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All my [parole] denials are based on the severity of the crime. I cannot change what I did 20 years ago.
– Johnny Lira, California Men's Colony, San Luis Obispo[1]

INTRODUCTION

In theory, parole is a possibility for tens of thousands of California inmates; in practice, it has been an illusion. California's parole system releases a tiny number of inmates each year, transforming most indeterminate sentences with the possibility of parole into sentences of life-without-parole.[2] As recently as the 1980s, approximately 20% of California inmates with indeterminate life sentences received parole.[3] Since then, the proportion of inmates paroled has decreased dramatically to less than 1%,[4] compounding problems of severe prison

* Yale Law School, J.D. expected 2009; Brown University, B.A. 2004.

1. *California's Prisoners Tell How They See the System*, S.F. CHRON., Aug. 20, 2000, at 5.

2. This Comment addresses discretionary parole decisions, not the automatic placement of all released prisoners under parole supervision. For a discussion of automatic placement, see JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST., CALIFORNIA'S PAROLE EXPERIMENT 6 (2002), *available at* http://www.urban.org/UploadedPDF/CA_parole_exp.pdf.

3. *California Lifers Look to Governor for Parole* (National Public Radio Weekend Edition radio broadcast Mar. 16, 2008) at 1:58, *available at* http://www.npr.org/templates/story/story.php?storyId=88324577.

4. *Id.* at 2:42-2:58 (noting that Governor Gray Davis released only eight lifers during his four-year term, and Governor Arnold Schwarzenegger has approved parole for more than forty lifers annually since his election in 2003); California Department of Corrections and Rehabilitation, Caseload Statistics (2007), http://www.cdcr.ca.gov/Reports_Research/caseload_stats.html (last visited Oct. 15, 2008) (reporting that 4498 lifer hearings were held in 2003).

overcrowding.[5] Fearing the political consequences of releasing convicted offenders, recent governors have appointed "tough on crime" parole board members who are unlikely to grant parole.[6] In 2006, the Bureau of Parole Hearings ("parole board" or "board") rejected 99.5% of parole applications from eligible inmates.[7] Even when the board approves parole, the Governor can—and frequently does—reverse the decision.[8] Typically, the board and Governor rely on the commitment offense to deny parole, regardless of the offender's rehabilitation and good prison behavior. This Comment explores the due process implications of using the commitment offense as a basis for parole denials. It examines recent California Supreme Court and Ninth Circuit cases and argues that parole decisions should weigh the commitment offense less heavily than rehabilitative progress after the expiration of the minimum sentence term.

I. Discretionary Parole in California

In 1977, California adopted its current sentencing system, mandating determinate sentencing for most offenses,[9] but preserving indeterminate sentencing for certain serious ones.[10] Indeterminate sentences typically range from a

5. California's thirty-three adult prisons, designed for about 100,000 inmates, currently hold 159,000. *Judge Orders Schwarzenegger To Testify on Prisons*, S.F. Chron., Aug. 14, 2008, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/08/13/state/n101001D89.DTL&tsp=1. The problem has become so severe that a hearing was scheduled for November 2008 to determine whether overcrowding is causing unconstitutionally poor prison health care. *See* Michael Rothfeld, *Prison Overcrowding Negotiations Get 30 More Days*, L.A. Times, May 31, 2008, at B8.

6. *See, e.g.*, Julia Reynolds, *Parole Board Members Feel Pressure: Those Asked To Resign Deny That They're Soft on Crime*, Monterey County Herald, Oct. 9, 2007, at A1 (suggesting that Governor Schwarzenegger asked parole board members to resign because of their willingness to grant parole).

7. Andy Furillo, *Lifers Seek Court Allies in Fight with State for Parole*, Sacramento Bee, Dec. 10, 2007, at A1.

8. Editorial, *Doors Closing for Lifer—Again*, S.F. Chron., Oct. 15, 2005, at B4; Robert Salladay, Governor's Race: Gray Davis / Democrat / Profile, S.F. Chron., Oct. 27, 2002, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/10/27/MN159709.DTL.

