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Life Means Life, Maybe? An Analysis of Pennsylvania's Policy Toward Lifers

When a court of common pleas judge in Pennsylvania strikes his gavel and sentences a convicted felon to "life in prison without parole," he is not being harsh—he is being redundant. This is because the Pennsylvania Parole Act of 1941,¹ specifically, Section 331.21 of the Act² prohibits the Pennsylvania Parole Board from granting parole to prisoners sentenced to life in prison ("lifers"). Pennsylvania is one of only four states which prohibits parole for all lifers by denying the Parole Board the authority to consider lifers for parole.³ Arguably, this has never posed a problem for anyone other than the lifers and their families, but that may be changing.

In recent years prison overcrowding has become an increasingly perplexing problem. The situation in Pennsylvania has culminated in court-mandated release of prisoners⁴ and court ordered construction of additional facilities⁵ to alleviate the problem. This problem is exacerbated by the state's current fiscal stress. At an average cost of \$17,509⁶ per year to house, feed and provide medical care for each prisoner, fiscal responsibility requires a critical analysis of Pennsylvania's policy of categorically denying parole to lifers.

1. 61 Pa Stat § 331.1 et seq (Purdon 1964 & Supp 1991).

2. See note 57.

3. Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All*, 43 Vand L Rev 529, 544-45 (1990). The other states are Wyoming, South Dakota and Virginia. While other states have life-without-parole sentences, Wyoming, South Dakota and Virginia are the only states that categorically deny parole for lifers by restricting the jurisdiction of the Parole Board. Wright, 43 Vand L Rev at 544-45 (cited within this note).

4. *Inmates of the Allegheny County Jail v Wecht*, 565 F Supp 1278 (W D Pa 1983). Judge Cohill ordered the immediate release of prisoners. *Inmates of the Allegheny County Jail*, 565 F Supp at 1296-97.

5. *Id* at 1147-48. Judge Cohill ordered the jail to be closed and new facilities constructed. *Id*.

6. Department of Corrections; Planning, Research & Statistics Division, 1990-91 Annual Report. This figure does not include capital expenditures such as facilities. Estimates of the yearly cost including capital expenditures are in the area of \$25,000 per year per prisoner.

The need for this critical analysis becomes clear upon an examination of current trends in prison demographics. The Pennsylvania lifer population has been increasing at a consistent rate for the last twenty years. In 1971 the lifer population was 390.⁷ Twenty years later that population had increased over 500% to 2,139.⁸ This comment focuses on two factors contributing to this growth. Part One considers whether the state's policy of denying parole to lifers accurately reflects present legislative intent. Part Two considers the almost total extinction of commutations of life sentences in recent years.

This comment will conclude that Pennsylvania's policy against parole for lifers is clouded by the haphazard manner in which the legislature has passed seemingly conflicting parole and sentencing statutes. The problem is further heightened by the inconsistent use of the commutation system. The legislature must address this situation in a cohesive, constructive manner or the Pennsylvania parole system will remain in its current state of contradiction and instability.

I. NO PAROLE FOR LIFERS—LEGISLATIVE INTENT OR LEGISLATIVE ACCIDENT?

A. *The Parole Act*

Over the years, Pennsylvania attorneys⁹ and judges¹⁰ have often mistakenly believed that lifers were eligible for parole. In fact, the legislature may have contributed to this mistaken belief when it passed certain sentencing statutes¹¹ which appear to be in conflict

7. Figure provided by the Pennsylvania Department of Corrections. Available through Planning, Research & Statistics Division.

8. *Id.*

9. See *Commonwealth v Floyd*, 506 Pa 85, 484 A2d 365, 370 (1984), where the prosecutor in asking for the death penalty improperly presented to the jury the possibility that the convicted murderer could one day be paroled if given a life sentence. See also *Commonwealth v Aljoe*, 420 Pa 198, 216 A2d 50, 56 (1966), where in a first degree murder case the district attorney discussed the possibility of parole from a life sentence during closing argument.

10. See *Commonwealth v Pfender*, 373 Pa Super 102, 540 A2d 543, 547-49 (1988), where the trial court erroneously stated that a defendant sentenced to life in prison would be eligible for parole in fifteen to twenty years.

See also *Commonwealth v Scarborough*, 313 Pa Super 521, 460 A2d 310, 316 (1983), where the superior court noted that possibility of parole for a defendant sentenced to life in prison was for the consideration of the Parole Board.

11. In particular, Sentencing Code, 42 Pa Cons Stat Ann § 9756(c) (Purdon 1982 & Sapp 1991). See note 56 and accompanying text. See also, Act of December 7, 1982, 1982 Pa

with the Pennsylvania Parole Act of 1941.

This complex history of parole in Pennsylvania begins in 1909, when the legislature passed Pennsylvania's first Parole Act.¹² This initial parole legislation was modified by two 1911 provisions. The first provision gave judges in courts of Quarter Sessions, Oyer and Terminer the power to parole prisoners in county jails and workhouses.¹³ The second provision extended parole considerations to prisoners in state penitentiaries.¹⁴ Parole of these prisoners was available upon the completion of a minimum sentence established by the sentencing court.¹⁵ Where sentencing statutes did not establish minimum sentences, the courts were free to establish the minimum. The 1909 and 1911 laws failed to establish separate standards of parole for lifers. A prisoner serving a life sentence was eligible for parole in the same manner as a prisoner serving a lesser sentence.

