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Notes

Escapes From Permissive Release Programs: Proposals For Reform

One of the hallmarks of modern criminal theory is that rehabilitation is acknowledged as the predominant function of corrections in the United States.¹ One manifestation of this shift in theories from punishment to rehabilitation has been the inclusion of permissive release programs in correctional services throughout the nation.² Permissive release³ allows ostensibly trustworthy prisoners to venture beyond the boundaries of the penal institution for such purposes as employment interviews, work, education, entertainment, visits with relatives, attendance at funerals and medical treatment.⁴

¹See *Williams v. New York*, 337 U.S. 241, 248 (1949); *In re Lamb*, 34 Ohio App. 2d 85, 88, 296 N.E.2d 280, 284 (1973). *But cf.* R. CARTER & L. WILKINS, *PROBATION, PAROLE, AND COMMUNITY CORRECTIONS* 1 (2d ed. 1976): "Today a very large proportion of those who could claim to be experts take the view that offenders are not being rehabilitated; many take the view that they cannot be rehabilitated, while others think that attempts at rehabilitation are undesirable on ethical grounds."

²In 1913, the state of Wisconsin initiated a new era in corrections with the enactment of the Huber law, *Wis. STAT. ANN.* § 56.08 (West 1957). Misdemeanant prisoners convicted and confined to the county jail were permitted to work in the community during the day. For approximately 45 years the Huber law stood alone, because the rest of the nation was not prepared to follow the lead of Wisconsin. However, a change in the philosophy of corrections, *see e.g.*, *Williams v. New York*, 337 U.S. 241, 248 (1949), and an economic recession in the late 1950s created conditions conducive to a search for inexpensive alternatives to the traditional forms of imprisonment. Having the requisite traits desired by correctional reformists, the Huber law served as the prototype for permissive release programs. *See e.g.*, 18 U.S.C. § 4082 (1976); *ALA. CODE tit. 14, § 14-8-1,-10* (1975); *FLA. STAT. ANN.* § 945.091 (West 1973); *IND. CODE § 11-7-9-1,-11* (1976); *MD. ANN. CODE art. 27, § 700A*; *N.J. STAT. ANN.* § 30: 4-92 (1964); *S.D. COMPILED LAWS ANN.* § 248-1 (Supp. 1977). For a compilation of work release programs current to 1972 see Riskin, *Removing Impediments to Employment of Work Release Prisoners*, 8 *CRIM. L. BULL.* 761, 762-63 nn.4 & 5 (1972).

³See generally Project, *Temporary Release in New York State Correctional Facilities*, 38 *ALB. L. REV.* 691 (1974); Root, *State Work Release Programs: An Analysis of Operational Policies*, 37 *FED. PROB.* 52 (Dec. 1973); McMillan, *Work Furlough for the Jailed Prisoner*, 29 *FED. PROB.* 33 (Mar. 1965); Jeffrey & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L.* 405 (1974); Comment, *Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions*, 47 *TEMP. L.Q.* 288 (1974); Comment, *Project: A Description of Prerelease in Pennsylvania*, 20 *VILL. L. REV.* 967 (1975).

⁴A variety of programs are available because permissive release is often viewed as part of a broader concept: "The community base must be an alternative to confinement of an offender at any point in the correctional process." R. CARTER & L. WILKINS, *PROBATION, PAROLE AND COMMUNITY CORRECTIONS* 486 (2d ed. 1976). *See also* Note, *Community Based Corrections: Some Techniques Used as Substitutes for Improvement*, 2 *CAP. U.L. REV.* 101 (1973); Pettibone, *Community-Based Programs: Catching Up with Yesterday and Planning for Tomorrow*, 37 *FED. PROB.* 3 (Sept. 1973).

Placing permissive release within the community corrections movement suggests that all

The participants are either unsupervised or loosely guarded; inevitably, the prisoner's mobility is expanded.⁵

Legislators and correctional authorities anticipated the ease with which a prisoner could escape from a permissive release program, and reacted by defining an unauthorized departure from or failure to return to confinement as a "criminal escape."⁶ However, instead of creating a separate category of escape, legislators have generally chosen to punish unauthorized departures from permissive release programs through existing escape laws.⁷

This decision to forego development of separate rules of escape law was unfortunate. Escapes from permissive release programs differ markedly from other types of confinement; the hazards engendered by an illegal departure from a penal institution, such as injury to bystanders and property damage,⁸ do not accompany escapes from a permissive release program.⁹ Accordingly, the principle declaring that the punishment of all escapes is beneficial to society¹⁰ is inapplicable in this instance. Further, the absence of physical restraints in a permissive release setting necessitates the development of rules sensitive to the distinctive aspects of "constructive" escapes.

This note identifies and discusses the problems surrounding escapes from permissive release programs.¹¹ Legislative reforms designed to eliminate the injustices resulting from the use of one system of judgment and punishment

unauthorized departures from community-based programs should be treated similarly, *i.e.*, punished administratively rather than criminally. See notes 56-61 *infra*, & text accompanying.

