, is within the exclusive discretion of the parole board. *January v. Porter*, 75 Wn. 2d 768, 453 P.2d 876 (1969).

17. WASH. REV. CODE §§ 9.95.015, .040(1)-(2) (1974). If an individual is convicted of being a habitual criminal or of embezzling funds from an institution of public deposit, mandatory minimum terms are also required by statute. *Id.* §§ 9.95.040(3) & (4).

18. *Id.* § 9.95.040. See *Baker v. Morris*, 84 Wn. 2d 804, 529 P.2d 1091 (1974), in which the court invalidated a Board rule that required a vote of at least six members to waive an inmate's mandatory minimum term on the ground that the Board had exceeded its rulemaking authority to the extent that the rule modified and amended the precise statutory requirements of WASH. REV. CODE § 9.95.040 (1974). 84 Wn. 2d at 809, 529 P.2d at 1094.

19. WASH. REV. CODE § 9.79.170 (Supp. 1975).

20. *Id.* § 9A.32.040. This provision is part of the new criminal code effective July 1, 1976.

earned good time, if the penitentiary superintendent certifies that his conduct and work have been meritorious and recommends that he be paroled.²¹ Therefore, any person sentenced for first degree murder may be paroled as soon as thirteen years and four months after his or her original incarceration. In contrast, a person convicted of aggravated murder in the first degree²² who is imprisoned instead of executed²³ will never be paroled or released from prison.²⁴

The Board is well aware that the alleged arbitrariness of sentencing and its decision-making process have been severely criticized.²⁵ It has seemed to some that not all persons in similar circumstances have been treated alike. It must be realized, however, that even experts are often unable to agree on solutions to common sentencing problems. For example, in 1975 the King County Prosecutor's Office co-hosted a conference entitled *The Criminal and Society: Should We Treat or Punish?* Nationally-recognized experts²⁶ in law and the behavioral sciences, as well as officials from all over the state, participated, yet no concrete answers to common sentencing problems were formulated.

Nevertheless, some steps can be taken to ameliorate the sentencing problem. The establishment of an explicit policy for sentencing decision-making would increase the Board's ability to ensure that convicted persons are dealt with in similar ways in similar situations. With this goal in mind, the Board is developing a compilation of its

21. *Id.* § 9.95.115 (1974).

22. *Id.* § 9A.32.045 (Supp. 1975). This provision is also part of the new criminal code and is a result of the passage of Initiative 316. Although laws enacted through the initiative process ordinarily take effect thirty days after the election, Initiative 316, by its own terms, is an amendment to the new criminal code and will not take effect until July 1. [1976] WASH. ATT'Y GEN. OP. 4. Aggravated murder in the first degree is defined by statute to include, *inter alia*, instances in which the victim was a police officer or fire fighter, the murderer was serving time in a state correctional institution, the murder was for hire, or the murder was committed in the course of rape or kidnapping. WASH. REV. CODE § 9A.32.045 (Supp. 1975). *But see* Gregg v. Georgia, 44 U.S.L.W. 5230 (U.S. July 2, 1976).

23. The punishment for aggravated murder is a mandatory death sentence. WASH. REV. CODE § 9A.32.046 (Supp. 1975). If the Governor commutes the death sentence or the death penalty is held to be unconstitutional, the penalty is life imprisonment without parole or release. *Id.* § 9A.32.047.

24. *Id.* § 9A.32.047.

25. *See* note 5 *supra*.

26. Participants in the conference included: Marvin Wolfgang, Professor of Sociology and Law, University of Pennsylvania; Norval Morris, Dean of the Law School, University of Chicago; Robert Martinson, Chairman, Dep't of Sociology, City College of the City University of New York; John Conrad, Director of the Program for Social Justice, Academy for Contemporary Problems; Clarence Schrag, Professor of Sociology, University of Washington; Duncan Chappel, Division of Law and Justice, Battelle Memorial Institute; Milton Rector, President, Nat'l Council on Crime and Delinquency.

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past experience in minimum sentencing for both initial terms and terms resulting from parole violations. Using this data,²⁷ the Board will develop an explicit policy²⁸ concerning minimum term fixing. A decision-making matrix will be constructed with one axis reflecting the severity of the offense and the other axis reflecting risk to the public. The Board's discretion will not be removed, but will be structured in a way that can enhance equity and equality of treatment, facilitate the giving of reasons, and expose decision policy to public debate and criticism. At the same time, it should substantially reduce the uncertainty felt by prisoners under the modified indeterminate sentence system.

