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American Exceptionalism in Parole Release and Supervision

A EUROPEAN PERSPECTIVE

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Introduction

Some discussions about American exceptionalism in criminal justice are relatively easy to conduct because practices in the United States are so clearly different from those of other Western countries. If one is talking about the death penalty (Steiker 2005; Garland 2010, 20–24) or incarceration rates (Downes 2001; Lacey 2010), it is obvious what is exceptional about the United States. Such exceptionalism provides a firm basis for a critique of American practices and suggestions for reform informed by comparative insights. Comparative discussions of other criminal justice institutions require more subtlety, however, for the specific phenomena being studied may not be significantly different. Exceptionalism has to be demonstrated before it can be discussed.

The subjects of this chapter, parole release and supervision, fall into the latter category. Observable differences between parole in the United States and equivalent institutions in Europe might be the product of factors other than American exceptionalism. For example, it is particularly difficult to isolate "parole" as an institution from the prison, as release from imprisonment lies at its core. The stresses placed upon systems for parole release and supervision by the exceptionally high rate of imprisonment in the United States could be expected to create differences in institutional standards and practices. However, if we are to develop the understanding of American parole specifically, we need to identify what, if anything, is exceptional about parole in

the United States, other than it operating in the context of a penal system with an exceptionally large carceral component. This applies both to the way in which decisions in respect of release on parole are made and to the postrelease supervision of offenders that parole allows.

To introduce this investigation, we turn to establishing a clear understanding of what we mean by granting parole and parole supervision in the United States and Europe within the respective sentencing schemes and to giving a basic comparative statistical picture. The latter provides some evidence that parole remains important in the United States but is less freely granted and more harshly enforced than in Europe.

This exceptionalism does not reveal itself easily. The third part of the chapter considers the history of parole on both sides of the Atlantic, which provides some preliminary insights. It is a story of partially common historical roots but also of independent developments that suggests the possibility that American parole has had a different trajectory from that in Europe.

We then directly compare the general judgments on parole of the US Supreme Court and the European Court of Human Rights and find little to distinguish them in their hands-off attitude to the establishment of substantive standards for, and the enforcement of, procedural safeguards. Can one therefore conclude that the reformative project of revealing American exceptionalism in order to change the criminal justice system is doomed, at least as far as the twin processes of parole release and supervision are concerned? We think not.

In the fourth part of the chapter, much as James Whitman (2003) did in his historical comparative study of punishment in the United States and Europe (which focused mainly on France and Germany), we examine and compare current policies on the two sides of the Atlantic in more detail. In this regard we identify a vision of conditional release/parole that is now accepted in core western European countries and, to a lesser but important extent, at a pan-European level, and the very different vision that can be illustrated with examples of concrete practices in key American states. This distinction manifests itself in particular in the way the release of prisoners serving life imprisonment and other indeterminate sentences is considered. However, in many European countries there are also significantly more procedural safeguards than in the United States, which ensure that the granting and revocation of parole are fairly considered. Finally, European parole supervision serves different objectives from those in the United States.

In the next part of the chapter, our principal finding is that European parole, unlike its American counterparts, is dominated by a discourse that stresses human dignity and procedural justice rather than public safety. According to

this discourse, postcustodial release and supervision should enable offenders to become full members of society by granting them enforceable legal rights and opportunities for reintegration. In other words, the European discourse recognizes that imprisonment is inimical to human dignity, and that it damages the ideal relationship between individual and society. Accordingly, it should be used to the most limited extent possible, and all prisoners should be assisted with reintegration into society after their release. This should be achieved, *inter alia*, by parole procedures that meet the substantive and formal due process requirements of a state governed by the rule of law. The ideals of dignity and parsimony should determine how parole is granted, the substantive conditions that are set in order to enable parolees to participate in society, and the way in which conditions are enforced and revocations handled.

In the American discourse, by contrast, there is less emphasis on the rights of parolees. Initially, this may have been because of an overoptimistic assessment of the reformative value of parole, under which officials enjoyed a largely unfettered discretion. In recent years concerns for public protection have continued to give unaccountable officials substantial discretion over the release of offenders and their supervision in the community, even as the legal possibilities for the granting of parole (ostensibly) decrease. In these respects parole in the United States is exceptional.

In the final part of the chapter we reflect on whether European ideals for parole may take root in the United States. We speculate that recent American developments may facilitate an approach that places greater emphasis on the dignity of potential parolees as well as of parolees subject to supervision.

American Parole and European Conditional Release: Definitional and Statistical Preliminaries

Before embarking, some definitional clarifications are necessary, for comparative analysis may be undermined by terms that sound similar but have subtly different meanings. Comparing statistics too requires clear, shared understandings of what is being compared across continents, where different jurisdictions do not necessarily use identical definitions.

Definition of Indeterminate/Determinate Sentences

In comparative analyses of prison-release systems, great confusion can be caused by what is meant by "determinate" and "indeterminate" sentences.

Despite using the same terminology, US and European penal systems have fundamentally different understandings of these categories. When sorting systems or individual sentences into one category or another, the American and European approaches disagree more often than not. Therefore, we pause to explain the different vocabularies.

The basic concept at work is that in America the word "determinate" focuses on the determinability (on the day of judicial sentencing) of a prisoner's actual release date, while in Europe the word attaches to the determinability (also at judicial sentencing) of the maximum possible prison stay. Because "determinacy" in the US lexicon requires prediction of future events that are difficult to know in advance and "determinacy" in Europe responds to a legally established element of the sentence that is easily discernable, a broader category of sentences is considered "determinate" in European usage than in American usage.

Within the United States, "determinate" and "indeterminate" sentencing systems are characterized by significant variations as to the foreseeability of prison-release decisions. In order to locate a particular system on a continuum of whether it is "indeterminate" or "determinate," it is crucial to understand whether and to what extent the offender's date of release can be forecast when a prison sentence is imposed. If a prison sentence is "determinate" in the American sense, then reasonably accurate predictions can be made—at the time of judicial sentencing—about what the actual "time served" will be. Both law and practice must be taken into account to classify a given sentence as "determinate" or "indeterminate"—or to characterize the degree of determinacy that exists in a given system. Under these conceptions, the majority of American states are considered to operate with indeterminate sentencing systems, at least with respect to the bulk of their prison sentences (Reitz 2015).

Europe, in contrast, is characterized, by and large, by what its scholars regard as "determinate" sentencing systems—but the European terminology is not linked exclusively to the predictability of actual time served. In European usage, the key element in deciding whether a sentence can be defined as "determinate" is whether the *maximum* term that the offender may serve is clearly indicated at the imposition of sentence. (It is important to note that the vast majority of sentences considered "indeterminate" in the United States would be classified as "determinate" in Europe. This is because prison sentences that do not carry a specified maximum term are very rare in America.) In Europe, the court's sentence is the maximum time the offender *could* spend in prison. The derivation of the word "determinate" in European usage, therefore, is the fact that the longest possible prison stay is "determined" on the day of judicial sentencing. The laws of European states do not routinely allow for

judicially imposed minimum and maximum terms. However, offenders will not necessarily spend the whole of their sentences of imprisonment in prison. As we will see shortly, under most European sentencing schemes, inmates usually become eligible to be considered for conditional release after serving a defined portion of their imposed sentence. In some instances there is provision for automatic and unconditional early release as well, in particular for short sentences.

Therefore, from a European perspective, when a judge imposes a fixed-term sentence of, say, six years and the sentence is subject to reduction by parole or remission of a third or even a half, it is denoted a "determinate" sentence. The procedure by which parole may be granted is seen as separate from the process of setting a determinate (maximum) sentence. The fact that, in some European countries, an early release mechanism may operate after only one-half of the judicially pronounced sentence has been served does not move the sentence itself across the conceptual line that divides "determinate" from "indeterminate" prison terms.

There is also a difference of terminology for describing life imprisonment, which can promote additional confusion in comparative sentencing analysis. From the European perspective, a life sentence is fully indeterminate as the sentencer cannot know how long someone will live and does not set a fixed period to be served.[1] From the American perspective, in contrast, a life without parole sentence is regarded as fully determinate, for the offender knows that imprisonment will last until death. No one need guess about the timing of a release date that will never occur. For Americans, a life sentence is indeterminate only if, after a certain period in prison, a parole board or similar body can order the prisoner's release. For example, a maximum life prison term with parole eligibility at five years would be considered a *highly* indeterminate sentence by American criminal justice professionals. Thus, most life prison sentences in America would share with their European counterparts the categorization as "indeterminate" penalties—but for different reasons.

These definitions are not wholly static—in Europe or in America—so there are scenarios that might provoke disagreement in either setting (see, e.g., Wool and Stemen 2004; Weisberg 2012). Additional conceptual work is needed to enrich comparative analyses. For example, consider a sentence in which a judge at sentencing announces a penalty with, say, a minimum of one year and a maximum of 10 years and leaves it to a parole board to determine the actual time to be served in prison. From the US perspective, this is a classic example of an indeterminate sentence (Reitz 2015). In Europe, however, this example might prove difficult for many people to classify. Sentences of from one year to 10 years have never been common in Europe but, if they were,

they might be regarded as "semi-determinate" as the 10-year maximum gives them the familiar marker of determinacy—even though the actual release date could be a small fraction of the maximum length of stay. The European language of criminal justice has not had to adapt to the phenomenon of low minimum sentences and low predictability of release dates, due to the historical fact that neither has been a widespread feature of the continent's criminal justice systems. In the absence of necessity, language does not evolve. In the American usage such a sentence would have no place in a "determinate" sentencing system—except in the highly unusual circumstance in which actual release dates were highly predictable despite the seemingly wide range of possibilities.

We speculate that the differences in language across these two loosely organized legal landscapes come from a key difference in approach to the restraints that ought to be placed on governmental power in the use of criminal penalties. In Europe, maximum sentences matter; in the United States, punitive severity is mediated to a much greater degree by release dates. In Europe, generally, the maximum prison term prescribed by law is meant to operate as a genuine protection against excessive punitiveness. In the United States, in contrast, statutory maximum penalties ceased to have much practical meaning in ordinary cases with the advent of highly indeterminate sentencing systems. In most states, it is not expected that judges will impose the statutory maximum except in the most extraordinary circumstances, and paroling systems contemplate early release after only a fraction of the significantly-below-maximum prison term chosen by the judge. In American indeterminate jurisdictions, therefore, authorized maximum sentences are not a useful barometer for gauging the overall severity or operation of the sentencing system in practice. Certainly at the dawn of indeterminacy in the United States, the important question was when a prisoner would be released, not the theoretical maximum term a prisoner could serve.

Definitions of Parole

Some discussion of what is meant by parole is also necessary. Here again, different understandings are found within and across systems. The term "parole" is common parlance in the English-speaking world, but has multiple and smudged-together meanings. It is typically regarded as the discretionary decision as to *when* to release sentenced prisoners prior to completion of their maximum sentences. The release decision is referred to as the "parole decision," and the relevant decision-maker is called the "parole board" or the "paroling" authority. Released prisoners, generally known as "parolees" or as

being "on parole," are said to be placed "under parole" supervision and charged with obeying numerous "parole" conditions. That generally means that a parole supervision office (a different entity from the parole releasing agency) has the power to monitor releasees' behavior in the community for a specified or indefinite period. In the United States, therefore, the single word "parole" is used to denote the discretionary release decision but it also stretches across the entire period of postrelease supervision. This broad usage is potentially confusing. For example, when Americans speak of "abolishing parole," they mean removing the discretion to grant early release; they do not mean the abolition of postrelease conditional supervision (American Law Institute 2011).

In European criminal justice, "parole" is generally used only in the narrow sense of release from incarceration with conditions; it does not signal whether the release process was discretionary or mandatory. It derives from the French *parole*, meaning "word" or "promise." The leading pan-European text in this area, the 2003 Council of Europe *Recommendation on Conditional Release (Parole)*, defines its subject matter as "the early release of sentenced prisoners under individualized post-release conditions." One linguistic caveat should be added to this definition: the exact equivalent of the English legal term "parole" does not exist in all European languages. Statutes referring to early release subject to supervision usually employ the expression "conditional release"—for example, *liberación condicional* in Spanish, *libération conditionnelle* in French, *liberazione condizionale* in Italian. It is for this reason that the title of the key Council of Europe recommendation refers to "conditional release" and then adds "parole" in parentheses.

European early release systems can be divided in two main types, which are both explicitly recognized by the Council of Europe recommendation. First, under the "discretionary release" regime, inmates normally become eligible to be considered for conditional release after serving half to two-thirds of their sentence in the case of first offenders and two thirds to three quarters in the case of recidivists (Tonry 2004a, 59). Once an inmate becomes eligible, the decision to release is made based on a positive individual prognosis, taking into account factors such as restitution to the victim and good behavior in prison. Such (limited) discretionary release schemes are in force in most European countries (e.g., Germany, Austria, the Netherlands, France, Italy, Spain, and Poland). Second, in relatively recent years "mandatory" or "automatic" release systems have been encouraged by the Council of Europe[2] and have become increasingly popular across the continent. Such systems do not require an individual prognosis and simply set a point when offenders become legally entitled to release by virtue of having served a fixed period of their sentence. They can be identified as parole systems because conditions

are attached to the release. Countries that follow this approach for most determinate sentences include England and Wales, Sweden, Finland, Greece, and Turkey. On closer examination, a middle-ground regime is also identifiable: some countries with a formally discretionary release system (e.g., Belgium, and Denmark) limit the requirements to be met to the *absence* of a negative prognosis so that early release becomes the norm unless significant factors or circumstances speak against it (Dünkel 2014, 1261).

Parole can be defined more broadly than what is typical in Europe. The US Bureau of Justice Statistics (BJS) does so by defining parole as "a period of conditional supervised release in the community following a prison term." The definition goes on to explain that it "includes parolees released through discretionary or mandatory supervised release from prison, those released through other types of post-custody conditional supervision, and those sentenced to a term of supervised release" (2014a, 2). Parole is distinguished from probation by the BJS, which it defines as "a court-ordered period of correctional supervision in the community, generally as an alternative to incarceration" (p. 2).

In the United States, the fact that a jurisdiction has a determinate sentencing scheme tells one nothing about the presence or absence of conditional release. Nearly all American states that have "abolished" parole as early release retain postimprisonment supervision. For example, there is provision for postrelease supervision sentences (PRS) in some states (and in the Model Penal Code, American Law Institute 2014, § 6.09). A PRS term is an independent phase of the sentence that occurs after the completion of a determinate prison sentence: it thus follows its own rules, first of all regarding its length, which is not measured by the unserved balance of the prison sentence but is determined independently by statute or the sentencing court (Travis and Stacey 2010, 605; Doherty 2013). At the federal level, it is estimated that more than 95 percent of offenders sentenced to a term of imprisonment are also sentenced to a term of supervised release—introduced in 1984 as part of the Sentencing Reform Act—to be served upon completion of the prison time (US Sentencing Commission 2010; Scott-Hayward 2013). PRS schemes as a "concomitant" component of determinate sentences in states that eliminated discretionary early release reveal the shift in the dominant ideology. While determinate sentencing reforms from the mid-1970s onward subscribed to a notion of punishment strongly influenced by desert considerations, according to which it was not defensible to subject offenders to supervision after the expiration of their fixed sentences, subsequently the new focus on surveillance and prevention favored the retention or enactment (e.g., New York Penal Law § 70.45 enacted in 1998.) of PRS terms that can exceed the length of the imposed incarceration term.

Statistical Comparisons

Statistical comparisons are not possible without applying the wide (American) definition of parole that the BJS uses. The figures provided by the BJS, most recently in its reports on probation and parole (2014a), correctional populations (2014b), and trends in admissions and releases (2014c) in the United States are invaluable for giving a picture of persons released from prison and subject to supervision.

For Europe it is hard to obtain similarly accurate overall data. The most complete quantitative data on imprisonment and early release in Europe as a whole are those provided by the SPACE surveys compiled by the Council of Europe.[3] The 2013 SPACE I survey on imprisonment (Aebi and Delgrande 2014) contains information from 50 out of 52 prison administrations in the 47 Council of Europe member states, whereas SPACE II on noncustodial sanctions and measures (Aebi and Chopin 2014) contains information from 47 probation services. The detailed figures in these reports are far less comprehensive than those of the BJS, particularly as far as "parole" is concerned. Given the problems of statistical comparison in this area, what useful information can nevertheless be extracted?