⁵The degree of freedom permitted a prisoner in a permissive release program varies both within an between jurisdictions. For example, some prisoners remain in actual custody while on furlough, others are unguarded but permitted only limited freedom for brief periods of time, and still others are allowed to live in a community halfway house for their entire period of incarceration, see H. SANDHU, *MODERN CORRECTIONS 278-86* (1974). For background information concerning halfway houses see Beha, *Halfway Houses in Adult Corrections: The Law, Practice, and Results*, 11 CRIM. L. BULL. 434 (1975).

⁶*E.g.*, N.J. STAT. ANN. § 30: 4-91.5 (Supp. 1977): "The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the commissioner, shall be deemed an escape"

⁷See *e.g.*, ALA. CODE tit. 14, § 14-8-8 (1975); MISS. CODE ANN. § 47-5-161(3) (Supp. 1977); N.J. STAT. ANN. § 30: 4-91.5 (Supp. 1977); *but cf.* *Robinson v. State*, 18 Md. App. 438, 441, 306 A.2d 624, 626 (1973) (an escape from work release is punishable under both the general escape statute and the work release law).

⁸See *United States v. Brown*, 333 U.S. 18, 21 n.5 (1948); *United States v. Person*, 223 F. Supp. 982, 985 (S.D. Cal. 1963).

⁹"In the case of 'constructive custody', such as when a prisoner is allowed to leave the jail to go out and seek a job, the danger of violence is missing because there is no supervisor to resist the prisoner's doing exactly what he pleases." *Utley v. State*, 258 Ind. 443, 446, 281 N.E.2d 888, 890 (1972).

¹⁰*In re Haines*, 195 Cal. 605, 621, 234 P. 883, 889 (1925); *People v. Haskins*, 177 Cal. App. 2d 84, 86-87, 2 Cal. Rptr. 34, 36 (1968); *Commonwealth v. Reed*, 364 Mass. 545, 547, 306 N.E.2d 816, 818 (1974).

¹¹See generally Annot., 76 A.L.R.3d 658 (1977); Annot., 76 A.L.R.3d 695 (1977) (permissive release escapes); MODEL PENAL CODE § 208.33, Comment (Tent. Draft No. 8 1956) (escape from Official Detention).

for escape are proposed.¹² The substantive escape elements¹³ of custody, *actus reus*, and *mens rea* are separately analyzed and proposals for the reformation of or additions to the escape statutes are made. And in the realm of procedure, a method of selecting the proper forum for trial will be suggested. Finally, two alternatives regarding the punishment of permissive release escapes will be set forth.

ALTERING THE STATUTORY DEFINITION OF THE CRIME

Custody is the predicate for the conviction of all escapes. The doctrine of custody¹⁴ refers to the minimum control over the prisoner necessary to a finding that the accused escapee was actually subject to the authority of the state. When escape statutes were originally enacted, physical control over the prisoner was exclusive and custody was defined solely in terms of physical custody.¹⁵ Therefore, the permissive release escape can present construction problems, because a court may equate the lack of physical control inherent in permissive release programs with release from custody.¹⁶

The anachronistic doctrine of custody has created a dilemma for the courts. If custody does not encompass all the activities of a permissive release program, the continued viability of permissive release programs will be threatened;¹⁷ prison administrators, knowing that prisoners could escape from confinement with impunity, would be understandably reluctant to place any prisoners in permissive release programs. Incongruously, although it is to the

¹²Injustices to the prisoner and to the state shall both be addressed. While unfair rules of culpability and punishment work injustices to the individual defendant, society and the objectives of the criminal law are undermined when culpable prisoners avoid punishment.

¹³See, e.g., *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966).

¹⁴The concept of custody separates into the issues of lawfulness and legality. Lawfulness describes the propriety of confinement. See generally *Annot.*, 70 A.L.R.2d 1430 (1960); 24 So. CALIF. L. REV. 114 (1950). In the text the concept of custody is used in the sense of legality, i.e., the minimum control over the prisoner required to establish confinement.

¹⁵E.g., *Wilkes v. Slaughter*, 10 N.C. (3 Hawks) 211, 216 (1824): "[T]he moment compulsion and force are withdrawn there is no legal custody; the prisoner becomes a free agent. . . ." *But cf. Riley v. State*, 16 Conn. 47 (1843) (prisoner who was allowed to walk freely on the premises of the "gaoler" could be convicted for escape).

¹⁶See, e.g., *Smith v. Arnold*, 24 Ariz. App. 590, 540 P.2d 716 (1975). The defendant had been transferred from the custody of the Arizona State Prison to the executive director of the Alcohol Council of Southern Arizona. The court held that the defendant had been released from custody: "[P]etitioner did not escape from within the prison walls, nor from any of the enumerated areas outside the walls, nor was he 'constructively' confined to the prison since he was not under guard. . . ." *Id.* at 592, 540 P.2d at 718.

¹⁷E.g., *People v. Strong*, 53 Mich. App. 620, 219 N.W.2d 804 (1974):

The entire purpose of the program at the YMCA was for the successful integration of the defendant back into society. The program of gradual release appears to be a good one which will benefit both the defendant and the public. For us to attempt a strict construction of the escape statute declaring that [*sic*] the YMCA program to be a non-custody situation would defeat the language of the statute and clear intent of the program.