9. *See* Cal. Penal Code § 1170 (a)(1) (West 2004) (declaring "determinate sentences fixed by statute" to be California's penal scheme). *See generally* April Kestell Cassou & Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L.J. 5 (1978) (providing the legislative history of the 1977 overhaul of California's sentencing system).

10. These crimes include first degree murder without a special circumstance, attempted first degree murder, conspiracy to commit first degree murder, second degree murder, kidnapping, and certain repeat offenses. *See* Cal. Penal Code

minimum term up to life imprisonment, with the parole board determining the release date.[11] Approximately 17% of California's inmates are currently serving an indeterminate life sentence.[12]

The possibility of parole serves important public interests. It provides inmates with an incentive to rehabilitate and build the skills necessary for successful re-entry into their communities. Release contingent on good behavior also encourages inmate compliance with prison rules.[13] Perhaps recognizing these considerations, the California legislature mandated that the parole board "*shall normally*" grant parole,[14] unless "consideration of the public safety requires a lengthier period of incarceration for [the] individual."[15] The board may consider any available information when determining suitability for parole, with the original offense representing just one of many factors.[16] If the board con-

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§§ 190, 190.05, 209, 217.1 (West 2008); CAL. PENAL CODE §§ 182, 664, 667.51, 667.7 (West 1999 & Supp. 2008).

11. Indeterminate sentence statutes exist in two forms: most specify a minimum sentence term, while others merely assign life imprisonment with the possibility of parole. *See* People v. Jefferson, 980 P.2d 441, 445 (Cal. 1999). If a sentence includes a minimum term, the prisoner must serve at least that term, although "good time" credits sometimes can be subtracted. CAL. PENAL CODE §§ 3046, 3049 (West 2000 & Supp. 2008). Other crimes, like torture and kidnapping, have no specified minimum sentence. *Id.* §§ 206.1, 209 (West 2008). For these crimes, prisoners must serve at least seven years. *Id.* § 3046(a)(1) (West 2000).

12. LEGIS. ANALYST'S OFFICE, JUDICIAL & CRIMINAL JUSTICE, at D-70 (2006), *available at* http://www.lao.ca.gov/analysis_2006/crim_justice/crimjust_anl06.pdf.

13. American Probation and Parole Association, Discretionary Parole (2002), http://www.appa-net.org/about/ps/discretionaryparole.htm (last visited Oct. 15, 2008).

14. CAL. PENAL CODE § 3041 (a) (West 2008) (emphasis added); *see also id.* § 3041(b) (stating "[t]he panel or board *shall* set a release date . . . .") (emphasis added).

15. *Id.* § 3041(b).

16. *See* CAL. CODE REGS. tit. 15, § 2402(b) (2005). The relevant regulations list circumstances tending to show unsuitability and suitability for parole, including "an especially heinous, atrocious or cruel" commitment offense, previous violence, unstable social history, sadistic sexual offenses, psychological factors, and institutional behavior. *Id.* § 2402(c)(1)-(6); *see also id.* § 2402(d)(1)-(9) (indicating circumstances tending to show suitability for parole, such as no juvenile record, stable social history, signs of remorse, motivation for crime, Battered Woman Syndrome, lack of criminal history, age, understanding and plans for future, and institutional behavior).

cludes that an inmate is suitable for parole, it must then set a release date.[17] The board's decision is subject to the Governor's review.[18]

In practice, reliance on the commitment offense has swallowed the statutory mandate that parole "normally" should be granted. A recent judicial review of California parole decisions found that every parole application was denied at some point based on the nature of the original offense,[19] supporting oft-voiced charges of an unwritten no-parole policy for indeterminately sentenced inmates.[20] Denying parole solely on the basis of the commitment offense raises serious due process concerns, as the California Supreme Court and the Ninth Circuit have begun to realize.

