

The Power to Parole

Remarks of Barbara R. Levine

The executive director of CAPPs, Ms. Levine has been a member of the Michigan Bar since 1974. She began her career at the State Appellate Defender Office, representing indigent felony defendants on appeal. She has taught at Wayne State University Law School and the University of Toledo College of Law, and served as a commissioner of the Michigan Supreme Court. Before leaving state employment in 1999, Ms. Levine spent 14 years as the administrator of the Michigan Appellate Assigned Counsel System. She was the first chairperson of the State Bar Prisons and Corrections Section Council, is a long-time member of the State Bar Standing Committee on Character and Fitness, and has served for many years on the board of Prison Legal Services of Michigan. Ms. Levine received both her undergraduate and law degrees from the University of Michigan.

In 2001, an MDOC spokesperson acknowledged that all the growth in the prison population in the 1990's was due to parole board practices. Parole grant rates plummeted from 68% in 1990 to 48% in 2002. Over 1,400 prisoners per year are now being discharged after completing their maximum sentences. If parole approval rates were at the same level as they were in the '80's, the spokesman said, the system "would be at near zero growth."

Decisions not to release prisoners who are, by law, eligible for release, have enormous consequences for prisoners, their families, and for victims, as well as for the size of the prison system. These decisions also have consequences for the criminal justice system as a whole. In theory, the minimum term imposed by the judge reflects the amount of prison time that is appropriate for the particular offense as committed by the particular offender. The legislature's sentencing guidelines are predicated on the assumption that the minimum term really indicates when the prisoner is likely to be released, if he or she behaves appropriately. Prosecutors and defense attorneys rely on this assumption when they negotiate guilty pleas. Judges rely on it when they select the actual sentence to impose. If the parole board simply views completion of the minimum as the point at which it gets to make its own independent decision about how much time the prisoner should serve, the minimum loses its meaning; the discretion of the parole board effectively negates the roles of judges, legislators, prosecutors, and defense attorneys.

The parole board also decides whether to return to prison parolees who have not been convicted of any new crimes, but who have failed to meet some condition of supervision, such as reporting to a parole officer, participating in treatment, or avoiding substance abuse. From 1992 to 2002, the number of technical parole violators brought back to continue serving their original sentences nearly doubled,

from 1,660 to 3,293. And, of course, it is the parole board that decides whether and when technical parole violators should be paroled again. While technical violators used to be re-paroled in an average of 10 months, over the last few years this figure has also doubled to 20 months.

So when we talk about parole board policies and practices, we are talking about power – the power to control individual lives, the power to protect the public from clearly dangerous offenders, the allocation of decision-making power within the criminal justice system, and the power to impact state resources by requiring the operation of dozens of facilities to house prisoners who, by law, are eligible for release.

Vesting so much power in parole boards was, historically the norm throughout the country. Most states had indeterminate sentencing schemes like ours, where the judge imposed the minimum, the statute set the maximum, and the board determined how much time within that range the person would actually serve. In some states where seats on the parole board were rewards for political service, power was blatantly abused and scandals would erupt periodically over parole board members being bribed or otherwise influenced to grant releases. Commonly, there was no body of law that governed the parole board's procedures. Since the board had absolute discretion to release or not release a prisoner, its decisions could never be wrong. Recognizing the possibility that so much power could be abused, some states took steps to control the way parole boards exercise their discretion. Michigan was a pioneer in this regard.

As early as 1937, it made appointing parole board members a function of the Corrections Commission that oversaw all MDOC operations, and it gave the board members civil service protection. For decades, Michigan's parole board was made up of career corrections professionals who could not lose their jobs because they made a politically unpopular decision.

Over the last few decades, things have changed greatly both nationally and in Michigan. Many states have scrapped their indeterminate sentencing schemes in favor of determinate or "flat" sentences. Based on whatever formula is required by statute, the judge selects a single term of years the prisoner must serve. Thus, instead of receiving 5-15 for an unarmed robbery, for instance, the defendant's sentence may be 9 years. There may or may not be an opportunity to reduce that term by earning good time credits. There may or may not be a period of post-release supervision in the community. But no one has the discretion to decide whether to release the person. Once the judge's sentence has been served, release happens automatically.

The rationale for flat sentences is that they are fair and certain. Everyone with a similar prior record who commits a given offense gets the same punishment. Defendants do not end up serving very different terms based on speculation about their future behavior. At one extreme, flat sentences are favored by those who believe that too much discretion results in arbitrary decisions, racial disparities, and other abuses. At the other extreme, those concerned only about being tough on crime reject the notion of rehabilitation and with it the concept that parole boards can and should determine whether someone has been rehabilitated.