Id. at 624, 219 N.W.2d at 806 (latter emphasis added).

benefit of the general prisoner population fully to extend custody to permissive release settings, the limitations of the custody doctrine¹⁸ may dictate a finding of no custody, solely as a matter of statutory interpretation.

Ignoring the clear language of the statute, some courts have still found a permissive release prisoner in custody;¹⁹ other courts, heeding the statute, have exonerated the prisoner.²⁰ As a matter of judicial integrity, courts should not be forced to distort meanings to reach the proper result. Moreover, anomalies are created by the inconsistent construction of similar statutes which result in unfairness to the defendant.

Apparently, the problem is one of legislative oversight rather than of conscious policy decision.²¹ Sensitive to public reaction, legislators are unlikely intentionally to permit permissive release prisoners to escape with impunity by refusing to extend custody to permissive release programs. Redrafting of general escape statutes to reflect the attenuated control inherent in constructive confinement, or enactment of independent permissive release statutes specifically addressing the issue of custody, is vital to define the parameters of legal custody.²² Under either statute the legislature should generally extend

¹⁸The issue is whether the doctrine of custody retains physical control as an element. Prior to the development of permissive release programs, courts were faced with analogous custody problems in minimum security institutions. Courts had little difficulty in finding escaped prisoners to have been in custody because of the presence of guards within the vicinity. *See, e.g.*, *State v. Baker*, 355 Mo. 1048, 199 S.W.2d 393 (1947). Thus even in quasi-constructive confinement courts found some physical presence. Relying on this precedent (implicitly and explicitly) several courts have held that permissive release escapees were not in legal custody due to the absence of physical control. *See United States v. Person*, 223 F. Supp. 982 (S.D. Cal. 1963); *Smith v. Arnold*, 24 Ariz. App. 590, 540 P.2d 716 (1975); *Utley v. State*, 258 Ind. 443, 281 N.E.2d 888 (1972); *see generally* Comment, *What Custody Necessary to Constitute Escape a Crime*, 17 S.C. L. REV. 568 (1965). *But cf.* Annot., 76 A.L.R.3d 658, 670-72 (1977) (cases finding custody in permissive release confinement).

¹⁹*E.g.*, *State v. Verrett*, ___ La. ___, 347 So. 2d 230 (1977). Louisiana's escape law, LA. REV. STAT. ANN. § 14:110 (West 1974), required that a prisoner escape from the custody of a *law enforcement* officer. The court surprisingly found that an escape by a prisoner while under the supervision of a state park superintendent fell within the meaning of the statute. In apparent recognition of the court's untenable position the legislature revised the escape statute to explicitly include departures from permissive release. *See Escape*, Act No. 455 § 110(d), 1977 La. Sess. Law Serv. (West).

²⁰*E.g.*, *Smith v. Arnold*, 24 Ariz. App. 590, 540 P.2d 716 (1975).

²¹In several instances legislative bodies have acted to close the loopholes in custody which have developed after a court decision. For example, after the failure to find custody in *United States v. Person*, 223 F. Supp. 982 (S.D. Cal. 1963), Congress enacted 18 U.S.C. § 4082 which extended the limits of custody to encompass constructive confinement.

²²And drafters of such legislation must avoid restrictive statutory language. In *Price v. State*, 333 So. 2d 84 (Fla. Dist. Ct. App. 1976), the escapee had been temporarily released from the county jail to attend an Alcoholic Anonymous meeting. At some point during his furlough, he became intoxicated and failed to return to jail. He was convicted of escape and was sentenced to five years, although FLA. STAT. ANN. § 951.24 under which he was charged was limited in scope to releases for work, vocational, or educational purposes. The court held the statute applicable on the grounds that to do otherwise would create an absurd result, *i.e.*, a drunken escapee would avoid punishment while a prisoner who returned late from a vocational program would be subject to the criminal law. 333 So. 2d at 85. Again, a court was forced to extend illogically the actual meaning of a statute to fill the gap left by the legislature.

the limits of confinement to permissive release programs but leave the specific details of an individual's limits of confinement to prison administrators. Once this is accomplished, the courts can focus on the real issue of escape, the prisoner's culpability, as determined by his mental state at the time of departure.

Much like statutes defining custody, the presumption that prisoners would be physically constrained in confinement has affected the statutory phrasing of the *actus reus*²³ of escape.²⁴ Application of such statutes in the permissive release context may also present problems of construction. Permissive release escapes should only be prosecuted under a general escape statute if the statute includes escapes not involving the use of force.²⁵

A different problem may exist when escapes are prosecuted under separate permissive release statutes. An escape from the constructive confinement of a permissive release program may be defined as an act of either commission or omission.²⁶ Most escapes from permissive release confinement can be analyzed as acts of omission; for example, the prisoner may fail to return to a place of confinement at a designated time. However, to describe a permissive release departure solely in terms of an omission²⁷ creates a loophole, since the prisoner who walks outside of the boundaries of confinement but returns prior to the designated hour eludes punishment.²⁸ Instead of

²³See generally Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917); Hitchler, *The Physical Element of Crime*, 39 DICK. L. REV. 95 (1934).

