

# Federal Probation

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# Federal Probation

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## This Issue in Brief

**Performing Pretrial Services: A Challenge in the Federal Criminal Justice System.**—Contending that "the Federal release and detention process is far from routine and mundane," author James R. Marsh explains in depth the challenges Federal pretrial services officers face daily. He discusses the responsibilities inherent in pretrial services—to assess the risks defendants pose, to complete investigations and prepare reports for the court, and to supervise defendants released pending disposition of their cases—and the challenges that accompany such responsibilities.

**A Sanction Program for Noncompliant Offenders in the District of Nevada.**—When probationers do not comply with the terms and conditions of supervision, probation officers must report the noncompliant behavior and take steps to correct it. Author John Allan Gonska describes how the U.S. probation office in the District of Nevada addressed the issue of noncompliance by creating a sanction program. The author explains how the program was developed and how it works, giving examples of violations and appropriate sanctions for them under the program.

**Recruitment and Retention in Community Corrections: Report From a National Institute of Corrections Conference.**—With a changing workforce and a changing work environment, how do community corrections agencies recruit and retain qualified employees? The National Institute of Corrections sponsored a conference to explore this issue with a group of community corrections managers from around the country. This article reports on the group's discussion—which focused on probation and parole image, the recruiting market, qualifications, training, and motivation—and offers the group's recommendations.

**Pretrial Diversion: A Solution to California's Drunk-Driving Problem.**—Author Lea L. Fields explains how California currently has an array of pretrial diversion programs to address offenses ranging from drug abuse to domestic violence to sexual molestation but has no such program for drunk driving. The author examines drunk-driving diversion programs in

Oregon and Monroe County, New York, explains the benefits of these types of programs, and tells how a diversion program for drunk drivers could be set up in California.

**The Continuum of Force in Community Supervision.**—In these times of increased emphasis on offender control, some community corrections agencies may be providing their officers with lethal weapons such as revolvers and less-than-lethal weapons such as stun guns and personal defense sprays with little or no guidance as to when their use is appropriate. Author Paul W. Brown stresses the importance of proper training and describes the "continuum of force," the primary tool for providing guidance to officers in the use of force. He explains how the continuum of force works, focusing

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# The Educational Role of the Board of Parole

BY MICHAEL M. PACHECO

*Vice-Chairman, Oregon Board of Parole and Post-Prison Supervision*

RECENTLY, THE Oregon Board of Parole and Post-Prison Supervision (Board) was criticized by crime victims' groups and the Secretary of State<sup>1</sup> for the Board's purported lack of accurate bookkeeping. The fear was that such errors would result in an unwarranted early release and parole of certain prison inmates. The truth is, no one was released before they were supposed to be released.<sup>2</sup> The criticism, however, brought an acute focus upon an age-old conflict in criminal justice theory: punishment versus reformation of criminal offenders. Perhaps of greater significance was the realization by the general public that the Board wields only limited control over the release of some very dangerous offenders.

### *Overview of Oregon Parole Law*

In Oregon, the Board of Parole was formally created in 1989 to identify and release "those inmates who [could] be released into the community under supervision without unreasonable risk to the public at large."<sup>3</sup> Basically, there have been three different systems of parole used in Oregon since the Board's creation: the discretionary method, the matrix system, and the sentencing guidelines.<sup>4</sup>

### *The Discretionary Method*

Until January 26, 1977, the Board of Parole operated under a "discretionary" method of determining parole.<sup>5</sup> Under that system, the Board had full discretion in setting prison terms and making release decisions based on a set of statutory criteria that emphasized a consideration of a parolee's risk of re-offending and the welfare of society.