BJS statistics reveal that in 2013 about 6.9 million people (6,899,000) were under some form of adult correctional supervision in the United States: around 1.35 million were incarcerated in state prisons, 215,866 in federal prisons, and 731,200 in local jails. About 3.91 million offenders were on probation and 853,200 on parole (Bureau of Justice Statistics 2014a, table 1 and app. table 4, 2014b, table 1 and app. table 1).

During 2013 a total of 631,200 offenders were admitted to state or federal prisons: while state prison populations increased by about 6,300 from year end 2012, the federal prison population declined for the first time since 1980, with 1,900 fewer prisoners in 2013 than 2012. While 2013 federal figures regarding prison releases outnumbered admissions by 1,100 inmates, states admitted 9,000 more sentenced prisoners in 2013 than they released. Of the 573,212 prisoners released, 399,388 were conditionally released (Bureau of Justice Statistics 2014c, table 9). From the BJS reports we calculate that, at the end of 2013, 1,506.9 people per 100,000 US residents were supervised in the community, of whom 1,163.3 were on post-sentence probation[4] and 269.9 were on parole.[5]

In Europe the overall correctional population in 2013 amounted to roughly 3.8 million people: on September 1, 2013, there were 1,679,217 inmates held in penal institutions across Europe (Aebi and Delgrande 2014, table 1), while on December 31, 2013, there were 2,145,289 people under the supervision

of the probation services of the responding countries before and after the imposition of a sentence. On December 31, 2013, the average rate of the population subject to some form of supervision or care of the parole and probation services in the responding countries was 219.3 persons per 100,000 inhabitants (Aebi and Chopin 2014, 1). In order to avoid any confusion with reference to Figure 10.1, which deals, with regard to probation and parole, exclusively with *sentenced* offenders, this number encompasses, in addition to people on parole and post-sentence probation, individuals on various forms of presentence probation and those who were not under some form of "active" supervision in the community. With respect to the latter, these are first and foremost persons serving fully suspended sentences without probation or whose criminal proceeding ended with a conditional suspension or a form of deferral, where the only condition was to abstain from the commission of a new offense.

At year end 2013 in Europe, 704,904 people were on probation after conviction,[6] while 314,228 people were on parole. For parole, the main focus of this work, these figures refer to persons out on "conditional release or parole with probation," as well as those serving partially suspended sentences and conditional pardons in a few individual European countries (Aebi and Chopin 2014, table 1.1). If combined, the result would be similar to those on parole as broadly defined by the BJS. The 314,228 persons on parole yield a figure

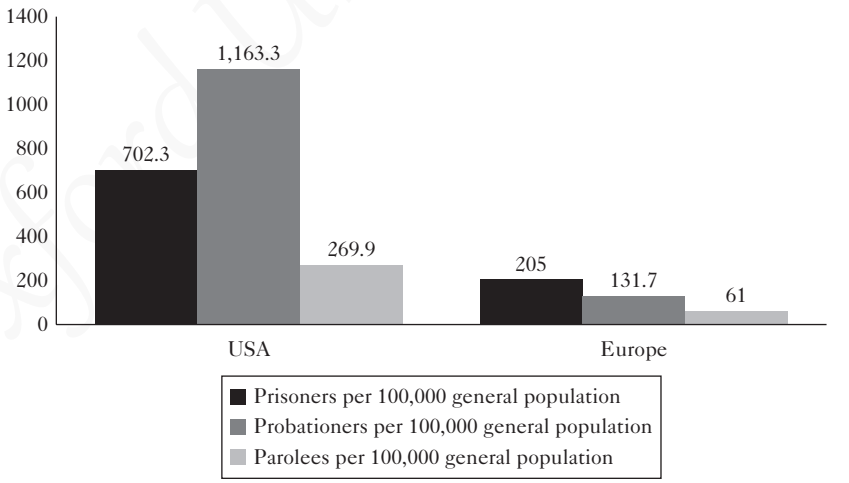

FIGURE 10.1 Prisoners (Including Jail Populations and Pretrial Detainees), Probationers, and Parolees per 100,000 General Population in the United States and Europe in 2013

of 61 persons per 100,000 of the general population of member states of the Council of Europe.

This relatively static picture needs to be brought to life. In Figure 10.1 we have reproduced the figures of people per 100,000 general population serving, respectively, terms of imprisonment (both sentenced inmates and pretrial detainees),[7] probation, and parole in the United States and in Europe.

The European numbers reported in Figure 10.1 require further explanation. The European prison rate is calculated for all Council of Europe member states—total prisoners per total Council of Europe population.[8] This overall prison rate may be higher than some readers would expect, primarily because it is a "weighted" average for Europe's entire population. Individual countries such as Poland and Russia have significantly higher confinement rates than the vast majority of other states (see Lappi-Seppälä, this volume), so a small number of high-incarceration jurisdictions—especially those with large resident populations—raise the overall average. If rates for individual Council of Europe countries are compiled separately and then averaged, the mean ("unweighted") incarceration rate is 140 per 100,000.

While all Council of Europe members are represented in European prison statistics, the SPACE II reports on probation and parole are seriously incomplete. Important states, including Russia, Iceland, and Ukraine (to which are to be added Andorra, Bosnia and Herzegovina, Liechtenstein, Macedonia, Montenegro, Slovenia, and the Slovak Republic), have not made any data available. Germany has never provided broken-down figures on probation and parole to SPACE II,[9] possibly because its official statistics do not distinguish between sentences of imprisonment that are fully and partially suspended on conditions. German scholars have recognized that the failure to draw this distinction is problematic (Dünkel 2010).

For the purposes of Figure 10.1, we used information on probation and parole only for European countries for which SPACE II included data that are reasonably comparable to probation and parole as defined and reported in the United States. We then calculated probation and parole supervision rates against the aggregated populations of those reporting countries. Because a dozen European jurisdictions are missing in the SPACE II report, our calculations may not be fully reflective of Europe as a whole.

One way to compensate for this is to compare the positions in individual American states with those in individual European countries, as we do in Figure 10.2. Taking a closer look at the US state figures,[10] at the high end[11] we have Pennsylvania (847.6 parolees per 100,000 general population), Arkansas (768.6), and Louisiana (656.4). At the opposite end, we have

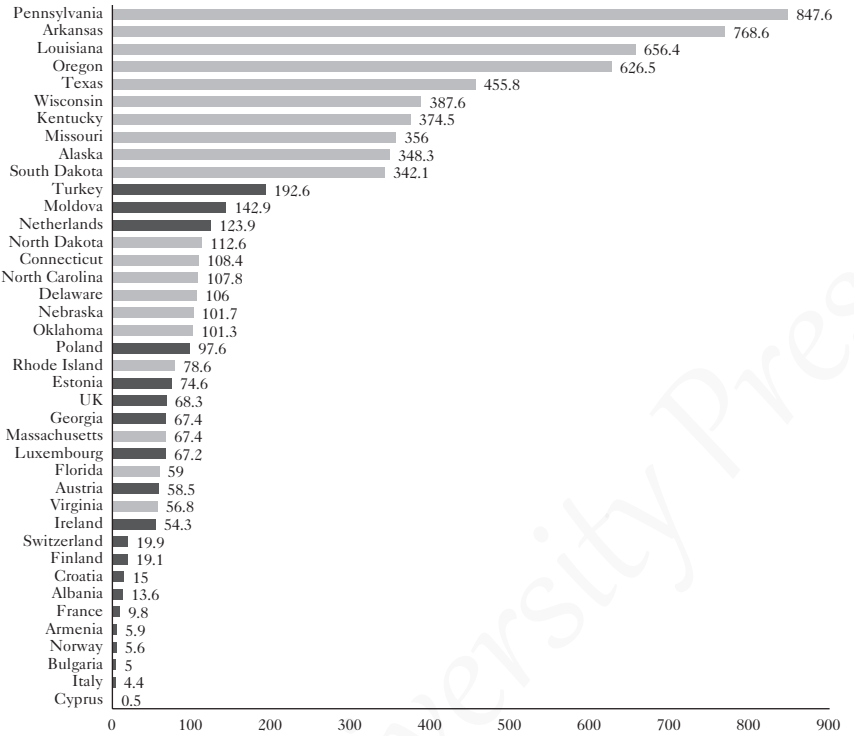

FIGURE 10.2 Parolees (under Bureau of Justice Statistics Definition) per 100,000 General Population, Selected US States and European Countries (10 Highest and 10 Lowest Rates), Year End 2013

Virginia (56.8), which abolished both parole release and supervision in 1995 (Allen 1995) but then five years later reinstated PRS for certain felonies (Code of Virginia §19.2-295.2.); Florida (59), which abolished discretionary early release in 1983 but has "controlled release" in order to maintain the state's prison population under 100 percent of its total capacity (Petersilia 1999, 482) and mandatory PRS under the name of "conditional release" for certain categories of serious offenders (Chapter 947.1405 Florida Statutes); and Massachusetts (67.4). These states reported the lowest numbers of offenders on parole per 100,000 of the general population among the US states with an operating parole system, meaning early release or/and PRS (Bureau of Justice Statistics 2014a, app. table 4). Even lower was Maine (36.6), which can fairly be considered as an outlier because in 1975 it became the first state to abolish early release and it has eliminated PRS for all offenders except egregious sex offenders (Maine Criminal Code § 1231). For this reason Maine is not included in Figure 10.2. From a European perspective, the imposition

of a period of supervised release after imprisonment on offenders found guilty of gross sexual assaults resembles a post-sentence noncustodial "safety measure" tailored to a specific class of particularly dangerous offenders rather than a form of conditional release.

In Europe at the end of 2013, Turkey had 192.6 conditionally released persons per 100,000 of the general population, the highest rate among reporting Council of Europe countries. Also at the high end were Moldova (142.9) and the Netherlands (123.9). At the low end, not considering microstates like the Republic of San Marino and Monaco,[12] Cyprus had 0.5 supervised released persons per 100,000 of the general population, Italy (4.4), and Bulgaria (5.0) (Aebi and Chopin 2014, table 1.1).

We can say that the highest European rates of parole supervision, on the American BJS definition, would fit within the range of the second largest cluster of US states. Overall, 26 US states have a parole supervision rate of more than 200 parolees per 100,000 general population, while in 19 states the supervision rate is between 100 and 200. In Europe, in contrast, a rate of conditionally released persons of more than 100 per 100,000 residents is the exception, with only three countries above that threshold. At the same time, wide differences between US and European parole supervision rates are seen at the "highest" and "lowest" ends of the continuum.

Figure 10.2 shows this vividly. It selects 40 jurisdictions, including 10 with the highest supervision rates in the United States and in Europe (among reporting countries) and 10 in each region with the lowest rates. Most European jurisdictions do not overlap with the American rates, and when overlap does occur, it is at the lower end of the chart. While the 10 American states at the "high end" report supervision rates completely unmatched in the old continent, the leading European countries—with the sole visible exception of Turkey—present figures that tend to fold over the range of the lowest US rates, with only Virginia, Florida, and Massachusetts having rates comparable to the European mean.

In the United States in 2013, the average length of a parole supervision term was 22 months (Bureau of Justice Statistics 2014a, 8) compared to 14.9 months in Europe during 2012 (Aebi and Marguet 2014, 1).[13] Although this is a significant difference in duration (with US parole terms more than 47 percent longer than in Europe), it does not account for gross differences in parole supervision rates, where the US rate is over four times greater than the European rate among reporting states. Almost certainly, the bulk of the difference is attributable to much higher incarceration rates in the United States than in Europe—estimated as 3.4 times higher in Figure 10.1—resulting in much larger cohorts of prison releases.[14]

Finally, we explore the available statistics on parole revocation. In the United States at the federal level in 2013, about 9 percent (4,845 prisoners) of prison admissions were offenders returned for violating their conditional release. At the state level, there were 159,220, admissions due to parole violations. Parole violation admissions, including all conditional-release violators returned to prison for either violations of conditions of release or for new crimes, accounted for 27.5 percent of the total state prison entries (Bureau of Justice Statistics 2014c, table 9); and this is a low number in recent US history. Before the drop in California revocations due to the "realignment" plan in response to the 2011 Supreme Court decision in *Brown v. Plata*, about 35 percent of new admissions to state prisons were violators of conditional release. Moreover, approximately two-thirds of parole violators were sent back to prison for "technical" violations such as breaking curfew or failing to report to their parole officer (Clear et al., 2012, 405; Rhine 2012, 640).

In Europe, during 2012 (the most recent year for which information is available), prison entries after the revocation, suspension, or annulment of (or "recall" from) conditional release or probation amounted to a mean rate of only 7.4 percent of all prison admissions (Aebi and Delgrande 2014, table 8). A grain of salt is needed here, however. This statistic is incompatible with the BJS-reported figure. First, the SPACE I calculation is based on recalls of both probationers and parolees. The US calculation includes only parolees. Thus, for example, it is possible that only 5 or 6 percent of prison admissions in the reporting European countries were due to actions that are equivalent to parole revocations in the United States.[15] Second, calculations of percentages of "prison admissions" in Europe and the United States are based on very different denominators. In US jurisdictions, incarcerated populations are housed in both state prisons and local jails, with jails making up nearly one-third of the total confinement population. Jails admitted nearly 20 times more people than prisons in 2013 (Bureau of Justice Statistics 2014d, 2016, table 2). Besides pre-trial detainees and people convicted and sentenced for minor crimes, jail admissions include uncharged arrestees (including mentally ill and drug-addicted individuals), apprehended probation, parole, and bail bond violators awaiting a hearing on an alleged violation (thus, in regard to parole violators, with a risk of double counting if they are sent back to prison), as well as immigration and customs enforcement detainees pending deportation or adjudication (Subramanian et al. 2015; Bureau of Justice Statistics 2014d, 12). US jails are exceptional institutions. Prison population statistics in Europe, in contrast, are generally not similarly bifurcated: "prison" numbers as reported in Europe include the sum of prison and (much less eclectic and overused) jail confinement (Lappi-Seppälä, this

volume). While available data do not allow precise comparisons, we suggest that the overall higher parole revocation rates in the United States seem to be attributable to the unusual scale of American prison and parole supervision populations, and also to the crime control approach to supervision adopted in American jurisdictions.

One provisional conclusion that can be reached from these statistics is that parole is a large-scale phenomenon in the United States compared to Europe on almost every measure. To the extent that America is "exceptional" in its confinement policies and practices, as measured by raw numbers, this exceptionalism carries forward to the postrelease stage. Yet one might argue that merely looking at differences in scale is not fully satisfactory. Although numbers vary significantly, they also show that parole is an important penal institution on both sides of the Atlantic. We should therefore also look at the "qualitative dimension" (Garland 2013, 500) of state power of release and supervision, as well as at the different ends toward which they are directed. Understanding what may be really exceptional about parole in the United States requires closer investigation.

Comparing the Similarities

In this part we consider the similarities between American and European systems of conditional release from prison. We first describe their common nineteenth century roots and the similar developmental paths they followed until the 1970s. We then discuss how the two models of conditional release parted ways after the indeterminate sentencing system came under attack in the United States beginning in the mid-1970s. Despite the misleading claim that parole has been "abolished" in the United States, we contend that it is still alive and well in today's America, even though parole policies and practices are substantially different from those of the "rehabilitative era." We also highlight some aspects of contemporary European systems of conditional release that echo the current approach to parole release and supervision in the United States. Finally, we turn to the evident similarities in the case law of the Supreme Court of the United States and the European Court of Human Rights concerning the procedural fairness of early release proceedings.

History: Until the 1970s

It is beyond the scope of this chapter to fully compare the evolution of parole in the United States and in Europe. It should be noted, though, that there was

little that was exceptional in the United States about the very early ideas that led to the introduction of parole. Nineteenth-century American pioneers were in close contact with penal reformers in the English-speaking world, in particular with Sir Walter Crofton who introduced the first identifiable "parole" in Ireland, a system of early release based on points earned for good conduct in prison and community supervision thereafter, which was adopted shortly thereafter in England (Petersilia 2011a, 507). Ironically, given the subsequent evolution, an institution of this type was initially viewed with skepticism in the United States. It was considered contrary to the "American principles of freedom" to place someone under supervision after release. A person should either be in prison or at liberty. It seemed inconceivable to have a middle-ground regime where people were released without being completely free from official oversight. At this early stage, such supervision fell to the police, as it seemed unrealistic to delegate this task to any other body (Abadinsky 2012, 121).