In Michigan, we have retained indeterminate sentences, but, starting in 1992, we have made numerous other changes. The parole board was stripped of its civil service protection. Members are now appointed by the MDOC director, who is in turn appointed directly by the governor. Current members are not corrections professionals. While the statute now says that at least 4 of 10 members must be people who were never employed by the MDOC, none of the current members have ever worked in a prison. Half have backgrounds in law enforcement. Thus, there is a natural tendency for these members to look more at the offense, no matter how long ago it

was committed, and less at what the prisoner has accomplished and how he or she has changed in the interim.

Another statutory change in 1992 was the requirement that the board utilize parole guidelines. The theory is that the parole guidelines will constrain the board's power much like sentencing guidelines constrain judicial power. In fact, it hasn't worked out that way. The factors scored in the parole guidelines include in-prison conduct, program completion, age, years served, and mental health. But the most heavily weighted factors are the offense and the prisoner's prior criminal record, both of which, of course, are the basis for the sentencing guidelines that determined the minimum sentence in the first place. And both are factors the prisoner can never change. Offense characteristics and prior record are each weighted separately. They are then counted again in another factor, called the statistical risk score. If the prisoner is serving for a sex offense, no matter what the details, 5 negative points are added under the mental health variable, so the offense is counted yet again. By comparison, the most positive points a person can receive for completing recommended programs is 3.

All the positive and negative points are added to result in a score. That score is then used to place the prisoner in one of three categories: hi, low, or average probability of parole. If the person falls in the high probability group, the board is supposed to grant parole unless it has substantial and compelling reasons for departing from the recommendation. If the person falls in the low probability group, the board is supposed to deny parole, again absent substantial and compelling reasons for departure. If the person falls in the average group, the board has total discretion whether to grant parole. In practice, the requirement of substantial and compelling reasons for departure has not controlled the board's discretion much at all. It routinely denies parole to people with high guidelines scores based on factors already counted in the guidelines – most notably, factors about the offense or the person's prior record.

The bottom line is, the parole guidelines provide a starting point for the board's decision making, but they do not control it. Certainly people with low scores do not get released. But neither do a lot of people with high scores. And for the single largest group of people, those the guidelines sort into the average group, the board simply does what it wants.

There is another reason why parole guidelines don't do much to control the board's power. There is no way for a prisoner to get them enforced. Although not many won, prisoners used to have the right to try to appeal denial of parole in the courts. In 1999, the statute was amended to eliminate the prisoner's right to appeal, although it still gives prosecutors and victims the right to appeal grants of parole with which

they disagree. There is litigation ongoing right now to determine whether prisoners can still appeal parole board decisions to any extent under a different statute, called the Revised Judicature Act. But for all practical purposes, it is virtually impossible for a prisoner to get a parole denial reversed. There is no routine administrative or judicial review of the parole board's actions. The board has complete power because it has no oversight.

Finally, there is another set of changes that dramatically illustrate the scope of the parole board's power. In Michigan, the crime of first-degree murders carries a mandatory penalty of life without parole. The parole board never gets the jurisdiction to release those prisoners. But all the other most serious offenses – second-degree murder, armed robbery, first-degree criminal sexual conduct – carry a penalty of life or any term of years. The judge can impose a life sentence or pick both the minimum and maximum of an indeterminate term, such as 10-20 or 20- 40 or 40-60. For these crimes, the life term is parolable. For lifers whose offenses were committed before Oct. 1992, the board gets jurisdiction after the prisoner has served 10 years.

For those whose offenses were later, jurisdiction comes at 15 years. There are some extra steps in the process for paroling lifers. The sentencing court must be given an opportunity to object, and, if there is no judicial objection, the board must conduct a public hearing before it can make a final decision to grant parole. But parole eligibility under the "lifer law" is what distinguishes "second-degree" life sentences from those imposed for first-degree murder.

Historically, judges imposed life sentences in the expectation that serious parole consideration would occur after 10 years and that, if the defendant conducted himself or herself well in prison, release after 12 or 14 or 16 years was likely. Some judges told defendants this right at sentencing. There were never a lot of lifers paroled each year because there didn't use to be that many who were eligible. But everyone in the system – prosecutors, defense attorneys, judges and parole board members assumed well into the 1980's that lifers could earn their release just like other prisoners could.

