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GUEST COLUMN

Life, with a possibility of blocked parole

By Nazgol Ghandnoosh

Gerald Denson (a pseudonym) was convicted of first-degree murder in Los Angeles County in 1983. He was sentenced to 25 years to life plus two years for using a firearm. Four years ago, the California parole board found him suitable for parole based on his record in prison. But Denson remains behind bars, 31 years after his conviction, because California is among a handful of states that allow the governor to reverse the decisions of a governor-appointed parole board. If Denson were serving his sentence in any of 45 other states, he would be a free man.

A quarter of California's 135,000 prisoners are "lifers" sentenced to serve up to life with the possibility of parole. The national rate is only 7 percent. California has not always been an outlier: In 1990, lifers accounted for 8 percent of the state's prison population. The state has achieved this distinction because of its sentencing and parole policies, not its crime rates.

Among these 34,000 lifers, one-quarter have been sentenced under the "three strikes" law passed in 1994. But the lifer population has grown largely due to policies that have limited the release of rehabilitated prisoners.

Following California's 1977 Determinate Sentencing Law, only prisoners sentenced to life with the possibility of parole have indeterminate sentences, with release requiring approval of the state's parole board. Through Proposition 89 in 1988, voters authorized the governor to block parole grants in cases involving murder, and to send other life-term parole grants back to the board for additional review.

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DAILY APPELLATE REPORT

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Environmental Law: Group fails to preliminarily prevent logging projects in Montana's Flathead National Forest where their cumulative impacts would not cause imminent injury. Friends of the Wild Swan v. Weber, U.S.C.A. 9th, DAR p. 13168

Environmental Law: Governor Brown's concurrence with Dept. of Interior's approval of tribe's proposed casino in Madera County does not require environmental impact report under CEQA. Picayune Rancheria of Chukchansi Indians v. Brown (NP Fresno Land Acquisitions LLC), C.A. 3rd, DAR p. 13162

Real Property: Borrowers may sue Bank of America for breach of contract due to its sale of their home while they were complying with loan modification trial period plan. Fleet v. Bank of America N.A., C.A. 4th/3, DAR p. 13157

Associated Press

Sylvester Stallone, left, and former California Gov. Arnold Schwarzenegger arrive at the Los Angeles premiere of "The Expendables 3" last month. The film was a box office disappointment.

Film producer vows to pursue file sharers

By Matthew Blake
Daily Journal Staff Writer

LOS ANGELES — Last week, Avi Lerner, producer of box office disappointment "The Expendables 3," vowed in media reports to "go after" millions of action flick fans who illegally obtained a digital file of the film. Legal observers say such a strategy is highly unusual. The movie industry, they say, treats Internet piracy with kid gloves, fearful of the bad publicity and painstaking work that can accompany a file sharing suit.

While "we've seen many lawsuits against file sharers over the years," said Eric Goldman, a professor at Santa Clara University School of Law, the movie industry has brought "fewer suits" and "looked for other people to do their dirty work."

Starring Sylvester Stallone and various other action stars of yesteryear, "The Expendables 3" was produced by Millennium Films, where Lerner is chairman, distributed by Lions Gate Films Inc., and released in theaters Aug. 15.

But two weeks before the movie debut, Lions Gate had already filed a lawsuit in the Central District against a number of Internet bit torrent sites. In the suit, *Lions Gate Films Inc. v. John Does 1-10,* 2:14-cv-06033 (C.D. Cal., filed 2014), the studio alleged that sites including limetorrents.com and billionuploads.com obtained a pirated digital file of "The Expendables 3" which was then illicitly shared among bit torrent users.

On Aug. 7, still more than a week before the film's theatrical release, U.S. District Judge Margaret Morrow granted a Lions Gate restraining order against the sites.

"Lions Gate has established that it will suffer irreparable harm in the absence of immediate relief," Morrow wrote — the "harm" being lost box office proceeds.

The restraining order apparently came too late to prevent lackluster sales.

While "The Expendables 3" has made $190 million so far, Lerner claimed in published reports that file sharing has cost the film $250 million.

