

# Insight into California's Life Sentences

## I. Introduction

Although the unique characteristics of most “rehabilitative” systems of criminal punishment vary greatly, a central component is often an indeterminate sentence with the possibility of parole. In California, these decisions are made by twelve governor-appointed commissioners of the Board of Parole Hearings and by the Governor himself. With roughly 32,000 prisoners sentenced to life with the possibility of parole (i.e., 7-, 15- or 25-to-life), and another 3,200 prisoners sentenced to life *without* the possibility of parole, California has a considerable lead over all other states in issuing life sentences.

Life sentences in this state date back to 1872, when the sentence was for “natural life” and did not include the possibility of parole. By 1893, some prisoners could seek parole from a life sentence, but convicted murderers could not do so until 1901. By 1917, the Indeterminate Sentencing Law was introduced, and it remained in effect until 1976. After that, most sentences in California were converted to determinate terms, but several crimes continue to carry life sentences. These crimes include murder, attempted murder, kidnapping, aggravated mayhem, torture, and certain sex offenses. There are also roughly 9,000 prisoners serving life sentences as a result of 1994’s “Three Strikes” initiative.<sup>1</sup> More than a third of these prisoners may currently be eligible for sentence modification under a November 2012 initiative (Proposition 36) because their third “strike” offenses involved neither serious nor violent felonies.<sup>2</sup>

California currently has more than three times as many lifers as the state with the next highest total (New York).<sup>3</sup> Indeed, there are 37 states that have fewer total *prisoners* in their individual systems than there are *lifers* in California’s prisons.<sup>4</sup> Roughly 20 percent of California’s prisoners are currently serving life sentences, an increase from only 8 percent in 1990.<sup>5</sup> As the nation’s leader in handing out life sentences, California provides a useful model for identifying and understanding some of the unique challenges inherent in the administration of indeterminate sentences.

## II. The Meaning of “Life”

In the earliest days of California’s life sentences, a defendant could be sentenced to “natural life” with no chance of parole for committing a handful of nonviolent crimes. In 1928, the California Supreme Court upheld a natural life sentence for Evelyn Rosencrantz for writing four bad

checks.<sup>6</sup> In later years, life sentences typically included the possibility of parole even for those convicted of murder. Since then, there has been a dramatic increase in the length of time prisoners actually serve before their release. Decades ago, lifers served an average of 5 years for second degree murder and 14 years for first degree murder. Nowadays, the difference is negligible for categories of murder: lifers serve about 24 years for second degree murder and 27 years for first degree murder. In a current study, Stanford’s Criminal Justice Center found no statistically significant difference in the parole prospects at each hearing for those convicted of first degree versus second degree murder.<sup>7</sup> A recent study by California’s Department of Corrections and Rehabilitation also confirmed a grim reality: life in prison too often means *death* in prison. Between 2000 and 2010, 674 lifers convicted of murder were released on parole; however, 775 such prisoners died in custody during the same period.<sup>8</sup>

## III. Current Statutory and Regulatory Framework

California Penal Code § 3041(a) provides that the Board “shall normally set a parole release date” the first time a lifer appears for parole consideration, which occurs one year prior to serving either 7, 15, or 25 years of his or her sentence.<sup>9</sup> The mandatory language in the statute is what creates a constitutionally protected liberty interest in parole.<sup>10</sup> However, the mandatory language in subdivision (a) is qualified by subdivision (b), which directs the Board to deny parole if it “determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.”<sup>11</sup> The Board’s determination under subdivision (b) is guided by a series of administrative regulations requiring the consideration of factors, including the nature and circumstances of the commitment offense, the prisoner’s prior record, his or her institutional behavior, and his or her past and present mental state relative to the crime, including expressions of remorse and understanding of the nature and magnitude of the offense.<sup>12</sup>

Since 1988, California’s Governor has had the final word on whether or not convicted murderers could be released on parole, and the Governor can remand to the Board those parole decisions not involving murderers.<sup>13</sup> The Governor may block parole if, after considering the



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same record that was before the Board, the Governor believes that concerns for public safety militate against approving the parole grant. Governor Wilson used this veto sparingly, Governor Davis vetoed nearly every parole grant, and Governor Schwarzenegger blocked roughly 80 percent. Current Governor Jerry Brown is reversing roughly 20 percent of the Board's parole grants.<sup>14</sup>

#### IV. State Courts Provide Limited Review

In most states utilizing an indeterminate system, release decisions are *completely* discretionary and therefore virtually unreviewable in any court. After all, an individual has no federal constitutional right to release on parole unless the state's statutory scheme creates one by using restrictive language to guide the parole board's decisions.<sup>15</sup> California's statutory scheme contains such language and therefore creates a constitutionally protected liberty interest. Yet even here, years of federal judicial opinions vindicating the rights of California lifers were recently wiped away in a brief per curiam opinion from the U.S. Supreme Court in January 2011.<sup>16</sup> There, the Court declared that federal due process protections afforded to California lifers are limited to (1) notice of an upcoming hearing, (2) an opportunity to be heard, and (3) a statement of the reasons parole is denied.<sup>17</sup> The Court thus eliminated the standard of judicial review that asked whether the parole board's decisions were actually supported by any evidence.