II. PAROLE

Granting and revoking parole is another major function of the Board of Prison Terms and Paroles. When a person has completed his minimum sentence, less time for good behavior, he becomes eligible for parole,²⁹ which will be allowed if the Board deems it advisable. The determination whether a person poses a risk to society is of grave concern and requires careful consideration. In this time of high crime rates and rising numbers of prison sentences our purpose remains clear: to protect society, to release under parole supervision only those persons who will remain at liberty without violating the law, and to return to custody those persons who violate parole conditions. This approach to the disposition of offenders is supported by two fundamental concepts. First, the law favors the liberty of the individual.³⁰ Second, when government has a variety of equally effective means

27. See Appendix *infra* for a portion of the data compiled.

28. WASH. REV. CODE § 9.95.150 (1974) gives the board authority to "make all necessary rules and regulations" pertaining to its responsibilities.

29. *Id.* § 9.95.110.

30. As early as State *ex rel.* Syverson v. Foster, 84 Wash. 58, 146 P. 169 (1915), a habeas corpus case, the Washington Supreme Court stated that the right of personal liberty was a strictly natural right preserved by the law of the commonwealth. That the law favors the liberty of the individual also may be discerned from the Washington Constitution. WASH. CONST. art. 1, § 3 (due process); § 4 (right of petition and assembly); § 5 (freedom of speech); § 7 (prohibition on invasion of home or private affairs); § 9 (rights of the accused); § 11 (religious freedom); § 13 (habeas corpus); § 15 (effect of convictions); § 17 (imprisonment for debts prohibited); § 20 (availability of bail); § 21 (trial by jury); § 22 (rights of the accused); § 23 (bills of attainder, ex post facto laws prohibited).

available to achieve a given end, it must choose the one which interferes least with individual liberty.³¹

The responsibility of deciding whether to parole or deny parole is not taken lightly by the Board. An error in judgment may endanger the public and may jeopardize the criminal justice system, especially parole. On the other hand, to deny parole may extinguish a person's hopes, destroy his or her family, and embitter the person to the extent that he or she will more likely be a greater threat when finally released. A proper decision is predicated on a fair sentence, accurate diagnosis and classification, modern prisons, adequate treatment, and professional supervision of the parolee. The quality of the Board's decisions cannot rise above the quality of these components.

The Board is in the process of developing an explicit policy regarding parole. It has adopted the goals of the National Advisory Commission on Criminal Justice Standards and Goals, which stated that "the major task of the Parole Board is articulation of criteria for making decisions and development of basic policies. This task is to be separated from the specific function of deciding individual parole grant and revocation cases"³²

Five different points of view have been identified³³ that are commonly considered by parole boards in making their decisions. These views are those of the jurist, sanctioner, evaluator, citizen, and regulator. The Board attempts to balance each of these views when making a decision regarding a parolee. The jurist is sensitive to the concepts of due process and impartiality, rules of evidence, and the protection of individual rights. The sanctioner disapproves of certain types of behavior, whether performed in society, in the institution, or on parole, by imposing penalties. The evaluator balances factors indicating societal risk with an individual's potential success in each particular case and determines his or her risk and rehabilitation potential. The citizen's view is reflected in the concern for maintenance of community harmony and preservation of social order. It considers the citizenry's desires and expectations regarding the handling of convicted

31. See, e.g., Comment, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969); *Goodwin v. Oswald*, 462 F.2d 1237, 1245 (2d Cir. 1972) (Oakes, J., concurring).

32. NATIONAL COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT ON THE TASK FORCE ON CORRECTIONS: SUMMARY REPORT ON CORRECTIONS 417 (1973).

33. V. O'Leary & J. Hall, *Frames of Reference in Parole* (unpublished, undated pamphlet of the Nat'l Parole Institute, Nat'l Council on Crime & Delinquency, Hackensack, N.J.; on file at the offices of the *Washington Law Review*).

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persons. The regulator is sensitive to the effect of the Board's decisions on the parole system and its participants, especially prisoners and parolees.

The Board must decide and, when appropriate, reconsider the disposition of each offender based upon factual evidence, individual evaluation, public interest, and prevailing social values in a setting that reflects fair play and due process. In evaluating a person's readiness for release on parole, the Board considers several factors. The most significant of these are the threat the individual may pose to the public, the individual's degree of rehabilitation, his attitudes, and the willingness of the community to accept him back into society. These factors are determined in part by examination of the individual's prior criminal record and his response to the correctional programs. Evidence of increased personal stability and responsibility is favorable. Additionally, family ties, satisfactory living arrangements, the ability to form positive personal relationships, and employability are viewed as indicators of continued stability after release. Many personal deficiencies apparent at admissions are overcome during incarceration. Educational or vocational achievement and progress made through the staff counseling and therapy are aspects to be considered. In the end, the Board must agree that the person's rehabilitation is complete and that he or she is a fit subject for release.