### *The Matrix System*

From January 26, 1977, until November 1, 1989, the Board set prison terms for inmates using established matrix ranges which were based on crime category ratings and history risk scores.<sup>6</sup> This matrix system was an early determinate sentencing system that employed the notion of proportionality wherein more serious crimes were deemed to deserve more serious punishment.<sup>7</sup>

### *Sentencing Guidelines*

The Oregon felony sentencing guidelines were developed and adopted so that courts would punish each offender "appropriately" and also "to ensure the security of the people in person and property, within the

limits of correctional resources."<sup>8</sup> Under the guidelines system, a judge imposes a "presumptive" prison term using an established "grid" that uses a criminal history scale and a crime seriousness scale. The task for a sentencing judge thereby became a relatively straightforward process. Except in a few rare cases, the Board of Parole has no authority on any issue regarding the prison term but remains responsible for the person upon release on post-prison community supervision.<sup>9</sup>

The Oregon Board of Parole is an independent, administrative entity that complements but is separate from the Department of Corrections. Both agencies share the responsibility of reforming criminal offenders and of promoting public safety.

### *Punishment vs. Reformation*

The Oregon state constitution provides that "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."<sup>10</sup> Following that mandate, the state must act with an underlying goal of reforming a criminal offender.

As a utilitarian philosophy, the reformation sanctioning theory, like the deterrence and incapacitation theories, offers its own unique reasons and justifications for punishment. Reformation, in particular, involves the prediction of several factors: 1) whether or not a particular offender is likely to re-offend and 2) how best to treat those classified as being in need of treatment to alter their criminal tendencies.

Judging from the language used in article I, section 15, of the Oregon constitution, the constitutional authors<sup>11</sup> focused criminal sanctioning on what Oregonians as a polity believed then was needed to keep an offender from choosing to commit further crimes. Indeed, by 1949, it was generally believed that "[r]tribution [was] no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders ha[d] become important goals of criminal jurisprudence."<sup>12</sup>

The Oregon experience in criminal sanctioning has followed a clear intent to reform offenders.<sup>13</sup> Law-abiding citizens apparently decided in 1857 to help the offender reform himself because the offender was demonstrably incapable of self-reformation.<sup>14</sup> That yesteryear strain of thought has carried into present-day penological practice, though not in its

purest form. Today, the Oregon Department of Corrections offers a multitude of programs within the state correctional institutions that are geared toward the reformation of criminal offenders and their smooth transition into free society. As a consequence of these programs, the constitutional mandate to reform an offender can be said to have been followed, though not without the injection of morality by those who believe in punishment itself as a moral imperative.

In Oregon, as perhaps in other states, there is a constant tension between those who believe in reformation of criminal offenders and those who see incarceration and punishment as "just deserts." Under this theory (sometimes called a justice theory), an offender is punished because he deserves it.<sup>15</sup> As opposed to the reformation concept, it looks to the past and to the harm done by the offender. In Oregon, the focus on a justice-based system began in the 1970's and culminated in the adoption of the felony sentencing guidelines. As noted above, the relative merits of the justice perspective have received renewed attention.<sup>16</sup>

The guidelines reflect a basic tenet of the justice theory: proportionality and "appropriateness" of punishment. It is argued that the guidelines promote equity in the sense that similar crimes are to be punished similarly. Thus, a serious crime carries a serious penalty whereas a minor crime carries a less serious penalty.

Under the guidelines, an offender's need for treatment or the prediction about whether the person might re-offend play a minor role, if any at all. The established facts, in any given case, are the main determinant of an offender's punishment. The trier of fact thus determines whether an offense was committed, and the judge then imposes a sentence from the customary range of months of imprisonment. The severity of the crime, therefore, determines to a large degree the severity of the sanction.

A justice theory in its pure form emphasizes the unpleasantness of punishment. If the punishment for prohibited conduct outweighs the gain, it is assumed that rational people will not commit those acts.<sup>17</sup> For some theorists, the unpleasantness might also serve to reform, deter, or incapacitate the offender. One of the problems with the justice theory, however, is that most criminal offenders typically do not subscribe to a conventional lifestyle. To them, prison may be neither a punishment nor a deterrent.<sup>18</sup>

Because an offender "deserves" punishment, the justice theory centers on the amount and duration of punishment imposed. That punishment is, in a sense, predetermined, and thus a Board of Parole is not needed until the offender actually goes on supervised parole.

