

In re Lawrence and Hayward v. Marshall: Reexamining the Due Process Protections of California Lifers Seeking Parole

Blaire Russell†

INTRODUCTION

In California prisons today, approximately 30,000 inmates are serving potential life sentences but are eligible for release on parole¹ after serving minimum terms of confinement.² Most of these “lifers” are convicted murderers³ serving sentences of twenty-five or fifteen years to life.⁴ Approximately 4,000 lifers apply for parole each year.⁵ The Board of Parole Hearings, the agency within the executive branch responsible for making parole determinations, recommends parole two to five percent of the time.⁶ Of that two to five percent, even fewer lifers are actually released. The Governor has the power to approve or disapprove parole recommendations made by the Board of Parole Hearings. During his four years in office, former Governor Gray Davis reviewed 371 parole recommendations and approved parole nine times.⁷ Since taking office in late 2003, Governor Arnold Schwarzenegger has been slightly less stringent than Governor Davis, but stringent nonetheless: as

† J.D. Candidate 2009, University of California, Berkeley, School of Law.

1. Michael Rothfeld, *Is This Paroled Killer Still a Threat?*, L.A. TIMES, July 13, 2008, at A1; Gary Klien, *‘Buddha Behind Bars’ Granted Rare Release, But Fight from DA Promised*, MARIN INDEP. J., July 21, 2008.

2. *In re Dannenberg*, 34 Cal. 4th 1061, 1078 (2005). See *infra* Part I for a discussion of California’s parole scheme for life inmates.

3. Rothfeld, *supra* note 1.

4. As discussed *infra* note 23, twenty-five years is generally the minimum term for first degree murder, while fifteen years is generally the minimum term for second degree murder.

5. Klien, *supra* note 1.

6. Compare Rothfeld, *supra* note 1 (reporting that the Board under Schwarzenegger has been granting release to 5% of eligible lifers), and Klien, *supra* note 1 (reporting that the Board recommends parole 2% of the time).¹

7. Rothfeld, *supra* note 1.

of mid-2008, he had reviewed 830 parole recommendations⁸ and allowed release 192 times.⁹

Both California and federal courts have recognized that California lifers are entitled to some measure of due process protection when they are denied parole—in other words, that they have a constitutionally protected “liberty interest” in parole release. The due process protection that the courts have established to protect that liberty interest is judicial review to determine whether the decision by the Board or Governor denying parole is supported by “some evidence.” The year 2008 saw important developments in both state and federal case law concerning the “some evidence” standard of review of lifer parole decisions. At the state level, the California Supreme Court issued *In re Lawrence*,¹⁰ which sharpened the some evidence standard to require some evidence of “current dangerousness.” At the federal level, the Ninth Circuit granted a petition for rehearing en banc in the case *Hayward v. Marshall*¹¹ to (re)consider the fundamental questions of whether there is a federally protected liberty interest in parole in California in the first place and, if so, whether the some evidence standard affords the appropriate protection for that liberty interest. This Article examines the *Lawrence* and *Hayward* decisions and their potential impact on parole release of California lifers.¹²

The Article begins in Part I by describing California’s parole determination process for lifers.¹³ Part II provides an introduction to prisoners’ due process jurisprudence generally by describing important U.S. Supreme Court decisions on the subject. Part III examines state-level judicial review of parole denials with a focus on *Lawrence*. It argues that while *Lawrence*’s sharpened some evidence standard is undoubtedly favorable for California lifers, in practice the case might not result in a significant increase in parole release due to its extremely sympathetic petitioner and its decision not to overturn a prior case, *In re Rosenkrantz*,¹⁴ with a similarly sympathetic petitioner. Part IV examines federal-level judicial review of parole denials with

8. *Id.*

9. Maura Dolan & Michael Rothfeld, *High Court Sides with Parolee*, L.A. TIMES, Aug. 22, 2008, at B1.

10. 44 Cal. 4th 1181 (2008).

11. 512 F.3d 536 (9th Cir. 2008), *reh’g en banc granted*, 527 F.3d 797 (9th Cir. 2008).

12. The year 2008 saw another important development in the area of parole for lifers: California voters passed Proposition 9, or Marsy’s Law, which (among other things) amended the California Constitution and the California Penal Code to expand victims’ rights as they relate to lifers’ parole proceedings. See Summary, *2008 California Criminal Law Ballot Initiatives*, 14 BERKELEY J. CRIM. L. 173, 185-188 (2009), for a detailed discussion of Marsy’s Law. The focus of this Article is solely on the *Lawrence* and *Hayward* decisions and the specific due process issues they confront—namely, the existence of a liberty interest in parole in California and the some evidence standard of review as the due process protection for that liberty interest.

13. As we shall see, a different, mandatory parole scheme governs inmates serving fixed, or “determinate,” sentences. Only the discretionary parole scheme of inmates serving potential life sentences (lifers) is the subject of this paper.

14. 29 Cal. 4th 616 (2002).

a focus on *Hayward*. It describes the issues addressed in the Attorney General's petition for rehearing and predicts that the Ninth Circuit will likely reaffirm its prior holdings that there is a federally protected liberty interest in parole in California and that the some evidence standard—with the contours defined in *Lawrence*—is the appropriate standard of review for that interest.

I. CALIFORNIA'S PAROLE SCHEME

Before July 1, 1977, California employed an “indeterminate” sentencing scheme for felons.¹⁵ Under this system, the trial court imposed a statutory sentence expressed as a range between a minimum and maximum period of confinement—often life imprisonment.¹⁶ The inmate's actual confinement period within that range was under the exclusive discretion of the parole authority.¹⁷ On July 1, 1977, California replaced this system with a new law, the Determinate Sentencing Act (DSA).¹⁸ Under the DSA, courts select one of three precise terms of years (the lower, middle, or upper term) when imposing a sentence.¹⁹ The offender must serve this entire term, less sentence credits, inside prison walls, but then *must* be released for a period of supervised parole.²⁰

Even under the DSA, however, California continues to impose indeterminate sentences for certain serious offenders, including “‘noncapital’ murderers (i.e., those murderers not punishable by death or life without parole).”²¹ Because these offenders receive sentences of some number of years “to life,” or simply “life,”²² they are called “lifers.” However, they become eligible for parole consideration after serving minimum terms of confinement.²³ Lifers' actual confinement periods beyond their minimum terms are determined by the Board of Parole Hearings (Board).²⁴ It is this

15. *People v. Jefferson*, 21 Cal. 4th 86, 94 (1999).

16. *In re Dannenberg*, 34 Cal. 4th 1061, 1077 (2005).

17. *Id.*

18. CAL. PENAL CODE §§ 1168(a), 1170(a)(1).

19. *Id.* § 1170(a)(3)18, (b); *see Dannenberg*, 34 Cal. 4th at 1078.

20. CAL. PENAL CODE § 3000(b); *see Dannenberg*, 34 Cal. 4th at 1078.

21. *Dannenberg*, 34 Cal. 4th at 1078; *see also* *People v. Jefferson*, 21 Cal. 4th 86, 92-93 & n.2 (1999) (listing offenses carrying indeterminate sentences).

22. *People v. Felix*, 22 Cal. 4th 651, 654 (2000).

23. *Dannenberg*, 34 Cal. 4th at 1078. The indeterminate sentences for first and second degree murder expressly specify a minimum term: generally, first degree murder carries a term of “25 years to life” while second degree murder carries a term of “15 years to life.” CAL. PENAL CODE § 190(a); *see Jefferson*, 21 Cal. 4th at 92. For sentences that do not specify a minimum term, the minimum term is found in California Penal Code § 3046, which requires that a defendant sentenced to life imprisonment with the possibility of parole serve “at least seven calendar years or . . . a term as established pursuant to any other section of law that establishes a [greater] minimum period of confinement.” *Jefferson*, 21 Cal. 4th at 96 (quoting CAL. PENAL CODE § 3046).

24. *See Dannenberg*, 34 Cal. 4th at 1078-79 (summarizing and quoting from CAL. PENAL CODE §§ 3040 (granting the parole board the authority to parole life inmates) & 5075.1 (listing duties of parole board)). Before July 1, 2005, the Board of Parole Hearings was called the Board

Board-controlled parole determination process for lifers, not the mandatory parole scheme for less serious felons under the DSA, that is the subject of this paper.