It is important that the Board continuously evaluate the effects of its decisions on the personal safety and property of the public. Board members are aware of the difficulty in predicting who will be dangerous to society. This difficulty is, of course, increased when a person has never previously been convicted of a dangerous act. No one can accurately predict dangerous behavior in an individual with no history of violent activities. Therefore, the Board deals in probabilities in the important decisions relative to future behavior. The author is well aware that the general public is not as concerned with probabilities as it is with possibilities. Neither is the public concerned about statistics which may reveal that a murderer is a better parole risk and is least likely to re-offend than a burglar or auto thief, or that violence is more likely to be unleashed by a relative, close friend or acquaintance than by a total stranger.³⁴ The Board does its best, however, to balance and accommodate the concerns of the individual and society.

34. For a statistical survey of Washington's corrections process, see Comment, *A Perspective on Adult Corrections in Washington*, 51 WASH. L. REV. 495 (1976).

III. CONCLUSION

The criminal justice system is not perfect, and, in this author's opinion, never will be so long as human beings make judgmental decisions affecting other human beings. The irrationality and unpredictability of some crimes make them difficult to understand and nearly impossible to guard against. These inherent problems are aggravated by the fact that the system is overcrowded, overworked, undermanned, underfinanced, and frequently misunderstood.³⁵ To improve the system, more knowledge, resources, vision, and public support are needed. Most of all, people must be willing to examine and re-examine the system and attempt to undertake reform in light of public input.

The Board of Prison Terms and Paroles works within the criminal justice system by exercising its discretion in fixing sentences and dealing with parole offenders. It seeks to give the offender the opportunity to utilize the correctional experience for his or her benefit and to secure the public from those who threaten it with violent or undesirable behavior. In this manner it attempts to implement the major objectives of the criminal justice system: crime control and protection of the public.

35. The Board of Prison Terms and Paroles' daily population report of March 9, 1976 (on file at the offices of the *Washington Law Review*) indicates that four of Washington's seven adult correctional institutions house populations above their stated capacities. The Board has been asked to consider early parole of certain categories of persons in order to alleviate overcrowded conditions, pending action by the state legislature on a request made to the Department of Social and Health Services for more funds, facilities, and staff. Interviews with Mr. Milton Burdman, Deputy Secretary, Dep't of Social and Health Services and Mr. Harold B. Bradley, Director, Adult Corrections, in Olympia, Washington, Feb. 27, 1976.

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APPENDIX

Minimum Terms Fixed, RCW Offenses 1975 Fiscal Year

Offense	Number	From		To		Average	
		Years	Months	Years	Months	Years	Months
Murder, Second Degree	37	3	0	50	0	15	0
Manslaughter	21	1	0	10	0	5	3
Robbery	146	0	6	20	0	5	9
Assault, First Degree	13	5	0	25	0	12	0
Assault, Second Degree	82	1	0	27	6	6	1
Burglary, First Degree	7	3	0	20	0	6	9
Burglary, Second Degree	243	0	9	30	0	3	1
Grand Larceny	235	0	9	15	0	3	1
Auto Theft	59	0	6	10	0	2	9
Forgery	83	0	9	15	0	3	2
Rape	24	1	6	25	0	9	3
Carnal Knowledge	11	1	0	10	0	3	6
Indecent Exposure	25	2	6	20	0	9	4
Sodomy	8	2	6	11	0	7	2
Drug Offenses	224	0	3	10	0	2	5
Felony, in possession of firearm	4	2	6	6	0	4	0
Escape	9	0	9	7	6	4	1
Arson, First Degree	4	3	6	20	0	7	11
Arson, Second Degree	9	1	6	7	6	3	11
Kidnapping	4	2	6	20	0	9	2
Accessory After Fact	7	1	0	5	0	2	4
Riot	4	2	0	4	0	2	6
Non-support†	--	--	--	--	--	--	--
Other‡	5	1	6	4	0	2	6
All Court Commitments	1,267	0	3	50	0	4	10
All Returns From Parole	216	0	1	20	0	2	11
TOTAL	1,483	0	1	50	0	4	1

† No one was sentenced for non-support in Washington in 1975.

‡ Crimes included under the title "Other" are accepting the earnings of a prostitute, fraudulent issue of securities, and sabotage.