THE FOUNDATIONS OF PAROLE IN CALIFORNIA

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Parole was introduced in California, and used for over a decade, primarily to relieve governors of part of the burden of exercising clemency to reduce the excessive sentences of selected state prisoners. Later, when parole was additionally used to relieve prison crowding, processes were initiated that eventually led to the adoption of a rehabilitative justification for parole. We outline these events and their background and briefly consider their implications for the study of penal reforms.

This article examines the origins and early development of parole in California, one of the first states to adopt the measure for adult prisoners. The empirical argument of the paper is as follows: Parole was proposed, and used for more than a decade, selectively to provide "early" release for prisoners serving "excessive" terms. As such, it was intended and used as a partial substitute for executive clemency. Later, it was turned to an additional end: to control the size of the prison population. This latter use undermined the earlier justification for parole and led to establishment of an agency to provide surveillance of and services to parolees. Only with this development did parole-supervision come to be emphasized and parole begin to be justified as a means for helping to assure the "rehabilitation" of released prisoners.

Sections I-V of this article deal with the events leading to the adoption of parole in 1893. Sections I and II examine official concern over excessive sentences and the use of executive

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clemency to modify them. Section III considers the implications of removing control of the prisons from elected officials to a "non-partisan" board. Section IV analyzes the board's recommendation of parole, and Section V, the events leading to legislative adoption of the recommendation. Section VI shows how parole was used from 1893 until about 1907, when prison population pressures mounted; Section VII, how these pressures led to change in parole policy. Section VIII explores modifications in the structure and rhetoric of parole in California after this change, until 1914, the eve of indeterminate sentencing in California. A summary and conclusions are offered in Section IX.

I

California became a state in 1850 and at first leased its prisoners to private entrepreneurs who sold the prisoners' labor to various businesses, including their own.[1] The expense of the enterprise, rumors of corruption, persistent complaints about atrocious prison conditions, and perhaps most important, large numbers of escapes, often preceded by bloody mass uprisings, helped move state officials to take over management of the prisoners in late 1860.[2] By that time, prison buildings surrounded by a wall had been constructed at San Quentin. There were over 500 prisoners on hand, with more coming daily.

When the state took over, prison management was formally lodged in a Board of Directors of the State Prison, composed of the governor, lieutenant governor, and secretary of state.[3] The lieutenant governor also functioned as the resident director and warden of San Quentin, when he was not busy with his other duties. The Board appointed San Quentin personnel. Its primary mandate was to keep the prisoners

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[1] There is no fully satisfactory history of nineteenth- (or twentieth-) century penal affairs in California. However, Lamott (1961) provides an informative and generally reliable account, especially for the nineteenth century. A useful general history of California is provided by Bean (1973).

[2] During most of the period 1851-60, the state paid the lessees for housing, feeding, and keeping the prisoners. Rumors of pay-offs for pardons and for arranged escapes were rife. Prisoner uprisings were common. See Lamott, 1961: 1-81. Through fiscal 1861, about one-third of those leaving the prison did so by escaping. This was about one-fourth of those committed by the courts during the same period. Fewer than half of those who escaped appear to have been recaptured. These and similar numbers derive from annual and biennial reports of the various prison boards, compiled by the authors.

[3] The Board of Directors of the California State Prison (1858-79) was preceded by boards without full control of the prison.

behind San Quentin's wall, peacefully if possible, until their sentences expired. Prisoner labor was to be used to produce income to reduce expenses, but secure, peaceful confinement was the more significant goal.

An important source of prisoner discontent, which made tranquil confinement difficult, was the "excessive" sentence. Sentences considered "too severe" or "excessive" often sorely troubled prisoners and those responsible for keeping them peacefully confined. Governor John B. Weller (1858-60) mentioned several sources of such sentences, suggesting that, by 1860, excessively severe sentences were both fairly frequent and difficult or perhaps impossible to avoid in advance. There was the fallibility of judges and juries, particularly "in a new country [like California], composed of a population drawn from all parts of the globe." And there was the tendency "at different periods," when crimes became "frequent," for local jurisdictions to impose "extraordinary punishments to arrest the evil." Then, too, "a few years since," some judges "sought to establish the reputation of *severe*, rather than just, officers." Although he had used his clemency powers sparingly, the governor said he had "not hesitated to extend executive clemency" in such cases (Weller, 1860: 66-67, emphasis in original).

The Prison Directors suggested in 1865 why state prisoners with excessive sentences might become especially upset:

> We wish to call attention to an evil without knowing how to suggest a remedy: That is, the disparity in the sentences of Courts for the same grade of crime. Men have been sentenced to the Prison for the term of ten years for stealing a pair of mules or oxen, while others from other Courts for the same crime or one similar have been sentenced for two or three years. No mode of reasoning will convince the prisoners that both of these sentences are equal and exact justice (DCSP, 1865: 8-9).

In addition to feeling that they had been dealt with unjustly, they would feel that they had been treated unfairly.

No remedy except executive clemency was immediately forthcoming. Governors and other members of the Board of Prison Directors continued to tell the legislature that excessive sentences were frequent and caused prisoner discontent. Governor Frederick F. Low (1863-67) commented in 1867 that:

> It has been for some years a well settled belief in the minds of those having the best opportunities for acquiring information, that a large number of prisoners at San Quentin [are] . . . suffering

> imprisonment under unjust or unreasonably long sentences (Low, 1868: 39).

In 1873, Governor Newton Booth (1871-75), drawing on his experience with appeals for pardon, said:

> The inequality of sentences for the same offense in different Courts, and often in the same Court, at different times, will become apparent to any one called upon to review them. This [breeds a] sense of injustice [that] rankles in the bosom of the convict and emphasizes his war with society (Booth, 1874: 76).

Governor Romualdo Pacheco (1875) confirmed this judgment during his brief stay in office, adding that it was not only prisoners and prison officials who were disturbed:

> Judges and juries frequently unite in soliciting the Executive to undo their work. Prosecuting officers regret their own successes, prosecuting witnesses become repentant, and the victims of criminal acts obtain satisfaction, before the term of a sentence has expired—sometimes, almost before it begins—and they join in a petition for a pardon . . . [There is] also the misery and actual destitution of the innocent, for whose wants [the prisoner] would provide if released . . .(Pacheco, 1876: 21).

Governor William Irwin (1875-80), concurring in the indictment of "the inequality of sentences for crimes of essentially the same character," outlined certain consequences in 1877:

> It is not in human nature—not even in criminal human nature—not to rebel against this kind of inequality. The convict who has the long sentence at once feels that he is the subject of injustice and oppression. In the forum of his own conscience he stands the accuser of society for the wrong it is inflicting upon him. . . . And he now feels the glow of a moral sanction as he resolves afresh to perpetuate his war against society (Irwin, 1878: 28-29).

A year later, Lieutenant Governor James A. Johnson explicitly tied the sense of injustice to the problem of prison management. While resident director and warden of San Quentin, he said there were at least two hundred prisoners "serving excessive, unheard of, and inhuman sentences." Such sentences produce prisoners who are "brooding, plotting, unreliable, unsafe, treacherous and unhappy criminals." Something ought to be done; a tenfold increase in the number of pardons for state prisoners would not be too much (DCSP, 1879: 11-12, 20-21).

II

But no effective action to deal with excessive sentences was taken. Indeed, before parole was adopted in 1893, executive clemency was the only way to modify the excessive sentences of most state prisoners.[4]

Problems associated with its use for this purpose were recognized very early. Pardoned prisoners might recidivate, for example, thus embarrassing governors. Governor Weller, in 1859, was moved to "regret to say" to the legislature that two pardoned convicts had "deceived" him; they seemed to have gotten into trouble with the law again. He was also moved to present a "pardon docket" recording the names of citizens supporting prisoners' "prayers" for pardons and his reasons for:

> granting or rejecting the prayer. The publication of this will, at all events, show the people (who have morally, if not constitutionally, a right to know) the grounds upon which the power was exercised (Weller, 1859: 32-33).

Some earlier governors had neglected, apparently, to furnish the names of the pardoned to the legislature, leading to suspicions of corruption.[5]

In 1860, Governor Weller presented an even more elaborate defense of his exercise of the clemency power. Responding to complaints that he was pardoning too many prisoners, he furnished a chart purporting to show that his administration had issued pardons to a smaller proportion of prisoners than had benefited from such actions in eight of nine other states. He also called for a legal change to permit the courts to retry cases when there was newly discovered evidence throwing doubt on the conviction. "As it is now, the Governor may be deceived or imposed upon by *ex parte* affidavits, or the statements of persons unacquainted with all the evidence"

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[4] "Good time," adopted in 1864, permitted the Directors to shorten prison terms, but in proportion to the length of the sentence. Thus, although absolute disparities could be reduced, relative disparities remained. Additionally, maximum grants of good time, which reduced sentences from about 20 to 40% (the longer the sentence, the greater the percentage reduction), did not permit making long sentences short, merely shorter. The courts uniformly refused to modify sentences unless a clear-cut "legal error" was involved. See, e.g., *People v. Bowers* for a statement holding the executive, not the court, responsible for a remedy.