Section 3041 of the California Penal Code governs the Board's parole determination process. Subdivision (a) provides that for prisoners sentenced to indeterminate terms, one year prior to the inmate's minimum eligible parole release date, a Board panel shall meet with the inmate and "shall normally set a parole release date . . . in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public."²⁵ Subdivision (b) specifies the circumstance under which a release date need *not* be fixed: when the Board determines that the inmate is *unsuitable* for parole, i.e., that "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting."²⁶

The regulations accompanying California Penal Code Section 3041(b) set forth detailed criteria for determining whether the inmate is suitable for parole.²⁷ Initially, the regulations provide that "[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison."²⁸ Factors tending to show unsuitability include that the prisoner: "committed the offense in an especially heinous, atrocious or cruel manner"²⁹; has a previous record of violence; has an unstable social history; "has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim"; "has a lengthy history of severe mental problems related to the offense"; and "has engaged in serious misconduct in prison or jail."³⁰ Factors tending to show suitability include that the prisoner: does not have a juvenile record of violent crime; has a stable social history; has shown signs of remorse; committed the crime as the

of Prison Terms. See CAL. PENAL CODE § 5075(a).

25. CAL. PENAL CODE § 3041(a). Of course, the fact that the Board recommends parole release just two to five percent of the time (see *supra* note 6 and accompanying text) suggests that, contrary to the language of the statute, setting a release date is not actually the norm.

26. CAL. PENAL CODE § 3041(b) (cited in *Dannenberg*, 34 Cal. 4th at 1079).

27. CAL. CODE REGS. tit. 15, § 2402.

28. *Id.* § 2402(a).

29. The factors that support a finding that the prisoner committed the offense in this manner include: multiple victims were attacked, injured, or killed in the same or separate incidents; the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; the victim was abused, defiled, or mutilated during or after the offense; the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering; and the motive for the crime was inexplicable or very trivial in relation to the offense. CAL. CODE REGS. tit. 15, § 2402(c)(1)(A)-(E).

30. *Id.* § 2402(c).

result of significant stress; committed the crime as a result of Battered Woman Syndrome; lacks a significant history of violent crime; is of the age that reduces the probability of recidivism; has realistic parole plans or has developed marketable skills; and has participated in institutional activities that indicate an ability to function within the law.³¹

Until recently, if the Board found the inmate unsuitable for parole, the inmate would have to wait between one and five years for another parole hearing.³² However, under the Marsy's Law initiative passed by California voters in the November 4, 2008, election, inmates who have been denied parole now must wait up to fifteen years before their next hearing.³³

Article V, section 8(b) of the California Constitution, adopted by California voters in 1988, grants the Governor the authority to review the Board's parole decisions within thirty days.³⁴ Under this provision, the Governor may "affirm, modify, or reverse" the decision of the Board, but only "on the basis of the same factors which the parole authority is required to consider."³⁵

II. PRISONERS' DUE PROCESS JURISPRUDENCE

Lifers who are denied parole by the Board or Governor may appeal the decision in court—first state, then federal—by filing a petition for habeas corpus on due process grounds. In 1972, the U.S. Supreme Court opinion *Morrissey v. Brewer*³⁶ established a two-step process for judicial review of prisoners' due process claims.³⁷ The first step asks "whether the requirements of due process in general apply" to the prisoner's claim.³⁸ Due process protections apply if the interest at stake "is one within the contemplation of the

31. *Id.* § 2402(d).30

32. CAL. PENAL CODE § 3041.5(b)(2) (Deering 2008).

33. California General Election, November 4, 2008, Official Voter Information Guide, Text of Proposed Laws, at 130, available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9> (last visited April 9, 2009). Again, for a detailed discussion of Marsy's Law, see Summary, *2008 California Criminal Law Ballot Initiatives*, 14 BERKELEY J. CRIM. L. 173 (2009).

34. CAL. CONST. art. V, § 8(b); see CAL. PENAL CODE § 3041.2 (setting forth statutory procedures governing the Governor's review of parole decisions).

35. CAL. CONST. art. V, § 8(b).

36. 408 U.S. 471 (1972).

37. States have the power "to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). Thus, states do not have to adopt federal standards (such as *Morrissey's* due process test), so long as the state's standards are equal to or more protective than the federal standards. See, e.g., *Cooper v. California*, 386 U.S. 58, 62 (1967) (noting that a state has the "power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so"). Nevertheless, we will see in Part III that much of California prisoners' due process jurisprudence parallels the U.S. Supreme Court jurisprudence described in this Part.

38. *Morrissey*, 408 U.S. at 481.

'liberty or property' language of the Fourteenth Amendment."³⁹ The term that courts often use to refer to such an interest—that is, an interest that rises to the level of deserving constitutional protection—is a "liberty interest."⁴⁰ If the court finds that the prisoner has a liberty interest, the second step asks "what process is due" to protect that interest.⁴¹ This Part describes important decisions by the U.S. Supreme Court regarding both steps of the due process analysis that are important for state and federal analysis of prisoners' claims challenging the denial of parole.

*A. Step One: Is the Interest at Stake a Constitutionally Protected
"Liberty Interest"?*

At issue in *Morrissey* were the due process rights of parolees (prisoners who have already been released on parole). Specifically, the Court considered whether parolees have a liberty interest in not having their parole revoked. In answering this question, "the Court focused on the nature and the weight of the interest."⁴² The Court reasoned that "[t]he liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime"—such as having a job and associating with family and friends.⁴³ While recognizing that a parolee's liberty is "indeterminate," i.e., contingent on the parolee not violating the terms of his parole, the Court concluded that it was weighty enough to deserve constitutional protection.⁴⁴

For lifers challenging the initial denial of parole (prisoners who have not received the conditional liberty that parole release presents), the U.S. Supreme Court has developed a different test for answering the liberty interest question. In this context, the question is whether there is a liberty interest in being released on parole at some future date. In *Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*,⁴⁵ the Court scrutinized Nebraska's parole statute to see if the "statutory language itself create[d] a protectible expectation of parole."⁴⁶ The statute stated that the Board of Parole "shall" release the prisoner "unless" it found any of what the Court referred to as four "specifically designated" factors to be satisfied.⁴⁷ The Court concluded that this "unique structure and language" created an "expectancy of release" that

39. *Id.*

40. See, e.g., *Bd. of Pardons v. Allen*, 482 U.S. 369, 370 (1987); *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1, 12 (1979); *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002).

41. *Morrissey*, 408 U.S. at 481.

42. Sharif A. Jacob, *The Rebirth of Morrissey: Towards a Coherent Theory of Due Process for Prisoners and Parolees*, 57 HASTINGS L.J. 1213, 1216 (2006).

43. *Morrissey*, 408 U.S. at 482.

44. *Id.*

45. 442 U.S. 1 (1979).

46. *Id.* at 11.

47. *Id.* at 11-12.

was “entitled to some measure of constitutional protection.”⁴⁸

Subsequently, in *Board of Pardons v. Allen*,⁴⁹ the Supreme Court summarized the *Greenholtz* holding as follows: “the mandatory language [“shall”] and the structure of the Nebraska statute at issue in *Greenholtz* created an ‘expectancy of release,’ which is a liberty interest entitled to [due process] protection.”⁵⁰ Thus, *Greenholtz*’s standard has come to be known as the “mandatory language” test.

As we shall see, whether the *Greenholtz/Allen* mandatory language test was abrogated by a subsequent U.S. Supreme Court case, *Sandin v. Conner*, is a chief issue in *Hayward*.

B. Step Two: What Process is Due to Protect the Liberty Interest Found in Step One?

Once a liberty interest has been found under Step One of the due process analysis, Step Two is to determine what process is due to protect that interest. *Morrissey* established that “due process is flexible” in that “not all situations calling for procedural safeguards call for the same kind of procedure.”⁵¹ Determining the process due requires weighing, on a case-by-case basis, “the precise nature of the government function involved” against “the private interest that has been affected by governmental action.”⁵²

Obviously, free citizens are entitled to the “full panoply of rights” set out in the Bill of Rights.⁵³ *Morrissey* established the due process requirements for parolees.⁵⁴ Most relevant for our purposes, the Supreme Court in *Superintendent v. Hill*⁵⁵ established the due process requirements for inmates in the specific context of the revocation of good time credits. The question before the Court was whether the findings of the prison disciplinary board that resulted in the loss of good time credits had to be supported by a certain amount of evidence in order to meet the requirements of due process.⁵⁶ The Court concluded that the findings of the prison disciplinary board must be supported

48. *Id.* at 12.

49. 482 U.S. 369 (1987).

50. *Id.* at 371 (emphasis added).

51. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

52. *See id.* (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

53. *See Morrissey*, 408 U.S. at 480.

