Parole Board Discretion and the Use of Base Term Enhancements

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Introduction

California's criminal justice system utilizes a determinate sentencing scheme where the legislature sets the possible punishments that a judge may impose on offenders.[1] California's determinate sentencing law states that the purpose of imprisonment for crime is punishment and that that purpose is best served by proportionate and uniform sentences. [2] The determinate sentencing law attempts to achieve this uniformity through a philosophy of "like punishments for like crimes" by reducing the freedom of trial court judges in their sentencing options. The hope is that more fair and accurate punishment will result from a system with less judicial discretion, but for those very serious offenders still given an indeterminate sentence of "for life," the discretion built into the system remains a powerful reality.

For individuals who receive indeterminate sentences without a defined maximum term for imprisonment, a trial sentence is simply an entry point into a criminal justice system filled with levers of discretion that subject inmates to wildly different outcomes. The time an individual spends under correctional control can even extend after they are found suitable for parole. The practice of back-end sentencing, increasing the amount of time an inmate spends under correctional control after they receive their original sentence, is a reality for many lifers in the California criminal justice system. This paper seeks to examine one aspect of this system, how the Board of Parole Hearings exercises discretion when setting release dates for individuals who have been found suitable for parole.

Under Cal. Penal Code § 3041 the Board has the authority to not only grant parole, but also to set the date a parole eligible individual will be released from prison. While significant empirical analysis has been dedicated to analyzing how the Board determines whether an individual is suitable for parole, less research has been dedicated to understanding how the Board exercises discretion in setting release dates for parole suitable inmates. Finding an individual suitable for parole does not guarantee release. Indeed, in some cases a parole suitable inmate may have their release date set several years after they have been found suitable for release. According to CCR Title 15 §§ 2406 and 2407,[3] the Board can add enhancements to the original sentence based on whether an individual committed other offenses or used a firearm in the commission of their original crime. Our central research question focuses on understanding how §§ 2406 and 2407 are applied and whether they are applied consistently or in a way that can be explained by inmate characteristics. We begin by outlining the larger framework in which our research fits, discussing sentencing procedures, and explaining how the Board sets release dates. We then proceed by analyzing how release dates were calculated for lifers granted parole in 2011 to determine if the Board is applying its discretionary authority uniformly or based on specific inmate characteristics. Finally, we examine the regulations' text and possible legal issues that arise from their application. The goal of this paper is to explore how this discretion is used in California, look at the authority that grants the Board of Parole Hearings in California the power

[1] The authors of this paper would like to extend a special thanks to Joan Petersilia, Bob Weisberg, Debbie Mukamal, Beth Colgan, and Lisa Quan for their guidance and assistance in pursuing our research on this subject.
[2] Cal. Penal Code § 1170 (West 2012).
[3] Note that §2285 and §2286 are parallel regulations to §2406 and §2407 that apply to life crimes other than murder and attempted murder. Because the majority of the lifers in our sample fall under 2406 and 2407, we will refer to these regulations throughout.

to alter sentences, discuss whether this practice raises constitutional questions, and advance policy suggestions.

A System of Discretion

The term discretion, while important in the criminal justice system, is often applied with ever changing meanings. At the most basic level, discretion empowers individuals to decide or make a judgment about alternative courses of action or inaction when presented with a set of facts. This paper builds on that specific definition of discretion as it relates to formal actors in the criminal justice system (prosecutors, judges, parole boards, etc.). Our definition of discretion has two characteristics: actors are able to exercise some control over an outcome and their ability to exercise control is constrained by formal or informal rules. In the context of criminal justice, exercising discretion means having the ability to make different decisions based on similar sets of facts that affect how long an individual will serve under correctional control. This discretion can derive from statutes that assign broad discretion or grant actors the power to reach judgments within a range of options.

Levers of discretion permeate through every level of the criminal justice system. This discretion can be used to mitigate the sentence imposed against a defendant and it can also provide an actor the opportunity to enhance an imposed penalty so that an individual spends more time under correctional control.[4] Before an individual even enters the system, decisions about where police patrol and who they will arrest impact how the criminal justice system intakes individuals. Once defendants are detained, prosecutors exercise prosecutorial discretion in deciding who to charge and what charges they will pursue.[5] If an individual is found guilty, he is subject to yet another lever of discretion at the sentencing phase when the trial judge decides his sentence.[6] Once incarcerated, discretion remains an important factor because the parole board can shift the amount of time an individual spends under the control of the correctional system away from their original sentence. These shifts can take place at the front-end (in courts) and at the back-end (parole and post-release) of the system.

Extensive effort has been dedicated to understanding the effects of discretion throughout the criminal justice system. Research has primarily focused on front-end discretion by prosecutors and judges,[7] but our research draws on work by other scholars who have analyzed discretion at the "back-end" of the system by parole boards and supervisors of parolees deemed suitable for parole or release. In their research on parole, Petersilia et al. note that although many states have abolished the authority of parole boards to grant early release, "the overall reliance on parole supervision has increased dramatically in a manner, however, that is often disconnected from the decision to release."[8] In 2008, the parole board in California sent 248,000 parole

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[4] LORAINE GELSTHORPE AND NICOLA PADFIELD, EXERCISING DISCRETION: DECISION MAKING IN THE CRIMINAL JUSTICE SYSTEM AND BEYOND (2003).

[5] MICHAEL SIMONS, PROSECUTORS AS PUNISHMENT THEORISTS: SEEKING SENTENCING JUSTICE (2008).

