



8-1-2006

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Alexander K. Mircheff

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Recommended Citation

Alexander K. Mircheff, *In re Dannenberg: California Forgoes Meaningful Judicial Review of Parole Denials*, 39 Loy. L.A. L. Rev. 907 (2006).

Available at: <https://digitalcommons.lmu.edu/llr/vol39/iss2/11>

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IN RE DANNENBERG: CALIFORNIA FORGOES MEANINGFUL JUDICIAL REVIEW OF PAROLE DENIALS

I. INTRODUCTION

The California Supreme Court's holding in *In re Dannenberg*¹ sharply curtailed judicial review when the State Board of Prison Terms ("the BPT")² denies parole to eligible life prisoners. In some respects, *Dannenberg* represents an important effort at judicial restraint, as the court deferred to an administrative agency's expertise in an area where the legislature had delegated substantial discretion.

In other respects, however, *Dannenberg* echoes an early scene in Frank Darabont's *The Shawshank Redemption*, which set a backdrop of an arbitrary and exploitive prison system:

Inside a bare parole hearing room within a maximum-security prison, seven men administer a perfunctory annual parole review to a life prisoner, Ellis Boyd "Red" Redding. Red has served twenty years of his sentence.

PAROLE BOARD: You feel you've been rehabilitated?

RED: Yes sir. Absolutely. Yeah, I've learned my lesson. I can honestly say I'm a changed man. I'm no longer a danger to society. That's the God's honest truth. No doubt about it.

[A stamp marks a red "REJECTED" on Red's parole file.]³

In responding to the parole board's questions, Red, portrayed by

1. 104 P.3d 783 (Cal. 2005).

2. As of July 1, 2005, the BPT was abolished and replaced with the Board of Parole Hearings. CAL. PENAL CODE § 5075 (West Supp. 2005). The newly formed Board of Parole Hearings now bears responsibility for making parole determinations. Because the case law discussed herein involves decisions made by the BPT, for the sake of clarity and consistency, this Comment refers to the body responsible for making parole determinations as the BPT.

3. FRANK DARABONT, *THE SHAWSHANK REDEMPTION* scene 9 (1994) available at <http://www.dailyscript.com/scripts/shawshank.html>.

Morgan Freeman, spoke in an indifferent and somewhat ironic monotone. Red's cadence revealed that he had been through parole hearings many times before, and that he knew whatever he said would not make any difference. Just as the parole board was simply going through the motions, so was Red.

Dannenberg may have inadvertently endorsed *Shawshank*-type parole hearings because for those crimes the BPT labels "especially callous and cruel," the parole applicant has no hope of meaningful consideration. Under *Dannenberg*, the BPT may decline to set a parole release date whenever it deems a life prisoner's commitment offense "especially callous and cruel."⁴ The BPT need not base this label on objective criteria.⁵ Further, the BPT may deem an offense "especially callous and cruel" without regard to whether that offense shares characteristics of others labeled "especially callous and cruel."⁶ In fact, under *Dannenberg*, the BPT can deny parole based solely on the commitment offense so long as the BPT cites "some evidence" of aggravating facts "beyond the minimum elements" of that offense.⁷ *Dannenberg* does not, however, explain how a reviewing court can know when circumstances rise "beyond the minimum elements" of an offense. Thus, in practice, *Dannenberg* allows the BPT to deny parole merely by reciting the circumstances of a prisoner's offense and applying a label that courts have no power to dispute.

This lack of judicial oversight confers immense power on a politically-appointed⁸ body comprised mainly of former law enforcement officers.⁹ In short, *Dannenberg* allows the BPT to rewrite the legislature's sentencing scheme for serious offenders, one parole hearing at a time. For example, the BPT can erase the

4. *In re Dannenberg*, 104 P.3d at 786–87. The term "commitment offense" refers to the crime for which the parole applicant was incarcerated. *Id.* at 786

5. *See id.* at 786.

6. *Id.*

7. *Id.*

8. *See* CAL. PENAL CODE § 5075 (West 2000 & Supp. 2005) (establishing the BPT's gubernatorial appointment and senate confirmation process).

9. *See* Jenifer Warren, *Panel Backs Gov.'s Parole Board Picks*, L.A. TIMES, Jan. 27, 2005, at B6 (describing state legislators critique of the current BPT's lack of professional diversity). For biographical information on the BPT's members, see <http://www.bpt.ca.gov/divisionsboards/boph/commissioners.html> (last visited Feb. 18, 2006).

difference between those convicted of first and second degree murder¹⁰ simply by keeping both behind bars indefinitely, even though those convicted of second degree murder become eligible for parole after fifteen years—a full ten years before those convicted of first degree murder.¹¹ Further, *Dannenberg* allows the BPT to erase the difference between life sentences that grant the possibility of parole and life sentences that do not.¹²

This Comment contends the *Dannenberg* court leaned too heavily towards judicial restraint because the court unnecessarily feared more oversight would force the BPT to release all but the most violent inmates. To provide necessary context for understanding the *Dannenberg* case itself, and to show that the legislature did not give the BPT unfettered discretion to deny parole, part II of this Comment outlines the statutes and regulations that comprise California's approach to parole. Part III proceeds to examine each phase of the *Dannenberg* case in detail, highlighting the circumstances of the murder, the BPT's denial of parole, and the reviewing courts' differing results. Part IV then argues *Dannenberg* infringes the due process protection afforded to inmates by the California¹³ and United States constitutions¹⁴ by precluding judicial review of parole denials. Part IV also contends *Dannenberg* incorrectly interprets California law by failing to understand that the mandated system of objective criteria for parole release can coexist

10. California defines murder as "the unlawful killing of a human being . . . with malice aforethought." CAL. PENAL CODE § 187 (West 1999). First-degree murder is "any . . . willful, deliberate, and premeditated killing" or any killing committed during the commission of a statutorily delineated felony. *See id.* § 189. All other murders constitute second-degree murders. *Id.*

11. *Id.* § 190. First-degree murders carry a sentence of twenty-five years to life, while second-degree murders only carry a sentence of fifteen years to life. *Id.*

12. This Comment does not discuss in detail *Dannenberg*'s potential impact on policymakers and sentencing judges. California's State Legislative Analyst, however, has suggested profound effects. *See* CAL. STATE LEGISLATIVE ANALYST'S OFFICE, JUDICIARY AND CRIMINAL JUSTICE, at D-60 (2001), available at http://www.lao.ca.gov/analysis_2000/crim_justice/crimjust_anl00.pdf [hereinafter STATE LEGISLATIVE ANALYST] ("This could result in judges being more or less willing to sentence a particular offender to a life term, and could make the Legislature more or less willing in the future to establish a life term as the penalty for a particular offense . . .").

13. CAL. CONST. art. I, § 7.

14. U.S. CONST. amend. XIV, § 1.

with public safety. Part V cautions that the *Dannenberg* court may have turned a blind eye towards a blanket policy on the part of the BPT to deny parole, thus tolerating wholesale violations of inmates' due process rights. Finally, part VI recommends replacing the amorphous labels *Dannenberg* allows with objective criteria that would allow courts to evaluate and, when appropriate, overrule the BPT's parole denials. Part VII concludes.

II. BACKGROUND: CALIFORNIA STATUTES AND REGULATIONS GOVERNING PAROLE RELEASE

Understanding the legal framework in which the court decided *Dannenberg* seems crucial to understanding *Dannenberg*'s troubling impact and why the court reached an incorrect outcome. As discussed below, *Dannenberg* required the California Supreme Court to resolve the tension between two subdivisions of section 3041 of the Penal Code.¹⁵ These subdivisions govern the BPT's parole release procedures for "indeterminate" life inmates. To show that the legislature did not give the BPT unfettered discretion to deny parole to such inmates, subpart A of the present discussion examines both the current status and the historical development of California's scheme of "determinate" and "indeterminate" sentences. Additionally, subpart B examines section 3041 itself. Further, subpart B shows how regulations adopted under section 3041 allow the BPT to deny parole based on extremely vague criteria.

A. *The BPT Only Determines the Parole-Eligibility of Inmates Serving "Indeterminate" Life Sentences*

In contrast to determinate sentences, indeterminate sentences require the BPT to decide when an inmate receives parole. As illustrated below, however, the legislature did not give the BPT unfettered discretion to deny parole to inmates serving indeterminate sentences. Rather, the legislature required the BPT to craft meaningful, objective criteria that would punish similar offenses with similar terms of incarceration. In doing so, the legislature rejected the previous regime, which had given nearly total discretion to prison officials.

15. See *In re Dannenberg*, 104 P.3d 783, 793 (Cal. 2005); see also CAL. PENAL CODE § 3041 (West 2000 & Supp. 2005).

1. California's current regime combines determinate and indeterminate sentencing

In 1976, the California legislature enacted the current “hybrid”¹⁶ sentencing approach, which combines both determinate and indeterminate sentences.¹⁷ Today, most felonies in California carry “determinate” sentences.¹⁸ California imposes “indeterminate” sentences only for serious offenses,¹⁹ including murders not punishable by death or life imprisonment without the possibility of parole.²⁰

Parole is granted differently for determinate sentences than for sentences with indeterminate terms. Determinate sentences incarcerate violators for a specified period of time, after which they are *automatically* released on parole.²¹ Determinate sentencing statutes specify three potential terms for each offense, such as “two, three, or four years.”²² The trial court selects one of these alternatives during sentencing.²³

In contrast, violators whose offenses carry “indeterminate” terms receive life sentences and eventually become *eligible* for parole.²⁴ Some indeterminate sentences specify the minimum term an inmate must serve before becoming parole-eligible.²⁵ Others

16. April K. Cassou & Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5, 86 (1978).

17. 1976 Cal. Stat. 5140. This Comment refers to the described sentencing scheme as the Determinate Sentencing Law.

18. *People v. Jefferson*, 980 P.2d 441, 445 (Cal. 1999).

19. *See infra* notes 25–26.

20. *See In re Dannenberg*, 104 P.3d at 791.

21. *Id.*

22. *Id.*

23. *E.g.*, CAL. PENAL CODE § 1170(a)(3) (West Supp. 2005); *see also* 1976 Cal. Stat. 5140–41 (setting forth factors for determining which of the three sentencing alternatives apply).

24. *E.g.*, *People v. Jefferson*, 980 P.2d 441, 445 (Cal. 1999).