54. *Id.* at 484-89. Parolees are entitled to a “preliminary hearing” to determine whether there is probable cause to believe the parolee committed the alleged violation of his parole conditions, followed by a “revocation hearing” that “must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.”

55. 472 U.S. 445 (1985).

56. *Id.* at 453. The Court proceeded on the assumption that Massachusetts law created a liberty interest in good time credits. *Id.* Thus, the Court dealt only with the second step of the due process inquiry—what process is due to protect that interest.

by some evidence in the record.⁵⁷

We will see that the California Supreme Court has adopted *Hill* in the parole context for *state* due process purposes; however, whether *Hill* applies in the parole context for *federal* due process purposes is another important issue in *Hayward*.

III. STATE-LEVEL JUDICIAL REVIEW

This Part discusses how California courts have addressed parole seekers' due process claims, with a focus on *Lawrence*. It begins by outlining pre-*Lawrence* case law holding that there is a liberty interest in parole under California law and that the some evidence standard is the corresponding due process protection for that interest. It then describes how *Lawrence* sharpened the some evidence standard by requiring that the evidence point to current dangerousness. The Part argues that, although *Lawrence*'s sharpened standard is undeniably favorable for California lifers, its practical impact is less certain due to its extremely sympathetic petitioner and its decision not to overturn a prior case, *In re Rosenkrantz*, with a similarly sympathetic petitioner.

A. Pre-*Lawrence* Case Law

1. Liberty Interest Question

The California Supreme Court has held that California parole applicants have a liberty interest in parole entitled to the due process protections of the California Constitution. In the 2002 decision *In re Rosenkrantz*,⁵⁸ the court stated that "the requirement of procedural due process embodied in the California Constitution places some limitations upon the broad discretionary authority of the Board."⁵⁹ The court concluded that California's parole statute and regulations give "parole applicants in this state . . . an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole."⁶⁰ The court further held that, because the

57. *Id.* at 454. *Hill*'s some evidence standard, which requires that decisions of prison administrators have some basis in fact, is not the only standard for ensuring due process for inmates in administrative settings. Other cases have held that due process requires that prison officials comply with specific *procedures* before depriving an inmate of a protected liberty interest. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), for example, the Supreme Court held that, before depriving an inmate of a protected liberty interest in good time credits, prison officials must provide the inmate with the following: advance written notice of the disciplinary charges; an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and a written statement by the fact-finder of the evidence relied upon and the reasons for the disciplinary action. *Id.* at 563-67. *Morrissey*'s protections for parolees are similarly procedural. *See supra* note 54.

58. 29 Cal. 4th 616 (2002).

59. *Id.* at 655 (citation omitted).

60. *Id.* at 654.

Governor's decision to affirm, modify, or reverse the Board's decision must be based upon the same factors that the Board must consider, the Governor's decision to affirm, modify, or reverse the decision of the Board must also satisfy due process.⁶¹

2. Due Process Question

Rosenkrantz, the first California Supreme Court case to decide the question of the appropriate standard of judicial review in the context of the denial of parole,⁶² adopted *Hill's* some evidence standard of review.⁶³ The court concluded that "to impose a standard of review that is less stringent than the 'some evidence' test . . . would permit the Board to render a decision without any basis in fact. Such a decision would be arbitrary and capricious, thereby depriving the prisoner of due process of law."⁶⁴ Following the same logic, *Rosenkrantz* held that the judicial branch may also review a decision by the Governor affirming, modifying, or reversing the Board's parole determination under the same some evidence standard.⁶⁵

Subsequently, in *In re Dannenberg*,⁶⁶ the California Supreme Court affirmed the some evidence standard of review outlined in *Rosenkrantz*.⁶⁷ More central to that decision, however, was the court's holding that the primary consideration for the Board in making a parole determination is the "public safety" provision of subdivision (b) of California Penal Code Section 3041, not the "uniform terms" principle of subdivision (a).⁶⁸

After *Dannenberg*, a tension emerged in the California courts of appeal regarding the precise contours of the some evidence standard.⁶⁹ The courts struggled to decipher the "extent to which a determination of current dangerousness should guide a reviewing court's inquiry" into the Board's or Governor's decision denying parole and, relatedly, "whether the aggravated circumstances of the commitment offense, standing alone, provide some evidence that the inmate remains a current threat to public safety."⁷⁰ The main

61. *Id.* at 660-61 ("Because prisoners possess a protected liberty interest in connection with parole decisions rendered by the Board, it would be anomalous to conclude that they possess no comparable interest when such decisions are reviewed by the Governor, where such review must be based upon the same factors considered by the Board. Under California law, this liberty interest underlying a Governor's parole review decisions is protected by due process of law").

62. *See id.* at 654.

63. *Id.* at 656. A prior case, *In re Powell*, 45 Cal. 3d 894 (1988), dealt with judicial review of the *rescission* of parole (i.e., taking away parole after it has been granted but before the prisoner has been released). *Powell* likewise held that *Hill's* some evidence test applies. *Id.* at 904.

64. *Rosenkrantz*, 29 Cal. 4th at 657.

65. *Id.* at 667, 670, 676-77.

66. 34 Cal. 4th 1061 (2005).

67. *Id.* at 1084.

68. *Id.* *See supra* text accompanying notes 25 and 26 for the text of these subdivisions.

69. *See In re Lawrence*, 44 Cal. 4th 1181, 1206 (2008).

70. *Id.*

reason for the tension was that, in every published judicial opinion addressing the issue, the decision of the Board or the Governor to deny parole was founded in whole or in part on the gravity of the commitment offense.⁷¹ A minority of courts concluded that a denial of parole must be affirmed if some evidence supports the Board's or Governor's factual determination that the commitment offense was particularly aggravated (or that some other unsuitability factor was present).⁷² Conversely, a majority of courts concluded that the inquiry must be whether some evidence supports the Board's or Governor's overall decision—and that decision must be whether or not the inmate poses a current threat to public safety.⁷³

B. *In re Lawrence*

On August 21, 2008, the California Supreme Court case issued *In re Lawrence* in order to resolve this conflict in the lower courts. The supreme court agreed with the majority of appellate courts and held that, “when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.”⁷⁴ In tune with this new obligatory focus on current dangerousness, the court held that the aggravated circumstances of the offense cannot automatically justify the denial of parole; the egregiousness of the offense must indicate that the prisoner would likely reoffend if released. In the court's words:

[A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and

71. See *id.* at 1206 & n.10 (citing cases); see, e.g., *In re Gray*, 151 Cal. App. 4th 379, 396 (2007) (Governor reversed Board's suitability determination based solely on the nature of the crime); *In re Burns*, 136 Cal. App. 4th 1318, 1327-28 (2006) (Board found petitioner unsuitable for parole based on callousness of the commitment offense and petitioner's unstable social history); *In re Lee*, 143 Cal. App. 4th 1400, 1408 (2006) (Governor reversed Board's suitability determination based on “atrocious[ness]” of petitioner's crimes and his late acceptance of responsibility); *In re Scott*, 133 Cal. App. 4th 573, 589 (2005) (Governor reversed Board's suitability determination based on gravity of the commitment offense coupled with petitioner's significant criminal history).

72. See *Lawrence*, 44 Cal. 4th at 1208 (citing cases); see, e.g., *In re Bettencourt*, 156 Cal. App. 4th 780, 800 (2007); *Burns*, 136 Cal. App. 4th at 1327-28; *In re Andrade*, 141 Cal. App. 4th 807, 819 (2006).

73. See *Lawrence*, 44 Cal. 4th at 1208-09 & n.13 (citing cases); see, e.g., *In re Roderick*, 154 Cal. App. 4th 242, 263 (2007); *Gray*, 151 Cal. App. 4th at 410; *In re Barker*, 151 Cal. App. 4th 346, 366 (2007); *In re Tripp*, 150 Cal. App. 4th 306, 313 (2007); *Lee*, 143 Cal. App. 4th at 1408-09; *Scott*, 133 Cal. App. 4th at 595.

