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Michael Mandel

Osgoode Hall Law School of York University

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RETHINKING PAROLE

By MICHAEL MANDEL*

Parole has received a lot of attention lately. The usual gaggle of indignant editorialists, angry letter-writers and ambitious backbenchers has been accompanied in the seventies by a virtually ceaseless flow of committee reports, penological investigations, judicial decisions and ministerial announcements. Most of this is interesting and some even illuminating, but it is all disappointing for one basic reason: the failure to subject the entire enterprise to a systematic critical evaluation. Parole has taken on the aura of received truth. It has become in penology as much a part of the liberal-reformist outlook as *mens rea* in criminal law and due process in criminal procedure, and it is the liberal-reformist view which dominates the field. But revered penal institutions are just the sort of item for which we ought to reserve our most potent cynical acid. This system holds imprisoned over twenty thousand persons every day.¹ A disproportionate majority are working class or poorer² and the overwhelming majority of their offences are property offences;³ all this in a society with ever deepening disparities of material well-being.⁴ If, as Norval Morris laments,⁵ penological optimism is no longer fashionable, one can only feel a sense of relief, however slight.

Parole⁶ has been many (positive) things to many people. Some of these

* Assistant Professor, Osgoode Hall Law School of York University.

¹ The average daily population for 1973 was 20,551: Statistics Canada, *Correctional Institution Statistics 1973* (Ottawa: Queen's Printer, 1973) at 8.

² See, e.g., L. James, *Prisoners' Perceptions of Parole* (Toronto: U. of T. Press, 1971) at 12; S. Binnie, *Parole and Ontario Reform Institution Inmates* (Toronto: U. of T. Press, 1974) at 91; I. Waller, *Men Released from Prison* (Toronto: U. of T. Press, Toronto, 1974) at 59-60.

³ James, *id.* at 231-32; Binnie, *id.* at 16; Waller, *id.* at 46-51; Statistics Canada, *supra*, note 1 at 20-23; Statistics Canada, *Statistics of Criminal and Other Offences 1971* (Ottawa: Queen's Printer, 1971) at 38-41, 78-79.

⁴ The relevant statistics are collected and discussed by Leo A. Johnson in *Poverty in Wealth* (Toronto: New Hogtown Press, 1974).

⁵ *The Future of Imprisonment* (Chicago: U. of Chicago Press, 1974) at 12.

⁶ "Parole" is used in the sense in which it exists in Canada under the *Parole Act*, R.S.C. 1970, c. P-2, namely conditional release from prison under supervision before the expiry of the sentence of the court, selection for release being at the discretion of the parole board. In Canada, eligibility normally commences after one third of the sentence has been served: *Parole Regulations*, SOR/60-216 as amended, s. 2.

My primary concern is with the *federal* parole system as it applies to *fixed term* sentences. All of what will be said, however, could be applied without much difficulty to the "parole" systems of Ontario and British Columbia. Indeterminate sentencing (life sentences and preventive detention) is, of course, inconceivable without some sort of parole but this is only to say that an assessment of parole is also an assessment of one aspect of indeterminate sentencing in general. In any event, indeterminate sentences are sufficiently infrequent (one fifth of one percent of all prison sentences for indictable offences in 1971) that if they are a special case they do not invalidate what follows.

Finally, "temporary" and "day" parole, under which a prisoner must return to prison at intervals, are outside the scope of this paper.

will be discussed a little later on. With some exceptions, that is a fairly well-travelled path. Before we get to these things, though, I want to look at the "underside" of parole, that aspect which makes the matters to be discussed later so much more crucial than they usually seem. It is the underside of parole which raises the issue of justification, for it is only when parole is no longer conceived of as benign or at worst neutral that questions of whether it actually does what its advocates say it does will be asked in earnest.

There are many things seriously wrong with parole, each requiring justification. I want to look closely at three of the less obvious ones. Others will receive brief mention further on.

A. THE ECONOMICS OF PAROLE

It is commonplace among advocates of parole to point to the enormous money savings in the marginal substitution of parole for prison. Statements of the sort "It costs only x dollars per year to keep a person on parole, while it costs xy dollars to keep him in prison" are found virtually wherever parole is discussed. The value of y has changed from time to time. The seminal *Fauteux Report*⁷ put it at between 32 and 35 (i.e. prison was considered to be 32 to 35 times as expensive as parole) in 1956. The National Parole Board (NPB) in its *Annual Reports* has put it variously at 3.5 (in 1963 and 1964), 4.3 (1965), 3.0-4.0 (1966), and 7.2-16.3 (1967 and 1968). The *Ouimet Report*⁸ put it at 7.1 in 1969, but admitted this to be slightly inflated as certain administrative costs and costs of supervision undertaken by private agencies were not accounted for. Rough calculations support a figure even higher than this one for the fiscal year of 1973-74.⁹

⁷ *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: Queen's Printer, 1956) at 52.

⁸ *Report of The Canadian Committee on Corrections; Toward Unity: Criminal Justice and Corrections*, (Ottawa: Queen's Printer, 1969) at 331.

⁹ I derive my own figure of 8.4 as follows:

The *Parole Act* cost \$8,497,840 to administer in 1973-74 (Canada, *Estimates for the Fiscal Year Ending March 31, 1976* at 25, 12 ff.). The best estimate that can be made from existing data (see below, note 12) is that roughly 63.3 percent of this was spent on activities in the nature of selection, as opposed to supervision. Of these activities 82.1 percent dealt with parole (as opposed to mandatory supervision, which has no selection component, and pardons, which have no supervision components) (Solicitor General of Canada, *Annual Report 1973-74* (Ottawa: Information Canada, 1975) at 52-54). The total selection expenditure was therefore roughly \$4,416,268. Of the 36.7 percent or \$3,118,708 spent on activities in the nature of supervision, 14.4 percent of these involved mandatory supervision and ought not to be included, leaving \$2,669,614.

The total spent, therefore, on (ordinary and day) parole in fiscal 1973-74 was \$7,085,882. During that period the average daily population on parole was 4,872 (*Annual Report 1973-74, id.* at 53 and a personal communication to me from the Director of Research and Planning of the National Parole Service regarding the number of day parolees under supervision during 1973). The cost per parolee was therefore \$1,454.41.

The cost of operating the penitentiary system in 1973-74 was \$110,034,571 (*Estimates, id.*). The average daily penitentiary population in the same period was 9,033 (*Annual Report 1973-74, id.* at 40; Solicitor General of Canada, *Annual Report 1972-73* (Ottawa: Information Canada, 1974) at 49). Therefore, the cost per prisoner was \$12,181.39.

\$12,181.39. Of course, these figures take no account of the differences in costs which may exist at the level of provincial prisons.

Parole, in any view, is certainly cheaper than prison. But the point I want to make here, a point that is obscured by statements of the type in the preceding paragraph, is that parole itself is not free. In fact it is very expensive. It cost somewhere in the neighbourhood of seven and one half million dollars in fiscal 1973-74 and it will probably cost ten and one half million and fifteen and one half million in fiscal 1974-75 and 1975-76 respectively.¹⁰ This is a great deal of money on any scale. Much good could be done with it, and if there is a cheaper way to do what parole is designed to do to time spent in prison, that way should be taken unless there is some good reason to the contrary. There is no dearth of alleged good reasons to the contrary, and we will look at them shortly. But in the meantime two conceptual alternatives around which the discussion can proceed suggest themselves:

- 1) The elimination of both the selection and supervision elements of parole, leaving only the reduction of time spent in prison which it currently effects.¹¹ This would retain the savings of the current system and add to them *all* the money currently spent on parole.
- 2) The elimination of only the selection process, leaving supervision and reduction. This should be kept as a separate alternative because the reasons for suggesting that we could get along quite nicely without the selection process are different from those for suggesting the same thing with respect to supervision.

Clearly the first alternative would represent a substantially greater saving than the second, but it is difficult to know how much greater. This question of relative costs is an important one, and it grows in importance the less certain we become about the value or lack of it of either the selection or supervision elements of parole.

Information on the relative costs of selection and supervision is extremely scarce because of the multiplicity of tasks carried out by members of the National Parole Service. A very rough estimate is that 63.3 percent of the work done is "selection work" and only 36.7 percent "supervision work".¹²

¹⁰ These figures include the costs of mandatory supervision, i.e. the costs of supervision and cancellation. During 1973-74 an average of 817 persons were on mandatory supervision. During that same period 507 persons had their mandatory supervision cancelled: *Annual Report 1973-74, id.* at 54.

¹¹ We need not concern ourselves at this point as with *how* a reduction could be effected without the discretionary selection process, whether through random selection or uniform proportionate reduction, or some other means. The point being made here is that if all that is wanted of a parole system is a reduction in time spent in prison, then discretionary selection is unnecessary. Other justifications for the parole system and discretionary selection are discussed below.

¹² I base this estimate on two reports by the Management Consulting Service of the Department of the Solicitor General of Canada (*National Parole Service Study on Staffing Standards 1973*) and supplementary material provided to me in a personal communication from the Director of Research and Planning of the National Parole Service (see Appendix A). From these I estimated that 57.7 percent of the activity under "Field Operations" was "case preparation" (for the selection process) and only 42.3 percent supervision of those already selected. Field Operations constituted 67.6 percent of the "man years" allocated for the administration of the *Parole Act*. The rest came under "Headquarters" and I assigned 75 percent of this to selection, which is probably a conservative estimate given the number of decisions which have to be made by the NPB each year (over 14,000 in 1973-74: *Annual Report 1973-74, supra*, note 9 at 52-54).

In terms of the Estimates for 1975-76 this works out to approximately \$9,775,000 on selection (and a saving of this amount with the second alternative above) and \$5,668,000 on supervision.

In any event, it is clearly established that despite the relative saving parole represents over prison, it has itself a cost which must be justified. But this is not all. The relative cost arguments have assumed that the system of parole has resulted not only in a reduction in the portion of sentences of imprisonment which must be served in custody, but also in a reduction in the overall level of imprisonment. They have, in other words, assumed that sentences have not increased in length in response to the shortening effect of parole. But what if they have? Then the cost of parole would have to be *added* to the cost of imprisonment. There would not even be a comparative saving. What if, finally, the total time spent in prison were *longer* as a result of parole?

B. PAROLE AND SENTENCE LENGTH

1. *The Direct Effect*

Obviously, when a prisoner is paroled and his parole is neither revoked nor forfeited he spends less time in custody than he would have had he not been paroled. In this *direct* sense parole results in less incarceration. In order to calculate the overall direct effect of parole on prison sentences we need answers to the following empirical questions: What proportion of prisoners eligible for parole actually get it? How much of their sentence do those paroled serve in prison before being paroled? What proportion of parolees have their paroles cancelled and are returned to prison? How much time is spent in prison after a parole cancellation?

Table 1 shows the percentages of final decisions of the NPB which have been for granting and for denying parole since its inception in 1959.¹³ Various trends can be discerned. From 1959 on there is a decrease in percentage granted reaching a nadir of 21.7 percent in 1964. The trend then reverses itself and rises steadily to a peak of 75.3 percent in 1970. It then declines again and indications are that it has continued to decline beyond 1972.¹⁴

¹³ Not included are decisions to "defer" parole, for that merely means that a final decision has been postponed. Ultimately the prisoner whose application is deferred will come up for a final decision.

Also not included are decisions recorded as "no action" defined in contradictory terms as "a previous decision is not changed in the light of further developments or representations" (*Annual Reports of NPB 1962-69*), and "cases where the Board has decided not to grant parole where the time remaining before a provincial Parole Board assumes jurisdiction does not facilitate the comprehensive inquiry necessary to service the best interests of the applicant and the Community" (*NPB Statistics 1970-72*). "No action" decisions accounted for 2.2 percent of all decisions from 1961 to 1967 and to the extent that they included decisions to deny parole, our percentage for parole granted is slightly inflated.

¹⁴ The Solicitor General's *Annual Report 1973-74*, *supra*, note 9, discloses that between April 1, 1973 and March 31, 1974, 46.6 percent of the final decisions of the NPB were in favour of granting and 53.4 percent in favour of denying parole.

A report in the *Globe and Mail*, June 3, 1975 cites an approval rate of 32 percent in 1973 and 42 percent in 1974.

TABLE 1

Decisions of the National Parole Board to Grant and to Deny Parole* 1959-1972

<u>Year</u>	<u>Number Granted</u>	<u>Percentage Granted</u>	<u>Number Denied</u>	<u>Percentage Denied</u>
1959	2038	42.2	2790	57.8
1960	2525	41.3	3594	58.7
1961	2213	29.1	5404	70.9
1962	1803	26.2	5085	73.8
1963	1725	23.3	5682	76.7
1964	1688	21.7	6088	78.3
1965	1905	23.7	6123	76.3
1966	2190	31.3	4810	68.7
1967	3131	43.5	4072	56.5
1968	3162	55.2	2571	44.8
1969	4371	69.2	1949	30.8
1970	5193	75.3	1706	24.7
1971	5117	69.2	2280	30.8
1972	3800	56.9	2878	43.1
TOTAL				
1959-72	40,861	42.6	55,032	57.4

*Includes all types of parole except "temporary" parole and "day" parole.

SOURCES: *Annual Reports of the National Parole Board 1959-1969*;
National Parole Board Statistics 1965-1972

For our purposes, the most important figures in Table 1 are the "total" figures for 1959-1972. We will use these figures — 42.6 percent granted, 57.4 percent denied — for future calculations. In this way we will be limited to an assessment of the impact parole has had *so far*. But we will be more confident in it than we would be in a projection into the future based on current trends which history shows are often subject to reversal.

If all eligible cases had been considered in the decisions covered by Table 1, this would mean that 42.6 percent of the prison sentences imposed had experienced some initial reduction in the time to be served. All penitentiary prisoners are automatically considered for parole, but prisoners in provincial institutions are considered only on application.¹⁵ Do all provincial prisoners apply? This is an especially important question in light of Waller's finding with respect to federal prisoners that an important motive for not applying is an acute sense of one's own poor chances of success.¹⁶

There does not seem to be any direct evidence of the proportion of eligible provincial prisoners who have applied for parole. However, we do know the proportion of eligible *federal* prisoners who have applied and this

¹⁵ *Parole Act, supra*, note 6, s. 8.

¹⁶ *Supra*, note 2 at 189-90, 199.

TABLE 2Percentage of Eligible Federal Prisoners
Applying for Parole* 1960-1971

<u>Year</u>	<u>Number Eligible</u>	<u>Number Applying</u>	<u>Percentage Applying</u>
1960	4125**	3506	85
1961	4486	2871	64
1962	4322	2766	64
1963	4474	2550	57
1964	4625	2590	56
1965	4993	3046	61
1966	4382	2717	62
1967	4282	2826	66
1968	4463	3169	71
1969	4365	3274	75
1970	5369	4456	83
1971	5130	4566	89
TOTAL 1960-71	55,016	38,337	69.7

*Ordinary parole only.