### *Dilemmas and Conundrums*

Most prison inmates are eventually released and, as parolees, they live under supervision that is an extension of the state's jurisdiction over them.<sup>19</sup> What is not clear, though, is the extent to which the supervising authority of the Department of Corrections and the Board of Parole overlap. There appear to be undefined areas of "concurrent jurisdiction" over a parolee's case. For example, the Department of Corrections is entrusted with assisting an inmate in preparing a parole release plan, but the Board may defer release if the plan is inadequate. Likewise, a parole officer may recommend a local jail sanction for a parolee's violation of parole conditions, but the Board can disapprove and not impose the sanction. Another example of "concurrent" jurisdiction can be found in sex offender cases. The Department of Corrections has authority to evaluate an inmate to determine whether a community should be notified of a soon-to-be-released person who has been convicted of a sex offense (or has a history of predatory sexual behavior). Yet the Board can recommend or impose the notification requirement on its own motion. Finally, there is the case of a defendant sentenced to life imprisonment who actually may serve, according to statute, as little as 10 years of combined imprisonment and parole.

These examples highlight some of the areas in which the demarcation line of authority between courts, corrections, and the Board is not clear. They also provide fertile ground in which dilemmas and conundrums can result. First, the general public still may be under the impression that when a person is sentenced to life imprisonment under the matrix system, that person is to be incarcerated for the rest of his or her life. That misunderstanding gives the public a false sense of security because given that particular sentence, the inmate is eventually released (pursuant to statute) back into the community. The Board, then, is seen as having been too "liberal" and perhaps uncaring about the community's concern regarding the inmate's release. It makes little difference that it was the public's own elected legislators that passed the law allowing the inmate to go free. The Board still must explain to the public why the inmate is to be released.

A second problem area arises because the Board does not directly supervise parole officers or hearings officers. Thus, while the Board may have authority to impose parole conditions, it is through the officers in the field by which the Board exercises that authority. Accordingly, a parole officer, as a Department of Corrections employee, may determine that a parolee has violated his parole conditions but also that, as a budgetary and prison overcrowding consideration, the violation does not warrant a return to the institution. The Board may disagree and, as an exercise of its

discretion, revoke the person's parole, thus thwarting a possible objective of its sister agency. Under those circumstances, should the Board aid in the quest to reduce prison costs and overcrowding?<sup>20</sup> Or should the public's safety always remain paramount? A decision to revoke parole obviously would affect the amount of freedom that the parolee enjoys. On the other hand, the Board could choose to continue the person on parole and thus help alleviate prison overcrowding and expense. That decision, while perhaps attractive to the budget-minded population, runs the risk of allowing a dangerous, criminal offender to remain in the community. Balancing the competing interests in these cases is a difficult and omnipresent challenge. Regardless of the path it chooses to follow, the Board must account for its decision and its underlying rationale to governmental bodies, officials, and the general public.

### *The Changing Landscape of Parole*

The future existence of the Oregon Board of Parole as a discretionary decisionmaking authority appears to lie in its ability to clarify its mission and purpose in the Oregon criminal justice system. By clarifying its role, the Board can then make decisions that are in accord with the will of the general public and thus receive the full support of the legislature.

The Board, and practitioners alike, should undertake an assertive approach to information dissemination regarding parole rules and regulations. Presently, the Board is bound by and adheres to the cumbersome rules and rule-making procedures under the Oregon Administrative Procedures Act.<sup>21</sup> Yet those rules, as they apply to the Board, require notice of proposed rules and rule changes only to persons and organizations on its mailing list and to those who make a formal written request for the notice. The common person and the average lawyer are rarely aware of the administrative rules as they apply to them until they are already enmeshed in the system in some way, be it as victim, lawyer, defendant, or interested citizen. By that time, the avalanche of statutes and rules is overwhelming.