[6] Peterson and Lynch found that in Los Angeles county, for example, that "approximately 87% of first-degree murder cases meet the criteria for one or more special circumstances" which allows prosecutors to exercise additional control over a case. Nicholas Peterson & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, Vol 102, J. CRIM. L. & CRIMINOLOGY 1248 (2012).

[7] Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117, Yale L. J. 1481-82. 2008.

[8] JOAN PETERSILIA & KEVIN R. REITZ OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, 628 (2012).

violators back to prison accounting for 37% of all newly admitted prisoners.[9] Parole violations can extend sentences and guarantee an individual will spend significantly more time under correctional control than their original sentence mandates.[10] This is the essence of what scholars like Travis, et al. have called "back-end sentencing."[11] Once a defendant receives a sentence, the levers of discretion they confront on the back-end can add years to the time he serves under correctional control and often result in a sentence that does not resemble the sentence he received at the trial phase. This back-end sentencing is not limited to parole violations. Our paper examines how parole boards fit into this developing understanding of back-end sentencing.

For many decades, parole boards were granted statutory authority to release an individual deemed eligible for parole. This lever of discretion was extensively studied through its decline in the latter part of the 20th century when states turned towards determinate sentencing laws that minimized the discretion of parole boards.[12] In California, indeterminately sentenced inmates can be released after they are found suitable for release by the Board of Parole Hearings. The Board's statutory discretion allows them to consider the threat that an individual poses to public safety in deciding his parole suitability,[13] but it also opens up the possibility that other factors influence the time an individual spends under correctional control. For example, research has suggested that factors including race may influence the way parole boards exercise discretion.[14]

This paper focuses on the discretion exhibited by parole boards when setting release dates for lifers (individuals sentenced to life imprisonment) granted parole in order to develop a deeper understanding of back-end sentencing in California's criminal justice system. Even after the parole board finds an individual suitable for release they may still require an individual to spend months or even years in prison before being released. These lengthened sentences result from the term calculation process the parole board engages in to determine how many years an individual should spend in prison to satisfy the non-rehabilitative purposes of incarceration. These term calculations can extend or alter an individual's sentence, creating a system of back-end sentencing in which a judge's sentence may bear little resemblance to the actual time an individual serves under correctional control.[15] Examination of these term calculations and the discretion involved in their application first requires a broader understanding of where the parole board fits in California's current sentencing scheme.

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[9] *Id.*

[10] Jeffery Lin, Ryken Grattet, & Joan Petersilia, *"Back-End Sentencing" and Reimprisonment: Individual, Organizational, and Community Predictor of Parole Sanctioning Decisions*, Vol 48 Criminology, 759-795 (2010).

[11] Jeremy Travis, *Back-end sentencing: A practice in search of a rationale*, Vol 74, No. 2, Social Research: An International Quarterly 631-644 (2007).

[12] JOAN PETERSILIA & KEVIN R. REITZ OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, 628 (2012). It is also important to keep in mind that while California, among other states, turned away from indeterminate sentencing the practice of giving out an indeterminate sentence has not been abandoned. Indeed under California's Three Strikes law indeterminate sentences have been increasingly relied upon.

[13] Cal. Penal Code § 3041 (West 2012).

[14] Beth Huebner & Timothy Bynum, *The Role of Race and Ethnicity in Parole Decisions*, Vol 46, No. 2, Criminology 907-938 (2008).

[15] Based on our research, we found no evidence of other states with a similar structure that allows for the parole board exercise this type of discretion over judicial sentences.

Understanding Sentencing

Determinate, Indeterminate, and In-between

In California sentencing regimes and ideals have evolved tremendously over the last century. Before the 1970s, sentencing emphasized the need for individual punishments that suited individual needs.[16] This system of indeterminate sentencing, where a punishment lacked a definitive date of release or a maximum term of confinement, granted significant authority to judges.[17] Judges were seen as qualified to determine suitable punishments and rehabilitative needs and parole boards were granted ultimate authority to release inmates.[18] A combination of political and social forces led to a reexamination of indeterminate sentencing.[19] After the 1970s most states abandoned indeterminate sentencing in favor of determinate sentencing laws that offered less discretion to judges.[20] The transition to determinate sentencing shifted the responsibility for determining a suitable sentence for a crime from judges to legislatures.[21] Despite this shift, the primary responsibility for sentencing, even in a determinate system, remains with the judicial branch and individual judges.

Although California has adopted a mostly determinate system, more than 30,000 inmates are still serving indeterminate sentences of life with the possibility of parole.[22] These inmates have been sentenced under California's since abolished indeterminate sentencing regime, received an indeterminate sentence because of a third strike offense, or committed an offense that still carries an indeterminate sentence. Their release is not determined by a set date but instead by the Board of Parole Hearings. In 2010, the Stanford Criminal Justice Center released a comprehensive report on lifers serving with the possibility of parole. The report showed that most lifers are admitted for first or second degree murder, they are older than the general population, and they have served on average more than 18 years in prison.[23] The population examined in our research includes individuals granted parole from this specific lifer population.