Despite the statutory mandate that parole "shall normally" be granted the first time a California lifer appears for parole consideration, release is actually granted in less than 1 percent of initial hearings and roughly 18 percent of the time overall. This latter figure actually represents a dramatic *increase* from only 1–2 percent just a few years ago, mostly due to increased judicial oversight. That is, even though federal courts are off limits to California lifers, prisoners have prevailed in dozens (if not hundreds) of state court cases over the past thirteen years, rulings that have directly impacted the Board's and Governor's practices. A recent report indicated that California courts reversed 106 out of 144 (74 percent) gubernatorial decisions blocking parole release in 2011.<sup>18</sup> A prisoner appearing before the parole board now has a significantly greater chance of being granted parole than he or she did just a few years ago, even if an 18 percent rate is a far cry from the statutory command that parole "shall normally" be granted.

The modern era of California parole law began roughly thirteen years ago. On April 27, 2000, the Court of Appeal for the Second Appellate District (in Los Angeles) decided *In re Rosenkrantz*, 80 Cal. App. 4th 409 (2000), which marked the first time in a very long time that a court was willing to strike down the Board's parole decision for violating due process. The Court ordered the Board to give the prisoner a new hearing, which resulted in a parole grant. The Governor then reversed that parole grant, which led to more significant litigation.

On December 16, 2002, the California Supreme Court decided *In re Rosenkrantz*, 29 Cal. 4th 616 (2002), and

rejected the Governor's argument that the law did not permit judicial review of parole decisions. Instead, the Court adopted the highly deferential "some evidence" standard of review, which had previously been applied only to hearings at which the Board considered rescinding a previously granted parole date.<sup>19</sup> The Court also held that the Board or Governor can rely solely on the historical circumstances of a prisoner's crime to deny parole as long as some aspects of the crime might be characterized under the Board's regulations as "especially heinous, atrocious or cruel." Incidentally, by the time this case was decided, the Board had already been describing *every* crime as "especially heinous, atrocious or cruel,"<sup>20</sup> so this seemed to put a stamp of approval on that practice.

*Rosenkrantz* touched off a battle among lower courts throughout the state. Some courts interpreted the opinion to say that as long as the Board or Governor could point to *any* evidence in the record that might support their factual findings (for example, that the prisoner had an unstable childhood or that the prisoner's actions involved some conduct that was more than necessary to complete the crime), then the parole decision had to stand. Other courts opined that such a strict view could prevent many lifers from ever being released because the parole decisions were being based on historical factors that would never change. The latter view ultimately prevailed and gave rise to two California Supreme Court cases that set the stage for what currently happens in parole hearings and how courts review those proceedings.

On August 21, 2008, the Court decided *In re Lawrence*, 44 Cal. 4th 1181 (2008), and tried to make clear that the Board and the Governor could not continue denying prisoners parole *solely* because their crimes could be considered "especially heinous, atrocious or cruel." Instead, the Court held, there had to be some current evidence to show that the prisoner remains dangerous.<sup>21</sup> In other words, prisoners who had strong records of rehabilitation and who demonstrated that they could safely be released must be granted parole even if their crimes were really bad. With this decision, *Lawrence* seemed to signal an end to the practice of denying almost everyone parole.

Unfortunately, in the other case decided the same day as *Lawrence*, the Court held that the Board or Governor *may* still rely on a prisoner's original crime if, at the time of the parole hearing, there is evidence that the prisoner somehow lacks an understanding of the factors that contributed to the crime.<sup>22</sup> Relying on *Shaputis*, the Board and Governor have continued denying prisoners parole most of the time; however, in addition to finding that every crime was especially bad, they also find that nearly all prisoners lack "insight" into their crimes and that is why they remain dangerous.

#### V. Parole Board's Focus Shifts to Insight

Beginning around 2006, the Board developed a new protocol in which its own team of psychologists evaluates lifers, assessing their insight and remorse and predicting their

risk of future violence. The Board's commissioners then use these reports as a primary basis for their parole decisions. Critics complained that the Board made this move solely to insulate its decisions from judicial review, that the Board made this change immediately after admitting that psychologists are incapable of assessing a prisoner's insight or remorse, and that the risk assessment tools the Board's psychologists utilize rely too heavily on unchanging historical factors that produce elevated predictions of dangerousness.