This resistance was soon abandoned. In 1846, Massachusetts was the first state to create a form of parole, when a service was established under which an agent other than the police was appointed to assist and supervise released inmates. At this stage there was little difference between parole as it was emerging in the United States and in the United Kingdom, where prisoners released on a "ticket of leave" were also subject to supervision in the community (Wise 1950, 112).

US parole, however, gradually differentiated itself as a result of the adoption of a system of flexible sentences—"indeterminate" sentences, in the American usage. Such sentences were meant to allow prisoners to be *treated* by their expert custodians in ways that would rehabilitate them and released when their rehabilitation was better served by further treatment in the community. Of course, prisoners who did not respond to treatment would not be released.

The most famous early version of the US parole system was later developed by Zebulon Brockway, superintendent of the Elmira penitentiary in New York in 1877. Under the New York statute, after a certain period of good conduct, prisoners were released in the community, remaining under the supervision of the correctional system. They had to report monthly to a volunteer "guardian," the forerunner of today's parole officer, who would make a written report to the institution (MacKenzie 2002, 1212). The idea was to delegate supervisory powers to competent persons in the community (Abadinsky 2002, 1127), while encouraging prisoners to reform in order to "win their way out of prison" through good behavior (Petersilia 2011a, 507–508). This model of parole spread rapidly across the country, and in 1884, Ohio became the first

state to create an official parole agency as part of a comprehensive sentencing law. Its members were prison officials in charge of setting up a plan under which any prisoner (except murderers) could be released (Travis 2005, 12).

The New York statute of 1877 was not only the first to use the term "parole" but also the first to introduce a highly indeterminate sentencing scheme limiting the duration of the sentence only by very high maximum terms (Lindsey 1925, 21).[16] In such structures, the first possible release dates for individual prisoners were typically set much earlier than their lengthy maximum terms, so that the parole board's authority over actual lengths of prison terms was greater than the power held by sentencing judges. Often, the judge's prison sentence was not even a pencil sketch of the actual time to be served but more of a blank canvass with constraints only at the extreme boundaries. In some American states, the parole board's power to release existed from the moment prison sentences began, yielding incarceration terms with maximum but no minimum durations under law.

The high–release discretion model of indeterminate sentencing spread quickly throughout the United States in the first half of the twentieth century. By the 1920s, 47 states (all but Florida, Mississippi, and Virginia) had adopted largely indeterminate sentencing systems (Taxman and Rudes 2011, 63), and by the 1940s all jurisdictions across the country had done the same, with Mississippi the last in 1944. At the federal level, in 1910 Congress established the US Federal Parole Commission and gave it the responsibility of evaluating and setting release dates for federal prisoners (Stinchcomb 2011, 214). Although each American jurisdiction adopted its own idiosyncratic configuration of the indeterminate model, the remarkable wave of system change in the early twentieth century, and the resulting congruity of philosophy and practice across the country, remained in place until the 1970s (Frankel 1973).

In continental Europe, the early history of parole release resembles the US history in many ways. The first form of modern early conditional release was introduced on an experimental basis for juvenile delinquents in France during the 1830s. Portugal was the first country to extend parole, in the sense of discretionary release followed by some supervision in the community, to adult prisoners in the penal code draft of 1861 (eventually enacted in 1893). Soon, many other countries passed similar legislation (e.g., Germany in 1871, France in 1885, the Netherlands in 1886, Belgium in 1888, Italy in 1889, Sweden in 1906, Spain in 1914, and Turkey in 1926) (Tak 1989, 22; O'Brien 1995, 189). Parole release systems thus spread across Europe a few decades earlier than their American counterparts, although in England a parole board with discretionary release authority (but with a relatively narrow scope) was not established until 1968 (Morris and Tonry 1990, 25). As in the United States,

the conceptual superstructure of prison release prior to the maximum sentence, to be followed by a period of community supervision, became the dominant model throughout Europe.

At the same time, European legislatures remained skeptical about giving back-end decision-makers too much discretion. The high–release discretion model prevalent in the United States was never embraced with enthusiasm in Europe. From the earliest days of parole, European states have adopted a strict principle of legality, in the definition of punishment as well as crimes. The *nulla poena sine lege* principle, prominent in many classical European criminal codes, implied distrust of too much discretion in the imposition as well as the implementation of a sentence. Europeans saw indeterminacy, American style, as a danger to the rights of prisoners and as inclining toward severity (Morris 1967, 552). Further opposition to the full reception of parole release discretion was represented by the retributivist ideals that informed the classical European penal law doctrine since the end of the eighteenth century (Tak 1989, 19). Therefore, the uncertainty of highly indeterminate sentences was not only viewed as the possible resurgence of a dangerously unrestricted power to punish (Rothman 1980, 76; O'Brien 1995, 196) but also considered contrary to the principle of proportioning punishment to the gravity of the offense.

It is true that the final report of the 1887 International Prison Congress in Stockholm, at which both American and European representatives were present, acknowledged that conditional release was "not contrary to principles of penal law, not harming the judgment, and presenting advantages for society and for the convicted" (quoted in O'Brien 1995, 189). However, models of parole in Europe were generally characterized by less ambitious goals and by more limited discretion than their American counterparts. For instance, parole was seen as a useful tool, akin to the American good time, with which prison management could encourage good behavior in prison. The question of whether someone had behaved well in the institution was far less open-ended than a global inquiry into prisoner reformation.

Following from these differences in mission, the main distinction that developed between American and European parole systems was a far greater reliance in the former on highly indeterminate sentences and on "experts" for deciding when prisoners could safely be released. This distinction became prominent during the so-called Progressive era at the beginning of the twentieth century. David Rothman has explained that the optimistic American reformers of this era were far more trusting than their European counterparts that the state, as represented by the "experts" of the parole boards, would make "scientifically informed" decisions (1980, 68–70). According to Michele

Pifferi (2012), the broad historical differences of the late nineteenth and early twentieth centuries turned on subtly contrasting responses to the growing body of "scientific" support on both sides of the Atlantic for individualized treatment for offenders. In the United States, the response was to separate the trial from the sentence, giving parole boards considerable discretion in the post-sentencing phase to shape the term that would actually be served. In Europe the protection of individual liberty offered by the guaranteed release after determinate sentences following conviction remained important. At best, sentences could be reduced by early release/parole on the grounds of executive mercy (van Zyl Smit, Snacken, and Hayes 2015, 6), but wholesale reduction of effective sentences at the post-trial stage was not allowed.

In several jurisdictions, however, Europeans departed from these principles for a smaller class of "incorrigible" offenders, who through a parallel civil process of preventive detention could be detained indeterminately. The notion of incorrigible offenders was open to abuse and, in fact, widened and misused by Fascist governments in the 1930s. However, this was something of an aberration. Norval Morris' (1951) careful study of western European habitual criminal legislation in the immediate post-Second World War period reveals that most European countries adopted laws that limited the use of judicially imposed indeterminate preventive detention, to be served immediately after the completion of a determinate sentence, to a relatively small group of "dangerous offenders." Moreover, they retained judicial control over the enforcement of detention and the processes of release of such offenders for longer periods than their initial determinate sentences allowed. As will be explained, this has remained a source of tension in European law governing release.

In summary, by the late 1960s, although relative prison populations in the US and key European systems were broadly similar, significantly more use was being made of indeterminate sentences in the United States than in the United Kingdom and certainly more than in most continental European jurisdictions. At that time, decisions about parole had a more central role in the American penal process than elsewhere, with greater release discretion invested in back-end decision-makers. In the United States considerable deference was also paid to the "professional" expertise of parole officers assisting parolees.

The differences, however, were of degree rather than absolute. Confidence in parole boards when they were eventually introduced in 1968, and in those responsible for enforcing parole supervision, was high in the United Kingdom. Before the wave of crime-control legislation starting in the mid-1970s, parole in both the United States and the United Kingdom (where the decisive shift toward more populist and punitive policies occurred in

the early 1990s; Newburn 2007, 426) could be characterized as a "hybrid, 'penal-welfare' structure, combining the liberal legalism of due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare and criminological expertise" (Garland 2001, 27). Increasingly in continental Europe, the social defense movement successfully advocated a wider use of specialists to supervise offenders in the community (Ancel 1965). By the late 1960s, concern with due process had not yet become a major issue in American or European parole release decisions, although in many European countries judges were already beginning to play a larger role in parole decision-making.

History: From the 1970s Onward

The relatively uniform picture of parole in the United States became considerably more complex from the 1970s forward. At the end of the twentieth century, Michael Tonry commented that "[a]fter a quarter century of changes, there is no longer anything that can be called 'the American system' of sentencing and corrections" (1999a, 1). Any national commitment to the rehabilitative ideal, genuine or rhetorical, had greatly weakened, and distinct regional traditions emerged (Dolovich 2012, 100–101).

From the 1970s to the 1990s, more than a dozen American jurisdictions adopted "determinate" sentencing schemes in order to modify "a system of sentencing in which there [had hitherto been] little understanding or predictability as to who would be imprisoned and for how long" (US Department of Justice 1996, 6). Legislators at the state and federal levels did so by eliminating altogether the release discretion of parole boards and by limiting, in some cases, judicial sentencing discretion through the adoption of sentencing guidelines. For many specific offenses, American legislatures sought to eliminate individualized sentencing discretion entirely through the creation of mandatory minimum penalties (although observers quickly complained that the chief effect of mandatory sentence provisions was to transfer sentencing discretion to prosecutors). Another component of the shift was the federal "truth in sentencing" legislation enacted in 1994. In order to qualify for federal funding, states were required to see that offenders served a substantial portion of their prison sentences, usually at least 85 percent for violent crimes, before being considered for release. As a result, parole and good-time credits were restricted or eliminated in a number of states (Mauer 1996; Ditton and Wilson 1999; Tonry 1999b).

The resulting picture is anything but clear. Notwithstanding bipartisan support for determinate sentencing, the enactment of determinate sentencing

reforms has varied widely among the states (Dharmapala, Garoupa, and Shepherd 2010, 1045). The national picture has been shifting constantly. Maine was the first state to abolish discretionary parole release in 1975, soon followed by many others. Overall, 16 states[17] and the federal government have abolished discretionary release by a parole board. Some states abolished parole release only to restore it later for some or most criminal offenses. The 1976 California determinate sentencing legislation left release discretion in place only for offenders with life sentences, although massive changes in the California system following the Supreme Court's decision in *Brown v. Plata* (2011) have created numerous new avenues of early prison release. Other states abolished parole for certain violent crimes while maintaining it for less serious offenses (Reitz 2004, 199; Rhine 2012, 631–32).

Only one state (Maine) has entirely abolished parole release discretion and nearly all forms of PRS (Scott-Hayward 2011, 433–34). In most of the states that have adopted a "determinate" sentencing system there are still generous good-time credits. In Minnesota, for example, the PRS term usually amounts to one-third of the imposed prison sentence, with release generally occurring at the two-thirds mark. In Washington state, most offenders are eligible for a 50 percent good-time reduction (American Law Institute 2011).

A recent survey of the 50 US states has come to the conclusion that the overall picture of parole is "more complex than previously documented." According to this study, the division of parole systems according to whether sentencing in a state follows a "determinate" or an "indeterminate" approach is simply not valid since most states have mixed sentencing structures, blending features of both (Caplan and Kinnery 2010, 40). The overall conclusion is that there is no universal approach to parole in contemporary American correctional philosophy. As Kevin Reitz (2012, 289) has commented, "Despite the efforts of many sentencing 'reformers,' indeterminacy remains prominent on the American scene. It is still in place in half of the states, and may even be poised for resurgence." Perhaps this comeback is already on its way (O'Hear 2011, 1248).

The methodology of parole decision-making has also been subject to meaningful changes in the United States since the mid-1970s. Before the 1970s, the granting or denial of parole was based upon "the decision maker's subjective impressions from studying case records and reports, and perhaps from direct observations and interviews with the person" (i.e., the offender) (Glaser 1985, 367). In making their decisions, parole boards did not structure their discretionary power through rules, policy statements, or guidelines (Davis 1969, 126). Widespread discontent with the outcomes of unstructured "clinical" opinions and a growing concern for public safety triggered the development

and adoption of explicit parole guidelines, which aimed to enhance the overall rationality, consistency, and accuracy of parole decisions (Palacios 1994, 579), which were often criticized as arbitrary, inconsistent, and inaccurate (Gottfredson et al. 1975; Carroll et al. 1982). American parole boards soon started to rely heavily upon risk-prediction instruments. As a result of these changes, parole officers became risk managers rather than facilitators of the personal rehabilitation and social reintegration of parolees. The institutional emphasis on risk, and even risk aversion, was reflected in the increasing ease with which American parolees could be subjected to recall (Kremling 2012, 95–96).

By contrast, European criminal justice has developed in very different ways since 1970. First, imprisonment rates across Europe as a whole have been relatively constant and have even declined slightly over the same period. This overall picture includes a great deal of regional variation, however. The dramatic decline in prisoner numbers in the countries of the former Eastern bloc more than compensated for the increases in some western European countries, such as the United Kingdom and, until relatively recently, the Netherlands (van Zyl Smit 2006; see Lappi Seppälä, this volume).

Second, there was no dislocation in Europe as dramatic as the move away from indeterminate to determinate sentencing in the United States. If anything, in a few countries there has been a small change in favor of sentences that allowed for imprisonment beyond the term that would otherwise be imposed. The most notable example is provided by the United Kingdom, where the 2003 Criminal Justice Act introduced the so-called extended sentence, consisting of a custodial period plus an extension period if the following requirements are met: an adult offender is found guilty of a specified violent or sexual offense, is deemed to pose a substantial risk of causing serious harm through re-offending, and has a previous conviction for an offense listed in the 2003 Act or the current offense justifies an appropriate custodial term of at least four years.

When all these conditions are met, the judge not only decides the length of the prison sentence but also fixes the extended period to be applied to the offender for the purpose of public protection (up to five years for a violent offense and up to eight years for a sexual offense). There is a further ceiling as the combined total of the prison term and extension period cannot be more than the maximum sentence for the offense committed. Under this scheme, the offender is entitled to apply for parole after having served two-thirds of the primary prison sentence. If parole is refused, the offender will be released at the expiration of the prison term. Following release, the offender will remain under supervision until the expiration of the extended period. If the imposed

conditions are violated, the offender might be returned to prison to serve some or all of the extended period (Ashworth 2015, 242–43).

Interestingly, while recent European gestures toward indeterminate sentencing have been motivated by the perceived need to confine "dangerous" offenders for extended periods for purposes of incapacitation and public safety, in the United States the conventional (if questionable) belief is that indeterminate sentencing schemes are engines for the production of more lenient sentences overall (Reitz 2015).

Without fundamental system change, some European jurisdictions have moved in the direction of greater emphasis on punishment and control in the practice of post-release supervision. England and Wales has displayed the clearest manifestation of this trend: for instance, in the early 2000s it saw a significant increase in recalls of parolees to prison as a result of a "centrally led and politically driven transformation of the culture and practice" in parole (Padfield and Maruna 2006, 338). This shift, "from a social service orientation to a surveillance led focus on public protection," paralleled more extreme developments in the United States (Simon 1993).

The idea of "truth in sentencing" also has had some impact in western Europe. A Belgian study has observed that both judges and influential members of the political establishment were susceptible to criticism of conditional release as undermining the authority of the legislature and judiciary and as weakening the justice done in individual cases (Beyens, Snacken, and van Zyl Smit 2013). In March 2013, in response to the conditional release of the partner of Belgium's most notorious sex offender, Parliament quickly amended the law to extend the period during which parole could not be granted and to create procedural hurdles to the release of certain classes of offenders (Scheirs, Beyens, and Snacken 2013; Snacken, quoted in van Humbeeck 2013).