25. *E.g.*, CAL. PENAL CODE § 190(a) (West 1999 & Supp. 2005) (punishing second degree murder with imprisonment for fifteen years to life); *id.* § 191.5(d) (punishing gross vehicular manslaughter while intoxicated with prior convictions with fifteen years to life); *id.* § 217.1(b) (punishing attempted murder of a governmental official with fifteen years to life); CAL. PENAL CODE § 269 (West Supp. 2005) (punishing aggravated sexual assault on a child with fifteen years to life); *id.* § 273ab (punishing fatal assault on a child under eight years of age by means likely to produce great bodily injury with twenty-five years to life).

contain no minimum term, and instead impose either “imprisonment in the state prison for life with the possibility of parole” or “imprisonment in the state prison for life.”²⁶ Inmates in the latter category of indeterminate offenders must serve at least seven years in prison before becoming eligible for parole.²⁷

When a life prisoner with an indeterminate sentence becomes parole-eligible, the BPT may grant a release date at its discretion, consistent with the statutory requirements discussed below in subpart B.²⁸

2. The legislature enacted the current hybrid approach to curb the power of prison officials

The legislature created the current hybrid scheme following much dissatisfaction with the old approach, which had granted nearly unfettered discretion to prison officials. Prior to 1976, all felonies carried indeterminate sentences.²⁹ Under this old scheme, statutes specified a sentencing range for different felonies that often spanned from as little as one year in prison to life imprisonment.³⁰ The parole authority had exclusive control over an inmate’s actual period of incarceration within this range.³¹ In exercising its control, the parole authority focused primarily on the offender’s progress toward rehabilitation, not on the appropriate punishment for the original offense.³² As a result, prisoners had no idea when their confinement would end until the moment the parole authority found them ready

26. *E.g.*, CAL. PENAL CODE § 205 (West 1999 & Supp. 2005) (aggravated mayhem); *id.* § 206.1 (torture); CAL. PENAL CODE § 209(a) (West 1999 & Supp. 2005) (kidnapping for ransom that does not result in bodily harm); *id.* § 209(b) (kidnapping for robbery or sexual assault); CAL. PENAL CODE § 209.5(a) (West Supp. 2005) (kidnapping during carjacking); CAL. PENAL CODE § 219 (West 1999 & Supp. 2005) (nonfatal train wrecking); *id.* § 664(a) (attempted premeditated murder); *id.* § 664(e) (attempted murder of a peace officer or fire fighter); CAL. PENAL CODE § 12308 (West 2000 & Supp. 2005) (exploding a destructive device with intent to kill); CAL. PENAL CODE § 12310(b) (West 2000) (exploding a destructive device that causes mayhem or great bodily injury).

27. CAL. PENAL CODE § 3046 (West 2000 & Supp. 2005).

28. *See infra* Part II.B.

29. Cassou & Taugher, *supra* note 16, at 6–16.

30. *Id.* at 8.

31. *Id.*

32. *Id.* at 9.

for release.³³ In fact, the parole authority regularly denied parole release until it developed the feeling that the applicant had become “ready to go home.”³⁴

Both academics and policy-makers attacked indeterminate sentencing. Commentators criticized the old scheme in two main ways.³⁵ First, they expressed concern that sentences were either too heavy or too light for the crimes they purported to punish.³⁶ Second, some argued that denying prisoners advance notice of their parole dates contributed to uncertainty and violence within the incarcerated population.³⁷ Additionally, the California Supreme Court twice held that sentences to life in prison for certain crimes could be so grossly disproportionate to their commitment offenses as to violate the California Constitution’s ban on cruel and unusual punishment.³⁸ Further, members of the legislature expressed concern that indeterminate sentencing gave prison officials too much power.³⁹

In response to these concerns,⁴⁰ the 1976 Determinate Sentencing Law set mandatory sentences for the vast majority of California felonies.⁴¹ In doing so, the Determinate Sentencing Law

33. *In re Dannenberg*, 104 P.3d 783, 790 (Cal. 2005).

34. Cassou & Taugher, *supra* note 16, at 9.

35. *See generally* Paula A. Johnson, Comment, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133, 133–34 nn.5–7 (1977) (surveying critiques of the old indeterminate sentencing law).

36. *See* Cassou & Taugher, *supra* note 16, at 6–9.

37. *Id.* at 11.

38. *See* *People v. Wingo*, 534 P.2d 1001, 1006–07 (Cal. 1975) (finding that life-maximum sentence for assault with force likely to produce great bodily injury raised constitutional concerns regarding cruel and unusual punishment); *In re Rodriguez*, 537 P.2d 384, 392, 394–97 (Cal. 1975) (holding that cruel and unusual punishment clause prohibited twenty-two year incarceration for a single incident of lewd and lascivious conduct upon a child under fourteen when inmate had shown exemplary prison conduct with no evidence of “inherent criminality”).

39. *See, e.g.*, CAL. LEGISLATIVE ASSEMB. SELECT COMM. ON ADMIN. OF JUSTICE, PAROLE BOARD REFORM IN CALIFORNIA: “ORDER OUT OF CHAOS” 15 (1970) (“The parole board is one of the last bastions of unchecked and arbitrary power in America.”).

40. *See generally* Raymond I. Parnas & Michael B. Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. DAVIS L. REV. 29 (1978) (outlining the purposes of the Determinate Sentencing Law).

41. *See supra* Part II.A.

declared “the purpose of imprisonment for crime is punishment.”⁴² This emphasis on punishment contrasted sharply with that of the previous system, which mainly sought to rehabilitate.⁴³ Further, the Determinate Sentencing Law stated that the punishment purpose required “terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.”⁴⁴

Even so, the Determinate Sentencing Law kept indeterminate sentences for serious offenders.⁴⁵ At the same time, however, the law amended section 3041 of the Penal Code,⁴⁶ which for the first time created specific procedures for the BPT’s review of serious offenders who had achieved parole eligibility.⁴⁷

As such, the Determinate Sentencing Law delegated to the BPT the task of devising a proportional sentencing scheme for serious offenders. Thus, the legislature did not grant the BPT unfettered discretion to deny parole even for indeterminate life inmates.

B. Although Section 3041 Requires the BPT to Use Guidelines During Parole Review that Enable Proportional Sentencing, the BPT Enacted Criteria So Vague that the BPT Can Deny Parole at Will

As discussed above, section 3041 implements California’s hybrid sentencing scheme, which combines determinate and indeterminate sentences. Specifically, section 3041 orders the BPT to craft criteria for paroling similar offenders after similar periods of incarceration.⁴⁸ The BPT, however, crafted administrative regulations that contain such vague criteria that the BPT can in practice ignore proportionality in sentencing.

42. CAL. PENAL CODE § 1170(a)(1) (West 2004 & Supp. 2005).

43. *See, e.g., Ex parte Lee*, 171 P. 958, 959 (Cal. 1918) (explaining that the indeterminate sentence law “place[s] emphasis upon the reformation of the offender Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong.”).

44. CAL. PENAL CODE § 1170(a)(1).

45. *See supra* notes 25–26 and accompanying text.

46. 1976 Cal. Stat. 5151–52.

47. *See Parnas & Salerno, supra* note 40, at 33.

48. CAL. PENAL CODE § 3041(a) (West 2000 & Supp. 2005).

1. Section 3041 *presumptively* directs the BPT to set indeterminate life prisoners' parole release dates in proportion to their offenses' gravity

As noted above, section 3041's provisions conflict to some degree. Subdivision (a) provides:

One year prior to the inmate's minimum eligible parole release date a panel of . . . [the BPT] *shall . . . normally* set a parole release date The release date shall be set in a manner that will provide *uniform terms* for offenses of similar gravity and magnitude *in respect to their threat to the public*⁴⁹

Additionally, subdivision (a) also requires the BPT to "establish criteria for the setting of parole release dates . . . [that] consider the number of victims of the crime for which the prisoner was sentenced and other factors in mitigation or aggravation of the crime."⁵⁰

Subdivision (b) provides an exception, however, under which the BPT need not set a parole date at all: "The . . . board shall set a release date *unless* it determines that the gravity of the current convicted offense . . . 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."⁵¹

2. The BPT crafted objective criteria for setting parole dates for "suitable" inmates but vague criteria for determining suitability

Pursuant to subdivision (a)'s directive to establish parole-release date criteria, the BPT enacted a series of "matrices."⁵² The BPT uses these matrices to set release dates for inmates it deems suitable for parole per section 3041, subdivision (a).⁵³ The BPT sets release dates for "suitable" inmates in a two-part process. First, the BPT compares the facts of the inmate's commitment offense to those listed in the matrix to determine the offense's "category."⁵⁴ Each matrix category lists an "upper, middle, or lower" term.⁵⁵ For

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.* § 3041(b) (emphasis added).

52. CAL. CODE REGS. tit. 15, §§ 2400–11 (2005).

53. *See id.* § 2403(a).

54. *See id.*

55. *Id.*

example, for second degree murders committed after 1978, the matrix specifies terms of 17, 18, or 19 years when the victim “goaded” the offender and the victim and offender had a prior relationship (including a spousal relationship), but a term of 18, 19, or 20 years for a “goaded” killing with no prior relationship.⁵⁶ Second, the BPT considers which term to apply.⁵⁷ In general, the BPT must apply the middle term.⁵⁸ The BPT may, however, consider whether the offense involved aggravating or mitigating circumstances.⁵⁹ If the BPT finds such aggravating or mitigating circumstances, it may apply the upper or lower term as appropriate.⁶⁰ In short, the BPT crafted objective criteria to guide its date-setting for inmates found *suitable* for parole.

In contrast, pursuant to subdivision (b) of section 3041, the BPT adopted several extremely vague regulations to guide the parole suitability determinations themselves.⁶¹ These regulations direct the BPT to deny a parole date to any prisoner who poses an “unreasonable risk of danger to society.”⁶² According to the regulations, the BPT must consider all relevant information when determining parole suitability.⁶³ The regulations specify factors tending to show suitability for release,⁶⁴ as well as factors that weigh against suitability.⁶⁵ No single factor is dispositive, and the BPT need not specify more than one factor in support of its decisions.⁶⁶

Factors that tend to indicate suitability for parole release include: (1) the lack of a juvenile record; (2) a history of stable social relationships; (3) signs of remorse for the commitment offense; (4) an offense committed under the influence of long-term stress; (5) an offender diagnosed with Battered Women’s Syndrome; (6) a lack of criminal history; (7) an offender of advanced age that tends to reduce the risk of recidivism; (8) the inmate’s ability to earn a legitimate

56. *See id.* § 2403(c).