**All numbers are approximate, having been derived from percentages.

SOURCE: Task Force on Release of Inmates, *Report*, Appendix B.

is shown in Table 2. The lowest level was in 1964 but there has been a steady rise ever since and due to the introduction of "mandatory supervision"¹⁷ in 1970, high application rates can be expected for the future.¹⁸ As we are concerned with provincial application rates, it should be noted that mandatory supervision does not apply to provincial prisoners.¹⁹ Apart from this, though, can we assume similar application rates for provincial and federal prisoners? There seems every reason that the rates should be similar. For one thing, success rates of federal and of provincial applicants have been very close over the years.²⁰ Furthermore, the same disadvantages of parole (the length of the parole period and the severe consequences of cancel-

¹⁷ *Parole Act*, *supra*, note 6, s. 15, implemented in 1970. Under the new system, where earned and statutory remission exceed sixty days, instead of being completely discharged the prisoner must undergo supervision for the duration of his remission time. He is subject to the same sanctions for failure to comply as is a parolee.

¹⁸ There was a slight drop to an 85.3 percent application rate in 1972-73: *Annual Report 1972-73*, *supra*, note 9 at 54. This was probably due to the NPB's recently falling release rate.

¹⁹ SOR/70-339 proclaims the amendment in force only "in respect of persons who are sentenced to imprisonment in or transferred to any class of penitentiary on and after the first day of August 1970".

²⁰ Between 1959 and 1971, 47.1 percent of federal applicants and 47.4 percent of provincial applicants were granted ordinary paroles: Task Force on Release of Inmates, *Hugessen Report (1973)* (Ottawa: Information Canada, 1973) Appendix A.

TABLE 3

Final Decisions of the National Parole Board
1960-1972 by Jurisdiction of Origin of Applications*

<u>Year</u>	<u>Percentage Provincial</u>	<u>Percentage Federal</u>	<u>Total</u>
1960	45.6	54.4	6119
1961	51.0	49.0	7617
1962	46.4	53.6	6888
1963	48.6	51.4	7407
1964	48.5	51.5	7776
1965	45.6	54.4	8028
1966	48.4	51.6	7000
1967	50.5	49.5	7203
1968	62.0	38.0	5733
1969	60.4	39.6	6320
1970	50.7	49.3	6899
1971	54.0	46.0	7397
1972	54.0	46.0	6678
TOTAL 1960-72	51.0	49.0	91,065

*Applications for "temporary" and "day" parole are not included.

SOURCES: *Annual Reports of the National Parole Board* 1960-1969;
National Parole Board Statistics 1965-1972.

lation²¹) exist for both federal and provincial parolees. In the absence of direct evidence, we ought to be prepared to assume the same application rates. If anything, this will inflate the rate of applications because of the effect of mandatory supervision.

We will assume, then, that the parole applicants from provincial institutions have been 69.7 percent of those eligible to apply. Final decisions on provincial applications for parole represented 51.0 percent of all final decisions between 1960 and 1972.

It follows that the final decision of the NPB taken in total have concerned only 81.9 percent of all the eligible population, i.e. of all those sentenced to prison under federal statutes.²² If 42.6 percent of *these* prisoners have been granted parole, then only 34.9 percent of all eligible prisoners have been granted parole.

²¹ The parole period extends to the end of the sentence including remission: *Parole Act*, supra, note 6, s. 13; *Penitentiary Act*, R.S.C. 1970, c. P-6, s. 25; *Prisons and Reformatories Act*, R.S.C. 1970, c. P-21, s. 19.

A prisoner whose parole is revoked or forfeited must serve the time remaining unexpired when paroled (i.e. he gets no credit for time served on parole) plus the statutory remission which had accrued up to that time: *Parole Act*, supra, note 6, ss. 20 and 21; *Penitentiary Act*, id., s. 24(2); *Prisons and Reformatories Act*, id., s. 18(2).

²² For every 73 provincial prisoners eligible for parole there are 51 applicants. For every 49 federal prisoners eligible for parole, 49 are considered. Therefore, out of every 122 eligible prisoners 100 or 81.9 percent are considered.

The next question that must be answered in order to assess the direct effect of parole on the length of time spent in prison is: of those sentences affected by parole, how much of a reduction in time served has been effected? Table 4 sets out the available information. In this case a quite

TABLE 4

**Proportion of Sentences Spent in
Prison by Parolees* Before
Being Paroled 1959-1972**

<u>Year</u>	<u>Number Paroled</u>	<u>Percentage serving under 35% of their sentences</u>	<u>Percentage serving 35% to under 50%</u>	<u>Percentage serving 50% to under 70%</u>	<u>Percentage serving 70% and over</u>
1959	1720	1.7	13.4	61.0	23.9
1960	2320	5.0	22.0	55.0	18.0
1961	1985	8.9	14.5	55.7	21.0
1962	1592	9.0	15.6	56.6	18.8
1963	1519	7.0	18.0	55.0	20.0
1964	1528	9.0	19.0	56.0	16.0
1965	1776	10.0	27.0	47.0	16.0
1966	2067	9.0	30.0	44.0	17.0
1967	2496	9.0	31.0	43.0	17.0
1968	2954	14.2	27.4	46.0	12.5
1969	4147	15.4	25.8	47.7	11.1
1970	5068	28.3	35.0	35.4	1.3
1971	4949	36.5	32.9	29.3	1.1
1972	3778	31.7**	52.4**	15.1	.8
TOTAL					
1959-72	37,899	17.9	29.0	42.2	10.9

*Does not include those on "temporary" or "day" parole.

**These figures are only approximate. In 1972 new categories were introduced preventing direct comparison with previous years. However, 1972 represents a substantial shift to early release and should be included. The actual percentages were:

10% and under	Over 10% to 20%	Over 20% to 30%	Over 30% to 40%	Over 40% to 50%	Over 50% to 60%
1.5	2.1	5.3	45.6	29.6	10.5
		Over 60% to 70%	Over 70% to 80%	Over 80% to 90%	Over 90% to 100%
		4.7	.4	.2	.2

To derive the figures in the table it was assumed that there was an equal distribution within each of the 1972 categories.

SOURCES: *Annual Reports of the National Parole Board 1959-1969*;
National Parole Board Statistics 1965-1972

marked trend in favour of earlier release dates is somewhat disguised by averaging the experience of fourteen years, but one cannot be sure of the cause of the trend or whether it will endure. It is likely that it is at least in part a result of the introduction of mandatory supervision in 1970 which would naturally cause the Board to hand out fewer late parole dates. This would make the trend relatively permanent, but would also result in fewer paroles being granted. We will, in any case, remain with the overall averages. As was pointed out above, they do demonstrate the effect parole *has* had.

A simple mathematical assumption²³ allows us to go one step further and derive a single figure from the four in Table 4 which will approximate the average time parolees have served in prison before they have been paroled: an even 50 percent.

²³ The assumption is that paroles are equally distributed *throughout* each category so that the average parole in the 50-70 percent category is at 60 percent and so on. If 1972, the first year when finer discriminations could be made, is any indication, this will slightly deflate the average. Using the 1972 distributions *within* categories (i.e. assuming that within 50-70 the distribution will be 69.1 percent in the 50-60 category and 30.9 percent in the 60-70 category as they were in 1972) the result would be 50.8 percent as opposed to 50.0 percent.

The reader will note another important assumption which I have made, namely that the overall proportions (percentage of sentences affected and percentage reduction in these sentences) have occurred equally among all lengths of sentences, or that countervailing tendencies have combined to produce this effect (e.g., longer term prisoners being paroled less frequently but earlier in their sentences or vice versa). If this were not true, the figures in the text would distort the actual situation. For example, a decrease of 10 percent in a ten year sentence and 50 percent in a six month sentence is not equivalent to a 30 percent reduction in each, nor is a 10 percent reduction in the former and no reduction in the latter equivalent to a 5 percent reduction in each.

Relevant data are only available since 1968 and there are serious gaps. In the period 1968 to 1972 those serving sentences of two years or over served, on the average, 15.4 percent less of their sentences than those with sentences of less than two years (42.4 percent as opposed to 50.1 percent). However, they were as close at 54.9 percent to 58.8 percent in 1972 and it cannot be known what the proportions were before 1968.

If they were similar, then the figures in the text would have underestimated the effect of parole somewhat, unless there were a countervailing tendency to grant fewer paroles to those with longer sentences. But this cannot be known because of the failure of the statistics since 1968 to record decisions to "defer" parole which are virtually restricted to applicants serving more than two years imprisonment. The Board can only "defer" and cannot "deny" when two years or more remain to be served. In 1966 and 1967 decisions to defer parole were made almost ten times as frequently with respect to applicants serving sentences of two years or more as with respect to other applicants (17.4 percent of all decisions to 1.8 percent). If this obtained in 1968-1972, prisoners with shorter sentences would have been more successful in getting paroles than prisoners with longer sentences by 61.3 percent successful applications to 57.2 percent, perhaps enough to counteract the tendency to grant long-term prisoners earlier paroles. Excluding decisions to defer, however, long-term prisoners appear to have been more likely to be successful in parole applications by 69.3 percent to 62.4 percent over the 1968 to 1972 period.

At any rate, these are not large differences, and until better data is made available, the original assumption is as good as any and it has the virtue of simplicity. This assumption is the only one made here that might underestimate the effect of parole. Any distortions resulting from the other assumptions would overestimate it.

The above figures were derived from the *National Parole Board Statistics 1966-72*.

However, the fact that the average parolee serves x percent of his sentence in prison does not necessarily mean that parole has resulted in a $100-x$ percent reduction in time spent in prison, for these percentages have been calculated without regard for earned or statutory remission which together can amount to slightly less than one third (32.4 percent) of the total sentence.²⁴ Surprisingly, there are no published statistics from which we could discover the amount of remission earned and retained by Canadian prisoners. To read the recent official reports, one would think that it is very rare for a prisoner not to earn or to lose remission.²⁵ Michael Jackson's study of Matsqui Institution²⁶ suggests that this is not entirely accurate. During 1969-1972 an average daily population of 301 received an average 42 sentences per year of forfeiture of statutory remission averaging 26 days each. Even this, however, amounts to an average loss of only 4.0 percent of the *statutory* remission for the year (leaving earned remission untouched). We are probably overestimating things if we assume that on the average a parolee would have lost 25% of *all* of his remission had he not been paroled, especially since the selection criteria used by the NPB²⁷ suggest that those selected for parole are also those most likely to receive and retain their full remission.

If the average parolee would have received 75 percent of his remission had he not been paroled, then the fact that he served 50 percent of his sentence in prison would mean that parole had effected a reduction of 33.9 percent in the time spent in prison.²⁸

Our final two questions concern cancelled paroles. The proportionate sentence reduction so far indicated assumes that parolees are not returned to prison but in fact many are. And at the present time, not only is no credit given for time successfully served on parole, but those returned to prison are actually penalized the statutory remission standing to their credit when

²⁴ Statutory remission amounts to 25 percent of the total sentence and is credited on entry "subject to good conduct": *Penitentiary Act* s.22; *Prisons and Reformatories Act*, *id.*, s. 17; earned remission can amount to three days "of each calendar month during which he has applied himself industriously": *Penitentiary Act*, *id.*, s. 24, *Prisons and Reformatories Act*, *id.*, s. 18.

²⁵ The *Huggessen Report*, *supra*, note 20 at 27; Standing Senate Committee on Legal and Constitutional Affairs, *Parole in Canada* (Ottawa: Information Canada, 1974) (The *Goldenberg Report*) at 58: "... during the Committee staff meetings with penitentiary and parole staff throughout the country, the view most often heard was that most inmates, even if they forfeit part of their remission during incarceration, are released with most of the remission to their credit. Even though they may have forfeited some remission, it has been reinstated prior to their release date which was established upon admission to the institution."

²⁶ M. Jackson, *Justice Behind the Walls — A Study of the Disciplinary Process in a Canadian Penitentiary* (1974), 12 O.H.L.J. 1 at 52.

²⁷ See text accompanying notes 66 to 71.

²⁸ 75 percent of remission is equal to 24.3 percent of the total sentence, leaving only 75.7 percent of the sentence to serve. If one is paroled after serving 50 percent of the *total* sentence, the reduction is $\frac{75.7-50}{75.7}$ percent = 33.9 percent.

paroled.²⁹ For the purpose of our calculations this means that a cancelled parole is worse than no parole at all. First, those cancelled should be deducted from the total number granted and second, modification should be made for the penalty.

Between 1959 and 1972, 7,412 paroles, 18.1 percent of those granted, were cancelled.³⁰ This means that instead of 40,861 prison terms being shortened by parole (see *supra*, Table 1) only 33,449 were shortened, 37.8 percent of those considered for parole, 31 percent of those eligible for parole. This figure is inflated because it does not take account of those granted parole in 1972 and before who will have their paroles cancelled in the future.

Finally, as for what modification to make for loss of statutory remission, the average parolee will have served 50.0 percent of his sentence when paroled and will therefore have accrued statutory remission amounting to 12.5 percent of his total sentence. This will have been lost to all those whose paroles were cancelled. However, prisoners may be re-paroled and escape some or all of the effects of the penalty. Giving parole violators neither a better nor worse chance of parole than all prisoners, and assuming that if paroled, they will be paroled before they are affected by their loss of remission, i.e., being as conservative as possible, the total effect of the penalty on the reduction effected by parole can be estimated at 2.0 percent.³¹ Instead of effecting a 33.9 percent reduction in the time to be served, when penalties for cancellation of parole are taken into account the estimated total reduction is 31.9 percent in the sentences that have been reduced. As only 31 percent of prison sentences have been affected by parole, the total direct effect of parole on time spent in prison is to reduce it by 9.9 percent.

To recapitulate: on the basis of our estimates, 82.1 percent of those eligible for parole (all prisoners) have been considered for parole; 42.6 percent of these have been granted parole; 18.1 percent of paroles granted have been cancelled; 31 percent of all prison terms have been reduced by

²⁹ It was held in *Marcotte v. Deputy Attorney-General of Canada* (1974), 19 C.C.C. (2d) 257 by the Supreme Court of Canada that the penalty was not authorized by the legislation as it stood before being amended by R.S.C. 1968-69, c. 38, s. 102. However, that amendment put the issue beyond doubt and the opinion of the Court was carefully limited to the unamended legislation. See now *Parole Act, supra*, note 6, s. 20, 21; *Penitentiary Act, supra*, note 21, s. 24(1); *Prisons and Reformatories Act, supra*, note 21, s. 18(2).