²⁴E.g., N.J. REV. STAT. § 2A: 104-6 (1952): "Any person imprisoned or detained in a place of confinement, or being in the lawful custody or control of a penal or correctional institution or of an officer or other person, . . . who by force or fraud escapes. . . ." (emphasis supplied).

²⁵See *State v. Walker*, 131 N.J. Super. 547, 330 A.2d 634 (1974). In *Walker* the defendant claimed that he had not committed the act of escape with force or fraud. The New Jersey statute in addition to force or fraud stated that departure without consent also constituted an escape, N.J. REV. STAT. § 2A: 104-6 (1952), and therefore, the defendant could be found guilty. Other statutes may not be as explicit and similar to custody, the issue may arise as to whether the legislature contemplated the use of force in an escape.

²⁶This is done by designating a period of time at which the prisoner must return to confinement. Therefore, even though the prisoner may have initially walked away, the failure to return converts the act into one of omission.

²⁷"If any prisoner released from actual confinement under a work release plan shall wilfully fail to return to the place of confinement so designated at the time specified in such plan, he shall be guilty of a felony and, upon conviction, shall be subject to the penalties provided in § 139 of Article 27." MD. ANN. CODE art. 27 § 700A(c) (1957).

²⁸In *Robinson v. State*, 18 Md. App. 438, 306 A.2d 624 (1973), the defendant was assigned to a Correctional Camp where he was participating in a work release plan at a local fishery. He left at approximately 8:45 P.M. but returned at about 11:00 P.M. Upon his return he was arrested and imprisoned. By midnight the rest of the inmates had completed their work for the day and returned to camp. The defendant could not be convicted for escape under MD. CODE ANN. § 700A(c) (1957) because he had not wilfully failed "to return to the place of confinement at the time specified in the work release plan." 18 Md. App. at 442, 306 A.2d at 626. By simply defining the escape in terms of an affirmative act the result in *Robinson* could be avoided. Mississippi's work release statute, for instance, is sufficient:

The willful failure of a prisoner to remain within the extended limits of his confinement as authorized in this section or to return within the time prescribed to the

exculpating all prisoners who returned prior to the specified hour, the statute should make all departures the *actus reus* of the offense, shifting the focus to *mens rea* to distinguish the culpable from the non-culpable.

While the issues of legal custody and *actus reus* fail adequately to circumscribe all unauthorized departures from custody, *mens rea*²⁹ presents precisely the opposite problem. The non-culpable prisoner may be found guilty under the general intent standard of the majority of jurisdictions,³⁰ since a defendant need only intend to do the *act* that constitutes the *actus reus* of the crime,³¹ *i.e.*, depart. In contrast, a specific intent rule would focus upon the defendant's intent to avoid confinement *after* the act of escape had been committed.³²

An analysis of the differences between the nature of actual and constructive custody suggests that a separate *mens rea* standard is both feasible and necessary for escapes from permissive release programs. The general intent standard serves to deter violence in an institutional setting;³³ by making the *intent to depart* a culpable mental state, the criminal law is attempting to deter the commission of the act of escape which engenders violence. But

designated place of confinement shall be deemed an escape from the custody of the parole board and shall be punished as provided in sections 97-9-45 and 97-9-47, Mississippi Code of 1942.

MISS. CODE ANN. § 47-5-161(3) (Supp. 1977).

²⁹See generally Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939); Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644.

³⁰See, *e.g.*, *People v. Haskins*, 177 Cal. App. 2d 84, 2 Cal. Rptr. 34 (1960); *State v. Roy* 173 Conn. 35, 376 A.2d 391 (1977); *State v. Marks*, 92 Idaho 368, 442 P.2d 778 (1968); *State v. Boleyn*, ____ La. ____, 328 So. 2d 95 (1976); *People v. Noble*, 18 Mich. App. 300, 170 N.W.2d 916 (1969); *State v. Kiggins*, 86 S.D. 612, 200 N.W.2d 243 (1972).

³¹See Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1057-61 (1958). In one of the rare cases articulating the content of the general intent standard in the context of an escape the court in *Alex v. State*, 484 P.2d 677 (Alas. 1971) opined:

In the context of this case, leaving the Palmer camp was the wrongdoing committed by Alex. The trial court's instructions required the jury to find that Alex left the Palmer camp with an awareness of his conduct. The instructions then, required the jury to find that Alex acted with an awareness of his wrongdoing. It is of no consequence that the instructions did not require the jury to find that Alex knew he was committing a crime or that his act was wrong in a legal sense. It is sufficient that the jury was required to find that Alex acted intentionally and with an awareness of his conduct.

Id. at 682.

³²Three courts have held the *mens rea* standard for the crime of escape is specific intent. *United States v. Nix*, 501 F.2d 516 (7th Cir. 1974) (escape is a voluntary departure from custody with an intent to avoid confinement); *Gallegos v. People*, 159 Colo. 379, 411 P.2d 956 (1966) (an escape is the voluntary departure from lawful custody by a prisoner with the intent to avoid the due course of justice); *People v. Dolatowski*, 94 Ill. App. 2d 434, 237 N.E.2d 553 (1968).