II. Due Process Analysis and the Role of the Commitment Offense

The U.S. Supreme Court famously decreed that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country.... Prisoners may not be deprived of life, liberty, or property without due process of law."[21] Indeed, the constitutional right to "due process" has long been the source of important protections for inmates.[22]

A due process violation occurs when the state: (1) deprives an individual of life, liberty, or property; and (2) denies adequate procedural protections.[23] Given the mandatory language in California's parole statute,[24] every indetermi-

17. *Id.* § 2403(a). This release date is set through an administrative matrix, which uses the circumstances of the crime to determine an appropriate base term. The base term is calculated based on the category of crime, prior relationship to victim, victim contribution, and the resulting physical trauma. *Id.*

18. Cal. Const. art. V, § 8(b); *see also In re* Rosenkrantz, 59 P.3d 174, 207 (Cal. 2002) ("[T]he Governor's review is limited to the same considerations that inform the Board's decision.").

19. *In re* Criscione, No. 71614 at 9 (Cal. Super. Ct. Aug. 30, 2007). The court reviewed a random sample of 2690 cases decided in a thirteen-month period.

20. *See* Legis. Analyst's Office, Judiciary & Criminal Justice, at D-3 to -4, D-56 to -62 (2000), *available at* http://www.lao.ca.gov/analysis_2000/crim_justice/crimjust_anloo.pdf.

21. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

22. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 487 (1980) ("[T]he involuntary transfer of a ... prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause."); Baxter v. Palmigiano, 425 U.S. 308 (1976) (reviewing inmate's due process rights at disciplinary hearing); *Wolff*, 418 U.S. at 557 (recognizing inmate's liberty interest in "good time" credits).

23. *E.g.*, Biggs v. Terhune, 334 F.3d 910, 913 (9th Cir. 2003) (citing McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir. 2002)).

24. Cal. Penal Code § 3041(b) (West 2000 & Supp. 2008).

nately sentenced prisoner has a liberty interest in parole,[25] commencing "upon . . . incarceration."[26] Thus, any parole denial or finding of unsuitability must comport with due process. The second prong of the due process test requires that "some evidence" support the parole decision.[27] Although the "some evidence" threshold is low, it prevents the state from interfering with a liberty interest "without support or [in an] otherwise arbitrary" manner.[28]

The legal controversy over the appropriate role of the commitment offense in parole denials centers on when commitment offenses can satisfy the "some evidence" standard. Previous California Supreme Court decisions permitted parole denials based solely on the commitment offense if it was "particularly egregious"[29] or "especially callous and cruel."[30] This led to confusion over whether "some evidence" had to support the egregiousness of the crime or the inmate's public safety risk, per the statute. And, despite judicial guidance that the circumstances of the offense had to exceed "the minimum necessary to sustain a conviction" for the crime to justify a parole denial,[31] the parole board labeled almost every offense as sufficiently callous to deny parole.

In August 2008, the California Supreme Court began to restore inmates' parole rights by limiting the use of the commitment offense to support parole denials.[32] Its opinion in *In re Lawrence* clarified that the only permissible reason to deny parole is *current* dangerousness, adding that the nature of the offense "does not, in every case, provide evidence that the inmate is a current threat to public safety."[33] The court held that when evidence of an inmate's rehabilitation and parole suitability is "overwhelming," and "the only evidence related to unsuitability is the gravity of the commitment offense . . . [which] is temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur," then "the immutable circumstance that the commitment offense

25. *See McQuillion*, 306 F.3d at 901; *see also* Bd. of Pardons v. Allen, 482 U.S. 369, 373 (1987) (holding that mandatory language in parole statutes creates a protected liberty interest).

26. *Biggs*, 334 F.3d at 915.

27. *See* Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1129 (9th Cir. 2006); Jancsek v. Or. Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). California's statutes safeguard an inmate's ability to be heard at parole hearings and ascertain the reasons behind adverse decisions, which the second prong of the due process test also requires. *See* CAL. PENAL CODE §§ 3041.5, 3041.7 (West 2000).

28. Superintendent v. Hill, 472 U.S. 445, 457 (1985) (noting that the "some evidence" standard assures that "the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary").

29. *In re* Rosenkrantz, 59 P.3d 174, 222 (Cal. 2002).

30. *In re* Dannenberg, 104 P.3d 783, 785 (Cal. 2005).

31. *Rosenkrantz*, 59 P.3d at 222.