57. *See id.* § 2403(a).

58. *Id.*

59. *Id.* §§ 2403–05.

60. *Id.* § 2403(a).

61. *Id.* § 2402.

62. *Id.* § 2402(a).

63. *Id.* § 2402(b).

64. *Id.* § 2402(d).

65. *Id.* § 2402(c).

66. *See id.* §§ 2402(c)–(d).

living upon release; and (9) a clean disciplinary record during incarceration.⁶⁷

In addition to these mitigating factors, the regulations also direct the BPT to consider whether the parole applicant committed the offense in “an especially heinous, atrocious or cruel manner.”⁶⁸ Factors that would indicate such an offense include: (1) multiple victims; (2) a “dispassionate” killing such as an execution-style murder; (3) abuse or mutilation of the victim; (4) an offense “carried out in a manner which demonstrates an exceptionally callous disregard for human suffering;” and (5) a motive that is “inexplicable or very trivial in relation to the offense.”⁶⁹

The BPT’s regulations also cite factors other than the circumstances of the commitment offense that weigh against suitability.⁷⁰ Such factors include: (1) a previous record of violence; (2) a history of unstable social relationships; (3) a history of “sadistic” sexual offenses; (4) a history of severe psychological problems “related to the offense;” and (5) serious misconduct during incarceration.⁷¹

As discussed below, *Dannenberg* ratified the BPT’s power to apply these regulations unconstrained by judicial review. The *Dannenberg* court held that the BPT may decline to set a parole release date merely by labeling a prisoner’s commitment offense “especially callous and cruel.”⁷² Thus, *Dannenberg* allowed the BPT to use the *vague* criteria enacted pursuant to section 3041, subdivision (b) to deny parole unlimited by the *objective* criteria the BPT promulgated pursuant subdivision (a).⁷³ The facts of the *Dannenberg* case illustrate the flaws of this approach.

III. THE CALIFORNIA SUPREME COURT’S HOLDING IN *DANNENBERG*

A. *Factual and Procedural Background*

In 1986, John E. Dannenberg stood trial on charges of first and

67. *See id.* §§ 2402(d)(1)–(9).

68. *Id.* § 2402(c)(1).

69. *Id.* §§ 2402(c)(1)(A)–(E).

70. *See id.* §§ 2402(c)(2)–(6).

71. *Id.*

72. *See In re Dannenberg*, 104 P.3d 783, 786–87 (Cal. 2005).

73. *See supra* text accompanying note 50.

second degree murder for the death of his wife.⁷⁴ A jury acquitted him of first degree murder, but convicted on the second degree charge.⁷⁵ Accordingly, the jury sentenced Dannenberg to a term of fifteen years to life in prison.⁷⁶

Dannenberg became eligible for parole in 1996.⁷⁷ The BPT declined to set a parole release date at hearings held in 1994, 1997, and 1999.⁷⁸ Each time the BPT found Dannenberg unsuitable for parole, the panel based its decision mainly on the underlying facts of the murder—despite overwhelming evidence that Dannenberg had been a model prisoner.⁷⁹ Dannenberg challenged the BPT's 1999 denial of parole.⁸⁰

1. The 1999 parole hearing

At Dannenberg's 1999 parole hearing, the BPT reviewed information from a variety of sources, including a report prepared by prison staff, oral testimony from Dannenberg, and Dannenberg's psychological evaluations.

a. The 1994 staff report

First, the BPT considered a staff report prepared for Dannenberg's 1994 hearing.⁸¹ The report recorded the circumstances of the murder: Following years of severe marital difficulties, during which Dannenberg and his wife sought marriage counseling, Dannenberg killed his wife on the morning of May 15, 1985.⁸² When police arrived at the couple's home, they discovered the victim draped over the side of the bathtub with her head under water.⁸³ Various wounds covered both the victim and Dannenberg.⁸⁴

74. *In re Dannenberg*, 125 Cal. Rptr. 2d 458, 462 (Ct. App. 2002), *rev'd*, 104 P.3d 783 (Cal. 2005).

75. *Id.*

76. *Id.*

77. *In re Dannenberg*, 104 P.3d at 787. Dannenberg became eligible for release less than fifteen years after the conviction because of pretrial and prison conduct credits. *Id.*

78. *Id.*

79. *Id.* at 788.

80. *Id.*

81. *Id.* at 787.

82. *Id.*

83. *Id.*

84. *Id.*

Dannenberg had scratches, a deep bite mark on a finger, and cuts on his neck, face, and eyelid.⁸⁵ The victim had cuts, abrasions, and puncture wounds, consistent with being hit repeatedly.⁸⁶ One such wound indicated that the victim had been hit with a half-pound pipe wrench.⁸⁷ An autopsy concluded the victim had been hit repeatedly on the head, but that she had not died from the head wounds.⁸⁸ Rather, the autopsy determined she had drowned.⁸⁹

Also according to the 1994 report, Dannenberg gave investigating officers the following account:

Around 7:00 a.m., . . . [Dannenberg] procured a pipe wrench and a screwdriver to fix a leaky toilet valve. “During this time[,] he evidently said something to his wife” about the drain. She came into the bathroom and picked up the screwdriver. A heated argument ensued. Screaming that she “wanted him dead,” the victim jabbed the screwdriver at Dannenberg, cutting his arm, and clawed and scratched his forearm with her fingernails. Dannenberg first tried to defend himself with his bare hands. Then he picked up the pipe wrench and hit the victim once on the side of the head. When she continued to advance on him, he “hit her a couple more times on the head,” and she fell to the floor. Dannenberg himself collapsed “and may have passed out.” When he awoke, he checked the victim’s pulse, but could not find one. He then called 911.⁹⁰

b. The BPT’s questioning

In addition to reviewing the 1994 staff report, the BPT questioned Dannenberg at the 1999 hearing.⁹¹ According to the record, Dannenberg testified to the following:

As both he and the victim collapsed on the floor, the victim was lying on her back, still holding the screwdriver, and Dannenberg was kneeling over her, pinning her arms. She

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (alterations in original).

91. *Id.*

seemed to relax, but then suddenly placed her feet against his shoulders and pushed. He was knocked back against the bathroom door and fell to the floor. After that, he remembered nothing until he saw the victim lying on the edge of the tub. A pool of blood covered the floor where she had previously lain. There was also considerable blood on her head, and smeared on the wall. Dannenberg could not move at first, because his legs, curled underneath him, were asleep. From his low position, and in a dazed condition, he did not notice the victim's head was in the water. Eventually he reached over and tried to take her pulse, but could not feel anything. He then struggled to his feet, went to his bedroom, and called 911. The fire department responded within a few minutes, but determined that the victim was dead and did not try to resuscitate her.⁹²

During Dannenberg's testimony, BPT members twice pressed Dannenberg regarding the circumstances of the murder.⁹³ Initially, a BPT member expressed skepticism that the victim could have moved herself to the bathtub after bleeding so profusely on the floor.⁹⁴ In response, Dannenberg denied placing his wife in the tub.⁹⁵ Further, Dannenberg noted there had been evidence of blood on the underside of the bathtub faucet.⁹⁶ He then theorized, as he had at trial, that:

[T]he victim must have tried to rise on her own, climbed over the edge of the tub, "and either tried to wash herself or had attempted to get up and slipped and got her face in the water and jerked her head up and hit her head on the spout and then went down again and drowned."⁹⁷

Dannenberg insisted his trial evidence demonstrated "he could not have moved [the victim] into the tub without walking in the blood on the bathroom floor, thus 'making a mess' of the murder scene."⁹⁸

92. *Id.* at 787–88.

93. *Id.* at 788.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Later, a BPT member indicated skepticism that the victim could have drowned during the mere minute or two Dannenberg claimed he was unconscious.⁹⁹ Dannenberg replied that the coroner had testified at trial that drowning can occur virtually instantaneously if the victim inhales water.¹⁰⁰

c. Dannenberg's argument for suitability

After considering the 1994 report and soliciting Dannenberg's testimony, the BPT panel also heard Dannenberg's argument for parole.¹⁰¹ In his argument, Dannenberg expressed remorse, but denied he intended to kill his wife.¹⁰² He maintained that the prosecutor in his trial told the jury "the circumstances of the victim's death" could never be known for certain.¹⁰³ In addition, Dannenberg averred that on appeal the Attorney General conceded that the drowning was "unexpected."¹⁰⁴ Nonetheless, Dannenberg maintained he had accepted responsibility for the killing, stating his wife "would in all likelihood not have died if [he] had not hit her that morning."¹⁰⁵

In addition, Dannenberg noted the following:

- he had no history of drug abuse;
- he had no criminal history other than the commitment offense;
- he had no disciplinary problems while in prison;
- he had pursued all recommended therapy and vocational training while in prison;
- he had college degrees in mathematics and engineering, and decades of expertise in electronics; and
- he had several offers of housing, sufficient liquid assets to support himself, an offer of employment, and plans to start a water conservation business.¹⁰⁶

99. *Id.*

100. *Id.*

101. *Id.* at 787.

102. *Id.* at 788.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

d. Dannenberg's psychological evaluations

Finally, the BPT panel reviewed Dannenberg's psychological evaluations.¹⁰⁷ Dannenberg's 1999 evaluation described him as a "model prisoner."¹⁰⁸ The evaluation opined that the murder amounted to "a one-time response to Dannenberg's extreme stress and fear of his wife's rage while she was armed with the screwdriver."¹⁰⁹ The examiner did not view Dannenberg as likely to commit such a violent act again.¹¹⁰ The evaluation noted Dannenberg had no signs of mental or emotional disorder, and concluded he presented a low risk of further violence.¹¹¹ These conclusions echoed Dannenberg's previous psychological evaluations.¹¹² In fact, evaluations in 1989, 1992, 1994, 1995, 1996, 1997, and 1999 uniformly concluded that Dannenberg "showed no psychopathology and should not be denied parole on psychological grounds."¹¹³

e. The BPT's ruling

After considering the record, the BPT panel issued an oral ruling that found Dannenberg unsuitable for parole.¹¹⁴ The panel based its finding "primar[ily]" on the commitment offense itself.¹¹⁵ First, the panel found the murder was committed "in an especially cruel or callous manner," and was carried out in a way that "demonstrates an exceptionally callous disregard for human suffering."¹¹⁶ Second, the panel found the motive for the crime "was inexplicable or very trivial in relation to the offense."¹¹⁷ The panel based these labels in

107. *Id.*

108. *Id.*

109. *Id.*

110. *In re Dannenberg*, 125 Cal. Rptr. 2d 458, 463 (Ct. App. 2002), *rev'd*, 104 P.3d 783 (Cal. 2005).