³⁰ The yearly revocations and forfeitures have been as follow:

1959	1960	1961	1962	1963	1964	1965	1966	1967	1968
118	191	262	217	246	220	307	340	406	551
1969	1970	1971	1972						
711	1228	1326	1289						

Sources: *Annual Reports of the National Parole Board, 1959-1969; National Parole Board Statistics, 1965-1972.*

³¹ 18.1 percent lose back 12.5 percent of their total sentence and 69 percent of these are not re-paroled. In other words, 18.1 percent x 12.5 percent x 69 percent = 1.56 percent is lost back to sentence length. Therefore, the average reduction is not $\frac{75.7\% - 50\%}{75.7\%}$ but rather $\frac{75.7\% - 51.56\%}{75.7\%} = 31.9\%$.

parole; they have been reduced on the average by 31.9 percent; and the total effect of parole has been a 9.9 percent reduction in the time spent in prison.³²

2. *The Indirect Effect*

I have argued for a tentative figure of 9.9 percent as the maximum overall reduction effected by the parole system in the time spent in custody under fixed term prison sentences. I have called this the *direct* effect of parole on sentence length. However, suggestions have recently been made that the parole *system* might have a contrary *indirect* effect, i.e. a sentence lengthening effect.³³ The way in which it can be argued to have done this is quite simple. Sentencers have merely lengthened the sentences they would otherwise have imposed in view of the fact that offenders may be paroled before the entire sentence is served. The fact that this has sometimes been done will be easy to demonstrate, and this will mean that the effect that parole has had on the length of incarceration is *to some extent* illusory. The difficult question is to *what* extent. It may have only been a slight and insignificant matter which has not impaired the essential efficacy of parole in emptying the

³² This would mean that parole has been working at less than one fifth (17.7 percent) its capacity on the basis of eligibility after one third of the sentence and the assumption made earlier about remission.

³³ See, e.g., American Friends Service Committee, *Struggle for Justice* (New York: Hill & Wang, 1971) at 91:

Three trends are significant in appraising the consequences of California's adoption of the rehabilitative ideal [one of the most indeterminate forms of the indeterminate sentence system']. First, the length of sentences has steadily increased. From 1959 to 1969 the median time served has risen from twenty-four to thirty-six months, *the longest in the country*. [emphasis in original]

and Jessica Mitford, *Kind and Usual Punishment* (New York: Knopf, 1971) at 83-84:

While the indeterminate sentence seems to imply a policy of early release for the rehabilitated offender, it is actually a means of assuring much longer sentences for most prisoners than would normally be imposed by judges, . . . [and quoting one Amos W. Butler, an early administrator of Indiana's indeterminate system] 'Under the definite sentence, our courts measured out so much punishment for so much crime. Having served his time, the prisoner was free to go. Under the present system of indeterminate sentence with parole, accompanied as it is with efforts at reformation, the average length of sentence is markedly longer.'

and Sol Rubin, *Law of Criminal Correction* (2nd ed. St. Paul: West Pub. Co., 1973) at 650: . . . contrary to the assumption that parole is ameliorative, reducing the term . . . , parole has increased time served in prison.

and Norval Morris, *supra*, note 5 at 48:

Whether overall parole has indeed achieved a reduction of prison time served in America is speculative. In individual cases it has made possible leniencies that were politically impractical at the time of trial, but it is not known whether this has been counterbalanced by the public's and the judge's knowledge of the operation of parole and by his accommodating the sentences he imposes to parole board practices. The tendency of parole boards to overpredict danger and to follow the politically safer path of prolonging incarceration because of exaggerated expectations of criminality on parole . . . would lead one to suspect that parole may well have increased total prison time. But reliable data are lacking.

and the Goldenberg Report, *supra*, note 25 at 51:

. . . Dr. Ciale's evidence suggests that Canadian courts have been attempting to counteract the effect of the parole system.

prisons, or it may have obliterated it totally. It may even have over-compensated and resulted in longer periods of incarceration. If this last possibility were fact, it would not be the first time that a penal measure has had the opposite effect to that expected.³⁴

How do we go about investigating these questions? The logical starting point would be to ask the sentencers themselves, though of course this would only shed light on the conscious level of motivation. Anyway, this is precisely what Hogarth did in his recent study of Ontario Magistrates and, startlingly enough, 42 Magistrates of his sample of 71 (59.2 percent) admitted that "they sometimes increased the length of sentence imposed . . . in light of the possibility of parole being granted."³⁵ The motives admitted to were of three sorts: in the interests of rehabilitation — "in order to give the institutional personnel ample opportunity to work with the offender in hopes that he would respond quickly and be considered for early parole"; in the interests of public relations — Magistrates would impose long deterrent sentences, and then write to the Board on behalf of the offender: "In this way they felt that they could appear to be punitive without serious consequences to the offender"; and finally "in order to ensure that the offender would not be 'back on the streets' in a relatively short time", i.e. to counteract the effect of parole on the time to be spent in prison.

Hogarth suggested that this was illegal. In that he was only partly right. But the legal question is complex. As there is no legislation covering the matter, the only law to be found is in the opinions of the various Courts of Appeal on sentencing appeals. To understand the appellate approach to parole, one must first understand the highly artificial way in which the courts reason on sentencing appeals.³⁶ Very briefly, they ostensibly attempt to ensure that there has been a proper 'blending' by the trial judge of the various aims of punishment (deterrence, reformation, 'protection of the public' — by which is usually meant the incapacitation of the offender through segregation — and, to a decreasing extent, retribution) as they apply to the case at hand. This the trial judge is to do by taking into account all of the relevant facts of the case and prescribing the sentence that best serves the aims of sentencing in the light of these facts. Argument on sentencing appeals usually revolves around an allegation that the trial judge has not taken a fact or facts into account, at all or sufficiently, that he ought to have taken into account. The facts in issue usually concern aspects of the offender's 'character' or the 'gravity' of the offence, but on occasion they concern such other matters as the prevalence of the offence, sentences given elsewhere for similar offences, or whether a plea of guilty has been entered. The question arises whether these facts and others, such as the availability of parole, which are

³⁴ See R. F. Sparks, *The Use of Suspended Sentence* (1971), Crim. L. Rev. 384.

³⁵ John Hogarth, *Sentencing as a Human Process* (Toronto: U. of T. Press, 1971) at 176-77.

³⁶ Some leading cases are: *R. v. Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.); *R. v. Jones* (1956), 115 C.C.C. 273 (Ont. C.A.); *R. v. Hinch and Salanski*, [1968] 3 C.C.C. 39 (B.C.C.A.); *R. v. Morrisette and two others* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.).

obviously relevant in a factual way to at least some conceptions of the aims of sentencing, are *legally* relevant, are 'factors' which should be thrown in with the others in deriving the sentence.

As far as the status of parole as a factor is concerned, there appear to be four positions which have found their way into the reported cases. Two have been uniformly rejected. The other two each seem to have their adherents, though one is more widely and firmly held than the other.

The first universally unpopular position is best illustrated by the Ontario Court of Appeal decision in *Wilmott*,³⁷ a conviction for rape. The sentence was 12 years, but according to the trial judge, it would only have been "somewhere from six to eight years", if there had been no possibility of parole. Furthermore, when handing out this sentence, the trial judge opined that "the philosophy behind parole is that it is desirable to have criminals under some control and guidance for a long period" and that "if the Parole Board . . . is to be made a success the obvious existence of such a Board must be recognized and, if otherwise fitting in with the general scheme of law and policies, should be supported. Their policies cannot be supported unless long sentences are imposed".³⁸

In other words, the trial judge imposed a longer sentence than he otherwise would have in order to give the Parole Board more time to work its magic and rehabilitate the offender.³⁹ The Court of Appeal reduced the sentence to eight years. In doing so it expressed firm opposition to this overly supportive posture:

I can not agree that a Court in exercising its powers of sentencing is to function merely as an appendage or appurtenance of the Parole Board and bound to support the policies of the Board inconsistent with its duties under the *Criminal Code*. . . . For a Court to impose long sentences to support the policies of the Board would amount not only to a delegation to the Board of its duties, but a substantial abandonment of them.⁴⁰

Another example of this sort of approach may be found in *Holden*,⁴¹ where the British Columbia Court of Appeal reduced a sentence of fourteen months imprisonment for wilful damage to property to six months, because in its view the trial judge had given the longer term in order "to give the authorities an opportunity to rehabilitate [the offender], leaving it to the Parole Board to release [him] when it thinks proper to do so."⁴² The probation officer had recommended "a sentence long enough to involve review by the National Parole Board" in order to "motivate this man towards his own rehabilitation".⁴³ The Magistrate apparently followed this advice, but the

³⁷ [1967] 1 C.C.C. 171.

³⁸ *Id.* at 174-75.

³⁹ "Reformation is the work of time," said the American Correctional Association in 1870, quoted in Mitford, *supra*, note 3 at 83.

⁴⁰ *Supra*, note 37 at 185.

⁴¹ [1963] 2 C.C.C. 394.

⁴² *Id.* at 397.

⁴³ *Id.* at 395.

Court of Appeal regarded it as impermissible: "Heavier sentences must not be imposed for collateral purposes in the professed interests of society or of the prisoner, either to extend the minimum time the prisoner must serve before obtaining parole, or to keep him in custody until the Parole Board decides he may properly be released".⁴⁴

The second uniformly rejected position is much less subtle. The sentencer must not try to *counteract* the effect of parole on the length of time in custody by imposing a longer sentence to delay parole eligibility. Sentencers are not as willing to express opposition to the Parole Board as they are to express support, so this kind of motive can only be inferred from statements made during sentencing about the availability of parole. The best example is probably *Heck*,⁴⁵ wherein the British Columbia Court of Appeal reduced a five year term for false pretences to two and one half years. The trial judge had said that his sentence could not be lower "particularly in view of the parole system which now makes it possible for an accused to apply for parole after having served one-third of the sentence, which in this case would make the accused eligible for parole after having served slightly more than eighteen months".⁴⁶ The Court of Appeal considered it equally illegitimate "that the sentence should be increased as to offset any possible reduction by the parole board" as that "there should be a long sentence, leaving it to the parole board to release the prisoner when it thinks proper to do so"⁴⁷ (the position discussed above).

None of these decisions go so far as to deny that parole could ever be taken into account in sentencing. Both Courts have made that clear elsewhere. They merely say the obvious and easy thing, that it is no part of the sentencing function to support or subvert what the Parole Board might be trying to do. Only one Court of Appeal, The Newfoundland Supreme Court, seems to hold to what might be called the "purist" approach. In *Coffey*⁴⁸ a sentence of four years imprisonment for theft of a cheque was reduced to three years, with the following unequivocal statement:

It would seem that in this case the magistrate may have been influenced by the actual length of time the accused would spend in prison, rather than to the length of the sentence to be imposed. The duty of any court in imposing sentence is to determine the length of the term of imprisonment without consideration of any reduction due to the grant of parole, or any other reduction. It is not the concern of the court what disposition may be made of the prisoner by the executive authorities. The law lays upon us the duty of determining the innocence or guilt of an accused person and if found guilty his punishment within the precise limits which the law prescribes. In imposing punishment we may not consider the matter of subsequent parole; this is not within our sphere.⁴⁹

⁴⁴ *Id.* at 395.

⁴⁵ (1963), 41 W.W.R. 629.

⁴⁶ *Id.* at 630.

⁴⁷ *Id.*

⁴⁸ (1965), 51 M.P.R. 7; earlier tendencies of a similar nature can be found in *R. v. Switliff* (1950), 97 C.C.C. 132 (B.C.C.A.) and *R. v. Courtenay* (1956), 115 C.C.C. 260 (B.C.C.A.).

⁴⁹ *Id.* at 8-9.

The Ontario Court of Appeal seemed headed in the purist direction in *Bailey and Protheroe*⁵⁰ where sentences for armed robbery were reduced from life and twelve years to two sentences of seven years each. This was not a case of a sentencer mentioning parole (or more appropriately in this case, remission). The majority opinion merely stated, perhaps in response to argument,

. . . I have put from my mind the fact that this man may be relieved from serving the full amount of the sentence as determined by the Court by reason of time off which he might earn or that may be conferred upon him by statute. To regard these things in determining the sentence and, accordingly, to lengthen the term, is obviously to be at cross-purposes with Parliament.⁵¹

Whatever its cogency, the purist approach does not seem to be the predominant one at present. A fourth, which might be termed the 'realist' approach, has been adopted by the Courts of Appeal for Ontario, British Columbia and Alberta. It holds that between the extremes of support and subversion, the availability of parole and remission is a factor that may be taken into account by the sentencer when he is engaged in his 'blending' exercise. For example, in *Holden*, though it reduced the sentence in the instant case, the Court cautioned *obiter*:

So that there may be no misunderstanding of what I propose to say later, I think it should be said now that when it is urged that a prisoner has learned his lesson, and that a light sentence, or suspended sentence will aid in his rehabilitation, or pleas of that nature are advanced, a trial Court may properly, in its discretion, reject such pleas and leave it to the Parole Board to release the prisoner on parole when it is satisfied that the prisoner by his conduct has demonstrated that he should be granted parole.⁵²

This was largely echoed by the Ontario Court of Appeal in *Wilmott*, also *obiter*. "In my opinion" said McLennan, J.A. for the Court, "a Court in determining an appropriate sentence of imprisonment may, quite properly, take into consideration the provisions of the *Parole Act* and the duties of the Parole Board under the Act and Regulations";⁵³ and he proceeded to give examples. First, he agreed with what was said in *Holden*, that the availability of parole could be considered in order to reject a claim for a "light sentence" in the interests of the offender's rehabilitation. He also, in effect, approved of the public relations gambit admitted to by Hogarth's Magistrates:

[The availability of parole] is also relevant where deterrence to others than the particular offender is of importance. As an illustration, suppose an outbreak of a particular type of crime in a community — not an uncommon occurrence — it would be proper for a trial Court to impose a severe sentence on the offender designed to deter others and it could do so with the reasonable assurance that with the availability of parole the particular offender would not be incarcerated for a longer period than appropriate, provided always that he shows the necessary qualifications for release.⁵⁴

Finally, he pointed out the use that could be made of the availability of parole

⁵⁰ [1970] 4 C.C.C. 291.

⁵¹ *Id.* at 305.

⁵² *Supra*, note 41 at 396.

⁵³ *Supra*, note 37 at 185.