Even in eastern Europe, a region in which the overall penal climate is still more severe than the relatively mild conditions prevailing in western Europe (Krajewski 2014), there have been instances of policy shifts having a similar effect to those in the United States. Krzysztof Krajewski has used Poland as an example: between 2000 and 2007 the average time spent in prison by Polish inmates increased by more than one-fifth. However, "this probably resulted not from radical changes in sentencing patterns, but from more restrictive policies on conditional release" (Krajewski 2013, 317). As so often, the devil is in the details. Krajewski (2013, 317–18) explains,

> Conditional release in Poland is decided by the court, but on application either from the prison administration or from an inmate. An inmate's application always requires that an opinion must be provided to the

> court by the prison administration. In principle, conditional release is possible after half of the sentence has been served. These rules have not been changed since 1998. The government could not influence court decisions directly. Since 1999, however, the Ministry of Justice has tried by means of various guidelines to influence the prison administration to implement much more restrictive policies on conditional release. As a consequence the prison administration became much more reluctant to initiate conditional release procedures. Moreover, it has become much more reluctant to provide a positive opinion as required by the law if the application for conditional release is being initiated by the inmate. All of this probably had an impact on patterns of court decisions, although the final outcome resulted not from changes in judges' attitudes, but from courts' decisions being "structured" by the new policies of the prison administration.

Krajewski notes that from around 1996 the percentage of the motions for conditional releases granted (on average between 70 and 80 percent from 1990 until 1998) started to decline. In 1999 it fell below the 50 percent mark for the first time and, during the following decade, it has remained below 40 percent. In his view,

> This confirms that the growth of the prison population in Poland during the past decade is not primarily the result of changes in sentencing patterns by the courts, but of changes in patterns of conditional release, resulting in prisoners staying longer behind bars than during the preceding decade. (p. 318)

Due Process in Early Release Proceedings

If, as Krajewksi's study indicates, national courts that decide on conditional release in specific cases have little power to shape parole policy, what of more powerful courts that apply bills of fundamental rights? If one has regard only to the "apex courts" in the United States and in Europe, that is, the Supreme Court of the United States and the European Court of Human Rights (ECtHR), there are some striking similarities in the period from the 1970s onward in the cautious way in which they have approached legal standards governing the granting and withdrawal of parole. Of course, these courts have to deal with the very different legal regimes relating to parole in the states that fall within their jurisdiction. Nevertheless, both courts agree that in the normal course

there is no fundamental right to early release before the maximum term of a prison sentence has expired, whether such release is conditional or not. The US Supreme Court made this explicit in 1979 in *Greenholtz* where it held that there is no "constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. . . . [T]he conviction, with all its procedural safeguards, has extinguished that liberty right" (at 7). The *Greenholtz* court held that even if the executive decided to set up a system of conditional early release and gave it a statutory basis, its constitutional obligations in this regard were limited. The court explained bluntly,

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision-making must comply with standards that assure error-free determinations. This is especially true with respect to the sensitive choices presented by the administrative decision to grant parole release. (at 7)

This has continued to be the dominant view of the US Supreme Court.[18] In the 2011 case of *Swarthout v. Cooke*, the court again emphasized that when it came to the granting of parole, the prisoner was entitled only to the limited degree of due process required by the relevant state law (in this case, that of California). Only in cases where revocation of parole is involved has the Supreme Court stated that there are clear liberty interests involved requiring general due process protections. In 1972, in *Morrissey v. Brewer*, the Supreme Court determined that, although a parole revocation hearing is not part of the criminal proceedings that end with the adjudication of guilt, it might still result in the loss of liberty. Therefore, although it does not trigger "the full panoply of protective rights due a defendant" (*Morrissey*, at 480), the person's interest at stake implicates the recognition of a significant number of rights protected by the due process clause of the Fourteenth Amendment (in particular, advance and written notice of the alleged violation, full disclosure of the evidence against the offender, right to appear and present witnesses, neutrality and independence of the decision-maker).

In *Morrissey* and in the following year, in the case of *Gagnon v. Scarpelli* (1973), the Supreme Court set out a two-step process to be followed in revocation proceedings. The first step involves a preliminary hearing held at the time of arrest to determine whether probable cause exists with regard to the violation of the terms and conditions of parole. The second step is constituted by the final revocation hearing, a more extensive proceeding on the revocation of parole where a final decision on the merits is made. Finally, in *Scarpelli*

(at 790) the Supreme Court has recognized only a limited right to counsel for the parolee in the revocation proceedings. The right to counsel applies when the parolee contests the allegations in a timely fashion or in cases in which relevant circumstances making the revocation inappropriate exist but are hard to develop or present.

Shifting our attention to Europe, we find a similar jurisprudence: where determinate sentences of imprisonment (those with designated maximum terms) are involved, the ECtHR has resolutely held that the protections relating to preventing wrongful detention and ensuring fair trials, contained in Articles 5 and 6 of the European Convention on Human Rights, do not apply to routine measures designed to allow for release prior to the completion of the full custodial term.[19] In *Dybeku v. Albania* (2007, para. 57), for example, the ECtHR stated clearly that "the Convention does not guarantee, as such, a right to conditional release or to serve a prison sentence in accordance with a particular sentencing regime." What this means in practice is that, where determinate sentences are involved, the ECtHR has consistently declined to review the procedural fairness of decisions to refuse early release (*Hudec v. Slovakia* 2006). Indeed, as far as the ECtHR is concerned, the absence of guaranteed procedural rights carries over to the recall of conditionally released offenders charged with infringing their conditions (*Ganusauskas v. Lithuania* 1999). In this respect, the ECtHR appears to be more conservative than the US Supreme Court. Whether this hands-off approach of the ECtHR is shared by other major European courts and whether the ECtHR applies the same approach to other aspects of the law that have an impact on parole will be considered more fully in what follows.

Comparing the Differences

Notwithstanding the partial similarities in history and law we have outlined in the previous part, we argue that Europe as a whole possesses a very different ideal notion of parole as conditional release, which contrasts substantially with the more law enforcement–oriented approach that dominates American penal policy, including parole release and supervision. Attempts to implement the essentially humanist ideal of conditional release, which recognizes the offender's capacity to change, can be identified both at the pan-European and at the national level and have had important practical consequences.

In this part we identify the broad contours of this ideal as it has emerged both at the European level and, in particular, in some key pronouncements of the German Federal Constitutional Court, arguably the most influential current national apex court in Europe. We pay particular attention to life

imprisonment in this regard, as the very widespread acceptance in Europe that all persons serving life sentences should be considered for release stands in stark contrast to the American position and reflects a fundamentally different understanding of the roles of, and relationship between, the offender and the state. Subsequently, we look again at the approach adopted to the granting of parole to fixed-term prisoners and to the decision-making structures involving both the granting and revocation of parole. Finally, we highlight differing approaches to how parolees should be supervised.

Ideals about Parole

At the pan-European level there is evidence that, since the late 1980s, a particular notion of conditional release (parole) has been articulated by European institutions with growing strength. There is also evidence that it is still the dominant narrative (van Zyl Smit and Spencer 2010).

First, we offer some background on how penal policy is articulated in the European context. Regional penal policy has been principally developed by the Council of Europe, which has an overall brief to foster and protect human rights in Europe. Such policy is articulated directly in the recommendations and rules made by the Committee of Minsters of the Council of Europe. Technically, these recommendations and rules, although agreed unanimously by the member states of the Council, are merely soft law and not directly binding. However, they are often relied on specifically by two other key organs of the Council of Europe, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the ECtHR. These institutions' powers are based on treaties that all European countries (except Belarus) have ratified and which therefore carry considerable legal weight.[20] More recently, council policy has been complemented by the emerging power of the European Union to set some criminal justice policy among its member states via directives, especially regarding the cross-border implementation of sentences (Baker 2013).

The 2003 Council of Europe's *Recommendation on Conditional Release (Parole)* closely represents the European ideal of parole. It begins by "recognising that conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community [and that] it should be used in ways that are adapted to individual circumstances and consistent with the principles of justice and fairness."

Similarly, the 1992 *Rules on Community Sanctions and Measures*, which explicitly include parole, specify that parole "shall seek to contribute to

personal and social development [of offenders that is] of relevance for [their] adjustment in society" and that its imposition and implementation must be guided "by the essential aim of treating the offender with respect as a responsible human being" (rule 55). These ends are also spelled out in the first of the general principles enumerated under the *Recommendation on Conditional Release (Parole)*:

> Conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community.

This point is underlined in the next principle:

> In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners. (Council of Europe 2003)

Although these principles mention "public safety and crime reduction," it is clear from the recommendation as a whole that these objectives are contingent on fostering the human development of the persons placed on parole.

The 1999 *Recommendation Concerning Prison Overcrowding and Prison Population Inflation* also supports the use of parole, not only to reduce overcrowding but also as a positive means of managing the return of the offender to the community. It does not mention parole as a form of punishment to be continued in the community. At the core of the European conception of parole articulated in the various recommendations is the individual right to the possibility of parole as a means of achieving eventual social rehabilitation and reintegration into society.

This latter aspect is emphasized also in the 2008 Framework Decision on mutual recognition of judgments and probation decisions (including parole), which was developed by the European Union to enable sentences to be implemented across member states' national borders. The preamble to this Framework Decision explains that "the aim of mutual recognition and supervision of . . . decisions on conditional release is to enhance the prospects of the sentenced person's being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties," while its very first stated aim is to facilitate "the social rehabilitation of sentenced persons."

The CPT and the ECtHR have had relatively little to say about parole release policy in general, although the former has emphasized its importance as a means of restricting prison populations and thus reducing the overcrowding that jeopardizes the humanity and dignity of prison regimes (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT] 1992). The latter has made similar comments regarding overcrowding and has also recognized that conditional release has the legitimate aim of fostering the progressive social reintegration of persons sentenced to imprisonment (*Léger v. France* 2006, para. 70).

The thinking underlying the aforementioned European instruments is best illustrated by a remarkable decision of the German Federal Constitutional Court in the 1973 *Lebach* case (BVerfGE 1973), which explicated what offenders may expect with regard to conditional release as of (constitutional) right. At issue was whether a major German television could broadcast a sensational documentary about the offense committed some years previously by an offender who was about to be released on parole, if there was evidence that it would have the effect of undermining the successful reintegration of the offender into society.

In insisting on its right to do so, the television station relied on the explicit guarantee in the German Constitution of the media's right to free speech. In American constitutional law the right of freedom of speech may be expected to prevail. By contrast, the German Federal Constitutional Court ruled that this right had to be balanced against the constitutional rights of the offender, who retained personal rights to privacy and the protection of his or her reputation. These rights would always have to be considered and could outweigh even free speech rights. Crucial in this respect was what the court saw as a constitutional duty that the German state, as both a *Rechtsstaat* (a state bound by the rule of law) and a *Sozialstaat* (a state with constitutional obligations for the social welfare of all its inhabitants), had to manage in the implementation of a sentence of imprisonment in a way that would give a prisoner "the ability and the will to follow a responsible way of life; he should learn to maintain himself in a free society without breaking the law, to grasp its opportunities and to come to terms with its uncertainties" (BVerfGE 1973, para. 234). The court explained that this meant that the state was required to provide the offender with opportunities for resocialization, which the offender could exercise as of right. In the view of the German court,

> [T]he decisive stage began with release. Not only the offender must be prepared to return to free human society; society from its side must be prepared to take him up again. . . . From the point of view of the

> Constitution this requirement reflects the communal identity of a society that places human dignity at the center of its value system and is bound by the principle of the social state. As bearer of the guaranteed fundamental rights to human dignity the convicted offender must have the opportunity, after the completion of his sentence, to establish himself in the community again. (para. 234)

Having recognized this constitutional right to resocialization, the court weighed it against the right to free speech of the television station and concluded that, in this instance, the station's legitimate interest in making the public aware of a sensational but historical offense was less fundamental than the offender's constitutional right to resocialization.

The *Lebach* judgment, which is still good law in Germany, embodies the idealism of the various subsequent recommendations of the Council of Europe on conditional release. In stark contrast to what happens in the United States, its focus is principally on what is best for the individual offender. Risk management, so important in the American context, is not even mentioned directly in *Lebach*.

In the American context it is quite hard to find aspirational standards and regulations regarding parole that are comparable to those existing at the European level. Many US parole boards operate under a statutory set of goals, but they tend to be extremely broad and often "muddled and perplexing" (Reitz 2012, 278). In Arkansas, for example, the parole board is required to "establish written policies and procedures governing the supervision of parolees designed to enhance public safety and to assist the parolees in reintegrating into society" (A.C.A. § 16-93-712). According to the law of Pennsylvania, the US state with the highest figures of parolees per 100,000 inhabitants,

> [T]he parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison. [Yet, in] providing these benefits to the criminal justice system, the board and any other paroling entity shall first and foremost seek to protect the safety of the public. (Parole Act, 61 Pa.C.S. § 6102[1][2])

Although it is completely legitimate for a policy to pursue different objectives, whether there is a hierarchy of goals or not, the risk-averse American

approach to parole (Raphael and Stoll 2013, 45) makes it predictable which goal will trump in case of a conflict between reintegration and public safety.

In sum, the language of European aspirational standards and most national case law is clearly focused on the reintegration of individual offenders into society and provides what is by and large a presumption in favor of release. In the United States, in contrast, the activity of parole boards seems to be primarily focused on the protection of the community. When public safety is at stake, even at the statutory level, US parole boards are more openly encouraged than the European ones to "err" on the side of safety.[21]

Life Imprisonment and Release Eligibility

The *Lebach* decision has not only continued to be influential in Germany but has also been complemented by other decisions. It has had particular impact on the law relating to the conditional release of offenders sentenced to life imprisonment. The willingness to consider even the worst offenders for conditional release underlines a key difference between the European and American approaches to parole.

European thinking on the law relating to life imprisonment, and to release from it, was shaped most dramatically by the German Federal Constitutional Court in 1977 (BVerfGE 1977). In that year it faced a direct challenge to the constitutionality of all life sentences. In response, the court built on the concept of human dignity that it had developed in the *Lebach* judgment and emphasized the importance of the right of all humans to develop their potential in a free society. It followed that it would be incompatible with human dignity for the state to arrogate to itself the power to deprive someone of his or her freedom, without at least the opportunity to be considered for release on the ground that he or she was fit to become part of free society again.

The German Federal Constitutional Court concluded that a life sentence could only be constitutional as a punishment for the most serious offenses if the requirements of human dignity were met. This entailed two elements. First, the prison regime had to be organized in a way that provided prisoners with a right to facilities that would enable them to resocialize themselves. Second, and more controversially, the court held that the existing system of release, where persons serving life sentences were considered for pardon by the premiers of the federal states in which they were being detained, contravened both the principle of legality and the dignity of the relevant offenders, who had a right to have such an important decision taken by a court. Accordingly, the court upheld the constitutionality of life sentences, but it

instructed the government to enact legislation within three years of the judgment being adopted which would create an appropriate framework.

The government duly amended the Penal Code to provide that a court must consider the conditional release of everyone sentenced to life imprisonment after they have served 15 years (Art. 57a of the German Penal Code). The responsible court must consider the gravity of the offenders' guilt and whether it is likely that they will lead a law-abiding life outside prison. If, after 15 years, the court is of the view that an offender has not yet served a sufficient term as a proportionate punishment for the original offense or if the indication is that an offender would not lead a crime-free life on release, it can temporarily refuse release. However, as subsequent jurisprudence has made clear, as time passes, the significance to be attributed to the gravity of the initial offense declines and the importance of the fundamental dignity-based right to eventual freedom increases (BVerfGE 1992).

In contrast, American courts and policymakers have been quite prepared to accept that there are tens of thousands of prisoners who will never be considered for release. This category includes the increasingly common sentence of life without parole (LWOP) as well as other sentences from which there is no realistic prospect for release. LWOP sentences have been adopted by all states except Alaska, whose version is a 99-year sentence. Despite the large decline in violent crime across the United States from 1992 to 2008, the number of people sentenced to LWOP more than tripled from 12,453 to 41,095 (Nellis and King 2009, 9, fig. 2). In 2016 an estimated 53,290 people were held in prison with no possibility of early release (Nellis 2017, 9).