Lerner publicly declared last week that Millennium Films would push its distributor's legal action one step further, going after not just bit torrent sites but individual file sharers. Lerner claimed that 10 million people "stole the movie" via bit torrent sites, and, "We want to go after those 10 million people."

Calls to Millennium Films for this story were referred to CEG TEK International, a Beverly Hills-based company that works on anti-piracy matters. Kyle Reed, chief operating officer for CEG TEK, confirmed that the company was work-

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Bill takes on voting district woes

SB 1365 lets activists sue over lines minimizing minority voters' power

By Paul Jones
Daily Journal Staff Writer

SACRAMENTO — Recent lawsuits across California have forced some municipalities with "at large" voting systems to instead create voting districts to shore up minorities' voting power. But legislation before Gov. Jerry Brown would allow judges to redesign existing districts to amplify minority influence in elections.

The legislation, SB 1365 by Sen. Alex Padilla, D-Pacoima, would allow voting rights activists to sue to require that municipalities' voting districts be drawn up to ensure "protected classes" of voters, including ethnic, racial and linguistic demographics, aren't so spread out that they lack influence. It would even allow a court to create districts cobbling together different minority groups to allow them to form a coalition.

Alternatively, a judge could order an increase to the size of a governing body — such as a city council — to ensure smaller groups of voters could pick some representatives.

Lori Shellenberger of the American Civil Liberties Union, the source of the legislation, said the goal was to expand on the original California Voting Rights Act of 2001. That law sanctioned legal challenges to "at large," or district-less voting systems.

In "at large" systems, all members of a governing body are picked by all voters in a municipality, an arrangement that can prevent smaller ethnic or racial groups from being a deciding vote in any race. To give minorities more representation, under the act, judges can require a municipality to divide voters into districts that each pick one or more members.

Now, "SB 1365 builds in accountability for district systems — so we ensure lines are drawn in ways that don't undermine protected communities," Shellenberger said.

A spate of lawsuits against at-large systems has blossomed recently in California, including ones against the cities of Bellflower and Palmdale and the Santa Clarita Community College District. However, while SB 1365 would allow suits, Shellenberger said backers hoped the legislation would encourage changes to districts without legal fights.

Laura Ho, an attorney with Goldstein, Borgen, Dardarian & Ho, has been involved in several suits against at-large districts. She said the issue SB 1365 purports to address is a real one.

"After districts have been drawn … there's still disenfranchisement for protected classes," she said.

The legislation has no listed opposition, but carving up districts to emphasize one group of voters could lead to legal challenges.

Notably, a U.S. Supreme Court decision in 2009, *Bartlett v. Strickland,* found that minority voters aren't guaranteed an electoral advantage under the federal Voting Rights Act, striking down North Carolina officials' effort to engineer a cross-county voting district to concentrate black voters, which opponents said violated North Carolina law.

A key factor in the ruling, written by Justice Anthony Kennedy, was that creating a new district still wouldn't produce a majority of black voters.

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Bingham partners meet to discuss Morgan Lewis acquisition

By Joshua Sebold
Daily Journal Staff Writer

Merger talks between Bingham McCutchen LLP and Morgan, Lewis & Bockius LLP are ongoing, according to several Bingham partners who confirmed the firm held an internal meeting Wednesday to discuss a potential tie-up.

"I don't think it's a state secret," said Thomas S. Harman, a partner in Bingham's Washington, D.C. office, who declined to comment on the substance of the discussions, other than to confirm they were about the potential merger.

The potential combination would create a firm of more than 2,100 attorneys, with roughly 800 of them coming from Bingham, although most observers believe redundancy in many of the California offices would mean not all of those attorneys would remain with the combined firm in the long run.

The merger discussions emerged at the end of what has been a difficult 12 months for Bingham.

"They've already had substantial departures over the last year," said Solana Beach legal recruiter Larry Watanabe, who closely follows lateral movement in the California legal industry. "They reported very bad financial stats for last year as well."

The firm reported in June that it took in 12 percent less revenue in 2013 than in 2012.

Bingham has lost major partners via single attorney lateral moves or in small groups throughout California. Larger groups have departed from offices outside the state.

