

# California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners

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## Introduction

ON DECEMBER 15, 1978, Ronald Hayward entered a bar in Sierra Madre, California, joined by several members of a motorcycle gang to which he belonged.<sup>1</sup> Once inside, another man allegedly assaulted and attempted to rape Hayward's girlfriend.<sup>2</sup> A fight ensued, during which Hayward stabbed the man to death.<sup>3</sup> A jury convicted Hayward of second-degree murder and sentenced him to an indeterminate sentence of fifteen years to life in prison.<sup>4</sup> Once in prison, Hayward retired from his motorcycle gang, completed extensive vocational training, and obtained a GED.<sup>5</sup> He led prison tours and remained free from major disciplinary action for the twenty years leading up to his final appeal.<sup>6</sup> He avoided even minor disciplinary action for over ten years.<sup>7</sup> Furthermore, Hayward remained free of drugs and alcohol, received favorable psychological evaluations, and established concrete plans for his life outside of prison.<sup>8</sup> Despite these positive efforts, the Board of Parole Hearings ("Board") repeatedly denied Hayward pa-

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1. *Hayward v. Marshall*, 512 F.3d 536, 538 (9th Cir. 2008).
2. *Id.*
3. *Id.*
4. *Id.* For a discussion of indeterminate sentencing, see *infra* Part I.A.
5. *Hayward*, 512 F.3d at 538.
6. *Id.*
7. *Id.*
8. *See id.* at 539.

role a total of eleven times by November 2003.<sup>9</sup> After the most recent denial, Hayward filed a state habeas corpus petition, which the California Supreme Court ultimately denied.<sup>10</sup> He then filed a federal habeas corpus petition, which the district court denied.<sup>11</sup> The Ninth Circuit reversed, reasoning that “no evidence in the record supports a determination that Hayward’s release would unreasonably endanger public safety.”<sup>12</sup> Finally, after twenty-seven years in prison, at the age of sixty-four, Hayward was granted parole.<sup>13</sup>

This Comment focuses on the parole suitability determinations of California prisoners, like Hayward, who have received indeterminate sentences. It posits that the system is flawed on both the administrative and judicial levels and argues that these problems must be rectified in order to protect prisoners’ rights. Part I provides an overview of the system, discusses the establishment of prisoners’ rights in this context and outlines the foundational case law. Part II discusses Proposition 9, passed by California voters in November 2008. Part III asserts that the California Supreme Court has acquiesced to a flawed regulatory scheme and suggests changes to the regulations. Part IV discusses additional policy concerns, including the current crisis of prison overcrowding in California. Part V suggests potential solutions and addresses the parole systems of other states.

## I. Background

### A. An Overview of Sentencing and the Roles of the Executive

California uses both determinate and indeterminate sentencing. Under the former, sentences are specified by the legislature, with the goal of maintaining uniform sentences for similar offenses based on the seriousness of the crime.<sup>14</sup> Crimes that carry determinate sentences often specify three terms of imprisonment—a high, middle, and low term.<sup>15</sup> The sentencing judge has complete discretion in determining which of the three to apply, based on aggravation and mitigation evidence.<sup>16</sup> By contrast, under the indeterminate sentencing

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9. *See id.* at 539–40. The Board actually granted parole the last two times, but both times Governor Gray Davis reversed. *Id.* The Governor’s ability to reverse grants of parole is discussed *infra* Part I.A.

10. *Id.* at 540.

11. *Id.* at 540–41.

12. *Id.* at 544.

13. *Id.* at 538.

14. CAL. PENAL CODE § 1170(a)(1) (West 2009).

15. *Id.* § 1170(b).

16. *Id.*

scheme, judges are explicitly prohibited from applying a fixed sentence—one that contains a maximum number of years to be served.<sup>17</sup> Indeterminate sentencing applies in murder cases; first-degree murder carries an indeterminate sentence of twenty-five years to life, and second-degree murder generally carries an indeterminate sentence of fifteen years to life.<sup>18</sup> Indeterminate sentencing also applies in other serious felonies where the penalty is described as “life with the possibility of parole.”<sup>19</sup> The California Supreme Court has stated that the purpose of indeterminate sentencing is “to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime.”<sup>20</sup>

When a prisoner is given an indeterminate sentence, the duty of deciding when, and if, the inmate is released rests with the Board.<sup>21</sup> The Board is comprised of seventeen commissioners, each appointed by the governor, subject to senate approval, for a term of three years.<sup>22</sup> Twelve commissioners oversee adult parole determinations.<sup>23</sup> At the time of publication, the majority of these commissioners had backgrounds in law enforcement and/or military service.<sup>24</sup> This is not a new phenomenon, and critics argue that the Board is inevitably prejudiced against granting parole.<sup>25</sup>

17. CAL. PENAL CODE § 1168(b) (West 2004).

18. CAL. PENAL CODE § 190(a) (West 2009). The minimum term for second degree murder can be increased if certain aggravating circumstances are present. *E.g., id.* § 190(b) (increasing the sentence for second degree murder to twenty-five years to life if the victim was a peace officer engaged in the performance of his or her duties, and the defendant knew, or should have known, this).

19. *E.g.*, CAL. PENAL CODE § 209(a), (b)(1) (West 2009) (applying this indeterminate sentence to certain forms of kidnapping).

20. *Ex parte Lee*, 171 P. 958, 959 (Cal. 1918).

21. *See* EDWARD A. RUCKER & MARK E. OVERLAND, CALIFORNIA CRIMINAL PRACTICE MOTIONS, JURY INSTRUCTIONS, AND SENTENCING 181–82 (3d ed. 2004).

22. CAL. GOV'T CODE § 12838.4 (West 2009).

23. California Department of Corrections and Rehabilitation, [http://www.cdcr.ca.gov/Divisions\\_Boards/BOPH/index.html](http://www.cdcr.ca.gov/Divisions_Boards/BOPH/index.html) (last visited Aug. 29, 2009).

24. California Department of Corrections and Rehabilitation, [http://www.cdcr.ca.gov/Divisions\\_Boards/BOPH/commissioners.html](http://www.cdcr.ca.gov/Divisions_Boards/BOPH/commissioners.html) (follow links to individual Board members) (last visited Aug. 29, 2009).

25. *See, e.g.*, Michael Rothfeld, *California Parole Board Is on Receiving End of a Grilling, for a Change*, L.A. TIMES, July 6, 2008, available at <http://articles.latimes.com/2008/jul/06/local/me-parole6> (“Where are the social scientists, the psychologists? Where are the people who bring a different dimension to life, a different view on rehabilitation?”) (internal quotation marks omitted); Dr. B. Cayenne Bird, *Real Prison Reform Must Include Sentencing and Parole Changes*, CAL. CHRONICLE, Sept. 25, 2006, <http://www.californiachronicle.com/articles/view/13934> (“The current [Board] is comprised of people who will most assuredly almost never grant a parole, even to those who have earned it. Every entity of the govern-

California prisoners who are eligible for parole meet with the Board one year prior to their minimum eligible parole release date.<sup>26</sup> At this meeting, the Board determines the inmate's suitability for parole.<sup>27</sup> If the inmate is found suitable, the Board "shall normally set a parole release date" such that similar offenses receive uniform terms and the inmate's "threat to the public" is taken into consideration.<sup>28</sup> The Board is required to release those who are eligible for parole *unless* they pose a current threat to the public.<sup>29</sup> In determining suitability, the Board is bound by its authorizing statute. One of its duties is to "establish criteria for the setting of parole release dates."<sup>30</sup> Pursuant to this provision, the Board has established a number of factors to consider in determining parole suitability.<sup>31</sup> The regulations adopted by the Board encompass a total of six unsuitability factors and nine suitability factors.<sup>32</sup> After the Board makes its decision, the governor is permitted to affirm, modify, or reverse "on the basis of the same factors which the parole authority is required to consider."<sup>33</sup>

The Board is notorious for denying parole to "99% of eligible inmates."<sup>34</sup> Thus, out of the estimated 5000 inmates eligible for parole,<sup>35</sup> 4950 remain in prison. Each inmate costs the State approximately \$35,587 per year to incarcerate.<sup>36</sup> By multiplying this by the number of inmates who remain in prison (4950), the total annual cost of keeping these inmates in prison is approximately \$176,155,650. The cost of supervising an inmate on parole is substantially lower—only \$4,338 per inmate per year,<sup>37</sup> or a total of \$21,473,100 for all 4950. Therefore, by granting parole to every single eligible inmate,

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ment is purchased and/or dominated by law enforcement labor unions so that virtually no 'lifer' gets out, even those who have earned it or are well past being a danger to society.").

26. CAL. PENAL CODE § 3041(a) (West 2008). The minimum time, minus good time credits, is usually twenty-five years for prisoners convicted of first-degree murder, fifteen years for those convicted of second-degree murder, and seven years for those convicted of other crimes that are punishable by a life sentence. *See* RUCKER & OVERLAND, *supra* note 21, at 182.

27. CAL. PENAL CODE § 3041(a) (West 2008).

28. *Id.*

29. *See id.* § 3041(b).

30. *Id.* § 3041(a).

31. *See* CAL. CODE REGS. tit. 15, § 2281 (2008).

32. *Id.* § 2402(c), (d).

33. CAL. CONST. art. V, § 8(b).

34. Bird, *supra* note 25.

35. *Id.*

36. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, FOURTH QUARTER 2008 FACTS AND FIGURES (2008), *available at* [http://www.cdcr.ca.gov/Divisions\\_Boards/Adult\\_Operations/docs/Fourth\\_Quarter\\_2008\\_Facts\\_and\\_Figures.pdf](http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/docs/Fourth_Quarter_2008_Facts_and_Figures.pdf).