⁵⁴ *Id.* at 185-86.

in sentencing the "dangerous" offender. The sentencer could ensure by a long sentence that the offender would not be released before he had been made safe, but could nevertheless be assured that should the danger be eliminated before the whole sentence had been served, he could be released and everyone would be happy. In this connection the Court pointed to *Mabee*⁵⁵ where, in upholding a precautionary sentence of five years imprisonment for indecent assault on a child, the Court referred to the possibility of the Parole Board releasing the offender according to periodic assessments of the danger of doing so. A very recent example of this type of use of parole in sentencing is *Boomhower*.⁵⁶

The Ontario Court of Appeal's latest pronouncement on the point is in *Pearce*.⁵⁷ That was an appeal against a sentence of six years imprisonment for conspiracy to traffic in a controlled drug. It was apparently argued that in imposing such a severe sentence the trial judge had not shown sufficient concern for the rehabilitation of the offender. The majority disagreed:

He did not fail to take into account the possible rehabilitation of the appellant. In considering the latter aspect of sentencing it is proper to take into account that the appellant need only serve four years and one month of the sentence imposed and that he will be eligible for parole in two years from the time of sentence.⁵⁸

Dubin, J.A., in dissent thought that, in the circumstances, parole ought not to be taken into account. He drew a distinction between rehabilitation prospects apparent at trial (for the Court to deal with) and those which might become apparent later (for the Parole Board to deal with).

The most recent appellate decision, this time by the Appellate Division of the Alberta Supreme Court in *McIntosh*,⁵⁹ indicates that the realist view is spreading. In that case a sentence of three years for trafficking in a narcotic was imposed on a Crown appeal, with numerous references to the Parole Board as mitigator of severe sentences in the interests of rehabilitation.

To summarize the predominant realist position: In considering what sentence to impose, the sentencer may take the availability of parole into account and impose a longer sentence than he otherwise would have imposed, not in order to support or subvert Parole Board policies, but in order to better serve the aims of sentencing. Parole may be relevant in any of several ways, but primarily it will be relevant to the aim of rehabilitation. In considering the effect of prolonged incarceration on the possibility of the offender being rehabilitated, the sentencer can consider the fact that the Parole Board is empowered to release the offender in the interests of his rehabilitation before his time is up. Any similarity between this and a delegation of sentencing duties to the Parole Board is purely a product of the reader's imagination and mine as well.

⁵⁵ [1965] 3 C.C.C. 150 (Ont. C.A.).

⁵⁶ (1975), 20 C.C.C. (2d) 89 (Ont. C.A.).

⁵⁷ (1974), 16 C.C.C. (2d) 369.

⁵⁸ *Id.* at 370.

⁵⁹ (1975), 20 C.C.C. (2d) 33. No reference was made in this decision to a much older Alberta decision in the realist vein, *R. v. Tews* (1926), 45 C.C.C. 116 (Alta. S.C.).

To return to the point we were driving at earlier, it is clear that some sentencers are taking parole into account and their sentences are longer as a result. The fact that this practice is condoned by the Courts of Appeal of at least three provinces⁶⁰ suggests that it is not a minor phenomenon. Furthermore, although the purist position is far from psychologically impossible to carry into practice (much less difficult, one would think, than excluding inadmissible evidence), it seems to me that where the realist position is legitimate, it would be natural for sentencers to adopt it. This is because in considering the 'appropriate' number of months or years of incarceration on any of the criteria of appropriateness, any sentencer would want to know the *actual* time to be spent incarcerated. There are several jobs to perform in sentencing and all require advertence to the actual facts to be done to the best of the sentencer's ability. If x years of incarceration is the appropriate sentence for deterrence etc., would not a conscientious sentencer try to ensure that that was what resulted?

In any event, we know that it is done sometimes. Some people have clearly had their sentences lengthened on account of parole at the conscious level. It is difficult to know but not difficult to surmise what occurs subconsciously. How many judges would not want to reconsider a sentence to a term of imprisonment just passed if they were told that it was absolutely certain that there was to be no parole? One's guess has to be that the practice is fairly widespread, because judges are for the most part rational people. If it were taken into account in one third of the prison sentences, it would have the effect of lengthening more sentences than are shortened by parole. Even if it were not that widespread, then just by chance many individual sentences would be lengthened on account of parole but would not be shortened by it, and this would of course be unfair to the individuals involved.

How much have sentences been increased? If we based our answer solely on what has been said in the reported cases the average increase would be rather huge. The deductions made by the Courts of Appeal where judges improperly took parole into account represent increases, on the average, of 79.2 percent.⁶¹ In order to counteract that, if it were done in every case, parole would have to reduce time served by 44.2 percent just to keep up⁶² and, as we have seen, it falls far short of doing so. Of course, one cannot consider four cases decided over a five-year period to be a representative sample when over 250,000 sentences of imprisonment were passed in that same period. But looking at it theoretically, this 79.2 percent increase would need to have occurred in only 13.9 percent of the cases to have obliterated

⁶⁰ Perhaps four, if Manitoba still holds to the view expressed in *R. v. Skibo* (1931), 55 C.C.C. 124 (Man. C.A.).

⁶¹ In *Wilmott*, *supra*, note 37, the increase was from 8 to 12 years or 50 percent; in *Holden*, *supra*, note 41, from 6 to 14 months or 133.3 percent; in *Heck*, *supra*, note 45, from 2½ to 5 years or 100 percent; in *Coffey*, *supra*, note 48, from 3 to 4 years or 33.3 percent.

⁶² $\frac{179.2-100}{179.2} \times 100 = 44.2$ percent.

TABLE 5

Frequency of Various Increases in Sentence Length Necessary to Totally Counteract the Effect of Parole on Time Spent in Prison

Percentage increase in length of sentence	Increase expressed in months [or years]	Percentage frequency of increase necessary to counteract effect of parole
100	1 to 2	11
50	2 to 3	22
33.3	3 to 4	33
25	4 to 5	44
20	5 to 6	55
16.67	6 to 7	66
14.28	7 to 8	77
12.5	8 to 9	88
11	8 to 8.9	100

the effect of parole on time spent in prison,⁶³ — even if there were no increases in any other cases. A smaller increase, say of 50 percent (representing an increase, for example, of two to three months or years), would need to have occurred in 22 percent of the cases, and so on as illustrated in Table 5.

The possibilities for a massive and over-compensating expansion in the net lengths of sentences are virtually limitless. For example, one judge increases a sentence in view of the availability of parole without saying so (unconsciously or deliberately) and, in the legitimate interest of uniformity of sentences⁶⁴ other judges follow suit so that a new threshold is established. Or a general amplification is effected through a change in attitude by judges to the severity of any given term of months or years. Initially this is a deliberate response to parole but judges soon become habituated⁶⁵ and amplification is piled onto amplification. Over the years a quite fantastic escalation might result.

One must confess to a certain dissatisfaction with this type of reasoning, but there is really not much else to go on. Empirical study of sentencing

⁶³ A decrease of 9.9 percent is counteracted by an increase of $\frac{9.9}{100-9.9} \times 100 = 11.0$ percent. An increase of 79.2 percent would therefore only have to take place in $\frac{11.0}{79.2} \times 100 = 13.9$ percent of the cases to counteract a decrease of 9.9 percent in 100 percent of the cases.

⁶⁴ For the requirement to promote uniformity, see, *R. v. Baldhead*, [1966] 4 C.C.C. 18 (Sask. C.A.); *R. v. O'Neill* (1973), 13 C.C.C. (2d) 276 (Nfld. S.C.); *R. v. Mikkelson* (1973), 14 C.C.C. (2d) 255 (Sask. C.A.); *R. v. Spencer* (1973), 16 C.C.C. (2d) 29 (N.S.S.C.); *R. v. Jones* (1974), 17 C.C.C. (2d) 31 (P.E.I.S.C.).

⁶⁵ In much the same way that we all become habituated to obeying the law. See, e.g., F. E. Zimring and G. Hawkins, *Deterrence: The Legal Threat in Crime Control* (Chicago: University of Chi. Press, 1973) at 84-87.

practice over the years might seem useful at first thought, but apart from the usual difficulties of statistical gaps, there are numerous problems: the increasing use of alternatives to short terms of imprisonment, changing offence and penalty structures, changing attitudes towards crime and crimes, changing patterns of offence commission. All of these would affect sentencing and disguise any effect parole was having. Furthermore, we have had something very like parole for almost as long as sentencing statistics have been kept so it would be difficult to locate appropriate points on which to concentrate study. Nonetheless, such a study has been undertaken and the inconclusive results will be found in Appendix B.

This subject remains, unfortunately, largely a matter for intuition. There is no question that sentences would be shorter if conditional release on parole were abolished. Would they be more than 11 percent shorter? I have no doubt, but the reader may differ.

C. THE PAINS OF PAROLE

The original object of relative indeterminacy of prison sentences was the control of prisoner behaviour within the institution. At first it was negative, aimed merely at the prevention of misconduct, much like the criminal law or modern statutory remission. Release on 'ticket-of-leave' would be delayed if offences were committed. It was Alexander Maconochie who, in the early 1840's at Norfolk Island's penal colony, first introduced a positive element. Release on ticket-of-leave became partly dependent on *good* conduct as well, through the mechanism of a system of 'marks'. Maconochie could more accurately be called the 'father of earned remission' than the 'father of parole', at least as those terms are understood today. Anyway, according to the predominant aetiological theories of the era, criminality was a species or a symptom of immorality in general, a result in the more hopeful cases of defective moral upbringing. Thus it was, neatly enough, that prison discipline could itself have a reformative effect, because reform did not mean "learning a trade" but rather moral reform. To English aristocrats of the 1840's this meant the learning of self-discipline. So Maconochie's system was constructed to reward and thereby encourage "good ordinary behaviour, as diligence, sobriety, obedience, honesty, fidelity, zeal, or the like".⁶⁶ In other words Maconochie's system combined reform and discipline, the former coming as a consequence of the latter.

There must be few who cling to such notions of causation today and fewer still who believe that such qualities, if absent, can be cultivated in prison. Nevertheless, their relevance has persisted into the modern parole system. Parole is now used, at least in part, to promote rehabilitation by 'encouraging' the prisoner to take part in programmes, and success at rehabilitation is judged by elements of 'attitude' such as those mentioned by Maconochie. For instance, in the *First Annual Report of the National Parole*

⁶⁶ J.V. Barry, *Alexander Maconochie of Norfolk Island* (Oxford: Oxford Univ. Press, 1958) at 246.

Board under "Parole Preparation and Selection" one finds: "Inmates are informed that in order to be considered for parole they must *demonstrate* a sincere intention to be law-abiding" (my emphasis).⁶⁷ And further on under "factors that the Board considers relevant" there are, among others

- (c) *the inmate's total personality* as it reflects the possibility that he may cause harm to society;
 - (e) *the effort that the inmate has made in the institution to improve himself* and is likely to make when released;
 - (f) the inmate's response to the treatment and training program in the institution *and his general industry, conduct, behaviour and attitude*;
 - (g) the inmate's understanding of his own problem *and his willingness to attempt to overcome it*;⁶⁸
- (my emphasis)

In the second report (1960) we read: "the main test for parole is whether or not the applicant seems to have changed his attitude and sincerely intends to reform." And some new factors are added: "the degree of maturity and of insight gained" and "the impressions, assessments, representations, and recommendations received".⁶⁹ The former Chairman made pronouncements of this nature from time to time: "Parole is a matter of giving a man a chance to reform *if he seems to deserve it* and of helping those who want to help themselves . . ." (my emphasis).⁷⁰ Ontario officials inform inmates that "general conduct and attitude within the institution are taken into account"⁷¹ in parole deliberations.

So, though parole is not now normally justified as a behaviour controlling mechanism, it is inevitable with such selection components that it would operate as one. It need not, of course, have been this way. There is nothing which makes it conceptually impossible for parole to have no effect on institutional behaviour. It could do so if it concerned itself solely with matters falling outside of the prisoner's power, outside of the prison context. Indeed, the state of the art suggests that there is really nothing which goes on in prison which could assist a parole board in deciding (for either of the professed main purposes of rehabilitation or "the protection of society") whether or when to grant parole.⁷²

⁶⁷ At 8.

⁶⁸ *Id.* at 9.

⁶⁹ At 1 and 2.

⁷⁰ T.G. Street, quoted (beneath Goethe) at the front of the *Annual Report* for 1967. A more complete statement of the former Chairman's views (he retired at the end of 1973) can be found in (1965), 7 Can. J. Corr. 283 at 284;

The main test for parole is whether or not the applicant seems to have changed his attitude and sincerely intends to live a law-abiding life. This is necessarily a matter of judgment based on a complete study of the various reports received on each individual. The Board considers [among other things] . . . personality and mentality, conduct, industry, behaviour, attitude and progress in the institution . . . whether he has matured and achieved insight into his problem . . .

⁷¹ Binnie, *supra*, note 2, at 122.

⁷² See, below, text accompanying notes 95-98.

However, this is not the road taken by parole boards here or elsewhere. As a consequence there are many things within the prisoner's control, or at least which he and others would naturally believe were within his control, which the NPB apparently takes into account in the parole decision and we have outlined them above. The result of this is to make the prisoner's life even more miserable than it is already. For beyond the ordinary fear and anxiety which we all experience from the threat of unpleasantness as a sanction for rule-breaking (and which the prisoner also experiences from the threat of loss of remission or "privileges" for misconduct), the parole system brings with it an additional special sort of anxiety, a product not of the severity of the sanction but of the nature of the rules. In order to avoid loss of remission, etc. the prisoner knows (fairly well⁷³) what he must do and not do, just as non-prisoners know what to do and not to do to avoid entanglement with the criminal law. And it bears emphasizing that in each of these cases it is the *doing* and not the *being* of something that matters. But parole criteria are so vague and so all-embracing, encompassing as they do the prisoner's total personality, that their impact is quite different. A vastly increased level of anxiety is the concomitant of the vastly increased number of situations in which the possibility of doing something wrong and punishable, or of exposing one's personality as unworthy, arises. This leads inevitably to a further result of parole based on current criteria, the indignity and humiliation of the constant inauthenticity the prisoner must maintain in order not to spoil his chances for parole. At all costs and no matter what the provocation, he must avoid giving offence to anyone in a position of the slightest authority who might therefore influence the parole decision. Remember the factors: "impressions, assessments, representations and recommendations received".⁷⁴ Finally, just as vagueness in penal statutes excessively limits our freedom by rendering the parameters of permissible conduct un-

⁷³ As with the criminal law, there are many grey areas in disciplinary rules. See Jackson, *supra*, note 26 at 3-16.