111. *In re Dannenberg*, 104 P.3d at 788.

112. *Id.*

113. *In re Dannenberg*, 125 Cal. Rptr. 2d at 465.

114. *In re Dannenberg*, 104 P.3d at 788.

115. *Id.*

116. *Id.* The labels that the panel used to characterize the offense mirror vague language in the administrative regulations that specify circumstances the BPT may consider when it evaluates parole suitability. See CAL. CODE REGS. tit. 15, § 2402(c) (2005); *supra* Part II.B.

117. *In re Dannenberg*, 104 P.3d at 788. As above, the BPT panel's label for Dannenberg's motive mirrors language in the administrative regulations

part on the autopsy report, which, the panel noted, “indicated that the victim was repeatedly struck in the head, and at some point . . . was pushed or fell into the bathtub full of water and the eventual cause of death was drowning.”¹¹⁸

The panel acknowledged that it found “no psychiatric factors to consider.”¹¹⁹ Without explanation, however, the panel also stated, “The prisoner needs therapy in order to face, discuss, understand, and cope with stress in a nondestructive manner. Until progress is made, the prisoner continues to be unpredictable and a threat to others.”¹²⁰

In addition to finding Dannenberg unsuitable for parole, the panel held it did not reasonably expect to grant Dannenberg parole the following year.¹²¹ Accordingly, the panel postponed his next hearing for two years.¹²² In support of this purportedly “separate” ruling, the panel cited the considerations listed above.¹²³ The panel also based the postponement on its assertion that Dannenberg “needs to accept full responsibility for the crime . . . and discontinue his attempts to minimize his responsibility for that.”¹²⁴

2. The lower courts ruled in favor of Dannenberg

a. Marin County Superior Court

Following the 1999 hearing, Dannenberg petitioned for a writ of habeas corpus.¹²⁵ In his petition, Dannenberg claimed the BPT panel had wrongly denied his parole because he had refused to admit to first degree murder.¹²⁶ Further, Dannenberg asserted the BPT showed no evidence of his “current dangerousness” and accordingly

governing the BPT’s determinations of parole suitability. See CAL. CODE REGS. tit. 15, § 2402(c); *supra* Part II.B; *supra* note 116.

118. *In re Dannenberg*, 104 P.3d at 788.

119. *In re Dannenberg*, 125 Cal. Rptr. 2d 458, 464 (Ct. App. 2002), *rev’d*, 104 P.3d 783 (Cal. 2005).

120. *Id.*

121. *Id.*

122. *Id.*

123. *In re Dannenberg*, 104 P.3d at 805.

124. *Id.*

125. *Id.*

126. *Id.* See generally CAL. PENAL CODE § 5011 (West Supp. 2005) (prohibiting the BPT from demanding an admission of guilt to any crime as a condition of parole).

could not have avoided its “presumptive duty” to set a parole release date per section 3041 of the Penal Code.¹²⁷

The superior court held for Dannenberg.¹²⁸ Following *In re Powell*,¹²⁹ the trial court applied a “some evidence” standard of review, which required it to determine whether any facts supported the BPT’s decision to deny Dannenberg parole.¹³⁰ The court noted that several factors pointed toward Dannenberg’s suitability for parole: (1) Dannenberg had no criminal history; (2) he showed remorse for the killing; (3) he had a clean disciplinary record while incarcerated; (4) he had “exemplary” post-release plans; and (5) uncontroverted evidence from prison psychologists indicated he did not need therapy.¹³¹

Moreover, the trial court found that the commitment offense itself did not indicate unsuitability.¹³² According to the court, the offense did not preclude parole for Dannenberg because no evidence indicated that his crime had been any more callous, cruel, or indifferent to human suffering than “any and all second degree murders.”¹³³ Additionally, the trial court held that the “exceptionally cruel or callous nature” of a murder can never justify a finding of unsuitability because such a label “would necessarily apply to every second degree murder.”¹³⁴

The trial court also found that the BPT violated section 5011(b) of the Penal Code when the panel relied upon Dannenberg’s failure to accept responsibility for the murder.¹³⁵ Moreover, the trial court noted that a former chair of the BPT alleged that the BPT “followed an unwritten policy against releasing any life term inmate on parole.”¹³⁶

127. *In re Dannenberg*, 104 P.3d at 789. See generally CAL. PENAL CODE § 3041 (West 2000 & Supp. 2005) (specifying procedures for parole eligibility determinations).

128. *In re Dannenberg*, 104 P.3d at 789.

129. 755 P.2d 881 (Cal. 1988).

130. See *In re Dannenberg*, 125 Cal. Rptr. 2d 458, 465 (Ct. App. 2002), *rev'd*, 104 P.3d 783 (Cal. 2005).

131. *In re Dannenberg*, 104 P.3d at 789.

132. *Id.*

133. *Id.*

134. *In re Dannenberg*, 125 Cal. Rptr. 2d at 468 (quoting *In re Rosenkrantz*, 95 Cal. Rptr. 2d 279, 291 (Cal. Ct. App. 2000)).

135. *In re Dannenberg*, 104 P.3d at 789; see *supra* note 126.

136. *In re Dannenberg*, 125 Cal. Rptr. 2d at 465–66.

Accordingly, the trial court ordered a new parole hearing.¹³⁷

b. Court of Appeal

A unanimous appellate court affirmed the trial court in part and reversed in part.¹³⁸ Citing its own holding from *In re Ramirez*,¹³⁹ the appellate court stated that the BPT must make its parole suitability decision under section 3041, subdivision (b) consistent with section 3041, subdivision (a)'s requirement of uniform terms for similar offenses.¹⁴⁰ Thus, the court reasoned as follows:

[W]hile the gravity of the commitment offense may be a sufficient basis for refusing to set a parole date under the exception provided in section 3041, subdivision (b), the exception properly applies only to particularly egregious offenses. Otherwise, the exception would tend to swallow the rule that a parole release date is "normally" set under section 3041, subdivision (a) Accordingly, the Board must weigh the gravity of the inmate's criminal conduct against other instances of the same crime, performing an evaluation similar to that prescribed by the sentencing rules governing probation determinations.¹⁴¹

The appellate court also held that the BPT should consider whether the parole applicant's crime carried a minimum sentence of fifteen or twenty-five years.¹⁴² The court reasoned that ignoring sentencing minimums would allow the BPT to destroy the system of proportionality the legislature enacted in section 3041, subdivision (a) and in the murder statutes.¹⁴³

The court therefore affirmed the trial court holding that the BPT erred when the panel refused to grant a parole date.¹⁴⁴

137. *Id.* at 466.

138. *In re Dannenberg*, 104 P.3d at 789.

139. *Id.* (citing *In re Ramirez*, 114 Cal. Rptr. 2d 381 (Ct. App. 2001)).

140. *In re Dannenberg*, 125 Cal. Rptr. 2d at 467.

141. *Id.* (citing *In re Ramirez*, 114 Cal. Rptr. 2d at 396–97).

142. *See id.* at 469 (asking the board to consider the minimum term prescribed by law for the offense).

143. *Id.*

144. *See id.* at 471.

B. The Supreme Court Holding

The California Supreme Court reversed the court of appeal.¹⁴⁵ The court held that the BPT may decline to set a parole release date based solely on the commitment offense without regard to the proportionality requirement of section 3041, subdivision (a).¹⁴⁶ Accordingly, the court reinstated the BPT's denial of a parole release date and did not require the BPT to conduct a further hearing.¹⁴⁷

The court summarized its holding as follows:

[T]he Board, exercising its traditional broad discretion, may protect public safety *in each discrete case* by considering the dangerous implications of a life-maximum prisoner's crime individually. *While the Board must point to factors beyond the minimum elements of the crime for which the inmate was committed*, it need engage in no further *comparative analysis* before concluding that the particular facts of the offense make it unsafe, at that time, to fix a date for the prisoner's release. The BPT acts properly in determining unsuitability, and . . . renders a decision supported by "*some evidence*."¹⁴⁸

According to the court, "the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders."¹⁴⁹ Thus, the court reasoned, section 3041 does not require the BPT to schedule an inmate's release, "simply to ensure that the length of the inmate's confinement will not exceed that of others who committed similar crimes."¹⁵⁰

The court emphasized subdivision (b) could apply just as frequently as subdivision (a).¹⁵¹ According to the court, the word "normally" in subdivision (a) of section 3041 merely reflects the

145. *In re Dannenberg*, 104 P.3d 783, 787 (Cal. 2005).

146. *Id.* at 786–87.

147. *Id.* at 787.

148. *Id.* at 786 (emphasis added).

149. *Id.* at 795.

150. *Id.*

151. *See id.* (stating that other provisions governing parole decisions for indeterminate life prisoners support the notion that the determination of parole suitability involves a paramount assessment of the public safety risk posed by the particular offender).

legislature's "assumption" or "hope" that uniform release dates would be a common result for indeterminate life inmates.¹⁵² In fact, the court read subdivision (a) as though it did not include the word "normally."¹⁵³

Moreover, the court stated that it refused to construe subdivision (a) to "ever require[] the Board to fix . . . a prisoner's parole date, under principles of term 'uniform[ity],' *despite* the Board's factually supported belief that the particular circumstances of the inmate's crime indicate a continuing public danger."¹⁵⁴ The court reasoned that to do so would contravene the legislature's direction that the BPT refuse to release dangerous life prisoners.¹⁵⁵

The court extensively defended its statutory analysis. The court emphasized that the BPT had long considered an individual prisoner's suitability for release before the BPT conducted what the court termed "comparative analysis."¹⁵⁶ Moreover, the court reasoned, legislative acquiescence to the BPT's longstanding parole practices indicated tacit approval.¹⁵⁷ According to the court, this acquiescence seemed particularly persuasive because the legislature had recently amended other provisions of section 3041.¹⁵⁸ The court also found support for its statutory construction in the context in which the legislature had enacted the Determinate Sentencing Law.¹⁵⁹ Finally, the court warned that the court of appeal's interpretation of section 3041 would require "intercase comparisons in every parole matter" that could "backlog[]" the BPT.¹⁶⁰

After analyzing the statute, the court quickly disposed of constitutional concerns. First, the court stressed that indeterminate life inmates have "no vested right" to parole.¹⁶¹ Additionally, the court stated, indeterminate life sentences amount to sentences to life

152. *Id.* at 797.