[5] Governors were required by CAL. CONST. of 1849, art. 5, § 13 to report the names, crimes, length and dates of sentences, and dates of pardons or reprieves to each legislature. Weller initiated the practice of reporting more than was required, a practice continued by later governors. CAL. CONST. of 1879, art. 7, § 1 added that the reasons for granting pardons and reprieves were also to be reported.

(Weller, 1860: 65-68). Governor John G. Downey (1860-62) echoed his predecessor in expressing great concern over granting pardons, saying he did not desire to thwart the justice done by the trial courts. He offered the legislature assurances that he was exercising his power with "due caution and discretion" (Downey, 186l: 37).

In 1865, the state Prison Directors noted two problems specifically associated with using executive clemency to modify the disparate sentences of state prisoners. First, there was no way confidently "to separate the deserving from the undeserving." This would require examining the sentences of all 650 prisoners and, as elected state officials with other pressing duties, they—and, especially, the governor—were simply too busy to carry out such a large, complicated task. The second problem was with the governor's taking on "the responsibility of pardoning the number of men, whose good conduct, faithful labor and inordinate sentences seem to entitle them to pardon." Making this point explicit, the Directors noted that although the governor had granted pardons to but 11 prisoners during the past year, he had been subjected to unfavorable comments in the public press. This, they said, was not because the prisoners were undeserving of pardon but because the number was seen as too large (DCSP, 1865: 9).

The legislature finally responded but not in a way that satisfied governors. In 1868, the Directors were required to report to the legislature at each session the names of prisoners who ought to be pardoned. The governor, in turn, could pardon such reported convicts if the legislature so recommended by a majority vote of both houses (1868 Cal. Stats., ch. 137). A year later, the names of 52 prisoners were reported to the legislature to be worthy of pardon, including 8 with life sentences and 28 others with sentences of 10 years or more. Given the pressures later brought to bear on the paroling function, it is interesting to note that the Directors' report contained the following statement:

> In view of the crowded conditions of the cells at the prison, and the fear that the appropriation will not admit of the erection of additional ones the coming year, the Directors may have extended the above list somewhat beyond the limits which they otherwise might have done (DCSP, 1869-70: 4).

So far as we know, the Directors did not again use the provisions of this bill. In 1871 Governor Henry H. Haight explained why:

> The practical working of this Act is not satisfactory. . . . The selections for recommendation are liable to be hastily and indiscriminately made, and the Legislature has not the means of acting intelligently upon the report of the Prison Directors (Haight, 1872: 44).[6]

Later governors continued to sound the litany of troubles attending the use of executive clemency. Governor Pacheco, in 1875, outlined the difficulty of taking account of the multiple values a governor was supposed to honor when granting pardons:

> To maintain a due respect for the power of the law, to avoid weakening the force of example, to refrain from violating any principle of justice and yet to decide impartially upon appeals for clemency . . . is difficult beyond the comprehension of those who lack the experience [of dealing with clemency matters] (Pacheco, 1876: 21).

Governor Irwin, referring in 1877 to the continuing need to deal with "gross inequalities of sentences," proposed that the legislature should find other means than executive clemency:

> The exercise of the pardoning power of the Executive is wholly unsatisfactory to all parties concerned—to the criminals as a body, to their friends, to the community at large, and—more than to any one else—to the Executive himself.

As exercised, he went on, the power may be "productive of more evil than good." Not that it has been too freely exercised or, by and large, exercised in improper cases. Nor did Irwin believe that lodging the power in some other government department would result in better decisions. The problem, he said, is that grounds for exercise of the power, except in cases of apparent wrongful conviction, are "more or less vague and ill-defined"; therefore, the power must be used "in a degree, arbitrarily and capricious[ly]." He went on:

> I presume there has been no Executive who has exercised the pardoning power at all . . . who has not felt that there was an indefinite number of other cases, in which precisely the same reasons existed for exercising it. . . . The tendency of such an exercise of the pardoning power is to produce among prisoners, who are not pardoned, dissatisfaction, and a sense of injustice, analogous to that which results from the inequality of sentences.

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[6] In 1880, the law was amended to require the Prison Directors to report to the governor instead of the legislature. (1880 Cal. Stats., ch. 71, § 34.)

Irwin suggested that, "with the introduction of a plan to equalize sentences," the pardoning power should be "eliminated" from the criminal justice system. Persons wrongfully convicted should be discharged from prison; power should be "vested somewhere" for this purpose. The guilty should not be pardoned, but they should have a chance to shorten their sentences "very materially" if they show "punctiliousness" in the observance of prison discipline, and "faithfulness, skill and efficiency" in performing the work assigned to them (Irwin, 1878: 29-30).

During the next several years, Governor George C. Perkins (1880-83) continued to call the attention of the legislature to the twin evils of unjust sentences and an inadequate, troublesome remedy. He would be pleased, he said, to aid in implementing whatever solutions it might devise (Perkins, 1881: 20-21; 1883: 13). As the result of a constitutional change, Perkins, unlike Irwin, was no longer a prison director. The results of this change, as well as events during Perkins' tenure of office, brought the state a step closer to adopting a measure—parole—designed to address the problems of excessive sentences and clemency with which he and other officials were concerned.

III

The Constitution of 1879 replaced the governing board of elected state officials, acting ex officio, with a board of five citizens appointed by the governor to staggered, ten-year terms.[7] Members of the new State Board of Prison Directors were to devote part of their time, without salaries, to managing the prison system, which had come to include Folsom State Prison as well as San Quentin. The Board was to appoint a warden and clerk for each prison; each warden would appoint the other personnel of his prison. The change was intended to provide more stable management for the prisons and more permanent personnel, instead of the virtually complete turnover at each gubernatorial election that had been the case. It was also intended to relieve elected officers, especially governors, of a heavy task, for which they did not feel especially well prepared. Previous governors had long recommended such a change.

The change was also intended "to take the prisons out of politics," but whether it ever did so may be doubted. In any

[7] The constitution was adopted by majority popular vote in May 1879; Art. X embodies the relevant change.

case, it did not do so immediately. Governor Perkins appointed five Republicans to the first Board of Prison Directors. Charges of misconduct soon surfaced, eventually moving Perkins to appoint a Special Commission of Inquiry into prison affairs. In its report of August 1881, the Commission found the Directors and wardens guilty of a variety of financial and other infractions. Its main finding, however, was that the Prison Directors and the wardens had violated the intent of the new constitution by continuing to operate the prisons as partisan spoils. Not only were the Directors all Republicans; so were the wardens and clerks they had appointed. Further, many prison personnel who were Democrats had been replaced with Republicans; and the wardens, legally required to make these appointments, had agreed to clear them with the Prison Directors (Lamott, 1961: 136-38; Special Commission of Inquiry, 1881: 4-9). The continuation of partisan politics in the prisons was seen as a grievous wrong—the bane of prison reform:

> There is no other factor in the whole subject of penal administration of equal importance. In fact . . . whether proposed legislation will or will not produce salutary effects must depend upon the elimination of politics from prison management . . .[In this case,] the first principles of penal reform were deliberately violated at the very threshold of the new administration, and what followed was still more flagrantly at variance with all reform requirements. . . . The whole prison administration has been thrust in the political groove, and every purpose of reform in the new constitution has been stifled and aborted (Special Commission of Inquiry, 1881: 62-63).

Governor Perkins left office in January 1883 without removing the Prison Directors. But the matter was not concluded. In February, a majority report of the Senate Committee on State Prisons and Prison Buildings charged the prison officials with 15 breaches of statutory and constitutional law. The Committee found the Prison Directors to "have been grossly negligent in the performance of the duties assigned to them." The Senate, upon a majority vote, amended the report only by deleting the phrase "and their whole course is reprehensible and deserving of condemnation," and forwarded it, with 1,127 pages of accompanying evidence, to the new Democratic governor, George C. Stoneman (1883-87) (JS, 1883: 345-46).

Stoneman, in turn, launched his own inquiry during the summer of 1883. It culminated in September with the removal of the four remaining Perkins appointments (the fifth had

resigned earlier and been replaced by a Stoneman appointee). The resignation of the San Quentin warden was accepted shortly thereafter (Lamott, 1961: 140; *Sacramento Weekly Bee*, Sept. 22, 1883; *San Francisco Evening Bulletin*, Sept. 17, 1883; BMSQ, Vol. 1, Oct. 10, 1883: 317, and Oct. 12, 1883: 320-21).