37. *Id.*

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the State could theoretically save \$154,682,550 per year.<sup>38</sup> These figures demonstrate the enormity of the taxpayer cost at stake, and emphasize the need to make the right decisions regarding parole suitability determinations.

## B. The Rights Retained by Prisoners

Prisoners maintain three distinct rights in the context of parole: (1) a statutory right; (2) a procedural due process right; and (3) a substantive due process right. In regard to the first right, the Legislature intended for parole to be granted “unless . . . public safety requires a more lengthy period of incarceration.”<sup>39</sup> Therefore, parole denials that ignore public safety concerns violate the statute and the express intent of the Legislature.<sup>40</sup>

As to the second right, the California Supreme Court has recognized that “the requirement of procedural due process embodied in the California Constitution places some limitations upon the broad discretionary authority of the Board.”<sup>41</sup> Additionally, the court has stated that there is “a limited cognizance of rights of parole applicants to be free from an arbitrary parole decision, to secure information necessary to prepare for interviews with the [Board], and to something more than mere pro forma consideration.”<sup>42</sup> Thus, a prisoner’s procedural due process right is violated when, for example, the Board fails to issue a statement that articulates its reasons for denying parole.<sup>43</sup>

The substantive due process right is the focus of this Comment. The United States Supreme Court has held that when a state statute mandates the granting of parole pursuant, of course, to certain public safety requirements, it creates a constitutionally protected liberty interest.<sup>44</sup> The key lies in the “mandatory language” of the parole stat-

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38. This Comment recognizes that not every eligible inmate will necessarily be found suitable for parole.

39. CAL. PENAL CODE § 3041(b) (West 2008).

40. A more in-depth analysis of the statutory right is beyond the scope of this Comment.

41. *In re Rosenkrantz*, 59 P.3d 174, 203 (Cal. 2002) (citations omitted).

42. *In re Sturm*, 521 P.2d 97, 104 (Cal. 1974).

43. *Id.* at 107. A more in-depth analysis of the procedural due process right is beyond the scope of this Comment.

44. *Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987); *see also* *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979) (“[T]he expectancy of release provided in this statute is entitled to some measure of constitutional protection.”).

ute.<sup>45</sup> The California statute includes such mandatory language. It reads, in relevant part, the Board “*shall* set a release date unless . . . .”<sup>46</sup> Therefore, parole-eligible prisoners in California enjoy a presumption of conditional release, assuming they satisfy the requirements of the statute and the regulations.

### C. The Establishment of a Judicial Standard of Review

After a denial of parole by the Board or the governor,<sup>47</sup> prisoners may seek judicial review of the executive’s administrative decision.<sup>48</sup> They can also challenge their continued incarceration through a writ of habeas corpus.<sup>49</sup> The judiciary is required to uphold the decision of the executive if it satisfies the highly deferential “some evidence” standard; that is, if any evidence supports the conclusion that the inmate continues to pose a threat to public safety.<sup>50</sup> The standard has evolved over a number of landmark decisions by the California Supreme Court.

#### 1. *In re Rosenkrantz*

The foundational case of *In re Rosenkrantz* (“*Rosenkrantz*”) explained the proper standard by which courts should review parole decisions.<sup>51</sup> In 1986, Robert Rosenkrantz was convicted of second-degree murder.<sup>52</sup> He killed a boy named Redman in retaliation for a barrage of homophobic harassment and abuse.<sup>53</sup> The breaking point occurred when Redman revealed to Rosenkrantz’s father that his son was gay.<sup>54</sup>

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45. *Allen*, 482 U.S. at 377–78 (explaining that mandatory language creates the “presumption that parole release will be granted when the designated findings are made”) (internal quotation marks omitted).

46. CAL. PENAL CODE § 3041(b) (West 2008) (emphasis added).

47. The “Board” and the “governor” will be referred to collectively as “the executive” when specifying one or the other is unnecessary. Both exist within the executive branch, follow the same statutes and regulations, and are susceptible to the “some evidence” standard of review.

48. See *In re Rosenkrantz*, 59 P.3d 174, 205 (Cal. 2002) (holding that the judiciary has authority to review the Board’s decision to deny parole); *id.* at 209 (explaining that this ability to review such decisions also extends to decisions made by the governor).

49. The writ can be filed in California state court. *In re Streeter*, 423 P.2d 976, 977 (Cal. 1967) (“Habeas corpus is a proper remedy to test the propriety of proceedings before the [Board].”). If certain procedural requirements are satisfied, inmates can also file for habeas relief in federal court. See *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973).

50. *In re Lawrence*, 190 P.3d 535, 553 (Cal. 2008).

51. *In re Rosenkrantz*, 59 P.3d at 207.

52. *Id.* at 182–83.

53. See *id.* at 184–86.

54. *Id.* at 185.

Rosenkrantz purchased a gun, and then contacted Redman and urged him to recant what he had told his father. Redman refused.<sup>55</sup> The next day, Rosenkrantz waited for Redman outside of his house, confronted him, and demanded that he recant.<sup>56</sup> After Redman again refused, Rosenkrantz shot and killed him.<sup>57</sup>

In 1999, after several denials of parole, the superior court granted Rosenkrantz's writ of habeas corpus and ordered the Board to grant parole.<sup>58</sup> The Board held a new suitability hearing and reluctantly granted parole.<sup>59</sup> The governor reversed, citing the circumstances of the commitment offense and Rosenkrantz's failure to demonstrate remorse.<sup>60</sup> For a second time, the superior court granted habeas relief to Rosenkrantz, again finding the executive had deprived him of due process of law by failing to support its denial of parole with any evidence.<sup>61</sup> The appellate court affirmed.<sup>62</sup> The California Supreme Court explained that the standard of review is extremely deferential, permitting reversal only when the decision is unsupported by any evidence in the record.<sup>63</sup> Applying this standard, the court found two pieces of evidence that supported the governor's decision: (1) the offense was carried out in a "dispassionate and calculated manner,"<sup>64</sup> and (2) Rosenkrantz "did not show signs of remorse during" the month following the offense, while he was a fugitive.<sup>65</sup>

## 2. *In re Dannenberg*

In *In re Dannenberg* ("*Dannenberg*"),<sup>66</sup> the court attempted to clarify the standard of review. In 1986, a jury convicted John Dannenberg of the second-degree murder of his wife.<sup>67</sup> The two had experienced years of domestic problems.<sup>68</sup> In 1985, a domestic dispute between the couple resulted in the drowning death of Dannenberg's wife.<sup>69</sup> The

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55. *Id.*

56. *Id.*

57. *Id.* at 185–86.

58. *Id.* at 187.

59. *Id.* at 187–88.

60. *Id.* at 189.

61. *Id.*

62. *Id.*

63. *See id.* at 210.

64. *Id.* at 219.

65. *Id.* at 219–20.

66. 104 P.3d 783 (Cal. 2005).

67. *See id.* at 787.

68. *Id.*

69. *Id.*

evidence suggested that Dannenberg had struck his wife with a wrench and either pushed her into a filled bath or did not prevent her from drowning after she fell into it.<sup>70</sup>

After the Board denied parole in 1999, Dannenberg filed a petition for habeas corpus.<sup>71</sup> The superior court granted the writ, and the appellate court affirmed in part, reasoning that the Board should have compared Dannenberg's crime to other similar offenses and determined parole suitability based on that analysis.<sup>72</sup> The case reached the California Supreme Court, which first clarified the standard that was established in *Rosenkrantz*:

So long as the Board's finding of unsuitability flows from pertinent criteria, and is supported by "some evidence" in the record before the Board, the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders.<sup>73</sup>

The court applied this standard and upheld the Board's determination of unsuitability,<sup>74</sup> reasoning that the "exceptional callousness and cruelty" of the commitment offense provided "some evidence" in support of the Board's decision.<sup>75</sup>

### 3. *In re Lawrence*

In August 2008, the California Supreme Court again addressed the proper standard for reviewing parole denials. It considered the habeas petitions of two defendants—Sandra Lawrence and Richard Shaputis—and issued two opinions, released together as companion cases. The bulk of the court's legal analysis takes place in *In re Lawrence* ("*Lawrence*").<sup>76</sup> A jury convicted Lawrence of first-degree murder in 1982, and sentenced her to life in prison with the possibility of parole.<sup>77</sup> She had been involved in an affair with a dentist named Williams.<sup>78</sup> When Williams terminated the affair, Lawrence took her

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70. *See id.*

71. *Id.* at 789.

72. *Id.* at 789–90.

73. *Id.* at 795 (citation omitted).

74. *Id.* at 803.

75. *Id.* at 805.

76. 190 P.3d 535 (Cal. 2008).

77. At the time, "life imprisonment," as opposed to "25 years to life," was a possible penalty for this crime. *Id.* at 538.