153. *See id.*

154. *Id.* (alteration in original).

155. *Id.*

156. *Id.* at 800 (providing that the panel shall first determine whether the life prisoner is suitable for release on parole (citing CAL. CODE REGS. tit. 15, § 2402(a) (2005))).

157. *Id.*

158. *Id.*

159. *See id.* at 797–99. *See generally supra* Part II.A (describing the history of California's hybrid sentencing approach).

160. *In re Dannenberg*, 104 P.3d at 801.

161. *Id.* at 804 (quoting *People v. Wingo*, 534 P.2d 1001, 1011 (Cal. 1975)).

imprisonment, subject only to the discretion of the parole board.¹⁶² As a result, the court reasoned, the cruel and unusual punishment clause¹⁶³ of the California Constitution adequately protects the rights of inmates who want to challenge the length of their incarceration as a result of parole denials.¹⁶⁴ According to the court, the ban on cruel and unusual punishment does not require the BPT to parole life term inmates the BPT considers dangerous.¹⁶⁵ Moreover, the court predicted, a parole denial would probably never amount to cruel and unusual punishment because California only imposes indeterminate terms for the most serious offenses.¹⁶⁶

The court also found that the BPT's parole denial determinations provided inmates with due process.¹⁶⁷ Specifically, the court stressed that when the BPT denied parole based solely on the circumstances of the commitment offense, the BPT "must cite 'some evidence' of aggravating facts *beyond the minimum elements of that offense*."¹⁶⁸

The court then turned to the facts of Dannenberg's case. The court held that the BPT acted lawfully when it denied Dannenberg parole because the panel pointed "to some evidence that the particular circumstances of his crime—circumstances beyond the minimum elements of his conviction—indicated exceptional callousness and cruelty with trivial provocation, and thus suggested he remain[ed] a danger to public safety."¹⁶⁹ The court did not explain how it had determined that the circumstances of Dannenberg's crime exceeded the minimum elements of second degree murder.¹⁷⁰

162. *Id.*

163. CAL. CONST. art. I, § 17.

164. *In re Dannenberg*, 104 P.3d at 804.

165. *Id.*

166. *Id.*

167. *Id.* at 803 n.16.

168. *Id.* (citing *In re Rosencrantz*, 59 P.3d 174, 205 (Cal. 2002)).

169. *Id.* at 805.

170. *See id.* The court merely pointed to the undisputed fact that Dannenberg repeatedly struck his wife in the head with a pipe wrench, and other facts that, despite Dannenberg's denials, reasonably suggested he placed her head underwater or allowed it to stay there. *See id.* For a more detailed account of the murder involved in *In re Dannenberg*, see *supra* Part III.A.1.a–b. For a critique of the court's "beyond the minimum elements" standard, see *infra* part IV.A.1–3.

Finally, the court acknowledged that the BPT might have improperly considered Dannenberg's alleged refusal to admit guilt,¹⁷¹ as evidenced by the panel's statement that Dannenberg needed to discontinue his efforts to minimize his responsibility for his crime.¹⁷² The court noted, however, that the BPT panel only expressly relied on any refusal to admit guilt during the decision to postpone a rehearing for two years, and not during the purportedly "separate" decision to deny parole.¹⁷³ Thus, the court deemed any error harmless.¹⁷⁴

The court did not address the BPT's seemingly inexplicable assertion that Dannenberg needed further "therapy" despite overwhelming evidence to the contrary.¹⁷⁵

IV. ANALYSIS: *DANNENBERG* VIOLATES INMATES' DUE PROCESS RIGHTS AND FAILS AS A MATTER OF STATUTORY CONSTRUCTION

Dannenberg orders courts to rubber stamp the BPT's pro forma consideration of parole applications, thus violating inmates' right to due process under the United States and California constitutions. Additionally, *Dannenberg* interprets section 3041 in a way that clearly contravenes the intent of the legislature's scheme for setting parole dates, and paves the way for the BPT to rewrite the penal code.

A. *Dannenberg* Violates Inmates' Rights to Due Process

1. Both federal and state due process requirements govern California's parole review process

The *Dannenberg* court implicitly holds that *state* due process

171. As discussed above, the BPT panel made this assertion after questioning Dannenberg about the circumstances of his wife's murder. Specifically, the BPT contested Dannenberg's contentions that he had not intended to drown his wife. *See supra* text accompanying notes 94–100. Also as noted previously, the penal code prohibits requiring a parole applicant to admit guilt as a condition of parole. CAL. PENAL CODE § 5011(b) (West Supp. 2005).

172. *See In re Dannenberg*, 104 P.3d at 805.

173. *Id.* at 805.

174. *Id.*

175. As noted previously, *Dannenberg's* psychological evaluations consistently found he had no mental health problems that should prevent his parole. *See supra* Part III.A.1.d.

rights apply to California parole determinations, and in doing so, reaffirms that *federal* due process rights apply under the analysis articulated by the United States Supreme Court. Under *Board of Pardons v. Allen*¹⁷⁶ and *Greenholtz v. Inmates of Nebraska Penal*,¹⁷⁷ state law dictates whether parole applicants have a “liberty interest” in parole release that the Fourteenth Amendment Due Process Clause protects.¹⁷⁸

State parole law can create a federal liberty interest in several ways. First, a statute triggers a liberty interest if it requires that the parole authority grant release after determining, in its broad discretion, that the necessary prerequisites for release exist.¹⁷⁹ A statute does so when it uses mandatory language like “shall” to create a presumption that the parole authority will grant parole release when it makes the designated findings.¹⁸⁰ Additionally, state courts’ case law interpreting a parole statute can confer Fourteenth Amendment due process rights by construing the scope of the due process protection the statute affords.¹⁸¹

Here, implicitly following its holding in *In re Sturm*,¹⁸² the *Dannenberg* court assumed California law triggered due process rights during the parole stage.¹⁸³ The BPT apparently did not contest this conclusion. Moreover, if the United States Supreme Court interpreted section 3041, it would almost certainly reach the same result, because section 3041(a) creates a presumptive structure analogous to the statutes in *Allen* and *Greenholtz*.¹⁸⁴ The Ninth

176. 482 U.S. 369 (1987).

177. 442 U.S. 1 (1979).

178. *See Allen*, 482 U.S. at 381 (holding that a Montana statute created federal due process rights); *Greenholtz*, 442 U.S. at 12 (holding that a Nebraska statute created federal due process rights).

179. *Allen*, 482 U.S. at 376 (construing *Greenholtz*).

180. *Id.* at 377–78 (citing *Greenholtz*, 442 U.S. at 12).

181. *See, e.g., Greenholtz*, 442 U.S. at 12 (“Since respondents elected to litigate their due process claim in federal court, we are denied the benefit of the Nebraska courts’ interpretation of the scope of the [liberty] interest, if any, the statute was intended to afford to inmates.”).

182. 521 P.2d 97, 104 (Cal. 1974) (pointing to “time-honored” principles of parole applicant’s right to “due consideration”).

183. *See In re Dannenberg*, 104 P.3d 783, 803 n.16 (Cal. 2005).

184. *Compare CAL. PENAL CODE* § 3041(a) (West 2000 & Supp. 2005) (“[T]he [BPT] shall . . . normally set a parole release date . . .”) (emphasis added), and *id.* § 3041(b) (“The . . . board shall set a release date unless it determines that the gravity of the current convicted offense . . . is such that

Circuit has so held.¹⁸⁵ *Dannenberg's* assumption, however, renders moot speculation about the High Court's due process analysis of section 3041 because *Dannenberg*, like *Sturm*, represents definitive California case law giving parole applicants due process rights.¹⁸⁶ Thus, under *Allen* and *Greenholtz*, *Dannenberg* and *Sturm* operate to confer federal due process rights on California's parole applicants.

Additionally, *Allen* and *Greenholtz* make clear that merely delegating the parole authority substantial discretion to deny parole does not by itself violate the Fourteenth Amendment Due Process Clause.¹⁸⁷ Neither case, however, addresses judicial review of the exercise of that discretion, which is the central issue in *Dannenberg*.

2. Due process demands a "some evidence" standard of review when the BPT denies parole

As noted above, California courts review BPT decisions under a "some evidence" standard of review that asks whether any facts support the BPT.¹⁸⁸ California adopted this approach following *Superintendent, Massachusetts Correctional Institution at Walpole v. Hill*,¹⁸⁹ which held that the Due Process Clause of the Fourteenth Amendment required that "some evidence" support decisions to revoke a prisoner's "good time credits."¹⁹⁰ The Ninth Circuit concurs with importing *Hill's* approach into review of California's

consideration of the public safety requires a more lengthy period of incarceration . . ."), with *Greenholtz*, 442 U.S. at 11 ("Whenever the Board of Parole considers the release of a committed offender . . . on parole, it *shall* order his release *unless* it is of the opinion that his release should be deferred because [of certain mitigating considerations]" (quoting NEB. REV. STAT. ANN. § 83-1,114(1) (LexisNexis 1976))) (emphasis added), and *Allen*, 482 U.S. at 376 ("Subject to the following restrictions, the board *shall* release on parole [if certain requirements are met]" (quoting MONT. CODE ANN. § 46-23-201 (1985))).

185. See *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003) (finding that California's section 3041 creates a liberty interest); *McQuillion v. Duncan*, 306 F.3d 895, 902-04 (9th Cir. 2002) (holding that California parole applicant had federal due process rights).

186. See *In re Dannenberg*, 104 P.3d at 803 n.16 (stating that the well established principles applied by the BPT when evaluating whether an inmate is suitable for parole on public safety grounds do not deny due process).