The "public education" approach to the problem of public apathy would involve practitioners and the Board in public relations by way of speaking engagements, lectures, and presentations. These efforts could target schools, business and government organizations, the media, and special interest groups such as victims' rights groups. In delivering information to the public about parole law and how the Board functions and what its rules dictate, practitioners and the Board can engage in an ongoing dialogue with the public and

keep abreast of the public's perspective on crime and punishment.

An accurate determination of public support for the Board's discretionary authority can aid the Board in setting priorities in its release decisions. For example, in the situation cited above regarding overcrowding, the Board likely would not find it difficult to release an inmate if the public knew that continued confinement meant more tax dollars needed to support the institution. In the worst case scenario for the voting public, it might even have to build new prisons to keep every parole violator locked up, an even more dreaded prospect.

Likewise, in the case of the life sentence for murder in which the inmate serves 10 years or less in prison, information would help alleviate the public's ignorance and worry. If the public can gain a general understanding of the fact that most sentences imposed in court are rarely served completely, then the shock upon hearing about a feared inmate's release may be lessened. If the shock or disappointment is not lessened, certainly the release decision can at least be understood. Understanding is important because often it is the perception of parole as a fair and rational process that contributes to the legitimacy of parole within the criminal justice system.<sup>22</sup> Consequently, it is incumbent upon practitioners and the Board to lead the effort in educating the public regarding the sentencing and parole process, but it is also a civic duty of us all to become better informed about these issues because they affect every one of us.

Educating the public can also help in conveying to those outside the corrections field about the Board's lack of control over an inmate's prison term under the sentencing guidelines. Oregon's legislators apparently have not fully informed their constituents about the consequences of the matrix system adopted in 1977 and the guidelines that took effect on November 1, 1989. On those dates, the Board's discretionary power was significantly curtailed. The guidelines, in setting a determinate sentence for each crime, removed the Board's flexibility to adjust a prison term according to the merits of each individual case. That means that if an inmate was determined by the Board to be dangerous to society but fell under the guidelines, the inmate would have to be released when the guidelines said so, dangerous or not. A public educated on this point would then realize that the venting of their frustrations to the Board about a particular guidelines release decision would be ill-conceived and misdirected. Accomplishing the "education goal" would also help maintain the Board's credibility within the criminal justice system by making clear to other agencies and the public the Board's own statement of purpose and mission.

A second step in clarifying the Board's role in the criminal justice system may lie in a realignment of its priorities to match more closely those of the declared legislative intent. As best as one can discern, the Oregon legislature has a two-faceted goal: to punish and, at the same time, to reform criminal offenders.

By adoption of the matrix system in 1977, the legislature made a significant philosophical change in the direction toward which the entire Oregon criminal justice system was to operate. The ability to tailor a release decision to each unique offender had provided a flexibility that promoted fairness. Yet, in removing the Board's ability to "custom-fit" each prisoner with a unique prison term and parole period, the legislature essentially declared reformation of the offender to be secondary to the amount and duration of punishment.

The legislature, again, diminished the Board's authority by passage of the sentencing guidelines in 1989, thereby removing the Board's ability to set prison terms and periods of post-prison supervision. Despite the accumulated wisdom and expertise of the Board's members on parole matters,<sup>23</sup> the legislature found it best to set determinate sentences for all crimes.

To reconcile the aim of the guidelines with the constitutional mandate to reform a criminal offender, one might conclude that the legislature deemed incarceration itself as a method of reformation. The irony of the present situation is that an offender who knows he will be imprisoned for only a limited period of time may not be reformed or have any inclination to be so at all. If anything, the legislature has merely guaranteed the inmate a fairly definite release date. The notion that an inmate is somehow "entitled" to a predetermined release date may well be an unintended consequence of the guidelines that lends credibility to the contract theory of parole, and thus the anticipated "strength" of a determinate sentencing system (predictability of sentence) may turn out to be its greatest weakness.<sup>24</sup>