Judges who did not support parole established minimum sentences nearly as long as the maximum sentence, effectively circumventing legislative intent.¹⁶ In order to correct judicial circumvention of the parole system, the legislature again modified the parole law in 1913.¹⁷ Prisoners sentenced after July 1, 1911 became eligible for parole upon completion of one-third of their maximum sentence.¹⁸ Subsequent acts in 1923¹⁹ and 1931²⁰ further restricted minimum sentencing discretion.²¹

By 1941 this system was under severe criticism,²² and due in

Laws 811, where the legislature amended the arson statute and provided for a specific sentence of "life imprisonment without parole." Crimes Code, 18 Pa Cons Stat Ann § 3301 (Purdon 1983 & Supp 1991). This seems to be superfluous if the parole board cannot parole lifers. See notes 26-27 and accompanying text.

12. L. W. Kolakoski and T. W. Broecker, *The Pennsylvania Parole System in Operation*, 23 J of Crim L, Crim & Police Science 427 427 (1933).

13. Act of June 19, 1911, 1911 Pa Laws 1059, section 1.

14. Act of June 19, 1911, 1911 Pa Laws 812.

15. *Id.*

16. Kolakoski and Broecker, 23 J Crim L, Crim & Police Science at 427 (cited in note 12).

17. Act of June 19, 1913, 1913 Pa Laws 340.

18. *Id.*

19. Act of June 29, 1923, 1923 Pa Laws 397.

20. Act of June 22, 1931, 1931 Pa Laws 280.

21. The 1923 Act limited minimum sentences to one-half the maximum. Act of June 29, 1923, 1923 Pa Laws 397, section 6. The 1931 Act applied the 1923 limitation retroactively. Act of June 22, 1931, 1931 Pa Laws 280, section 1.

22. See 1941 Legis J 5209, remarks of Senator Shapiro:

The worst thing you could pass would be even better than the situation which we have, particularly in Philadelphia; I want to say of the man in charge of the Parole Board in Philadelphia that he does a fine job, but he does not have the machinery,

large part to this criticism, the Parole Act of 1941 was passed.²³ The Act established a uniform system for the administration of parole in Pennsylvania. The new legislation created a parole board (hereinafter "the Board") vested with the exclusive power "to parole and reparole, to commit and recommit for violations of parole, and to discharge from parole all persons theretofore or thereafter sentenced by any court in the State to imprisonment in any penal institution of the State or of a county."²⁴

The Board was originally composed of three members who were appointed by the governor.²⁵ The Board's jurisdiction did not extend to persons sentenced for a maximum period of less than two years,²⁶ nor to "convicts condemned to death or serving life imprisonment."²⁷ The clarity of the jurisdictional provision of the Parole Act has never been questioned even though it appears to be in conflict with Section 331.17, which states that the Board has the power to parole *all* persons.²⁸ The Board's power to parole prisoners could not be exercised until the expiration of the minimum sentence imposed by the sentencing court.²⁹

The constitutionality³⁰ of the Parole Act was almost immediately challenged and upheld by the Pennsylvania Supreme Court in *Commonwealth v Cain*.³¹ In that case, Elmer Banks was serving a

and he does not have the time with which to do the job that ought to be done and that can be done. I am going to ask my colleagues to vote for this bill.

Id at 5214. The bill in question was the Parole Act of 1941. Act of Aug 6, 1941, 1941 Pa Laws 861.

See also Senator Jaspán's comments about alleged abuse of judicial power in this area. Id at 5210.

23. House Bill No 11 was introduced on January 14, 1941. 1941 Legis 90 (1941). The bill was immediately sent to the House Committee on Judiciary General. Id. The House of Representatives unanimously passed the original version on May 20, 1941. Id at 5558.

The House version was introduced in the Senate on May 21, 1941 and was immediately sent to the Senate Committee on State Government. Id at 2531. The full Senate passed the bill on July 11, 1941. Id at 5215. Interestingly, the Senate appeared to be less than thrilled with the Parole Act, which passed 28-18. See debate, id at 283.

The House unanimously agreed to the Senate amendments on July 12, 1941. Id at 2505. The Act went into effect on June 1, 1942.

24. Parole Act, 61 Pa Stat § 331.17 (Purdon 1964 & Supp 1991).

25. Id at § 331.2. Today, the Board is comprised of five members serving six-year terms. Id.

26. Id at § 331.17.

27. Id at § 331.21.

28. Specifically, § 331.17 states, "The board shall have exclusive power . . . to discharge from parole *all* persons heretofore or hereafter sentenced by a court in this Commonwealth." Id (emphasis added).

29. Id at § 331.21.

30. Pursuant to the Pennsylvania Constitution.

31. 345 Pa 581, 28 A2d 897 (1942).

two-year sentence in a state prison.³² The sentencing court directed that Banks be paroled,³³ but the prison warden³⁴ refused to parole Banks before the date set by the newly established Board.³⁵ Banks obtained a writ of habeas corpus and the lower court found that the Parole Act, which established the Board, was unconstitutional.³⁶ The warden appealed.³⁷

Banks challenged the Parole Act on two grounds. His first argument was that the Act infringed upon the power of the governor to grant pardons and commutations of sentences.³⁸ The Pennsylvania Supreme Court answered that argument by drawing a distinction between pardons, which it defined as the exertion of a state's right to completely free a prisoner,³⁹ and parole, which did not completely free a prisoner as he remained under the control of the penal authorities.⁴⁰ The court drew a further distinction between pardons and parole by analyzing which branches of the government had control of the respective actions.