187. See *Allen*, 482 U.S. at 376 (construing *Greenholtz*).

188. E.g., *In re Powell*, 755 P.2d 881, 887 (Cal. 1988).

189. 472 U.S. 445 (1985).

190. *Id.* at 455.

parole denials.¹⁹¹ The United States Supreme Court would also likely agree.¹⁹²

3. *Dannenberg* precludes effective judicial review when the BPT denies parole

As Justice Moreno notes in dissent, parole applicants' due process rights demand "something more than mere pro forma consideration" during parole review.¹⁹³ Moreover, these rights are toothless without meaningful judicial review to guard against their abrogation.¹⁹⁴ *Dannenberg*, however, prevents meaningful judicial review when the BPT denies a parole date based solely on the commitment offense. Thus, *Dannenberg* violates prisoners' due process rights. The court's purported due process safeguard—that the BPT must point to "factors beyond the minimum elements of the crime"—rings hollow because the court does not explain when those factors could possibly not exist.¹⁹⁵ In other words, *Dannenberg*

191. See *Biggs v. Terhune*, 334 F.3d 910, 915 (9th Cir. 2003) ("In the parole context, the requirements of due process are satisfied if 'some evidence' supports the decision." (citing *McQuillion v. Duncan*, 306 F.3d 895, 904 (9th Cir. 2002)); *Jancsek v. Ore. Bd. of Parole*, 833 F.2d 1389, 1390 (9th Cir. 1987) (citing *Superintendent v. Hill*, 472 U.S. 445, 457 (1985)).

192. Although the Court in *Greenholtz* held that the Nebraska parole authority need not notify applicants of the evidence supporting its stated reasons for denying parole, *Greenholtz* does not negate the "some evidence" standard of review for California parole denials for several reasons. First, *Greenholtz* merely addressed whether federal *procedural* due process demanded particularized notification to unsuccessful applicants themselves. See *Greenholtz v. Inmates of Neb. Penal*, 442 U.S. 1, 14–16 (1979) (addressing procedural requirements of parole review, including notice of hearing). *Greenholtz* did not, however, address whether *substantive* due process rights demanded judicial inquiry into whether "some evidence" supported the denial. Second, even if *Greenholtz* could somehow be read to make a substantive due process holding, *Hill* likely superseded *Greenholtz*, requiring, under a broad reading, that "some evidence" support decisions affecting prisoners' parole-eligibility. See *supra* text accompanying notes 188–191. Finally, the California cases requiring a "some evidence" standard of review represent definitive state case law from which federal due process rights flow. See *supra* Part IV.A.1. In sum, even if Nebraska parole law did not create a federal due process right to "some evidence" review, California law does.

193. *In re Dannenberg*, 104 P.3d 783, 808–09 (Cal. 2005) (Moreno, J., dissenting) (quoting *In re Sturm*, 521 P.2d 97, 104 (Cal. 1974)).

194. *Id.* at 809 (Moreno, J., dissenting) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 161–163 (1803)).

195. See *id.* at 786 (majority opinion).

renders meaningless the already deferential “some evidence” standard of review because it fails to explain just *what* a reviewing court must find “some evidence” of.

The *Dannenberg* court purports to require that the BPT point to “factors beyond the minimum elements of the crime” when it denies parole based solely on the commitment offense.¹⁹⁶ This requirement, according to the court is sufficient to protect prisoners’ due process rights.¹⁹⁷ Although the court claims the facts of the *Dannenberg* murder satisfy this “beyond the minimum elements” requirement, the court does not explain *why*. Further, according to the court, it suffices that “some evidence” suggested *Dannenberg*’s offense was “callous and cruel” and was committed with “disregard for human suffering.”¹⁹⁸ Again, however, the court does not explain what particular circumstance of *Dannenberg*’s case provides the “some evidence” of “beyond the minimum elements” standard the court purports to demand.

Put more starkly, *Dannenberg* implies that some second degree murderers, though validly convicted, merely committed the “minimum” elements of the offense and thus must receive a parole release date after fifteen years in prison.¹⁹⁹ The court does not, however, come close to describing how a court will know these offenders when it sees them. The court merely held, without explanation, that *Dannenberg* is not such an offender.²⁰⁰

It seems curious that the court would apply such a conclusory analysis to the very element that supposedly prevents a due process violation. In dissent, Justice Moreno offers the following explanation:

The majority gives us no clue, because the concept of a crime being “more than minimally necessary to convict [a prisoner] of the offense for which he is confined” is essentially meaningless. Second degree murder is an abstraction that consists of certain legal elements. Particular second degree murders have *facts* that fit within these elements. These facts are never “necessary” or

196. *Id.*

197. *E.g., id.* at 803.

198. *Id.* at 788, 803.

199. *See id.* at 803 n.16.

200. *See id.* at 802–03.

“minimally necessary” to convict someone of a second degree murder, because we can always imagine other facts that would also lead to a second degree murder conviction.²⁰¹

Concededly, the court’s “beyond the minimum elements” standard may refer to cases where evidence suggests that the offender actually satisfied the elements of a greater offense. For example, the court could mean that the BPT may treat a second degree murderer like a first degree murderer where evidence indicates premeditation.²⁰²

This explanation seems weak, however, because of the complete absence of any evidence that suggested Dannenberg *premeditated* his wife’s murder. Rather, the only dispute appears to have been whether Dannenberg *intended* to kill his wife. Premeditation would require more, such as advanced planning. The death of Dannenberg’s wife, on the contrary, seems to have been a domestic fight gone awry. Accordingly, even if the *Dannenberg* court did intend “minimum elements” to mean “could have been guilty of a greater offense,” the willingness to accept such a weak showing on this level would render the standard virtually meaningless.

Said another way, if Dannenberg could have been guilty of first degree murder in the eyes of the court, and had thus committed more than the “minimum elements” of his offense such that he could be denied parole based solely on the circumstances of that offense, it would be difficult to imagine any second degree murderer who did not share those characteristics and whose parole would not be similarly denied. This difficulty, along with Justice Moreno’s point above, illustrates that the *Dannenberg* majority provides only a specious safeguard for prisoners’ due process rights.

201. *Id.* at 808 (Moreno, J., dissenting) (emphasis in original) (footnote omitted).

202. The California Supreme Court has previously upheld such an approach. *In re Rosenkrantz*, 59 P.3d 174, 219 (Cal. 2002) (“[T]hat the jury, for whatever reason, did not find beyond a reasonable doubt . . . premeditation and deliberation does not preclude the Governor from considering such evidence in exercising his discretion whether to reverse a Board decision granting parole.”) (emphasis omitted); *cf. In re Dunham*, 545 P.2d 255 (Cal. 1976) (upholding revocation of parole based on evidence indicating that the parolee committed the crime of which he was acquitted).

4. *Dannenberg's* contradictions allow the BPT to give parole applicants only nominal consideration

The *Dannenberg* opinion rests on two contradictions that allow the BPT to violate inmates' due process rights. First, the court purports to allow the BPT to decide suitability based on individualized consideration, unconstrained by "comparative" considerations.²⁰³ At the same time, the court allows the BPT to use labels that, on their face, virtually compel comparative consideration unless the BPT either uses them as "boilerplate" or engages in mental gymnastics. The court effectively contended that even someone who has never heard of second degree murder, understood its elements, or imagined its hypothetical circumstances could independently decide whether a given offense was "*especially* cruel or callous" or "carried out in a manner which demonstrates an *exceptionally* callous disregard for human suffering" or committed for a "*very* trivial" motive.²⁰⁴ These labels almost inherently involve consideration of either second degree murders in general, or other specific instances of second degree murder. Thus, it seems impossible that the BPT truly evinces "individualized consideration" when it applies such labels. Much more likely, these labels are just that—standard language the BPT applies when it has decided to deny parole.

Second, and perhaps just as contradictory, *Dannenberg's* construction of section 3041 gives the BPT nearly complete license to say, in effect, that a prisoner is not yet ready—but may become ready—for parole based solely on an event that occurred in the past. Said another way, one wonders why an inmate whose offense alone precluded parole would *ever* become suitable for parole. The facts of

203. *In re Dannenberg*, 104 P.3d at 786.

204. *In re Dannenberg*, 104 P.3d at 788 (emphasis added); see CAL. CODE REGS. tit. 15, § 2402(c) (2005). The *Dannenberg* trial court persuasively rejected this notion when it noted that all murders are "especially cruel and callous" when not viewed in comparison with the concept of murder itself. *In re Dannenberg*, 125 Cal. Rptr. 2d 458, 465 (Ct. App. 2002), *rev'd*, 104 P.3d 783 (Cal. 2005). Put simply, second-degree murder is by definition an especially callous and cruel act. Similarly, Justice Moreno pointed out that all second degree murders are by definition committed for a trivial reason. *In re Dannenberg*, 104 P.3d at 808 (Moreno, J., dissenting). In fact, the law defines killings with nontrivial motives as either manslaughter, if based on legally cognizable provocation, or self-defense, if in response to a threat of death or great bodily harm. CAL. PENAL CODE §§ 192, 197 (West 1999 & Supp. 2005).

the commitment offense will not change, and, apparently, no other facts are relevant.

In sum, *Dannenberg* violates prisoners' due process rights by precluding judicial review and allowing the BPT to apply vague labels in a nonsensical way. As illustrated below, the legislature could not have intended such a result.

B. *Dannenberg's Construction of Section 3041 Fails*

Laws with the language "shall" and "unless" establish a general rule with an exception. Typically, such laws *presume* that the general rule, i.e., the thing that "shall" be done, applies.²⁰⁵ In contrast to this usual approach, *Dannenberg* holds that the BPT can apply the exception, section 3041, subdivision (b), merely by labeling an offense "exceptionally callous and cruel" and reciting case facts.²⁰⁶ Thus, *Dannenberg* allows the exception to swallow the rule.²⁰⁷ This contravenes the intent of the legislature, and effectively returns California's parole consideration to the regime the legislature rejected in 1976.²⁰⁸ As discussed below, the court achieved this result by framing its decision with a straw man argument. Moreover, the court ignored the will of the legislature in several ways.