This, too, has changed. The board became less and less inclined to parole lifers, and for the past several years it has publicly taken the position that "life means life". Despite the intentions of the sentencing judges and the assumptions that underlay plea bargains, the board has unilaterally decided that, except in extraordinary cases, lifers who became eligible for release after 10 years should nonetheless spend their entire lives in prison. As a result of this change in philosophy, over 1,000 parolable lifers who have served more than 10 years are now stacked up in our prisons. Many were first offenders, many were very young when they committed their crimes, many could not even receive a life term under current sentencing guidelines, and many have now served 20, 25 or 30 years.

The procedures for reviewing lifers have also changed drastically. The board now only has to reconsider a lifer once every five years. And that reconsideration does not have to include a face-to-face interview. The board can simply look at the prisoner's file, then send the person a notice saying it has no interest in proceeding. The board also doesn't calculate parole guidelines scores for lifers, as it does for other prisoners. The whole situation is circular. Because the board has decided it doesn't want to parole lifers, it follows procedures that insulate it from obtaining the sort of information that might persuade it to consider paroling any particular lifer.

Now that we have looked at how much power the parole board has, let's look at a few examples of how it has exercised that power in recent years. Let's consider first the case of Phyllis Dempster, an 80-year old non-assaultive offender. You will find her picture about midway through your materials in the Free Press article entitled: "Parole policy carries harsh price for prisoners, taxpayers." Ms. Dempster has a long history of bilking people of their money. She was convicted in 1981 of multiple counts of obtaining money under false pretenses and securities violations, for which she received a 1-10 year prison term. Numerous similar charges were brought and dismissed in succeeding years. In 1994, when she was 71, Ms. Dempster pled guilty to 12 counts of obtaining money under false pretenses and securities violations. She was sentenced to serve 6-15 years.

While incarcerated, Phyllis had a total hip replacement. She also suffers from diabetes. She became eligible for parole in December, 1998. At that time, her parole guidelines score was "average probability" and the board continued her incarceration for 24 months. She was reviewed again in September 2000. This time she scored "high probability for release", but the parole board once again continued her for 24 months, stating that because of her history and crime she was viewed as a risk. Phyllis Dempster was reviewed by the board again in 2002 and once again she was "flopped". On April 30, 2005 she will complete her maximum sentence and have to be discharged. Her case raises numerous questions. Most obvious is: if we can't safely supervise in the community an elderly woman with no assaultive history, who can we ever release? Beyond that, what rationale underlies the board's repeated denials of parole? We can be sure that the trial judge took Ms. Dempster's prior record into account when it decided to impose a minimum sentence of 6 years on a 71-year old woman. Is the board simply saying it doesn't think that sentence was adequate? Why does the board think she is too big a risk for re-offending, despite her high score on parole guidelines that already counted her offense and prior record? What good is the statute requiring the board to give substantial and compelling reasons for departing from high probability scores if the board can just recite factors the guidelines already included? And if the board is ultimately going to make its decision just on the offense and prior record, what can a prisoner ever do to earn release? Or is there something more subjective going on? Did Ms. Dempster fail to show adequate remorse during her parole interview? If so, is that a good enough reason to keep her in prison for all those additional years, at our expense?

Another example is Gladys Wilson, who pled guilty to aiding and abetting an armed robbery in 1978. Her picture is also in your materials, next to Ms. Dempster's. Gladys was 31 years old, employed, and had no prior record. Her husband, who is now serving mandatory life without parole, robbed a grocery store and killed the young night manager. Gladys' involvement was peripheral and she cooperated with the police. At the time she pled guilty, every assumed she would not serve much more than 10 years. And, in fact, the "old" parole board talked about releasing her as early as 1988, but never finished processing her case. Even the "new" board was interested in releasing her in 1993, but the successor sentencing judge objected until she had served 20 years. By the time she was reviewed again in 1998, when she had served 20 years, the board had adopted the position that life means life and had no longer had any interest in releasing her. Today, Gladys is a middle-aged grandmother with an exceptional institutional record and many supporters. The successor judge has written to the board urging her release. She is currently up for another five-year review and the board did choose to interview her. It has not calculated her sentencing guidelines, which would be highly favorable. And if it decides not to parole her, the board will not be required to give any reasons and

Gladys will not be able to appeal. She will have to wait another five years to be considered again, at a cost to taxpayers of over \$140,000 and at an immeasurable cost to her and the family that is awaiting her release. Again we can ask what we gain by keeping this person locked up? No one has ever suggested that Gladys is any threat to public safety. She would not even receive a life sentence under today's sentencing guidelines, and she is no more or less culpable than other defendants who received sentences of 10-20 or 20-30 years for armed robbery and have been paroled. Is it sensible to apply across the board policies based on the type of sentence the judge imposed? Why not assess Gladys's risk of re-offending using parole guidelines as is done with other prisoners? Is it an appropriate exercise of power to change the rules years after the participants at the trial level relied on them? Should Gladys and other lifers like her have access to some special review mechanism that takes into account the intentions of sentencing judges who did not think that life meant life?