78. *Id.* at 539–40.



anger out on Williams's wife, Rubye. Lawrence went to Rubye's office, where she repeatedly shot her and stabbed her with a potato peeler.<sup>79</sup>

From December 1993 to January 2006, the Board found Lawrence suitable for parole four times; yet, each time, the governor reversed.<sup>80</sup> In the most recent reversal, Governor Schwarzenegger asserted that the commitment offense was sufficient justification for the reversal.<sup>81</sup> The Governor also cited evidence that, early in her incarceration, Lawrence received unfavorable mental health evaluations and had denied killing Rubye.<sup>82</sup> Lawrence filed a writ of habeas corpus, which eventually reached the California Supreme Court.<sup>83</sup>

Again, the court first clarified the "some evidence" standard, by holding that the proper inquiry is whether there is "some evidence" the inmate poses a current threat to society, not merely "some evidence" of an unsuitability factor.<sup>84</sup> It reasoned this was not only mandated by statute, but also required by the due process clauses of the state and federal constitutions.<sup>85</sup> The court then analyzed the use of the commitment offense as the basis for depriving parole to Lawrence. Noting the split in appellate court rulings that had emerged in the wake of *Rosenkrantz* and *Dannenberg*, the court clarified that the circumstances of the commitment offense are relevant only if they are probative of the prisoner's current dangerousness.<sup>86</sup> Applying this revised rule, the court found that Lawrence's "due process and statutory rights were violated by the Governor's reliance upon the immutable and unchangeable circumstances of her commitment offense."<sup>87</sup>

#### 4. *In re Shaputis*

In the companion case, *In re Shaputis* ("*Shaputis*"),<sup>88</sup> the court applied the legal standard that it clarified in *Lawrence*. In 1987, a jury convicted Shaputis of the second-degree murder of his wife and sentenced him to seventeen years to life in prison.<sup>89</sup> The record indicated that on the night of the murder, Shaputis had been drinking heavily

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79. *Id.* at 540.

80. *Id.* at 542-44.

81. *Id.* at 545.

82. *Id.*

83. *Id.* at 545-46.

84. *Id.* at 552.

85. *Id.* at 552-53.

86. *Id.* at 555.

87. *Id.* at 564.

88. 190 P.3d 573 (Cal. 2008).

89. *Id.* at 574.

and, at some point, began to fight with his wife.<sup>90</sup> During the fight, Shaputis shot and killed his wife.<sup>91</sup>

After multiple parole denials, Shaputis filed a writ of habeas corpus in the superior court, which affirmed the latest parole denial.<sup>92</sup> The appellate court reversed, finding there was no evidence of Shaputis' unsuitability for parole.<sup>93</sup> In its new suitability hearing, the Board begrudgingly approved Shaputis for parole.<sup>94</sup> The governor reversed, and Shaputis filed a second writ of habeas corpus.<sup>95</sup> Again, the superior court denied the writ, and the appellate court reversed, reasoning that Shaputis no longer posed a risk to the public and therefore should be granted parole.<sup>96</sup> The California Supreme Court reversed, reinstating the governor's denial of parole.<sup>97</sup> The Court recognized that there was evidence Shaputis may no longer pose a risk to society, and that he had been sober for many years, was advanced in age, and had chronic health problems.<sup>98</sup> Yet, the Court concluded that "the gravity of the commitment offense and petitioner's current attitude toward the crime . . . provide[d] evidence of the risk *currently* posed by petitioner."<sup>99</sup> The Court attempted to reconcile this holding with its decision in *Lawrence* by noting that, in *Lawrence*, the murder "was an isolated incident, committed while [Lawrence] was subject to emotional stress that was unusual or unlikely to recur."<sup>100</sup>

## II. The Effects of Proposition 9

On November 4, 2008, California voters approved Proposition 9 ("Prop 9"),<sup>101</sup> which, among other things, altered the process by which parole is granted or denied.<sup>102</sup> The passage of this initiative has aggravated the preexisting problems with the regulations and stan-

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90. *Id.* at 576.

91. *Id.* at 578.

92. *Id.* at 577-78.

93. *Id.* at 578.

94. *Id.* at 579.

95. *Id.* at 580.

96. *Id.*

97. *Id.* at 585.

98. *See id.*

99. *Id.* at 575.

100. *Id.* at 584.

101. OFFICE OF THE SECRETARY OF STATE OF CAL., VOTES FOR AND AGAINST NOVEMBER 4, 2008, STATE BALLOT MEASURES (2008), *available at* [http://www.sos.ca.gov/elections/sov/2008\\_general/7\\_votes\\_for\\_against.pdf](http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf).

102. OFFICE OF THE SECRETARY OF STATE OF CAL., TEXT OF PROPOSED LAWS, 128-32 (2008), *available at* <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf> [hereinafter TEXT OF PROPOSED LAWS].

dard of review. Prop 9 included numerous changes to the Penal Code as well as to the California Constitution. The most significance changes in the context of parole are to the constitution and to section 3041.5 of the California Penal Code.

### A. Changes to the California Constitution

The legislation enacted by Prop 9 is titled the “Victim’s Bill of Rights Act of 2008: Marsy’s Law.”<sup>103</sup> The proposition amended the constitution in many ways, three of which pose particular concerns. First, Prop 9’s definition of “victim”<sup>104</sup> sheds light on the fact that Prop 9 was less of a “victims’ rights” effort, and more of an attempt to diminish the rights of prisoners. It highlights the political influence and discriminatory practices at work. Second, Prop 9 alters the way in which the victim’s family members are included in the parole determination process. These changes do not provide actual rights to victims and have the potential for causing arbitrary and discriminatory denials of parole. Finally, there is a broad policy statement at the end of the proposition that demeans prisoners and their rights. This third change highlights the political posturing at work in this context.

#### 1. Definition of “Victim”

Prop 9 amended the constitution to define the term “victim” as follows:

[A] “victim” is a person who suffers direct . . . harm . . . [and] also includes the person’s spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term “victim” does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.<sup>105</sup>

While there is certainly logic—and accuracy—in extending the term to the family members of the direct victim, it is fundamentally inconsistent to then curtail the definition (as is done in the final sentence). One’s rights as a victim should not hinge on one’s condition as prisoner. While the People, acting as legislators, certainly have the right to enact broad definitions of terms like “victim,” they cannot have it both ways. It must be either narrow, encompassing only the direct victim, or broad, covering *all* family members and others, regardless of their statuses as prisoners. It is sensible to exclude the in-

103. *Id.* at 128.

104. *Id.* In this context, “victim” really means the *family* of the victim.

105. CAL. CONST. art. I, § 28(e).

mate, who actually harmed the victim, as well as those who would not act in the interests of a minor victim. But the definition goes far beyond this and includes anyone who is currently in prison. By illogically and discriminatorily defining victim, a cloud of corruption and illegitimacy is cast on this entire legislation. This definition indicates that the drafters were not truly concerned with victims' rights, but rather merely wanted to diminish the rights of the prisoner under the guise of compassion for those harmed by the crime.

## 2. Inclusion of "Victims" in Parole Determinations

Prop 9 added the following section to the California Constitution:

[A] victim shall be entitled to the following rights: . . . To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.<sup>106</sup>

The provision that the Board consider information provided by the victim poses both practical and constitutional problems. First, from a practical standpoint, how is the Board to consider such information? Should it assume the absolute validity of any facts provided by the victim? How is the Board to incorporate unquantifiable information—such as fear of the inmate or disapproval of his or her release on parole—into its analysis? These questions are raised, not to mock the potentially noble efforts of victims' rights activists, but rather to highlight that Prop 9 may in fact offer empty promises. Prop 9 will only complicate the decision-making process, charge it with emotion, and increase the possibility that the Board makes a determination based on how it feels rather than on real evidence.

This provision also poses a threat to prisoners' due process rights in that it may lead to arbitrary and discriminatory denials of parole. For example, if two inmates, convicted of the same crime, were both eligible and equally suitable for parole, the proper outcome would be for both to be paroled. However, after Prop 9, if one set of victims is strongly opposed to parole, then they may be able to convince the Board to deny release. Thus, two equally suitable parole candidates would be arbitrarily given different treatment.

Although these concerns are worst-case scenarios, they highlight the danger in the legislation of emotion. It may seem fair to include victims in the parole-determination process, but they, presumably, are not experts in criminology. More importantly, a victim's close connec-

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106. *Id.* § 28(b)(15).

tion to the inmate no doubt prejudices his or her opinion of that inmate's suitability for parole. As terrible as their crimes may have been, the justice system should not allow for the denial of due process based on animus or vengeance. Instead, justice demands a fair procedure that has the sole aim of accurately determining an inmate's threat to society.

### 3. Unnecessary Statements That Degrade Prisoners' Rights

Prop 9 inserted the following language into the constitution: "The current process for parole hearings is excessive, especially in cases in which the defendant has been convicted of murder. The parole hearing process must be reformed for the benefit of crime victims."<sup>107</sup> As a preliminary matter, this provision is completely devoid of any substantive law. It is a political statement. The California Constitution, and the process of amending it, should not be used as a platform for asserting a political agenda. It is no secret that prisoners are not a well-liked group of individuals. But characterizing efforts to ensure fairness and equity in the parole system as excessive is unwarranted. In addition, taking such a position is impractical given extreme prison overcrowding<sup>108</sup> and the claim that 99% of eligible prisoners are denied parole.<sup>109</sup> It is irresponsible to refer to the parole process as excessive when, in fact, California's prisons are in desperate need of population reduction, and there are thousands of inmates who may actually be suitable for parole.

#### B. Changes to Section 3041.5 of the California Penal Code

Prop 9 resulted in drastic revisions, as well as numerous additions, to section 3041.5 of the California Penal Code. Perhaps the most astonishing change is the increase in the waiting period for a reconsideration hearing after parole has been denied.<sup>110</sup> While this does not alter the basis upon which parole is ultimately granted or denied, it aggravates the problem by prolonging the incarceration of an inmate who is worthy of parole, but has been wrongfully denied it based on a flawed initial suitability determination. In other words, while the changes to section 3041.5 do not directly affect the determi-

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107. CAL. CONST. art. I, § 28 (f)(6).