Records confirm that the Board now uses its psychologists and their controversial assessments to deny prisoners parole for lacking insight most of the time. In the year after *Shaputis I* was decided in 2008, a "lack of insight" was cited in twice as many appellate opinions as had been the case in all of the 31 years before *Shaputis I*. Similarly, the Governor cited a lack of insight in only 12 percent of his decisions to block parole in the year preceding *Shaputis I*, but he did so in a whopping 78 percent of his decisions in the year after *Shaputis I*. Overall, the Governor cited the Board's psychological evaluations in nearly 90 percent of his decisions to block parole between 2009 and 2011.

It bears noting that the term "insight" never actually appears in the Board's guidelines for determining parole suitability. However, courts have accepted the presence or absence of insight as a relevant factor within the Board's authority to consider the prisoner's "past and present attitude toward the crime," the "presence of remorse," and indications that the prisoner "understands the nature and magnitude of the offense."<sup>23</sup> Indeed, the California Supreme Court has recognized insight as "a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety."<sup>24</sup>

Nevertheless, at least one Associate Justice on the California Supreme Court appreciates the potential for abuse inherent in the Board's increasing reliance on a claimed lack of insight to deny parole, fearing it may have become "a new talisman" to protect the Board's decisions.<sup>25</sup> Lower courts have shared this concern, rejecting the Board's and Governor's decisions denying parole when their "lack of insight" findings were based on outdated information that had been superseded by more recent relevant evidence.<sup>26</sup>

Courts have also held that the Board cannot properly claim a lack of insight simply because the prisoner's version of the crime is not identical to the facts as the Board understands them, particularly where the prisoner's version is plausible.<sup>27</sup> Also, the relative weakness of a prisoner's insight is insufficient *by itself* to support the denial of parole if the prisoner otherwise accepts responsibility and shows remorse.<sup>28</sup> Indeed, even a *total* lack of insight is insufficient unless it reflects a "material deficiency in [the prisoner's] understanding and acceptance of responsibility for the crime."<sup>29</sup> Nevertheless, the presence or absence of insight remains a central focus of the parole board's inquiry during its hearings.

Of course, not all judicial opinions on "insight" favor prisoners. In fact, after Richard Shaputis lost his first case in the California Supreme Court on "insight" grounds, he (like many other lifers at the time) tried his best to provide *positive* evidence of his insight for his next hearing. He attempted to neutralize the Board's negative assessments of his risk by refusing to meet with the state's psychologist and by declining to speak to the Board about his crime. Instead, he offered his own written statement about his insight, as well as a written statement by a psychologist he hired, but he refused to discuss those documents with the Board during his parole hearing. The California Supreme Court acknowledged a prisoner's right to limit his participation in the parole consideration process; however, the Court opined that such a "choice cannot restrict the scope of the Board's review of the evidence."<sup>30</sup> Ultimately, the Court held that the Board could look beyond the prisoner's most recent evidence of his insight and instead rely on prior reports and statements to determine his state of mind in considering his suitability for parole.<sup>31</sup>

## VI. Stanford's Preliminary Findings

The Stanford Criminal Justice Center has released some preliminary findings regarding, among other things, the length of time lifers typically serve prior to release and some of the factors that tend to be predictive of whether or not a prisoner appearing before the Board will be granted parole.<sup>32</sup> Among the factors found to correlate with the likelihood of being granted parole were prison location, disciplinary record, psychological evaluations (and their risk predictions), and treatment for drug or alcohol abuse.<sup>33</sup> As to this last factor, the study found that lifers who had successfully undergone treatment for drug or alcohol abuse while in prison were more likely to be granted parole than lifers who never had drug or alcohol problems to begin with.<sup>34</sup> The study also found that the presence of crime victims or their representatives in parole hearings cut prisoners' parole chances in half.<sup>35</sup>

And some factors, surprisingly, did *not* correlate with a prisoner's parole prospects: the prisoner's current age, his or her prior criminal record, whether or not the prisoner was the principal actor in the crime (i.e., shooter vs. nonshooter), the number of victims in the crime, and the category of crime (with the caveat that those convicted of attempted murder fared much worse).<sup>36</sup> Perhaps most notable among Stanford's preliminary findings was the observation that only 5 out of the 860 convicted murderers released on parole since 1995 had been sent back to prison for new felonies by 2011.<sup>37</sup> That amounts to a recidivism rate of roughly 0.5 percent, which is far below the recidivism rate among determinately sentenced prisoners in California, which hovers above 60 percent.