Finally, I want to tell you about a client of mine who I will call Joe. He was charged with criminal sexual conduct and kidnapping. He had no prior convictions, adult or juvenile, no history of substance abuse, and had worked for the same employer for over four years.

The offense involved a young woman that Joe dated at one time. The two had remained friendly and agreed to go out together on the evening in question. They made several stops, including a car dealership, an Arby's, a shop that sells sexual paraphernalia, and a few homes of people that Joe knew. They ended up at Joe's apartment, where they engaged in oral sex. Joe then brought the young woman back to her place of employment.

Joe maintained the evening's events were entirely consensual. However, the young woman said that after they stopped for food, the situation evolved into a kidnapping, and that Joe handcuffed her to the steering wheel of the car. She also said that he coerced her into having oral sex by threatening her with a small knife that was built into his belt buckle. Both parties agreed there was friction during the evening because of the young woman's relationship with another man.

The jury acquitted Joe of kidnapping, but convicted him of criminal sexual conduct. The judge initially sentenced him to serve a year in the county jail, but the prosecutor appealed on the grounds that the statute required a prison sentence. So the judge resentenced him to 1-20 years, with credit for nine months in jail. Despite its extremely low rate of paroling sex offenders, the board released Joe after he had served another nine months. One of the conditions of Joe's parole was that he attend sex offender counseling. Joe was uncomfortable with some of the people in his therapy group and he began skipping sessions. He was charged with violating parole and was returned to custody in July 1998. He was subsequently denied re-parole in 1999, in 2000, and in 2001. Each time, the board scored the parole guidelines to include a finding that Joe had committed kidnapping. The board's position was that since the allegation of kidnapping was mentioned in Joe's presentence report, it was entitled to rely on that, even though the jury had obviously not believed that part of the young woman's testimony. In November 2001, when he had been back in prison for nearly 3 ½ years, Joe filed an appeal in circuit court. The judge decided that Joe was entitled to appeal the board's decision under that other statutory provision I mentioned earlier, the Revised Judicature Act. The judge went on to find that the decision was not authorized by law because in

scoring kidnapping in the parole guidelines, the parole board had made factual findings inconsistent with the trial court's scoring of the sentencing guidelines.

Joe was finally released in July 2002, four years after his parole was revoked. Thus he spent more than twice as much time in prison for missing therapy sessions as he served for the offense in the first place. The parole board is still appealing the circuit judge's decision. It not only maintains it was entitled to give Joe points for kidnapping, but that Joe had no right to contest that decision because he has no right to appeal under the Revised Judicature Act or any other statute.

Joe's case also raises many questions. Is it a good use of public funds to return technical parole violators like Joe to prison when no one perceives them as a threat to the community? How long should technical violators be kept after they've been returned to prison? Should they be evaluated based on their original offense, or should they have separate parole guidelines that account for the fact that they were released once already? Should the parole board have the power not only to keep a prisoner much longer than the judge intended, but to redetermine the facts of the offense in a way that contradicts the trial court fact finder? Should the board have absolutely unreviewable discretion so that prisoners have no way to correct even the most serious errors in the board's decision-making process?

These three examples suggest that new limits may be needed on how the parole board exercises its enormous power. I can't tell you how typical these cases are. I can tell you that the same MDOC spokesperson I mentioned earlier said in 2001 that 44% of the prison population --21,000 prisoners--were past their first release date. That is a truly astonishing figure. In 1991, only 16.5% of prisoners were past their first release date, and that was less than 6,000 people.

Clearly, the nature as well as the size of our prison population has changed dramatically in just 12 years. To decide whether that is good or bad, we need a lot more information about just who is being held for so long and why. How many of them would be genuine threats to public safety if released, and how many are like Phyllis, Gladys and Joe? We also need to think carefully about what alternative policies we might adopt. The MDOC has already taken a big step toward reducing the number of technical parole violators being returned to prison. By having parole officers apply more progressive community-based sanctions before recommending revocation, it has cut the return rate in half. The recommendations proposed by the Prisons and Corrections Section and by CAPPs, which are at the back of your material, contain a number of other proposals for corralling the parole board's power. I hope that you will get the chance to review them before the panel discussion this afternoon, and I urge you to jump in and join the debate.

Thank you.