108. See Bird, *supra* note 25.

109. See *id.*

110. See TEXT OF PROPOSED LAWS, *supra* note 102, at 130–31 (extending the maximum waiting time from five to *at least* fifteen years, and the minimum from one to *at the earliest* three years).

nation of a prisoner's suitability for parole, they aggravate any errors that *do* take place. Until California repairs its broken system of parole suitability determinations, it is unwise to so drastically extend the waiting period for the reconsideration of prisoners' claims.

There are two other important changes to section 3041.5. The first is subsection (6) of paragraph (a), which reads as follows: "The board shall set a date to reconsider whether an inmate should be released on parole that ensures a meaningful consideration of whether the inmate is suitable for release on parole."<sup>111</sup> The problem is that neither this sentence, nor any other part of the section, explains what is meant by "meaningful consideration." Presumably, this refers to section 3041, and the requirement that parole be granted *unless* the inmate is determined to pose a current threat to society.<sup>112</sup> On the other hand, the context here is different; it concerns a reconsideration hearing rather than the original granting of parole. Therefore, this addition to section 3041.5 injects more uncertainty and potential for arbitrariness into the system. The new language provides the Board with statutory justification for unnecessarily prolonging the review of an inmate's suitability for parole. This subsection must be amended to clarify its intent and provide better standards for the Board to follow.

The second relevant addition also concerns the timing of an inmate's rehearing. Subsection (b)(4) allows the Board, in its discretion, to advance the rehearing to an earlier date, but only after it considers "the views and interests of the victim."<sup>113</sup> As with the changes to the constitution, this injects the potential for arbitrariness and discrimination into the process.<sup>114</sup> It is improper, and potentially unconstitutional, to allow victims to dictate the conditions of an inmate's rights—in this case, the right to a hearing.<sup>115</sup>

### C. A Final Word on "Victims' Rights"

The respect for, and maintenance of, victims' rights is fundamental to our legal system. However, prisoners, too, retain certain funda-

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111. CAL. PENAL CODE § 3041.5(a)(6) (West 2008).

112. *See id.* § 3041(b).

113. *Id.* § 3041.5(b)(4).

114. *See supra* Part II.A.2.

115. CAL. PENAL CODE § 3041(a) (West 2008); *See Biggs v. Terhune*, 334 F.3d 910, 915 (9th Cir. 2003) (discussing the statutory right to a parole-suitability hearing). Additionally, since there is a *substantive* due process right to parole in California, it necessarily follows that in order to protect that right, there must also be a *procedural* due process right—i.e., a right to a hearing.

mental rights.<sup>116</sup> These two interests must be balanced. And at some point, the rights of victims must be recognized as sufficiently vindicated by our system. In certain contexts, like parole suitability hearings, the rights of victims must give way to the liberty interests of inmates to be free from prejudiced adjudications. Three reasons support this conclusion.

First, victims are represented throughout the investigation and trial of a criminal case. Through a conviction, justice is restored to the victim and to society at large. After this point, however, the defendant—now, prisoner—is the responsibility of the State, which must make all decisions relating to the confinement, control, and rehabilitation of the inmate. Parole-suitability determinations fall within the scope of these duties. The rights of the victim, having been addressed, should not be revived merely because an inmate becomes eligible for parole.

Second, criminal prosecutions are carried out in the name of the State. The civil law provides ample tools for victims who seek redress from criminal defendants, such as restraining orders, wrongful death suits, and other tort claims. Especially in the parole context, where potential dangerousness should be the only factor, a consideration of the retributive concerns of victims is improper.

Finally, and perhaps most important, victims should not be allowed to influence parole determinations given the due process rights at stake. Constitutional rights, such as the right to parole, cannot be arbitrarily deprived. Allowing victims to influence the parole process will undoubtedly lead to such results. For example, if one inmate's direct victim did not have any family members, then there would be no victims left to oppose the granting of parole. Another similarly situated inmate may not be so "lucky." Such disparate treatment should not be tolerated when constitutional rights are at stake.

### III. Problems with the Board's Regulations

#### A. The Unsuitability Factors

In *Lawrence*, the court stated that denying parole to an eligible inmate without a showing of some evidence of current dangerousness deprives the inmate of due process.<sup>117</sup> But the court's solution does

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116. See, e.g., *Turner v. Safley*, 482 U.S. 78, 84 (1987) (famously stating that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution" and citing numerous examples of rights retained by prisoners).

117. *In re Lawrence*, 190 P.3d 535, 552 (Cal. 2008).

not solve the problem that it should have recognized; many of the factors currently considered by the Board can *always* show some evidence of current dangerousness. They are overbroad, misused, and many “contain such vague criteria that the [Board] can in practice ignore proportionality in sentencing.”<sup>118</sup> Thus, they permit the Board to provide a mere pro forma review, without offering adequate reasoning for the decision. This result is illustrated by the following factor-by-factor analysis of these regulations.

### 1. The “Commitment Offense”

The “Commitment Offense” is the most complex factor; it includes five sub-factors and it has the overarching requirement that the offense was committed “in an especially heinous, atrocious or cruel manner.”<sup>119</sup> The United States Supreme Court has found this exact language to be unconstitutionally vague in capital cases.<sup>120</sup> In those cases, the Court analyzed the aggravating circumstances used to impose the death penalty, but the rationale is the same here; certain language is simply so vague that it fails to provide any standard for distinguishing between different murders. In the Court’s own words, “[t]o say that something is ‘especially heinous’ merely suggests that the individual jurors should determine that the murder is more than just ‘heinous,’ whatever that means.”<sup>121</sup> Like a jury attempting to make a sentencing determination, the executive is similarly left completely unguided by such vague language.

Beyond being overly vague, this factor is also problematic in that it addresses conduct that is unchangeable. As one commentator argues, “one wonders why an inmate whose offense alone precluded parole would *ever* become suitable for parole. The facts of the commitment offense will not change.”<sup>122</sup> Of course, *Lawrence* explicitly requires that this factor actually be probative of current danger-

118. Alexander K. Mircheff, Comment, In re Dannenberg: *California Forgoes Meaningful Judicial Review of Parole Denials*, 39 LOY. L.A. L. REV. 907, 914 (2006).

119. CAL. CODE REGS. tit. 15, § 2402(c)(1) (2008).

120. *Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988); see also *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (forbidding the use of similar language—“outrageously or wantonly vile, horrible and inhuman”—reasoning that “[a] person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman’”).

121. *Maynard*, 486 U.S. at 364.

122. See Mircheff, *supra* note 118, at 935–36; see also *id.* at 940 (“Of all the factors that could potentially impact public safety, a commitment offense fifteen years prior seems the least relevant.”).



ousness.<sup>123</sup> But the court should not have had to mandate this, as it is already statutorily required. Furthermore, this simple judicial decree does not solve the problem. The standard of review is so deferential that the executive merely has to provide *some* articulation of why the offense is probative of dangerousness and, the court must defer to that determination under its own standard. This is exactly what happened in *In re Hyde* (“*Hyde*”),<sup>124</sup> where a California appellate court reinstated a denial of parole based solely on the commitment offense.<sup>125</sup>

In 1973, Hyde was convicted of first-degree murder, four counts of robbery, and two assault charges.<sup>126</sup> In 2005, after Hyde was denied parole for the twentieth time,<sup>127</sup> the superior court granted his writ of habeas corpus and reversed the Board’s most recent denial.<sup>128</sup> Before reversing the superior court’s decision, the appellate court cited a laundry list of positive factors, all tending to show suitability. The court noted that Hyde had been free of any disciplinary infractions for ten years, parole-eligible for nineteen years, only eighteen at the time of the offense, and that thirty-three years had passed since the crime.<sup>129</sup> Furthermore, the court found that he “was a positive and perhaps notable participant in his institution’s training programs, activities and organizations, and had positive [reviews] from the training supervisors and prison staff.”<sup>130</sup> Nevertheless, the court held that some evidence supported the Board’s denial of parole because “these crimes went beyond the minimum necessary to commit the offenses, and the fashion in which the offenses were committed was cruel and callous, calculated, and demonstrated an exceptional disregard for human suffering.”<sup>131</sup> One year later, the California Supreme Court in *Lawrence* cited *Hyde* with approval.<sup>132</sup> The court reasoned the *Hyde* court had “concluded that the circumstances of petitioner’s numerous commitment offenses were both particularly egregious and provided evidence of his continuing threat to public safety.”<sup>133</sup> With this finding, the court sanctioned the use of the commitment offense as

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123. *In re Lawrence*, 190 P.3d 535, 555 (Cal. 2008).

124. 65 Cal. Rptr. 3d 162 (Ct. App. 2007).

125. *Id.* at 175–76.

126. *Id.* at 163.

127. *See id.* at 165.

128. *Id.* at 169.

129. *Id.* at 174–75.

130. *Id.*

131. *Id.* at 175.

132. *In re Lawrence*, 190 P.3d 535, 556 n.15, 565 (Cal. 2008).

133. *Id.* at 556 n.15.

the sole factor for denying parole even when the underlying offense occurs in the distant past—thirty-three years in this case.

## 2. “Previous Record of Violence”

The second factor, “Previous Record of Violence,”<sup>134</sup> presents the same problem as the “Commitment Offense” in that it refers to unchangeable conduct. The California Court of Appeals addressed both of these factors, and raised concerns about each:

The commitment offense is one of only two factors indicative of unsuitability a prisoner cannot change (the other being his “Previous Record of Violence”). Reliance on such an immutable factor “without regard to or consideration of subsequent circumstances” may be unfair, and “runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation.”<sup>135</sup>

However, this factor goes even further, specifying that “serious assaultive behavior at an early age” should be given special attention.<sup>136</sup> The regulations do not explain why this is relevant to current dangerousness, or how the factor is to be used. In addition, this factor poses an ethical concern, alluded to by the appellate court; how are individuals ever to be rehabilitated if past bad conduct forever haunts them? While *Lawrence* held that this factor may only be used if it is truly probative of current dangerousness, this is an extremely low, or even non-existent, hurdle, as evidenced by *Hyde*.