Governor Stoneman sought new Board members among Republicans as well as Democrats, though he had some difficulty finding Republicans willing to serve (*Sacramento Weekly Bee*, Oct. 6, 1883). In the end, however, Charles Sonntag and Robert T. Devlin were appointed as the Republican members. Sonntag, a San Francisco commission merchant (of munitions, among other things), had been a founder of the California Society for the Prevention of Cruelty to Children. Devlin, a Sacramento corporation and bank counsel, was known for his legal acumen; he had written on the laws of real property and deeds and on the treaty powers of the United States. Later he was elected to the state Senate, and became a U.S. attorney. The three Democrats also had active public and business lives. John Boggs was a wealthy landowner and sheep rancher who had been a county supervisor, a member of the governing board of Napa Insane Asylum, and a member of the California Board of Agriculture. William C. Hendricks, involved in gold mining, had been a state senator; he was later elected secretary of state. James H. Wilkins was a well-known journalist and newspaper editor, who also served as the mayor of San Rafael. Governor Stoneman appears to have put together a Board of Prison Directors composed of persons of some stature, perhaps particularly in the eyes of the legislature, people who were able to afford to spend non-salaried time on prison affairs. And the Board, if still partisan, was at least bipartisan.

Stoneman immediately initiated the practice of referring all clemency petitions to the Prison Directors, save only those "having apparent merit, and demanding immediate attention."[8] The Prison Directors, he said, could better investigate the claims made by petitioners, thus assisting him in carrying out a difficult duty. He reported that the Board served him well:

> In nearly all cases their presentation of facts and the conclusions therefrom have been thorough and satisfactory, and they have been of great assistance to the Executive in determining the delicate problem

[8] It is worth noting that the Prison Directors removed from office had indicated their awareness of the problem of prisoners with unjust sentences. They said that they didn't have time to investigate properly such a large number of cases (BPD, 1880: 12).

> presented of doing justice to the prisoner and at the same time, my duty to the State (Stoneman, 1885: 36-37).

The warden of Folsom also commended the newly appointed Board for the quality of its recommendations, noting their positive effects on prisoner conduct (BPD, 1884: 61). The Board, for its part, highly praised Governor Stoneman for his pardon actions, despite "adverse criticism," claiming that only two prisoners he had pardoned had been returned to prison for the commission of new felonies.[9] It credited this result to its thorough investigations, which had weeded out the undeserving. Favorable recommendations were said to have been based on "doubt as to guilt, excessive punishment, or unusual service to the State, backed up by a thorough conviction of the prisoner's reformation," and the governor, they said, has, "as a rule, followed such recommendations" (BPD, 1885: 7-8).

In closing their report, the Prison Directors explicitly proclaimed their fitness for the task of recommending sentence modifications by emphasizing their separation from political influences:

> The Board in its constitution is purely non-partisan and the provisions of the Constitution in creating a Board of this character have been faithfully observed. We have endeavored to conduct the prisons as business institutions, and with regard solely to the public interest. How well we have succeeded others must judge (BPD, 1885: 8).

Such actions and statements laid the ground, we think, for a more complete transfer of discretion to the Board of Prison Directors in the matter of sentence modifications. Still needed was an effort to describe, justify, and move the legislature to adopt the procedures that would embody the required discretion.

IV

Senate Concurrent Resolution No. 5, adopted February 16, 1885, directed the governor "to appoint a committee of five citizens to inquire into the subject of penology as applicable to the conditions of prison affairs in this state" (PC, 1887: 1). The

[9] One example of "adverse criticism," not particularly more colorful than others that might be presented: "Governor Stoneman is piling up a fine record of pardons in the closing days of his administration. Murderers, burglars, thieves, confidence men, defaulters, all these have been allowed to go free . . ." (*San Francisco Chronicle*, Dec. 14, 1886).

precise reasons for this resolution are obscure. However, it is possible to infer that, whatever the reasons, the Commission was destined to be used as a vehicle for recommending solutions to those problems that prison officials, as well as the governor, considered most pressing. Governor Stoneman helped fashion this outcome on October 26, 1885, by establishing the five members of the Board of Prison Directors as the "Penological Commission."

The Commission's report was submitted to Governor Stoneman in 1887. In 21 chapters covering 167 pages, it discussed the care of abandoned, dependent, and neglected children; the role of the state police and police matrons; the county jails; the causes of crime (which included want of a trade, ignorance, intemperance, and the looseness of marriage obligations). Pious hopes were expressed: that children would receive better care; that personnel could be better selected and trained; that county jails could be improved. Three pieces of legislation were proposed. The most carefully presented and defended, and the only one to be enacted, was the proposal for "An Act to Adopt a Parole System."

Chapters on "Indeterminate Sentences" and "Inequalities of Terms and Sentences" (PC, 1887: 40-45, 56-69) prepared the ground for the discussion of parole. The Commissioners knew the tenets upon which indeterminate sentences are based, and they believed there was "much of merit" in these ideas. But they declined to recommend adoption in California. To adopt indeterminate sentences, they said, "would be at once to change all the ideas of punishment that had hitherto prevailed." In particular, it would reject the principle that more serious crimes should be punished more severely. This "would rob the law of its terror to evildoers, and the deterrent effects of criminal punishment would be lost." "We do not believe that in the present time our people are prepared to accept this code, that draws no distinction between crimes," they went on. In addition, they strongly doubted that people could be found who had "sufficient knowledge of human nature, courage, and power to withstand the importunities of friends, to be intrusted with this vast power" to release anyone from prison, anytime, no matter their crime.

Why did the Commissioners feel called upon to discuss indeterminate sentencing, only to reject it? First, in our view, they were concerned to document their still-developing credentials as nonpartisan experts through careful consideration of the newest ideas in penology. This also

accounts, we think, for the broad coverage of topics in their report. Second, they were concerned to show their regard for what they took to be the prevailing local sentiment, evidenced in court decisions, that serious offenders should continue to receive severe sentences. Their discussion says, in effect, that as prison officials, the Commissioners would not use discretion in a way that contravened the sentiment of the community. At the same time, as nonpartisan experts, they would use discretion in an enlightened fashion, taking all new ideas into account.

The next chapter of the report dealt with excessive sentences. "There is no more perplexing question," the report says:

> than what should be the length of time to which a person convicted of a crime should be sentenced. . . . It will be admitted that for the same offense as defined by statute, different persons, under different circumstances aggravating or mitigating their crimes, should receive different sentences. But it is not right that the same person, for the same offense, should receive a punishment all out of proportion to what he should receive, depending on the accident of appearing before one or another Judge of the same Court, or from a temporary excitement of the public mind, either with reference to that offense or to that particular offender, or to offenders generally (PC, 1887: 56).

Still, this happened; there are "cases where sentences of undue severity have been pronounced." Indeed, it happened frequently, as shown by long lists of prisoners at San Quentin and Folsom, classified by offense, with quite different sentences: from one to ten or more years for grand larceny, burglary, and other common crimes. And, it is noted, the "only way of rectifying inequalities, where such exist, is at present, by an appeal to executive clemency."

Finally, "The Parole System" is discussed (PC, 1887: 70-81); it is the answer to a carefully posed dilemma. The courts, properly concerned with deterrence but working with statutes that permit considerable variation in sentences, and subject to pressures that produce such variation, sometimes, if inadvertently, impose excessive sentences. This demoralizes prisoners and makes them difficult to manage; it probably also increases the law-violating propensities of ex-prisoners. Indeterminate sentencing has been proposed as a solution, but this risks undermining the deterrent influence of court sentences. Further, given pressures to release prisoners, who

was there who could be trusted not to release "criminals by nature"[10] back to the community long before the intent of the law was satisfied?

Parole of first-termers not convicted of murder should resolve the dilemma, particularly if release is entrusted to a nonpartisan board, expert in penology.

> By this system the inequality of sentences which confessedly exists, can be corrected without weakening the respect that all should have for the sentences of the Courts . . . (PC, 1887: 70).

Further, parole will relieve the governor of many of the "arduous and unpleasant duties" involved in exercising his clemency powers. This point is made again in a separate, later chapter (PC, 1887: 116-23) emphasizing the help that the Prison Directors had been able to give the governor by subjecting each application for clemency to "a patient and careful examination to determine its merits." Doubtless, the Commissioners asserted, the adoption of parole would greatly reduce the number of pardon applications.

The Commission report was submitted to Governor Stoneman just before his term expired in January 1887. In his final address to the legislature, the governor directed its attention to the report's recommendations:

> One of the most important of these [he said] is what is commonly called the "parole system." This system is now in operation in Ohio, and from all that can be learned is productive of great benefit both to the prisoner and to the general community. In a modified form, it prevails in several European Institutions. The Penological Commission recommended the adoption of this system in this State and in the recommendation I concur. I believe that it is the best system which can be devised for reforming the prisoner, and at the same time giving protection to the interests of society (Stoneman, 1887: 12).