1. The *Dannenberg* majority argued for its statutory construction of section 3041 by knocking down a straw man

The court repeatedly characterized the proportionality requirement of section 3041, subdivision (a) as a form of "comparative analysis" that the BPT should not have to conduct prior to determining a prisoner's suitability for parole.²⁰⁹ By using this language, the court implicitly raises the specter of forcing the BPT to release clearly dangerous prisoners simply because their crimes

205. See, e.g., *People v. Braxton*, 101 P.3d 994, 1003 (Cal. 2004) (interpreting CAL. CONST. art. VI, § 13); *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 144 (Cal. 2004) (interpreting CAL. CIV. PROC. CODE § 1021.5 (West 1980 & Supp. 2004)); *Villa De Las Palmas Homeowners Ass'n v. Terifaj*, 90 P.3d 1223, 1224–26 (Cal. 2004) (interpreting CAL. CIV. CODE § 1354(a) (West 1982 & Supp. 2004)).

206. See *In re Dannenberg*, 104 P.3d at 786, 794, 802–03.

207. See *In re Rosencrantz*, 59 P.3d at 222 (quoting *In re Ramirez*, 114 Cal. Rptr. 2d 381, 397 (Ct. App. 2001)).

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

209. See *In re Dannenberg*, 104 P.3d at 785–86, 791–92, 794–97, 799, 801–02, 804, 805 & n.18.

happened to fall on the less egregious end of the spectrum *in comparison to those of other murderers*.²¹⁰ In other words, the court insinuates that the analysis it rejects would demand release of all but the most egregious life prisoners, even if *all* such offenses in a relevant period somehow escalated one hundredfold in brutality.²¹¹ The legislature must not have intended such a construction of section 3041. Accordingly, the court implies that its construction—allowing the BPT to eschew proportionality by applying vague labels to the commitment offense—must be correct.

This argument amounts to a straw man because no one—not the court of appeal, the trial court, the petitioner, nor the dissent—advocates a “parole all but the worst X percent” approach. Such an approach would allow egregious killers to go free simply because other killers happened to have committed even more heinous crimes. Rather, the proportionality requirement of section 3041 merely suggests that objective criteria should be used to uniformly punish murder. Moreover, section 3041 requires that the BPT use such objective criteria to compare the inmate’s criminal conduct against *generic, hypothetical* instances of the same crime.²¹²

The following scenario illustrates how proportional sentencing, based on objective criteria, differs from the majority’s straw man construction. Suppose nearly all murders in a given time period had characteristics that matched those describing egregious murders, i.e., those at the upper end of the base-term spectrum.²¹³ In this hypothetical, objective criteria would not compel paroling all but a small percentage of the *most* egregious criminals. Rather, objective criteria would deny parole to *all* those who fell at the upper end of the spectrum, *regardless of the number*, and would set parole release

210. *See id.* at 786 (emphasis added).

211. *See id.* at 810 (Moreno, J., dissenting) (emphasis added).

212. *See In re Ramirez*, 114 Cal. Rptr. 2d at 397 (holding that compliance with section 3041 requires the BPT to “weigh the inmate’s criminal conduct not against ordinary social norms, but against other instances of the same crime”).

213. *Cf.* CAL. CODE REGS. tit. 15, § 2403(c) (2005). Justice Moreno notes in dissent that, for suitability determinations, the BPT need not necessarily use the same matrix it drafted pursuant to section 3041, subdivision (a). *In re Dannenberg*, 104 P.3d at 810 (Moreno, J., dissenting). Rather, the BPT could devise a new matrix with longer base terms if it believes the fifteen to twenty-one year sentences in the current matrix do not sufficiently protect public safety. *Id.*

dates for others in proportion to the seriousness of their offenses and other relevant factors. Put simply, objective criteria can achieve proportional sentencing without using a “curve.”

2. The court’s construction of Section 3041 fails for several reasons

Dannenberg construes section 3041(b) to allow the BPT to deny parole whenever the BPT deems a commitment offense “especially callous or cruel.”²¹⁴ Under *Dannenberg*, the BPT need not consider objective criteria when denying parole, even when it does so based solely on an inmate’s commitment offense.²¹⁵ This construction of section 3041 has three main difficulties: (1) it ignores the legislative assessment that objective, proportional terms can be consistent with public safety; (2) it places undue weight on legislative “acquiescence” to the BPT’s practices; and (3) it gives the BPT free rein to deny parole based solely on commitment offenses in a way that conflicts with the public safety purpose of section 3041.

First, section 3041 makes clear that the legislature believes the concepts of proportionality in sentencing and “public safety” can coexist, even for serious offenders. Subdivision (a) expressly combines these two concepts by directing the BPT to grant release dates “in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public.”²¹⁶ In effect, subdivision (a) directs the BPT to weigh how long different classes of serious offenders—defined by objective criteria—should be incarcerated before they can safely be released. Read in this way, subdivision (b) merely provides an “escape clause” by which the legislature acknowledged that some offenders present such a threat to public safety that the BPT should not release them in the foreseeable future.²¹⁷ Accordingly, when *Dannenberg* suggests public safety cannot be served by applying the plain language of section 3041,²¹⁸ it makes a policy judgment in direct conflict with that of the legislature. Clearly, the legislature sits in a much better

214. *In re Dannenberg*, 104 P.3d at 786–87.

215. *Id.* at 786 (holding that the “[BPT] need engage in no further comparative analysis before concluding that the particular facts of the offense make it unsafe, at that time, to fix a date for the prisoner’s release”).

216. CAL. PENAL CODE § 3041(a) (West 2000 & Supp. 2005).

217. *Id.* § 3041(b).

218. *See supra* text accompanying notes 154–155.

position than the court to make such an assessment. Thus, the court should have deferred.

Second, the legislative acquiescence upon which the court relies²¹⁹ should not allow such a fundamental departure from the proportionality requirement expressly stated in section 3041. Justice Moreno noted that the issue whether the BPT may ignore proportionality when denying parole based solely on the commitment offense arose just recently with *In re Ramirez* in 2001.²²⁰ *Ramirez* merely disapproved of the BPT's administrative practice of ignoring proportionality. Thus, Justice Moreno argues, the legislature simply may not have considered that practice when it enacted amendments to section 3041.²²¹

In addition, the BPT's parole denials represent an especially poor vehicle for a "legislative acquiescence" mode of interpretation because legislators probably prefer to ignore parole denials of serious offenders. Parole grants present huge political risks, while denials do not.²²² Political calculation certainly permeates the parole decision-making process of the governor²²³ and the BPT.²²⁴ The legislature probably has no immunity from such calculations. For example, California's Democratic-controlled legislature might simply prefer to look the other direction as the BPT chips away at its law, rather than

219. See *supra* text accompanying notes 156–158.

220. *In re Dannenberg*, 104 P.3d at 807 (Moreno, J., dissenting) (citing *In re Ramirez*, 114 Cal. Rptr. 2d 381, 396–97 (Ct. App. 2001)).

221. *Id.* Significant evidence supports Justice Moreno's argument. In fact, the BPT appears to have been less than forthcoming with the legislature regarding its parole practices. See STATE LEGISLATIVE ANALYST, *supra* note 12, at D-61 (noting that the BPT had not provided the legislature with information regarding a variety of important issues, including a justification for funding parole hearings "given that . . . offenders will not be released on parole").

222. John Simerman, *Convicts Pin Hopes On Governor*, CONTRA COSTA TIMES, Aug. 22, 2004, at A1 (outlining the reasons why California politicians have kept most parole eligible prisoners incarcerated); see Jean Arnold, *California's Secret Judges*, S.F. CHRON., Aug. 20, 2000, at A1 ("Since 1988, when ads featuring Willie Horton, a furloughed Massachusetts convict who wrought havoc on a young couple, sabotaged the presidential prospects of Michael Dukakis, California governors have feared that one wrongly paroled felon could wipe out a lifetime of strategic political planning.").

223. Simerman, *supra* note 222.

224. Arnold, *supra* note 222. For a discussion of the impact of the BPT's political calculations, see *infra* Part V.

risk a “soft on crime” label by intervening on behalf of murderers. The court, however, should not give cover to legislators who would prefer to silently tolerate an erosion of statute than enact necessary legislation they opposed or legislation fraught with political pitfalls. As such, the court’s claim, that the legislature implicitly endorsed its position merely because the legislature did not amend section 3041 to expressly reject certain BPT practices, rings hollow.

Third, Dannenberg incorrectly interprets section 3041 because allowing the BPT to regularly give commitment offenses overwhelming consideration conflicts with section 3041’s public safety emphasis. Recall that even the subsection (b) exception makes public safety the primary consideration in the BPT’s parole processes.²²⁵ Of all the factors that could potentially impact public safety, a commitment offense fifteen years prior seems the least relevant. An inmate’s prison behavior, psychological evaluations, and plans for employment upon release appear much more salient. The latter factors are inherently better tied to public safety because they focus on what inmates are capable of currently and in the future. In contrast, the commitment offense mainly illustrates what inmates were capable of in the past.²²⁶ In short, the public safety purpose strongly implies that the BPT must weigh parole prospectively rather than retrospectively and focus on whether the inmate would likely act violently *in the future* if released. Even the *Dannenberg* court agrees with this prospective conception of the parole suitability inquiry.²²⁷ Simply put, under section 3041, parole suitability cannot turn on whether the inmate “deserves” more punishment. Rather, suitability must depend on whether the BPT can safely release the inmate.

225. As discussed above, section 3041, subdivision (b) provides that the BPT may only decline to set a release date when “consideration of the public safety requires a more lengthy period of incarceration for this individual.” CAL. PENAL CODE § 3041(b) (West 2000 & Supp. 2005).

226. For a former San Quentin teacher’s impression of how incarceration impacts inmates’ temperaments, see Arnold, *supra* note 222.

227. See *In re Dannenberg*, 104 P.3d 783, 797 (Cal. 2005) (“[T]he Board [need] not schedule the release [of] any life-maximum prisoner who is *still* dangerous . . . [or who presents] a *continuing* public danger . . .”) (emphasis altered); see also *id.* at 786 (accepting the BPT’s decision that “Dannenberg remains too dangerous for parole”).