## 3. “Unstable Social History”

The third unsuitability factor allows the Board to look at whether “[t]he prisoner has a history of unstable or tumultuous relationships with others.”<sup>137</sup> This is both vague and overbroad; it provides no indication of how far back the Board should look into the inmate’s “history,” what is meant by “unstable or tumultuous,” or how any of this is probative of current dangerousness. These concerns are not merely theoretical. In *In re Bettencourt* (“*Bettencourt*”),<sup>138</sup> a California appellate court held that the fact that the inmate had “drank alcohol and used drugs” when he was younger provided “a modicum of evidence in sup-

134. CAL. CODE REGS. tit. 15, § 2402(c)(2) (2008).

135. *In re Scott*, 34 Cal. Rptr. 3d 905, 919–20 (Ct. App. 2005) (internal citations and footnote omitted). It should be noted that the claim that these are the “only two factors” that the prisoner cannot change is not in fact true; virtually all of the unsuitability factors carry a level of immutability. See *infra* Parts III.A.3–6.

136. CAL. CODE REGS. tit. 15, § 2402(c)(2) (2008).

137. *Id.* § 2402(c)(3).

138. 67 Cal. Rptr. 3d 497 (Ct. App. 2007).

port of the Board's finding that Bettencourt has an unstable social history."<sup>139</sup> The court in *Lawrence* reviewed *Bettencourt*, and acknowledged some concern over the appellate court's use of the "Commitment Offense."<sup>140</sup> However, it specifically cited the use of the "Unstable Social History" factor as evidence that the case was properly decided and should not be overturned.<sup>141</sup>

An even more deferential approach was taken in *In re Burns* ("*Burns*"),<sup>142</sup> where an appellate court concluded, without any analysis, that "[t]he Board also found that Burns has a history of unstable or tumultuous relationships with others" and that "[t]he record contains 'some evidence' supporting this finding."<sup>143</sup> Again, the court in *Lawrence* explicitly approved of this case. It reasoned that there was no error since it was not the *only* evidence relied on by the Board.<sup>144</sup> This is surprising because the *Burns* court stated there was evidence to support the *finding* and did not specify whether this evidence was actually probative of current dangerousness. Thus, in the very case in which it announced this requirement, the court failed to enforce it.

In both of these decisions, the court seemed comforted by the fact that the appellate courts had cited numerous factors of unsuitability.<sup>145</sup> However, the definition of the "some evidence" standard demonstrates that this is irrelevant, because only a modicum of evidence is required.<sup>146</sup> It is troubling how easily these courts have used the "Unstable Social History" factor to uphold denials of parole. This factor again raises the question of how an inmate is ever to become rehabilitated. More importantly, the factor poses a serious threat to the inmate's liberty interest in being granted parole *unless* he or she is found to pose a *current* threat to society.

#### 4. "Sadistic Sexual Offenses"

The fourth unsuitability factor allows the Board to consider whether "[t]he prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim."<sup>147</sup> No California court has addressed the use of this factor, nor has any

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139. *Id.* at 513.

140. *See In re Lawrence*, 190 P.3d 535, 565 (Cal. 2008).

141. *Id.*

142. 40 Cal. Rptr. 3d 1 (Ct. App. 2006).

143. *Id.* at 7 (internal citation omitted).

144. *In re Lawrence*, 190 P.3d at 565.

145. *See id.*

146. *In re Rosenkrantz*, 59 P.3d 174, 184 (Cal. 2002).

147. CAL. CODE REGS. tit. 15, § 2402(c)(4) (2008).

commentator analyzed it. It raises the question of why sexual assaults are singled out. The regulations already require the Board to address past violent crimes and social problems. Therefore, this factor is superfluous. In all likelihood, political motives were behind its creation. Sex crimes invoke a particular disdain from the public, and politicians often make special exceptions in the law to confront them.<sup>148</sup> But the law must be reasoned and logical, rather than vengeful and emotional. This is particularly important in this context given the prisoners' rights at stake. The Board, which is embroiled in the politics of the executive branch, cannot be allowed to be unduly influenced by the repugnance of the inmate's past crimes. This threat is already present with the first three factors, but it reaches a new level of inappropriateness here. This factor should therefore be eliminated, so as to prevent this threat from becoming a reality.

### 5. "Psychological Factors"

The fifth unsuitability factor calls for the Board to analyze whether "[t]he prisoner has a lengthy history of severe mental problems related to the offense."<sup>149</sup> This factor was at issue in the *Bettencourt* case, where it proved problematic.<sup>150</sup> The court noted two pieces of evidence that supported the Board's finding of this factor. First, the court addressed the evaluation of Dr. Donoviel, assigned to Bettencourt, who found that the risk of "future violent behavior was 'no greater than for others in society' only if Bettencourt received positive recognition and there were 'no significant threats to his narcissistic ego.'"<sup>151</sup> Dr. Donoviel also recommended that Bettencourt participate in one-on-one psychotherapy.<sup>152</sup> The court found these two statements provided some evidence of current dangerousness, and reasoned that "the Board could infer from Dr. Donoviel's report that Bettencourt's release on parole would pose an unreasonable risk of danger to society unless he received psychotherapy treatment to enable him to avoid responding violently when his narcissistic ego was threatened."<sup>153</sup>

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148. See, e.g., CAL. EVID. CODE § 1108 (West 2003) (allowing evidence of past sexual offenses to be admitted in a current sex crime preceding). This is an exception to the general rule that character evidence is inadmissible to prove conduct. CAL. EVID. CODE § 1101 (West 1996).

149. CAL. CODE REGS. tit. 15, § 2402(c)(5) (2008).

150. *In re Bettencourt*, 67 Cal. Rptr. 3d 497, 514–15 (Ct. App. 2007).

151. *Id.*

152. *Id.*

153. *Id.*

In analyzing the court's reasoning, it is appropriate to reiterate the fact that the members of the Board, while experts in penology, perhaps lack the requisite psychological training to make the determinations called for by this factor.<sup>154</sup> While, as in this case, psychologists and doctors may be assigned to the prisoners, the ultimate decision rests with the Board. It would aid the process if such professionals were actually members of the Board. Furthermore, as evidenced by this case, the Board is not required to analyze or interpret the findings of the doctors in order to be given judicial deference: the court merely states that "the Board *could infer* . . ." <sup>155</sup> This demonstrates that the courts will affirm a parole denial even in the absence of proof that the Board *actually considered* the inmate's suitability. Thus, a parole denial can be based solely on an unfavorable psychological report.

The second piece of evidence was the fact that Bettencourt interjected twice at his parole suitability hearing. While Bettencourt argued that he had merely tried to take responsibility for the crime, and had not been violent or inappropriate in his interruptions, the Board concluded that these "outbursts" raised concerns "as to how Bettencourt would behave if free in the community."<sup>156</sup> The Board based its concerns on testing performed by Dr. Donoviel, and his finding that "Bettencourt's test results were consistent with 'individuals [who] are noted to have problems with emotional control. They tend to overuse denial to control aggressive impulses. While they are generally over controlled they occasionally may have angry/violent outbursts that cause concern or embarrassment.'" <sup>157</sup>

The court dismissed Bettencourt's argument quickly, reasoning that Bettencourt's claim amounted to an implicit contention that the Board had awarded undue weight to this evidence and did not have authority, under the some evidence standard, to reweigh the evidence.<sup>158</sup> The opinion demonstrates that under the current standard courts do not even have the power to ask whether the Board acted unreasonably in its weighing of evidence because the some evidence standard dictates that *any* evidence is sufficient. Even under the current standard, however, the court's analysis is flawed. It seems to have ignored the critical part of Dr. Donoviel's statement. Dr. Donoviel

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154. See Bird, *supra* note 25.

155. *In re Bettencourt*, 67 Cal. Rptr. 3d at 514 (emphasis added).

156. *Id.* at 515.

157. *Id.* at 514.

158. *Id.*

noted that any outbursts that Bettencourt may experience would cause “concern or embarrassment,” but he did *not* say that such outbursts were dangerous, which should have been the sole focus of the Board’s inquiry.

## 6. “Institutional Behavior”

The sixth unsuitability factor involves an analysis of the inmate’s “serious misconduct” in prison.<sup>159</sup> This factor is an important one and should be retained. On its face, this factor is certainly probative of current dangerousness. However, caution is required regarding the use of misconduct that has occurred in the distant past. Forever holding such misconduct against the inmate not only diminishes the drive for good behavior, but also deprives the inmate of the due process right to a consideration of *current* dangerousness.

### B. The Suitability Factors

The nine suitability factors raise different concerns from those of the unsuitability factors. While unsuitability factors primarily present “facial” problems, the suitability factors raise “as applied” concerns. The Board often uses the *lack* of a suitability factor to show unsuitability. This practice should be discontinued because the burden is on the Board to show unsuitability, *not* on the inmate to show suitability.<sup>160</sup>

In particular, California courts often use an inmate’s inability to show signs of remorse<sup>161</sup> as evidence of his or her unsuitability for parole. For example, in *Rosenkrantz*, the court agreed with the following statement made by the governor: “[Rosenkrantz] demonstrated a lack of remorse by affirming his violent act after the crime was committed, attempting to mitigate his role in the crime, portraying himself as a victim, lying about numerous aspects of the murder, and not taking full responsibility for the crime.”<sup>162</sup> Similarly, in *In re Shaputis*,<sup>163</sup> the court made the following statement:

[W]e conclude that some evidence in the record supports the Governor’s conclusion that petitioner remains a threat to public safety in that he has failed to take responsibility for the murder of his wife, and despite years of rehabilitative programming and participation in substance abuse programs, has failed to gain insight into his previous violent behavior, including the brutal domestic vio-

159. CAL. CODE REGS. tit. 15, § 2402(c)(6) (2008).

160. See *supra* Part I.B and accompanying notes.

161. CAL. CODE REGS. tit. 15, § 2402(d)(3) (2008).

162. *In re Rosenkrantz*, 59 P.3d 174, 189 (Cal. 2002).