V

The bill drafted by the Commission authorized the Prison Directors to parole first-termers, except those convicted of murder, after one year of imprisonment. Introduced in 1887 after Governor Stoneman left office, it failed to pass the legislature (JS, 1887: 85, 149, 350-51, 393, 407; JA, 1887: 144, 253,

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[10] The phrase was used by the Commissioners (PC, 1887: 70 and *passim*). Such prisoners were to be discriminated from "those who, not bad at heart, have committed crime." It is the latter who were to be paroled. The influence of Lombrosian thinking is apparent.

579, 653). Washington Bartlett (January-September 1887), the governor when it failed, believed in the sparing use of clemency (Melendy and Gilbert, 1965: 223-24). So did his successor, Robert Waterman (1887-91), who also felt that the power to pardon should be confined to the governor (Waterman, 1888: 15). No parole bill was introduced during Waterman's tenure.

The situation changed during the tenure of Henry H. Markham (1891-95). The origins of a parole bill introduced in 1891 are unknown. Different from the Commission's bill, it would have authorized parole of *any* prisoner by a citizen board at each prison, headed by the warden. It seems unlikely to have been supported by the Directors or the governor. In any case, it did not pass (JS, 1891: 289, 366, 367; JA, 1891: 314, 412). Nor did a similar bill introduced in 1893, proposing parole boards that included the Directors, along with the wardens and guard captains of each prison. But five days after the introduction of the latter bill, the Directors asked the prison committees of the Senate and Assembly to substitute for it a bill duplicating the original, Commission-written legislation (BMSQ, Jan. 14, 1893: 335). This was done, and the bill soon passed both houses by large majorities (JS, 1893: 45, 243, 286, 391; JA, 1893: 412, 425, 635, 698, 741, 793, 820-21, 945).

Governor Markham's support seems to have played a key role. Addressing the legislature in 1893, he noted the burden of exercising his clemency powers. Although aided by the Prison Directors, to whom he sent for investigation and recommendations all petitions not rejected outright, he was convinced that more prisoners should serve reduced terms than could be reached through the clemency process. California state prisons, he said, confine:

> from two to three times as many prisoners as in any other State in the Union in proportion to . . . population. . . . I believe it is due to two reasons. First, our statutes create such an exceedingly large number of State prison offenses. Second, because the Judges of this State, in their discretion, impose excessive sentences as compared with other States . . . (Markham, 1893: 44-45).

Perhaps a partial remedy might be found in parole.

> I recommend that your honorable bodies give this system a thorough examination, for I have no doubt that within our prison walls is a large number of men who could be trusted to go upon their parole and thus save the State a very great expense, and afford the men themselves an opportunity of proving that they

> can be trusted and that their desire to reform is genuine (Markham, 1893: 45).

On March 23, 1893, Governor Markham signed the parole bill, notwithstanding a flurry of mostly negative newspaper comment during the preceding weeks.[11] Two years later, he commented on parole in a final address to the legislature:

> At the time of its passage, much opposition was manifested to its enactment. Since testing it, many of the objections have been withdrawn, and, under the stringent rules adopted by the Board of Prison Directors, it promises to result beneficially to all concerned. It certainly acts as a great incentive to the prisoner, and aids in a better maintaining of prison discipline (Markham, 1895: 40).

This abbreviated account of six years of relative inaction further points up the importance of governors' attitudes toward "excessive" sentences and clemency for the history of parole in California. Direct promotion of parole in the state stemmed mainly from the Board of Prison Directors, but they responded to gubernatorial concerns, and their initiatives waxed and waned with each governor's enthusiasm for the measure. Prison administrators (e.g., wardens) supported parole as a disciplinary aid but presumably were reluctant to promote it, and unable to do so successfully, without the support of their appointers, the Directors. The positions of local legal officials are not evident from existing records. No private organizations promoting parole (or other penal reforms) appear to have existed in California during the relevant period. Neither are there any signs of more diffuse popular support. On the other hand, although newspaper commentary only surfaced when adoption was imminent in 1893, it mainly argued that parole would weaken criminal penalties, thus encouraging crime, as well as immediately unloose a flood of dangerous convicts. Such commentary assumes broad support for penal severity, which parole was thought to reduce, and helps make understandable why, without strong gubernatorial urging, legislators would be reluctant to vote for it.

VI

As noted, the statute authorized the Directors to parole only first-termers not convicted of murder. Thus, the Board did not have to consider parole for repeat offenders or those

[11] For newspaper comment see the *San Francisco Examiner*, Mar. 15, 1893, and Apr. 4, 1893. The latter contains quotations from many other California newspapers.

convicted of the most heinous crimes and could avoid conflict over what were typically the most sensitive cases.[12] A minimum stay of a year in prison was required, assuring some punishment whatever the sentence. The Directors were also authorized to "retake and imprison" parolees. Beyond that, the statute was silent, except in giving the Board authority to establish and enforce "rules and regulations" with respect to parole grants and revocations.

The Board proceeded cautiously. First, it adopted rules that made application for parole an obstacle course that few prisoners would traverse.[13] One barrier was cost: some $55 to $65 was needed to place two notices of intent to apply for parole in local newspapers of "opposite politics" ($5); for a security bond to defray the expense of possible arrest and reimprisonment ($25); to buy civilian clothing ($20); and for fare to places of employment ($5-$15). As late as 1910, the cost of application was said to deter "many . . . very many men" from parole.[14] Another barrier was the need to present "satisfactory evidence . . . in writing" that "some responsible person, certified to be such by the Clerk of the County where such person resides," would furnish employment for the parolee, or that the parolee would engage in "some respectable business for himself." This requirement could hinder anyone in a time of depression; for the many without strong outside ties, the barrier was probably insuperable in any period.

Even more prisoners were probably deterred from applying for parole by knowledge, which soon must have percolated throughout the prisons, that opposition from local law officials, or from others in their local communities, would almost certainly result in a denial of parole. The rules required solicitation of the opinions of local officials; publication of the notice of intent stimulated communications from others.

In any event, few applied for parole. Although we do not know the exact number, we do know that fewer than 210 applications reached the Board between March 23, 1893, and

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[12] Prisoners with life sentences, whatever the conviction offense, were not considered for parole until 1901, when they were explicitly made eligible, although the law had not technically barred consideration.

[13] The rules may be found in BMF, Vol. 3: 238-39. They were published separately in BPD, 1893. Otherwise uncited quotations in the following paragraphs are from the rules.

[14] The figures are from an article in the *San Jose Mercury*, Apr. 15, 1904; they applied from 1893 on. The quotation is from Prison Reform League, 1910: 282-83, which gives the same total cost as a minimum. Many prisoners employed attorneys to complete their application documents, which added to the cost.

June 30, 1903, a ten-plus year period we studied intensively. During that same period, at least 4,500 prisoners were formally qualified to apply.

Of the roughly 200 prisoners considered, 156 were granted parole (one of these died before being released). Their conviction offenses were various: manslaughter (26), robbery (23), burglary (17), larceny (33), fraud (12), rape (5), arson (5), various types of assault (16), murder (parole became possible in 1901) (14), and some miscellaneous offenses (5), including perjury.[15] As a group, those paroled had far longer sentences than those either admitted to or discharged from prison during the same decade. For example, among the first-term admissions, well over half (57.5 percent) had sentences of less than four years; fewer than one-seventh (12.8 percent) of those paroled had such short sentences. At the other end, fewer than a fifth (18.5 percent) of those admitted had sentences of 10 years or more, compared to almost a third (31.4 percent) of those paroled. The proportions among those discharged during the period were similar to those among the admittees.[16]

When the sentences of those granted parole are compared with those of other first-termers in prison during the same period, convicted of the same offense, one again sees that the parolees tended to be chosen from among those with longer sentences. Still, parolees were a small subset of those serving long sentences who might have been paroled. What, if anything, distinguished them from these others? As far as we can tell, they, along with the unsuccessful applicants, had the resources and confidence to try for parole. It is important to appreciate the fact that prisoners had to apply in order to be considered for parole—a distinct and considerable difference from later practice in California (and elsewhere), and one linking these early parole procedures to their origins in executive clemency. The result was to limit the occasions on which the Directors had to determine whether to reduce excessive sentences. Many prisoners with excessive sentences were never considered for parole and so served their full terms.

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[15] Information on parole and clemency applicants and grantees was obtained from multiple sources, including registers of admissions (which show later actions), Board minutes, prisoner case files, pardon application files, papers of the California Supreme Court, and secondary sources listed in the References.