Concededly, the legislature merely created a *general* rule that even serious offenders be granted a parole date based on proportionality. As such, section 3041 implicitly recognizes that, in some instances, the nature of an offense might point to an offender who might be dangerous if released, even when all other considerations suggest parole suitability. The statute's use of a general rule, however, also makes clear that this is not the legislature's assessment of the typical indeterminate life inmate. To the contrary, section 3041 embodies the legislature's conclusion that the normal indeterminate life offense does not, *by itself*, suggest an offender too dangerous for parole.²²⁸ Therefore, *Dannenberg* contravenes the will of the legislature by allowing the BPT to deny parole *routinely* and without constraint.

In sum, *Dannenberg's* construction of section 3041 seems dubious at best. Even more troubling, however, is that this construction tolerates a significant denial of inmates' right to due process because it renders judicial review virtually impossible.

V. DANNENBERG MAY HAVE TOLERATED A BLANKET POLICY ON THE PART OF THE BPT TO DENY PAROLE

Dannenberg allowed the BPT to apply vague, amorphous, and hopelessly subjective labels under the guise of "individualized consideration." In so doing, *Dannenberg* at best rubber-stamped an inherently arbitrary practice. At worst, *Dannenberg* turned a blind eye toward a near-blanket policy of parole denial for eligible prisoners. In either case, the statutory interpretation adopted by the *Dannenberg* court violates the due process rights of indeterminate life prisoners.

There appears reason to suspect the worst. Evidence suggests the BPT systematically infringed inmates' due process rights during the administration of former California Governor Gray Davis. The *Dannenberg* trial court noted testimony from a former BPT chair alleging the BPT followed an unwritten policy of denying parole to life prisoners.²²⁹ Moreover, the BPT's own statistics suggest that it

228. As one commentator stated, section 3041 seems to suggest that the Board should set a parole date unless an inmate's behavior "indicates that [the inmate is] not getting the idea yet." Arnold, *supra* note 222.

229. *In re Dannenberg*, 125 Cal. Rptr. 2d 458, 465-66 (Ct. App. 2002), *rev'd*, 104 P.3d 783 (Cal. 2005).

virtually never grants parole. For example, Justice Moreno noted that in 1999, the BPT granted parole in less than one percent of the hearings it conducted for eligible indeterminate life inmates.²³⁰ Indeed, several commentators have posited that the BPT systematically denies parole in order to protect the governor's political interests,²³¹ in part because BPT members depend on the governor for reappointment.²³²

No court appears to have examined in detail whether the BPT has ever maintained a blanket policy of denying parole to virtually all indeterminate life inmates. It seems clear, however, that such a blanket policy would be an impermissible violation of due process.²³³

Moreover, if a blanket policy to deny parole did exist, the policy would almost certainly manifest itself through parole proceedings exactly like that in *Dannenberg*. In addition to levying the boilerplate labels, the BPT stated that Dannenberg needed further therapy despite uncontroverted evidence to the contrary.²³⁴ In fact, Dannenberg's psychological evaluations invariably concluded the BPT should determine Dannenberg's parole-suitability based on considerations other than his mental health, and that Dannenberg presented no significant threat of future violence.²³⁵ Indeed, the California Supreme Court tacitly upheld the trial court's finding that the BPT's statement regarding therapy did not even satisfy the "some evidence" standard.

230. *In re Dannenberg*, 104 P.3d at 809 (Moreno, J., dissenting) (citing STATE LEGISLATIVE ANALYST, *supra* note 12, at D-59).

231. *See supra* text accompanying notes 222–224.

232. *E.g.*, Arnold, *supra* note 222, Simerman, *supra* note 222. Simerman suggests that Governor Schwarzenegger's politics may allow a less hostile approach to parole than those of his predecessor, Governor Davis, who publicly declared that no murderer would receive parole on his watch. *Id.* Moreover, the BPT's statistics suggest that any blanket policy that existed during Dannenberg's parole hearing may have loosened. *See infra* App. B. If true, this would prove the broader point. The political winds may occasionally blow in favor of parole, or, more aptly put, less strongly against parole. Nonetheless, *Dannenberg* violates prisoners' due process rights by leaving them completely at the mercy of those winds, unprotected by judicial review.

233. *See In re Dannenberg*, 140 P.3d at 802; *In re Rosenkrantz*, 59 P.3d 174, 223 (Cal. 2002); *cf. In re Minnis*, 498 P.2d 997, 1003–04 (Cal. 1972) (describing requirements of parole release hearings prior to the Determinate Sentencing Law).

234. *See supra* text accompanying notes 108–113, 119–120.

235. *See In re Dannenberg*, 104 P.3d at 788.

Additionally, the record indicates that the BPT strongly disapproved of Dannenberg's version of how the murder occurred and wished that Dannenberg would accept more responsibility for his wife's death.²³⁶ The California Supreme Court acknowledged that this consideration impermissibly tainted the BPT's postponement of Dannenberg's next parole hearing.²³⁷ It seems impossible, however, that this consideration did not affect the BPT's denial of parole itself. In contrast, it seems quite possible that the BPT was sophisticated enough to anticipate this result and thus merely purported to exclude the impermissible consideration from its suitability determination.

In effect, this looked very much like a panel that simply "developed the feeling" that Dannenberg was not "ready to go home"²³⁸ before it assessed Dannenberg individually. Apparently, because the BPT could not point to any permissible, objective criteria, the panel slapped perfunctory, boilerplate labels on Dannenberg's case file—not unlike the parole board in *Shawshank*.²³⁹ Put simply, Dannenberg's hearing looked like a farce.²⁴⁰ If the BPT had decided to deny parole to virtually all life prisoners but knew courts would overturn such a blanket policy if stated explicitly, the BPT would probably conduct proceedings just like Dannenberg's. The *Dannenberg* court embraced this result.

VI. RECOMMENDATIONS

Correctly interpreted, section 3041 makes inmates presumptively eligible for parole dates and requires that the BPT consider proportionality in determining such eligibility. Of course, presumptive eligibility may be overcome in a given case, and indeed may be frequently or even typically overcome.

The crime should be particularly egregious, however, to defeat the presumption based solely on the commitment offense. The measure of an offense's "egregiousness" need not be comparative—but it must be objective. In deeming an offense "egregious," the

236. See *supra* text accompanying notes 94–100.

237. See *supra* text accompanying notes 171–173.

238. Cassou & Taugher, *supra* note 16, at 9.

239. DARABONT, *supra* note 3.

240. For an example of another BPT panel that inexplicably concluded the parole applicant needed further therapy, see *In re Ramirez*, 114 Cal. Rptr. 2d 381, 398 (Ct. App. 2001).

BPT should rely on tangible factors that *may be* present in an offense of the relevant category. These factors must not be so loose, however, as to describe the crime almost by definition. The BPT has already articulated such factors pursuant to the mandate given by section 3041, subsection (a). The BPT ought to follow these factors at the suitability stage. If the BPT finds these objective factors inadequate, it may draft others.

Objective factors would allow judicial review in the very way that *Dannenberg* prevents it: reviewing courts would have a meaningful standard to determine whether the BPT acted arbitrarily or otherwise abused its discretion.

VII. CONCLUSION

Dannenberg validated a parole hearing wrought with flaws. The California Supreme Court could easily have avoided this result by demanding that the BPT point to objective criteria when denying parole to eligible life prisoners based solely on their commitment offenses. The court did not choose this route. As a result, the *Dannenberg* court violated prisoners' due process rights and incorrectly interpreted section 3041.

*Alexander K. Mircheff**

* Juris Doctor Candidate, Loyola Law School, May 2006. This Comment owes a great deal to Professor Laurie Levenson, and Gibson, Dunn & Crutcher partner Gareth Evans, each of whom provided outstanding suggestions and technical advice. I also thank the editors and staff members of the *Loyola of Los Angeles Law Review* for their assistance, particularly Glenn Anaiscourt, Shawn Michael Domzalski, Rena Durrant, Brianna Fuller, Anastasia Mazzella, Erica Pines, Sonia Salinas, and Jon Son. Most of all, thanks to my family for their support, and to Whitney Baugh, whose analytical skills and diligence are surpassed only by her patience and kindness.

APPENDIX A

BASE TERM MATRIX PROMULGATED BY THE CALIFORNIA BOARD OF PRISON TERMS PURSUANT TO SECTION 3041 OF THE PENAL CODE, AS CODIFIED IN SECTION 2403 OF TITLE 15 OF THE CALIFORNIA CODE OF REGULATIONS

<p>Second Degree Murder Penal Code § 189 (in years and does not include post conviction credit as provided in § 2410)</p>	<p>A. Indirect Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing.</p>	<p>B. Direct or Victim Contribution Death was almost immediate or resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner. This does not include victims acting in defense of self or property.</p>	<p>C. Severe Trauma Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with weapon not resulting in immediate death or actions calculated to induce terror in the victim.</p>
<p>I. Participating Victim Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as result of which the death occurred, e.g., crime partner, drug dealer, etc.</p>	<p>15-16-17</p>	<p>16-17-18</p>	<p>17-18-19</p>

APPENDIX A (CONTINUED)

II. Prior Relationship Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. This category shall not be utilized if victim had a personal relationship but prisoner hired and/or paid a person to commit the offense.	16-17-18	17-18-19	18-19-20
III. No Prior Relationship Victim had little or no personal relationship with prisoner or motivation for act resulting in death was related to the accomplishment of another crime, e.g., death of victim during robbery, rape, or other felony.	17-18-19	18-19-20	19-20-21

APPENDIX B

SUMMARY OF CALIFORNIA BOARD OF PRISON TERMS
"LIFER" PAROLE DECISIONS, 1990-2004²⁴¹

Life Offenders By Number of Hearings, Deny and Grant Actions								
Actions	1990	1991	1992	1993	1994	1995	1996	1997
Hearings	1,912	1,817	1,828	1,680	2,029	2,182	2,317	2,299
Deny	1,488	1,369	1,471	1,464	1,786	1,978	2,202	2,188
Grant	81	57	19	17	12	16	10	16
Actions	1998	1999	2000	2001	2002	2003	2004	
Hearings	2,190	1,953	2,179	3,644	4,827	4,499	*	
Deny	2,046	1,827	1,875	3,097	3,747	2,952	2,614	
Grant	27	13	52	84	168	168	199	

241. California Board of Prison Terms, original on file with the author. In cases where the Board neither granted nor denied parole, it postponed the hearing due to logistical difficulties. The Board's Communications Director did not have information on the total number of hearings scheduled in 2004 at the time of writing.