32. *In re* Lawrence, No. A174924 (Cal. Aug. 21, 2008).

33. *Id.* at 36.

involved aggravated conduct does not provide 'some evidence' *inevitably* supporting the ultimate decision that the inmate remains a threat to public safety."[34] Thus, the court signaled that the board no longer could conflate a heinous crime with public safety risk, and that lower courts henceforth had to scrutinize board determinations that the inmate still posed a danger.[35] More specifically, the court stated:

> [A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental states, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.[36]

The *Lawrence* court reached these conclusions based on state due process grounds and statutory construction.[37] Nevertheless, the decision mirrors recent Ninth Circuit cases involving federal due process concerns, which suggested that the commitment offense should not always constitute "some evidence."[38] These cases recognized that relying solely on a commitment offense to deny parole inaccurately estimates an inmate's current public safety risk and does not account for an inmate's rehabilitative progress.[39] In particular, the Ninth Circuit appears to understand that the predictive value of past events, like the commitment offense, diminishes over time. As one district court stated, relying on the commitment offense "as an indicator of [an inmate's] dangerousness may be reasonable for some period of time . . . [but] continued reliance on [it] . . . violates due process because . . . [the] offense has become such an unre-

34. *Id.* at 3.

35. Research confirms the California Supreme Court's intuition that a heinous crime is not necessarily proof of a future public safety risk. For instance, the U.S. Department of Justice found that homicide offenders have the lowest re-arrest rate of any other serious offender. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002); *see also* NAT'L PAROLE BD., GOV'T OF CAN., REPEAT HOMICIDE OFFENCES COMMITTED BY OFFENDERS UNDER COMMUNITY SUPERVISION (suggesting that those convicted of homicide are unlikely to murder again) (on file with the Yale Law & Policy Review).

36. *In re* Lawrence, No. A174924, slip op. at 36 (Cal. Aug. 21, 2008).

37. There may be some difference between state and federal due process in this context, but the court does not address it.

38. *See* Irons v. Carey, 505 F.3d 846 (9th Cir. 2007); Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003).

39. *See, e.g.*, *Biggs*, 334 F.3d at 916-17.

liable predictor of his present and future dangerousness that it does not satisfy the 'some evidence' standard."[40]

While the California Supreme Court sought to inject new life into the otherwise moribund possibility of parole, its decision lacks the specificity needed to provide firm guidance to parole boards and courts. Given the politicization of parole decisions and the reluctance of the board and the Governor to grant parole,[41] it is unclear whether *Lawrence* can produce the impact on the parole system that the court intended. While the decision insists that the parole board carefully scrutinize an inmate's rehabilitation and the continued relevance of the commitment offense, it is possible that the board may continue to deny parole by simply nodding to the decision's subjective and nebulous language. Almost anything arguably "indicates that . . . the commitment offense remain[s] probative . . . of a continuing threat to public safety."[42] And, at what point is a commitment offense sufficiently "temporally remote?" The court may have resisted more precise language because of the fact-specific nature of parole decisions, or because predictions of future behavior are inherently difficult to tie to fixed rules. However, the decision lacks the specificity necessary to overcome the predictable (and demonstrated) reticence of the parole board to amend its practices. Rather than hope that the lower courts will fill in the details necessary to effect real change, the legislature should take steps to buttress *Lawrence.*

III. A Proposed Solution

Action by the California legislature is necessary to reinforce the California Supreme Court's declaration that the parole board must cease automatically denying parole based on the original crime. State legislators should enact laws reaffirming the importance of rehabilitation by insisting that the parole board not rely indefinitely on the original offense to deny parole. Further, it should resolve the ongoing question of when the original offense must cede to evidence of rehabilitation. The most practical solution would be to accept the Ninth Circuit's suggestion that the expiration of the minimum prison sentence may be the most suitable time.