74. *Lawrence*, 44 Cal. 4th at 1212 (internal citations omitted).

mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.⁷⁵

The court next applied the sharpened some evidence test to the facts of Lawrence's case. Lawrence had served nearly twenty-four years in prison on a first degree murder conviction for killing her lover's wife.⁷⁶ During those twenty-four years, Lawrence "had an exemplary record of conduct": she remained free from serious discipline; exhibited "long-standing involvement" in educational programs; engaged "in many years of rehabilitative programming specifically tailored to address the circumstances that led to her commission of the crime"; gained "substantial insight on her part into both the behavior that led to the murder and her own responsibility for the crime"; "repeatedly expressed remorse for the crime"; and "had been adjudged by numerous psychologists and by the Board as not representing any danger to public safety if released from prison."⁷⁷ Moreover, Lawrence "had no prior criminal record or history of violent crimes or assaultive behavior" and had "realistic parole plans, which included a job offer and family support."⁷⁸ With regard to the commitment offense, the court noted that it had "occurred 36 years ago when petitioner, who is now 61 years of age, was 24 and, as the Board found, under significant emotional stress as a result of her love affair with the victim's husband."⁷⁹ The Board had made successive recommendations that she be granted parole, all of which were reversed by the Governor "based solely upon the immutable circumstances of the offense."⁸⁰ From this evidence, the court concluded that "the unchanging factor of the gravity of petitioner's commitment offense has no predictive value regarding her current threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time."⁸¹

Lawrence is definitely a positive case for California lifers. It gives teeth to the some evidence standard in a way that shifts the focus away from retribution and towards rehabilitation. No longer can the gravity of the initial offense singlehandedly and perpetually outweigh overwhelming signs of rehabilitation—at least without the existence of a plausible nexus between the gravity of the offense and current dangerousness. A lifer with a model prison record now has more reason to hope that taking positive steps toward self-

75. *Id.* at 1214.

76. *Id.* at 1190, 1226.

77. *Id.* at 1225-26.

78. *Id.* at 1225.

79. *Id.*

80. *Id.* at 1226.

81. *Id.*

improvement will not go unrewarded.⁸²

It remains to be seen to what extent the Board and the Governor will be able to comply with *Lawrence* simply by sharpening their syntax rather than their actual focus on “current dangerousness.” One might think that drawing the nexus between the commitment offense and current dangerousness cannot be that hard, since as *Lawrence* itself recognized, an “implication concerning future dangerousness . . . derives from the prisoner having committed [a particularly egregious] crime.”⁸³ Plus, it is important to keep in mind that *Lawrence* left undisturbed the “unquestionably deferential” standard of review set in *Rosenkrantz*.⁸⁴ However, there are reasons to expect that complying with *Lawrence* will require more than smart syntax. First of all, *Lawrence* made an effort to clarify that *Rosenkrantz*’s standard “certainly is not toothless”⁸⁵ and that “mere acknowledgement by the Board or the Governor that evidence favoring suitability exists” is not sufficient.⁸⁶ Moreover, in *Lawrence* itself, the Governor’s statement *did* acknowledge ample factors “supportive of [petitioner’s] parole suitability” and *did* draw a nexus between the commitment offense and current dangerousness,⁸⁷ and yet the court reversed the Governor’s decision.

Though propitious for California lifers, one important aspect of *Lawrence* suggests that the class of lifers that will actually feel the impact of the decision might be quite limited: the court chose not to overturn its prior holding in *Rosenkrantz*. The facts in *Lawrence* were extremely favorable to the petitioner, while the facts in *Rosenkrantz*, which upheld the Governor’s denial of parole, involved slightly less but still very favorable facts. That *Lawrence* chose not to overturn *Rosenkrantz*’s holding means that the lifers whom the *Lawrence*

82. Indeed, as of this writing, multiple California appellate court decisions have reversed denials of parole in light of *Lawrence*. See, e.g., *In re Vasquez*, 170 Cal. App. 4th 370, 386 (2009); *In re Gaul*, 170 Cal. App. 4th 20, 39 (2009); *In re Burdan*, 169 Cal. App. 4th 18, 39 (2008); *In re Aguilar*, 168 Cal. App. 4th 1479, 1488 (2008); *In re Singler*, 169 Cal. App. 4th 1227, 1244 (2008).

83. *Lawrence*, 44 Cal. 4th at 1214.

84. See *id.* at 1210. Perhaps most importantly, the court did not challenge the following language from *Rosenkrantz*: “Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole.” 29 Cal. 4th 616, 677 (2002).

85. *Lawrence*, 44 Cal. 4th at 1210.

86. *Id.* at 1212.

87. The Governor stated: “[T]he murder perpetrated by [petitioner] demonstrated a shockingly vicious use of lethality and an exceptionally callous disregard for human suffering because after she shot Mrs. Williams—four times—causing her to collapse to the floor, [petitioner] stabbed her repeatedly. And the gravity alone of this murder is a sufficient basis on which to conclude presently that [petitioner’s] release from prison would pose an unreasonable public-safety risk.” *Id.* at 1200; see also *id.* at 1221-22.

decision will affect are those whose records falls somewhere in between the sympathetic facts of *Rosenkrantz* and the “slightly more” sympathetic facts of *Lawrence*. An examination of the facts of *Rosenkrantz* will demonstrate how slim the margin is between a winning case and a losing case after *Lawrence*.

The petitioner in *Rosenkrantz*, while perhaps not quite as sympathetic as *Lawrence*, was sympathetic nonetheless. *Rosenkrantz* was a homosexual who bought a gun and killed his tormentor after the tormentor revealed petitioner’s sexual orientation to petitioner’s father.⁸⁸ He was convicted of second degree murder and sentenced to fifteen years to life, plus two years for the use of a firearm in the commission of the offense.⁸⁹ Like *Lawrence*, *Rosenkrantz* was a model prisoner: at his first suitability hearing, the Board recommended his release based on several factors, including that he had remained discipline-free while in prison; had no involvement with drugs or alcohol; had a stable social history; required only one more semester of classes before receiving a bachelor of arts degree; participated in extensive self-help and therapy programming; showed signs of remorse and acceptance of responsibility for his crime; had no juvenile record or criminal history aside from the conviction offense; and had realistic parole plans and strong family support.⁹⁰ Also like *Lawrence*, who according to the Board committed her offense “while under the stress of an emotional love triangle,”⁹¹ *Rosenkrantz* “committed the crime as a result of significant stress in his life” caused by the disclosure of his sexual orientation.⁹² Although the Board in *Rosenkrantz* did not find the petitioner suitable as many times as the Board in *Lawrence*, *Rosenkrantz*’s positive factors were so strong that the superior court hearing his habeas petition twice ordered the Board to “set a parole date commensurate with his conviction for second degree murder”—an order that the court of appeals affirmed.⁹³ Twice, the Governor reversed the Board’s suitability determination.⁹⁴ The second time (at issue in the case), the Governor grounded his decision on three factors: the callousness of the commitment offense, petitioner’s demonstrated lack of remorse as a fugitive in the weeks following the crime, and petitioner’s lying about aspects of the murder to the parole board.⁹⁵ The court affirmed the Governor’s decision because there was some evidence to support the first two factors, despite finding that there was no evidence to support the third—the only factor dealing with post-conviction conduct.⁹⁶

If both *Lawrence* and *Rosenkrantz* involved petitioners with a model

88. In re *Rosenkrantz*, 29 Cal. 4th 616, 627-30 (2002).

89. *Id.* at 624.

90. *Id.* at 630.

91. *Lawrence*, 44 Cal. 4th at 1225.

92. *Rosenkrantz*, 29 Cal. 4th at 630.

93. *Id.* at 631-33.

94. *Id.* at 632-34.

95. *Id.* at 634.

96. *Id.* at 677-81.

prison record, no criminal history besides the commitment offense, and a sympathetic explanation for their violent acts, what differences between the two cases might account for their different outcomes? Again, this is an important question because the prisoners most helped by the *Lawrence* decision will be those whose records fall in between those of *Lawrence* and *Rosenkrantz*. One potentially important distinction is that in *Rosenkrantz* the Governor relied not just on the gravity of the commitment offense in denying parole, but also “upon petitioner’s conduct—affirming his violent act—while he remained a fugitive during the several weeks following commission of the crime.”⁹⁷ In *Lawrence* by contrast, the Governor relied solely, in the court’s estimation, on “the immutable and unchangeable circumstances of her commitment offense.”⁹⁸ It will be interesting to see whether the Board or the Governor will be able to comply with *Lawrence* by simply adding the inmate’s unremorseful conduct immediately following the commitment offense to their reasons for finding current dangerousness. This would be a troubling result, given that there does not seem to be much of a difference between relying solely on the commitment offense and relying solely on the commitment offense plus conduct immediately after the offense but before imprisonment. Both types of decisions equally fail to recognize (and thus incentivize) post-conviction rehabilitative conduct.