⁷⁴ In his study of the parole boards of four American states, "Some Consequences of a Parole System for Prison Management" in D. J. West (ed), *The Future of Parole* (London: Duckworth, 1972), Keith Hawkins found at 115 that

Though parole boards possess the authority to override the advice or recommendations of prison staff, the latter are by no means powerless to influence decisions. The major part of the report available to the parole board, comprising evaluations and assessments of the individual's career in prison, is supplied by the staff of the institutions. The only contact board members have with inmates at the hearing may last no more than ten or fifteen minutes: otherwise they have to depend for their knowledge of the prisoner on what they are told by others. This ubiquity of authority will, of course, also effect an amplification of the prisoner's anxiety and fear. Goffman called it "an authority system of the echelon kind":

. . . any member of the staff has certain rights to discipline any member of the inmate class, thereby markedly increasing the probability of sanction . . . Given echelon authority and regulations that are diffuse, novel, and strictly enforced, we may expect inmates, especially new ones, to live with chronic anxiety about breaking the rules and in fear of the consequence of breaking them . . . staying out of trouble is likely to require persistent conscious effort.

"On the Characteristics of Total Institutions: The Inmate World" in D. R. Cressy (ed.), *The Prison: Studies in Institutional Organization and Change* (New York: Holt, Rinehart & Winston, 1961) at 43-44.

known,⁷⁵ the same is true of prisoners and parole. Indeed, it is much worse. "Attitude" and "general conduct" are big words. They entail a whole-life view of the prisoner. Everything is relevant and therefore every public moment (of which there are many in prison) is crucial.

Even if parole were completely divorced from institutional behaviour there would still remain what for many is its worst aspect.

The useful fiction that parole is merely one part of an overall sentence notwithstanding, there is a fundamental difference between being on parole and not being on parole even under the same sentence. It is the difference between being free and being locked behind bars. By introducing a substantial element of indeterminacy into prison sentences, the parole system makes it impossible for the prisoner to know with any certainty when he will again be free. He experiences the paralysis of being unable to plan for the future. His freedom is beyond his knowing or control. Whether uncertainty is more effective than certainty in controlling behaviour is a debate into which I do not wish to enter here.⁷⁶ It suffices for now to point out its incompatibility with a prisoner's dignity and peace of mind.

Anxiety, fear, loss of dignity, excessively limited freedom, uncertainty of one's future — these are the pains a parole system brings with it, and they must be justified.

It would be no answer at all to the foregoing to show that the prisoners themselves do not consider the parole system to operate against their own interests. In the context of their daily lives parole (for those not yet denied it) offers the prospect of earlier release, earlier, that is, than the expiry of the sentence pronounced by the court (no matter that a component of that sentence was this same prospect of earlier release). The pains of parole are after all a product of the overwhelming desire for earlier release, and its prospect must therefore be a forceful element of most prisoners' affective

⁷⁵ John Rawls, *A Theory of Justice*, (Cambridge, Mass.: Belknap Press, of Harvard University Press, 1971) at 239:

. . . if the precept of no crime without a law is violated, say by statutes being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise.

⁷⁶ The following observation of Zebulon R. Brockway, one-time warden of the famous Elmira Reformatory toward the end of the last century, suggests that uncertainty may have a double-edged nature:

The indeterminateness of the sentence breeds discontent, breeds purposefulness, and prompts to a new exertion. Captivity, always irksome, is now increasingly so because of the uncertainty of its duration.

(Quoted in Mitford, *supra*, note 33 at 81-82.) Of course Brockway was concerned here with the catalysing effect of uncertainty on the prisoner's efforts to rehabilitate himself.

On the effect of indeterminacy, E. H. Sutherland and D. R. Cressey in *Criminology* (9th ed. Philadelphia: Lippincott, 1974) have observed at 591:

Suffering on the part of prisoners is increased by indeterminate sentences and parole. Most prisoners would prefer sentence of a fixed term in prison plus a fixed term on parole to the agony of indeterminacy. Some would even prefer a long term fixed in advance to a short term accompanied by a period of worry and anxiety while they await a decision or 'setting' by the parole board.

responses to parole. One is therefore surprised to learn how widely among prisoners it is recognized that the net effect of parole is to produce suffering.

When Lois James asked 238 prisoners in Ontario penitentiaries what they thought was the effect on them "of knowing there is a chance of parole", of those who answered in emotional (as opposed to behavioural) terms, 31.9 percent (44 out of 138) said that it "causes worry and anxiety, wondering if he will make it or after making it, waiting for it . . . 'shake rough time' " or that it "causes depression, bitterness, and sometimes violence when inmate is refused."⁷⁷

James also found that when asked "What is considered when granting parole?", inmates placed the greatest emphasis on behaviour in the institution, giving a high priority to "how well the inmate got along with staff". Finally, in response to the question "What is your opinion of the National Parole Board", unfavourable comments outnumbered favourable comments by 111 to 92.

Susan Binnie⁷⁸ asked a similar question of 182 prisoners in Ontario provincial institutions, but in this case the favourable comments outnumbered the unfavourable by 53 to 31. However, when background information was added in it was found that "favourable responses were given proportionately more often by those with a high interest in obtaining parole, by less educated inmates, and by those who had never had parole".⁷⁹ Binnie thought this might be explained by variation in prisoner "willingness to use critical terms in the interview situation".⁸⁰ Obviously, another explanation might lie in the ability to pinpoint the source of one's anxiety. As in the James study, with respect to factors important in getting parole, a very high emphasis was placed on behaviour in the institution ("trying to keep out of trouble and from getting any kind of punishment") and a substantial number rated as important trying to give a good impression and being on good terms with the rehabilitation staff.

Useful and illuminating as these raw figures might be, they cannot bring the impact of the system home to non-prisoners nearly as well as the following first hand accounts of the system in operation:

Responses by inmates of Ontario penitentiaries to the question: "How are the inmates here affected by knowing that there is a chance of parole?"⁸¹:

"Many really worry. Hold over their heads like blackmail".

"It's always in your mind like a fantasy — you're always aware of it. Your spirits are higher until you are turned down, when you become very depressed, feeling you weren't done right by. You become antagonistic".

⁷⁷ James, *supra*, note 2 at 62 ff. The other 68.2 percent had positive things to say of the sort: "Gives the inmates hope — something to look forward to. Makes them happy."

⁷⁸ *Supra*, note 2 at 31-32.

⁷⁹ *Id.* at 31.

⁸⁰ *Id.*

⁸¹ James, *supra*, note 2 at 62-63.

"Too many people cutting each others throats over parole".

"Some go to extremes. They rat on other guys to make themselves look better".

"He goes into a shell and can't act naturally".

An account of a Connecticut parole hearing⁸²

"They discuss his addiction. Johnson grows more sullen. He is past caring about making a good impression. He may not know how. But how do you judge the importance of appearance, of manner? A man might blow it with a truculent manner, or a sneer — eight months of freedom for the satisfaction of a sneer.

Johnson was nervous before the hearing. 'I'm wondering whether I'll say too much or not enough,' he had said, 'whether I'll put my foot in my mouth. If they ask is this yellow wall blue, I'll say of course it's blue. I'll say anything I think they want me to say if they're getting ready to let me go'."

A prisoner of Frontera Prison, California:⁸³

". . . the constant mental torture of never really knowing how long you'll be here. The indeterminate sentence structure gives you no peace of mind and absolutely nothing to work for."

Four prisoners of San Quentin Prison, California:⁸⁴

"The people on the board are God and they know it. They have you in their hands. They control your salvation, your heaven and your hell. Once a year you stand before that God and they decide whether or not you stay in hell for another. And that God is unpredictable. That is the way it is. I just don't know how to get around it. You never really know what they want."

"I was sent to prison for possession of marijuana. So far I have done two and a half years. The last time I went to the board they asked me if I believed in legalizing marijuana. Now how am I supposed to answer that? If I say 'no' they will just assume that I am lying; if I say 'yes' they will think that I intend to continue to break the law when I get out and that I am not rehabilitated. I told them that I thought the penalties were too severe but that I didn't know whether it should be legalized or not. They denied me a year."

"For three years I was the model prisoner. I had perfect work reports. I graduated from high school and was taking college courses. I didn't have any disciplinary infractions except for one or two very minor things. I stayed away from the militants. I went regularly to therapy programs — group therapy, Alcoholics Anonymous, and even a Yokefellow group. So when I went to the board after three years I felt positive I would get a date. The Adult Authority shot me down a year. They said that they didn't feel I was sincere. They said that I was just con-wise and was playing a game with them. Now I don't know what to do. If I get any writeups or stop going to therapy, they will take this as proving that I was faking it before. But if I don't do anything new, they will just say the same thing next year."

"An individual leaves his individuality and any pride he may have behind these walls . . . No one walks into the board room with head up. This just isn't done!

⁸² Donald Jackson, "Parole Board", *Life*, Vol. 69, No. 2 (1970) at 60.

⁸³ Quoted in D. A. Ward and G. G. Kassebaum, *Women's Prison* (London: Weidenfeld & Nicholson, 1966) at 20.

Too much should not be made of the word "indeterminate". The California system, like our own, is only semi-indeterminate. Not all sentences are life sentences. Most have minima and maxima, though they tend to be somewhat further apart than Canadian minima and maxima. This is merely a matter of degree.

⁸⁴ Quoted by E. O. Wright in "San Quentin Prison: A Portrait of Contradictions" in E. O. Wright (ed.), *The Politics of Punishment*. (New York: Harper & Row, 1973) at 127-30.

Guys lie to each other, but if a man gets a parole from the prison, Fay, it means that he crawled into that room . . . No black will leave this place if he has any violence in his past until they see that thing in his eyes. And you can't fake it, resignation — defeat, it must be stamped clearly across the face."

An account of a California parole hearing:⁸⁵

" . . . the members of the board were looking for indications that the prisoner felt remorse for his crime. When one prisoner responded to the question, 'Do you regret that you committed the burglary?' by saying, 'I didn't do it,' the head of the hearing told him: 'We are not a court that is going to retry your case. We must assume that you are guilty of the crime. You are only hurting yourself by denying it.' After the prisoner left the room, one of the members of the board remarked: 'This man obviously doesn't feel the slightest remorse for what he did. He is hostile and bitter towards the prison. It seems to me that he needs more time to think things over'."

Two California prisoners:⁸⁶

"From the vindictive guard who sets out to build a record against some individual to the parole board, the indeterminate sentence grants Corrections the power to play God with the lives of prisoners."

"Don't put in a shiny modern hospital; free us from the tyranny of the indeterminate sentence!"

There are many other things wrong with parole which I do not propose to discuss here. Two that deserve brief mention, though, are the *in camera* nature of the proceedings, and the wide discretion conferred on the paroling authorities.

For all the fictions about parole being just another way of serving a prison sentence, parole decisions have profound effects on the lives of thousands of individuals. They radically affect the meaning of the sentence of the court. Yet they are made in private. The consequence of this is that we are left in utter confusion about an essential aspect of the harshest part of the penal system. We just do not know how long people are being sent away for. As a result, one of the purposes of a public trial is vitiated.

The problem with wide discretion in decision making is that it is always liable to abuse through conscious and unconscious prejudice and motives which are irrelevant to the purpose to be served. These need not be so obvious as the political and racial biases with which the American parole boards have been charged. It can be as subtle as the insinuation of vengeful and retributive feelings and class prejudices about certain crimes and criminals into the decision maker's calculus. It is not hard to see how such feelings, the vindication of which no one has ever suggested as a legitimate purpose of the parole system, can find expression in such ambiguous criteria as "attitude" and "general conduct".⁸⁷

⁸⁵ *Id.* at 130.

⁸⁶ Quoted in Mitford, *supra*, note 33 at 83, 87.

⁸⁷ See, generally, American Friends Service Committee, *supra*, note 33 at 124-44; Hawkins, *supra*, note 74 at 113; Sutherland and Cressey, *supra*, note 76 at 590; Wright, *supra*, note 84 at 97-99.

D. THE JUSTIFICATION OF PAROLE

Like the seasons, justifications for parole come and go with reassuring regularity. I propose to look at five which cover the field with reasonable comprehensiveness.

1. *Parole and Rehabilitation*

“Rehabilitation” (or “reformation”) has long been the main rallying cry for parole.⁸⁸ The word is used in a very narrow sense to mean the character transformation from criminality to law-abidingness, and the ways in which parole is said to perform the transformation are basically two. They represent what might be called the “positive” and “negative” aspects of prison rehabilitation.

On the positive side, parole, or the prospect of early release, is supposed to operate as an inducement to the prisoner to rehabilitate himself and in that way attain his freedom. The roots of this are, as was seen above, in the marks system of Alexander Maconochie. For Maconochie and his contemporaries the idea was rehabilitation through self-discipline. More recently, though, it has been rehabilitation through participation in prison programmes, be they individual or group counselling, vocational or academic training, or the like, which are intended to transform prisoners into law-abiding citizens. The *Fauteux Report* said:

The prospect of parole stimulates the inmate to derive maximum benefits from the facilities provided by the prison as preparation for parole, i.e. the educational, vocational, religious, recreational and other services furnished by the institution.⁸⁹

⁸⁸ Prime Minister Laurier, on introducing the 1899 Bill to provide for the Conditional Liberation of Penitentiary Convicts said in part (*House of Commons Debates*, 1899 at 9602):

There are two classes of men in the prisons of the country; there are the men who are hopeless criminals and there are other men who are the victims of accident rather than of criminal instincts, and it is to these men to which this Bill is to be applied with the design to giving them a chance to redeem their characters. It is questionable whether a jail or a penitentiary is a place of improvement for a man placed in confinement there. Very often a man goes into a penitentiary who is not a criminal, but he is made a criminal by the associations which in jail become unavoidable.

The *Fauteux Report*, *supra*, note 7 at 51:

Parole is a well recognized procedure which is designed to be a logical step in the reformation and rehabilitation of a person who has been convicted of an offence and, as a result, is undergoing imprisonment.

The *First Annual Report of the National Parole Board*, *supra*, note 67 at 3:

The purpose of parole is to aid in the reformation and rehabilitation of the offender having due regard, of course, for the protection of the public.

The *Ouimet Report*, *supra*, note 8 at 330:

Parole is a treatment-oriented correctional measure . . .

⁸⁹ *Supra*, note 7 at 52, echoed in 1965 by the Chairman of the NPB, *supra*, note 68 at 284: “The possibility of parole provides a strong incentive to an inmate to gain maximum benefit from the prison facilities and to change his attitude towards crime.”

The prospect of early release is to operate as an incentive. The concept is one of punishment and reward and very little else. We will call this the "incentive" thesis for short. It is "positive" because it rests on the belief that through a course of study or training or counselling within the prison a change in the prisoner will occur (other than, one supposes, through fear of having to undergo the process again) which will make it less likely that further crimes will be committed by him, and that this will happen whatever the motive for his participation.