163. 190 P.3d 573 (Cal. 2008).

lence inflicted upon his wife and children for many years preceding the commitment offense.<sup>164</sup>

Later in the opinion, the court conceded that the record actually *did* show that Shaputis had demonstrated some remorse for his crimes, but concluded that this showing was simply inadequate.<sup>165</sup>

Similar to remorse, the Board has also used the failure of an inmate to show adequate understanding and “[p]lans for [the] [f]uture”<sup>166</sup> as evidence of current dangerousness.<sup>167</sup> However, an inmate’s dangerousness to society cannot be demonstrated by his inability to show concrete plans for the future, in itself. Perhaps, on a statistical or theoretical level, those most likely to commit future acts of violence are those with the least direction and structure in their lives. But statistical and theoretical information is not evidence in any individual case. If that type of information is to be considered, the next step would be for the Board to impose a minimum income requirement in order for someone to be granted parole since, on average, those with less money commit more crimes.<sup>168</sup> This trend is dangerous and discriminatory.

One more suitability factor, battered woman syndrome,<sup>169</sup> is potentially problematic. There is no evidence that the Board has ever used a female inmate’s inability to show that she was suffering from battered woman syndrome at the time of the offense as justification for denying parole. In this way, the factor is less troublesome. That being said, this factor does pose some concerns regarding disparate treatment along gender lines. For example, Rosenkrantz, who killed the man who outed him to his father, arguably had a claim similar to a battered woman syndrome argument in that his murder may have been the breaking point in a long history of abuse and fear of his father.<sup>170</sup> Yet, even if Rosenkrantz had been a woman, he still would

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164. *Id.* at 575.

165. *Id.* at 584 (“The record establishes, moreover, that although petitioner has stated that his conduct was ‘wrong,’ and feels some remorse for the crime, he has failed to gain insight or understanding into either his violent conduct or his commission of the commitment offense.”).

166. CAL. CODE REGS. tit. 15, § 2402(d)(8) (2008).

167. *See, e.g.,* Willis v. Campbell, No. 2:06-cv-01829-AK, 2009 WL 50076, at \*2 (E.D. Cal. Jan. 7, 2009); People v. Chastain, No. E032987, 2004 WL 542228, at \*3 (Cal. Ct. App. Mar. 19, 2004).

168. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, Nov. 2000, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

169. CAL. CODE REGS. tit. 15, § 2402(d)(5) (2008).

170. *See supra* Part I.C.1. The facts of the case also suggest that Rosenkrantz’s father was opposed to homosexuality, so much so that Rosenkrantz may have felt threatened and

not have benefited from this factor because the abuse was not the result of domestic violence.<sup>171</sup> Therefore, this factor allows for the different treatment of inmates—both male and female—who have suffered abuse, based only on the happenstance of the source of the abuse. To fix this unfairness, the factor should be revised, and the Board should take into consideration *any* type of abuse that may have spurred the inmate to commit violent acts.

The remaining five suitability factors pose insignificant concerns. The age factor allows the Board to view advanced age as a characteristic of suitability.<sup>172</sup> The other factors merely provide the converse to an unsuitability factor: the lack of a juvenile record or criminal history;<sup>173</sup> a history of “stable relationships with others;”<sup>174</sup> positive institutional behavior;<sup>175</sup> and whether the crime was “the result of significant stress . . . especially if the stress [was] built over a long period of time.”<sup>176</sup> These five factors pose fewer risks, as the inability for prisoners to demonstrate them will often mean that the Board can provide evidence of the converse. Thus, they will rarely be used to punish the inmate for his or her inability to demonstrate suitability.

#### IV. Policy Concerns

##### A. California’s Overflowing Prisons

As of February 2009, California prisoners were reportedly operating at 188% of capacity.<sup>177</sup> Another report estimated that, at the end

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desperate. *See In re Rosenkrantz*, 59 P.3d 174, 185 (Cal. 2002) (describing how Rosenkrantz’s father cried and “angrily questioned him” about Redman’s allegations that he was gay); *see also id.* at 184 (“Petitioner testified that he knew at an early age that he was gay but also knew that this circumstance was unacceptable to his family—particularly to his father.”).

171. CAL. CODE REGS. tit. 15, § 2000(b)(7) (2008) (“Evidence of the effects of physical, emotional, or mental abuse upon the beliefs, perceptions, or behavior of *victims of domestic violence* where it appears the criminal behavior was the result of that victimization.” (emphasis added)).

172. *See id.* § 2402(d)(7).

173. *Id.* § 2402(d)(1), (d)(6).

174. *Id.* § 2402(d)(2).

175. *Id.* § 2402(d)(9).

176. *Id.* § 2402(d)(4). This is essentially the converse of the fifth sub-factor of the commitment offense, which reads: “[t]he motive for the crime is inexplicable or very trivial in relation to the offense.” *Id.* § 2402(c)(1)(E).

177. Matt Kelley, *Will California Free 57,000 Prisoners?*, CRIMINAL JUSTICE—CHANGE.ORG, Feb. 12, 2009, [http://criminaljustice.change.org/blog/view/will\\_california\\_free\\_57000\\_prisoners](http://criminaljustice.change.org/blog/view/will_california_free_57000_prisoners).



of 2007, they were operating at 170% capacity.<sup>178</sup> These figures show that the conditions of California's prisons are dire. A number of solutions have been proposed, including a strict population cap or the outsourcing of prisoners to correction facilities in other states.<sup>179</sup> Some have even suggested simply releasing certain prisoners.<sup>180</sup> This crisis, therefore, provides an excellent reason to repair the broken parole system.

This is not to say that every parole-eligible inmate should be released. But perhaps this is the time to recognize that the "some evidence" standard is simply too weak to ensure the release of inmates who do not pose an unreasonable threat to society. The standard should be strengthened, and the regulations reworked, so as to ease the strain on California's prisons.

## B. The Functional Purpose of Parole

Parole is a modern creation, intended to increase the humanness of the penitentiary system by giving eligible inmates the "hope and prospect of liberation from the prison walls under the restrictions and conditions of a parole."<sup>181</sup> Therefore, the original purpose of parole was rehabilitation, rather than retribution.<sup>182</sup> As explained by the United States Supreme Court, "[i]ts purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison."<sup>183</sup> This shows that the liberty interests of individual inmates are not the only concerns—society has a monetary interest as

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178. See California Prisons Rocked by Problems, USATODAY.COM, April 5, 2008, [http://www.usatoday.com/news/nation/2008-04-05-california-prisons\\_N.htm](http://www.usatoday.com/news/nation/2008-04-05-california-prisons_N.htm) ("California's 33 prisons have a capacity of roughly 100,000 inmates but hold about 170,000.").

179. See *id.*

180. See *id.*; see also Kelley, *supra* note 177 ("After months of wrangling, a federal three-judge panel announced . . . that it intended to order California to significantly reduce its prison population in order to ensure that the state is providing the services constitutionally guaranteed to prisoners, like adequate health care. The state will appeal, of course, and litigation will probably go on for years. But the writing is on the wall. . . . The state would likely aim to reduce the population through early parole release and a reduction in the number of parolees readmitted for violations.").

181. Roberts v. Duffy, 140 P. 260, 262 (Cal. 1914).

182. For a discussion of this transition from rehabilitative to retributive goals, see Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1585–87 (2005). See also *id.* at 1599 ("The Board . . . should not be allowed to consider retributive, backward-looking factors. The Board should be allowed to consider only rehabilitative, forward-looking factors.").

183. Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

well. Additionally, society has an interest in the effective functioning of our penological system. Since the system, as it currently exists, fails to adequately determine an inmate's suitability for parole, it is failing society in that it is preventing the rehabilitation of prisoners capable of reintegrating into society and wasting tax dollars in the process.<sup>184</sup>

The Court also noted that, "[r]ather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals."<sup>185</sup> In this sense, parole is no different from an inmate's transfer to another prison facility. Of course, parole involves much greater concerns for both the liberty of the inmate and the safety of the public. As a result, the parole process is met with greater procedural safeguards. But this does not change its designation as a rehabilitative form of state *capture*, rather than mere *release*.<sup>186</sup>

## V. Proposed Solutions

The complex and institutionalized nature of this problem requires a range of solutions. As addressed in Part III, one such solution involves an overhaul of the regulatory scheme.<sup>187</sup> Another solution involves improving conditions and services for prisoners; that is, actually making prisons *rehabilitative*. But that solution deserves far more attention than can be given in this Comment. Instead, the primary solution discussed here is the strengthening of the judicial standard of review. This solution raises unique benefits and concerns. The judiciary is more removed from political influence than the executive is, but it is also, generally, lacking in the latter's expertise. However, courts are familiar with constitutional requirements and statutory interpretation and are an appropriate venue in which to remedy the executive's errors in parole determinations. To aid in this discussion, the following sections briefly examine the parole schemes of other states.