There is a wisp of hope of change: the US Supreme Court has affirmed the unconstitutionality of LWOP sentences for juveniles both in nonhomicide cases (*Graham v. Florida* 2010) and in homicide cases if such sentences are mandatory (*Miller v. Alabama* 2012). The underlying principle, that such sentences are disproportionately severe for offenders whose moral judgment may not be fully formed and who could mend their ways in the future, could arguably apply to older offenders too. Nevertheless, in the United States LWOP continues to be used for large numbers of adults. In theory this is because of the seriousness of the committed crime or because offenders are so dangerous that their release should never be considered; but research has revealed that in 2013 there were 3,278 prisoners in the United States serving LWOP for nonviolent offenses (American Civil Liberties Union 2013).

The contrast with Europe as a whole is stark. With only a few relatively minor exceptions, in the old continent all prisoners are in principle regarded as worthy of consideration for release, as a matter of right. The vast majority of European countries have laws, similar to the German model, that require

the routine consideration by a court of parole for *all* prisoners serving life sentences after a fixed period ranging from 10 to 30 years (van Zyl Smit 2010). This is true even of Russia, which has a minimum of 25 years (Art. 79 of the Penal Code of the Russian Federation) and the Hague-based International Criminal Court, which must consider parole even for convicted genocidaires after 25 years (Art. 110 of the Rome Statute of the International Criminal Court).

In the United Kingdom, which in many respects is the most draconian of western European criminal jurisdictions (Tonry 2004b), the matter is approached somewhat differently: a minimum period is set in each case for almost all prisoners serving sentences of life imprisonment. This period reflects the minimum term necessary to meet the requirements of retribution and deterrence. After that, the prisoner should be released on parole unless he or she continues to pose a risk to society. The ECtHR has ruled that this decision has to be made by a court-like body, and therefore, the relevant panel of the parole board is always chaired by a high court judge (*Stafford v. United Kingdom* 2002). The law in England and Wales, however, provides that sentencing courts may set a whole-life tariff in exceptional cases, with no prospect for parole, where the offense is serious enough to necessitate that penalty for purposes of retribution and deterrence. In such a case release is only possible on compassionate grounds at the discretion of the secretary of state for justice, and the secretary has declared that this will be interpreted as limited to someone who is about to die.

In practice there are very few prisoners serving whole-life sentences (without prospect of consideration for parole as a result of legislation or the judge's sentence) in Europe as a whole—probably fewer than 200 prisoners across the entire continent (van Zyl Smit 2013), a total that can only pale in comparison to the reported US figures. Yet even that stark comparison is not the end of the story. In recent years the European legal position has changed considerably.

The Council of Europe's 2003 *Recommendation on Conditional Release (Parole)* states that the law should make conditional release available to *all* sentenced prisoners, including those serving life terms. Considerable weight was lent to this recommendation by the CPT, which in two 2012 national reports formally declared that imprisoning someone without a prospect of release infringed the prohibition on inhuman and degrading treatment (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2012a, 26, 2012b, 32).

In 2013 a near unanimous decision of the 17 judges of the Grand Chamber of the ECtHR in *Vinter and others v. United Kingdom* put the issue beyond doubt. It held that it was inhuman and degrading, and thus contrary to Article 3 of the European Convention on Human Rights (ECHR), to imprison someone

for life without reasonable prospect of release. Such a prospect, the Grand Chamber ruled, had to exist at the time of sentence. The Grand Chamber made it clear that compassionate release for the terminally ill could not be considered release at all if all it meant was that a prisoner could die at home or in a hospice rather than behind prison walls. Foremost in the analysis of the Grand Chamber was the need to recognize the human dignity of even the worst offenders. All prisoners had a right to a realistic hope that they would be able to become full members of society again if the balance of penological justifications shifted so that their further incarceration was not justified. On this principle the Grand Chamber in *Vinter* essentially adopted the same position as the German Constitutional Court (van Zyl Smit, Weatherby, and Creighton 2014).

On the procedures that are required to underpin this hope, the ECtHR has been less emphatic. It indicated in *Vinter* that its preferred solution would be a review by a court after 25 years but recognized that European states have a (limited) "margin of appreciation" in this regard. This became clear in May 2014, when the ECtHR considered the release procedures of Hungarian prisoners serving life sentences for which no date for release was set in law (*László Magyar v. Hungary* 2014). Under Hungarian law, all release decisions in such cases fell to the president. The court did not object directly to the president being the decision-maker but rather to the lack of clarity of the procedure to be followed. It held that this procedural uncertainty infringed Article 3 of the ECHR. Hungary was,

> [R]equired to put in place a reform, preferably by means of legislation, of the system of review of whole life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions. (*László Magyar v. Hungary*, para. 71)

In the light of this judgment it is probably only a matter of time before the ECtHR develops comprehensive procedural standards for the evaluation of the continued enforcement of all whole life sentences. It has even be argued that the principle established in *Vinter* means that all prisoners, including those with fixed-term sentences, have a right in international law to be considered for parole (partly dissenting opinion of Judge Pinto de Albuquerque in *Öcalan v. Turkey* 2014). Whether this radical development will be accepted by the ECtHR as a whole remains to be seen.

There has been some resistance at the national level. The British government responded with great hostility to the decision in *Vinter* (Pettigrew 2015). In early 2014 a specially constituted English Court of Appeal ruled that the Grand Chamber had misunderstood the scope of the powers of release of the secretary of state for justice, which, in its view, were sufficient to give prisoners serving whole life sentences a realistic prospect of release (*R v. McLoughlin and Newell* 2014). In 2017 this somewhat strained reinterpretation of English law was upheld by the Grand Chamber of the ECtHR in *Hutchison v. United Kingdom* (2017), which ruled that the judgment of the English Court of Appeal had eliminated the lack of clarity in UK domestic law on how whole life sentences should be reviewed. However, the Grand Chamber emphasized that the secretary of state for justice still has a duty to exercise her release powers in a way that is compatible with the ECHR, as interpreted in *Vinter* and subsequent Grand Chamber decisions, such as *Murray v. the Netherlands* (2016) that further clarified the procedural requirements for the release of life sentenced prisoners.

Other European Indeterminate Sentences

The ECtHR has been equally scrupulous about protecting the rights of sentenced prisoners subject to other forms of what it regards as indeterminate sentences, namely custodial security measures (which may take different names such as "secure prevention detention" or "preventive supervision"), imposed instead of, or in addition to, other prison sentences because these offenders are deemed to be dangerous and a continuing risk to society. According to SPACE I statistics for 2013 (Aebi and Delgrande 2014, table 5.2), a total of 15,916 persons were detained under such postconviction preventive detention measures in responding European countries.[22]

At this point, a definitional caveat is required. In the European context, the divide between civil and criminal sanctions is different from its American counterpart. In most European penal codes, legislative safety measures coexist with traditional punishments, although formally labeled as "civil" or, more usually, "administrative" security measures. This type of sanction, advocated by Enrico Ferri in Italy and Franz von Liszt in Germany, is the most notable legacy of the positivist school of criminology of the late nineteenth century. Unlike classicists, who supported retributive punishments based on the notions of free will and moral responsibility, positivists were mostly concerned with the extent to which offenders could represent a danger to society in the future (Bottoms 1977, 75). Although the classical school of thought eventually prevailed in the European penal codifications of the twentieth century, a mixed

system considering both moral responsibility and dangerousness (Ancel 1958, 369) is still in place in many countries (the so-called double track or dualistic system), allowing the sequential imposition of traditional punishment and security measures for dangerous offenders (e.g., a determinate prison sentence followed by an indeterminate term of secure preventive detention) (Battaglini 1933, 287–88; Mannheim 1935, 520; Corrado 2013, 55–57).

One example of ECtHR intervention with regard to security measures arose from the treatment of English prisoners sentenced to imprisonment for public protection (IPP).[23] IPP is a fully indeterminate sentence in the European sense of having no maximum term (that is, carrying a maximum of life imprisonment) and is often coupled with a relatively short minimum period after which the prisoners may be released if they can persuade the parole board that they no longer pose a risk to society. The officially expressed intention was that these prisoners should be offered training courses, which would enable them to rehabilitate themselves and thus present a good case for release after they had served their minimum terms. In practice the UK government underestimated the number of offenders who would be given IPP, with the result that far too few treatment programs were available. Without attending such programs, IPP prisoners were unable to show that they were no longer dangerous. The UK government had therefore failed to provide these prisoners with any reasonable prospect of expeditious release after their minimum term had expired. In the case of *James, Wells and Lee v. United Kingdom* (2012) the ECtHR not only held, as British courts did too (*R. [on the application of Wells] v. Parole Board*, 2009), that the UK government had failed in its public law duties but ruled further that IPP prisoners were entitled to compensation for not having expeditiously received the necessary courses in time. In December 2014 the UK Supreme Court reversed its previous view and somewhat reluctantly followed the ECtHR in awarding small amounts of monetary compensation to IPP prisoners who had not been given adequate training courses before the expiry of their minimum periods. Such courses would have enabled them to strengthen the cases that they were not dangerous anymore, which they put before the parole board (*R [on the applications of Haney, Kaiyam, and Massey] v. The Secretary of State for Justice* 2014).

The ECtHR has also challenged the detention of offenders who continue to be regarded as dangerous *after* they have served their criminal sentences and are then placed on a second track of *preventive* detention—a form of total confinement defined as outside the criminal justice system. In *M v. Germany* (2009) the ECtHR held that such detention is a criminal sentence in all but name[24]: the confinement followed a criminal conviction and was not (at least in M's case) based on diagnosed mental health concerns. The ECtHR ruled

that "second track" punishments of this kind were prohibited by both Article 7 of the ECHR, which outlaws retrospective increases of punishment, and Article 5, the European equivalent of habeas corpus, which protects individuals against wrongful detention.

These decisions, taken together with those on life imprisonment, show the ECtHR's determination to move beyond its reluctance to intervene in release decisions generally by developing a principled approach to the release of those subject to all forms of indeterminate sentencing in order to protect them against the arbitrary exercise of state power. Exactly what the decisions' impact will be in European states that have similar provisions for post-sentence preventive detention remains to be seen. The German response to the decision in *M* was complex. In the light of *M v. Germany*, the Federal Constitutional Court reversed its earlier judgment and agreed that the 1998 amendment of the penal code had been unconstitutional (BVerfGE 2011). However, it did not accept that post-sentence preventive detention (*Sicherungsverwahrung*) was a form of punishment and therefore subject to the German constitutional prohibition on retrospective punishments. Instead, it found that general prohibitions against changing the law to the disadvantage of a citizen could be found in other provisions of the Constitution. The Constitutional Court also held that preventive detention was not sufficiently differentiated from imprisonment. The German legislature duly amended the penal code to make post-sentence preventive detention harder to impose without a full enquiry and to ensure that persons subject to it are held in institutions that are significantly differentiated from prisons. Thus, Germany has made significant changes to its law and practice as a direct result of the judgment of the ECtHR in *M*. However, it has contrived to keep a dual track system in place by amending German law to ensure that the second track meets all the due process protections of the criminal law while remaining conceptually outside of it (Drenkhahn, Morgenstern, and van Zyl Smit 2012). Whether this new regime will withstand a challenge in the ECtHR remains to be decided, as is the wider impact of *M v. Germany* on other European systems of indeterminate detention. What is significant is that the ECtHR has signaled stiff opposition to the development of such second track detention. This contrasts with the United States where 21 states and the federal government have passed civil commitment statutes providing for the further confinement of sex offenders after the completion of their prison sentences.[25]

Parole for Sentences with Fixed Maximum Terms

Although it has been noted that the ECtHR has not been as forthcoming as it could have been in giving overall principled guidance about how conditional

release should be approached for sentences with fixed maximum terms (see the previous discussion on definitional issues in the second part of this chapter), such principles have been explored in several key national jurisdictions. This can be illustrated by a further German example, a lesser known case decided by the Federal Constitutional Court (BVerfGE 2009). The offender in this case had served two-thirds of his fixed-term sentence. Article 57 of the German Penal Code provides that at this point in their sentences offenders have a right to have their release considered by the chamber of the criminal court that has specialist responsibility for supervising the enforcement of sentences. The chamber must order their conditional release if they consent and if the "the release is appropriate considering public security interests."

In this case the relevant chamber of the criminal court had declined to release the offender as it held that his involvement in organized drug dealing as part of a Russian mafia (the offense for which he was convicted) precluded his release for public security reasons. The Federal Constitutional Court ordered the lower court to reconsider. It did so on the basis that the chamber had accepted uncritically the views of the prison authorities and had thus undermined its duty to come to an independent conclusion by failing to pay adequate attention to all the evidence that it could have considered. In particular, the chamber should have heard the evidence of a prison psychologist who had reported positively on the offender. In this way the court required clinical assessment of future behavior to be included in the decision-making process or, at least, that such evidence be weighed when it is available.

The Federal Constitutional Court stressed the importance of the prisoner's liberty interest even in cases where conditional release was being considered for the first time. In the words of the court,

> The freedom of the person may only be restricted on exceptionally weighty grounds and if strict formal conditions are met. From these are derived the minimum requirements for the penal law in respect of the reliable establishment of the truth, which have to be observed *not only in the initial trial but also in decisions that relate to the process of implementation of the sentence*. They set, amongst others, standards for the establishment of the facts and thus for a sufficient factual basis for judicial decisions. For it is a necessary condition for a procedure that meets the requirements of the *Rechtsstaat* that decisions that relate to the deprivation of human freedom be based on sufficient judicial fact finding and in practice have satisfactory bases that reflect the importance of the guarantee of [individual] freedom. (para. 26, emphasis added)

The contrast with US constitutional precedent is stark: in parole release proceedings American law does not recognize any liberty interest that would restrict the discretion of the parole authority, unless a given state has created it in the form, for example, of a presumptive right to parole release (*Morrissey* 1972; *Swarthout* 2011). Furthermore, the German judgment emphasized the continuity of procedural safeguards between the adjudication and sentencing phases, on the one hand, and the later release proceedings, on the other hand. This idea is shared by most European countries, as demonstrated by their using courts to make these decisions or, in the case of the United Kingdom, by high-level judicial intervention by the Supreme Court to strengthen parole board procedures in order to ensure that the board operates as a court-like body (*Osborn v. The Parole Board* 2013). It is very different from the US model where, after the adjudication of guilt, sentencing is governed by "second-class" procedures and parole release decision-making by "third-class" procedures (Reitz 2015).

The German Federal Constitutional Court also considered how the security interests of the public should be evaluated. In this regard the court made it clear that a prognostic evaluation of all relevant factors[26] was required, but that a release decision could *not* necessitate any certainty that the offender would not commit further offenses in the future. The court emphasized that the prison-release process must include the taking of an acceptable residual risk (para. 28). This decision illustrates a recognition of the tension between prisoners' liberty interests and the goal of public protection that is largely absent in the American law of parole release. While a German court may regard the "residual risk" to society as so severe that it is unacceptable and decline to release someone, the emphasis is on proportionality. Warnings on the need to limit consideration of risk abound in the German and European literature (Kunz 2004, 35).

The 2010 Council of Europe rules on probation, reflecting current best practices across the continent, make explicit that the assessment of the actual readiness for release must be made by focusing on the individual prisoner and not on any kind of actuarial generalization. Furthermore, they stress the importance of a direct and active involvement of the potential parolee in the release decision-making process. Rule 66 requires that an assessment of offenders be made "involving a systematic and thorough consideration of the individual case, including risks, positive factors and needs, the interventions required to address those needs and the offenders' responsiveness to the interventions." Most importantly, rule 67 maintains that "[o]ffenders should not only be made aware of the process and outcomes of the assessment, but they should also be enabled to make an active contribution to it, including by

giving due weight to their views and personal aspirations, as well as their own personal strengths and responsibility for avoiding further offending." Finally, according to rule 68, "[t]he offenders shall be made aware of the process and outcomes of the assessment."

Contrary to the European approach, the current American position elevates risk of recidivism to primary stature in prison-release policy, with few compunctions and little quality control. In the United States, actuarial risk prediction, rather than clinical prediction, which is more prominent in Europe, now plays a central role in most parole authorities' decision-making. With the retreat of the "rehabilitative ideal" in favor of deterrence and incapacitation, the focus has moved decisively from reintegration to public safety. Only the best of the actuarial instruments used by American parole boards have been statistically validated on the state's offender populations, and the worst instruments have no credible claim of reliability whatsoever (Monahan and Skeem 2014, 162). The procedural interests of prisoners are given so little weight that they are afforded no opportunity to review or challenge the decisive risk scores that have been calculated in their cases—nor may they raise questions about the validity of the instrument (Rhine, Petersilia, and Reitz 2017, 299–305).