[16] The figures on admissions (and those not shown for releases) are estimates based on an analysis of a random sample of 100 newly admitted prisoners a year.

Those who applied and were denied parole appear to have differed from those who were granted parole mainly in that there was community opposition to their "early" release. We were able to find records casting light on the reason(s) for denial in 19 of the 51 applications denied in the first decade. Two, each with two-year sentences, were denied because their sentences were "not excessive." Two others had sentences that were "too long"; i.e., they had not served sufficient time to be considered seriously for parole.[17] In two other cases, the Board felt parole inappropriate. One applicant had been convicted on two charges, leading the Board to find those convicted of multiple charges not "first-termers." The other person had served several years in jail while awaiting the outcome of an appeal; the sentencing judge recommended some action, and her case was referred to the governor for commutation.

In 13 cases, the reason for denial clearly was opposition to sentence reduction, most frequently by local law-enforcement or court officials. Thus, a judge wrote about one prisoner, sentenced to 10 years for manslaughter: "it would be an abuse of Executive Clemency to pardon or parole him." The prosecuting attorney added:

> The officials and people of this county, quite as a whole, will oppose his pardon, as they consider that he will have served little time enough, with the credits taken off of the ten years, for the crime of which he is convicted.

Another prisoner, in for eight years for perjury, was described by the county sheriff as a "bad man" who perjured himself to "cover up" a theft. The prosecutor added that the prisoner was a "moral degenerate." Neighbors, too, wrote letters about many of those denied, saying, for example, that the punishment "fit the crime."

Opposition of this sort was not found in the records of those granted parole.[18] In a very few cases, opinion was reserved—perhaps the time for release had not quite arrived—and later a positive opinion expressed. In almost all cases, only

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[17] On average, prisoners who were paroled served 70% of their sentences (less good time) prior to parole during the first decade. After a threat of repeal of the parole law (discussed below), the Board adopted the rule that prisoners could not be considered for parole until they had served half their sentences (less good time). We infer that this was meant, in part, to avoid the appearance of "undermining" court-fixed sentences. See Wilkins, 1918.

[18] We were able to examine files containing relevant information on 54 of the 156 parolees; 27 records included some or all of the records the Board had consulted in granting parole. There is no apparent reason to believe that the records of the other parolees would contain contradictory information.

communications expressing support for parole were present. Thus, the committing judge in the case of an offender sentenced to 12 years for robbery said: "If the boy desires to retrieve himself, I shall be pleased to learn he has been given a chance to do so." Letters in this case from the parish priest, various neighbors, the prosecuting and defense attorneys, and even the police chief were yet more positive. In other cases, petitions from neighbors pleaded for release on grounds of "mercy and justice"; former employers wrote about "good character"; judges and prosecutors mentioned mitigating information that had later come to light; jurors expressed second thoughts about the level of the penalty meted out by the court, or even about the prisoner's guilt. In brief, the cases made for those paroled resembled the cases made by governors for many of those granted executive clemency.

The Board sought more than the assurance that local law officials and the community supported modification of the prison terms of parolees on grounds of "justice." The Directors also, according to their rules, needed assurance that prisoners would "live and remain at liberty without violating the law." Parole advisory committees at each prison, composed of the warden, physician, and captain of the guard, were to help provide this assurance. The committees were to obtain "all information possible of the antecedents of each and every applicant," and to form and report an opinion about "the general conduct of the prisoner, and the probability . . . of his remaining on parole without violating the law." The committees frequently advised against parole—unfortunately, that is all that remaining records usually say. Sometimes they mentioned that a prisoner failed during the previous six months to maintain a "perfect" conduct record as required. In other cases their recommendations were clearly influenced by correspondence indicating that the applicant's record—of crime or character—made him a poor risk not to violate the law again: some unsuccessful applicants were characterized as "given to drink" or "untrustworthy."

Parole-supervision could hardly be trusted to make much difference; indeed, little was said about supervision, and no active supervision was provided by the Board for many years. Parolees were required, under the rules, to report monthly by mail. The form provided asked for a financial accounting and was to be countersigned by the parolee's employer. Parolees were also required to report to the local police chief or sheriff as frequently as the Board might specify in each case. Parolees

would remain under the constructive custody of the Directors until discharge from sentence. Until then, they could lose good time credits and be reconfined for "any reason . . . satisfactory to the board, and at their sole discretion."

Emphasis was clearly on the selection of "safe" parolees, not on the supervision of "risks." Overall, the Directors were arguably successful. Of the 155 prisoners released on parole during the first decade, 17 later had their parole status cancelled temporarily, or were reimprisoned by the Board or a court, either before or after discharge from sentence. Nine of the 17, over half, were returned to prison by the Board without being convicted of a new crime. We know the reason in only two cases: smuggling money to a prisoner by concealing it in a book, and getting drunk and being absent from work. Of the five recommitted by a court, four were convicted, respectively, of grand theft, assault with a deadly weapon, robbery, and murder. The commitment crime of the fifth is unknown.

The case of the "murderer" and his partner is instructive about the pressures on the Board—and the use of parole as an alternative to clemency. Abe Majors and Bert Willmore were originally committed from Alameda to Folsom Prison in 1896, each convicted of two counts of burglary in the first degree. Both were alleged to be 16 years of age, although Abe Majors' mother claimed he was 15 when convicted. The case attracted considerable notoriety, leading to petitions signed by dozens of citizens, a state senator, the mayors of Oakland and San Francisco, attorneys, newspapermen, and publishers, all calling on Governor James H. Budd (1895-99) to exert his clemency powers in view of the prisoners' "tender years." In mid-1898, the Directors unanimously recommended against clemency on the basis of the "very strong protest" from the Alameda prosecuting attorney and "others," stating that the applicants "would only again commit offenses" and had "not yet satisfied the ends of justice by the length of their terms of imprisonment."

By December 1898, however, with public pressure continuing, Majors and Willmore were being considered for parole. At the end of the month, both were paroled. What justified the change of heart, apparently, was testimony from Folsom Warden Aull that the prisoners' conduct in prison had led him to conclude that they had "reformed." In a unique action, the Alameda prosecutor agreed to waive publication of the notice of intent to apply for parole.

Within a year, Bert Willmore was killed by the chief of police of Alameda while resisting arrest. Shortly thereafter (the exact date is unknown) Abe Majors, on a "crime spree" in Utah, was convicted of murder and sentenced to be shot.[19] The fates of Willmore and Majors, like their earlier cases, aroused considerable interest and comment. One alleged result was a move on the part of one California legislator to repeal the parole law (Wilkins, 1918). This was resisted by the Directors, who convinced Governor Henry T. Gage (1899-1903) to support retention of parole. During this brief period of difficulty, the Directors ceased to grant paroles. When they resumed, they, not surprisingly, continued to issue paroles sparingly.

After the situation quieted down, Governor Gage proposed that the legislature authorize parole of first-term prisoners with life sentences, including those convicted of murder, after they had served at least seven years. This would relieve him, he said, of dealing with the many appeals for clemency coming from prisoners not eligible for parole under the original law.

> In nearly fifty percent of [these]. . . cases . . . , the applications are accompanied by a petition signed by the jury which convicted the criminal, and by a letter of the trial judge, expressing his opinion that the sentence imposed was perhaps too severe, or that the ends of justice would be subserved by the liberation of the convict (Gage, 1901: 37).

The law was amended as proposed (1901 Cal. Stats., ch. 64 at 82). The Board proceeded to grant parole to some murderers who had earlier applied for clemency and to check with the governor on the advisability of parole for others when the cases were unknown to his office. By June 30, 1903, 14 murderers were paroled, including three with life sentences; a fourth lifer had been convicted of robbery. (The non-life murderers had sentences ranging from 10 to 50 years.) The four lifers were among roughly 300 with similar sentences in the prisons, but these had served 323, 221, 212, and 102 months, respectively—among the longest terms. In each case, the opinion was expressed that the punishment already experienced was sufficient—more would be "excessive." Similar support was forthcoming for the paroled non-life murderers, who also had served lengthy terms.

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[19] Majors was later retried, convicted of murder in the second degree, imprisoned, and eventually paroled. When paroled from Utah State Prison, he applied for a pardon of his California conviction, claiming he was but 14 years old at the time of his burglary conviction. It was not granted. In 1920 he was committed to San Quentin on a charge of burglary in the second degree.

Gubernatorial interaction with the Board was especially intense in the cases of lifers and prisoners convicted of murder, but it existed in many other cases as well. And, as we shall show, governors continued to be concerned with overall paroling policy—as they have, indeed, to the present day. At the same time, it seems apparent that parole took over some considerable part of the burden associated with the exercise of clemency. It may have reduced the flow of clemency applications; we are not sure. It certainly reduced the number of applications governors had to consider in the sort of detail that a clemency grant appears to have involved. In the 1880s, even after the new Board of Prison Directors began to screen applications (and recommend rejection of some), governors issued over 40 pardons or commutations yearly to state prisoners. From 1893 to mid-1903, the first decade of parole, the average number was radically reduced, to 13. This reduction took place, it should be noted, while the prison population, and thus the number of potential clemency applications, was rising, as it has been virtually throughout California history (see Berk *et al.*, 1981).