The Sentencing Phase and the Parole Process

In the sentencing phase a judge makes several important decisions, but one decision central to our research is the decision about how to apply charges against a defendant in cases where a defendant is convicted of multiple crimes. For each charge an individual is convicted of the judge has the option to issue a sentence, stay a sentence, or to strike a penalty from the record.[24] Although there are limitations on when and how judges can strike certain imposed

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[16] LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1994).
[17] Nancy Gertner, *Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, Vol. 100, No. 3, Crim. L. & Criminology 691 (2010).
[18] *Id.*
[19] LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1994).
[20] *Id.*
[21] *Id.*
[22] ROBERT WEISBERG, DEBBIE A. MUKAMAL, AND JORDAN D. SEGALL, STANFORD CRIMINAL JUSTICE CENTER LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA (2011).
[23] *Id.*
[24] Cal. Penal Code § 1385 (West 2012); *See People v. Jones*, Cal.App.4th 1373, 1378-1379 (2007) ("It is well established that, as a general matter, a court has discretion under section 1385, subdivision (c), to dismiss or strike an enhancement, or to 'strike the additional punishment for that enhancement in the furtherance of justice.'").

penalties,[25] the authority to strike an additional enhancement in cases where a defendant is convicted of multiple counts is an exercise of statutory and common law authority. This remains true in cases where a judge stays certain counts, meaning that they shall not be applied against an individual once the time served for the more serious conviction has been completed.[26] If a judge determines that a sentence should be applied he can order the sentence to be served either consecutively or concurrently. Consecutive sentences run back-to-back such that completion of the first consecutive sentence allows an individual to start serving time towards the second consecutive sentence. Concurrent sentences run alongside each other. The same time under correctional control can be used to satisfy the punishment for both concurrent sentences. The ability of a trial judge to order a sentence to be served consecutively or concurrently has been affirmed by the U.S. Supreme Court and has deep common law origins.[27]

For lifers, the sentencing phase does not end in the courtroom because ultimately their release depends on an affirmation by the Board of Parole Hearings in California that they are suitable for parole. This board of 12 full-time commissioners is charged with the authority to determine the suitability of an inmate for release once he has served time until his minimum eligible parole date.[28] A suitability hearing consists of an in-person meeting between a commissioner from the Board of Parole Hearings, a deputy commissioner, and the inmate, and may include counsel, a representative for the victim, and a representative for the District Attorney in the county in which the inmate was sentenced.[29] The Board may also receive written notice from the judge of the court where an inmate was convicted, the defendant's attorney at trial, and the relevant law enforcement agency that handled the case.[30] Suitability hearings are not supposed to focus attention on the guilt or innocence of the individual but instead on whether he is suitable for release.[31] The rate of suitability determinations remained relatively constant from 2004 to 2008 at around ten percent, but in 2008 it increased significantly due to the passage of Marsy's Law.[32] [33]

If an individual is deemed suitable for release their grant then must be approved by the Governor. In preparing a case for review the Board of Parole Hearings creates Executive Case Summary (ECS) reports that contain information about an individual's offense, their prior arrest history, and other information relevant to the case. ECS reports are also accompanied by psychological evaluations. An ECS report is prepared for every individual found suitable for release by the Board and thus an assessment of ECS reports is an assessment of the population of individuals who have received grants from the Board. After the ECS reports are submitted to the

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[25] *See, e.g.*, Cal. Penal Code, §§ 667.61 (g), 1385 (b), 12022.53 (h) (West 2012).
[26] *S*ee People v. Miller, 558 P.2d 552, 557 (1977) ("When a defendant suffers multiple convictions, sentencing for some of which is precluded by operation of section 654, an acceptable procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.").
[27] *See Oregon v. Ice*, 170 P. 3d 1049 (2009).
[28] Cal. Penal Code § 3040 (West 2012).
[29] WEISBERG, ROBERT, DEBBIE A. MUKAMAL, AND JORDAN D. SEGALL, STANFORD CRIMINAL JUSTICE CENTER LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA (2011).
[30] *Id.*; Cal. Penal Code § 3042 (West 2012).
[31] Cal. Code Regs. Tit. 15, §2402(c) (2012).
[32] See Life in Limbo report, footnote 28.
[33] Marcy's Law amended § 3041.5(b) to extend the period a lifer has to wait for a new parole hearing after a denial to a maximum of fifteen years, with the possibility of receiving a ten, seven, five, or three year denial.

Governor's office, the Governor can request the Board review a suitability determination,[34] or in cases where the primary offense is murder the Governor can reverse the Board's finding.[35] Since 1991, the reversal rate by California Governors has ranged from less than ten percent (1997) to one-hundred percent (1999 and 2001).[36] Recently, the rate of grant reversals has decreased significantly under Governor Brown meaning that more parole decisions by the Board are not being overturned.[37] ECS reports and research work done by the Governor's office serve as the primary source of information for the Governor when reviewing parole decisions.

Term Calculations

If an individual is found suitable for parole release by the Board and affirmed by the Governor, he is still not guaranteed immediate release. When an individual is granted parole by the Board their ultimate release depends on their calculated release date.

