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Solano Justice

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AARON LOWERS

Solano Justice

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Prison discipline has come a long way since Attica, at least in California. The California Department of Corrections and Rehabilitation (CDCR) administers California's thirty-three adult correctional facilities, including California State Prison-Solano (CSP-Solano). Inmate discipline at these facilities is governed by Title 15 of the California Code of Regulations (CCR), which provides uniform rules and behavioral expectations for all California prisoners.⁸ With uniformity comes a certain rigidity, however, and in many instances this rigidity leads to an unfair application of discipline in California prisons.

The primary purpose of CCR Title 15 is to ensure the safety and security of California prisons. It provides for violent or disruptive inmates to be isolated from the general population in administrative segregation (solitary confinement) for a period of time based on the gravity of the misconduct. If violent or disruptive behavior persists, the inmates can be isolated for progressively longer periods. While the level of violence varies from prison to prison, the disciplinary generally system works well to minimize violence.

Nonviolent misconduct is handled differently. Possession of most contraband, for example, is usually punishable by a loss of privileges and "good time" credit. "Good time" is time off of one's sentence for good behavior. The reality is that these sanctions have little impact on the availability of contraband. Drugs and tobacco are commonplace, as is inmate-manufactured alcohol. In recent years, cell phones have also become prevalent. In 2011, for example, CDCR staff discovered over fifteen thousand cell phones in California prisons and camps.⁹ During that same year, staff at CSP-Solano confiscated

8. CAL. CODE REGS. tit. 15 (2013).

9. *Contraband Cell Phones in CDCR Prisons and Conservation Camps*, CAL. DEP'T OF CORRECTIONS & REHABILITATION 1 (2012), <http://www.cdcr.ca.gov/Contraband-Cell-Phones/docs/Contraband-Cell-Phone-Fact-Sheet-January-2012.pdf>.

672 cell phones—at a prison housing approximately forty-five hundred inmates.¹⁰

There are several reasons the sanctions provided within CCR Title 15 have so little impact on the amount of contraband in California prisons, but perhaps the single biggest factor is that prison inmates are seldom caught red handed. Contraband items are typically found in and around inmates' living quarters, not on the inmates themselves. This allows a certain level of deniability to individuals who actually possess contraband. Prison overcrowding has exacerbated the situation. California's inmates are housed either in cells or dormitories. In some dormitory situations, as many as eighteen inmates have been crammed into living areas designed to accommodate only eight inmates. California prison cells designed to accommodate one inmate typically house two.

Attributing possession of contraband found in a cell housing two inmates is difficult enough. It is all but impossible in dormitory settings where bunk beds are often separated by as little as one foot.

In an effort to overcome this difficulty, prison officials have taken to relying on constructive possession in disciplinary hearings to determine guilt or innocence. Constructive possession exists when one does not have physical custody of an item, but is in a position to exercise control over it. If, for example, two men wearing ski masks are arrested in a car with a gun on the back seat, it can be construed that both men are in possession of the weapon. In a similar fashion, if two men are housed in the same prison cell where a cell phone is discovered, both men can, and often are, found guilty of possessing the contraband, and both suffer the consequences.

The overriding difference here is that the two men in ski masks choose to get into the car together, whereas the two men in the cell are ordered to live together by CDCR officials. When two men are found guilty of possessing the same contraband in a prison cell, almost invariably one innocent man is falsely accused. Admittedly, finding two or more inmates guilty for possessing the same contraband started out as a tactic CDCR to gain admissions from the guilty parties. Over time, however, this tactic has evolved into a coercive device designed to force inmates to police themselves. Today, California inmates are routinely found guilty of possessing contraband based on constructive possession, even when another inmate admits guilt.¹¹

10. Solano Cnty. Grand Jury 2011-2012, *California State Prison-Solano*, SUPERIOR CT. OF CAL. COUNTY OF SOLANO 3 (Apr. 23, 2012), <http://www.solano.courts.ca.gov/materials/CSP-Solano%20Report%20-%20Final.pdf>.

11. See, e.g., *In re Hibbert*, No. H036217, 2012 WL 210340 (Cal. Ct. App. Jan. 25, 2012); *In re Zepeda*, 47 Cal. Rptr. 3d 172, 177 (Cal. Ct. App. 2006).

In essence, CDCR's policy of finding multiple inmates guilty based on constructive possession puts inmates in the precarious position of being their brother's keeper. On its face this may seem like a reasonable means of enlisting the aid of inmates in discouraging possession of contraband. In practice, the policy increases tension, promotes violence, and disrupts order by pitting inmates who choose to obey the rules against those who do not.