The court found that the power to grant pardons and commutations of sentences rested solely with the governor pursuant to Article IV, Section 9 of the Pennsylvania Constitution.⁴¹ Conversely, the court added that parole had never been in the category of either pardon or commutation in as much as the legislature had previously granted parole power to the courts.⁴² Since the state constitution did not give parole power to the governor, the legislature

32. *Cain*, 28 A2d at 898-99.

33. *Id.* at 899.

34. The defendant in this case.

35. *Cain*, 28 A2d at 899. The Board had been recently established by the Parole Act. See notes 24-27 and accompanying text.

36. *Cain*, 28 A2d at 899.

37. *Id.*

38. *Id.* The Governor is granted the exclusive power to pardon and commute sentences pursuant to the Pennsylvania Constitution, Article IV, section 9. *Id.* At the time of this attack on the Parole Act, similar statutes in ten other states had been attacked on a similar theory. *Id.* at 899 n 1. The argument had been rejected in each instance. *Id.*

39. *Id.* at 899. "A pardon is the exercise of the sovereign's prerogative of mercy. It completely frees the offender from the control of the state." *Id.*

40. *Id.*

A parole, on the other hand, does not obliterate the crime or forgive the offender. It is not an act of clemency, but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. It does not set aside or affect the sentence; the convict remains in the legal custody of the state and under the control of its agents, subject at any time, for breach of condition, to be returned to the penal institution.

Id.

41. *Id.* at 900. See note 38.

42. *Cain*, 28 A2d at 900. See notes 12-21 and accompanying text.

inherently had the power to parole. Thus, the legislature had the authority to shift parole power from the courts to the Board.

Bank's second constitutional attack on the Parole Act was that the power to parole was an exclusive function of the judiciary.⁴³ The power to parole, therefore, could not be legislatively transferred to an executive or administrative body.⁴⁴ The Pennsylvania Supreme Court rejected this contention,⁴⁵ holding that the power to grant parole was not inherent in the judiciary⁴⁶ but rather was inherent in the legislature's exclusive power over the penal system.⁴⁷ The court added that the granting of parole was purely administrative in nature and the legislature may entrust the function to non-judicial agencies.⁴⁸

B. *Sentencing Statutes*

Following this initial ratification of the Parole Act, judicial scrutiny of the Act was infrequent.⁴⁹ It appeared obvious that lifers were ineligible for parole. The seed for today's confusion and in-

43. *Cain*, 28 A2d at 900. Article V, section 1 of the Pennsylvania Constitution states that the judicial power of the Commonwealth is vested in the various courts:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Pa Const, Art V, § 1.

44. *Cain*, 28 A2d at 900. Of course, this is exactly what the Parole Act accomplished. See note 24 and accompanying text.

45. *Cain*, 28 A2d at 900. The court noted that this argument had also been rejected by at least ten states. *Id.*

46. *Id.* Pennsylvania courts did not possess such power until 1911. *Id.* See notes 13, 14 and accompanying text.

47. *Cain*, 28 A2d at 900.

48. *Id.* at 901. The court concluded that while the judiciary determines guilt or innocence and the proper penalty, the manner of execution of the sentence is a legislative function which could be put into effect by administrative officers. *Id.*

While holding that the Act did not impinge upon judicial functions generally, the court did hold that portions of Sections 331.21 and 331.24 were unconstitutional. *Id.* In particular, the court held the provision of Section 331.21, which gave the Board power to extend the period of parole beyond the maximum term imposed by sentence, and the provision of Section 331.24, which gave the Board power to discharge a parolee before the end of his parole period, unconstitutional. *Id.* The court held, "The fixing of the term of the sentence is exclusively a judicial function." *Id.*

The dissent found that the Parole Act impinged on both the power of the governor and on the judicial function of the courts. *Id.* at 903-07.

49. The power of the Board has never been questioned on constitutional grounds after the *Cain* decision.

consistency regarding parole for lifers was planted in 1973 when the legislature revamped the Sentencing Code.⁵⁰ The reworking of the Sentencing Code included a provision which appeared to extend parole eligibility to some lifers. This provision, Section 9756(c), stated:

(c) PROHIBITION OF PAROLE.— Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:

- (1) a summary offense is charged;
- (2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
- (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

This provision appeared to be in direct conflict with Section 331.21 of the Parole Act, which denied the Board jurisdiction over lifers:

The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment⁵¹

Section 9756(c) of the Sentencing Code can be read as requiring parole for lifers convicted of crimes other than murder of the first degree.⁵² Section 331.21 of the Parole Act prohibits the Board from considering for parole any person sentenced to life imprisonment *regardless* of the underlying crime. While there appears to be an obvious conflict between the two sections, the legislature provided that the Sentencing Code would repeal any prior statutes which were inconsistent with the new law.⁵³ The question is whether Section 9756(c) is actually in conflict with, and thus repeals, the inconsistent portions of Section 331.21 of the Parole Act. Attempts

50. Originally placed in title 18 of the Pennsylvania Statutes, the Sentencing Statute was transferred to title 42 in 1980. Act of Oct 5, 1980, 1980 Pa Laws 693, § 401(a).

