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Time To Move On: The California Parole Board's Fixation with the Original Crime

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All my [parole] denials are based on the severity of the crime. I cannot change what I did 20 years ago.

– Johnny Lira, California Men's Colony, San Luis Obispo¹

INTRODUCTION

In theory, parole is a possibility for tens of thousands of California inmates; in practice, it has been an illusion. California's parole system releases a tiny number of inmates each year, transforming most indeterminate sentences with the possibility of parole into sentences of life-without-parole.² As recently as the 1980s, approximately 20% of California inmates with indeterminate life sentences received parole.³ Since then, the proportion of inmates paroled has decreased dramatically to less than 1%,⁴ compounding problems of severe prison

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1. *California's Prisoners Tell How They See the System*, S.F. CHRON., Aug. 20, 2000, at 5.
2. This Comment addresses discretionary parole decisions, not the automatic placement of all released prisoners under parole supervision. For a discussion of automatic placement, see JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST., CALIFORNIA'S PAROLE EXPERIMENT 6 (2002), available at http://www.urban.org/UploadedPDF/CA_parole_exp.pdf.
3. *California Lifers Look to Governor for Parole* (National Public Radio Weekend Edition radio broadcast Mar. 16, 2008) at 1:58, available at <http://www.npr.org/templates/story/story.php?storyId=88324577>.
4. *Id.* at 2:42-2:58 (noting that Governor Gray Davis released only eight lifers during his four-year term, and Governor Arnold Schwarzenegger has approved parole for more than forty lifers annually since his election in 2003); California Department of Corrections and Rehabilitation, Caseload Statistics (2007), http://www.cdcr.ca.gov/Reports_Research/caseload_stats.html (last visited Oct. 15, 2008) (reporting that 4498 lifer hearings were held in 2003).

overcrowding.⁵ Fearing the political consequences of releasing convicted offenders, recent governors have appointed “tough on crime” parole board members who are unlikely to grant parole.⁶ In 2006, the Bureau of Parole Hearings (“parole board” or “board”) rejected 99.5% of parole applications from eligible inmates.⁷ Even when the board approves parole, the Governor can—and frequently does—reverse the decision.⁸ Typically, the board and Governor rely on the commitment offense to deny parole, regardless of the offender’s rehabilitation and good prison behavior. This Comment explores the due process implications of using the commitment offense as a basis for parole denials. It examines recent California Supreme Court and Ninth Circuit cases and argues that parole decisions should weigh the commitment offense less heavily than rehabilitative progress after the expiration of the minimum sentence term.

I. DISCRETIONARY PAROLE IN CALIFORNIA

In 1977, California adopted its current sentencing system, mandating determinate sentencing for most offenses,⁹ but preserving indeterminate sentencing for certain serious ones.¹⁰ Indeterminate sentences typically range from a

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5. California’s thirty-three adult prisons, designed for about 100,000 inmates, currently hold 159,000. *Judge Orders Schwarzenegger To Testify on Prisons*, S.F. CHRON., Aug. 14, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/08/13/state/n101001D89.DTL&tsp=1>. The problem has become so severe that a hearing was scheduled for November 2008 to determine whether overcrowding is causing unconstitutionally poor prison health care. See Michael Rothfeld, *Prison Overcrowding Negotiations Get 30 More Days*, L.A. TIMES, May 31, 2008, at B8.
 6. See, e.g., Julia Reynolds, *Parole Board Members Feel Pressure: Those Asked To Resign Deny That They’re Soft on Crime*, MONTEREY COUNTY HERALD, Oct. 9, 2007, at A1 (suggesting that Governor Schwarzenegger asked parole board members to resign because of their willingness to grant parole).
 7. Andy Furillo, *Lifers Seek Court Allies in Fight with State for Parole*, SACRAMENTO BEE, Dec. 10, 2007, at A1.
 8. Editorial, *Doors Closing for Lifer—Again*, S.F. CHRON., Oct. 15, 2005, at B4; Robert Salladay, *Governor’s Race: Gray Davis / Democrat / Profile*, S.F. CHRON., Oct. 27, 2002, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/10/27/MN159709.DTL>.
 9. See CAL. PENAL CODE § 1170 (a)(1) (West 2004) (declaring “determinate sentences fixed by statute” to be California’s penal scheme). See generally April Kestell Cassou & Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5 (1978) (providing the legislative history of the 1977 overhaul of California’s sentencing system).
 10. These crimes include first degree murder without a special circumstance, attempted first degree murder, conspiracy to commit first degree murder, second degree murder, kidnapping, and certain repeat offenses. See CAL. PENAL CODE