California Penal Code §3041 directs the Board of Parole Hearings to meet with each inmate one year before their minimum eligible parole release date and "normally set a parole release date," unless the inmate still poses a threat of continuing public danger.[38] The Board is to set release dates "in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates."[39]

In order to fulfill its direction to calculate uniform terms for parole release dates, the Board of Parole Hearings has adopted regulations that address how base terms are to be calculated for each category of life crime. After an inmate is found suitable for parole under these regulations, a "base term" is calculated using a bi-axial matrix based on the details of the inmate's life offense. Once an inmate's life offense is situated in the matrix, the Board selects the lower, middle, or upper base term contained in the matrix based on mitigating or aggravating circumstances of the crime.[40] [41]

After the base term is determined, enhancements (additional terms) are added for any use of a firearm and for any offenses other than the principal life crime for which the inmate was convicted.[42] Time for post-conviction credit earned by the inmate is then subtracted from this term to calculate the final total adjusted term.[43] If the inmate has served time equal or greater than the total adjusted term upon being found suitable for parole, he or she will be released

[34] See Life in Limbo report, footnote 28.
[35] Cal. Penal Code § 3041.2 (West 2012).
[36] See Life in Limbo report, footnote 28.
[37] *Id.*
[38] Cal. Penal Code §3041 (West 2012); *In re Dannenberg*, 104 P.3d 783, 786 (2005).
[39] Cal. Penal Code § 3041 (a) (West 2012).
[40] Cal. Code Regs. Tit. 15, §2403 (2012).
[41] See Appendix A for a sample matrix. Note that the matrix used for a particular crime also depends on the year in which the crime was committed.
[42] Cal. Code Regs. Tit. 15, §§ 2406, 2407 (2012).
[43] Cal. Code Regs. Tit. 15, § 2290 (2012).

immediately on parole. If an inmate has not served time equal to the total adjusted term, a future release date is set according to the completion of the adjusted term.[44]

Section 2407 allows for enhancements for additional offenses to be added to the base term regardless of whether they were sentenced concurrently or consecutively. The effect of this regulation upon base terms is not obvious and is best explained through an example.

	Offender A	Offender B
Convictions	2nd degree murder; 1st degree burglary	2nd degree murder; 1st degree burglary
Sentence	15 years to life + 6 concurrent years	15 years to life + 6 consecutive years
MEPD	15 years after conviction	17 years after conviction
Base Term	15 years (Cell A – 1 – Mitigated)	15 years (Cell A – 1 – Mitigated)
Adjusted Term	21 years	21 years
Total Time	21 years	21 years

Figure 1

The above figure is a simplified comparison between two nearly identical hypothetical criminal offenders. Both offenders are convicted of committing second degree murder and first degree burglary, and each offender receives an indeterminate sentence of fifteen years to life as their principal sentence. However, Offender A receives a subordinate sentence of six *concurrent* years for first degree burglary while Offender B receives a subordinate sentence of six *consecutive* years. Because Offender A is serving his subordinate sentence concurrently, his minimum eligible parole date (MEPD), when he may first stand before the parole board to determine his suitability for parole, is fifteen years after his conviction. Because Offender B is serving his subordinate term consecutively, he must wait an extra two years (one-third of the six year subordinate sentence under California Penal Code §1170.1(a)) before he may stand for his parole hearing. The determinate sentence is served first,[45] so Offender B's fifteen year to life term will not begin until after he has served his two year sentence.

After an offender is granted parole the parole board calculates the offender's base term (as described above) to determine the offender's actual release date. In the above example, the parole board selects cell A – 1 on the second degree murder matrix and chooses the mitigating term for both Offender A and Offender B.[46] Because § 2407 authorizes the Board to add enhancements to the base term for multiple convicted crimes regardless of whether they are sentenced as concurrent or consecutive, offenders A and B will both have six years added to their base term of fifteen years. If we assume that both of our hypothetical offenders are granted parole at their first parole hearing (a highly unlikely assumption), this will result in both

[44] Cal. Code Regs. Tit. 15, § 2289 (2012).
[45] Cal. Penal Code §669(a) (West 2012).
[46] See Appendix A for the full second degree murder matrix.

Offender A and Offender B serving exactly twenty-one years in prison. Offender A will go to his parole hearing fifteen years after his conviction and will then wait six years after being found suitable for parole before he is released. Offender B will go to his parole hearing in seventeen years and will be released four years after being found eligible for parole.

In the above example, Offender A theoretically loses six years of liberty by having his or her subordinate term treated as if it were consecutive. This is a simplified example with only one subordinate term and no weapon enhancements. In a real case, the difference between concurrent and consecutive sentences is usually irrelevant because the inmate will have served time greater than his or her total adjusted term by the time parole is granted. But for those who are affected, the difference between serving subordinate terms concurrently and consecutively can total up to ten years or more of lost liberty.

Research Methodology

Our research focused on Executive Case Summary (ECS) reports as a way of examining how the Board of Parole Hearings makes determinations once they have found an inmate suitable for parole. ECS reports are unique because they contain information about individuals who have been found suitable for parole but also provide a glimpse into the information available to key decision-makers in the grant process. Scholars have previously engaged in qualitative analysis of other documents produced or included in the process. For example, one study scrutinized pre-sentencing reports to explore how facts used to aid decision makers in sentencing and post-sentencing are discovered.[47] Other studies have used transcripts from hearings conducted by the Board to establish profiles of lifers appearing before the Board[48] or to assess the decision making process and potentially disparate outcomes.[49]

ECS reports include a summary of an individual's case details linked to his parole suitability and how long he must serve in prison before he can be released. Analyzing ECS reports allows scholars to connect term calculations and other discretionary decisions to facts in a case as they were presented to the board and ultimately the Governor.

To collect information about facts in each case we reviewed all the ECS reports issued for parole suitability hearings in 2011. Each report contains a variety of information about the individual. It is possible to determine when an individual received their primary sentence and what their original sentence was in order to compare it to the ultimate term calculation that the Board produces. We also collected qualitative data based on variables known to affect post-release outcomes, such as age at time of crime, current age, education, drug abuse, psychological problems, behavior in prison, prior record, and a general recidivism rating used by the Board. In addition we collected information less relevant to whether an individual will recommit that was still available to the Board and contained in the ECS reports, including whether the district

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[47] Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, Vol. 68, Ohio St. L.J. 1307, (2007).