Watanabe said the firm has put itself in a position where failing to merge is not an option because the firm would continue to bleed partners because of its unstable state.

"They've lost chunks, groups, not just individual partners," Watanabe said. "They've lost offices. It's more than problematic."

The most recent departures included 25 partners and one of counsel from offices in London, Frankfurt and Hong Kong last week. Akin Gump Strauss Hauer & Feld LLP confirmed the 26 lawyers had joined its ranks.

The group was led by rainmaker and former Bingham executive board member James Roome, whose practice focuses on restructuring.

In April, the firm lost an 11-attorney group to Sidley Austin LLP in New York, and another group of nine attorneys fractured and joined a variety of firms in Washington, D.C., according to media reports.

Official representatives for Bingham and Morgan Lewis declined to comment for this story on behalf of their firms.

Marshall B. Grossman, a longtime Bingham partner who moved to Orrick, Herrington & Sutcliffe LLP in January, said a merger with Morgan Lewis would bring stability and peace of mind to Bingham attorneys

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Don't trip on the immunity 'trail'

By Molly M. McKibben

Associated Press

A man and his dog walk along the Los Angeles River in Los Angeles in 2012.

Los Angeles County's ambitious plans to create a recreational paradise along parts of the Los Angeles River may lead to a slew of legal pitfalls for outdoor enthusiasts caught in a trap of government immunities.

The LA River, now known to most Angelenos as a concrete basin that accumulates more trash than water, is getting a facelift. The massive construction project would create a continuous bicycle path along all 51 miles of the River by 2020. A portion of this new path opened in the West San Fernando Valley in August 2014.

While the project will provide a long-needed use for the river, it's also possible that poor design or shoddy craftsmanship could result in the construction of hazards to bicyclists and pedestrians using the pathway. However, anyone who is injured by any of those hazards faces serious roadblocks to recovering damages.

Where a private landowner can be sued under general principles of negligence, a government entity can only be sued in specific instances, which are outlined in statutes that the government wrote for itself. For instance, California Government Code Section 835 provides the only grounds on which a plaintiff can sue a government entity for a dangerous condition on public property.

Perhaps your client is badly injured after riding his bike into a hole on the path and you file a lawsuit against the county. You establish that a hole in the middle of a bike path is dangerous. You win, right? Not necessarily. The government has written itself a litany of immunities that prevent it from being held liable even for its design of a hole in the middle of a bike path. In every case a plaintiff brings against them for a dangerous condition of public property, governmental entities will assert any and all of the immunities they can (even ones that don't apply) in order to persuade the court to throw your client's case out.

The most outrageous and least known immunity that governmental entities employ to avoid liability is trail immunity. Government Code Section 831.4 grants complete immunity to a public entity when an injury occurs because of a dangerous condition on any "trail." The plain language of the immunity provides immunity only for "unpaved roads" or "trails." The purpose of the statute was to encourage the government to open undeveloped property to recreational use by the public without burdening the government with the responsibility of improving or maintaining the property in a safe condition.

Yet, in defending lawsuits, governmental entities have severely expanded the breadth of the statute, so that the immunity now applies to anything the government can argue constitutes a "trail," including paved bike trails and beach boardwalks. These facilities are affirmatively designed and actively maintained by government entities for safety, and so allowing them to be liable where they are unsafely designed or maintained seems like a no-brainer. But instead, government entities have convinced courts to expand this immunity to cover almost any trail or pathway, including on-street bike trails.

Because this immunity has been so severely expanded, if a plaintiff is injured on anything the courts have already determined to be a "trail" under the statute, there is little a plaintiff can do to prevent the court from throwing their case out on summary judgment or a motion for directed verdict. The best hope the plaintiff's bar has is to either repeal Section 831.4 or fight to have cases published wherein courts decline to apply the immunity to areas government entities try to argue are a "trail."

Another lesser-known immunity that will likely apply to the new LA River project is what's known as "hazardous recreational activity." Essentially, the statute provides that a government entity generally is not liable to a person who's injured on public property, even if it is dangerous, if the person was participating in a hazardous recreational activity. The statute contains a noninclusive list of activities the Legislature determined automatically qualify as hazardous recreational activities.