Although risk-prediction tools have been available since the 1920s, they were not widely adopted by American parole boards until the 1970s, with the advent of parole guidelines. In the mid-1970s only two states resorted to prediction tools. By 2004, 28 states relied on risk scale tools to guide their parole decisions—23 of those with an active parole system for new convictions (Harcourt 2007, 41). The majority of US indeterminate jurisdictions currently require parole boards to use these instruments to guide release decisions and to set conditions of supervision. This strongly suggests that "incapacitation policy predominates over any inquiry into prisoners' progress toward rehabilitation" (Reitz 2012, 278).[27] The two most common models of risk assessment are the so-called matrix model and the sequential model (Harcourt 2007, 84; Gottfredson et al. 1978). Under the matrix model, "parole authorities first use a risk-assessment instrument—the Salient Factor Score, for instance—and then use a grid based on the severity of the sentence and the risk assessment to determine length of sentence prior to parole." Under the sequential model, "parole authorities fill in a table with scores that relate to different factors for parole and tally the score to determine whether the inmate is likely or unlikely to be paroled" (Harcourt 2007, 85–86).

Risk instruments represent the core of parole guidelines, usually weighing static and dynamic factors associated with the offender's record. Through actuarial techniques, in the words of one commentator, the prisoner's individual

identity is "fragmented and remade into a combination of variables associated with different categories and level of risk" (Robert 2005, 11).

Recently the US attorney general and a number of scholars have raised high-profile objections to risk-assessment tools as currently used. Critics have stressed the capacity of such tools to undermine the principle of equal justice that should inform the criminal justice system for they "have a disparate and adverse impact on offenders from poor communities already struggling with many social ills" (US Department of Justice 2014, 7). Resorting to socioeconomic factors such as employment, education, marital status, and residential stability would constitute a proxy for ethnicity and race, thus further worsening the distinctive racial disproportionality in American criminal justice decision-making (Tonry 2014, 173). Some have also expressed doubts about the constitutionality of current methods of risk assessment when they incorporate variables that indirectly implicate gender, race, or socioeconomic status as these refer to groups rather than individuals (Starr 2014a, 2014b). Finally, the use of risk-assessment instruments is perceived as unfair by prisoners applying for parole, who either are unaware of their existence or do not understand how they actually work. This is not surprising, since many such instruments are proprietary corporate products that cannot be accessed or challenged (Starr 2015, 871).

Decision-Making Processes for the Granting and Revocation of Parole

At first glance it seems hard to broadly characterize or identify trends in the procedural requirements that apply to parole decision-making in Europe. As we have noted, the ECtHR, like the US Supreme Court, gives relatively little guidance in this regard. Nevertheless, European procedures in most nation states reflect at their core a greater commitment than their American counterparts to *Rechtsstaatlichkeit*, a commitment not only to minimum requirements of due process but also to a procedural framework that can embody substantive underlying values such as human dignity, social reintegration, and the ability to change. Also, in contrast to the United States, European authorities tend to view all of the key decision points concerning parole release, supervision, and revocation as comparable in substance and consequence and as meriting equivalent procedural regularity. Thus, for example, there is no sharp differential in the procedural care taken in release and revocation decisions; both processes in Europe are often governed by identical standards.

The *Recommendation on Conditional Release (Parole)* of the Council of Europe (2003) provides a means for contrasting American and European

approaches. In order to achieve pan-European applicability, the recommendation outlines two ways of granting conditional release, which it refers to as the mandatory and discretionary release systems, allowing for both automatic and considered conditional release procedures at the national level (paras. 16–24). There is some overlap between the two release systems. In both instances the period before release or consideration of release (respectively) must be set by law (paras. 22–23). Moreover, the recommendation sets procedural safeguards that apply to "decisions on granting, postponing or revoking conditional release, as well as on imposing or modifying conditions and measures attached to it" (para. 32). All such decisions should be taken by authorities established by law in accordance with the following procedures:

a. convicted persons should have the right to be heard in person and to be assisted according to the law;[28]
b. the decision-making authority should give careful consideration to any elements, including statements, presented by convicted persons in support of their case;
c. convicted persons should have adequate access to their file;
d. decisions should state the underlying reasons and be notified in writing. (para. 32)

In addition, under the procedures set out in the European *Rules on Community Sanctions and Measures* (Council of Europe 1992, para. 35), convicted persons should be able to make a complaint to "a higher independent and impartial decision-making authority established by law" against the substance of any such decision, as well as against a failure to respect these procedural guarantees (para. 33). As a result, the matter must also be referred to a judicial authority whenever the offender wishes to complain "that a restriction of his liberty or the decision is unlawful" (rule 15).

Around Europe, various arrangements are in place to ensure judicial supervision of decision-making regarding parole, thereby ensuring procedural fairness, while pursuing the principal post-sentence aims of rehabilitation and reintegration. These tend to position specialist judges, with expert knowledge about the implementation of both custodial and noncustodial sentences, in the conditional release decision-making process. Examples include the German *Strafvollstreckungskammern*—literally chambers (of the criminal courts) for the implementation of punishment (Dünkel 2010); the offices of the *juge de l'application des peines* and for prisoners serving imprisonment of more than three years, also the *tribunal de l'application des peines* in France (Reuflet 2010); the *tribunale di sorveglianza* in Italy (Gualazzi and Mancuso

2010); and the *juez de vigilancia* in Spain (De la Cuesta and Cordero 2011). Although there are important differences among these institutions, they each task a member or members of the judiciary, often sitting as a specialist chamber of a court, with safeguarding prisoners' rights and ensuring that prison conditions meet minimum standards. Such specialist chambers simultaneously decide on the early conditional release of prisoners as well as the potential revocation of such release.

These arrangements are not immune to criticism. While national critics recognize the value of the expertise of such specialist courts, they sometimes doubt their independence. Judicial independence can be threatened by structural factors or by more sociological processes by which judges arguably become "captured" by the priorities of the penal administrators upon whom they may depend for information and access (Dünkel 1997). In France, for example, such judges cannot give binding instructions to the authorities with respect to treatment in prison, which would facilitate eventual conditional release (Herzog-Evans 1997).

These specialist benches do, however, provide a way of regulating parole decision-making that carries with it the legitimacy attached to the judicial system as a whole: the judges have lifetime tenure and are in a relatively good position to resist public pressures to be more restrictive in times of moral panic about particular offenses (Garoupa and Ginsburg 2012). They are certainly better positioned to resist political pressure than their theoretical American counterparts—that is, parole board members—who are usually appointed for limited terms by state governors and have to be responsive to their political agendas and priorities (Rhine, Petersilia, and Reitz 2017).

Broadly speaking, European judicial bodies that make parole decisions meet the Council of Europe's requirements. However, there are mixed structures in some European countries that only meet this ideal in part: in England and Wales (Padfield 2010) the parole board is in many ways a court-like body (particularly when deciding on release in cases of life imprisonment, where the parole panel is always presided over by a high court judge), but its work until very recently has largely been restricted to deciding on the release of prisoners serving life and other indeterminate sentences. For the majority of offenders who are serving fixed-maximum sentences, no decision on release is required, as such prisoners are entitled to release on parole after having served half their sentences. Even this rule of automatic release in England and Wales is subject to an exception because prison authorities and not the parole board have the power to order release before the mandatory release point, without the due process guarantees expected by the 2003 recommendation when an element of discretion is involved.

Belgium too has a mixed system, for, although its legislation provides for prisoners' release to be considered by a sentencing implementation court, this regime currently only applies to prisoners serving more than three years, who are the only prisoners released conditionally. Those serving less than three years may be released early by the head of a prison and enjoy no due process guarantees. In practice, however, heads of prisons release prisoners sentenced to less than six months automatically and those sentenced to under a year after three months (Snacken, Beyens, and Beernaert 2010).

More fundamental exceptions to what we have described as the core model of the release process exist too. In Scandinavian countries, most decisions on conditional release are made by prison authorities. However, there is a strong presumption in favor of conditional release after a fixed portion of the sentence has been served, coupled with a heavy focus on social reintegration throughout the implementation of sentence, which generally means there are fewer issues of dispute. Even in Scandinavia, however, there appears to be a tendency to refer the most difficult cases to specialist courts, as has happened with the release of prisoners sentenced to life imprisonment in Sweden since 2006 (Schartmueller 2014) and as is also the case with the release of a limited number of dangerous offenders in Finland (Lappi-Seppälä 2010).

Finally, departure from the core model also exists where the procedure is formally judicial but lacks a distinction between the goals and objectives of parole and those of a criminal sentencing. In many post-Soviet countries, decisions on granting parole are taken by "ordinary" criminal courts, which have no general responsibility for the implementation of the sentence. In these countries the focus is more narrowly on whether there are grounds for reducing the sentence. Typically, cases are heard only when the prison administration, or in some instances the prisoner, applies to the court to have the conditional release considered. Supervision is conducted by the police. Although the outward form of judicially controlled conditional release exists, the frequency of parole being granted and the mode of supervision bear little resemblance to a western European parole system. This is only gradually beginning to change as reforms are implemented, often driven by the Council of Europe and the European Union and following the standards of the Council of Europe rules and recommendations (Seddon 2014).

These exceptions should not blind us to the core European model of judicially led parole decision-making undertaken in multidisciplinary sentence implementation courts led by skilled professional career judges, following the basic tenets of due process.

In the United States, in contrast, the overall framework as well as the rules of procedure regarding parole are far less strict. First of all, the decision-maker

for release and revocation decisions, the parole board, is in most states made up of political appointees with no particular qualifications. Recent surveys report that in 43 out of 49 states retaining some form of parole in the United States, members of the paroling authority are appointed by the governor. Moreover, for the most part no particular expertise in the field of criminal justice, still less in specifics of implementation, is required. Indeed, only 15 states mandate members to have some kind of previous experience with the criminal justice system or related social and/or supervision services (Paparozzi and Caplan 2009, 411–15; Ruhland et al. 2016, 17–21).

Superficially, the issue of insulation from politics might appear more striking with regard to America's elected prosecutors (Ellis 2012) and judges (Swisher 2010) than for paroling authorities. Nevertheless, although members of parole boards do not directly run for office, they are usually chosen by the highest elected official in the executive branch and can be dismissed as easily as they were appointed. The requirements for removing parole board members vary from state to state, but while only few allow removal for cause only, many states "offer very little protection for parole board members and remind them that they serve at the pleasure of the Governor. This threat of removal introduces a political element into the parole process" (Bing 2012, 876). Indeed, parole board members are vulnerable to the loss of their livelihoods on every day of their tenure of service, whereas elected prosecutors and judges face ouster only at intervals of several years, depending on the length of their election cycles. Arguably, parole board members live with a degree of political insecurity more acute than other responsible officials in American criminal justice systems.

Small and politically vulnerable agencies, with vast systemwide power over the lengths of prison terms, can single-handedly effect large changes in a jurisdiction's overall prison policy. In the United States there is evidence that since the 1980s the institution of parole within indeterminate sentencing systems has not contributed to reducing incarceration rates. On the contrary, as a group, American indeterminate jurisdictions were the primary sites of the nation's massive prison expansion from 1980 through the first decade of the new century (Reitz 2012, 286–87). While until the mid-1970s discretionary parole release had served as "a back-end safety valve for the correctional system" (Clear and Frost 2013, 78), the policy shift toward increased punitiveness and risk aversion radically changed the functioning of existing institutions. As reported by the American Law Institute (2011, 147–48),

> Nine of 10 states with the highest standing imprisonment rates at year-end 2009 were indeterminate jurisdictions. The 10th state, Arizona,

> experienced most of its prison expansion prior to 1994, when it too was an indeterminate state. The five states with the largest per capita prison rates in 2009 included carceral powerhouses Louisiana, Texas, Oklahoma, and Georgia—all indeterminate jurisdictions. . . . If we ask which states have had the most per capita prison growth over time, the track record of indeterminate states is equally un-lenient. From 1980 to 2009, 9 of the "top" 10 prison-growth states were indeterminate jurisdictions.

Thus, one critical, but little recognized, source of American exceptionalism in prison population might well be the absence of effective, politically insulated back-end decision-makers able to release prisoners in a way that helps control prison population and prevents overcrowding.

As to procedural safeguards, American courts have traditionally afforded parole "only the most anemic procedural due process protections," as they "view parole decisions as 'equity-type' determinations" involving "predictive judgment[s]" about "what is best both for the individual inmate and for the community" (Bierschbach 2012, 1752). Often, prisoners have no meaningful opportunity to put their cases before the parole board, and decisions are not deliberative and are seldom adequately explained. Furthermore, there are no legally binding decision rules that have to be followed. One additionally important contrasting feature is the lack of enforceable decision rules and any significant possibility of appeal. In many systems, there is almost no right to participate in the first place, and when risk-assessment tools are used prisoners have very little real opportunity to challenge the outcomes. Reitz (2012, 283) speaks in this regard of "procedural shabbiness."

Ultimately, American parole is an executive, rather than a judicial, function of government, with profound effects on the personality and behavior of releasing agencies. The executive character of parole is especially pronounced in a handful of states. While a majority of states' parole boards have the final authority to authorize release, in some systems the governor retains the last word even after a positive recommendation has been issued by the parole board. In this way, parole release may become even more susceptible to policy choices that reflect a detachment from and lack of sympathy for offenders convicted of serious crimes: in Maryland, California, and Oklahoma, for example, the governor can overrule parole boards' decisions to free prisoners serving life sentences (Caplan and Kinnery 2010, 35). Between 1999 and 2011, California governors reversed or requested reviews for over 75 percent of the board's decisions to grant parole to lifers (Ghandnoosh 2017, 8).

The institutional shape and methods of prison release agencies have implications for their perceived legitimacy. The European insistence on procedural rectitude seems to have had a positive impact on the acceptance of parole decision-making. In Europe there are few general calls for "abolition" of parole as early release, although some clamor for limiting its scope in high-profile crimes against the person.

A good example is what happened in Belgium in the aftermath of the infamous Dutroux case. After being found guilty and sentenced for abducting and raping five young girls, in 1992 Marc Dutroux was released from prison by the Ministry of Justice (then in charge of release decisions) after serving half of his sentence. While under supervision, he abducted, raped, and eventually killed other teenage girls. After the discovery of these crimes in 1996, he was tried and sentenced to life imprisonment. The Dutroux case provoked a huge public outcry, which resulted in an overall institutional reform of the Belgian parole system with the main goal of enhancing public protection and reinforcing its transparency and legitimacy. The decision-making in such cases was first transferred to a specialist court for the implementation for sentences. Moreover, stricter criteria for granting release were introduced as well as conditions of supervision predominantly revolving around surveillance rather than reintegration (Snacken and Tournel 2014, 67; Bauwens, Robert, and Snacken 2012). In 2013, after serving 16 years, Dutroux applied for conditional release; but his request was denied. In general, however, European legislatures and supranational bodies have concentrated on increasing the rate of release on parole and focused on developing appropriate procedures for achieving it.

In contrast, the dire state of parole decision-making in the United States has led many influential voices to abandon discretionary release reform. Jeremy Travis, a prominent scholar of prisoner re-entry after release, has called for "an end to parole [release and supervision] as we know it" (2002, 1), mostly because of political and institutional realities. He has proposed abrogation of the release discretion of paroling agencies and a new approach to post-release supervision, recommending innovative incentives for early release and limited supervision conditions that would be set based on each prisoner's needs and risks (Travis 2005). Travis is far from being the only proponent of abolition of parole release discretion: other prominent scholars (Reitz 2004) as well as the American Bar Association (1994) and the American Law Institute's revised Model Penal Code sentencing provisions (2011) have called for the elimination of parole release authority in all American jurisdictions, while retaining post-release supervision that is reprioritized to focus on the successful reintegration of ex-offenders (see also American Law Institute 2014). Even those who favor the retention of discretionary release in American systems normally

concede that a radical "reinvention" of the substance and procedures of release decisions is necessary (Petersilia 2003, 171; Chanenson 2005, 455; Burke and Tonry 2006).