[48] WEISBERG, ROBERT, DEBBIE A. MUKAMAL, AND JORDAN D. SEGALL, STANFORD CRIMINAL JUSTICE CENTER LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA (2011). Report relied on reviewing transcripts from parole hearings to analyze the population of lifers in CA prisons.

[49] Beth Huebner & Timothy Bynum, *The Role of Race and Ethnicity in Parole Decisions*, Vol. 46 Criminology 907-938 (2008). Research suggests that parole board decisions often result in extending sentences for African American men disproportionately.

attorney opposed release, whether the county police department opposed release, and whether a victim or a member of the victim's family opposed release. After examining the ECS reports we obtained information available to the Board that should not affect the term calculation decision, namely race and gender of inmates. The information collected from ECS reports and linked to term calculations allowed us to build a profile of the population of those found suitable for parole in 2011 and assess whether certain factors are linked to decisions the Board makes about term calculations and applying prior sentences.

Our sample consisted of 367 lifers found suitable for parole in 2011 ($N = 367$).[50] An "Added Time" composite variable was created by combining all variables that could result in an inmate receiving more time due to application of §§ 2406 and 2407. This binary variable records a "yes" if an inmate received additional time added to their base term through concurrent counts being treated as consecutive, stayed counts being treated as consecutive, or the additional enhancements for stayed or stricken weapon enhancements. If none of these elements were present for a given inmate, the variable records a "no," as §§ 2406 and 2407 were not applied in the base term calculations of these inmates. Seventy-nine inmates belonged to the "Added Time" group and 286 inmates belonged to the "No Added Time" group. This composite variable was analyzed for a predictive relationship with all other variables recorded from the ECS reports. Our null hypothesis was that there is no predictive relationship between the recorded variables and the parole board's application of the regulations.

Similar tests were also run analyzing the relationship between the above variables and the Governor's decision to affirm or reverse parole grants. The null hypothesis was that no relationship exists between the recorded variables and the Governor's decision to affirm or reverse the decisions of the parole board.

Research Variables

Chi-Squared Goodness of Fit Variables:				
Primary Offense Type	Presence of a Plea Bargain	Inmate Subject to Deportation	Presence of Alcohol Addiction	Presence of Drug Addiction
Presence of Mental Health Disorder	Presence of Previous Rules Violation	Content of DA Recommendation	Content of Victim Involvement	Presence of Family or Other Support
Presence of Police Opposition	Gender	Ethnicity	Existence of Prior Criminal Record	Governor Action

Independent T-Test Variables:		
Inmate Age at Time of Crime	Inmate Age at Parole Grant	Number of Previous Hearings
Number of Previous Grants	Number of Rules Violations	

Mann-Whitney U and Kolmogorov-Smirnoff Variables:		
Inmate Education Level	Term Severity	Psychopathy Range
Risk of General Recidivism	Risk of Violent Recidivism	Overall Risk in Society
Presence of Police Opposition	Gender	Ethnicity

Figure 2

[50] The Board provided us with this random sample of ECS reports from the 463 total individuals found suitable for parole.

Analysis

Figure 3 shows a summary of the population of lifers found suitable for parole in 2011 contrasted with the general lifer population as of December 2010.[51]