³³"The courts have been close to unanimous in requiring intent to escape probably for two reasons. . . . A prisoner who leaves his custody without an intent to escape will not use force to leave the prison nor resist capture when he is found." *United States v. Nix*, 501 F.2d 516, 519 (7th Cir. 1974).

departure from a permissive release escape does not cause violence;³⁴ accordingly, the prisoner's *intent to avoid confinement* should be the relevant culpable state of mind.

Two purposes would be served by such a distinction. First, the freedom of movement permitted in permissive release confinement permits a technical "escape" without any actual intent to avoid confinement. For example, a prisoner may believe that he has implicit or explicit permission to leave confinement for a short period of time. A general intent standard would require a conviction, because, regardless of the prisoner's belief, he intentionally departed. However, under a specific intent standard which focuses on the prisoner's intent to avoid confinement, he would be found innocent.³⁵ In a permissive release setting, no purpose would be served by a finding of guilt if the prisoner had not formulated a culpable state of mind.³⁶

Secondly, a specific intent rule would allow the defendant to adduce evidence of intoxication. Access to alcohol in a permissive release setting is more likely than in institutional confinement.³⁷ If the consumption of alcohol is permitted in a permissive release confinement, then the rules of *mens rea* should be adjusted to reflect the potential effect of intoxication upon the defendant's mental state. Under the standard proposed herein, the defense of intoxication would not be allowed, but intoxication would be evidence bearing upon the defendant's lack of intent. Therefore, the trier of fact would be permitted to engage in the proper inquiry: did the defendant intend to avoid confinement?

In most jurisdictions, judicial implementation of a specific intent rule would be difficult. Courts generally feel constrained to use general intent as the proper *mens rea* standard due to perceptions of legislative intent³⁸ or ex-

³⁴United States v. Person, 223 F. Supp. 982 (S.D. Cal. 1963); Uteley v. State, 258 Ind. 443, 281 N.E.2d 888 (1972).

³⁵Two cases applying the specific intent rule illustrate this point. In State v. Lakin, 131 Vt. 82, 300 A.2d 554 (1973), the prisoner was charged with attempt to escape. (Attempt to escape is a specific intent crime, see People v. Gallegos, 39 Cal. App. 3d 512, 114 Cal. Rptr. 166 (1974), as are all attempt crimes, see Young, *Rethinking the Specific-General Intent Doctrine in California Criminal Law*, 63 CALIF. L. REV. 1352, 1356 (1975)). He had left the correctional center, which operated as freely as a halfway house, not to escape but to purchase some alcoholic beverages. His absence was discovered and resulted in the subsequent charge of attempted escape. The prisoner claimed he was merely engaging in a practice tolerated by the correctional officials. The court held this evidence could establish his lack of intent to escape. Therefore, although he "escaped," the prisoner could still be found innocent. Similar factual circumstances are likely to occur and reoccur in permissive release settings. In Lewis v. People, 159 Colo. 400, 412 P.2d 232 (1966), the defendant left prison to go fishing. The prisoner was indicted and convicted of an escape. On appeal the supreme court of Colorado held that a defense of mistake of fact, *i.e.*, permission to go fishing, could be raised under a specific intent standard.

³⁶See United States v. Nix, 501 F.2d 516, 519 (7th Cir. 1974).

³⁷See, *e.g.*, United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976) (the defendant apparently frequented taverns while living in a community halfway house without violating the terms of his agreement).

³⁸*E.g.*, People v. Haskins, 177 Cal. App. 2d 84, 2 Cal. Rptr. 34 (1960).

press statutory statement.³⁹ Accordingly, responsibility for the enactment of a specific intent standard lies with the legislature.⁴⁰

By developing a separate *mens rea* standard, redefining the *actus reus* of escape, and extending legal custody, the legislature will appropriately distinguish between the crime of escape from permissive release confinement and that of escape from physical confinement. The prisoner who unfairly evades punishment because of anachronistic or poorly drafted statutes will be subject to criminal punishment, while the prisoner who can prove his lack of intent to avoid confinement will be exculpated. Courts will thus be freed from the tortuous interpretation of statutes currently prompting unjust results for prisoners not intending actual escape.

Venue

Venue is the only procedural issue warranting special consideration in permissive release escape litigation. Because the point of departure can occur in a county other than the one to which the prisoner is lawfully confined, two forums for trial are possible.⁴¹ Courts forced to adjudicate this issue have unnecessarily confused themselves by questioning where the escape actually occurred,⁴² and by rigid interpretations of a state's statute or constitution.⁴³ Realistically, the permissive release escape is effectuated at *both* the point of departure and the location of legal confinement;⁴⁴ therefore the court's inquiry should focus on selecting the most appropriate of the two locations.