Parole also reduced the proportions of "early" releases for which governors had to assume direct responsibility. In the first decades of imprisonment in California, clemency was frequent; from 1865 through 1880, for example, 13.1 percent of prisoners released (excluding deaths, court discharges, and escapes), about one in eight, had their prison terms shortened by executive clemency. From 1880 through 1893, with the new Board screening clemency applications, the rate was reduced to 7.6 percent, about one in 13. The advent of parole saw a further dramatic reduction. From 1894 through 1901 (when the law was amended to permit parole of murderers), the rate was reduced to 2.3 percent, about one in 46. Later years saw further reductions, both absolutely and relative to parole.

Prisoners did not stop seeking clemency with the advent of parole, nor did governors cease to grant it. Both became more selective in doing so, although it is not uncommon to see parole files consisting largely of clemency petitions transferred to the parole board from the governor's office. Comparison of remaining records suggests some of the principles that were involved in differentiating between parole and executive clemency, but it also indicates that these principles were unevenly applied. We believe that political pressure to issue pardons to "erase" the blots on certain prisoners' records

counted for much in the decision.[20] Then, as earlier and now, pardons provided a way of doing an important favor for someone.

The bulk of the cases granted clemency became increasingly distinct from those paroled. A prisoner who legally might have been paroled was pardoned when convicting and sentencing officials came to believe that he was not guilty. In other cases, a statutory error had led to a sentence longer than intended by the legislature, and the prisoners had already served the "correct" sentence, or more. In still other cases, time in jail awaiting the outcome of an appeal was almost as long as the sentence finally imposed. In a few cases, clemency was a reward for some exceptional act—such as saving the life of a prison official during a riot. Other cases involved deportation; still others involved prisoners not deemed suited for parole because they were too old or infirm to obtain the sorts of employment the Board held requisite for parole. In later years, parole would be used to release "early" these sorts of prisoners too. Some pardons, however, continued to go to prisoners pleading "excessive" sentences, who are indistinguishable, with existing data, from those paroled.[21]

VII

In January 1907, Governor Pardee (1903-07) delivered his final message to the legislature. One important topic was the prisons. From 1890 to 1900, he noted, the prison population had risen by 73 persons, but in just the past six years, from 1900 to 1906, it had increased by 503. As the legislature would recall, he had reluctantly sought, and the legislature had generously provided, funds to increase the numbers of cells available. But cell construction was going slowly. And, even were it proceeding more rapidly, it was quite clear that the cells "will no sooner have been completed than the State will again be

[20] We looked closely at the remaining records of prisoners who were granted executive clemency during the period 1893-1903 and were formally eligible for parole. We compared these records with the records of prisoners who were granted clemency during 1883-93 and would have been formally eligible for parole in the later period. Many more of those granted clemency after the adoption of parole were depicted by governors as having come from families of high social status, or as having such status of their own accord. Many more cases referred to pleas for clemency from influential figures other than criminal justice officials. Finally, more justifications for clemency were given per case.

[21] Similarly, some of those paroled seemed apt candidates for pardons, according to these principles, e.g., those recommended for parole by governors because of "doubts" about their guilt.

face to face with the problem of [needing] more cells." What should be done? There is a way, he said, of:

> lessening the congestion consequent upon having too many prisoners and too few cells to put them in, aside from constucting additional prison quarters . . . [It] is the extension of the parole system (Pardee, 1907: 17-18).

In other words, parole could be used to shorten the sentences of a greater proportion of prisoners.

The risk to society of such a policy will be low, the governor maintained. Past experience showed that the Prison Directors were able to select for parole prisoners worthy of release from prison. Thus, of the 304 prisoners paroled since 1893, only 27 had violated their paroles. Of these, 18 were back in prison, leaving but nine unapprehended. Those to be paroled under a changed policy need pose no greater risk, since the use of parole:

> does not so much depend upon reformatory work as it does upon setting men at liberty who are not really criminals, but good men who have done bad things, as many good men do; but some of the bad things done by good men, are fortunately, not so very bad (Pardee, 1907: 19).

More "good men" should be found for parole. To help find them, a position should be established at each prison, and the person in that position should get to know which prisoners "are well deserving of being paroled" and recommend their parole to the Prison Directors. This will assist the Directors, who do not have the time to locate all the parolable prisoners. In addition, the persons in these positions will "follow, helpfully, those who need assistance while out on parole." In the meantime, the money appropriated for more cells won't be wasted. There "are prisoners enough who are criminals at heart to keep our new cellhouses full" (Pardee, 1907: 18-19).

Shortly after Governor Pardee's parting remarks to the legislature, an Assembly Special [Interim] Committee on State Prison Reform reported. It agreed with Governor Pardee that:

> There is a method by which this congested condition of the prison could be relieved, and that instead of building more and larger prisons, we should have some system of releasing the prisoners. . . . We refer to the parole system. We do not believe that sufficient consideration for the paroling of prisoners has been given in the past . . . (JA, 1907: 277-78).

Not everyone should receive a parole, of course. But excepting the "vicious, and totally depraved," those prisoners who

"behave well in confinement" and have "a reasonable prospect for . . . becoming self-sustaining in some honest and honorable occupation" should be paroled (JA, 1907: 277-78).

The committee estimated that about half of San Quentin's roughly 1,500 prisoners were eligible for parole, plus perhaps 200 at Folsom. But, they noted, applications for parole were relatively few; other states were paroling many more prisoners than California (JA, 1907: 277-79).

The committee concluded that the Board of Prison Directors was too reluctant to use its paroling power. It recommended that this power be withdrawn from the "men that manage prisons" and be given to a new board of five members, appointed by the governor; the new board would include the president of the Board of Prison Directors as a voting member. The committee introduced legislation to effect this end (JA, 1907: 98, 279, 1227-28). Assembly Bill No. 1 was passed by both houses but vetoed without comment by Governor James N. Gillett (1907-11) on March 23, 1907 (California State Legislature, 1907: 20).

By that time, Governor Gillett had joined the legislature in inviting the Prison Directors to use parole more frequently than they had in the past. Why had he done this? He did not mention prison crowding, but he did mention pardons. He had learned that "it was impossible for the Governor . . . to give to pardons the attention they deserved without neglecting other matters demanding his attention" (Gillett, 1911: 13; 1909: 7).

Governor Gillett took additional steps to encourage a change in parole policy. One was to redirect a major branch of the swollen stream of pardon applications to the Prison Directors for parole consideration. In 1907 he had, he said:

> adopted the . . . rule that no person eligible to parole, other than one establishing his innocence of crime, should be pardoned until he has applied for and received a parole. The advantages of this rule are manifest. It places pardons under the merit system removing all questions of undue influences or improper motives. A prisoner receives his parole solely because his prison life has been such as to justify the prison board and prison officers in believing his conduct outside the prison walls will be commendable, and that he will make good in every respect (Gillett, 1909: 8).

A second step was to couple this "rule" with "an additional incentive" to enhance the "striking . . . results attained by" parole. Pardons would be granted upon a recommendation of the Board of Prison Directors to "all paroled prisoners who

conducted themselves as honest and upright men for a period of not less than two years" (Gillett, 1909: 8).

A third step was to replace two members of the Board of Prison Directors appointed by the prior governor with people who were apparent supporters of the new policy. During the April-June 1907 quarter, following the appointment of the first of Gillett's nominees, the number of prisoners released on parole exceeded that of any preceding quarter in the history of California paroles. This increased rate was sustained. During the following seven quarters through January-March 1909, the average rate of releases by parole was virtually three times that of the preceding eight quarters. Clearly, there was a sudden and sustained increase in paroles in response to the gubernatorial and legislative pressures on the Prison Directors (Berecochea, 1982: 197-99).

In 1909, Governor Gillett recommended yet another measure that would raise the number of parolable prisoners—and reduce the occasions for grants of executive clemency. "Under our laws," he said:

> the only prisoners eligible for parole are first-termers. A second termer cannot be paroled. Equal privileges should be extended to all classes of prisoners, leaving to the Prison Board the determination of suitability of the particular person to receive parole. There is no reason to believe that this board will abuse any discretion reposed in it, and there is much reason to expect good results from the release of any second termers under the wise provisions of the parole laws and regulations (Gillett, 1909: 8).