51. Parole Act, 61 Pa Stat § 331.21 (Purdon 1964 & Supp 1991).

52. For example, a conviction of second degree murder carries a mandatory life sentence. Authorized Disposition of Offenders, 11 Pa Stat § 1102 (Purdon 1983 & Supp 1991). A mandatory life sentence is also imposed on any person convicted of third degree murder who has previously been convicted of murder or voluntary manslaughter. Sentencing Code, 42 Pa Cons Stat Ann § 9715 (Purdon 1982 & Supp 1991). The degrees of murder are distinguished at Criminal Homicide, 11 Pa Stat § 2501 (Purdon 1983 & Supp 1991).

53. The note to Sentencing Code, 42 Pa Cons Stat Ann § 9701 (Purdon 1982 & Supp 1991), states, "Section 2(b) of Acts 1974, Dec. 30, P.L.1052, No 345 provides that: 'All acts and parts of acts are repealed in so far as they are inconsistent herewith.'"

by Pennsylvania courts to answer this question have been less than convincing.

Prior to answering this specific question, however, Pennsylvania courts were faced with two other apparently conflicting Parole Act and Sentencing Code sections. In *Commonwealth v Dorian*,⁵⁴ the Pennsylvania Superior Court grappled with the potential conflict between Section 9761(a) of the Sentencing Code and Section 331.21(a) of the Parole Act. The manner in which the courts addressed that conflict foreshadowed the courts' resolution of the apparent conflict between Section 331.21 of the Parole Act and Section 9756(c) of the Sentencing Code.

Dorian centered around Section 9761⁵⁵ of the Sentencing Code, which permitted a judge to impose a second sentence which would run concurrently with a prior sentence.⁵⁶ The appellant-prisoner contended that Section 331.21(a) of the Parole Act⁵⁷ prohibited the

54. 314 Pa Super 244, 460 A2d 1121 (1983). This was an appeal from a sentence for burglary. *Dorian*, 460 A2d at 1122. The appellant was charged with criminal attempt, criminal mischief and burglary. *Id.* He pleaded guilty to burglary and the Commonwealth moved to have the remaining charges dropped because they merged with the burglary. *Id.* The lower court sentenced the appellant to six to twelve years in prison, the sentence to be served concurrently with a prior sentence the appellant had been serving. *Id.* Motions to modify or vacate the sentence were denied and this appeal followed. *Id.*

55. Sentencing Code, 42 Pa Cons Stat Ann § 9761 (Purdon 1972 & Supp 1991) states:
Computation and order of service of sentences

(A) ORDER OF SERVICE OF SENTENCES.-If a minimum sentence imposed by the court which is to run concurrently with one which has been previously imposed would expire later than the minimum of such a previously imposed sentence, or if the previously imposed sentence is terminated before the expiration of the minimum sentence of the last imposed sentence, the defendant shall be imprisoned at least until the last imposed minimum sentence has been served.

...

Id.

56. *Dorian*, 460 A2d at 1124.

57. Section 331.21(a) states:

COMMISSION OF CRIME DURING PAROLE; OTHER VIOLATIONS OF TERMS OF PAROLE

(a) Convicted Violators. Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution of the Commonwealth who, during the period of parole or while delinquent on parole, commits any crime punishable by imprisonment, for which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolo contendere at any time thereafter in a court of record, may, at the discretion of the board, be recommitted as a parole violator. If his recommitment is so ordered, he shall be reentered to serve the remainder of the term which said parolee would have been compelled to serve had he not been paroled, and he shall be given no credit for the time at liberty on parole. The board may, in its discretion, reparole whenever, in its opinion, the best interests of the prisoner justify or require his release on parole and it does not appear that the interest of the Commonwealth will be injured thereby. The period of time for which the parole violator is required to serve shall be computed from and begin on the date that he is taken into

lower court from directing that his sentence for burglary be served concurrently with an earlier sentence. The superior court rejected this argument⁵⁸ and held that, to the extent Section 9761(a) of the Sentencing Code and Section 331.21(a) of the Parole Act were inconsistent, Section 331.21(a) was repealed.⁵⁹ The superior court found precedent for this holding in the Pennsylvania Supreme Court's decision in *Commonwealth v Zuber*,⁶⁰ which "recognized" that Section 9761 of the Sentencing Code had changed the prior law.⁶¹

Judge Johnson filed a dissent⁶² in *Dorian*, arguing that if the General Assembly truly intended to change the longstanding policy of Section 331.21(a) of the Parole Act it would have done so expressly.⁶³ Failing to find an express intention, the dissent read the two provisions consistently.⁶⁴

On appeal, the Pennsylvania Supreme Court reversed the judg-

custody to be returned to the institution as a parole violator.

If a new sentence is imposed upon such parolee, the service of the balance of said term originally imposed shall precede the commencement of the new term imposed in the following cases:

(1) If a person is paroled from any State penal or correctional institution under the control and supervision of the Department of Justice and the new sentence imposed upon him is to be served in any such State penal or correctional institution.