### A. States That Recognize a Liberty Interest in Parole

Every state allows at least some criminal offenders to be given the possibility of parole, even if it is purely within the discretion of the

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184. See *supra* Part I.A.

185. *Morrissey*, 408 U.S. at 477.

186. See *id.* The Court refers to parole as a "variation on imprisonment," emphasizing that the inmate is still deprived of liberty while on parole and is thus still, in many ways, a prisoner of the state. *Id.*

187. Other commentators have recommended doing this. See, e.g., Weiss, *supra* note 182, at 1597-1600 (suggesting creative and sweeping changes to the entire system, including the regulations used by the Board).

parole agency whether such release is ever granted.<sup>188</sup> States diverge on their views of parole as a right, as well as the level of scrutiny with which courts should review agency denials of parole. Currently, there are few states that recognize a parole-eligible inmate's liberty interest in actually being released. In addition to California, five states have explicitly recognized the right: New Jersey, North Carolina, Rhode Island, Texas, and West Virginia.<sup>189</sup> Three more have at least implicitly recognized it: Alaska, Oregon, and Vermont.<sup>190</sup> The remaining states, and the District of Columbia, do not recognize a liberty interest in parole.<sup>191</sup> Even if no liberty interest exists, all states retain mechanisms of judicial review to remedy parole denials that are arbitrary, capricious, or discriminatory.<sup>192</sup> As explained by the Third Circuit, "[e]ven if a state statute does not give rise to a liberty interest in parole release under *Greenholtz* [sic], once a state institutes a parole system all prisoners have a liberty interest flowing directly from the due process clause in not being denied parole for arbitrary or constitutionally impermissible reasons."<sup>193</sup>

The significance of recognizing a liberty interest in parole is questionable if it only provides for the reversal of agency decisions that are arbitrary or otherwise unconstitutional. In California, while the courts claim to scrutinize decisions for some evidence of current dangerousness, the only reversals seem to arise out of parole denials that are so inexplicable that they rise to the level of arbitrary or discriminatory decisions.<sup>194</sup> The same conclusions would be reached if California did not recognize a liberty interest in parole.<sup>195</sup> This demonstrates that the "some evidence" standard provides no additional protections to inmates. It is incompatible with the additional due process rights af-

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188. See *infra* Table 1.

189. See *id.*

190. See *id.*

191. See *id.*

192. See, e.g., *Bussiere v. Cunningham*, 571 A.2d 908, 912–13 (N.H. 1990) (refusing to find a liberty interest, but recognizing that inmates are protected from "arbitrary and capricious" denials of parole); *Ellard v. State*, 474 So.2d 743, 750 (Ala. Crim. App. 1984) (noting that such agency decisions are reversed if found to be "illegal, capricious, or unsupported by [legal] evidence"); *U.S. ex rel. O'Connor v. MacDonald*, 449 F. Supp. 291, 296 (E.D. Ill. 1978) ("Of course, the Board's action is subject to judicial review in order to determine whether it has followed the appropriate criteria, rational and consistent with the applicable statutes, and that its decision is not arbitrary and capricious nor based on impermissible considerations.").

193. *Block v. Potter*, 631 F.2d 233, 236 (3d Cir. 1980).

194. See generally *Hayward v. Marshall*, 512 F.3d 536, 538 (9th Cir. 2008); *In re Lawrence*, 190 P.3d 535, 553 (Cal. 2008).

195. See *Block*, 631 F.2d at 236.

forded California prisoners based on their recognized liberty interests in parole. The standard allows the executive and the courts to circumvent the rights of parole-eligible prisoners under the guise of a constitutional procedure. In reality, though, both overlook the fact that more process is due; both lack process that actually vindicates the rights indisputably possessed by California prisoners.

## B. States with “Heightened” Standards of Review and Suggestions for California

Most states employ a level of judicial review that affords nearly complete discretion to the parole agency.<sup>196</sup> Like California, some employ the “some evidence” or “modicum of evidence” standards.<sup>197</sup> However, two states—Alaska and New Jersey—employ unique standards and may provide guidance for California.

### 1. Alaska’s “Reasonable Basis” Standard

In Alaska, discretionary actions of the parole board, including decisions to grant or deny parole, are “reviewed under the ‘reasonable basis’ standard,” to insure that they “are supported by evidence in the record as a whole and there is no abuse of discretion.”<sup>198</sup> In practice, this standard functions similarly to California’s in that it mandates approval of the Board’s actions as long as they are supported by “reasons,” i.e., some evidence. On the other hand, the semantics of the Alaska test suggests that it could be transformed into a workable standard.

California could build on the reasonableness concept, and employ a reasonable person standard. The judicial standard would then appear as follows: would a reasonable parole board conclude that the inmate poses a current danger to society? This would be a minor increase in the standard, but it would contain one critical change; courts would be permitted to *evaluate* the decision of the Board, and not simply defer to it upon a showing of *any evidence*.

There are, of course, problems with this test. For one, it would essentially alter the evidentiary standard of review from abuse of dis-

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196. See, e.g., *White v. Ind. Parole Bd.*, 713 N.E.2d 327, 328 (Ind. Ct. App. 1999) (“[T]he Parole Board has almost absolute discretion in carrying out its duties and . . . it is not subject to the supervision or control of the Courts.” (citing *Murphy v. Ind. Parole Bd.*, 397 N.E.2d 259, 261 (Ind. 1979))).

197. See, e.g., *Bussiere*, 571 A.2d at 912; *Hamel v. Johnson*, 25 P.3d 314, 318 (Or. Ct. App. 2001).

198. *Covington v. State*, 938 P.2d 1085, 1090–91 (Alaska Ct. App. 1997).

cretion to *de novo*. Courts would have to make an independent assessment of the reasonableness, or correctness, of the Board's decision. Second, it could lead to a flood of litigation, as every eligible inmate who is denied parole would rush to appeal, figuring that a clever and creative argument could win over a lenient court.

These problems are not insubstantial, and they may indeed be fatal. However, one cannot help but consider the lesser of two evils in this context. California has two options: (1) employ this standard and run into some serious, yet not necessarily insurmountable, administrative problems; or (2) continue the status quo and perpetuate the violation of the due process rights of prisoners.

## 2. New Jersey's "Substantial Evidence" Standard

In New Jersey, courts review the parole board's decision for "whether the record contains substantial evidence to support the findings on which the agency based its action."<sup>199</sup> Specifically, courts review whether there is "sufficient credible evidence" that supports the conclusion that the inmate "will commit crimes if released."<sup>200</sup> This standard provides a middle ground between the highly deferential "some evidence" standard and the much less discretionary "reasonable person" standard. It would allow the Board to enjoy wide discretion in how it investigates and evaluates inmates. At the same time, it would prevent the troubling practice of denying parole if any piece of negative history—no matter how far removed or how seemingly insignificant—is presented and successfully argued to be probative of current dangerousness.<sup>201</sup>

## 3. Proposal for a "Weighing" Test

Another solution may be to employ a weighing test whereby the Board would determine the presence of suitability and unsuitability factors and weigh them against each other. Courts could then employ an abuse of discretion standard that would test the reasonableness of the Board's determination in light of the statutory and constitutional rights at stake. This would be the least radical change, because as it would leave great discretion in the hands of the Board. The primary change would be that a finding of *any potential* for dangerousness would not automatically prevent courts from overturning the Board's denial of parole. Instead, the Board would be required to engage in

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199. *Trantino v. N.J. State Parole Bd.*, 711 A.2d 260, 262 (N.J. 1998).

200. *Id.* at 270.

201. *In re Lawrence*, 190 P.3d 535, 555 (Cal. 2008).

the same type of weighing analysis employed by many states in the determination of whether to sentence a defendant to death.<sup>202</sup> The decisionmakers must take all factors into account, fairly judge the weight and importance of each, and determine the individual's fate based on which way the scales tip. This test would more accurately reflect the level of complexity inherent in the decision of whether someone poses a threat to society.

### Conclusion

California's parole system is suffering from systemic failure. The executive employs vague, overbroad, and inappropriate standards. The standard employed by courts for reviewing these decisions is essentially meaningless. Furthermore, politics and prejudice pervade the entire process. Prisoners have been granted a constitutional right to parole; a parole-eligible inmate enjoys a presumption of release *unless* the Board meets its burden of demonstrating that the prisoner poses a current threat to society. Yet, the Board, the governor, and the courts have lost sight of this. Until a change is made, prisoners will continue to suffer deprivations of their due process rights. While fundamental change is needed, an immediate remedy is well within reach. The courts should imply a less deferential standard of review to ensure that prisoners maintain their statutory and constitutional rights.

**Table 1**

State	Parole Statute	Liberty Interest
Alabama	ALA. CODE § 15-22-26 (2009).	NO. <i>Ellard v. State</i> , 474 So. 2d 743, 754 (Ala. Crim. App. 1984).
Alaska	ALASKA STAT. § 33.16.010 (2009).	IMPLIED. <i>See Smith v. Dept. of Corr.</i> , 872 P.2d 1218, 1222 (Alaska 1994) ("The State takes no issue with Bynum's contention that he has a protected liberty interest in conditions of parole and we accept this implied concession.").
Arizona	ARIZ. REV. STAT. ANN. § 31-412 (2009).	NO. <i>Foggy v. Eyman</i> , 516 P.2d 321, 323 (Ariz. 1973).
Arkansas	ARK. CODE ANN. § 16-93-701 (2008).	NO. <i>Pittman v. Gaines</i> , 905 F.2d 199, 201 (8th Cir. 1990).
California	CAL. PENAL CODE § 3041(a) (West 2008).	YES. <i>In re Rosenkrantz</i> , 59 P.3d 174, 207 (Cal. 2002).
Colorado	COLO. REV. STAT. ANN. § 17-2-201 (LexisNexis 2009).	NO. <i>Silva v. People</i> , 407 P.2d 38, 39 (Colo. 1965).

