# Disparity in Ohio Prisons

A Discourse for the Greater Public Good

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In 1996, with the passage of Senate Bill 2, Ohio adopted a determinate criminal sentencing scheme termed "Truth in Sentencing." This action resulted in Ohio having two unequal classes of inmates in its prisons, with each class being held to different standards. The crucial difference between these two classes of inmates is that while all of the "old law" inmates, those sentenced before the SB2 law went into effect, were subject to the discretionary release authority of the Parole Board, only those convicted of murder and certain sex offences under the SB2 new law would be subject to the same discretionary authority. The remaining new law inmates serve flat time sentences not subject to this discretion. For example, a person under the old "indeterminate" scheme could be given a sentence of 5 to 25 years for a particular crime; yet, under the new "determinate" scheme that same person could be given a flat sentence of up to only 10 years for the same crime. This inequity places greater burdens on the old law class of inmates in terms of the actual time served for similar crimes and criminal histories. The primary reason for this inequity and subsequent unequal and unfair treatment of prisoners sentenced prior to the new law being enacted is that the new law was not made retroactive by Ohio's legislature.

It's my belief that concerns raised by the state's judiciary, who often felt the Parole Board was acting ultra vires and attempting to usurp their authority, provided significant motivation for the Ohio Criminal Sentencing Commission's recommendation to move to a determinate sentencing scheme. For example, the Parole Board would often refer to an offender's original indictment and effectively retry a case in question to determine what crimes they felt the offender should be held accountable for, even if the offender was not actually convicted of those crimes. Despite court orders prohibiting the Parole Board from engaging in these kinds of practices, inmates coming before the Parole Board continue to be questioned and held accountable for alleged actions in ways that would never be permissible in any court of law. To hold inmates accountable for crimes they have not been convicted of is clearly unconstitutional, and one of the things that make this kind of indifference to the rule of law possible is the lack of transparency within the parole process. As we know well, without transparency, there can be no accountability or confidence in any process.

In an attempt to address growing concerns with the parole process, the Ohio Department of Rehabilitation and Correction created a work group to look at ways to improve the process by increasing transparency and communication. This work group was specifically tasked with the responsibility of making recommendations for preparing offenders for the hearings, increasing understanding of the parole process, and improving rationales for their decisions. However, the principal hurdle in this attempt at transparency and communication is that while the outcomes of parole hearings are public information, the actual content of hearings and deliberations are not. So, the Parole Board is left to continue operating without oversight and we are left with the same questions and concerns.

One possible solution the work group should consider in addressing the problem of transparency is to allow the public or at least the relevant parties to the criminal case to

witness the parole hearings via video conferencing technology, which the Parole Board already utilizes in conducting their private parole interviews. This can be easily achieved as there are no space limitations, possible threats to security, or interruptions. If the Parole Board is unwilling to do this, then we need to ask: Why not? What's the big secret? What are you trying to hide? Whenever government entities are permitted to conduct their business in secret, we should always be concerned about probable abuses of their authority.

In the 19 years since the new law was enacted, Ohio's old law parole eligible population has changed dramatically. Besides getting smaller (now about 4,400), and predominantly older, the parole rates of old law inmates have decreased dramatically. In 2011, the parole rate had dropped to 6.9% as compared to 20% in 2010, and 48.5% in 2004. The current estimated parole rate is now below 4%. According to the Ohio Department of Rehabilitation and Correction, the reason for this decline is that the remaining old law parole eligible population have "committed crimes that are uncommon and of a very serious nature that do not conform to general risk patterns, or they have demonstrated themselves as chronic parole violators." These claims can be easily refuted. A cursory review of the crimes, sentences, and criminal histories of offenders who were paroled prior to 1996, as well as those up to the point where a significant reduction in the percentage of paroles being granted could be seen, would reveal that the crimes are equally common in most cases and certainly no more serious in nature. In fact, absent the enactment of SB2, most of these inmates would have been paroled long ago.