2) If a person is paroled from a county penal or correctional institution and the new sentence imposed upon him is to be served in the same county penal or correctional institution.

In all other cases, the service of the new term for the latter crime shall precede commencement of the balance of the term originally imposed.

Where the new term is to be served last, or the balance of the term originally imposed is to be served last, and such service is, in either case, to be had in any penal or correctional institution under the control and supervision of the Department of Justice, any male person upon recommitment shall be sent to the nearest Correctional Diagnostic and Classification Center for service of the remainder of the original term at such institution as shall be designated by the Deputy Commissioner for Treatment of the bureau of Correction. Any female person shall be recommitted to the State Industrial Home for Women at Muncy.

Parole Act, 61 Pa Stat § 331.21(a) (Purdon 1964 & Supp 1991).

58. *Dorian*, 460 A2d at 1123-24.

59. *Id* at 1124. The court relied specifically on the historical note to the Sentencing Code, which requires the repealing of all inconsistent statutes. *Id*. See note 53.

60. 466 Pa 453, 353 A2d 441 (1976). The prisoner pleaded guilty to a murder he committed while on parole. The supreme court denied the prisoner's request for post-conviction relief, which was based on an allegedly invalid plea bargain. *Zuber*, 353 A2d at 443.

61. *Dorian*, 460 A2d at 1124. By "law" the court meant Section 331.21(a). *Id*.

62. *Id* at 1125.

63. *Id* at 1127.

64. *Id* at 1125. Judge Johnson noted that Section 331.21a of the Parole Act dealt specifically with parolees. Section 9761 of the Sentencing Statute more generally dealt with multiple terms of imprisonment. *Id* at 1125-27.

ment of the superior court.⁶⁵ In a per curiam opinion, the court expressly disapproved of the lower court's "dictum"⁶⁶ dealing with the "implied" repeal of Section 331.21(a) of the Parole Act by Section 9761(a) of the Sentencing Code. The supreme court, apparently agreeing with Judge Johnson's dissent, held that Section 9761(a) of the Sentencing Code did not repeal Section 331.21(a) of the Parole Act.⁶⁷

The *Dorian* holding is constrained to the specific sections of the Parole Act and Sentencing Code in question. The case is important, however, because the superior court specifically recognized that an inconsistency between part of the Sentencing Code and the Parole Act would result in the repeal of the inconsistent portions of the Parole Act.⁶⁸ The supreme court did not dispute this in its holding and analysis⁶⁹ thus leaving the door open for the repeal of other Parole Act sections by the Sentencing Code. *Dorian* further reflects a judicial desire to find sections of the Parole Act and Sentencing Code consistent at the expense of detailed analysis or consideration.

C. *The Castle decision*

Section 331.21 of the Parole Act specifically prohibits the parole board from granting parole to all lifers, including those serving life sentences for crimes other than first degree murder.⁷⁰ As noted earlier,⁷¹ Section 9756(c) of the Sentencing Code limits sentences without parole to convictions for first degree murder and certain summary offenses while seemingly requiring judges to grant life sentences with parole for other crimes.⁷² Whether the two provisions conflict, resulting in the repeal of Section 331.21 of the Pa-

65. *Commonwealth v Dorian*, 503 Pa 116, 468 A2d 1091 (1983).

66. *Dorian*, 468 A2d at 1092. While the court referred to this portion of the superior court's decision as dictum, the lower court's discussion on this point appears to be the primary holding of the case.

67. *Id.* The theory that Sections 331.21(a) and 9761 are not inconsistent continues to be good law. See *Rivera v Pennsylvania Bd. of Probation & Parole*, 79 Pa Commw 558, 470 A2d 1088 (1984), and *Zazo v Pennsylvania Bd. of Probation & Parole*, 80 Pa Commw 198, 470 A2d 1135 (1984).

68. *Dorian*, 460 A2d at 1124.

See Judge Johnson's dissent, "I recognize that the clause repealing acts inconsistent with the Sentencing Code would operate as an express repeal of prior legislation that is inconsistent with its provisions." *Id.* at 1125.

69. *Dorian*, 468 A2d at 1092.

70. See note 51 and accompanying text.

71. See notes 51-53 and accompanying text.

72. *Id.*

role Act, has been addressed in only one Pennsylvania case, *Castle v Pennsylvania Bd. of Probation & Parole*.⁷³

Franklin Castle was convicted of second degree murder and sentenced to life imprisonment.⁷⁴ He initiated procedures seeking parole,⁷⁵ but the parole officer informed Castle that he was ineligible for parole because he was serving a life sentence.⁷⁶ Appellant then sent a letter to the Board asking to be considered for parole.⁷⁷ The Board refused, citing Section 331.21 of the Parole Act, and Castle appealed that decision to the commonwealth court.⁷⁸

The Board, by demurrer, argued that the appellant was serving a life sentence and, therefore, could not be considered for parole under Section 331.21 of the Parole Act.⁷⁹ The appellant raised two counterarguments. His primary contention was that he was eligible for parole under Section 9756(c) of the Sentencing Code,⁸⁰ which he argued impliedly repealed Section 331.21 of the Parole Act.⁸¹ In the alternative, appellant argued that at the time the Parole Act was passed only first degree murder was susceptible to a sentence of life imprisonment.⁸² Section 9756(c) of the Sentencing Code was, therefore, consistent with the intent of the Parole Act because it also denied parole only to those persons convicted of first degree murder.⁸³ Castle's second degree murder conviction, therefore, would not bar him from parole.⁸⁴

The commonwealth court did not address the second argument.⁸⁵ Instead, the court sustained the Board's preliminary objections, appellant's application for summary relief was denied, and his petition for review was dismissed.⁸⁶

The commonwealth court began its analysis by looking at the purpose behind Section 9756(c) of the Sentencing Code⁸⁷ and

73. 123 Pa Commw 570, 554 A2d 625 (1989).