³⁹See ALASKA STAT. § 11.30.093 (Supp. 1977) (wilfully); ARIZ. REV. STAT. § 13-2504 (eff. 10-1-78) (Supp. 1977) (knowingly); IOWA CODE § 719.4 (Supp. 1978) (intentionally); IND. CODE § 35-44-3-5 (Supp. 1977) (intentionally); LA. REV. STAT. ANN. § 14:110 (West 1974) (general intent). Since several of the aforementioned statutes have recently been enacted, it is unclear how the standards will be applied to permissive release escapes. However, they appear to be general intent standards merely under a different label. For instance, Indiana defines an escapee as "[a] person who intentionally flees from lawful detention." IND. CODE § 35-44-3-5 (Supp. 1977). To ensure that the finder of fact's attention is focused upon the alleged escapee's intent to avoid confinement the statute should specifically add those words, *i.e.*, a person who intentionally flees from lawful detention with intent to avoid confinement.

⁴⁰See generally Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 Wis. L. REV. 644.

⁴¹The venue issue manifests another aspect of the constructive custody doctrine. When the limits of confinement are extended, the prisoner remains within the constructive custody of the institution to which he was committed. This aspect of the constructive custody doctrine has long been recognized in some jurisdictions. See, *e.g.*, *Ex parte Rody*, 348 Mo. 1, 152 S.W.2d 657 (1941).

⁴²*E.g.*, *State v. Gasciogen*, 191 Neb. 15, 213 N.W.2d 452 (1973). The *Gasciogen* court in response to the defendant's claim that venue should have been where the departure was effectuated stated, "This overlooks the fact that a crime may be either an act or omission In this case the defendant failed to perform his duty to return to the penal complex in Lincoln, Lancaster County, and venue was clearly in Lancaster County." *Id.* at 20, 213 N.W.2d at 456.

⁴³See *Stewart v. State*, 275 Md. 258, 340 A.2d 290 (1975).

⁴⁴Although the court in *Stewart* held that venue was proper at the place of confinement and declined to decide if the place of departure could also be the appropriate place of venue, the court recognized the bifurcated nature of escape when it stated: "[A]lthough the prohibited act may physically take place in a separate geographical area, the effects of that act occur at the place of confinement." *Id.* at 273, 340 A.2d at 298.

In making such a decision the factors which should be considered by the court are fairness to the defendant and convenience⁴⁵ to all parties involved. If the witnesses or evidence critical to the defense of the accused are only available at one location, then trial may fairly be held only at that location, as, for example, when medical reasons confine a defendant's witness to testifying at one trial site.

In most instances, however, both forums will be fair,⁴⁶ and the major consideration will be convenience to the litigants. To determine the most convenient site the court should balance such factors as accessibility to witnesses and written documents,⁴⁷ and the location of the evidence to be produced at trial.⁴⁸ By utilizing this approach the court will be assured of selecting the proper forum.

PROPORTIONALITY OF CRIMINAL SANCTIONS OR ADMINISTRATIVE PUNISHMENT?

If the appropriate rules of culpability are applied and the prisoner is found guilty, the issue of punishment remains to be evaluated. There is great potential for disproportionate punishment when a general escape statute is applied to the permissive release escapee. For example, in Alabama, a convicted escapee is subject to a sentence of one year to life:⁴⁹ the purpose of the harsh penalty provision is to deter violent escapes.⁵⁰ In other jurisdictions following the common law, a prisoner convicted of escape may be punished according to the crime for which he was previously convicted;⁵¹ punishment

⁴⁵See Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944): "[T]he place of trial of criminal cases should be determined by 'the convenience of the court, the witnesses, and the person accused.'" *Id.* at 94. Convenience can only be considered after the court has determined that both trial sites are fair to the defendant.

⁴⁶See *Kneefe v. Sullivan*, 2 Ore. App. 152, 465 P.2d 741 (1970). Fairness is mentioned by the courts but seldom defined. Within the context of an escape from constructive confinement, however, fairness can have a specific meaning. Fairness is a consideration relevant only to the defendant's right to a fair trial. If due to an inability to produce a critical witness or other evidence a prisoner charged with escape might be found guilty at one trial site but the crucial evidence was accessible at the second forum, location of the trial at the first site would be unfair.

⁴⁷Written documents refer to records pertaining to the prisoner's conviction and confinement which are generally held by the department of corrections or particular penal institutions to which the prisoner has been confined.

⁴⁸For example, if either site is fair to the defendant and all of the prosecution's witnesses are prison officials, then the county in which the prison is situated would be the most convenient. On the other hand, if the prosecution's witnesses are split between the sites of constructive confinement (the prison) and actual departure and the defendant's witnesses are all at the site of actual departure, then probably the site of actual departure would be more convenient.

⁴⁹ALA. CODE tit. 13 § 5-65 (1975).

⁵⁰See *United States v. Person*, 223 F. Supp. 982, 985 (S.D. Cal. 1963).

⁵¹See, e.g., IDAHO CODE § 18-2505 (1947). The reason for rejecting this form of statute applies generally to all escapes:

Previous Hawaii law graded escape on the basis of the crime for which the actor was originally in custody. . . . [W]here the actor has been lawfully imprisoned as a sanction for a crime which he has committed, the danger presented by his escape is sui

based upon the prisoner's original conviction stems from a retributive theory of justice. Given the nature and purposes of permissive release confinement, both statutes create potentially excessive penalties. A permissive release escape does not threaten violence, and the entire concept of a permissive release program is to bury the past and build the future. Punishment based on the prisoner's previous conviction is grossly excessive when participation in the release program demonstrates his strides away from such behavior.