Finally, as to the grounds for release decisions, in most US paroling systems, the parole board may take into account different factors—explicitly articulated in parole release guidelines in few states only—ranging from the severity of the current offense, the offender's criminal history, conduct in the institution while imprisoned, and risk assessment to the more amorphous question of whether the prisoner has been successfully rehabilitated. The seriousness of the current offense and the offender's criminal career tend to represent the most salient factors of the release decision-making process that seems to be largely characterized by risk aversion (Rhine 2012, 634–35; Cullen and Gilbert 2013, 138–39).

In contrast, in most European jurisdictions, where a strong presumption in favor of release at the initial parole eligibility is present, the current offense and criminal history, although certainly considered, are not at center stage in the decision-making of the sentence implementation court. Put differently, release decisions tend to be less backward and more forward-looking. Accordingly, they are mostly based on the evaluation of the prisoner's propensity to change and readiness for re-entry assessed at the time of application for release, taking into account factors such as good conduct in prison, reduced criminogenic needs, and participation in programs allowing the inmate to acquire skills and work experience. In addition, the satisfaction of certain obligations set out in law (primarily restitution for victims) is required (see, e.g., Cid and Tébar 2010, 370; Gualazzi and Mancuso 2010, 282–83).

The Approach to Supervision

The previously highlighted difference in revocation rates suggests a divergence in the approach to parole supervision in the United States and in Europe. While in Europe it is mostly structured as a rehabilitative tool aimed at facilitating the re-entry and resettlement of the offender in the community, in the United States parole tilts more heavily toward a punitive and managerial intervention, weakening or supplanting a commitment to the ideal of reintegrating parolees into society.

In comparison to Europe two distinctive characteristics of US parole are (1) longer terms of supervision and (2) more, and more intrusive, conditions of supervision. The latter add greatly to the burden placed on American parolees. Such impediments do not exist to the same extent in any European country, where conditions imposed on released offenders are first and foremost aimed

at helping them to conduct law-abiding lives and to abstain from any illegal conduct.

Among others, conditions imposed in the context of US early-release schemes include extraordinary financial obligations placed on ex-offenders who are already struggling to resettle in the community. A recent report found that the 15 states with the highest prison populations in the country impose the payment of monthly supervision fees as a requirement for release, with no waiver for indigent offenders (Bannon, Nagrecha, and Diller 2010, 21). The ability to pay is often a precondition to be met in order to be released, and failure to make regular payments can constitute a violation leading to the revocation of parole. In addition, it is not unusual for profit-oriented private firms to become involved as contractors to provide supervision services (Logan and Wright 2014, 1193).

Very little of this can be encountered in Europe where conditional measures generally do not involve the imposition of financial burdens on offenders as part of a state-implemented penal sanction. In other words, besides the payment of fines and restitution to the victims, European offenders generally do not have to pay to be punished. Moreover, supervision services are usually provided by state-funded agencies. The involvement of private, paid-by-outcome firms and nonprofit organizations which receive referrals directly from the criminal justice system is limited for the most part to low-risk offenders (Robinson and Svensson 2013; Annison, Burke, and Senior 2014; Herzog-Evans 2014).

In the United States other conditions of supervision in the community can be very restrictive: for example, refraining from committing new crimes, reporting requirements, travel and residency restrictions, prohibition of association with known felons, curfews, prohibitions on the consumption of drugs and/or alcohol, and treatment (Rhine 2012, 637). In addition, a vast array of other burdens can be—and oftentimes are—imposed on parolees. As explained by Cecelia Klingele, this is possible Because "[l]aws governing the imposition of release conditions are broadly permissive . . . on the grounds that any conceivable term of release will be less punitive than the authorized term of confinement" (2013, 1032). In other words, given that parole is seen and conceived as an instrument of lenity and a milder mode of implementation of the sentence originally imposed as compared to serving time in prison, courts and correction agencies are granted a wide discretion in setting conditions of release. Regardless of how demanding they are, it becomes hard for parolees to challenge onerous and intrusive conditions, which may even infringe their constitutional rights: think, for example, of the tension between a condition allowing the parole officer to visit the parolee at any time

at home or elsewhere and Fourth Amendment rights (Jacobi, Richardson, and Barr 2014, 897–98). This is because "courts typically treat such rights as 'diminished' during the period of supervision" (Klingele 2013, 1032), thus adopting a highly deferential approach with regard to those subjects setting the conditions of release.

From a longer view, parole supervision in the United States has experienced at least three radical shifts of purpose since its inception. Jonathan Simon (1993) has provided a useful conceptual guide to these shifts: parole was originally created as a technique for enabling people who met certain eligibility criteria to become "normal" members of society again. After the Great Depression, the original idea of disciplining (in the Foucauldian sense) the parolee by means of work was superseded by the belief that the goal of a durable re-entry could be better achieved through the resort to clinical expertise provided by the parole supervisor. The next radical shift in the nature of parole supervision from the 1970s onward was from the "normalization" of offenders (whether through work or treatment) to their management. In this regard parole has become a key part of the actuarial "new penology," which is aimed less at transforming people and returning them to society and more at regulating the risks posed by offenders to public safety and order (Feeley and Simon 1992).

The emphasis in American parole supervision has shifted over time from a rehabilitative to a law enforcement paradigm, although considerable attention is also being paid in some jurisdictions to re-entry and reintegration. American parole is experiencing a degree of "mission confusion," aggravated by the lack of a considered choice of parole conditions based on the careful assessment of individual cases, because of the over-reliance to standardized risk-assessment tools (Jannetta and Burrell 2014, 1312–13). While on paper US parole is still comprehensive in its scope, combining elements of both control and treatment (von Hirsch and Hanrahan 1979, 59–60), currently a preference for a punitive approach to the supervision of parolees can be identified, evidenced by the dramatic increase in revocations of parole over time, especially for technical violations (Lin 2010; Jacobson 2006, 140–49). Recent declines in parole revocation rates are not sufficient to alter the broader picture significantly. This reflects the widely held view that "offenders must be supervised closely and punished with incarceration" in case of misbehavior since "rehabilitation does not work" and there is no viable alternative (Kremling 2012, 95). As Travis (2007, 631) observed, "America now sends more people to prison for parole violations than were sent to prison in 1980 for any reason, including commitments on new convictions and parole violation."

Joan Petersilia (2003, 11) has vividly underlined the cultural implications of the shift to managerial parole in the United States:

> Parole departments in most large urban areas have developed a prevailing culture that emphasizes surveillance over services. Parole officers believe that their caseloads now contain more dangerous offenders, and they are now authorized to carry weapons in three-fourths of the states. Parole officer training often provides minimal training on casework practices and services referrals, but numerous classes on arrests, searches, and other topics stressing law enforcement. Such training increasingly reinforces the image of parole officers as police officers rather than social workers.

In the United States parole officers have been transformed from social workers, "who helped offenders find jobs or get drug treatment," to law-enforcement agents, "who are more concerned with surveillance, from electronic monitoring and curfews to drug tests" (Butterfield 1999, 11). The law enforcement model is endemic in the administration of parole, and it is particularly prominent in intensive supervision parole, a program that supervises parolees who are most likely to return to prison. The program requires a minimum of one contact per week and a more intense level of parole supervision than what other lower-risk parolees receive (Petersilia and Turner 1993; National Research Council 2008). While on paper intense supervision restricts free time and helps foster a structured environment, in practice "reintegration rarely flourishes in this type of environment" since it promotes continued institutionalization (Binnall 2007, 546). In the language of Michel Foucault, parole in the United States currently is more of a "carceral scheme" than a measure aimed at helping former inmates "resettle" as productive and law-abiding citizens in a free society. In so doing parole continues the penitentiary technique of surveillance and discipline outside prisons.

In Europe, in contrast, continuing efforts are being made to humanize the process of parole supervision, which is viewed as a transitional period aimed at facilitating a successful and enduring re-entry to the community of the offender. This is seen most clearly in the 2010 Council of Europe rules on probation, which were explicitly designed to complement the 2003 *Recommendation on Conditional Release (Parole)*. One of the drafters of the new rules has explained that they should be understood as a deliberate ethical constraint on a tendency for parole supervision to be driven primarily by concerns with punishment and public safety (Canton 2010). The rules emphasize,

as their first principle, that they "aim to reduce reoffending by establishing positive relationships with offenders in order to supervise (including control where necessary), guide and assist them and to promote their successful social inclusion." They continue to set out detailed guidance to practitioners on how this ideal should be achieved.

Even in England and Wales, where risk avoidance has been emphasized most strongly, empirical data suggest that among practitioners there is a continued commitment to ideals about the possibility and value of individual change and development of persons subject to supervision in the community (Deering 2011). In Europe it is argued consistently, and with some considerable practical effect, that parole should be a means of enhancing the human dignity of sentenced offenders by enabling them to become full members of society and by giving them a legally enforceable right to the means to do so. Fergus McNeill (2013, 181) concluded that in Europe "an essentially humanitarian ethos" in community supervision practices (probation and post-release supervision) is probably "an important moderator of more punitive and exclusionary policy discourses."

General Conclusions, Recent Trends, and the Possibilities for Reform

Our general conclusion is that there are fundamental differences between approaches to parole in the United States and in Europe. We come to this conclusion notwithstanding some weaknesses in the available statistical evidence, the difficulties in comparing institutions that are not conceptually identical, and the apparent similarities in law and practice that we have identified. From a European perspective, the contemporary American approach is exceptional in failing to recognize the right of all offenders to be provided with a realistic opportunity to be reintegrated into society as full members with their human dignity intact.

This difference is illustrated by the continuing acceptance within the United States of LWOP sentences, which have the effect of permanently excluding many thousands of people from American society without any reasonable hope of release. The difference is also apparent in the greater weight that is attached to risk management and surveillance than to concerns about the human dignity of offenders in making release decisions in the United States. Other significant differences are to be found in the lesser commitment to due process in parole decision-making, as opposed to the European ideal, and in the approach to the management of parolees adopted by the supervising officials.

US parole practices have been the product, at the back end of the sentencing process, of the unprecedented popular punitiveness that, with the critical support of public opinion (Tonry 2004a, 11), has characterized American punishment policies from the mid-1970s onward. The rise of the use of victim impact statements at parole hearings, an example of what has been defined as "punitive victim rights," is telling. Currently, in many US jurisdictions, victims have a direct influence on whether parole is granted, and their input is considered very important to the parole board's decision-making process (Roberts 2009; Caplan 2012). Over the same period since the 1970s, the European commitment to the values of proportionality and dignity in sentencing matters, including parole decision-making, has not been substantially undermined. Emotional input from victims, where admitted at all, is largely discounted. This is not only due to the deep-seated belief that victims rarely possess information relevant to parole decision-making (BBC News 2014). European systems, while generally recognizing significant rights to victims in terms of participation in the criminal trial, protection, compensation, and restoration (Joutsen 1994; Kerner 2013), at the same time tend to resist populist trends toward granting victims a more active and central role at sentencing and in the sentence implementation phase (Tonry 2010).

According to Tonry (2013, 148, 150–51), after the end of the "tough on crime" era, the United States is currently experiencing a phase of "equilibrium" with regard to sentencing reforms and practices. In other words, in the current historical phase, law and policy would be inherently informed by a marked ambivalence as severity, compassion, and reintegration coexist within a picture in which "[n]o general theoretical logic is discernible in the crazy quilt of diverging policies." In this scenario it is hard to predict the future of parole in the United States. Will policymakers shift toward release mechanisms informed by the values of due process and long-term reintegration in the community or, rather, will they go even further toward the values of privatization, managerialism, and actuarial justice, embracing models like the "postconviction bail" through which prisoners can secure early release (Maruna, Dabney, and Topalli 2012) only on new, often privately enforced, conditions?

We were asked not only to consider American exceptionalism in respect of parole but also to suggest prescriptions for the future. Given that a key flaw in the American approach to parole lies in its failure to systematically address the underlying problems faced by parolees (Lynch 2000), it seems that thinking about how this could be achieved in practice would be a good place to start. However, in making this suggestion, we are alive to the fact that the United States and Europe differ on far more than just the arrangement of their penal systems. These underlying differences preclude a straightforward transplant of European systems, which have evolved in social, economic,

political, cultural, and other conditions that are qualitatively distinct from the American experience (Tonry 2009; Nelken 2009, 293–94). It makes more sense in our view to develop existing American initiatives that have the potential to address at least some of the shortcomings we have noted.

Recent North American empirical studies have shown how new and more refined tools for implementing parole, such as specific forms of community partnerships, could be effective if well-implemented (Hipp, Turner, and Petersilia 2010; Petersilia 2011b). Furthermore, there is some evidence of a recent trend toward more room for judicial or parole board discretion, especially in the implementation of sentences for drug crimes. Several states are moving toward the bipartisan enactment of "smart on crime" laws aimed at reducing prison overcrowding, while also cutting the costs of keeping inmates incarcerated (Fairfax 2011; Gingrich and Nolan 2011; US Department of Justice 2013). More generally, there is consistent nationwide evidence of how parole in the narrow sense of conditional release before the end of a sentence is being reconsidered as a major tool to address prison overcrowding in an era of budget crisis. As noted by Ryan King,

> Between 2004 and 2006, at least twenty-two states enacted legislative reforms to their sentencing policies or adopted reforms affecting probation and parole revocation procedures. These developments were driven by a number of factors, including budget crises at the state level, the development and expansion of a range of programs offering alternatives to incarceration, and the falling crime rate. (King 2007, 124)

The legacy of the economic crisis is causing many US states to face difficult budget choices. Expanding parole eligibility has been proposed as a viable way to reduce spending by lowering prison populations, along with the adoption of early release programs, such as "earned time" or "good time," which are not regarded as "parole" (Klingele 2012; Eaglin 2013, 203–206). States have been strongly incentivized to refine risk-assessment instruments so that they can be used to make "evidence-based" decisions on how to expand the number of people released on parole without endangering the safety of the general public. From 2007 to 2012, 31 states have managed to cut their imprisonment rates, 14 of them by double-digit percentages (Pew Charitable Trusts 2014). Texas, traditionally considered as a law-and-order state, provides a good example of this trend: it managed to cut its imprisonment rate by 7 percent, having allegedly discovered how to "shrink the prison population without threatening public safety" (*New York Times* 2013). Major steps have been the investment in treatment and diversion programs as well as changing the way the parole board assesses risk.

In California, a state that is under court order to reduce its prison population and to maintain it below certain levels, post-release community supervision (PRCS) was established in 2011 by the Public Safety Realignment Act (AB 109) as a distinct form of county supervision replacing supervision by the state parole system for low-level offenders——people released from state prison who were serving a prison term for a nonviolent, non-serious non-sex felony, regardless of prior convictions (Lofstrom and Raphael 2016, 251; Petersilia 2014, 810–11, 815). Similarly, there are reports that the governor of California is now routinely approving recommendations from the parole board that prisoners sentenced to life with parole be released, while in the past his predecessors routinely declined to support such recommendations (Levin 2014; Ghandnoosh 2017, 16).

It is important to stress, however, that the language of public safety and risk management is still ubiquitous in much of the American debate on parole. A 2011 report by the National Institute of Corrections, entitled *The Future of Parole as a Key Partner in Assuring Public Safety,* emphasizes that paroling authorities "have immense potential to make a difference in terms of public safety and wise use of resources" (US Department of Justice 2011, 3). According to the report, it is therefore critical to use good, empirically based actuarial tools to assess risks and criminogenic needs.

However, not all American reform initiatives rely exclusively on actuarial calculations. The introduction of "reentry courts," convening "team-based efforts that typically involve a judge, a social worker, and a mental health professional, who design a diversionary social service supervisory regimen for parolees and help to facilitate access to employment and housing" (McLeod 2012, 1608), is designed to address the multiple needs of released prisoners, drawing upon the problem-solving strategies adopted by specialist drug courts. Re-entry courts have the potential to address the substantive requirements for reintegration of offenders, while also supervising the enforcement of parole conditions that have been set for offenders in a way that meets the standards of legality (Hamilton 2010). Arguably, re-entry courts could tap into the idealism of the American resettlement movement and the federal Second Chance Act of 2007 (H.R. 1593/S. 1060; O'Hear 2007; Green 2013),[29] which recognize the need to provide the means of reintegration to released prisoners (Maruna and LeBel 2003). However, although such courts have been discussed for a long time, their introduction seems not to have proceeded much beyond the pilot stage. Moreover, even the pilots seem largely to allow the parole system to operate side by side with the re-entry courts, rather than fully integrating the two systems (Lindquist et al. 2013). In other words, the conditional release decision is still often made under the traditional parole system, with the court

operating within the parameters that the parole board has set. Moreover, reentry courts still lack a systemic role within the criminal justice system as well as consistent regulation capable of leading to predictable outcomes.