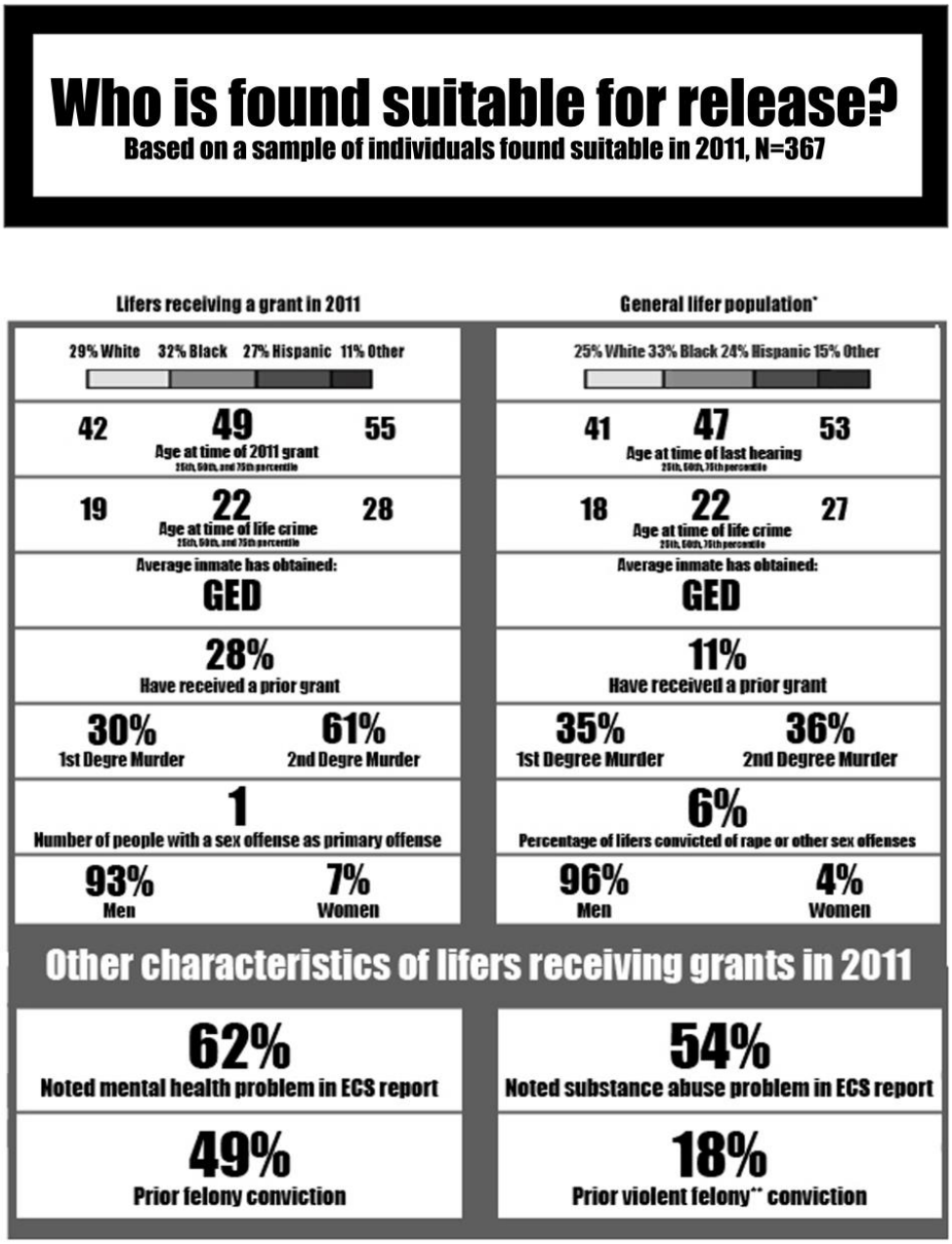

Figure 3

[51] WEISBERG, ROBERT, DEBBIE A. MUKAMAL, AND JORDAN D. SEGALL, STANFORD CRIMINAL JUSTICE CENTER LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA (2011). Data on general lifer population in Figure 3 comes from Life in Limbo report and underlying research.

Significance Tests

In total, 79 inmates (28 percent of the sample) had enhancements added to their base term through either CCR Title 15 §§ 2406 or 2407. Forty-seven inmates received an enhancement to their base term for the use of a firearm (twelve of whom also received a firearm enhancement as part of their sentence). Seven inmates received an enhancement for additional counts that had been either stayed or stricken by the trial court. Of the 81 inmates who were sentenced with concurrent sentences, 31 percent received enhancements for their concurrent sentences as if they had been consecutive.

It is important to remember that of the 79 inmates who had time added to their base term, few actually served greater time in prison. Even with the enhancements added to their base term, most of these inmates still served time greater than their final adjusted term before they were found suitable for parole. Only ten of these 79 inmates were given a future release date due to not serving time equal to their final adjusted term.

Fifty-three inmates had future release dates. Ten inmates had future release dates and also belonged to the added time group, meaning that they would be released from prison on parole sooner if not for the application of enhancements to their base term due to concurrent counts and firearm enhancements. The other 43 inmates were given future release dates for other reasons based on their base term calculations unrelated to multiple offenses or weapon enhancements.

Most tests did not find statistically significant results ($p > .05$) for the research variables shown in figure two. The null hypothesis was thus retained for a majority of the research variables, as they were not found to be related to the parole board's application of §§ 2406 and 2407. The null hypothesis was also retained for all research variables regarding the Governor's decision to affirm or reverse parole decisions.

A significant relationship was found between primary offense type and the added time composite variable. X^2 (3, N = 365) = 10.903, p = .012. The effect was most pronounced for kidnapping crimes with 50 percent of those convicted of kidnapping receiving time added to their base term for concurrent sentences. Figure four shows the distribution of inmates who received time added through enhancements to their base term organized by primary offense type.

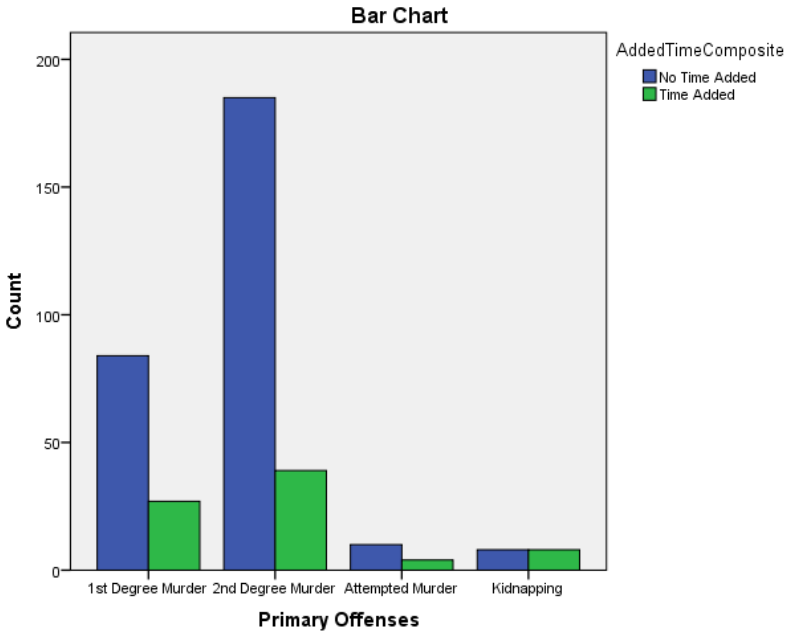

Figure 4

A significant positive relationship was found between Police Opposition and the added time composite variable. X^2 (1, N = 366) = 3.882, p = .049. The presence of police opposition at parole hearings was associated with a higher than expected rate of the application of §§ 2406 and 2407. Figures five and six below show the distribution of inmates who received enhancements to their base term organized by whether police opposition was present at the parole hearing.