74. *Castle*, 554 A2d at 626. Appellant was also serving a concurrent life sentence for assault which he committed while incarcerated. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 628.

81. *Id.*

82. *Id.* at 628 n 6.

83. *Id.*

84. *Id.*

85. The court merely noted the second argument in a footnote without comment on its merit. *Id.*

86. *Id.* at 629.

87. *Id.* at 628.

found that it did not have as its stated purpose the creation of parole eligibility. Furthermore, no reference was made in that section to the power of the Board.⁸⁸ Instead, Section 9756(c) dealt exclusively with what a trial court may or may not do when imposing a sentence in specific instances.⁸⁹ In contrast, the court noted that Section 331.21 of the Parole Act specifically prohibited the Board from paroling prisoners sentenced to life imprisonment.⁹⁰ Citing the presumption against implied repeal,⁹¹ the court held that the statutes were not clearly inconsistent.⁹² Therefore, Section 9756 of the Sentencing Code did not impliedly repeal Section 331.21 of the Parole Act.⁹³ The court concluded that Section 9756(c) did not create a right of parole for any lifers.⁹⁴

D. *Analysis of Castle*

The *Castle* decision is clearly result-oriented and fails to adequately analyze whether Section 9756(c) of the Sentencing Code and Section 331.21 of the Parole Act conflict. The court's reliance on the presumption against implied repeal serves as a weak crutch on which to rest the proposition that the sections do not conflict and merely sidesteps the apparently conflicting mandates of Section 331.21 of the Parole Act and Section 9756(c) of the Sentencing Code. The opinion makes a conclusory statement that the two statutes are not "clearly irreconcilable";⁹⁵ however, the court does not give a clear explanation of how the provisions are to be reconciled.⁹⁶ Arguably, three possible interpretations of these sections can be supported.

1. *The Castle Interpretation*

The initial interpretation is the one reached in the *Castle* decision. Unfortunately, the entire reasoning of the *Castle* court is expressed in two sentences.⁹⁷ However brief, the *Castle* decision is

88. *Id.*

89. *Id.*

90. *Id.* at 628-29.

91. *Id.* at 629, citing *Pittsburgh v Public Utility Comm.*, 3 Pa Commw 546, 284 A2d 808 (1971).

92. *Castle*, 554 A2d at 629.

93. *Id.*

94. *Id.*

95. *Id.*

96. See notes 87 and accompanying text.

97. *Castle*, 554 A2d at 629. See notes 87-95 and accompanying text.

currently the only guidance offered by Pennsylvania courts on the apparent conflict between Section 331.21 of the Parole Act and Section 9756(c) of the Sentencing Code. The authors of this comment are unable to further substantiate or expand the court's holding.

2. *The Sections Conflict*

The *Castle* court could easily have held that the sections were inconsistent, a result implicit in the plain language of the sections themselves. The Parole Act expressly denies the Board the power to parole lifers.⁹⁸ The Sentencing Code permits courts to deny parole only to prisoners convicted of first degree murder and certain summary offenses.⁹⁹ If the Sentencing Code is read as a grant of parole rights to lifers not convicted of first degree murder, then the conflict is obvious.

The Sentencing Code included a repeal provision: "All acts and parts of acts are repealed in so far as they are inconsistent herewith."¹⁰⁰ According to this provision, if the two sections under consideration in *Castle* are inconsistent, the earlier Parole Act restriction on parole for lifers is repealed by the Sentencing Code. This result would keep the Sentencing Code's prohibition on parole for first degree murderers intact, but would require parole for lifers sentenced for second or third degree murder. While it may be true that the courts of Pennsylvania are traditionally hostile to implied repeal,¹⁰¹ refusal to recognize the express repeal provision of the Sentencing Code ignores legislative intent. This interpretation is bolstered by both the superior court and supreme court's analysis in *Dorian* that sections of the Parole Act are expressly repealed by inconsistent sections of the Sentencing Code.¹⁰²

Of course, it would not be entirely accurate to state that the legislative intent is clear. Our review of legislative history failed to determine whether the legislature was cognizant of the impending conflict between the Sentencing Code and the Parole Act.¹⁰³ The

98. Parole Act, 61 Pa Cons Stat Ann § 331.21 (Purdon 1964 & Supp 1991). See notes 51-53 and accompanying text.

99. Sentencing Code, 42 Pa Cons Stat Ann § 9756(c) (Purdon 1964 & Supp 1991). See note 50 and accompanying text.

100. Act of Dec 30, 1974, Pub L No 345, 1974 Pa Laws 1052, section 2(b).

101. *Pittsburgh v Public Utility Comm.*, 3 Pa Commw 546, 284 A2d 808 (1971).