In *Irons v. Carey,*[43] the Ninth Circuit implied the commitment offense alone might not constitute "some evidence" after an inmate had served his minimum sentence.[44] The court concluded that reliance on the commitment offense to deny parole comports with due process, but the court explicitly limited its holding to inmates deemed unsuitable *prior* to the expiration of their minimum sen-

40. Rosenkrantz v. Marshall, 444 F. Supp. 2d 1063, 1084 (C.D. Cal. 2006).

41. *See supra* notes 6-8 and accompanying text.

42. *In re* Lawrence, No. A174924, slip op. at 26 (Cal. Aug. 21, 2008).

43. Irons v. Carey, 505 F.3d 846 (9th Cir. 2007).

44. *Id.* at 853-54.

tences.[45] Although the court did not explain the significance of the minimum term in parole decisions, it signaled a useful benchmark for judging when the commitment offense should weigh less heavily than rehabilitative progress. The minimum sentence represents the amount of punishment that the legislature has deemed necessary based on considerations of retribution and deterrence.[46] Any subsequent incarceration should be guided solely by public safety concerns, for example, whether the prisoner is likely to reoffend. Evidence of post-offense conduct, including steps toward rehabilitation, should receive more weight at this point in the parole calculus than the original crime. It is important to note that eliminating the commitment offense from the suitability determination after an inmate serves the minimum sentence does not render that offense irrelevant, because it dictates the actual parole release date set through the parole board's administrative matrix.[47] Currently, the commitment offense is "double-counted," factoring into both the suitability determination and the release date calculation.[48]

The legislature should revise the California Penal Code in two ways. First, if the board or the Governor uses the commitment offense to deny parole, the legislature should require a precise explanation of why the offense still has determinative value in order to facilitate inmate challenges to the decision. Second, the legislature should state that, after the minimum sentence expires, there should be a presumption that the original offense no longer bears on parole suitability or current dangerousness. The presumption should only be overcome if the record shows scant evidence of rehabilitation or other truly exceptional circumstances. The presumption also should become stronger with the passage of time.[49]

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45. *Id.* at 853 ("All . . . we hold today . . . is that . . . due process was not violated when these prisoners were deemed unsuitable for parole *prior to the expiration of their minimum terms.*") (emphasis added).

46. *See, e.g., In re* Lawrence, 59 Cal. Rptr. 3d 537, 559 (Cal. Ct. App. 2007) ("When the Legislature sets an indeterminate maximum term with a fixed minimum term, the latter can be viewed as setting the period of imprisonment deemed necessary to satisfy [retribution and deterrence], while the justification for continued imprisonment beyond that fixed minimum depends on the need for continued incapacitation of the offender.").

47. *See* CAL. CODE REGS. tit. 15, § 2403(a) (2008).

48. *See* Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal To Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1592 (2005).

49. Given the politicization of the Governor's role in the parole process, it might be preferable to eliminate the Governor's review entirely. But, the Governor's power to review parole decisions comes from Proposition 89, a voter-passed constitutional amendment. *See Statewide Measures on Tuesday's Ballot*, L.A. TIMES, Nov. 6, 1988, at 27. The California Constitution does not normally permit the state legislature to amend voter initiatives. CAL. CONST. art. II, § 10(c). Therefore, the removal of the Governor from the parole process would require another voter initiative.

By emphasizing post-conviction factors after completion of the minimum sentence term, the parole board can reward deserving, genuinely reformed inmates. Reducing reliance on the commitment offense may also force a more thorough review of prisoners' records, generating more accurate parole decisions that deny release for truly dangerous offenders while incentivizing "earned" release for selected inmates.[50] This mechanism could increase the number of deserving parolees and ease some of the pressure on California's overcrowded prisons.

Conclusion

By stating that the parole board should "normally" grant parole, the California legislature expressed a belief that few offenders should remain incarcerated beyond their parole eligibility date. Unfortunately, reliance on the commitment offense contravened that mandate, and illusory promises of parole have proved cruel to inmates, expensive to taxpayers, and destabilizing to prisons. But while the commitment offense will never change, inmates can—and do—reform. The California Supreme Court recently recognized that due process requires parole decisions to account for rehabilitative progress. The legislature should reinforce that message, adding a bright line temporal threshold to ensure implementation of the court's directive.

50. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 Crime & Just. 479, 480-81 (2000).