When denying parole to old law inmates, the board often cites one of their catchalls, "the serious nature of the crime," as their reason. This rationale effectively creates a double jeopardy incidence for the inmate because a judge has already taken this into consideration at sentencing. For example, a judge could have issued a sentence of 5, 6, 7, 8, 9 or 10 to 25 years for a particular offense. The spread on the minimum side was intended to give judges the discretion to account for the serious nature of a particular offense. For example, if the judge determined that the offense was of a "garden variety," then he would likely choose the lower end of this spectrum; however, if the offense involved greater malicious intent, then the judge would likely opt for the higher end. Additionally, under the old law system there was a presumption by all relevant parties that the inmate would likely be released after serving their minimum sentence if they behaved while in prison and participated in relevant programming, no matter which number from the spectrum the judge imposed. Only when institutional behavior or program participation was poor would an inmate be continued further toward his (or her) maximum sentence. However, under the new law, excluding inmates serving sentences for murder and certain sex offences, the inmate is released at their maximum expiration of sentence regardless of their institutional conduct or program participation. It should be noted that with the decline in parole rates since SB2 was enacted there has been a corresponding shift in the presumptions about how much time should be served. Some board members erroneously believe that the presumption of relevant parties is that inmates should serve close to their maximum sentences before being paroled. Furthermore, when the board decided that it was not legally bound to honor plea bargains and/or the clear intent of sentencing judges they are effectively resentencing the inmate. But, not to digress much, even if the nature of the crime is a truly relevant issue for consideration, it should certainly not extend past the inmate's first statutory parole hearing when such a determination should be

made and adhered to. To continually hold someone accountable for facts that they cannot change is clearly unconscionable if not unconstitutional.

The Parole Board and ODR&C often like to claim that these remaining inmates are the worst of the worst, and they often pick out a few infamous cases to put before the public eye as examples of the kinds of people they are protecting society from. In truth, the Parole Board has already released many inmates who are arguably the worst of the worst by any reasonable person's standard. In 1972, the Ohio Supreme Court abolished the death penalty. In doing so they commuted the sentences of all inmates on death row to life in prison with the possibility of parole. The Parole Board has already released a number of these people that a judge and/or a jury had decided deserved the death penalty for the heinous nature of their crimes. If anyone deserved to be labeled "the worst of the worst," these death row inmates did. As such, this label cannot apply to most of the approximately 4,000 remaining old law inmates whose crimes and criminal histories do not rank anywhere near as serious in nature and many of whom have now served more time than those former death row inmates did before being released.

Another, much more commonly held belief by many family and friends of inmates with regard to why the parole rate has drastically declined is simply a job security issue for the Parole Board members. This belief is also arrived at independently by most observers of the parole process. It is clear that parole rates have decreased in direct correlation to the decline in old law population. If they had continued paroling people at the 2004 percentage, they would have quickly run out of old law cases to hear. At that point, there would no longer be a need for a Parole Board as it existed at the time. As much as ODR&C would like to dispel these beliefs as myths, it will likely be an impossible hurdle for them to overcome since this belief is based upon empirical evidence. It is evident that the old law inmates still in the system represent a magic number that the board has determined they need to keep incarcerated to justify not just their jobs, but the jobs of their support staff as well. Perhaps when the number of new law inmates that will be subject to the board's authority increases to a sufficient level in the future, the parole rate for old law inmates will rise to a more responsible level.

In lieu of paroling a number of old law inmates, the Parole Board is increasingly electing to continue many cases until the maximum expiration of the inmate's sentence. By doing so, the Parole Board is relinquishing its statutory authority over these inmates and is acting contrary to public interest by forgoing the opportunity to have a guiding hand in their reentry processes. Here, we should be asking what the real cost of such a practice are going to be. As there is a significant amount of data demonstrating the direct correlation between the lack of supervision and a return to criminal activity, the basis for this action is puzzling. It should also be mentioned that the board essentially forgoes any personal responsibility if the person were to reoffend. I believe the primary cause for this self serving practice is all the negative publicity they have received in recent years over some inmates who've committed some rather notorious crimes after their release. Prosecutors have slammed the board in the news media by calling them, not just their actions, stupid and irresponsible. It is because of this public scrutiny that the board is now hesitant to give meaningful parole consideration to deserving inmates.

For those fortunate enough to be granted parole, even if by a majority or unanimous vote of the Parole Board, there is increasingly one more hurdle they must contend with, and

that is the objections to their parole by the victims, the victim's family and friends, and the county prosecutor. In the years since SB2 was enacted, these objections have increasingly become more common as the Ohio Office of Victims Services actively seeks out anyone who would be willing to raise an objection to the granting of parole. When someone does object, the board places the inmate's parole on hold pending an open hearing so that the objecting parties can be afforded an opportunity to speak directly to the board about their concerns. Unfortunately for most potential parolees, the Parole Board obviously believes that they are obligated to issue a courtesy flop (a flop is a continuance until some arbitrary point in time, usually 3 to 5 years, into the future) to the inmate to appear responsive to the protesting parties' concerns and becomes merely an accommodation, not a deserved "flop."