It is conceivable that in 1977 and again in 1989 the legislature completely missed the point in having a parole board because Board members are not disinterested and calculating actors working with a clear set of organizational goals merely because they have a guidelines grid. That view would suggest that the Board members' decisionmaking was intentional and consequential activity carried out by rational and almost robotic actions.<sup>25</sup> Instead, Board members' actions might not be the product of intention or of conscious choice or planning. Indeed, the notions of context and meaning that come into play in each prisoner's case are central to a Board member's view of decisionmaking.<sup>26</sup> As the Supreme Court has noted,

In each [parole] case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experi-

ence of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.<sup>27</sup>

As a consequence of Oregon's sentencing guidelines, the Board's emphasis in responsibilities must now shift to supervision of the person while the person is out of physical custody and free in the community. If the "supervisee" violates the conditions of supervision, the Board can decide to impose sanctions. Presumably, it is the swiftness and sureness of the sanctions that serve as punishment with the hope of reforming the offender.<sup>28</sup> The Board's priority should be to sanction quickly and appropriately and to adjust or modify conditions of supervision to best reform an offender. The sanction need not involve additional prison time.

No one can predict the legal and political climate of tomorrow. But, for the Oregon prisoner, the pendulum of public attitude always seems to swing between two extremes: the desire for domestic tranquility (safety) and the blessings of liberty (freedom). For the Board of Parole, and those who appear before it, the task remains the same at either extreme: know the law, apply the law, and educate the public on the law.

#### NOTES

<sup>1</sup>See, e.g., Staff & Wire Reports, *Parole Board Faulted for Errors in Records*, Statesman J., Dec. 30, 1993 (Salem, Or.), at B1, col. 1; Cathy Kiyomura, *Audit Finds Errors in Parole Board's Files*, Oregonian, Dec. 30, 1993 (Portland, Or.), at C1, col. 1.

<sup>2</sup>Ron Blankenbaker, *The Audit is a Great Political Tool*, Statesman J., Dec. 30, 1993 (Salem, Or.) at A1, col. 1. (noting that "[n]obody got out of jail before they were supposed to, according to the audit").

<sup>3</sup>Legislative Fiscal Office, Study of the State Board of Parole, 3 (Dec. 30, 1974).

<sup>4</sup>Most sentencing systems are classified by the type of sentence that they provide, indeterminate or determinate. See generally Arthur W. Campbell, *Law of Sentencing* §§ 4:1 to :3; 4:4 to :9 (2d ed. 1991).

<sup>5</sup>Or. Rev. Stat. 144.175 (1973) (repealed 1977). The preceding method of sentencing criminal offenders provided for minimum periods of imprisonment in the penitentiary for felony convictions. That system was abolished in 1939. See 1939 Or. Laws 514, ch. 265 § 1 (1939) (repealed Or. Code 1930 § 13-1129).

<sup>6</sup>Or. Admin. Rule 255-35-013 to 014; 255-35-025 (1992).

<sup>7</sup>See, e.g., Andrew von Hirsch, *Proportionate Punishments in Principled Sentencing* 195-99 (Andrew von Hirsch & Andrew Ashworth, eds., 1992).

<sup>8</sup>Or. Admin. Rule 253-02-001(1) (1993).

<sup>9</sup>See Commentary, Or. Admin. Rule 253-05-004 (1993). Actual supervision of the individual is conducted by the Department of Corrections. Or. Admin. Rule 253-11-002 (1993).

<sup>10</sup>Or. Const. art. I, § 15.

<sup>11</sup>The Oregon constitution was framed and approved in 1857 by 60 delegates chosen by the people of the Oregon Territory. The Oregon Blue Book 392 (1993-94). Congress ratified the Oregon

constitution on February 14, 1859. *Id.* at 388. Of those delegates, thirty-three (a majority) were farmers, 18 were lawyers, 5 were miners, 2 were newspaper writers, and 1 was a civil engineer. Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 28-29 (1926).

<sup>12</sup>Williams v. New York, 337 U.S. 241, 248 (1949).

<sup>13</sup>See, e.g., 1937 Or. Laws 378, ch. 268 § 1 (1937).