102. See note 67 and accompanying text.

103. A review of the appropriate legislative committee hearings may have shed light on this issue. We were unable to obtain these materials from either local libraries or from the Senate Library in Harrisburg.

provision of Section 331.21 of the Parole Act denying the Board power to release lifers has never been amended.¹⁰⁴ It seems likely that when the Sentencing Code was being reworked, the legislature did not consider the possible affect on the Parole Act.

In spite of the above, the courts are required to apply the provisions as they have been written. The plain language of each section, coupled with the repeal provision of the Sentencing Code, could have sustained a vastly different holding in *Castle*. The *Castle* court could have found the sections in conflict, resulting in immediate parole rights for lifers. This alternative holding is at least as feasible as the actual holding the court reached in *Castle*.

3. *The Sections Do Not Conflict*

The final theory is that Section 331.21 of the Parole Act and Section 9756(c) of the Sentencing Code are textually inconsistent, but not legally inconsistent.¹⁰⁵ According to this final interpretation, the Sentencing Code does not repeal the Parole Act's restriction on the Board's authority over lifers. Rather, the Sentencing Code merely grants parole rights to those sentenced to life in prison for crimes other than first degree murder without designating an administrative body to oversee the parole. Both sections can be enforced and, therefore, are legally consistent.

Under this theory the Parole Act and Sentencing Code cover different interests, an analysis consistent with the *Castle* court's reading of the statutes in *pari materia*.¹⁰⁶ The Parole Act was a grant of legislative authority to an administrative body, the Parole Board. In granting that authority, the legislature withheld the power to parole lifers. In contrast, the Sentencing Code is concerned with judicial power and merely restricts sentencing discretion. Judges are only permitted to deny parole rights to persons convicted of

104. An act authorizing the Parole Board to parole certain life prisoners was introduced in the State Senate, SB 312, by Messrs. Johanson and Donolow on December 27, 1965: "An Act amending the act of August 6, 1941 (P.L. 861), entitled 'Pennsylvania Board of Parole Law,' authorizing the release on parole for certain persons serving life imprisonment but prohibiting parole for those serving life imprisonment for homicide until fifteen years of the sentence has been served." 1965 Legislative Journal—Senate 187. The bill apparently died in committee as no further floor action on the bill could be found.

Section 331.21 of the Parole Act has been amended as recently as 1990. However, the provision restricting authority to parole lifers was unaffected. Act of July 11, 1990, 1990 Pa Laws 476.

105. Laws are legally inconsistent if the mandate or purpose of each law cannot be obtained when both laws operate on the same individual simultaneously.

106. *Castle*, 554 A2d at 628 n 4.

first degree murder or certain summary offenses unrelated to lifers. Thus, these two statutes actually focus on two completely separate issues: parole board power and judicial power. Because the sections deal with different issues no conflict would exist.

The practical effect of this analysis does not alter the ultimate result in *Castle*. While this theory would find lifers convicted of crimes other than first degree murder eligible for parole, the Board would still lack authority to grant parole. The legislative grant of authority to the board is only partial, and the right to parole lifers remains vested in the legislature. The result is that lifers are left with a right to parole but no way of exercising that right.¹⁰⁷ The plausibility of this complex reading of the statutes only underscores the haphazard and patchwork manner in which the legislature has dealt with lifers.

II. COMMUTATIONS

Although currently ineligible for parole, lifers have been released through commutations. The power to commute a sentence is conferred on the governor by Article IV, Section 9 of the Pennsylvania Constitution.¹⁰⁸ A commutation is a conversion of a prisoner's minimum sentence to a shorter term.¹⁰⁹ The Board of Pardons, which is, in part, appointed by the governor,¹¹⁰ hears prisoner petitions and makes recommendations to the governor. The governor can then either grant or deny the petitioner's commutation.¹¹¹ In the case of lifers, this requires a conversion of the life sentence to a term of years. After the prisoner serves the new minimum term, he is eligible to be paroled by the Parole Board.

As with any program administered solely at the discretion of the governor, the commutation system has been swayed by the changing political winds of the Commonwealth. Each governor's admin-

107. This interpretation leads to a possible due process claim by life prisoners. An analysis of this claim goes beyond the limited scope of this comment.

108. Pa Const, Art IV, § 9 states:

(a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, after full hearing in open session, upon due public notice. the recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

109. *Black's Law Dictionary* 254 (West, 5th ed 1979).