The significant issue with this practice is that the objections are often not based upon any new information unknowable to the board at the time they voted, by majority, to parole the inmate. Possible unknowable information such as the offender contacting the victim after being granted parole and making threats to harm them upon released would justifiably alter the Parole Boards position. However, too often it is just the understandable desire of the victim or their family, who still feel the raw emotion and pain of the crime, to keep the perpetrator in prison. This fact however is a given variable for the board. The board knows or should know this since most crime victims are likely to object to the release of the offender under any circumstances. Hence, this fact was already considered when the initial decision was made and should have no bearing on the outcome of the hearing.

Another significant concern often raised by old law inmates is that they see new law inmates with flat time sentences that are considerably less than the amount of time they have already served for comparable crimes. Many old law inmates get distraught as they watch new law inmates get released after serving only half the time they have for arguably comparable crimes, then continue to sit waiting to see the Parole Board again at some arbitrary future date. As further insult, they are still sitting there watching when these same inmates are welcomed back into the system for a second, third, and even fourth time.

An additional area of concern lies with the inequity of disciplinary action within the prison system for both classes of inmates. If two inmates, one old law and one new law, were to get into a confrontation with each other, they would both be subject to the same internal prison disciplinary action by being placed into segregation for a specified period of time. However, the problem that arises at this point is that while this disciplinary action will not prevent the new law inmate from getting out at the expiration of his (or her) stated term, the old law inmate will be further punished for this violation of institutional rules by the Parole Board. The board will often continue a case just because of a single rule infraction as opposed to a course of conduct while incarcerated for the inmate. Effectively, the old law inmates are punished twice for the same rule violation. Additionally, in the past, the board would only look back at rule violations occurring since the last parole hearing. Now, each time someone comes up for parole, the board looks at all the infractions. As such, the inmate could be penalized by the board more than once for the same infraction, which is a recipe for double, triple, and even quadruple disciplinary jeopardy.

The Parole Board had at one time attempted to address some of this disparity by listing the equivalent new law definite sentence on their decision worksheets, and it seemed as

though, at least in the beginning, that they were encouraged to seek parity between the two sentencing structures in making their parole decisions. Their own quality assurance personnel would mandate a re-hearing if the decision created too much disparity between the sentencing structures or in how similar kinds of cases had been decided in the past. However, beyond this action, nothing practical was actually done. The trouble here was that the Parole Board was never mandated in any way to follow the equivalent sentence in making their parole decisions. Given that the Parole Board cannot be trusted to guard its own house, then it becomes incumbent upon the state's legislature to fix the problem they created by mandating oversight, accountability, and most especially parity.

There are solutions available to this problem for those interested in solving it. I offer here one plausible solution for consideration. Perhaps public policy advocate groups, the Ohio Public Defenders Office, the Ohio Association of Criminal Defense Lawyers, and the ACLU could join forces, pool their resources, and file for clemency en masse for all old law inmates. Alongside this action, they would also petition the Governor to establish a commission of judges to review all old law cases still in the system and make a recommendation for an equivalent new law sentence. This new sentence would be presented to the inmate. If accepted, the inmate's sentence would be commuted by the governor to its new law equivalent. If it were not accepted, doubtful but possible, they would continue their previous sentence and remain subject to the discretion of the Parole Board.

In part, I believe Steven Hawking said it best, "When the fate of so many rests in the hands of so few, failure to be held accountable cannot be forgiven." The good people of this great State of Ohio must demand accountability from appointed officials in a manner not less than we do for those we elect. And, we have to remember that it is in part the purpose of the Parole Board to satisfy reasonable people that its decisions are fair and consistent. At present, there are many very reasonable and intelligent people who find no satisfaction with the current parole process. We must begin the work to change the parole process so that everyone can again feel confident in the system. We must also remember that just as right is right and wrong is wrong, everyone, including the Parole Board, must be held accountable for their actions.

As a final thought, since there are no acts beyond absolution, we must learn to embrace forgiveness and take into account that actual rehabilitation does occur, and the parole board must realize that rehabilitation occurs by many different means, not just through DRC's official programs. In fact, real rehabilitation often occurs in spite of some DRC programs. And while not to diminish the seriousness of any crime, to continue acting as though the crime just occurred and let raw emotions about its serious nature guide our decisions is not in the best interest of our State or humanity.