A more important difference between the two cases appears to be the degree of the murder conviction and the length of the prison term served. *Lawrence* was convicted of first degree murder and had served about twenty-four years in prison at the time of the Governor’s decision⁹⁹; *Rosenkrantz* was convicted of second degree murder and had served about fourteen years in prison at the time of the Governor’s decision.¹⁰⁰ In other words, *Lawrence* had served a whole ten years longer than *Rosenkrantz* corresponding with her conviction for a higher degree of murder. For obvious reasons, those ten extra years make a finding of current dangerousness based solely on the conviction

97. *Id.* at 683; see also *In re Lawrence*, 44 Cal. 4th 1181, 1208 (2008) (interpreting *Rosenkrantz* to support *Lawrence*’s current dangerousness requirement because *Rosenkrantz* concluded that “the decision of the Governor made clear that he independently found that petitioner pose[d] a risk of danger based upon the nature of the offense and petitioner’s conduct before he surrendered” (quoting *Rosenkrantz*, 29 Cal. 4th at 682) (emphasis added)).

98. 44 Cal. 4th at 1227. This distinction between the cases is a flimsy one because *Lawrence*, too, had been a fugitive; in fact, she remained a fugitive for *eleven years* before surrendering to police. *Id.* at 1193. What’s more, despite the court’s characterization of the Governor’s decision as relying solely on the commitment offense, the Governor’s decision actually did take into account “petitioner’s subsequent flight from the authorities.” *Id.* at 1199.

99. *Lawrence* committed the murder in 1971 and, after turning herself in to authorities in 1982, received a sentence of life imprisonment—the statutory penalty for murders committed prior to November 8, 1978—in 1983. *Id.*, at 1190, 1194. The Governor’s decision at issue in the case took place in January 2006. *Id.* at 1199.

100. *Rosenkrantz* was sentenced to fifteen years to life plus two years for the use of a firearm in 1986. *Rosenkrantz*, 29 Cal. 4th at 624-25. The Governor’s decision at issue in the case took place in October 2000. *Id.* at 634.

offense (and perhaps other pre-conviction factors) that much harder to swallow. This is especially true in cases like *Lawrence*, where the crime at issue, though undeniably brutal, had second degree aspects, including, as the Board found, having been committed amidst “the stress of an emotional love triangle.”¹⁰¹ Moreover, unlike in *Rosenkrantz*, where the Governor pointed out the first degree attributes of Rosenkrantz’s second degree murder in order to justify requiring a longer period of incarceration,¹⁰² the same move could not have been done in Lawrence’s case, who was already serving a first degree sentence. What all of this means is that the group of lifers most helped by *Lawrence* will likely be model inmates serving first degree sentences for crimes with second degree attributes. With *Rosenkrantz* still good law, it is not guaranteed that model inmates serving second degree sentences for crimes with first degree attributes will see a significant difference in their chances for receiving parole. Ironically, then, although *Lawrence*’s renewed focus on current dangerousness promotes and rewards rehabilitative efforts in theory, in practice courts may continue to focus on sheer length of time served. Perhaps this is inevitable, even desirable, under an inquiry concerned, essentially, with the extent to which a criminal has distanced himself from his “bad ways.” But it does not appear to be much of a change from the state of the law before.

IV. FEDERAL-LEVEL JUDICIAL REVIEW

Once a California lifer has appealed the denial of parole all the way through the state court system, he or she may choose to file a petition for a writ of habeas corpus in federal court. The federal-level due process analysis is similar to the state-level analysis described in Part III, but must comply with the deferential standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹⁰³ Just as the year 2008 saw important developments at the state level with the issuance of *Lawrence*, it saw important federal-level developments with the Ninth Circuit’s decision to grant en banc review in *Hayward v. Marshall*. The en banc court will (re)examine whether there is a federally protected liberty interest in parole in California, and if so,

101. *Lawrence*, 44 Cal. 4th at 1225.

102. In his statement denying parole, the Governor relied on law enforcement’s characterization of the crime as a “cold-blooded murder [that] required planning, lying in wait, and a degree of sophistication unusual in youthful offenders.” *Rosenkrantz*, 29 Cal. 4th at 673. Further, the Governor stated that petitioner “should be grateful that he was not convicted of first degree murder” and “has not served sufficient time in prison for this very serious crime.” *Id.* at 634.

Of course, a Governor cannot assume the role of a jury and unilaterally commute a second degree sentence into a first degree sentence; but the California Supreme Court has held that, under the some evidence standard, “[t]he circumstance that the jury, for whatever reason, did not find [premeditation and deliberation] beyond a reasonable doubt” does not prevent the Governor from considering such evidence in deciding whether to reverse a Board decision granting parole. *Id.* at 678-79.

103. Pub. L. No. 104-132, 110 Stat. 1214.

whether the some evidence standard is the appropriate standard of review for that liberty interest.

This Part begins with a brief summary of AEDPA's application to federal habeas review of the denial of parole. Next, it outlines pre-*Hayward* case law answering both due process questions in the affirmative. Against this background, it predicts that the en banc court will reaffirm both California lifers' liberty interest in parole and the some evidence standard of review, with the addition of the contours defined in *Lawrence*.

A. AEDPA

Under federal habeas corpus statutes, in order to bring a federal habeas corpus petition, state prisoners must claim that their confinement violates federal law in some way.¹⁰⁴ State prisoners appealing the denial of their parole rely on the Due Process Clause of the Fourteenth Amendment to get into federal court. Like California courts, federal courts analyze parole seekers' due process claims in two steps: Is there a liberty interest in parole and, if so, what process is due to protect that interest? Unlike California courts, however, federal habeas courts must answer these questions through the deferential lens set by AEDPA.

Passed in 1996, AEDPA amended the federal habeas statutes to provide that federal courts cannot grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim [] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."¹⁰⁵ This means that, in order for California parole seekers to get federal habeas relief, there must be "clearly established" U.S. Supreme Court authority both for the proposition that there is a liberty interest in parole in California and for the due process protection the petitioner seeks. It also means that the overarching inquiry for federal habeas courts is not whether the Board or Governor violated the prisoner's due process rights in denying parole, but rather whether the state court unreasonably applied clearly established U.S. Supreme Court authority in answering that question.

104. 28 U.S.C. §§ 2241(c)(3) (stating as grounds for federal habeas relief that the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States"), 2254(a) (providing that federal habeas courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

105. § 2254(d)(1).

B. Pre-Hayward Case Law

1. Liberty Interest Question

Applying the deferential AEDPA standard, the Ninth Circuit has repeatedly held that there is a liberty interest in parole in California under the *Greenholtz/Allen* mandatory language test.¹⁰⁶ In coming to this conclusion, the Ninth Circuit has dodged three AEDPA-based counterarguments. The first counterargument is that no Supreme Court case has directly held that there is a liberty interest in parole in California (*Greenholtz* found a liberty interest in parole in Nebraska while *Allen* found a liberty interest in parole in Montana). Confronting this problem, the Ninth Circuit in *McQuillion v. Duncan* stated that in order for the Supreme Court to have created “clearly established Federal law,”¹⁰⁷ “it is enough that the Supreme Court has prescribed a rule that plainly governs the petitioner’s claim.”¹⁰⁸ The court found that the *Greenholtz/Allen* mandatory language test “plainly govern[ed]” *McQuillion*’s claim, and that under that test, California’s parole scheme used mandatory language (“shall”).¹⁰⁹

The second counterargument to the finding of a liberty interest in parole in California under *Greenholtz/Allen* is that the 1995 U.S. Supreme Court case *Sandin v. Conner*¹¹⁰ abrogated the *Greenholtz/Allen* mandatory language test. At issue in *Sandin* was whether an inmate sentenced by prison officials to a term of disciplinary segregation was entitled to due process.¹¹¹ The Court criticized the mandatory language test as “somewhat mechanical”¹¹² and stated that liberty interests are “generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”¹¹³ Thus, it is argued that *Sandin*’s “atypical and significant hardship” test replaced the mandatory language test in prisoners’ due process jurisprudence. In response to this argument,¹¹⁴ the Ninth Circuit has held that *Sandin*’s test is limited to the context of internal prison discipline.¹¹⁵

106. *McQuillion v. Duncan*, 306 F.3d 895, 902-03 (9th Cir. 2002); *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006); *Irons v. Carey*, 505 F.3d 846, 850-51 (9th Cir. 2007). See *supra* Part II.A for a recap of the mandatory language test.

107. § 2254(d)(1).

108. *McQuillion*, 306 F.3d at 901.

109. *Id.*

110. 515 U.S. 472 (1995).

111. *Id.* at 474-76.