202. *See, e.g.*, CAL. PENAL CODE § 190.3 (West 2009).

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Connecticut	CONN. GEN. STAT. § 54-125a (2009).	NO. Baker v. Comm'r of Corr., 914 A.2d 1034, 1046 (Conn. 2007).
Delaware	DEL. CODE ANN. tit. 11, § 4347 (2008).	NO. Eskridge v. Casson, 471 F. Supp. 98, 101 (D. Del. 1979).
District of Columbia	D.C. CODE § 24-404 (2009).	NO. Bogan v. Bd. of Parole, 749 A.2d 127, 129 (D.C. 2000).
Florida	FLA. STAT. § 947.18 (2009).	NO. Kirsch v. Greadington, 425 So. 2d 153, 155 (Fla. Dist. Ct. App. 1983).
Georgia	GA. CODE ANN. § 42-9-42 (2008).	NO. Sultenfuss v. Snow, 35 F.3d 1494, 1499 (11th Cir. 1994) (en banc).
Hawaii	HAW. REV. STAT. § 353-62 (2008).	NO. Turner v. Paroling Auth., 1 P.3d 768, 775 (Haw. Ct. App. 2000).
Idaho	IDAHO CODE ANN. § 20-223 (2008).	NO. Hays v. State, 975 P.2d 1181, 1186 (Idaho Ct. App. 1999).
Illinois	730 ILL. COMP. STAT. 5/3-3-5 (2009).	NO. Blythe v. Lane, 551 N.E.2d 680, 685 (Ill. Ct. App. 1990).
Indiana	IND. CODE. § 11-13-3-2 (2009).	NO. Holland v. Rizzo, 872 N.E.2d 659, 663 (Ind. Ct. App. 2007).
Iowa	IOWA CODE § 906.3 (2009).	NO. Lyon v. State, 404 N.W.2d 580, 583 (Iowa Ct. App. 1987).
Kansas	KAN. CRIM. PROC. CODE ANN. § 22-3717 (West 2008).	NO. Gilmore v. Parole Bd. 756 P.2d 410, 415 (Kan. 1988).
Kentucky	KY. REV. STAT. ANN. § 439.340 (West 2009).	NO. Belcher v. Parole Bd., 917 S.W.2d 584, 587 (Ky. Ct. App. 1996).
Louisiana	LA. REV. STAT. ANN. § 15:574.4 (2009).	NO. Sinclair v. Kennedy, 701 So. 2d 457, 462 (La. Ct. App. 1997).
Maine	ME. REV. STAT. ANN. tit. 34-A, § 5211 (2008).	NO. Mottram v. State, 232 A.2d 809, 815 (Me. 1967).
Maryland	MD. CODE ANN., CORR. SERVS. § 4-305 (West 2009).	NO. Lomax v. Warden, Corr. Training Ctr., 707 A.2d 395, 402 (Md. Ct. Spec. App. 1998).
Massachusetts	MASS. GEN. LAWS ch. 27, § 5 (2009).	NO. Quegan v. Parole Bd., 673 N.E.2d 42, 44 (Mass. 1996).
Michigan	MICH. COMP. LAWS § 791.233 (2009).	NO. Lee v. Withrow, 76 F. Supp. 2d 789, 792 (E.D. Mich. 1999).
Minnesota	MINN. STAT. § 609.12 (2009).	NO. State v. Morse, 398 N.W.2d 673, 679 (Minn. Ct. App. 1987) (limited to prisoners serving mandatory sentences with no "target release date").
Mississippi	MISS. CODE ANN. § 47-7-3 (2009).	NO. Hopson v. Parole Bd., 976 So. 2d 973, 975 (Miss. Ct. App. 2008).
Missouri	MO. REV. STAT. § 217.690 (2009).	NO. Gale v. Moore, 587 F. Supp. 1491, 1493 (W.D. Mo. 1984).
Montana	MONT. CODE ANN. § 46-23-201 (2008).	NO. Worden v. Bd. of Pardons and Parole, 962 P.2d 1157, 1165-66 (Mont. 1998).
Nebraska	NEB. REV. STAT. ANN. § 83-1,111 (LexisNexis 2009).	NO. Moore v. Bd. of Parole, 679 N.W.2d 427, 438-39 (Neb. Ct. App. 2004).
Nevada	NEV. REV. STAT. § 213.1099 (2009).	NO. Austin v. Armstrong, 473 F. Supp. 1114, 1117 (D. Nev. 1979).

New Hampshire	N.H. REV. STAT. ANN. § 651-A:6 (2009).	NO. <i>Bussiere v. Cunningham</i> , 571 A.2d 908, 912 (N.H. 1990).
New Jersey	N.J. STAT. ANN. § 30:4-123.53 (West 2009).	YES. <i>Thompson v. Parole Bd.</i> , 509 A.2d 241, 248 (N.J. Super. Ct. App. Div. 1986).
New Mexico	N.M. STAT. § 31-21-10 (2009).	NO. <i>Owens v. Swope</i> , 287 P.2d 605, 612 (N.M. 1955).
New York	N.Y. EXEC. LAW § 259-c (McKinney 2009).	NO. <i>Williams v. Bd. of Parole</i> , 633 N.Y.S.2d 182, 182 (N.Y. App. Div. 1995).
North Carolina	N.C. GEN. STAT. § 15A-1371 (2008).	YES. <i>Harwood v. Johnson</i> , 388 S.E.2d 439, 444 (N.C. 1990).
North Dakota	N.D. CENT. CODE § 12-59-07 (2007).	NO. <i>Patten v. North Dakota Parole Bd.</i> , 783 F.2d 140, 142 (8th Cir. 1986).
Ohio	OHIO REV. CODE ANN. § 2967.03 (West 2009).	NO. <i>State ex rel. Hattie v. Goldhardt</i> , 630 N.E.2d 696, 698 (Ohio 1994).
Oklahoma	OKLA. STAT. tit. 57, § 332.7 (2009).	NO. <i>Shabazz v. Keating</i> , 977 P.2d 1089, 1093 (Okla. 1999).
Oregon	OR. REV. STAT. § 144.050 (2008).	IMPLIED. <i>See Davis v. Bd. of Parole and Post-Prison Supervision</i> , 114 P.3d 1138, 1140 (Or. Ct. App. 2005) (assuming, without deciding, that the liberty interest exists). <i>But see</i> OR. REV. STAT. § 144.050 (2008) (using permissive language).
Pennsylvania	61 PA. CONS. STAT. § 331.22 (2009).	NO. <i>Weaver v. Bd. of Prob. and Parole</i> , 688 A.2d 766, 770 (Pa. Commw. Ct. 1997).
Rhode Island	R.I. GEN. LAWS § 13-8-14.1 (2008).	YES. <i>Bishop v. State</i> , 667 A.2d 275, 276 (R.I. 1995).
South Carolina	S.C. CODE ANN. § 24-21-645 (2008).	NO. <i>Sullivan v. Dept. of Corrections</i> , 586 S.E.2d 124, 127 (S.C. 2003).
South Dakota	S.D. CODIFIED LAWS § 24-15-8 (2008).	NO. <i>Bergee v. Bd. of Pardons and Paroles</i> , 608 N.W.2d 636, 640-41 (S.D. 2000).
Tennessee	TENN. CODE ANN. § 40-28-117 (LexisNexis 2009).	NO. <i>Kaylor v. Bradley</i> , 912 S.W.2d 728, 733 (Tenn. Ct. App. 1995).
Texas	TEX. GOV'T CODE ANN. § 508.147 (Vernon 2009).	YES. <i>See Ex parte Geiken</i> , 28 S.W.3d 553, 559 (Tex. Crim. App. 2000) ("Under certain circumstances, and absent certain findings by the Parole Board, the language of the Texas statute requires release. It therefore creates a legitimate, although limited, expectation of release.").
Utah	UTAH CODE ANN. § 77-27-5 (LexisNexis 2008).	NO. <i>Malek v. Haun</i> , 26 F.3d 1013, 1016 (10th Cir. 1994).
Vermont	VT. STAT. ANN. tit. 28, § 502a (2009).	IMPLIED. <i>See</i> VT. STAT. ANN. tit. 28 § 502a(b) (2009) (using mandatory language to describe right to parole); <i>see also</i> <i>Bock v. Gold</i> , 959 A.2d 990, 991 (Vt. 2008) (referencing, with approval, the lower court's implication of the liberty interest).
Virginia	VA. CODE ANN. § 53.1-154.1 (LexisNexis 2009).	NO. <i>Robinson v. Fahey</i> , 366 F. Supp. 2d 368, 371 (E.D. Va. 2005).



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Washington	WASH. REV. CODE § 9.95.017 (2009).	NO. <i>In re Dyer</i> , 139 P.3d 320, 328–29 (Wash. 2006).
West Virginia	W. VA. CODE ANN. § 62-12-13 (West 2009).	YES. <i>Tasker v. Mohn</i> , 267 S.E.2d 183, 191 (W. Va. 1980).
Wisconsin	Wis. STAT. § 304.06 (2008).	NO. <i>State ex rel. Britt v. Gamble</i> , 653 N.W.2d 143, 148 (Wis. Ct. App. 2002).
Wyoming	WYO. STAT. ANN. § 7-13-402 (2008).	NO. <i>Seavolt v. Escamilla</i> , 17 F. App'x. 806, 807 (10th Cir. 2001).