Integrating these decisions under the jurisdiction of a single specialist court or court-like body, as is done, for example, in France, Germany, and Italy, would be a better strategy. Such a court could combine substantive concerns about what is best for the parolee or potential parolee with the procedural safeguards that parole-related decision-making requires, including, but not limited to, the granting and revocation of parole.[30]

Some proposed American parole reform would proceed by restricting, not increasing, the powers of decision-makers in respect of conditional release. For example, Tentative Draft No. 2 of the *Model Penal Code: Sentencing* (American Law Institute 2011, app. B) argues for the removal of all initial release authority from parole boards both because of their perceived inadequacy at predicting the future behavior and because in their American guise such boards fail to meet minimum procedural standards.

While we share these criticisms of the current US system, we do not think that these weaknesses are inevitable. On the contrary, the European judicial model is routinely capable of making such decisions fairly and without political interference. The new Model Penal Code recommends a movement toward determinate sentencing, with a system to award good-time credits injecting a modest degree of indeterminacy, that will essentially eliminate the release authority of state parole boards but would allow a judicial authority (newly created agencies or tribunals or trial courts) to retrospectively adjust sentences of prisoners who have served 15 years (§ 305.6, the so-called "second-look provision") and modify a prison sentence at any time on compassionate grounds, or for other compelling reasons (§305.7). That is unobjectionable but still relatively limited. In our judgment an independent court with a wider remit to supervise the implementation of the sentence and to make a range of necessary decisions after the initial sentence has been imposed could undertake the whole process much more effectively. At the same time, the new Model Penal Code also endorses the imposition of a PRS term independent of the length of the prison term, but only if deemed necessary to further one or more of the following goals: holding offenders accountable for their criminal conduct, promoting their rehabilitation and reintegration into law-abiding society, reducing risk of re-offending, and addressing the offenders' needs during their transition from prison to the community (§ 6.09).

Recently, there have been proposals to reshape the institutional structure and composition of US parole boards with the goal of improving their decision-making by increasing their expertise and ensuring their independence from

political pressure. According to such proposals, parole board members should be recommended for appointment by an independent special panel, although the recommendations of the panel would subsequently be subject to gubernatorial approval. The tenure of parole board members should be for a fixed term, with reappointment possible for only one further term. Conditions for removal should be governed by a protocol adopted and administered by the aforementioned special panel, thus by and large mirroring analogous protocols already in place for judges (Rhine, Petersilia, and Reitz 2017, 288–89).

While such reforms could certainly improve current US parole systems substantially, we think that in the long run a transition to a "judicial model" for parole boards would be advisable in order to achieve full independence from the executive branch of government. In other words, parole boards should be removed from the correctional environment and conceived anew as specialist sentence implementation courts squarely within the judicial branch. In this regard, the gradual evolution in England and Wales of the parole board from an advisory body squarely part of the Home Office (the government department responsible for immigration, security, and law enforcement) to a quasi-judicial, independent, nondepartmental public body board sponsored by the Ministry of Justice might represent a viable model for a common law jurisdiction such as the United States.[31]

To return to the wider issue of desirable changes, most recent parole reforms in the United States seem to have been driven by budgetary constraints rather than a real reconsideration of the appropriate role of parole in the criminal justice system. Nearly ten years ago, Marie Gottschalk noted,

> Evidence is growing that economic hardship may force a major change shift in penal policy that will significantly reduce the country's incarceration rate, for years the highest in the world. Dozens of states cut their corrections budgets in 2009, and many proposed closing penal facilities to cover gaping budget gaps. In 2008, 17 states enacted a slew of penal reforms aimed at shrinking their prison populations, including expanding the use of alternative sentences and drug courts, loosening restrictions on parole eligibility, and reducing revocations of parole and probation for minor infractions. (Gottschalk 2009, 42).

Joan Petersilia, in particular, has stressed the potential of hard times for reshaping an effective community corrections system:

> [I]f we use this crisis as an opportunity to implement evidence-based community correctional programs, we might finally demonstrate the

> critical role that community corrections agencies can play in the promotion of community safety, successful reintegration, and individual accountability. (Petersilia 2011a, 527)

A recent study has highlighted the increase in progressive legislative outcomes in the area of parole policy in the decade beginning with 2006, coupled with subtle yet notable shifts in the penal discourse surrounding their enactment. Such efforts peaked in the years immediately following the financial collapse of 2008. These reforms have been chiefly aimed at reducing the number of parole revocations due to technical violations and at facilitating the early release of prisoners (Beckett et. al 2016). However, the degree of irreversibility of these pieces of legislation is open to question:

> Some of these reforms entailed long-term changes to parole policy and practice, such as capping confinement lengths for parole violators, as lawmakers in Minnesota and Oregon did in 2009. Other reforms generated temporary prison release valves when budgets were especially tight, but were subsequently reversed. For example, in 2010, New Hampshire legislators enacted a reform requiring that inmates convicted of nonviolent offenses be released upon serving 120 percent of the minimum term, but repealed this reform in 2013. (247–48)

Are we experiencing the initial stages of a real shift in parole law and policy in the United States? It is too early to tell how deep the recent commitment to reform goes—in this and all other sectors of American criminal justice policy. Our concern is that public measures designed to reduce the use of imprisonment may be driven only by the economic crisis and budgetary problems (Aviram 2015; Alexander 2010, 14, 56). What if economic recovery enables a return to carceral excess and renewed denial of the role of parole within the penal system? Economic incentives are no guarantee of lasting penal improvement (Gottschalk 2015, 25). If the recent moves toward increased use of parole are to be maintained, they must be underscored by a clear commitment to the added value conditional release can bring not only to effectiveness but also to justice and humanity in the penal system. Our conclusion is that adoption of the best aspects of parole as it is practiced in Europe, but with an eye to the very different context of the United States, could ensure that this occurs. This approach would be preferable to the wholesale elimination of parole release discretion and could transform American parole supervision, moving it back toward its original aspirations of returning ex-offenders successfully to the community.

NOTES

1. We acknowledge that European penal codes usually list life imprisonment as a distinct category of penal sanction, without immediately setting a minimum period to be served before release can be considered. From a taxonomic perspective, therefore, a life sentence is a separate sanction, and to that extent it could be regarded as determinate. However, this does not change the fact that the sentencer cannot know how long offenders sentenced to life imprisonment will live and, thus, how much time they will spend in prison, regardless of possible early release schemes.
2. General Principle 7 of the Council of Europe's (2003) *Recommendation on Conditional Release (Parole)* provides, "Consideration should be given to the savings of resources that can be made by applying the mandatory release system in respect of sentences where a negative individualised assessment would only make a small difference to the date of release."
3. We use the Council of Europe membership as a proxy for Europe as a whole because it includes all European countries except Belarus. It thus encompasses more or less the whole of geographical Europe.
4. This chapter adopts a sentencing perspective. Thus, for probation, in Figure 10.1 we only took into account Council of Europe data that refer to post-sentence probationers and did not include forms of pretrial probation or deferred adjudication schemes. As for the United States, the BJS does not break down figures of different categories of pre- and post-sentence probationers. However, in the United States probation is mostly utilized as a *sanction*, and in the BJS data the focus is explicitly on people under probation as a sanction. The use of probation as an alternative to pretrial detention and in deferred adjudication and drug court schemes is of limited, although certainly growing, relevance. Moreover, in some states pretrial diversion programs run through prosecutors' offices are not included in the probation counts. For the purpose of Figure 10.1, we thus chose to use the overall number of probationers provided by the BJS's annual report on probation and parole minus the available counts from the BJS's *Annual Probation Survey* (2015) for the following categories: suspended imposition of sentence (persons not fully adjudicated, e.g., probation before verdict), forms of probation generally indicated as "other" than direct sentence to probation split sentence (incarceration combined with probation), and suspended execution of sentence to incarceration with probation. It must be noted that the question in the survey on how offenders are placed on probation does not have a good response rate. For this reason, the BJS does not produce official statistics on it.
5. While the US statistics on which Figure 10.1 is based are complete (all states are included), they have had to be converted from figures per 100,000 adults to per 100,000 of the total population to compare them with SPACE country statistics. To calculate the rate of parolees for 100,000 general population, we have made

the following calculation: (parole population at year end/estimated state population for the year) × 100,000.

6. For probation we counted fully suspended sentences with probation and community service sanctions, which historically grew as part of the probation scheme. Other postconviction measures like home arrest and semiliberty do not fit the US definition of probation and are not considered as parole. Rather, they are widely regarded across European jurisdictions as alternative forms of implementation of custodial sentences.
7. Available data did not allow us to break down figures: the BJS does not distinguish the jail population between pretrial detainees and those serving a custodial sentence for misdemeanors up to a year. For Europe, we had to rely on estimates for countries that did not report data (see note 8).
8. The source of these figures, SPACE I (Aebi and Delgrande 2014, table 1), is based in part on estimates for countries that did not submit their figures directly: 50 out of the 52 prison administrations under the control of member states reported data, while those for the remaining (Bosnia and Herzegovina and Ukraine) were retrieved from the SPACE website (http://www3.unil.ch/wpmu/space/space-i/prison-stock-2013-2014/).
9. Latvia, Malta, and Romania too did not provide any broken-down figures on individuals on parole at year end.
10. The converted federal rate per 100,000 adults, 35 per 100,000 general population, has been added to the converted single state numbers to (crudely) count federal supervised parolees for each state.
11. Due to its unique nature, we did not consider the District of Columbia, which in 2013 had 904.8 parolees per 100,000 of the general population.
12. Also, Serbia reported a total of only one person on supervised release and was not considered. In Serbia post-release supervision is authorized by law, but the country is struggling to implement it due to lack of resources (Zeleskov Djoric and Batricevic 2013).
13. Last measurement available, which, however, refers to persons placed under supervision in the community, with no distinction between probation and parole.
14. However, the scale of incarceration in the United States cannot account for its high probation supervision rates in comparison with European states. Indeed, one might expect a jurisdiction with an outsized confinement population to have lower than average numbers on probation, on the theory that probation is an "alternative" to prison—but no such relationship appears to exist within the United States or in US/European comparisons (Phelps 2013; Alper, Corda, and Reitz 2016; see Rhine and Taxman, this volume).
15. The share of prison admissions across the United States that are due to *probation* revocations is unknown as the BJS does not report this figure. Admissions to prison due to violations of probation are entered as "new court commitments"

in BJS reports, based on the legal fiction that a probation sentence is really a prison sentence whose execution has been suspended. In its turn, the Council of Europe's reports do not make it possible to distinguish parole revocations from total revocations. Given the available data, it is not possible to make a sensible estimate of the share of total recalls in Europe that originate in parole versus probation. Although probation populations in Europe are roughly twice as large as parole populations, we can expect prison releasees to be more prone to failure.

16. Interestingly, Brockway attempted to establish the country's first indeterminate sentencing system even earlier when in 1869 he drafted a law, passed by the Michigan legislature but then overturned by the state supreme court, that would allow for the conditional and discretionary release of "common prostitutes" (Lindsey 1925, 18; Gottschalk 2006, 117).
17. Maine, 1975; Indiana, 1977; Illinois, 1978; New Mexico, 1979; Minnesota, 1980; Florida, 1983; Washington, 1984; Oregon, 1989; Delaware, 1990; Kansas, 1993; Arizona, 1994; North Carolina, 1994; Mississippi, 1995; Virginia, 1995; Ohio, 1996; Wisconsin, 1999.
18. There have also been many attempts by constitutional lawyers to establish wider due process protections in the granting of parole. Some of these are built on the partial dissent by Justice Marshall in *Greenholtz*.
19. There may be exceptions for humanitarian reasons: for example, an illness that cannot be treated in prison may require release under the terms of Article 3 of the European Convention on Human Rights, even before the fixed-term sentence has expired. See *Mouisel v. France* (2002).
20. The CPT operates under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. It exists "to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." The CPT may require European states to cooperate with its inspection visits and to pay heed to its policy recommendations. Similarly, the ECtHR applies the European Convention on Human Rights, which also prohibits "torture and inhuman or degrading treatment or punishment" (the "European Eighth Amendment") as well as guaranteeing a range of other civil and political rights.
21. To return to our earlier historical discussion, the current American outlook was very much a product of a cultural shift beginning in the 1970s. The landscape of risk aversion in US prison-release practices is a clear departure from the policy expressed in § 305.9 of the 1962 draft of the American Law Institute's Model Penal Code, which established a presumption favoring the prisoner's release at the initial parole eligibility.
22. Responding countries include Albania, Andorra, Austria, Belgium, Czech Republic, Denmark, Germany, Hungary, Iceland, Ireland, Italy, Liechtenstein,

Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, San Marino, Spain, and Switzerland. Note that with the exception of Albania, Andorra, Monaco, the Netherlands, and partly Germany, these persons are already included in the total number of the prison population.

23. The IPP sentence was abolished on December 3, 2012. However, the abolition was not retrospective, and about 4,000 prisoners sentenced to IPP before that date remained subject to its provisions in 2016 (Strickland 2016).
24. In order to ascertain whether a certain penalty constitutes a criminal sanction and, accordingly, conventional procedural safeguards provided for by Article 6 apply, the ECtHR set out three criteria, commonly referred to as the "Engel criteria" (see *Engel and others v. the Netherlands* 1976). The first criterion is the legal classification of the offense under national law, the second is the very nature of the offense, and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative.
25. In most states committed individuals are detained indefinitely. They are evaluated on an annual basis but detained until they are no longer considered a danger to the community. Despite this forced deprivation of liberty, the Supreme Court has upheld state legislation that deems these commitment schemes to be civil commitment that is not punitive (*Kansas v. Hendricks* 1997). Most statutes allow committed persons to petition the court for conditional release if they have been "cured" so that they are no longer likely to engage in predatory acts of sexual violence. Because civil commitment schemes cannot hold sex offenders once treatment makes them no longer dangerous, it would seem that treatment is the premise to release. Yet the reality is quite different: states by and large provide inadequate treatment services and make it exceedingly difficult for committed persons to obtain release from civil commitment. In addition to this, "[r]ather than enable the offender to overcome his sexual deviancy, treatment often engenders further confinement by providing the prosecution with incriminating records" (Miller 2010, 2108).
26. Article 57 (1) provides that "The decision shall particularly consider the personality of the convicted person, his previous history, the circumstances of his offence, the importance of the legal interest endangered should he re-offend, the conduct of the convicted person while serving his sentence, his circumstances and the effects an early release are to be expected to have on him."
27. The other factor typically taken into account by American parole boards is the seriousness of the crime for which the offender has been convicted. This retributive consideration may be used to justify continued incarceration of prisoners who fall into low-risk classifications (Rhine, Petersilia, and Reitz 2017).
28. In contrast to the United States, where the right to counsel is almost unknown at the parole-release stage and some states bar participation of counsel retained

at the prisoner's expense, the right to assistance stated in the European rules refers first and foremost to the right of the prisoner to be represented by an attorney in parole proceedings. Furthermore, the right to assistance may also encompass, for instance, the presence of a translator for a prisoner who is not a native speaker of the country in which he or she is detained. However, at the national level the presence of a defense counsel in parole proceedings is usually not mandated by the law as a precondition for the validity of the procedure.

29. The Second Chance Act of 2007 (Pub. L. 110-199): Section 111 creates a grant program within the Department of Justice to fund re-entry courts. State and local adult and juvenile court systems may receive up to $500,000 to establish and maintain re-entry courts. Applicants must present a long-term strategy and implementation plan and identify government and community entities that the project would coordinate. In addition, grantees must submit an annual report to the Department of Justice. The bill authorized $10 million for fiscal years 2009 and 2010.
30. We are indebted to Martine Herzog-Evans for drawing to our attention the extent to which the French *juge de l'application des peines* can function as a problem-solving court in this dual sense.
31. English reformers would want the process to go further and have the parole board placed under the HM Courts and Tribunals Service, which would guarantee its independence even more fully (Creighton 2007).

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