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minimum term up to life imprisonment, with the parole board determining the release date.¹¹ Approximately 17% of California's inmates are currently serving an indeterminate life sentence.¹²

The possibility of parole serves important public interests. It provides inmates with an incentive to rehabilitate and build the skills necessary for successful re-entry into their communities. Release contingent on good behavior also encourages inmate compliance with prison rules.¹³ Perhaps recognizing these considerations, the California legislature mandated that the parole board "*shall normally*" grant parole,¹⁴ unless "consideration of the public safety requires a lengthier period of incarceration for [the] individual."¹⁵ The board may consider any available information when determining suitability for parole, with the original offense representing just one of many factors.¹⁶ If the board con-

§§ 190, 190.05, 209, 217.1 (West 2008); CAL. PENAL CODE §§ 182, 664, 667.51, 667.7 (West 1999 & Supp. 2008).

11. Indeterminate sentence statutes exist in two forms: most specify a minimum sentence term, while others merely assign life imprisonment with the possibility of parole. *See* *People v. Jefferson*, 980 P.2d 441, 445 (Cal. 1999). If a sentence includes a minimum term, the prisoner must serve at least that term, although "good time" credits sometimes can be subtracted. CAL. PENAL CODE §§ 3046, 3049 (West 2000 & Supp. 2008). Other crimes, like torture and kidnapping, have no specified minimum sentence. *Id.* §§ 206.1, 209 (West 2008). For these crimes, prisoners must serve at least seven years. *Id.* § 3046(a)(1) (West 2000).
12. LEGIS. ANALYST'S OFFICE, JUDICIAL & CRIMINAL JUSTICE, at D-70 (2006), *available at* http://www.lao.ca.gov/analysis_2006/crim_justice/crimjust_anlo6.pdf.
13. American Probation and Parole Association, *Discretionary Parole* (2002), <http://www.appa-net.org/about/ps/discretionaryparole.htm> (last visited Oct. 15, 2008).
14. CAL. PENAL CODE § 3041 (a) (West 2008) (emphasis added); *see also id.* § 3041(b) (stating "[t]he panel or board *shall* set a release date . . .") (emphasis added).
15. *Id.* § 3041(b).
16. *See* CAL. CODE REGS. tit. 15, § 2402(b) (2005). The relevant regulations list circumstances tending to show unsuitability and suitability for parole, including "an especially heinous, atrocious or cruel" commitment offense, previous violence, unstable social history, sadistic sexual offenses, psychological factors, and institutional behavior. *Id.* § 2402(c)(1)-(6); *see also id.* § 2402(d)(1)-(9) (indicating circumstances tending to show suitability for parole, such as no juvenile record, stable social history, signs of remorse, motivation for crime, Battered Woman Syndrome, lack of criminal history, age, understanding and plans for future, and institutional behavior).

cludes that an inmate is suitable for parole, it must then set a release date.¹⁷ The board's decision is subject to the Governor's review.¹⁸

In practice, reliance on the commitment offense has swallowed the statutory mandate that parole "normally" should be granted. A recent judicial review of California parole decisions found that every parole application was denied at some point based on the nature of the original offense,¹⁹ supporting oft-voiced charges of an unwritten no-parole policy for indeterminately sentenced inmates.²⁰ Denying parole solely on the basis of the commitment offense raises serious due process concerns, as the California Supreme Court and the Ninth Circuit have begun to realize.