Crosstab

			AddedTimeComposite		Total
			No Time Added	Time Added	
Police Opposition	No	Count	176	38	214
		Expected Count	168.4	45.6	214.0
	Yes	Count	112	40	152
		Expected Count	119.6	32.4	152.0
Total		Count	288	78	366
		Expected Count	288.0	78.0	366.0

Figure 5

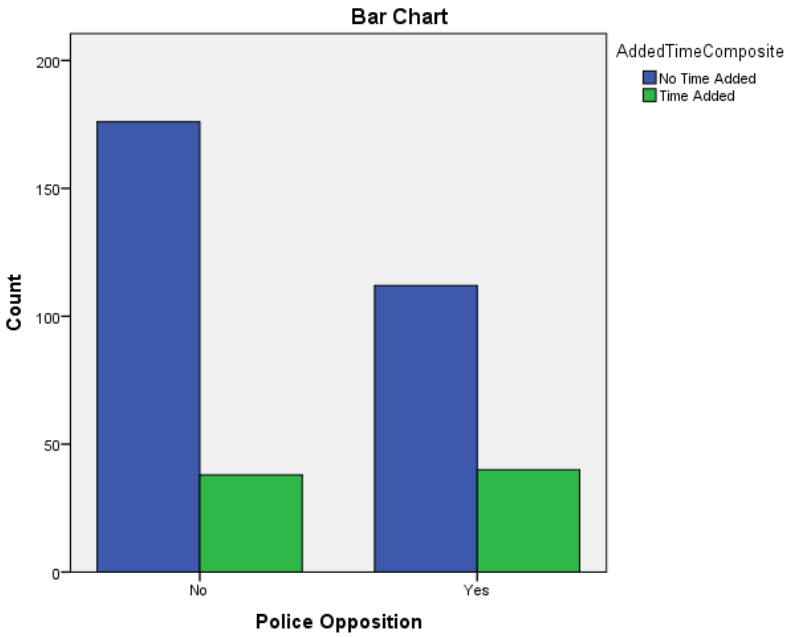

Figure 6

There was a significant effect for number of previous parole hearings attended. $t(364) = 2.428$, $p < .001$. Those who received additional time under §§ 2406 and 2407 attended a higher number of previous parole hearings. Figure seven displays the average difference in number of previous parole hearings attended by lifers between those lifers who received additional enhancements to their base term and those who did not.

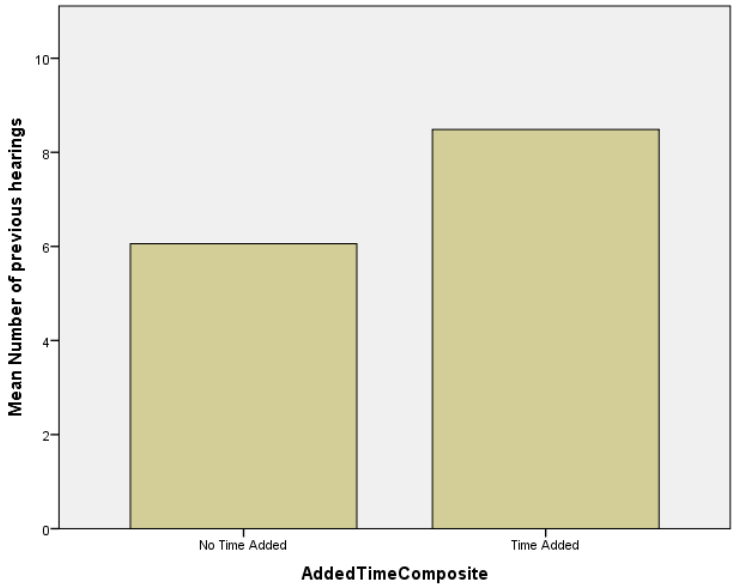

Figure 7

Commissioners

Another factor we analyzed was the possibility that some commissioners are more likely than others to apply back-end sentences. Given the diverse set of factors shown to affect parole release decisions, it seemed plausible that back-end sentencing is a commissioner specific phenomenon. Testing this hypothesis proved difficult and our analysis does not provide a clear indication of whether this is the case, but it does pose the question for future research.