On the negative side, it is said that whatever benefits one might derive from prison programmes there usually comes a time when, to quote the *Parole Act* (section 10(1) (a)(i)),

the inmate has derived the maximum benefit from imprisonment,

and, so the theory goes, further imprisonment will be deleterious, while release under supervision will be helpful to the prisoner's rehabilitation. It is at this moment that the prisoner should be paroled and it is the Parole Board's job to ascertain when this moment has arrived in each case and act.⁹⁰ We will call this the "peak period" thesis. It is negative because it emphasizes the prevention of deterioration through the use of timely release.

These theories will appeal to some and seem fantastic to others. Fortunately, they raise empirical questions which have been fairly thoroughly investigated.

The best way to test the correctional efficacy of a parole system would be to compare the rate of recidivism of prisoners released under such a system (not necessarily on parole, but just under a system which provided for parole) with that of prisoners released under a system which did not provide for

⁹⁰ *The Fauteux Report, supra*, note 7 at 52-53:

Experienced institutional officers have frequently observed: 'This inmate has had enough. If released in the near future he will probably go straight. If confined much longer, he'll be no use to himself or to society.' A former prisoner, released after serving ten years of a twenty-year sentence, expressed his feelings as follows:

"One of the most difficult and I might even add painful phases in prison life is at that period when the prisoner comes to the self shocking knowledge that the things he has been doing all his life have been stupid and his feelings about going straight at this time are very sincere. And very definitely if Society gave him a chance at this psychological moment he would make good. But since Canada does not have a parole system that can catch men at such times, especially second and third timers, then he goes on from day to day living in a hopeless hope until bitterness sets in and he becomes lost. I often wonder how many real criminals are made and violent type crimes thought of, planned and committed through just such bitterness in the heart formed in and by such a mental situation."

A memorandum submitted by the staff of one of Canada's federal penitentiaries gives this view of the same subject:

"This group desire to record their opinion that a time arrives during the period of incarceration of almost every inmate which is the most appropriate time for his release. Continued imprisonment after this time usually results in discouragement, bitterness, cynicism and an anti-social attitude. Penitentiary staff members, through daily contact with each inmate, are in a position to draw to the attention of the remission Service the fact that an inmate is ripe for release."

parole. That has not been done, nor is it likely to be done. What has been done is the testing of the relative performances of those released on parole and those discharged after normal expiration of their sentence, i.e. those denied parole — all within the same system. It is implicit in the incentive thesis at least, that those paroled will have been rehabilitated to a greater extent than those denied parole, because parole is granted as a reward for (and an inducement to) rehabilitative participation. As for the peak period thesis, one might first suppose that the same would not be the case because if the selection process were working perfectly the decision to *deny* parole would be as much the best decision for those denied parole as would be the opposite decision for those granted parole. That is, the thesis of the peak period supposes that if an inmate has not reached the peak period, it is best for his rehabilitation that he stay put. The problem is that as there is no third alternative (as opposed to releasing him or keeping him in custody), while a decision to release a prisoner *must* mean that his "reform and rehabilitation . . . will be aided by the grant of parole",⁹¹ a decision not to release *may* mean that his reform etc. will be aided by further imprisonment. But it may also mean that his release would "constitute an undue risk to society"⁹² even though his chances for rehabilitation are excellent, or that it makes no difference to his rehabilitation whether he is released or not. In the latter two cases the decision to keep the prisoner in prison would not enhance his chances of rehabilitation. In this way, the structure of decision-making would lead us to expect that if the peak period thesis were correct and being properly applied parolees would, as a group, benefit more from being paroled than discharges from being kept in prison.

And it is in this way that Irvin Waller's *Men Released From Prison* suggests strongly that the rehabilitative efficacy not only of Canada's parole system, but also of the two theses just mentioned, is illusory. His study concerned 423 men released from penitentiaries in Ontario during 1968, 210 released on parole and 213 discharged on the expiry of their sentences. A two year follow-up found 65 percent of the discharges but only 44 percent of the parolees re-arrested. However, the important point is that this differential performance in absolute terms was due solely to the selection process. The good risks (those who on the basis of age, penal record and personality were relatively less likely to recidivate no matter what was done to them) were paroled and the bad risks were discharged. When different risks were taken into account, it was found that parole had no effect except that, other things being equal, a parolee would be arrested slightly later than a dischargée. Waller attributes this to the parole supervisor's "help with employment".⁹³ But there was no lasting effect whatsoever, nothing that could remotely be called rehabilitation.

Of course a study such as this need not mean that parole *cannot* rehabilitate prisoners. An alternative explanation would be that the current administrators are inept at the operation of an essentially sound system. However

⁹¹ *Parole Act, supra*, note 6, s. 10(1)(a)(ii).

⁹² *Id.*, s. 10(1)(a)(iii).

⁹³ *Supra*, note 2 at 190.

appealing this explanation may be to those who believe that if only enough time, money and effort are devoted to an objective it can be achieved, it is extremely unlikely that it is the correct explanation. The premises upon which parole is claimed to be correctively efficacious have been carefully tested in many contexts and have yet to be verified empirically.

The incentive thesis rests on the premise that the better a person behaves in prison, the more he involves himself in prison programmes, the less likely he is to commit further offences when he is released. However, the evidence just does not bear this out. Study after study has failed to show any relationship between what one does in prison and what one does afterwards (criminally speaking) when the initial risk differences in the participants are controlled for.⁹⁴ Nor should this be surprising. Whatever one's favourite aetiological theory, it is very unlikely that any significant changes (apart from changes in one's attitude to prison and the chances and consequences of getting caught) can be effected in the context of the prison environment, whether they be changes in personality or material or social circumstances. Nor does common sense suggest that behaviour behind bars is at all likely to be a reliable indicator of behaviour in freedom.

The peak period thesis stands on even less stable footing. To prove this thesis, one would have to show first that a prisoner's subsequent criminality was affected by the length of time he spent in prison. This would be exceedingly difficult to do on the evidence as it now stands.⁹⁵ But even success in this regard would not prove the thesis, for it would merely mean that there were indeed *better* times to release an individual prisoner in the interests of rehabilitation. It would not prove that there were *best* times. That is to say, while a time element might be useful (if it existed) in deciding which prisoners should be kept in custody *longer* than others, and which *shorter* than others (or as long or short as possible) it could not of itself indicate for any prisoner or group of prisoners the existence of a point before which release ought not and after which it ought to occur in the interests of rehabilitation, *viz.* the existence of a peak period.

⁹⁴ See, for instance, R. G. Hood & R. F. Sparks, *Key Issues in Criminology* (New York: McGraw-Hill, 1970) at 186-214; J. Robison & G. Smith *The Effectiveness of Correctional Programs* (New York: McGraw-Hill, 1971), 17 *Crime and Delinquency* 67; V. O'Leary & D. Glaser, "The Assessment of Risk in Parole Decision Making" in West, *supra*, note 74 at 135 ff.

⁹⁵ See *id.*; also, R. F. Sparks, "Research on the Use and Effectiveness of Probation, Parole and Measures of After-care" in the *Report of the European Committee on Crime Problems* (Council of Europe, 1970) at 263.

There is one study which tends to support a time nexus, an unpublished Ph.D. thesis by Donald L. Garrity, *The Effects of Incarceration Upon Adjustment and Estimation of Optimum Sentence*, referred to in "The Prison as a Rehabilitation Agency" in *Cressey, supra*, note 74. This was a study of 1,265 Washington parolees conducted in the early 1950's and in it a connection is shown between length of imprisonment and parole violation for some types of offenders, though not for others. However, it should be noted that the study was concerned with parole violation, not recidivism, i.e. whether the "treatment" was completed, not whether it effected a cure. The criterion of failure was the issuance of a parole violation warrant which need not have entailed criminal misbehaviour and the follow-up period was not uniform for each subject.

Waller found length of time spent in prison to be completely unrelated to re-arrest: *supra*, note 2 at 191.

Finally, even if such a point could be identified, this would not in itself justify the parole selection process. For that it would have to be shown that the point, like the ripening point of some vegetable or fruit, could not be determined beforehand but only through careful observation of each case. Of course, as no one has demonstrated the existence of a peak period, the question of when it could be ascertained has not been investigated. But the evidence with other variables of post-release conduct is all against this last link in the thesis. All of what can be known of what an offender is likely to do after he is released from prison can be known before he is imprisoned.⁹⁶ There is no justification for a "wait-and-see" policy, for a selection process which keeps prisoners dangling throughout their period of custody on the ground that their "progress" is being gauged. If there are people who "respond" best to shorter or longer periods of incarceration, they can be identified at the sentencing stage.⁹⁷ This of course would have the benefit of eliminating not only their own uncertainty but that of the judges and the rest of us as well.

The selection process, then, cannot be supported on the basis of rehabilitation. What about the process of compulsory supervision? Waller's study is only the most recent to indicate that, however good it is for the soul, and whatever short run effects it might have, it has no long run effect on criminality. This finding applies to casework in general, of whatever quality and intensity.⁹⁸ The only thing that coercion, in the form of threatened revocation, adds, is mutual distrust and the unnecessary imprisonment of parolees returned to prison by overcautious supervisors.

2. Parole and Prison Discipline

The maintenance of prison discipline usually only figures in official justifications of parole in order to be denounced.⁹⁹ The exception is the "encouragement" of participation in prison programmes in the interests of re-

⁹⁶ Except for that which can be known after the prisoner is released, but before he is re-arrested. Waller found that a number of "post-release variables" such as unemployment, fighting and drinking were significantly related to re-arrest: see *id.* at 172-80.

⁹⁷ See Hood & Sparks, *supra*, note 94; Robison & Smith, *supra*, note 94; O'Leary & Glaser, *supra*, note 94; Sparks, *supra*, note 95; Garrity, *supra*, note 95; Waller, *supra*, note 2.

⁹⁸ See Joel Fischer, *Is Casework Effective? A Review* (1973), 18 *Social Work* 5; Robison & Smith, *supra*, note 94.

⁹⁹ See, e.g., the *Goldenberg Report*, *supra*, note 25 at 40:

Parole is not a means of managing prisons. Submissions to the Committee generally avoided making a direct suggestion that parole be used as a method of managing prisons although some proposals have come very close to it. We believe that parole should not be used to offset institutional deficiencies, nor to eliminate overcrowding. It is not the role of the parole authority to solve prison discipline problems by releasing troublesome inmates. . . .

Parole is not a reward. The Committee supports the position that the parole authority should not grant parole as a reward for good behaviour or assistance to the administration or for any similar reason. (emphasis in original)

The *Fauteux Report*, *supra*, note 7 at 51, did add, though, almost as an afterthought, "The possibility of parole may be an incentive to good conduct in the institution".

habilitation.¹⁰⁰ Of course, this exception in official doctrine indicates that the control potential of parole has not been lost on administrators. And reliance on "attitude" as a parole criterion¹⁰¹ has probably been sufficient to satisfy those with a more pragmatic turn of mind that parole has been put to good disciplinary use. In fact, it is probably the control objectives which predominate when they and the rehabilitation objectives conflict, which must frequently occur. This much at least is indicated by Keith Hawkins' study of four American parole boards.¹⁰² Good institutional behaviour becomes the threshold requirement for release because of the effect on prisoner "morale" which the release of a "troublemaker" would have, whether or not it was indicated for rehabilitative purposes.

It is clear that parole cannot serve both masters as well as it could serve either one. Only the simplistic "classical" explanation of criminality discussed earlier allows institutional behaviour and rehabilitation to so conveniently coalesce in "attitude". Perhaps it is an awareness of this and of parole's lack of rehabilitative effect that led the Hugessen Committee¹⁰³ (of which Irvin Waller was a member) to emphasize the control aspect of parole, among others, to the virtual exclusion of the rehabilitative aspect. Under this Committee's recommended scheme, an inmate would be released on parole, not when rehabilitation would be enhanced, but whenever eligible, *unless* (among other things)¹⁰⁴ "his release at that time would have a substantially adverse effect on institutional discipline". Parole is to serve this disciplinary function and remission is to be abolished. Of course, the Committee starts from the premise that parole is here to stay. If one starts rather from the premise that parole must be justified, is there any reason to prefer it to remission as a disciplinary device?

The Hugessen Committee preferred parole apparently because it was considered potentially more severe a sanction than remission: "If time is the currency of prisons, then parole is a more valuable coin than remission as it

¹⁰⁰ See the previous section.

¹⁰¹ Naturally, this has also been justified on the basis of rehabilitation: attitude as an index of reform or of reformability through release.

¹⁰² *Supra*, note 74.

¹⁰³ *Supra*, note 20.

¹⁰⁴ *Id.* at 33; the full text reads:

Whenever the board considers the release of an inmate who is eligible for parole, it shall be the policy of the board to order his release, unless the board is of the opinion that his release should be deferred because: -

(a) There is substantial risk that he will not conform to the conditions of parole; and that as a result, there is a risk of serious harm to society; or

(b) his release at that time would depreciate the seriousness of his crime or promote disrespect for law; or

(c) his release would have a substantially adverse effect on institutional discipline; or

(d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life when released at a later date and no equivalent treatment or training is available in the community.

This is a slight modification of §305.9 of the American Law Institute *Model Penal Code Proposed Official Draft* (1962).

may affect not days or weeks, but months and years of prison time and does so earlier in the sentence".¹⁰⁵ But, of course, so would corporal, or even capital, punishment be more severe. The question is whether the more severe parole would be anymore effective than remission, and if that, then sufficiently more effective to justify all the trouble it causes. And, as with sentencing itself, we will never know what is the appropriate (i.e. necessary) severity in order to prevent any given offence until experiments are performed with varying degrees of severity. This has not been possible not only, as with sentencing, because of the wide discretion and consequent variation in practice, but also because there has been no systematic recording of the granting and withdrawing of remission. We cannot know even if anything *like* remission is needed.¹⁰⁶

All this aside, it is clear that we do not need a multimillion dollar parole board to administer a remission system, no matter how severe its sanctions (or vague its criteria). The means of controlling prison behaviour through time are all present in the remission system. If that system needs adjustment, the adjustment needed is minor, anyway not major enough to justify a change in nomenclature. While parole is married to rehabilitation it cannot serve the function of control as well as a thoroughgoing remission system. Divorced from rehabilitation it is at worst an overly vague, severe and centralized remission system, and at best a good remission system.

3. *Parole and Clemency*

The Canadian parole system started life as a system primarily concerned with the administration of "clemency" i.e. sentence adjustment on purely humanitarian grounds.¹⁰⁷ By the time of the *Fauteux Report* one can detect

¹⁰⁵ *Id.* at 27.