II. DUE PROCESS ANALYSIS AND THE ROLE OF THE COMMITMENT OFFENSE

The U.S. Supreme Court famously decreed that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country. . . . Prisoners may not be deprived of life, liberty, or property without due process of law."²¹ Indeed, the constitutional right to "due process" has long been the source of important protections for inmates.²²

A due process violation occurs when the state: (1) deprives an individual of life, liberty, or property; and (2) denies adequate procedural protections.²³ Given the mandatory language in California's parole statute,²⁴ every indetermi-

17. *Id.* § 2403(a). This release date is set through an administrative matrix, which uses the circumstances of the crime to determine an appropriate base term. The base term is calculated based on the category of crime, prior relationship to victim, victim contribution, and the resulting physical trauma. *Id.*

18. CAL. CONST. art. V, § 8(b); *see also In re Rosenkrantz*, 59 P.3d 174, 207 (Cal. 2002) ("[T]he Governor's review is limited to the same considerations that inform the Board's decision.").

19. *In re Criscione*, No. 71614 at 9 (Cal. Super. Ct. Aug. 30, 2007). The court reviewed a random sample of 2690 cases decided in a thirteen-month period.

20. *See* LEGIS. ANALYST'S OFFICE, JUDICIARY & CRIMINAL JUSTICE, at D-3 to -4, D-56 to -62 (2000), available at http://www.lao.ca.gov/analysis_2000/crim_justice/crimjust_anloo.pdf.

21. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

22. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 487 (1980) ("[T]he involuntary transfer of a . . . prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause."); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (reviewing inmate's due process rights at disciplinary hearing); *Wolff*, 418 U.S. at 557 (recognizing inmate's liberty interest in "good time" credits).

23. *E.g., Biggs v. Terhune*, 334 F.3d 910, 913 (9th Cir. 2003) (citing *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002)).

24. CAL. PENAL CODE § 3041(b) (West 2000 & Supp. 2008).

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nately sentenced prisoner has a liberty interest in parole,²⁵ commencing “upon . . . incarceration.”²⁶ Thus, any parole denial or finding of unsuitability must comport with due process. The second prong of the due process test requires that “some evidence” support the parole decision.²⁷ Although the “some evidence” threshold is low, it prevents the state from interfering with a liberty interest “without support or [in an] otherwise arbitrary” manner.²⁸

The legal controversy over the appropriate role of the commitment offense in parole denials centers on when commitment offenses can satisfy the “some evidence” standard. Previous California Supreme Court decisions permitted parole denials based solely on the commitment offense if it was “particularly egregious”²⁹ or “especially callous and cruel.”³⁰ This led to confusion over whether “some evidence” had to support the egregiousness of the crime or the inmate’s public safety risk, per the statute. And, despite judicial guidance that the circumstances of the offense had to exceed “the minimum necessary to sustain a conviction” for the crime to justify a parole denial,³¹ the parole board labeled almost every offense as sufficiently callous to deny parole.

In August 2008, the California Supreme Court began to restore inmates’ parole rights by limiting the use of the commitment offense to support parole denials.³² Its opinion in *In re Lawrence* clarified that the only permissible reason to deny parole is *current* dangerousness, adding that the nature of the offense “does not, in every case, provide evidence that the inmate is a current threat to public safety.”³³ The court held that when evidence of an inmate’s rehabilitation and parole suitability is “overwhelming,” and “the only evidence related to unsuitability is the gravity of the commitment offense . . . [which] is temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur,” then “the immutable circumstance that the commitment offense

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25. See *McQuillion*, 306 F.3d at 901; see also *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987) (holding that mandatory language in parole statutes creates a protected liberty interest).
26. *Biggs*, 334 F.3d at 915.
27. See *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006); *Jancsek v. Or. Bd. of Parole*, 833 F.2d 1389, 1390 (9th Cir. 1987). California’s statutes safeguard an inmate’s ability to be heard at parole hearings and ascertain the reasons behind adverse decisions, which the second prong of the due process test also requires. See CAL. PENAL CODE §§ 3041.5, 3041.7 (West 2000).
28. *Superintendent v. Hill*, 472 U.S. 445, 457 (1985) (noting that the “some evidence” standard assures that “the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary”).
29. *In re Rosenkrantz*, 59 P.3d 174, 222 (Cal. 2002).
30. *In re Dannenberg*, 104 P.3d 783, 785 (Cal. 2005).
31. *Rosenkrantz*, 59 P.3d at 222.
32. *In re Lawrence*, No. A174924 (Cal. Aug. 21, 2008).
33. *Id.* at 36.