<sup>14</sup>As one writer notes, "The Biblical underpinning of moral responsibility made it natural for criminologists to view imprisonment as an opportunity to encourage the spiritual rehabilitation of offenders in 'penitentiaries.'" Victoria J. Palacios, *Go And Sin No More: Rationality and Release Decisions By Parole Boards*, 45 S. C. L. Rev. 1, 3 (1994) [hereinafter *Release Decisions*] citing Samuel Walker, *Popular Justice: A History of American Criminal Justice* 13, 69, 73-75 (1980).

<sup>15</sup>See U.S. Dep't of Justice, *Current Issues in Parole Decision-making: Understanding the Past; Shaping the Future* (1988):

Proponents of desert (or just deserts) as the appropriate purpose of criminal sanctions hold that punishment should be proportionate to the harm done by the crime and to the blameworthiness of the offender. . . . This thinking was a strong influence upon the drafters of the United States Constitution.

*Id.* at 20.

<sup>16</sup>The most current topic enjoying spirited debate and attention is the concept of lifetime imprisonment for certain violent offenders. See generally Bill Bishop, *Strikeout Law May Be Wrong Pitch*, Register-Guard (Eugene, Or.) (Feb. 6, 1994), at 1.

<sup>17</sup>Gray Cavender & Michael C. Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Critical Perspective*, 17 Ga. L. Rev. 425, 432 (1983).

<sup>18</sup>James Austin & John Irwin, *Does Imprisonment Reduce Crime?: A Critique of "Voodoo" Criminology*, 3 (1993) (Nat'l Council on Crime & Delinquency).

<sup>19</sup>See Sol Rubin, *The Law of Criminal Correction* 312 (1963) (noting that parole is not an extension of a sentence but rather, a portion of the sentence). Such was not always the case in Oregon. At one time, judges would impose a sentence and then the Parole Board would adjust the length of the prison term and post-prison supervision period according to its estimation of what was appropri-

ate in each case. The practice generally called for a prisoner "to spend the same amount of time on parole as he did in prison, regardless of the length of his sentence." Janet Evenson, *Parole Board's Policy Draws Anger of Judges*, *Oregon Statesman* (Mar. 1980) at B1, col. 1.

<sup>20</sup>See Governor's Task Force on Corrections Planning, *Special Report to the Governor and the Legislature: Promoting Balance in Oregon's Corrections System* (1990).

<sup>21</sup>See Or. Rev. Stat. 183.310 to 183.550 (1993); see also Or. Rev. Stat. 192.410 et seq. (Public Records Law) and Or. Rev. Stat. 192.610 to 192.690 (1993) (Public Meetings Law).

<sup>22</sup>*Release Decisions*, *supra* note 14, at 2.

<sup>23</sup>All the current members of the Board of Parole and Post-Prison Supervision have doctorate degrees in law. See 28 *Corrections News* 4 (Jan. 1994) (Or. Dep't of Corrections).

<sup>24</sup>Another drawback to the guidelines system is that courts are not in as good a position as the Parole Board to predict the risks of recidivism or likelihood of rehabilitation at the time of sentencing. As a consequence of the Board's non-role in granting release, there is a need for a realignment of its priorities. One writer makes a similar observation, stating that correction personnel should assist in parole decisions "so that prisoners could be released or detained according to informed judgments concerning their rehabilitation or likely recidivism." Alan M. Dershowitz, *Background Paper*, in *The Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment* 82 (1976).

<sup>25</sup>See, e.g., Neil P. Cohen & James J. Gobert, *The Law of Probation and Parole* §§ 3.06, 3.08 (1983) (discussing relevant factors in actual release decisionmaking under guidelines).

<sup>26</sup>For a discussion of rational and naturalist theories of decision-making see generally Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science in The Uses of Discretion* 11-46 (1992).

<sup>27</sup>Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 8 (1979) (footnote omitted).

<sup>28</sup>See, e.g., Governor's Task Force on Corrections Planning, *A Strategic Corrections Plan For Oregon: Restoring the Balance* 185-86 (1988) ("The public needs to be reassured—and criminals need to know—that in Oregon there are meaningful sanctions awaiting those convicted of crimes.")