Many defendants seek to overapply this immunity much like trail immunity, and obtain rulings expanding the breadth of this statute. For instance, if your client was riding a mountain bike and wearing spandex biking clothes when he fell into the hole, the government entity will argue that the plaintiff was "mountain bicycling" or "bicycle racing" (two of the listed hazardous activities) and therefore it is not liable. It's vital that plaintiffs fight these arguments and not allow government entities to have cases published where the statute is expanded beyond its plain meaning.

However, unlike trail immunity, this immunity has a number of exceptions — a government entity can still be liable for a dangerous condition that is not reasonably assumed by the participant. For instance, bicycle racers assume the risk that they may crash into another cyclist and be injured; they do not assume the risk that there will be a huge hole in the middle of the path on which they are riding. Other exceptions include where the government entity charges an activity-specific fee for participation, or where an act of gross negligence caused the injury (i.e., designing a four-foot-wide hole in the middle of a pathway).

Probably the best-known immunity a government entity can employ to shield itself against liability for dangerous conditions on its property is design immunity. This statute provides complete immunity for a public entity where an injury occurs because of a dangerous condition that had a plan or design which was approved prior to construction, and the reasonableness of which was supported by substantial evidence.

Once a plaintiff proves there was a dangerous condition on public property, most government entities will automatically assert that they are entitled to design immunity. They will bombard the plaintiff with documents including emails, proposals, and design schematics to support this argument. However, the key to defeating this immunity is to proving that the government entity had no written design for the "injury-producing feature." Thus, in the example above, if the county had a written design for the pathway surface, but not for the hole it built in the middle of the pathway, it would not be entitled to design immunity.

Moreover, many defendants attempt to skirt the requirements of design immunity by arguing that oral construction orders or instructions qualify as a "plan," since it's easy for them to find a government employee to testify that they told someone to construct something. However, there is no California case where a court found that a government entity was entitled to design immunity without a written design for the injury-producing feature.

As government entities undertake to develop recreational areas, it is vital that the public hold them accountable to design and maintain safe spaces, and not allow them to avoid responsibility due to loopholes they have written for themselves.

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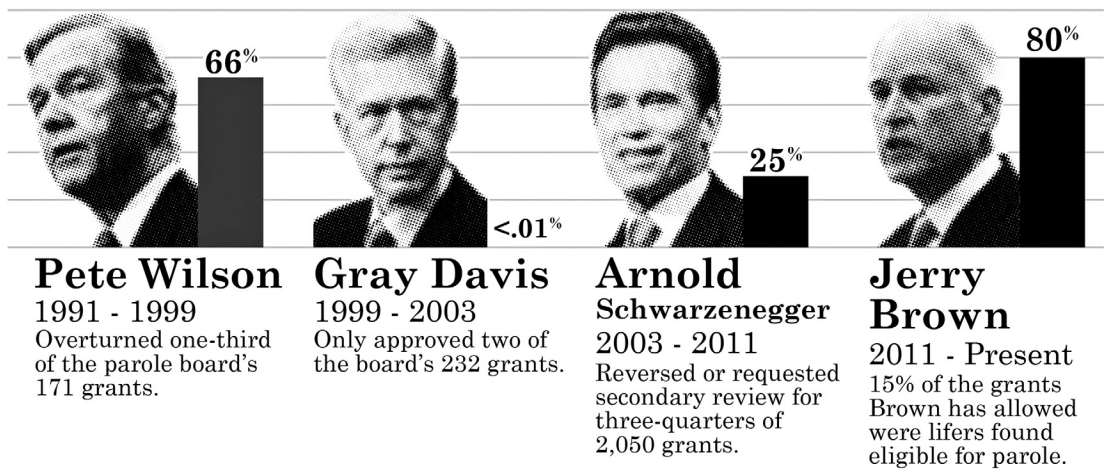
How California stands apart on lifer parole policies

With a succession of governors operating in a "tough on crime" environment, parole rates plummeted as governors overturned most of the board's parole grants, thus warehousing hundreds of prisoners who had been deemed low-risk and ready for community supervision. Gov. Pete Wilson (1991-1999), the first to have this authority, turned down one-third of the parole board's 171 grants. Gov. Gray Davis (1999-2003), who had famously proclaimed that "if you take someone else's life, forget it," approved just two of the board's 232 grants. Gov. Arnold Schwarzenegger (2003-2011) reversed or requested secondary review for three-quarters of 2,050 prisoners found suitable for parole.