Reduction in punishment can be accomplished through the revision of criminal statutes or, preferably, through the use of administrative sanctions alone. Two alternatives, currently in use, provide reasonable approaches to the criminal punishment of permissive release escapees. Arkansas's newly adopted statute⁵² could serve as a model with slight modification. Punishing permissive release escapees under a general statute, the Arkansas code attempts "to correlate severity of punishment with risk of harm created by the escape."⁵³ The grading of the penalties is based upon the use of force, the type of confinement from which the escape was made, and the seriousness of the offense that led to confinement. Excluding the latter factor,⁵⁴ such a formula would be responsive to escapes from differing forms of confinement.

Alaska's recently revised escape law suggests a second alternative. In recognition of their non-violent nature, escapes from permissive release confinement, labeled "unlawful evasion,"⁵⁵ are punished less onerously than other escapes, with the maximum punishment one year in jail.⁵⁶ Alaska's approach is exemplary, and can be utilized in jurisdictions punishing permissive release escapees under either general escape laws or permissive release statutes.

Ideally, if escapes from permissive release are to be criminally punished they should be reduced to the status of a misdemeanor, as the Alaska statute directs. But prior to adopting any change in statutory penalties, the legislature should first consider whether escapes from permissive release confinement should be criminally punished at all.⁵⁷ If criminal penalties were removed, prisoners would still be subject to the discipline of correctional officials.

generis and has nothing to do with the offense for which he was committed. If a thief and forger (or an accused thief and an accused forger) were to escape by identical methods, they should be penalized identically, according to the danger presented by their escapes alone.

HAW. REV. STAT. § 710-1021 (Supp. 1975) Commentary (footnote omitted).

⁵²ARK. STAT. ANN. § 41-2812 (Supp. 1976).

⁵³*Id.* Commentary.

⁵⁴See note 50 *supra*.

⁵⁵ALASKA STAT. § 11.30.093 (Supp. 1977).

⁵⁶See *id.* § 11.30.095.

⁵⁷Or maybe whether they *can* be criminally punished. At least one court has held that the application of criminal and administrative punishment amounts to double jeopardy. See *In re Lamb*, 34 Ohio App. 2d 85, 296 N.E.2d 280 (1973). However, the rest of the jurisdictions uniformly deny double jeopardy attaches to simultaneous administrative and criminal sanctions. See, e.g., *Alex v. State*, 484 P.2d 677, 682 (1971); therefore the responsibility for change continues to rest with the legislature.

Administrative sanctions provide a viable means of controlling permissive release escapes without the concurrent criminal sanctions currently employed. Permissive release program confinement is more analogous to probation or parole than imprisonment,⁵⁸ since the physical constraints upon a prisoner's movements in a correctional institution are absent in permissive release, probation, and parole programs. The failure of a probationer or parolee to abide by the conditions of his agreement is administratively controlled.⁵⁹ Given the similar physical regulation of permissive release prisoners, administrative rules might similarly provide sufficient, and less expensive, means of controlling unauthorized departures.

Administrative action is sufficient to control behavior and to punish, because two administrative sanctions are available. First, the privilege of permissive release is conditional and may be withdrawn for violations of the conditions of release. An escape from confinement could, therefore, be "punished" by a return to prison.⁶⁰ In this respect, the effects of the punishment and administrative sanctions are the same, loss of direct contact with society, but without the substantially disproportionate punishment now imposed by most criminal statutes.

Secondly, administrative action can be taken which prolongs an inmate's period of confinement by rescinding his good time credits.⁶¹ Therefore, the only difference between administrative and criminal penalties is the additional sentence which can be imposed by the criminal law. Since the likelihood of injury to persons or property from a permissive release escape is virtually nonexistent, the imposition of an additional sentence is excessive. Further, when the time and expense required in prosecuting an increasing number of escapes⁶² is balanced⁶³ against the sufficiency of administrative

⁵⁸See *United States v. Person*, 223 F. Supp. 982 (S.D. Cal. 1963):

[T]he status of the defendant was much like that of a parolee. He *did* have to return to the half-way house at 10:30 P.M. But then a parolee may have to live at a certain place, be home at a certain time each night, ask permission to own a car or leave the city, and admit a parole officer into his home at any time.

Id. at 985.

⁵⁹And the reasons stated by the drafters of the MODEL PENAL CODE for not punishing parolees or probationers through escape laws is equally as applicable to permissive release escapes: "It is important that the concept of escape should not be extended to such things as failure of a probationer to report at a specified time to his probation officer, or to a parolee's violation of parole conditions by going outside a specified area." MODEL PENAL CODE § 208.33 Comments (TENT. DRAFT NO. 8 1958) (emphasis added).

⁶⁰See, e.g., *State ex rel. Kaus v. McManus*, ___ Minn. ___, 238 N.W.2d 597 (1976) (by implication).