112. *Id.* at 479; see also *id.* at 480-83.

113. *Id.* at 484.

114. Hereinafter, this argument will be referred to as the “*Sandin* argument.”

115. *McQuillion v. Duncan*, 306 F.3d 895, 903 (“It is clear from the [Ninth Circuit’s] framing of the problem in *Sandin*, and from the fact that *Sandin* cited *Allen* with approval, that *Sandin*’s holding was limited to internal prison disciplinary regulations.” (citations omitted)); *Biggs v.*

The final counterargument is that federal courts must defer to the highest state court's interpretation of state statutes, and the California Supreme Court in *Dannenberg* held that California Penal Code Section 3041 does not use mandatory language. In *Sass v. California Board of Prison Terms*, the Ninth Circuit rejected this argument,¹¹⁶ concluding that *Dannenberg* addressed the narrow question of whether the Board must engage in term uniformity analysis pursuant to Section 3041(a) before determining parole suitability pursuant to Section 3041(b), and did *not* hold that section 3041(b) does not use mandatory language.¹¹⁷

2. Due Process Question

Having recognized that there is a liberty interest in parole in California, the Ninth Circuit has held that the process that is due to protect that interest is the same evidence standard that the Supreme Court outlined in *Hill*.¹¹⁸ In *Jancsek v. Oregon Board of Parole*,¹¹⁹ the Ninth Circuit explained that *Hill*, which dealt with the accumulation of good time credits, applies in the parole context because both situations "affect the duration of the prison term."¹²⁰

In a trio of cases after *Jancsek—Biggs, Sass, and Irons*—the Ninth Circuit confronted an issue similar to that later confronted at the state level in *Lawrence*: the extent to which the gravity of the commitment offense alone can constitute some evidence justifying the denial of parole. In all three cases, the court warned that continued reliance in the future on the circumstance of the offense and conduct prior to imprisonment "runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation."¹²¹ Nevertheless, all three cases affirmed the denial of parole based on the gravity of the commitment offense.¹²² In *Irons*, the Ninth Circuit gleaned a principle from the three holdings: "All we held in [*Biggs* and *Sass*] and all we hold today . . . is that, given the particular circumstances of the offenses in these cases, due process was not violated when these prisoners were deemed unsuitable for parole prior to the expiration of their minimum terms."¹²³

Terhune, 334 F.3d 910, 914 (9th Cir. 2003) (affirming *McQuillion*); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 n.3 (9th Cir. 2006) (affirming *McQuillion* and *Biggs* in a footnote).

116. Hereinafter, this argument will be referred to as the "*Dannenberg* argument."

117. *Sass*, 461 F.3d at 1127-28 (citing *In re Dannenberg*, 34 Cal. 4th 1061, 1077 (2005)); see also *supra* text accompanying notes 25 and 26 for the language of §§ 3041(a) and 3041(b), respectively.

118. See *McQuillion*, 306 F.3d at 904; *Biggs*, 334 F.3d at 915; *Sass*, 461 F.3d at 1128-29; *Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007).

119. 833 F.2d 1389 (9th Cir. 1987).

120. *Jancsek*, 833 F.2d at 1390.

121. *Biggs*, 334 F.3d at 917; *Sass*, 461 F.3d at 1129; *Irons*, 505 F.3d at 853. This principle is referred to as the "*Biggs* principle," since it was first established in *Biggs*.

122. *Biggs*, 334 F.3d at 916; *Sass*, 461 F.3d at 1129; *Irons*, 505 F.3d at 852-53.

123. *Irons*, 505 F.3d at 853-54. This principle will be referred to as the "*Irons* principle."

C. *Hayward v. Marshall*

Against this background, on January 3, 2008, the Ninth Circuit issued *Hayward v. Marshall*.¹²⁴ Hayward was convicted of second degree murder and sentenced to a term of fifteen years to life for stabbing to death a man who physically assaulted his future wife.¹²⁵ At the time of the decision, Hayward had spent twenty-seven years in prison and had been a model inmate for most of that time.¹²⁶ Twice, the Board granted him a parole date, and twice the Governor reversed.¹²⁷ Applying the two step due process framework, the court cited *Sass* for the finding that California prisoners have a liberty interest in parole, and *Irons* and *Sass* for the finding that the Supreme Court has “clearly established” that the some evidence standard applies to parole determinations.¹²⁸ With respect to the some evidence standard, the court, again following Ninth Circuit precedent, “look[ed] to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole.”¹²⁹ From its review of California statutes, regulations, and case law, the court summarized a rule similar to that which the California Supreme Court would lay down in *Lawrence*: “[T]he findings that are necessary to deem a prisoner unsuitable for parole . . . are not that a particular factor or factors indicating unsuitability exist, but that a prisoner’s release will unreasonably endanger public safety.”¹³⁰ Moreover, *Hayward* emphasized the “*Biggs* principle”¹³¹ that “continued reliance on an unchanging factor such as the circumstances of the commitment offense, pre-conviction criminal history, or other past conduct, might in some cases result in a due process violation at some point.”¹³² Until this point in the opinion, the court did not depart from Ninth Circuit precedent, particularly the *Biggs-Sass-Irons* trilogy.

Where *Hayward* did differ from *Biggs*, *Sass*, and *Irons* was that, rather than just giving lip service to the “*Biggs* principle,”¹³³ the court actually put the principle into action. Although the Governor had relied on several factors in reversing the grant of parole, the court found that the only factor that was

124. 512 F.3d 536 (9th Cir. 2008), *reh’g en banc granted*, 527 F.3d 797 (9th Cir. 2008).

125. *Id.* at 538.

126. *Id.* at 538-39.

127. *Id.* at 538.

128. *Id.* at 542.

129. *Id.* (citing *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128-29 (9th Cir. 2006); *see also Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007) (“[W]e must look to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole, and then must review the record in order to determine whether the state court decision holding that these findings were supported by ‘some evidence’ in *Irons*’ case constituted an unreasonable application of the ‘some evidence’ principle articulated in *Hill*.”) (citation omitted)).

130. *Hayward v. Marshall*, 512 F.3d 536, 543 (9th Cir. 2008), *reh’g en banc granted*, 527 F.3d 797 (9th Cir. 2008) (internal quotation and citations omitted).

131. *See supra* note 121 and accompanying text.

132. *Hayward*, 512 F.3d at 545 (citing *Biggs v. Terhune*, 334 F.3d 910, 916 (9th Cir. 2003)).

133. *See supra* note 121.

supported by the evidence was the gravity of the commitment offense.¹³⁴ The court held that denying Hayward parole based solely on this factor violated due process:

In light of the extraordinary circumstances of this case—given the provocation for Hayward’s violent crime in 1978, his incarceration for almost thirty years with his positive prison record in recent times, and the favorable discretionary decisions of the Board in successive hearings, which were reversed by the Governor on factual premises most of which were not documented in the record—we conclude that the unchanging factor of the gravity of Hayward’s commitment offense had no predictive value regarding his suitability for parole. In the circumstances of this case, the Governor violated Hayward’s due process rights by relying on that stale and static factor in reversing his parole grant.¹³⁵

In addition, noting the “*Irons principle*”¹³⁶ that due process is less likely to be violated when the prisoner has not yet served his minimum term, the court pointed out that, here, Hayward’s twenty-seven years in prison was far beyond the fifteen-year minimum for his offense.¹³⁷ Bringing the discussion back to AEDPA, the court concluded that the state court had unreasonably applied *Hill*’s some evidence standard to Hayward’s petition, and reversed the district court’s order denying the writ.¹³⁸

On January 17, 2008, the Attorney General (AG), representing the Warden John Marshall, filed a petition for rehearing en banc of the January 3, 2008, opinion. The petition challenged both the liberty-interest and the some-evidence prongs of the two-step due process analysis.¹³⁹ The challenge to the liberty interest prong raised familiar arguments. First, the AG argued that California lifers do not have a liberty interest in parole release because the Supreme Court in *Sandin* abandoned the *Greenholtz* mandatory language test in favor of the “atypical and significant hardship” approach.¹⁴⁰ Under the latter approach, continued confinement under an indeterminate life sentence does not impose an atypical or significant hardship.¹⁴¹ In the alternative, the AG argued that the Ninth Circuit’s prior holdings failed to give proper consideration to the California Supreme Court’s interpretation of state law in *Dannenberg*, which

134. *Hayward*, 512 F.3d at 544-46.

135. *Id.* at 546-47.

136. *See supra* note 123 and accompanying text.

137. *Hayward*, 512 F.3d at 547.