Under Gov. Jerry Brown, there has been a sharp change. Brown has allowed over 80 percent of the parole board's grants to stand. And the board has found lifers eligible for parole in 15 percent of its hearings — a low figure that nonetheless exceeds the 4 percent average from the previous three decades.

But why should the governor reverse even 20 percent of a governor-appointed board's decisions? And why should the rate at which decisions are overturned be dependent on who happens to be in the governor's office in a given year?

Most of these prisoners have committed serious violent crimes. Of the 26,000 lifers who were sentenced outside of the three strikes law, 80 percent were convicted of murder or attempted murder. ("Three strikers," in contrast, have long indeterminate sentences for a wide range of felony convictions — the scope of which was narrowed by Proposition 36 in 2012. These prisoners have not yet come up for parole review.)



Rei Estrada / Daily Journal

Consider Gerald Denson's crime. In 1982, Denson — 19 years old and without a high school diploma — was driving around with a group of young men with whom he had committed robberies and other crimes. While driving, the group spotted a car with rims that they wanted to steal. Denson's friend rear-ended the car to prompt the driver to exit, enabling Denson to drive away in the stolen car. As Denson got behind the wheel, he heard a gunshot: His accomplice had fatally shot the driver, with his wife and young child standing nearby.

These are tragic crimes that of course should be punished. But what is the right amount of punishment?

Twenty years? That's the average time served for first- and second-degree murder convictions among California lifers released between 1990-2010, according to a study by the Stanford Criminal Justice Center.

Until death? According to reporter Nancy Mullane, more lifers with murder convictions died in prison than were released by the state between 2000-2010.

Yet "life with the possibility of parole" typically connoted a much shorter sentence to the judges who issued most of these sentences, and who only sentenced people to life without the possibility of parole when they wanted someone in prison forever. For example, when now-retired Superior Court Judge Robert W. Armstrong sentenced Flozelle Woodmore (now deceased) to 15 years to life for second-degree murder in 1986, he "had expected that she would serve 'much less' than 15 years," as he told the San Francisco Chronicle. Yet Woodmore remained in prison for 21 years due to gubernatorial overrides even after her victim's relatives asked for her release, which the parole board recommended six times.

Not all lifers are fit to be released at their first parole hearing, and some will remain in prison for life. But a properly staffed and trained parole board is the most appropriate body to decide when a prisoner has rehabilitated and can be returned to the community.

Decades-long sentences are often fueled by emotions rather than evidence, and carry substantial costs. The Stanford Criminal Justice Center found that former lifers with murder convictions had a "minuscule" recidivism rate for new crimes — less than 1 percent. That compares to the nearly 50 percent rate of re-imprisonment for new crimes for all California prisoners. By incarcerating prisoners long after their public safety risk has declined, taxpayers spend $47,000 per prisoner annually to achieve very little crime control benefit.

To help achieve sustained reductions in incarceration, and use public funds to prevent rather than simply overreact to crime, California should end the practice of allowing governors to review parole board decisions. In doing so, it would join 45 states that allow parole boards to independently determine when a prisoner is ready for community supervision. Even "tough on crime" Texas amended its constitution to end gubernatorial parole review 20 years ago.

Gerald Denson, like most lifers, struggled to resume life in prison after the governor "took" his parole date in 2010. Soon after the news, guards caught him using a contraband cellphone. At his subsequent parole hearing, the board believed his account: He'd used the phone to contact his wife who had blocked his calls and wanted a divorce after hearing the governor's decision. The commissioners denied Denson parole in 2011 because they believed that the governor would view his infraction as evidence of his failure to rehabilitate. But last month, he was found suitable for parole. His fate again rests in the governor's hands.

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