⁶¹Good time credits are a method of reducing the original sentence upon which a prisoner has been convicted. E.g., GA. CODE § 77-320.1 (Supp. 1977): "The State Board of Corrections shall formulate and promulgate rules and regulations providing for earned time allowances to be awarded to prisoners. . . . Such rules and regulations shall not provide for earned time allowances exceeding one-half of the period of confinement imposed by the court."

⁶²Although no research studies are available, one empirical measure of the increasing number of cases coming before the courts can be devised by comparing the Seventh Decennial Digest with the Eighth Decennial Digest topic on escape.

⁶³See Schantz, *Objectives of Criminal Code Revision: Guidelines to Evaluation*, 60 IOWA L. REV. 430 (1975): "One must . . . ask whether the criminal law will be effective in controlling the

alternatives, the argument for the decriminalization of permissive release escapes becomes compelling.⁶⁴

In summary, the legislature may either decriminalize departures from permissive release confinement or pursue the more modest course of reforming present statutes and doctrines of general escape law to meet the special situation of the permissive release prisoner. As the number of prisoners participating in permissive release confinement grows,⁶⁵ and permissive release programs increasingly become identified with the community corrections movement,⁶⁶ legislators undoubtedly will be influenced by external pressures to modernize the current system of punishing permissive release escapees.

CONCLUSION

The legislature must initially decide if permissive release escapes should be criminally punished. However, if permissive release escapes are to be criminally punished the legislature must alter the current law on custody, culpability, venue, and punishment. Custody should be extended to permissive release programs generally, but the specific extent of an individual prisoner's confinement should be legally delegated to the determination of correctional authorities. The escape statute should also be redrafted to ensure that nonforcible escapes and affirmative acts of escape from constructive confinement are outlawed and that a specific intent standard which focuses upon the defendant's intent to avoid confinement is established. When determining the appropriate forum for trial the statute should direct the court to focus upon the issues of fairness to the defendants and convenience to all parties. Finally, escapes from constructive confinement should only be penalized lightly because of the lack of violence associated with permissive release escapes.

conduct, what the resource costs of enforcing the law will be, and what indirect or unintended consequences may occur. In short, one must assess costs and benefits and establish priorities." *Id.* at 447-48.

⁶⁴A further argument in favor of decriminalization is the discretionary process by which escapees are presently selected for prosecution. See *United States v. Spletzer*, 535 F.2d 950, 953 (5th Cir. 1976) (Work-Study Center Director admitted that regulations regarding provisions for escape were not rigidly enforced and reported); Ayer, *Work-Release Programs in the United States: Some Difficulties Encountered*, 34 FED. PROB. 53, 56 (1970). Thus prisoners can be led to believe they will not be prosecuted for an escape. Disrespect for the criminal law is developed by those who intentionally violate the law with impunity, and contempt for the criminal law may well be the feeling developed by those who are selectively prosecuted. Although similar problems would undoubtedly arise under the sole use of administrative sanctions, the criminal law would no longer be a discretionary tool of administrators.

⁶⁵Growth is occurring for several reasons. First, states faced with court orders requiring the alleviation of overcrowded conditions can use permissive release programs as one method of compliance, see, e.g., *Anderson v. Redman*, 429 F. Supp. 1105, 1131-33 (D. Del. 1977). Secondly, the community corrections movement as a whole is increasing, which affects permissive release programs, see note 6 *supra*. Finally, permissive release programs are inexpensive and in a period of limited resources, cheap alternatives will be utilized.

⁶⁶See note 6 *supra*.

In those jurisdictions where permissive release escapees are to be criminally punished the legislature must decide if escapes from permissive release confinement will be prosecuted under a general escape statute or a separate permissive release statute. Although existing escape law can be adjusted to encompass permissive release escapes, difficulties may arise. For example, the uniform application of a specific intent standard or a blanket reduction in criminal penalties may result respectively in the unintended exculpation of escapees from prison or in disproportionately light sentences for high security prisoners. Thus, the better approach would incorporate the proposals suggested herein enacting a separate statute punishing escapes from permissive release confinement. Fortunately, the framework for such statutes already exists: most statutes authorizing permissive release programs contain provisions declaring unauthorized departures or failures to return to confinement to be an escape. With the addition of a specific intent standard and appropriate provisions for punishment and venue most permissive release statutes could be readily transformed into escape statutes.⁶⁷

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⁶⁷A statute defining and punishing an escape from permissive release should read:

ESCAPE FROM CONSTRUCTIVE CONFINEMENT:

- (a) The wilful failure of a prisoner either to remain within the extended limits of his confinement, as designated by the administrative official authorizing the prisoner's release, or to return within the time prescribed to the designated place of confinement, with the intent to avoid confinement, shall be an escape.
- (b) The punishment for escape from constructive confinement shall be not less than thirty days nor more than one year.
- (c) If a prisoner is charged with an actual departure from confinement in a county other than the one to which he was legally confined, and the prisoner challenges the venue of trial, the court shall determine in which county the defendant can receive a fair trial.