138. *Id.* at 547-48.

139. Pet. for Panel Reh’g and Reh’g En Banc, *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. May 16, 2008) (No. 06-55392). The Attorney General also raised a third claim regarding the requirement of a certificate of appealability. *Id.* at 17-21. That issue will not be addressed in this paper.

140. *Id.* at 6-8 (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). This “*Sandin* argument” was discussed *supra* note 114 and accompanying text.

141. Pet. for Panel Reh’g and Reh’g En Banc, *supra* note 139, at 8-10.

held that California's parole statute does not use mandatory language.¹⁴²

Regarding the some evidence prong, the AG argued that the Supreme Court has never explicitly held that *Hill*'s some evidence test applies to parole determinations, which differ in kind from the revocation of good time credits.¹⁴³ Under AEDPA, the AG reasoned, "a reviewing court may not transfer a legal test from one factual scenario to another and call it clearly established law."¹⁴⁴ The AG acknowledged that *Hayward* "followed" a recent line of Ninth Circuit decisions that affirmed the existence of a liberty interest in parole release and the application of the some evidence test.¹⁴⁵ However, the AG distinguished *Hayward* from the prior cases in that *Hayward* was the only decision where the court ultimately concluded that the inmate should go free.¹⁴⁶ "[T]he stakes are great here," the AG stated, "and the questions presented in this petition are of the utmost importance to protect the principles of comity and federalism."¹⁴⁷

Hayward's answer to the petition for rehearing jumped on the AG's admission that *Hayward* simply "followed" a recent line of Ninth Circuit decisions.¹⁴⁸ In response to the AG's liberty interest analysis, *Hayward* argued that the Ninth Circuit's rejection of *Sandin* in the parole context was so "well-established," "settled," and "uncontroversial" that the *Hayward* opinion did not even mention the issue.¹⁴⁹ Moreover, the Ninth Circuit had "soundly rejected" the *Dannenberg* argument in *Sass*.¹⁵⁰ Similarly, in response to the AG's some evidence analysis, *Hayward* pointed out that for "more than twenty years" the Ninth Circuit "has reiterated that the least burdensome standard of review that due process requires for supporting evidence—[*Hill*'s] 'some evidence' [test]—applies to parole deprivations."¹⁵¹ *Hayward* defended the application of *Hill* to the parole context on the ground that *Hill* "set forth a working constitutional standard by which to evaluate" parole claims.¹⁵² He argued that *Hill* established that the some evidence standard is "the lowest possible standard of review" for due process claims; it is only where a prisoner does not have a due process-protected liberty interest that the state may arbitrarily deprive him of

142. *Id.* at 10-11. 141 This "*Dannenberg* argument" was discussed *supra* note 116 and accompanying text.

143. Pet. for Panel Reh'g and Reh'g En Banc, *supra* note 139, at 13-14.

144. *Id.* at 15.

145. *Id.* at 2, 4, 6, 12-13.

146. *Id.* at 3.

147. *Id.* at 3.

148. Answer to Pet. for Reh'g and Reh'g En Banc at 1-2, *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. May 16, 2008) (No. 06-55392).

149. *Id.* at 4.

150. *Id.* at 6 (citing *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006)).

151. Answer to Pet. for Reh'g and Reh'g En Banc at 7, *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. May 16, 2008) (No. 06-55392).

152. *Id.* at 8 (quoting *Fisher v. Roe*, 263 F.3d 906, 915 (9th Cir. 2001)).151

his interest.¹⁵³ And since “it is given” that California prisoners have a liberty interest in parole, the some evidence standard must apply in the parole context.¹⁵⁴

On May 16, 2008, the Ninth Circuit granted the AG’s petition for rehearing en banc.

How will the en banc court decide? The AG is correct that the United States Supreme Court has never directly answered either the liberty interest question or the some evidence question in the precise context of California parole determinations, which, as discussed, presents a problem under AEDPA.¹⁵⁵ But the issue is complicated by the fact that federal habeas courts are faced with a potentially countervailing principle: a state court’s interpretation of state law binds a federal court sitting in habeas corpus.¹⁵⁶ Because what constitutes “clearly established” U.S. Supreme Court authority and an “interpretation of state law” are far from black-and-white, sometimes there is overlap between the two deference requirements. How the en banc *Hayward* court will come out depends on the balance it strikes between its efforts to stay true to holdings of the U.S. Supreme Court and to interpretations of state law by the California Supreme Court, particularly in *Lawrence*.

With regard to the liberty interest question, the Ninth Circuit must weigh the ambiguity in U.S. Supreme Court authority created by *Sandin* against the California Supreme Court’s holding that there is a liberty interest in parole in California. On the one hand, it seems unlikely that the Ninth Circuit will suddenly credit the *Sandin* and *Dannenberg* arguments and decide that California lifers have no liberty interest in parole. First of all, it is far from “clearly established” that *Sandin* overruled *Greenholtz*’s mandatory language test in the parole context and replaced it with the “atypical and significant hardship” test. In fact, that *Sandin* cited *Allen*—the case that solidified the *Greenholtz* test and gave it its name¹⁵⁷—with approval is strong evidence to the contrary.¹⁵⁸ Moreover, there are multiple reasons why the *Dannenberg* argument is unconvincing, in addition to the (rather complicated) finding in *Sass* that *Dannenberg* held only that setting a release date under California Penal Code Section 3041(a) should come after the suitability analysis of Section 3041(b).¹⁵⁹ First, after coming to this holding, *Dannenberg* moved on

153. Answer to Pet. for Reh’g and Reh’g En Banc at 8, *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. May 16, 2008) (No. 06-55392) (citing *Superintendent v. Hill*, 472 U.S. 445, 455 (1985)).

154. Answer to Pet. for Reh’g and Reh’g En Banc at 8-9, *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. May 16, 2008) (No. 06-55392).

155. See 28 U.S.C. § 2254(d)(1); see *supra* Part IV.A for a recap of AEDPA.

156. *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975) (stating that “a State’s highest court is the final judicial arbiter of the meaning of state statutes”).

157. See *supra* Part II.A.

158. *Sandin* cited *Allen* for the proposition that “States may under certain circumstances create liberty interests which are protected by the Due Process Clause.” *Sandin v. Conner*, 515 U.S. 472, 484-85 (1995).

159. See *supra* note 117 and accompanying text.

to the second step of the due process analysis, i.e., the some evidence question.¹⁶⁰ As the Ninth Circuit noted in *Sass*, “[t]he [California Supreme Court] would not [have] reach[ed] this step if it had held that there was no liberty interest.”¹⁶¹ Second, *Dannenberg* implicitly held that there is a liberty interest when, referring to *Rosenkrantz*, it cited the principle that “sole reliance on the commitment offense might, in particular cases, . . . contravene *the inmate’s constitutionally protected expectation of parole.*”¹⁶² Finally, *Lawrence*, decided after *Dannenberg*, operated under the assumption that there is a liberty interest in parole in California.¹⁶³

On the other hand, it is not absolutely clear that the California Supreme Court has actually found a liberty interest in parole under the Federal Constitution, as opposed to under the California Constitution. Indeed, *Lawrence* merely affirmed the liberty interest in parole found in *Rosenkrantz*,¹⁶⁴ and in *Rosenkrantz*, the court appears to have found that liberty interest only under the California Constitution.¹⁶⁵ The finding of a liberty interest under California law does not automatically mean that inmates have a corresponding liberty interest under federal law, since state and federal tests for the existence of a liberty interest are not necessarily coextensive.¹⁶⁶ To control the federal analysis, the state court must have decided that the parole statute creates a liberty interest under the federal (*Greenholtz*) mandatory language test, i.e., because the statute uses mandatory language.¹⁶⁷ Nevertheless, it seems clear that *Lawrence* interpreted section 3041 as using mandatory language (though it did not cite *Greenholtz* directly).¹⁶⁸ It is likely, therefore,

160. In re *Dannenberg*, 34 Cal. 4th 1061, 1095 (2005).

161. *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006).

162. *Dannenberg*, 34 Cal. 4th at 1094 (emphasis added).

163. See In re *Lawrence*, 44 Cal. 4th 1181, 1191 (2008) (referring to “the inmate’s due process liberty interest in parole that we recognized in *Rosenkrantz*”).