¹⁰⁶ *Id.* at 27-28:

In a modern penitentiary system the means of control both by positive motivation and negative sanction are more diversified and offer a wider scope to the penitentiary authorities than was the case in the past. For minor offences such as swearing at a correctional officer or minor contraband, there are many privileges which can be withdrawn from an inmate ranging all the way from the right to watch television in the evening to the right to earn a full day's salary for his work. An inmate can be moved from one grade of payment to another. His activities in clubs, discussion groups and sporting activities can be limited or taken away altogether.

For more serious offences such as important contraband, refusal to obey orders and minor skirmishes among inmates, there are more serious actions that can be taken against the inmate such as disassociation or transfer to an institution with a higher security rating and therefore more restrictions.

Any inmate who commits, within the penitentiary, an offence against the Criminal Code such as an assault on a guard can and should be prosecuted in the ordinary way before the courts.

¹⁰⁷ The Prime Minister said, pithily, in 1899:

Here is a convict, a young man of good character, who may have committed a crime in a moment of passion, or, perhaps, have fallen a victim to bad example or the influence of unworthy friends. There is a good report of him while in confinement, and it is supposed that if he were given another chance, he would be a good citizen. Under the Bill power is given to the Governor General to order his liberation . . .

(*Supra*, note 88 at 9600.)

an ambivalence towards parole as clemency.¹⁰⁸ Since the report official opinion has definitely hardened against it.¹⁰⁹ The *Quimet*¹¹⁰ and *Goldenberg*¹¹¹ reports are both emphatically opposed to the inclusion of any element of sentence-tampering in their conceptions of parole. This is more rhetoric than anything else. The NPB has long used clemency considerations in administering parole.¹¹² The British were more frank about it when their system was recommended: "It would incidentally also go some way to relieve the overcrowding of prisons".¹¹³ Furthermore, it is the clemency aspect of parole which appeals to those who have investigated the promise of rehabilitation and have found it empty.¹¹⁴

Of course, the key assumption behind parole as clemency, or any form of humanitarian justification, is that parole confers a *benefit* on prisoners. The "pains of parole" apart, what was found earlier with respect to parole and sentence length bears repeating: it is clear that a good many sentences have

¹⁰⁸ *Supra*, note 7 at 51-52. In the space of two pages one reads:

There has been in Canada a tendency to confuse two completely different ideas in the field of corrections. One is parole. The other is clemency . . . Clemency . . . has very little, if anything to do with reformation or rehabilitation . . . [I]n a well designed system of corrections there should be few occasions for its use.

and

Parole . . . is a socially just procedure because it enables society to play an auxiliary role in the readjustment of the individual who may have become a criminal party through shortcomings in society itself. It may serve as a proper means of mitigating excessively severe punishments imposed under the influence of aroused public emotions.

¹⁰⁹ Right from the start, the NPB assured us, under "Policy of the Board", that the Board was striving "to avoid any suggestion that parole involves mollicoddling inmates or the use of leniency or clemency"; *First Annual Report of the National Parole Board, supra*, note 67 at 4.

¹¹⁰ *Supra*, note 8 at 330: "Parole is a treatment-oriented correctional measure, not a sentence-correcting method. It is in no way aimed at reviewing the sentence of the court."

¹¹¹ *Supra*, note 25 at 40:

Parole is not clemency . . . This Committee feels that clemency considerations should not be mixed with parole. They proceed from a philosophy completely different from the one on which parole is based . . .

Parole is not amelioration, equalization or review of sentence. Review of sentences for whatever reason is a function of appeal courts . . . (emphasis in original)

¹¹² It has always considered, e.g., "the nature and gravity of the inmate's offence" *First Annual Report of the National Parole Board, supra*, note 67 at 9. Furthermore, a host of clemency-type considerations (e.g., "death in family", "extenuating circumstances in the offence") were disclosed to the Goldenberg Committee as matters which were taken into account in deciding whether or not to grant parole before the normal one-third of the sentence had expired: *id.* at 24-25. Any board using these factors in this type of decision would also use them in ordinary parole decisions, whether it cared to admit it or not.

¹¹³ Secretary of State for the Home Department, *The Adult Offender* (London: Her Majesty's Stationery Office, 1965) para. 8.

¹¹⁴ See, e.g., Waller, *supra*, note 2 at 16 where he includes as "valuable functions" of parole "the relief of overcrowding" and "humanitarian considerations".

been lengthened, not shortened, by parole, and there is evidence that on the whole less time would be spent in prison if parole were done away with. It would at least eliminate the guesswork. If still shorter terms were desired, this could be achieved directly, openly, and relatively easily through sentencing legislation.

4. *Parole and the Protection of Society*

The most powerful and complex arguments for parole have been made under the rubric of "the protection of society".¹¹⁵ The essence of them is this: it is an important purpose of every sentence of imprisonment to protect the public for the duration of the sentence from the criminal depredations of the offender. Therefore, only those should be released before expiry of the sentence (for whatever reason — rehabilitation, as reward, humanitarianism) who are not likely to commit further offences while on parole, and to ensure this a careful selection process is necessary. Also necessary is supervision of the parolee to better prevent his commission of further offences.

Of course, a key assumption of this position is that some benefit either to the prisoners or to "society" is derived from the system of parole, either through less overall time spent in prison or rehabilitation or whatever. This point need not be reargued here. That apart, there are several fatal weaknesses in the position.

First, in the matter of practical application: How well can the NPB predict who is and who is not going to commit an offence while on parole? Its cancellation rate alone shows it to have been wrong over 18 percent of the time.¹¹⁶ But cancellations represent only mistaken predictions of non-violation. We have no way of knowing how many prisoners were denied parole under the mistaken prediction that they were going to violate parole, wrongfully condemned to serve out their full sentences (sentences which may well have been lengthened because of the availability of parole). It is for this reason that we cannot know whether the expensive selection process of the

¹¹⁵ *Fauteux Report, supra*, note 7 at 52:

[Parole] offers a means of protection to society from further criminal activity on the part of released offenders;

T. G. Street, Chairman of the NPB 1959-1972, *supra*, note 70 at 284:

The dual purpose of parole is the rehabilitation of the offender and the protection of society;

Ouimet Report, supra, note 8 at 330:

For society, [parole] offers immediate protection through a degree of surveillance and control over the offender's behaviour, and long-term protection through a reduced likelihood of recidivism;

Goldenberg Report, supra, note 25 at 43:

Parole is an aid to social control of offenders. One of the principles of this Report is that the core of parole is the protection of society. The parole system must protect the members of society — and the offender himself — at each stage of the process.

¹¹⁶ See note 30 and accompanying text.

NPB is one whit superior to purely random selection. We do not know the "base rate",¹¹⁷ the rate of default that would occur if random selection were used.

Parole prediction is still pretty much a matter of guesswork, and one cannot help but admire the candour of the current Chairman of the NPB, W. R. Outerbridge, in admitting (to a group of police chiefs, no less): "When it comes to predicting future behaviour with accuracy, we would all appear to be amateurs. This kind of prediction is even more difficult than predicting future economic trends, political events or even housing and food costs".¹¹⁸

Accuracy aside, another question must be raised, that of how much protection is actually being purchased here. We have calculated that parolees have served about 50.0 percent of their sentences and that this has resulted in an average for them in time spent in prison of 33.9 percent. What we should be asking is, what would happen if *everyone* were released 33.9 percent earlier than they are now, including the prisoners who are now denied parole and are kept in prison until the expiry of their sentences?

Table 6 gives the lengths of the sentences of those denied parole between 1968 and 1972. As the cumulative percentages show, 44.5 percent of them were serving sentences of less than 18 months and the "protection" achieved by denying them the earlier release afforded parolees was less than six months.¹¹⁹ For 79.7 percent the protection lasted less than one year and for 97.5 percent the protection lasted less than two years. Not an awful lot of protection, that. Those who will commit crimes will, of course, do so whether released two years later or earlier. Furthermore, many crimes will be committed in prison, perhaps more than would be committed outside of prison on account of the special circumstances of confinement; though, of

¹¹⁷ See D.M. Gottfredson, "Assessment and Prediction Methods in Crime and Delinquency" in *Task Force Report: Juvenile Delinquency. President's Commission on Law Enforcement and Administration of Justice, Appendix K* (1967), reprinted in N. Johnston, L. Savitz and M. E. Wolfgang, *The Sociology of Punishment and Correction* (2nd ed. New York: John Wiley & Sons, Inc., 1970) at 752:

The 'base rate' refers to the proportion of individuals in some population who fall into a category which is to be predicted. . . . In order for a prediction method to be useful, it must provide more information than that given by the base rate alone.

See, also, T. Grygier & O. R. Porebski, *Decision and Outcome: Studies in Parole Prediction* (1971), 13 Can. J. Corr. 133 at 135:

If a device to predict likelihood of parole success or failure is to serve as a guide to the Board, it must be independent of its policy. At the moment, we can only tell what risk is involved *after* a favourable decision of the Board has been made. In that sense our method — which was restricted by circumstances beyond our control and was the only one possible under the research contract — almost forced us to single out the types of parolees who are at present released and should be denied parole, instead of finding out which parolees, at present denied parole should be released earlier. [emphasis in original]

¹¹⁸ Quoted in *The Globe and Mail* January 30, 1975.

¹¹⁹ Six months' "protection" is derived from a sentence of less than eighteen months either by using the normal remission and normal figures calculated above (.75 x 18 x .339 = 4.6 months reduction in sentence) or by merely taking one-third of the sentence imposed as the amount within the control of the NPB.

TABLE 6
Sentence Lengths of Those Denied Parole 1968-1972

Year	Number of sentences less than 18 mos.	Percentage of all sentences	Number of sentences 18 mos. or over and under 3 yrs.	Cumulative Percentage	Number of sentences 3 years or over and under 6 yrs.	Cumulative Percentage	Number of sentences 6 years or over	Cumulative Percentage
1968	1048	49.3	674	81.0	355	97.7	48	100
1969	857	49.8	534	80.8	274	96.7	57	100
1970	696	43.2	566	78.3	309	97.5	41	100
1971	944	43.4	782	79.3	392	97.3	58	100
1972	1080	39.1	1107	79.2	514	97.8	60	100
TOTAL								
1968-1972	4625	44.5	3663	79.7	1844	97.5	264	100

SOURCE: National Parole Board, *Statistics 1968-1972*

course, they will be committed against a different sort of victim.¹²⁰ Finally, it is not as though those released were being licensed to commit further offences with impunity. They are still subject to the sanctions of the criminal law, and it operates with extra severity on those who have already spent time in prison.¹²¹

We must conclude that it is unlikely in the extreme that the quality and quantity of protection make it worth all the bother and expense of the selection process. In fact, to all that has just been said, we might add the observation that whatever useful protection function is now served by the NPB could just as usefully be served by the sentencer, because the passage of time does not improve the ability to predict what a prisoner is likely to do when released.¹²²

But we ought to go further and question the whole idea of parole as public protection. Presumably it is based on a conception of the sentence of imprisonment as a device for incapacitating or at least segregating the offender. However, this must play a very minor part in most sentences of imprisonment because most sentences of imprisonment are so short, and the costs of imprisonment so vastly outweigh the "harm" which incapacitation prevents in most cases. Certainly there are some dangerous offenders from whom total protection at the costs of prison is necessary. But they are far too few to justify the erection of a sentencing or parole system.¹²³ Incapacitation as a justifying aim most probably originated as a rationalization for retributively motivated mutilation and capital punishment. Given its slenderness, its persistence in official writings is somewhat puzzling. It is as if with the decline of retribution, some other justification for imprisonment had to be dreamed up which emphasized a fault in the *offender* — general deterrence being too conceptual and utilitarian, special deterrence being too obviously a failure, and rehabilitation being too non-punitive. Ultimately, though, the constant harping on the "protection of society" is probably best explained as just one facet of the broader public relations picture.

¹²⁰ Less "innocent" victims (other inmates) or better prepared victims (staff and the administration in general); nevertheless, according to the official rhetoric, everybody is entitled to equal protection from victimization: "The basic purpose of criminal justice is to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct." (my emphasis): *Ouimet Report, supra*, note 8 at 11.

For descriptions of criminal goings-on in prison, see W. E. Mann, *Society Behind Bars: A Sociological Scrutiny of Guelph Reformatory* (Toronto: Social Publishers, 1967); D. D. Akman, *Homicides and Assaults in Canadian Reformatories* (1966), 8 *Can. J. Corr.* 284; G. Sykes, *The Society of Captives* (Princeton: Princeton U. Press, 1958) at 65-78.

¹²¹ Rubin, *supra*, note 33 at 650: "A new crime committed by a released prisoner gives rise to a new prosecution, which is all the protection needed under law."

For the effect of a prison record on sentencing, see *R. v. Simmons et al.* (1973), 13 C.C.C. (2d) 65 (Ont. C.A.); *R. v. Bear et al.* (1973), 13 C.C.C. (2d) 570 (Sask. C.A.).

¹²² See *supra*, note 97.

¹²³ Of the total persons convicted in 1971, only about seven percent of offences include the type of conduct which might potentially be regarded "dangerous"; of these, less than half actually were imprisoned: Statistics Canada, *supra*, note 3.

5. Parole and Public Relations

Take the statement, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹²⁴ There is nothing much wrong with it on its face. In fact, it seems to demonstrate a quite democratic concern for public involvement in, or at least understanding of, official action. But what if the demonstration of justice interferes with the doing of it? Or what if justice is being demonstrated when it is not actually being done? Then we are in the realm of public relations, not justice. Of course, in our society governments are expected to do this sort of thing, and though it is lamentable, it does not concern us here. What concerns us is the pseudo-justification of penal practices on the basis that they are good public relations — that they lead the public to believe it is getting what it wants or at least will tolerate when it is not getting either — as if this were the same or as legitimate as justifying a practice on the basis that it is inherently right or results in the greatest good for the greatest number.

This is what Irvin Waller has to say about parole:¹²⁵

"We have attempted to be realistic in assessing the effectiveness of parole in changing behaviour. This is not necessarily to challenge its *raison d'être*, for while it may fail in one area, it has other valuable functions: avoidance of the construction cost of new prisons, the relief of overcrowding, humanitarian considerations, and the need to placate public opinion with the claim that justice is being done and protection being given, even though criminals are being set free." (my emphasis)

And Norval Morris, in a similar vein:¹²⁶

"... more importantly, one latent function of parole must be mentioned. The judge imposes sentence at a time of high emotional response to the facts of the crime. Even within our grossly dilatory system of justice, the sentence follows closely upon the public narration of the criminal events, if not upon the commission of the crime. A parole board, however, may make its decision in what one hopes will be a less punitive social atmosphere. One important latent purpose of probation is to allow a judge to give the appearance of doing something while in fact doing nothing. Similarly, one latent purpose of the division of power between judge and parole board is to give the possibility of some clemency while appearing in the public eye to be imposing a more severe punishment."