The negative impact of CDCR's ill-advised reliance on constructive possession is not limited to increased disorder. The majority of California's prisoners have determinate sentences with a fixed release date. If one of these inmates receives a write-up for possession of contraband, he rarely serves more than twenty-five to seventy-five days longer on his sentence, depending on the type of contraband. There are, however, roughly thirty thousand inmates serving out indeterminate sentences.¹² These inmates have no fixed release date, but instead must appear before a panel of parole commissioners and demonstrate that they are suitable for parole.

For these inmates, the stakes surrounding rule infractions are incredibly high. California has some of the strictest standards in the nation regarding the release of inmates serving indeterminate sentences. Proposition 9, a ballot initiative more commonly known as Marsy's Law, was passed by California voters in 2008.¹³ This law increased the minimum length of a parole denial for a person serving an indeterminate sentence from one to three years.¹⁴ It also increased the maximum length of a parole denial to fifteen years.¹⁵ Thus, an inmate serving an indeterminate sentence who is found guilty of a rule infraction may expect to serve at least an additional three years.

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12. See Robert Weisberg, Debbie A. Mukamal & Jordan D. Segall, Stanford Criminal Justice Ctr., *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, STAN. L. SCH. 3 (Sept. 2011), http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf (“[F]ar too little attention has been given to the prison population serving life sentences with the possibility of parole under older indeterminate sentencing principles, a population that as of 2010 represents a fifth of California state prisoners. More than 32,000 inmates comprise the ‘lifer’ category, i.e., inmates who are eligible to be considered for release from prison after screening by the parole board . . .”).
 13. Proposition 9: Victims' Bill of Rights Act of 2008: Marsy's Law, in CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION: TUESDAY, NOVEMBER 4, 2008, at 128 (2008) <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.
 14. See CAL. PENAL CODE § 3041.5(b)(3), (6) (West 2013); see also *In re Vicks*, 56 Cal. 4th 274 (Cal. 2013) (interpreting this provision).
 15. CAL. PENAL CODE § 3041.5(b)(3)(A).

The stark contrast in consequences between those serving determinate sentences and those serving indeterminate sentences does more than just create tension among inmates. The inequitable treatment also serves to erode the self-esteem of an entire class of inmates. Their faith in the fundamental fairness of government and authority is undermined, and their rehabilitative efforts are often stymied by hopelessness and despair.

The lamentable stratification of the inmate population and the increase in violence is bad enough. Sadly, there is a more tragic consequence. There are countless stories of inmates who have served ten, twenty, or twenty-five years, yet have been repeatedly denied parole because they have been found guilty of possessing contraband not belonging to them. For these inmates, resorting to violence in an effort to control the behavior of a short-term inmate with little to lose is simply not an option. Instead they suffer quietly, routinely falling victim to the unjust application of constructive possession.

The situation in CDCR's chronically overcrowded dormitories is particularly dire. In dorm situations, every inmate has access to all areas in the dorm. Contraband found anywhere in the dormitory could conceivably belong to anyone. Rather than abdicating assignment of responsibility for discovered contraband in dormitory settings, officials at CSP-Solano have take to assigning guilt to the individual whose bunk happens to be closest to where the contraband is discovered.

This practice is particularly unjust when one considers the common practice among inmates of tossing contraband onto an adjacent bunk whenever warned of approaching staff. Again, it is those inmates with indeterminate sentences who suffer the most. Many have returned to their living quarters from their job assignments only to discover that another inmate, frequently one with only days or weeks left to serve, has tossed a cell phone onto their bunk during a surprise inspection, rather than admit guilt and serve an additional month or two. While this is not an everyday occurrence, over time the risk increases, and it only takes once.

Having spent the last twenty years in California's prisons, I can attest to the psychological toll of potentially being held accountable for the actions of others. I have witnessed numerous inmates charged with possession of contraband not belonging to them. I have seen these same inmates found guilty at disciplinary hearings based on a preponderance of evidence.¹⁶ I have seen these same inmates denied parole by the Board of Parole Hearings because of disciplinary findings. While inmates may appeal the findings of a

16. CAL. CODE. REGS. tit. 15, § 3320(i) (2013).

disciplinary hearing in court, the process takes years and the outcome is far from certain.

The environment of California's prisons has changed dramatically in the last twenty years. Tobacco, once sold in prison commissaries, is now considered contraband. Cell phones, once unheard of, are now commonplace. The prison environment has changed but the disciplinary system has not kept up with the times. Certainly CDCR has an interest in holding rule-breakers accountable. The practice of indiscriminately assigning guilt based on proximity is not the answer. Because the consequences can be so grave, the standard of evidence needs to be raised. Keeping inmates locked up for years, and in some cases decades, because some item of contraband was found near where they happen to sleep is neither fair nor just. The time has come for the California Code of Regulations to be amended to reflect the changing realities within California prisons.



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