A statute was passed in 1909 making multiple termers eligible for parole after one year in prison (JS, 1909: 207, 500, 549, 855, 1729; JA, 1909: 914, 1149, 1289). The number of releases by parole continued to increase, resulting in a slowing of the growth of the prison population (Berecochea, 1982: 221-30; Berk *et al.*, 1983). In the ten years from fiscal 1894 through fiscal 1903, 155 prisoners were released on parole; in fiscal 1909 alone, the number was 188. In fiscal 1903, 5 percent of those released by parole or discharge were paroled; by 1909, 22 percent. In 1914, the approximate end of the founding period of parole in California, 520 prisoners were paroled; 527 prisoners were, by comparison, directly discharged from prison. In later years, both the numbers and proportions paroled were still higher.

With this change in policy, parole-release necessarily became less selective: some "criminals by nature" were almost

certain to be paroled, as well as many "meritorious" prisoners, "those who, not bad at heart, have committed crime." With the change also came a felt need to provide additional assurance that the "public" would be protected against the depredations of those released "early" on parole. This, in turn, would serve to move parole in California closer to the Progressive Era vision of parole as a rehabilitative enterprise.

VIII

The fundamental move in this direction was the creation of a bureaucracy promising control of parolees and services for them. The first step was the establishment in 1908 of a parole officer position by the Board of Prison Directors (BMSQ, Vol. 7, Mar. 13, 1908: 413) at the behest of the governor (Pardee, 1907: 18-19) and the Board of Charities and Corrections (1906: 41).[22] Although the position was ostensibly established, in part, to assist the Board in locating a greater number of parolable prisoners, the parole agent, Karl E. Hanson, was placed in the Board's offices in the San Francisco Ferry Building across the bridgeless Bay from San Quentin and 95 miles from Folsom—so it is not entirely clear how, or whether, he accomplished this task. A later account suggests that his main functions, from the start, were to help arrange employment for parolable convicts and to keep track of the monthly reports parolees were required to submit (Ford, 1912: 37-38). In 1913, the parole officer took on an additional function as he replaced the warden in reporting parole violations to the Board.

The numbers of new prison admissions, and thus releases, continued to increase after 1907. And higher proportions of those released were paroled rather than directly discharged from prison. One effect was a rapidly growing parolee population.[23] Asserting the value of parole but claiming that it needed more resources and staff to carry out its increasingly numerous tasks, the Board obtained a separate budget for the nascent parole office and then got a staff of assistant parole

[22] The Board of Charities and Corrections was established in 1903 to provide oversight for all state and local charitable and correctional institutions (Cahn and Bary, 1936: xiii-xx). It had no authority over the operations of prisons. Its reports, unlike those of the Board of Prison Directors, generally espoused a "Progressive" line about, e.g., parole and the indeterminate sentence.

[23] New prison admissions show an almost invariably increasing trend during the period, from 630 in fiscal 1893 to 1402 in 1914. In 1907, fewer than 80 persons were on parole. By 1914, the number was over 600.

officers, clerks, and bookkeepers in San Francisco and Los Angeles (BPD, 1910: 7-9; 1913: 9-12; 1915: 9-10; 1916: 119-24).

Meanwhile, by changing its procedures, the Board was making it easier for convicts to apply for parole. First, in 1911 prisoners were allowed to seek parole without having secured a promise of employment, provided that all other conditions had been met. If granted, release on parole would be contingent upon obtaining a promise of a job satisfactory to the warden and parole officer—who were to report details of the job and the person's intended place of residence to the Board. Additional changes were the elimination in 1911 of the $25 deposit required of parole applicants; the elimination in 1912 of the requirement that applicants publish a notice of intent to apply for parole; a further decision that year to supply prisoners released on parole with necessary clothing and enough money to provide at least $5 upon release (amended a year later to pay also for transportation to their place of employment); and in 1913 allowing parole violators who had been returned to prison to apply again for parole (BMF, Vol. 7: 34-35; BMSQ, Vol. 8: 480 and Vol. 9: 98, 105, 217). Clearly, the intent of all but the last of these changes was to remove barriers to applications by prisoners who might otherwise be eligible but could not raise the money required. Removal of the requirement to publish a notice of intent may indicate the Board's decreasing concern with general public opinion about the advisability of parole in individual cases (opinion from local law officials continued to be solicited). The last change, which also removed a barrier to applications for parole, may be seen as a reaction by the Board to the increasing number of returned parole violaters in prison, an increase traceable to the large number of people released on parole during the previous five years.

The beginnings of a routine parole application procedure may be seen in the 1911 rule changes allowing prisoners whose applications were denied to apply again after one year. This waiting period was reduced to six months a year later. In 1913, separate hearing calendars were established for life termers who had served at least eight calendar years and for other prisoners who had served at least ten (BMSQ, Vol. 8: 430; Vol. 9: 106, 203). Parole was changing from a special privilege for which exceptional prisoners might apply to a standard mode of release from prison, routinely considered upon completion of a minimum term of confinement.

Nor were these the only changes. As it grew, the new parole agency began to develop a distinctive rationale for its existence. Parole was presented as a rehabilitative system whose success could be measured. Parolees seldom recidivated—only about 20 percent got into trouble, and fewer than 5 percent were returned to prison with a new court commitment. One result, it was claimed, was a reduction in the proportion of persons committed to prison who were recidivists (Ford, 1912: 37-38). In prison, convicts cost the state around $200 a year; on parole they earned more than twice that amount, and many managed to accrue considerable personal savings. Further, it cost far more to keep people in prison than it did to keep them on parole, by a ratio of at least five to one (BPD, 1916: 119-20; Ford, 1912: 39-40). Also, the parole system, said Parole Officer Edward H. Whyte, "makes it possible to transform the men who have been convicted of crimes" from costly prisoners into "industrious men" earning their own living (Whyte, 1916: 3). Parole could do what the prisons could not—enable convicts to be self-supporting.

The success of parole was said to be dependent upon hard work performed by highly qualified people whose duties were so complex and numerous that their full exposition in print was precluded. The officers had to examine the parolees' monthly reports, correspond with employers and peace officers throughout the state, and respond to a multitude of requests and appeals from the parolees, their families, and friends. Also, the parole office became for many a multiservice employment agency, helping prisoners seeking parole to obtain a promise of employment, helping parolees who had lost their jobs to find another, providing clothes and tools needed for work, arranging transportation to a new job, and even securing temporary board and lodging for those temporarily out of work. Occasionally, the services of employment agencies were purchased for the parolee (BPD, 1910: 7-9; 1913: 9-12; 1915: 9-10; 1916, 119-20).

Surveillance, too, was promised. It was said:

> A detailed record is kept by the [chief] Parole Officer, under a special system recently devised and put in operation, by means of which the status, condition, and whereabouts of each paroled prisoner can at any time be ascertained at a glance (Ford, 1912: 39).

But, it must be remembered that there were then several hundred persons on parole and no more than three parole officers, and that the automobile had not yet become ubiquitous. Further, the officers were to see their charges personally only as their other duties would allow. Officers were

dependent for their knowledge of the parolees' whereabouts, employment, and conduct upon monthly reports and correspondence with employers and local peace officers. Clearly, surveillance was then more a pretense than a practical reality.

By the end of the development period—around 1914—parole was being proclaimed as an unqualified success which was becoming ever more effective:

> [W]e are evolving better methods of handling the prisoners' applications for parole, and determining their fitness, and also better facilities for their supervision while on parole (BPD, 1915: 9).

The ability of the parole office to provide services to the parolee was said to depend upon the acceptance of parolees by the community in general and by employers and peace officers in particular. The widespread, mistaken belief that a parolee is "a beast to be dreaded" must be overcome, according to parole officials. Imprisonment, it was claimed, no more fundamentally changes a person's nature than does the bestowal of the greatest honors. Thus, the upstanding person who was respected before being committed to prison ought not to be rejected just because he is on parole. Rather, with the penalty for crime having been paid by the period of imprisonment, the person ought again to be treated as a human being. To do otherwise, the argument continued, would be foolish, because failure to accept the former prisoner is likely to result in bitterness and despair, which might lead the person to crime. Indeed, the promise of help from the parole system, and acceptance by the community of parole and the parolee, were presented as being essential: the criminogenic influence of imprisonment could be counteracted by releasing the person on parole, where rehabilitation might occur (BPD, 1916: 212-22; Whyte, 1916: 1-4). There, in the community, the convict could live under the parole rules, which were said to be "complete in every detail and [to] cover minutely every point required to assist prisoners on parole to rehabilitate themselves as useful members of society" (BPD, 1916: 122).