What is wrong with this sort of argument? For two things, deceitfulness and elitism. Neither have any place in moral or rational discourse. Arguments of this style, which have no validity for, indeed cannot meaningfully be addressed to, the great mass of the members of a community, have absolutely no value for that community. Where this sort of thing passes for rational justification at all it is a sorry comment on the state of democracy.

In any event, the whole public relations point of view assumes that behind the elaborate smokescreen of parole something progressive and humane, even if *merely* humane, is being done which must be protected from

¹²⁴ Lord Hewart, C.J., in *R. v. Sussex Justices, ex p. McCarthy*, [1924] 1 K.B. 256 at 259.

¹²⁵ *Supra*, note 2 at 16.

¹²⁶ *Supra*, note 5 at 48.

the destructive grasp of the vicious, backward masses. It is this position that I earlier sought to discredit. To the extent that I was successful, deceit has not merely been in vain, but has backfired. It has operated to bolster and protect a process opposite to that intended — assuming, of course, the intentions were indeed humane in the first place.

E. THE FUTURE OF PAROLE: THREE REPORTS

Each of the last three years has brought with it a governmental report on the subject of parole. In 1973 it was the *Hugessen Report*,¹²⁷ in 1974, the *Goldenberg Report*,¹²⁸ and this year, somewhat more diversified, the Law Reform Commission of Canada's *Working Paper 11: Imprisonment and Release*. The Chairman of the NPB has announced that legislation embodying some of the recommendations of the *Goldenberg Report* is imminent.¹²⁹ Here are some of the things we can probably expect for the future.

1. *More Due Process*

This was recommended, in one way or another, by all three committees. The most conservative was the *Goldenberg Report*, but even it contained recommendations for fuller statutory hearing rights on the granting and cancellation of parole, including the right to be present, to see the material on which the decision was based, to have reasons for the decision and to have non-legal counsel.¹³⁰ Only the Hugessen Committee recommended legal counsel and then only for cancellation hearings.¹³¹ Both it and the Law Reform Commission were in favour of some form of judicial superintendence of parole.¹³²

If implemented, these reforms will rectify to some extent the characteristic Canadian lag behind American law in the provision of fundamental procedural safeguards.¹³³ The failure in this realm has typically been justified on grounds of rehabilitation, administrative convenience and control, which, it was said, left no room for rights and adversarial contests.¹³⁴ A change would, therefore, be welcome not only in its own right, but also as reflecting a shift simultaneously away from parole as rehabilitation and towards more respect for the prisoner as a human being.

¹²⁷ *Supra*, note 20.

¹²⁸ *Supra*, note 25.

¹²⁹ *The Globe and Mail*, September 12, 1974.

¹³⁰ *Supra*, note 25, recommendations 36-40, 63.

¹³¹ *Id.*, recommendation 47; also, generally, 31-35, 43-46.

¹³² *Id.*, recommendations 36, 56, 57; Law Reform Commission of Canada, W.P. #11 at 41-44.

¹³³ Compare *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *United States ex rel Johnson v. Chairman of New York State Board of Parole*, 500 F.(2d) 925 (1974) with *In re McCaud* (1964), 43 C.R. 252 and *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385.

¹³⁴ See R. R. Price, *Bringing the Rule of Law to Corrections* (1974), 16 Can. J. Corr. 209.

2. *Reduced Sanctions for Parole Violation*

Both the Hugessen and Goldenberg Committees recommended that time successfully served on parole be credited to the prisoner against his sentence even though his parole is ultimately cancelled.¹³⁵ It is not easy to gauge the significance of this because the prior practice was so unnecessarily severe as to lack conceivable justification. Perhaps it heralds a more tolerant approach to parole violation and a less hysterical concern with "the protection of society".

3. *The End of Remission and the Rise of Mandatory Supervision*

Both the Hugessen and Goldenberg Committees would abolish remission¹³⁶ and there does not seem much room for it in the Law Reform Commission's scheme. All seem to favour a universal scheme of mandatory supervision.¹³⁷ However, we have no indication that these recommendations will be adopted. If they should be, it is interesting to speculate on what would happen to parole. Of course, any residual control-through-time function would devolve on parole. This would be consistent with both the Hugessen and Law Reform Commission approaches (the latter of which, for all the world, resembles Alexander Maconochie's system more than any other¹³⁸) though not with Goldenberg, which clings most tenaciously to rehabilitation as a justifying aim.¹³⁹ The times are probably with the former two, and one could probably look forward to a period of parole as a combination of behaviour control and protection of society. Beyond that it is hard to tell what would happen: Would the new guise give parole survival power? Or would it become discredited and wither like remission? The answers to these questions await more years and more reports. In the meantime, parole's juggernaut continues to roll mindlessly over time, money, prisoners and public alike.

¹³⁵ The *Hugessen Report*, *supra*, note 20, recommendation 49; *Goldenberg Report*, *supra*, note 25, recommendation 67.

¹³⁶ The *Hugessen Report*, *id.*, recommendation 22; the *Goldenberg Report*, *id.*, recommendation 6.

¹³⁷ The *Hugessen Report*, *id.*, recommendation 22; the *Goldenberg Report*, *id.*, recommendation 41; Law Reform Commission, *supra*, note 132, at 38.

¹³⁸ The Justice Minister's recent noises of approval for the Law Reform Commission's scheme (*The Globe and Mail*, July 24, 1975) prompt further comment. The scheme is predicated on a three part sentencing system based on the purposes of the sentence: public protection (maximum 20 years), denunciation (maximum 3 years), and enforcement of non-custodial measures (maximum 6 months). Early release or parole would be available on a public protection basis in a number of stages passed through by good behaviour where the purpose was protection; where it was enforcement, when the fine was paid, etc. But as for denunciation — and this would surely be the bulk of the sentences of imprisonment — early release would only be based on humanitarian considerations, would be exceptional and would be determined only by a court.

It may be that such a sentencing system is not feasible. Or perhaps there would be no way to prevent judges from using "protection of society" as a ruse to effect longer "denunciatory" sentences. But if such a system were faithfully adhered to, the NPB would be out of business. There simply are not enough genuinely protective sentences to go around.

Is this the way parole ends?

¹³⁹ *Supra*, note 25 at 5: "Parole must be a positive step in the correctional process"; at 44: "Parole is an aid to social integration of offenders".

APPENDIX A

Breakdown of "volumes of activities" of National Parole Service for 1973-74 (n. 12).

<u>Activity</u>	<u>Volume</u>	<u>Hours per unit</u>
1. Visits to Institutions	12,917	1.5
2. Inmate Briefing Sessions	1,000	2.0
3. Inmate Interviews	28,875	1.0
4. Case Submissions	14,824	4.0
5. Cases Reviewed in Board Panel Hearings	1,529	1.5
6. Community Assessments		
(a) completed by Parole Officers	7,473	4.0
(b) completed by Contracting Agencies	3,714	1.0
7. Supervision		
(a) by Parole Officers	3,682	2.0
(b) by Agencies	2,180	0.5
8. Revocations and Forfeitures	1,460	3.0
9. Cases Reviewed in Case Conferences	16,571	0.5

Definitions and Explanations

1. Number of Visits to Institutions

This item is primarily intended to cover travelling time and informal discussions with institutional staff and inmates on case progress to get small bits of information, etc. Each separate visit to an institution should be counted regardless of purpose to account for travelling time.

2. Inmate Briefing Sessions

This is a count of group meetings to explain to inmates how the parole process works and what their rights and responsibilities are.

3. Number of Interviews with Inmates

This item is intended to cover both face to face time spent with inmates in formal interviews to prepare release plans, collect information for case preparation, discuss reasons for suspension, explain Board decisions, etc., and the time required to record the results of interviews.

4. Submissions

These items represent a count of all completed case submissions to the Board for definitive decisions plus cases completed for mandatory supervision releases.

5. Panel Hearings — Number of Cases

This is to cover extra time required to organize cases for panel review and to present the case to the panel. Count all cases reviewed including those which have to be forwarded to Headquarters for more votes.

6. Community Assessments Completed

(a) by staff — This is a count of all community assessments by the

staff of the particular District Office for inmate cases, whether as post-sentence reports, for Temporary Absences, for parole applications (including Day, Temporary and Re-Parole) or for mandatory supervision cases. It is intended to cover travelling time and recording time.

- (b) by agencies, etc. — This is a count of all community assessments for inmate cases completed in the area by other than NPS staff members. It is intended to cover time required for allocation, follow-up and reviewing.

7. *Cases under Supervision*

Includes Day Paroles, Full Paroles, and Mandatory Supervision cases.

8. *Revocations and Forfeitures*

This time allowance is based upon counts of decisions by the Board as an indirect measure of time involvement of District Office staff in suspending and working with suspended clients and in attending court sessions for clients charged with new offences.

9. *Cases Reviewed in Case Conferences*

This is a count of in-depth reviews of cases being prepared for Board submissions (or mandatory supervision release) with institutional personnel, visitors to the institution or employers or school authorities who have had contact with the inmate while incarcerated and of cases under supervision with community agencies providing services to clients, police, etc.

APPENDIX B

A study was undertaken, so far as available statistics would allow, of the distribution of sentences for all indictable offences and for robbery in order to ascertain whether any impact which the availability of parole might have had on sentence length was discernible. Tables B1 and B2 give the results.

If parole were having an effect on sentence length which was discernible from the tables, one would expect to see a shift towards longer sentences in periods of greater parole activity and a contrary shift in periods of lesser parole activity. Changes in sentence length appear in the tables as changes in the breakdown of prison sentences between those that were under two years in duration and those that were for two years or longer. The level of parole activity is indicated by the ratio of paroles to sentences of imprisonment for all indictable offences. This, of course, takes no account of the effect which a policy of earlier or later parole dates may have had on sentence length. Furthermore, the level of parole activity could only be expected to have an effect on sentence length to the extent that judges have been aware of changes in it.

Turning to the tables themselves, it is readily apparent that little support for the thesis advanced above can be found in them. With limited exceptions (such as the dramatic but temporary lengthening of sentences for rob-

bery on the introduction of parole in 1899-1903 and to a lesser extent in 1959-63) sentence lengths seem to have fluctuated independently of the parole rate.

It is clear that no safe conclusions can be derived from these figures. The reader should be specifically cautioned against concluding from the fact that sentences of imprisonment are no longer for all indictable offences (indeed, are shorter) and only modestly longer for robbery since the introduction of parole that parole has had little or no effect on sentence length. For all we can know from these figures sentences of imprisonment may have been much shorter still had there been no parole system.

We are thrust back, inevitably, on the indirect evidence of admissions, documented cases and common sense.

TABLE B1
PAROLE AND SENTENCES FOR INDICTABLE OFFENCES

Years	Number of Sentences	Sentences of Imprisonment as Percentage of All Sentences	Percentage less than two years	Percentage two years or more	Tickets of Leave/ Paroles per Sentence of Imprisonment
1886-88	10,513	72.7	84.5	15.5	0
1889-93	20,786	67.9	85.2	14.8	0
1894-98	27,444	63.8	83.9	16.1	0
1899-1903	29,298	55.8	83.0	17.0	.056*
1904-08	42,915	51.4	82.3	17.7	.069
1909-13	69,663	46.0	82.1	17.9	.120
1914-18	94,152	36.1	84.7	15.3	.160
1919-23	87,213	38.1	79.3	20.7	.144
1924-28	91,481	43.8	79.3	20.7	.101
1929-33	148,521	47.2	80.3	19.7	.083
1934-38	182,021	51.0	84.5	15.5	.042
1939-43	218,537	47.2	84.7	15.3	.031
1944-48**	217,103	47.5	83.8	16.2	.041
1949-53**	158,522	49.5	86.9	13.1	.063
1954-58	152,302	46.9	83.6	16.4	.074***
1959-63	185,562	48.6	83.5	16.5	.118
1964-68****	212,798	42.3	84.4	15.6	.134
1969-71*****	131,744	37.0	87.5	12.5	.314

* The parole figure is based only on the years 1900-1903.

** The figures for these years are not comparable as the first and preceding are based on total convictions and the second and following are based on *persons convicted* irrespective of the number of convictions any one person may have had.

*** The parole figure is based only on the years 1954, 1955, 1957 and 1958 as figures for 1956 are not available.

**** Excluding Quebec for 1968 only.

***** Excluding Quebec and Alberta.

SOURCES: Dominion Bureau of Statistics/Statistics Canada, *Statistics of Criminal and Other Offences 1937 and 1950-1971*; *Fauteux Report, supra* note 7, Appendix A; National Parole Board, *Annual Reports 1959-1964*; National Parole Board, *Statistics 1965-1971*.

TABLE B2
PAROLE AND SENTENCES FOR ROBBERY 1879-1971

Years	Number of Sentences	Sentences of Imprisonment as Percentage of All Sentences	Percentage less than two years	Sentences of Imprisonment Percentage two years or more	Tickets of Leave/ Paroles per Sentence of Imprisonment (all indictable offences)
1879-83	206	94.5	59.2	40.8	0
1884-88	276	94.8	53.3	46.7	0
1889-93	225	92.2	58.2	41.8	0
1894-98	267	92.1	58.4	41.6	0
1899-1903	265	89.2	42.6	57.4	.056*
1904-08	372	84.9	65.1	34.9	.069
1909-13	569	81.3	56.4	43.6	.120
1914-18	537	80.3	55.9	44.1	.160
1919-23	881	82.7	46.9	53.1	.144
1924-28	885	86.1	36.8	63.2	.101
1929-33	2,037	91.8	31.0	69.0	.083
1934-38	1,891	93.0	37.8	62.2	.042
1939-43	2,149	90.4	45.0	55.0	.031
1944-48**	2,796	90.9	46.5	53.5	.041
1949-53**	2,872	92.8	48.3	51.7	.063
1954-58	3,090	87.9	49.1	50.9	.074***
1959-63	3,925	88.3	45.1	54.9	.118
1964-68****	4,180	85.9	46.5	53.5	.134
1969-71*****	2,102	88.3	51.0	49.0	.314

* The parole figure is based only on the years 1900-1903.

** The figures for these years are not comparable as the first and preceding are based on total convictions and the second and following are based on *persons convicted* irrespective of the number of convictions any one person may have had.

*** The parole figure is based only on the years 1954, 1955, 1957 and 1958 as figures for 1956 are not available.

**** Excluding Quebec for 1968 only.
***** Excluding Quebec and Alberta.

SOURCES: Dominion Bureau of Statistics/Statistics Canada, *Statistics of Criminal and Other Offences 1937 and 1950-1971; Fauteux Report, supra*, note 7, Appendix A;
National Parole Board, *Annual Reports 1959-1964*;
National Parole Board, *Statistics 1965-1971*.