## VII. Some Too Young to Die in Prison

Several other recent developments in the world of life sentences deserve attention here because they provide further evidence that criminal justice policies may be trending

back toward discretionary parole release. For example, on June 25, 2012, the U.S. Supreme Court held in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), that mandatory life-without-parole (LWOP) sentences for children who committed homicide at age 17 or younger are unconstitutional. Such prisoners are now eligible for new sentencing hearings at which their age and other mitigating factors must be considered. Nationwide, it is estimated that close to 2,000 juvenile lifers may have their sentences reviewed under *Miller*, which could lead to opportunities for parole. It is unclear how many will have their sentences reduced to determinate terms without parole consideration because many states are still figuring out their sentencing alternatives to LWOP; some states are likely looking to California for guidance.

The *Miller* decision did not itself appear to require a change in California's treatment of juveniles, since California does not impose a mandatory LWOP on juvenile offenders. Such a sentence is discretionary in California, even for juveniles committing serious offenses.<sup>38</sup> But not long after *Miller*, California Governor Jerry Brown signed Senate Bill 9 on September 30, 2012, which permits LWOP-sentenced children to petition the court for review of their cases once they have served at least 15 years, shown remorse, and worked toward rehabilitation. Upon such a petition, the trial court has the discretion to reduce the LWOP sentence to 25-to-life with the possibility of parole.

### VIII. Crime Victims Strike Back

Not all trends, however, point toward expanding discretion in parole release decisions. Some states are also passing laws enhancing the power of crime victims and their supporters to delay subsequent parole consideration for lifers who have previously been found unsuitable for parole. California is again leading the charge, this time with the Victim's Bill of Rights Act of 2008, known as Marsy's Law, which ostensibly sought to relieve the hardship victims and survivors experience while revisiting their crimes at parole hearings. The argument advanced was that, given California's low rate of granting parole, it was an unnecessary hardship for crime victims to relive these crimes at hearings conducted every year or two when there was little likelihood the perpetrator would actually be granted parole.

With Marsy's Law, California voters eliminated presumptively *annual* parole hearings and replaced them with hearings held *once every 15 years* unless the Board finds clear and convincing evidence to justify a shorter interval. The prior law permitted the Board to defer hearings for only one, two, three, four, or five years; the law now authorizes deferral lengths of three, five, seven, ten, and fifteen years. Under the new law, a lifer could be considered for parole at his or her minimum term of, say, seven years, only to be found unsuitable for parole and denied any further consideration for fifteen *more* years. In March 2013, the California Supreme Court upheld the constitutionality of

Marsy's Law against a claim that it violates *ex post facto* principles.<sup>39</sup>

Other states may be following suit. For example, Oregon's House Bill 2335 in 2009 replaced the old maximum parole deferral period of two years with a new range of two to ten years in order to lessen the harm to victims and their supporters when they relive the trauma of the crimes committed against them.

### IX. Conclusion

The evolution of California's life sentences may be an instructive model because it indicates that the administration of such sentences has moved away from ostensibly objective measures that match the length of confinement with the gravity of the crime, and now focuses on the individual prisoner and his or her ability to reform. This is certainly not a novel approach when it comes to theories of punishment. However, the approach departs from prior practice in its increased focus on a prisoner's understanding of the underlying factors contributing to what he or she did in the past (i.e., his or her "insight") and whether he or she has sufficiently participated in self-help and therapeutic programs in prison to satisfy the subjective judgment of parole authorities that those historical factors have been resolved. Unfortunately, given the as-yet undefined middle ground between abuse of executive discretion on the one hand, and judicial overreaching on the other, such subjective decision making will continue to be the focus of further judicial interpretation and legislation before California, or some other state, can claim a fair balance that ensures a meaningful opportunity for release when lifers are no longer dangerous.