Parole was being expanded. It had started as a partial alternative to executive clemency and had come to be used as a tool for controlling prison population growth; now it was growing to include the promise of service and surveillance. But it did not yet have a theory of individual behavior which laid the person's criminal conduct to personal pathology that might be successfully treated. Rather, there were among convicts in

prison good people—many, it was believed—who had been subjected to exceptional tribulations that had gotten them into trouble. Parole would allow them to be released earlier than others convicted of similar offenses, and, perhaps with a little help now and then, to resume their former good standing in the community. The criminals at heart were to be left in prison; they could do nothing good for themselves and nothing good could be done for them. Still to come was the practice of releasing virtually all prisoners on parole and the charge to parole officers to complete their rehabilitation, ostensibly begun in prison. The "rehabilitative ideal" (Allen, 1981) had not yet arrived, but the organizational apparatus that would in time help engender it was being put in place.

IX

This is our line of argument in brief. From the start, many sentences imposed by local courts were felt by prisoners and their families and friends—and even by the officials who imposed them—to be excessive. Relief was sought by appeals for executive clemency, the only remedy available in almost all cases, and governors were subjected to an ever-increasing flood of petitions. Whether the governors granted clemency or not, they were subject to criticism. When they granted clemency, there were suspicions of political favoritism, even corruption, and accusations of disregard for the integrity of the law and for public safety. Further, prisoners and others charged, and some governors believed, that the clemency process was inherently arbitrary. On the other hand, a reluctance to pardon brought complaints from those whose plights would be relieved by clemency and from their supporters. It also brought expressions of concern from prison officials who saw prisoners with excessive sentences as special, remediable sources of discipline problems.

It is in this context that parole was recommended and adopted in California. In 1880, general management of the prisons was shifted from elected officials, including the governor, to an appointed board. The board was carefully defined as a "non-partisan" group of "penal experts." This laid the ground for later transfer of a share of the governor's clemency powers to the board. The parole law empowered gubernatorial appointees to relieve governors of the bulk of the burden of reducing excessive sentences, although at first it barred parole of persons convicted of murder and those previously imprisoned. After eight years, parole eligibility was

extended to murderers who had served at least seven years. The appointees proceeded cautiously, treating parole as a form of clemency reserved for the few prisoners whose "early" release was supported by officials and other citizens in the potential parolees' local communities. Throughout, the focus was on parole as a release mechanism, designed to remedy, however slightly and unevenly, injustices incurred in sentencing.

Still later, parole was turned to an additional use: to relieve the crowded condition of the prisons. This change did not come easily, but when it did, the justification for parole began to shift. Paroling authorities began to argue that parole would save money by reducing the need for additional prison space. At the same time, they said, it could assure greater public safety than outright discharge from prison—if more parole officers were hired. It was only when they were—after 1914, when our intensive study stops—that support for parole as a rehabilitative system began to submerge concern for parole as an instrument of justice. Such support appears to have come mainly, at first, from within the parole bureaucracy, serving to enhance the "professional" claims of parole officers (Berecochea, 1982).

Parole in California, then, was not begun as part of a broader program to "rehabilitate" prisoners, as was apparently the case in other states (McKelvey, 1977: 154-59). Nor does the broader ideology of the Progressive reformers appear to have been essential to its foundation (Rothman, 1980: 43-81).[24] Parole was not seen or represented as designed to motivate conformance to a rehabilitative prison regime. Although they were familiar with this interpretation of parole, the officials who promoted parole (and it was promoted mainly by officials) did not believe that a rehabilitative regime existed in California prisons, and they were skeptical of achieving one with available or anticipated resources. In the meantime, parole had a more pressing use. Nor was the parole-supervision period initially

[24] Although Rothman (1980: 3) purports to be concerned with the "origins" of the reforms he discusses, his descriptive materials on parole (159-201 and 433-35) date from the 1920s and 1930s. By then, parole in California had evolved away from its original form and purpose; perhaps this was true in other states as well. (Some states, indeed, may have adopted parole in its more "evolved" form.) Rothman (1980: 159) also treats parole as an aspect of indeterminate sentencing, a reform that in many states, including California, was adopted independently of and later than parole. We think it likely, from our data, that the broader Progressive ideology influenced the later form, purposes, and understanding of parole in California; perhaps this is true more widely.

conceived of as a time when rehabilitation would take place. It was, rather, the end of a determinate sentence imposed by a court, not worth troubling the governor to modify in most cases.[25]

Parole in California did not rest, either, upon any new-found faith that social science or increased governmental powers would significantly reduce crime (Rothman, 1980: 46-50). Although prospective parolees were studied carefully, the object of such consideration was not to discover the causes or cures for crime, nor to individualize sentences in light of such discoveries. It was to learn whether the punishments imposed by the courts were appropriate in light of justice standards assumed to be widely shared but unevenly applied. "Individualization" consisted in reducing the prison terms of those inappropriately sentenced, if there were no strong objections from the prisoners' local communities. Parole as adopted did not increase governmental powers; it transferred to lower officials a part of the governor's already-existing clemency powers. The argument was that these officials were better placed than the governor to undo error, carelessness, and, sometimes, malevolence in the imposition of sentences by local courts.

The adoption and early operation of parole in California is best understood as an incident in a still-continuing bureaucratization of the sentencing process. The problem that parole was primarily designed to address inheres in a sentencing process that upholds an ideal of commensurate, equitable punishment but leaves the choice of punishment to local officials operating under broad and vague standards. Perception of that problem, as well as efforts to cope with it, was present from the start of state imprisonment, which concentrated in a single place persons sentenced by multiple local courts and in a single official, the governor, power to remedy it. What changed—and triggered the introduction of parole—were the demands on the governor's time due to the increasing scale of the system, leading to an increased number of clemency petitions. Parole sheared off a part of the governor's responsibilities and relocated it in an administrative apparatus that already exercised related powers. The apparatus, at first, was expected to do nothing new but to be able to do an old job better under changed circumstances. Later, the

[25] In a number of instances during the early years, the Directors asked governors to commute very long sentences to shorten the parole-supervision period.

apparatus was asked to perform new tasks with its recently received powers, namely, to control the size of the prison population and to provide surveillance and services for parolees. It was responsibility for these new tasks, and the organizational changes they entailed, that encouraged the development and adoption of a rehabilitative justification for parole.

The foregoing suggests that inquiries into the origins of penal reforms should be specific about the times and places studied. The purposes that can be served by seemingly unitary reforms like parole are diverse. Snapshots of whole eras may be misleading about particular situations and pressures. Justice and social protection (one version of which recommends "rehabilitation") appear to be persistent aspirations in criminal justice and its reform; they mark permanent tensions in what is expected of the apparatus of criminal justice, including imprisonment. Any penal reform, if it is to be adopted, must appear to further, or at least not contradict, both. But determining which is truly compelling in any given instance remains problematic. Parole in California was adopted not mainly to promote social protection but to promote justice, however selectively. We think that the story to be told in other jurisdictions may differ from what we have found in California. Many penal reforms, like parole, are sufficiently malleable to permit their adoption for quite different reasons.

This leads to a second lesson: inquiries into the development of penal reforms must be alert to changes over time in the problems of the organizations they serve. Adopted to deal with complaints about justice, parole was turned 15 years later to the relief of prison crowding—a use continued into the 1970s (Berk *et al.*, 1983). When this happened, parole became, in fact, a means for greater centralization of sentencing—an effect not part of its original purpose. Further, supervision, which at first was not a significant part of parole, became important. It led to the establishment of a parole-supervision organization, centered on the parolees in the community. This development created still further problems, including the felt need for a revised justification of parole. As the supervisory apparatus grew, those responsible for it began to understand, or at least talk about, parole in a new way and to adopt justifications for it keyed to their experiences and interests. In time, parole came to be represented as a

rehabilitative program.[26]

Such changes have not ended. In 1977, California introduced determinate sentencing, abolished parole-release for most prisoners, and made parole-supervision a virtually mandatory period of surveillance to be served when the prison sentence expires.[27] Parole in California is no longer a way of being released from prison in advance of sentence expiration; it is no longer a means for achieving equity in sentencing. Time served in prison until release on parole can no longer be manipulated to control the size of the prison population. Parole-supervision, although retaining some rehabilitative pretensions, is represented as, above all, a means of providing "public safety" through "supervision and surveillance" (Messinger and Johnson, 1978: 51). Thus, once again, parole has been changed by dropping some former uses and emphasizing others. And the end, presumably, has not yet arrived.

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[26] A rehabilitative justification for parole became more prominent after 1917, when indeterminate sentencing was introduced. Even so, the measure was recommended primarily as an additional tool to enable the Directors to bring about "greater equality and consistency" than resulted from the determinate sentences imposed by the criminal courts (BPD, 1920: 6).

[27] These changes came about in a move to replace indeterminate sentencing with a procedure that would produce fairer and more certain prison sentences. The parole change took place in the background. See Messinger and Johnson, 1978.

* Abbreviations used in the text precede the appropriate entries.

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