164. See *id.*

165. See *supra* notes 58-61 and accompanying text.

166. See *supra* note 37; Appellee’s Supp. Br. in Response to En Banc Court’s September 8, 2008 Order at 2-3, *Hayward v. Marshall*, No. 06-55392 (9th Cir. Oct. 29, 2008) (asserting that *Rosenkrantz* and *Lawrence* dealt only with the question of whether there is a liberty interest in parole under the California Constitution and that the decisions are not dispositive of the existence of a federally protected liberty interest).

167. See *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 (9th Cir. 2006) (“Because ‘a State’s highest court is the final judicial arbiter of the meaning of state statutes,’ if the California Supreme Court [has held] that section 3041 does not use mandatory language, this court’s holdings to the contrary would [not] control.”) (quoting *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975)); see also Appellee’s Supp. Br., *supra* note 166, at 7 (“Under the *Greenholtz* methodology, the State Supreme Court’s interpretation of California’s parole statute may be relevant to the determination of whether California life inmates have a federally protected liberty interest in parole.”).

168. See In re *Lawrence*, 44 Cal. 4th 1181, 1204 (2008) (“[T]he governing statute provides that the Board *must* grant parole *unless* it determines that *public safety* requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction.”) (quotations omitted; emphasis in original); see also Pet’r’s Reply to the Warden’s Supp. Br. in Response to En Banc Court’s September 8, 2008 Order at 3-4, *Hayward v. Marshall*,

that the en banc court will defer to the state court's interpretation of California's statute and reaffirm that there is a federally protected liberty interest in parole.

The AG's some-evidence arguments stand on firmer ground. Unlike the question of whether a state parole statute uses mandatory language, the question of whether federal habeas courts should review a state courts' denial of parole under the some evidence test is not an interpretation of state law. On the contrary, since the Federal Constitution is entirely separate from the California Constitution, that the California Supreme Court applies *Hill*'s some evidence test in the parole context for *state* due process purposes should not control whether federal courts should apply *Hill* in the parole context for *federal* due process purposes.¹⁶⁹ The only entity that can satisfyingly answer whether federal courts should apply *Hill* in the parole context for federal due process purposes is the U.S. Supreme Court, because under AEDPA, only the U.S. Supreme Court can establish "clearly established Federal law."¹⁷⁰ But the Ninth Circuit granted en banc review for a reason. Without a change in the status quo afforded by an answer from the Supreme Court, perhaps the best way to predict the outcome of the en banc decision is by weighing the competing policy interests at stake.

What are the potential ramifications of reaffirming the some evidence standard in the parole context? As an initial matter, if the Ninth Circuit does make the threshold decision that the some evidence standard applies, it will likely look to *Lawrence* for the contours of that test; in other words, it will likely find that, pursuant to California law, the some evidence must be "of" current dangerousness.¹⁷¹ As for the wider ramifications of a pro-*Hayward* holding, the AG presented one perspective in its petition for rehearing, where it argued that "the stakes are great here" because, unlike in prior Ninth Circuit cases, the panel actually found that Hayward should go free.¹⁷² As the Ninth Circuit panel opinion found, however, the circumstances of Hayward's case are "extraordinary;"¹⁷³ it is hard to believe that reaffirmation of the some evidence principle, even with the contours defined in *Lawrence*, will result in a huge wave of reversals of decisions denying parole. If the court were worried about such an effect, it could emphasize, referring to the *Irons* principle,¹⁷⁴ that

No. 06-55392 (9th Cir. Nov. 6, 2008).

169. See *supra* note 37.

170. 28 U.S.C. § 2254(d)(1) (2000); see *supra* Part IV.A.

171. See *Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007) ("When we assess whether a state parole board's suitability determination was supported by 'some evidence' in a habeas case . . . we must look to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole . . .") (citations omitted).

172. Pet. for Panel Reh'g and Reh'g En Banc, *supra* note 139, at 3.

173. *Hayward v. Marshall*, 512 F.3d 536, 546-47 (9th Cir. 2008), *reh'g en banc granted*, 527 F.3d 797 (9th Cir. 2008); see also *supra* note 135 and accompanying text.

174. See *supra* note 123 and accompanying text.

Hayward presents a unique case where he had served nearly *double* the fifteen-year minimum term for his second degree murder conviction.

The potential ramifications of holding that *Hill*'s some evidence standard does *not* apply in the parole context are much weightier. If the court does reject *Hill*, it would have to fill the gap either with some other "clearly established" due process protection, or with no protection at all. The first option is unsatisfying, while the second is anomalous, even unconstitutional.

Regarding the first option, the AG suggests that the court should fill the gap with the due process requirements described in none other than *Greenholtz*, which, according to the AG, is "[t]he *only* clearly established Supreme Court authority describing the process due when there is a federal liberty interest in parole."¹⁷⁵ *Greenholtz*, in the AG's estimation, "simply requires that the inmate be given an opportunity to be heard and be advised of the reasons he was not found suitable for parole."¹⁷⁶ But if *Greenholtz* were so "clearly established," why has it taken the Ninth Circuit so long to realize it? Without a change in the status quo in the form of a decision from the U.S. Supreme Court, the Ninth Circuit's suddenly adopting the *Greenholtz* standard would simply invite future petitioners like *Hayward* to argue that no, *Hill* is the only clearly established Supreme Court authority.

Moreover, the *Greenholtz* standard is problematic in light of subsequent statements made by the Supreme Court in *Hill*. Even if *Hill* did not explicitly hold that the some evidence test applies in the parole context, it did establish the principle that "a governmental decision resulting in the loss of an important liberty interest" cannot be arbitrary, and that the way to prevent arbitrary deprivations is by requiring that the deprivation be supported by at least a "modicum of evidence."¹⁷⁷ As the Ninth Circuit held in *Sass*,

Hill's some evidence standard is minimal, and assures that "the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." . . . To hold that less than the some evidence standard is required would violate clearly established federal law because it would mean that a state could

175. Pet. for Panel Reh'g and Reh'g En Banc, *supra* note 139, at 14-15. Of course, *Greenholtz* is best known for developing the mandatory language test for the "liberty interest" step of the due process analysis, but it also contains (pre-*Hill*) language regarding the second step of the due process analysis, i.e., the process that is due to protect a liberty interest found under the mandatory language test. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 12-16 (1979).

176. Pet. for Panel Reh'g and Reh'g En Banc, *supra* note 139, at 14-15 (citing *Greenholtz*, 442 U.S. at 16). Essentially, the AG argues that *Greenholtz* applies to the second step of the due process analysis (because *Hill*'s some evidence test did *not* override *Greenholtz*'s "opportunity to be heard" test on this step), but that *Greenholtz* does *not* apply to the first step (because *Sandin*'s atypical and significant hardship test *did* override *Greenholtz*'s mandatory language test on this step).

177. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985) ("[r]equiring a modicum of evidence to support a decision to revoke good time credits will help to prevent arbitrary deprivations . . .").

interfere with a liberty interest—that in parole—without support or in an otherwise arbitrary manner.¹⁷⁸

If the court decides that neither *Hill* nor *Greenholtz* (nor some other standard) is “clearly established,” it would have to hold that there is no federal due process protection for the deprivation of parole. This would be anomalous if the court does decide that there is a liberty interest in parole (which, as discussed, seems likely). It would also be unconstitutional. Liberty interests, by definition, require due process protection.¹⁷⁹

What’s more, a holding by the Ninth Circuit that something less than the some evidence test applies would result in a significant reduction of the role of federal habeas courts in reviewing the denial of parole. After *Lawrence*, the state courts will be applying a bolstered some evidence test. It is hard to imagine that an arbitrary decision by the Board or the Governor could get past California’s “current dangerousness” test only to fail a weaker, or nonexistent, federal test.

CONCLUSION

Lawrence and *Hayward* are unquestionably important decisions for California lifers seeking parole. *Lawrence* now requires that state courts review denials of parole under a heightened some evidence standard that looks at whether there is some evidence in the record of current dangerousness. At least in principle, the focus of parole review has shifted closer to rehabilitation rather than punishment. There is a good chance that *Hayward* will reaffirm the some evidence standard for federal habeas purposes and that it will look to *Lawrence* for the contours of that test. Nevertheless, the practical impact of both *Lawrence* and a pro-petitioner decision in *Hayward* is less clear. *Lawrence* and *Hayward* were both model prisoners who had served almost three decades in prisons. The real test will be how the Board, the Governor, California courts, and federal habeas courts apply the current dangerousness approach to the many lifers who have served more average prison terms.

178. *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006) (quoting *Hill*, 472 U.S. at 457).

179. *See id.* at 1128 (noting that “a liberty interest cannot be interfered with unless the requirements of due process are satisfied”) (citing *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454 (1989)).