110. Administrative Code, 71 Pa Stat § 113 (Purdon 1964 & Supp 1991).

111. Thus, commutations are completely within the discretion of the governor.

istration brings its own philosophy on the use of commutations. The effect a change in administrations has on commutations can easily be seen by comparing the data in the following chart:

Table A¹¹²

Administration	Year	Petitions Heard	Recommended by Board	Governor:	
				Denied	Granted
Shafer	1967	99	25	0	25
	1968	82	21	0	21
	1969	81	17	0	17
	1970	101	31	0	31
Shapp	1971	123			48
	1972	122	51	1	50
	1973	90	40	1	39
	1974	78	29	2	27
	1975	83	26	0	26
	1976	73	27	6	21
	1977	81	17	0	17
	1978	83	23	10	13
Thornburgh	1979	93	15	13	2
	1980	62	9	9	0
	1981	43	9	9	0
	1982	25	5	4	1
	1983	43	12	11	1
	1984	40	8	7	1
	1985	45	11	11	0
	1986	23	5	5	0
Casey	1987	47	22	19	3
	1988	39	22	22	0
	1989	30	19	10	9
	1990	21	9	4	5
	1991	12	7	*	0

The Shafer administration averaged 23.25 commutations per year, the Shapp administration averaged 30.125, the Thornburgh administration averaged .625, and the Casey administration averaged 4.25 commutations per year.¹¹³ While these statistics show a differ-

112. Statistics supplied by Pennsylvania Board of Pardons.

113. Numbers for the Shafer administration are provided for the years 1967-1971 only because statistics were not kept by the Board of Pardons prior to 1967.

Numbers for the Casey administration do not include 1991 because the statistics for 1991 are not complete as of the writing of this article.

ence among all the administrations in the granting of commutations, clearly the sharpest distinction is between the Shapp and Thornburgh administrations. The impact of this dramatic change in commutation philosophy can be understood numerically by studying the following table:

Table B

Average increase in lifer population per year¹¹⁴:

1979-1986:	97.25	
1972-1978:	<u>52.29</u>	
Difference:		44.96.

Average Commutations per year¹¹⁵:

1971-1978:	30.125	
1979-1986:	<u>.625</u>	
Difference:	29.50	(Average increase per year due to change in policy)

Average increase per year attributable to other factors:	15.46
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One could conclude that the Shapp administration used the commutation system almost as a parole substitute, whereas the Thornburgh administration nearly ceased commuting lifers altogether.

The drop in commutations is the most significant factor in the higher average increase per year in lifer population for the Thornburgh administration vis-a-vis the Shapp administration. Over the eight years of the Thornburgh administration, this amounted to 236 more lifers than if the Shapp administration average had been maintained. The Casey administration has followed the Thornburgh trend, granting only seventeen commutations from 1987 through 1990.¹¹⁶

What is the practical effect of this change in philosophy? The total lifer population has been growing at a steady rate over the last twenty years:

114. Statistics supplied by the Pennsylvania Department of Corrections.

115. Statistics supplied by the Pennsylvania Board of Pardons.

116. Statistics for 1991 are incomplete as of the time of writing and therefore are not included.

Table C

Total Lifer Population ¹¹⁷		
Administration	Year	Population
Shafer	1967	449
	1970	402
Shapp	1971	390
	1978	756
Thornburgh	1979	826
	1986	1,544
Casey	1987	1,674
	1991	2,275

The reduction in commutation is not entirely responsible for this increase, but its profound effect cannot be easily dismissed.

The reduction in commutations is likely to cause the average age of the lifer population to rise as more prisoners are required to serve the full sentence. This aging population can not only be expected to require more cell space, but also more medical care as the infirmities of old age appear.¹¹⁸ The cost of housing and caring for an increasing and aging lifer population only serves to heighten the strain on an already stressed state budget.

III. CONCLUSION

While it appears that commutations may have been used by past administrations as a substitute for parole for lifers, this is clearly not the case today. Recent administrations have virtually closed this avenue of release. The courts and legislature are left to deal with the problems created by an increasing lifer population.

The problem of changing commutation policies is only relevant because of the state's apparent policy against parole for lifers. The patchwork manner in which the legislature has arrived at this policy has created difficult interpretation problems for Pennsylvania courts. The *Castle* decision, with its utter lack of analysis, highlights this difficulty.

The tenuous reasoning in *Castle* leaves it open to future attack.

117. Population as of December 31 of each year. Statistics supplied by the Pennsylvania Department of Corrections.

118. As these infirmities weaken the older prisoners, they must be separated from the general prison population for their own protection. Telephone interview with Galina Milohov, staff member of the Pennsylvania House Judiciary Committee (Feb 12, 1992).

The Pennsylvania Supreme Court could at any time reverse *Castle*, and find Section 331.21 of the Parole Act and Section 9756(c) of the Sentencing Code in conflict. This would lead to parole for lifers,¹¹⁹ whether that is the legislature's intent or not. This unstable situation benefits neither those in favor of parole for lifers nor those opposed to parole. Parties opposing parole for lifers desire clear legislation so that courts will not sua sponte interpret the current legislation as allowing parole for certain lifers. Parties advocating parole for lifers¹²⁰ require a clearly defined legislative policy as the first step toward implementing the views they advocate.

This situation requires immediate legislative action. Until the legislature addresses the instability, poorly considered decisions like *Castle* will continue to be the norm. Regardless of whether the legislature intends parole for lifers or not, the statutes need to clearly reflect legislative intent. This can be done in two ways. The legislature can either expressly reconcile the conflicting provisions of the Parole Act and Sentencing Code or combine the two into a unified system. Regardless of the method employed by the legislature, these statutes must be made to work in unison—not confusion.

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119. At least those lifers not convicted of first degree murder.

120. In particular the Pennsylvania Lifers Association (PLA). The authors wish to express their gratitude to the PLA for explaining their views on this subject.