### Notes

- <sup>1</sup> Mike Males, *Striking Out: California's "Three Strikes and You're Out" Law Has Not Reduced Violent Crime. A 2011 Update*, Center on Criminal and Juvenile Justice (April 2011), at 3.
- <sup>2</sup> Three Strikes Reform Act of 2012, amending Cal. Penal Code § 667.
- <sup>3</sup> The Sentencing Project, State Data: California, available at <http://www.sentencingproject.org/map/statedata.cfm?abbrev=CA&mapdata=true>
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> *Ex parte Rosencrantz*, 205 Cal. 534 (1928).
- <sup>7</sup> Robert Weisberg, Debbie A. Mukamal, & Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, Stanford Criminal Justice Center (September 2011), at 20.
- <sup>8</sup> Nancy Mullane, *New Data Shows California Lifers More Likely to Die in Prison than to Get Parole*, KALW News (June 16, 2011), available at [http://kalwnews.org/audio/2011/06/16/new-data-shows-california-lifers-more-likely-die-prison-get-parole\\_1041846.html](http://kalwnews.org/audio/2011/06/16/new-data-shows-california-lifers-more-likely-die-prison-get-parole_1041846.html).
- <sup>9</sup> Minus any good conduct time prisoners may earned toward these minimum terms.
- <sup>10</sup> *Swarthout v. Cooke*, 131 S.Ct. at 861–62; *Board of Pardons v. Allen*, 482 U.S. 369, 373–81 (1987).
- <sup>11</sup> Cal. Pen. Code, § 3041, subd. (b).
- <sup>12</sup> Cal. Code Regs., tit. 15, § 2402, subds. (b), (c) and (d); Cal. Code Regs., tit. 15, § 2281, subds. (b), (c) and (d).

- <sup>13</sup> Proposition 89, November 1988, amending Article V, Section 8 of the California Constitution and enacting Penal Code § 3041.2.
- <sup>14</sup> David Siders, *Jerry Brown Lets Parole Releases Stand*, Sacramento Bee, February 15, 2013.
- <sup>15</sup> *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 12 (1979); *Bd. of Pardons v. Allen*, 482 U.S. 369, 377–78 (1987); *In re Lawrence*, 44 Cal.4th 1181, 1205 (2008).
- <sup>16</sup> *Swarthout v. Cooke*, 131 S.Ct. 859 (2011).
- <sup>17</sup> *Id.* at 862.
- <sup>18</sup> Siders, *supra* note 14.
- <sup>19</sup> *In re Powell*, 45 Cal.3d 894, 904 (1988), citing *Superintendent v. Hill*, 472 U.S. 472 U.S. 445, 457 (1985).
- <sup>20</sup> One court reviewed nearly 3,000 parole hearing transcripts and observed that the Board applied its “exceptionally heinous, atrocious or cruel” label to 100 percent of the crimes. *In re Criscione*, Santa Clara County Superior Court, Case Number 71614, Order dated August 30, 2007.
- <sup>21</sup> *Lawrence*, 44 Cal.4th at 1191, 1219–21.
- <sup>22</sup> *In re Shaputis*, 44 Cal.4th 1241 (2008).
- <sup>23</sup> Cal. Code Regs., tit. 15, § 2402, subds. (b) and (d)(3); Cal. Code Regs., tit. 15, § 2281, subds. (b) and (d)(3); see also *In re Shaputis*, 53 Cal.4th 192, 218 (2011) (*Shaputis II*).
- <sup>24</sup> *Shaputis II*, 53 Cal.4th at 218.
- <sup>25</sup> *Id.* at 229–30 (Liu, J., conc.).
- <sup>26</sup> *Lawrence*, 44 Cal.4th at 1223–24; *In re Gomez*, 190 Cal.App.4th 1291, 1308–9 (2010); *In re Twinn*, 190 Cal.App.4th 447, 468–69 (2010).
- <sup>27</sup> *In re Palermo*, 171 Cal.App.4th 1096, 1112 (2009); *In re Jackson*, 193 Cal.App.4th 1376, 1391 (2011).
- <sup>28</sup> *In re Roderick*, 154 Cal.App.4th 242, 272 (2007); *In re Ryner*, 196 Cal.App.4th 533, 548–49 (2011).
- <sup>29</sup> *In re Rodriguez*, 193 Cal.App.4th 85, 100 (2011).
- <sup>30</sup> *Shaputis II*, 53 Cal.4th at 211.
- <sup>31</sup> *Id.* at 212.
- <sup>32</sup> Weisberg, Mukamal, & Segall, *supra* note 7, at 20.
- <sup>33</sup> *Id.* at 24–26.
- <sup>34</sup> *Id.* at 24.
- <sup>35</sup> *Id.* at 5, 19.
- <sup>36</sup> *Id.* at 20–21.
- <sup>37</sup> *Id.* at 17.
- <sup>38</sup> The Supreme Court in *Miller* singled out California’s statute as different from the mandatory schemes struck down by the Court (see 132 S. Ct. at 2472 n.10), though some appellate courts have found that *Miller* nonetheless affects California’s sentencing system. See, e.g., *People v. Moffett*, 209 Cal. App. 4th 1465 (2012) (depublished), rev. granted 2013 Cal. LEXIS 2 (Cal., Jan. 3, 2013).
- <sup>39</sup> *In re Vicks*, 56 Cal.4th 274 (2013).