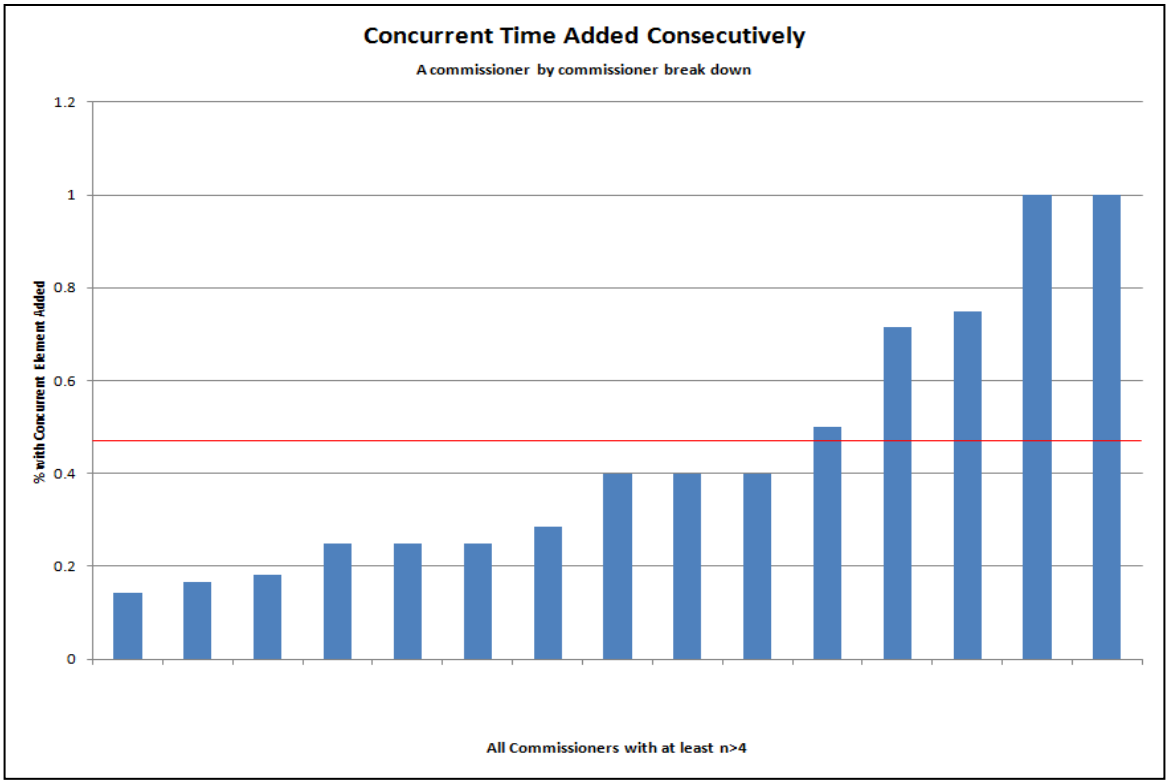

Figure 8

Figure eight shows the percentage of cases in which a commissioner[52] applied concurrent sentences to be served consecutively as a percentage of the total number of cases with a concurrent element. In other words, the figure shows how often a commissioner applied one type of back-end sentence when the option to apply that back-end sentence was possible.

Discussion

Our study revealed four distinct findings. Despite some interesting effects, these findings are largely inconclusive towards our research questions. None of the variables examined consistently predicted the addition of enhancements to lifers' base terms, and none adequately explained the inconsistent application of enhancements for multiple offenses or weapon enhancements.

The first significant finding is that lifers who were convicted of certain offense types displayed a significantly higher than expected rate of receiving enhancements to their base term.

[52] Names have been removed.

Lifers convicted of kidnapping were most likely to receive enhancements, being 26 percent more likely to receive additional enhancements than lifers convicted of first degree murder. This effect is even more pronounced if one controls for lifers that received a concurrent sentence from the trial court. In fact, all of the lifers convicted of kidnapping who did not receive additional enhancements were not sentenced with a concurrent sentence by the trial court. This means that 100 percent of those convicted of kidnapping who were eligible to have enhancements applied against them did in fact receive enhancements under the regulation. This finding should be qualified by the fact that the number of lifers convicted of kidnapping is small, but this 100 percent rate of application is highly unusual when compared with the 30 percent rate of application in the total sample. This finding suggests that something unique in either the type of person who is convicted of kidnapping or in the crime of kidnapping itself prompts the parole board to add enhancements more rigidly than usual.

The second finding is that police opposition to parole yielded a higher than expected rate of additional enhancements to lifers' base terms. While, police opposition to parole release only occurred in 41 percent of all cases, the presence of police opposition at a lifer's parole hearing increased the chance of that lifer receiving additional enhancements under §§ 2406 and 2407 by 25 percent. This finding remains accurate even after taking into account that the police force is more likely to oppose release for an offender who committed multiple crimes (and only offenders who commit multiple crimes are eligible to receive concurrent sentences).

This finding is strange because it has no likely explanation. One explanation is that the parole board may be using available enhancements as a way to keep a lifer in prison if the police force does not want the lifer released. While the parole board may place a high value on police opposition because many parole commissioners are former law enforcement officials, it is unknown why the parole board's application of §§ 2406 and 2407 would be affected by the presence of police opposition. It is unclear what this finding suggests.

The third finding is that lifers who receive additional enhancements to their base term attend on average two more parole hearings than those who do not receive additional enhancements. This finding is easily explained, as the effect is significantly lessened if concurrent sentencing is controlled for. This suggests a probable correlation between number of crimes committed (and thus the possibility of concurrent sentences) and number of parole hearings attended before release. It is not surprising that lifers convicted of several crimes are more likely to be found unsuitable for parole, so this finding is not unexpected.

Our last finding is a tentative connection between application of §§ 2406 and 2407 and certain parole commissioners. This conclusion should be viewed in light of the fact that many of the commissioners presided over very few cases with concurrent elements. All the commissioners in Figure 8 have presided over at least four cases with concurrent elements but this size may be so small that the pattern observed should be accepted cautiously. Although it does remain that in some cases commissioners have elected to not exercise that discretion and other commissioners have exercised the discretion to apply §§ 2406 and 2407 in all available cases. The possibility that commissioners may exercise their discretion to add time on the back-end differently is an area ripe for future research.

No other variables showed any explanatory or predictive power towards the parole board's use of base term enhancements. The parole board declined to add enhancements for

concurrent crimes in 70 percent of the cases where they could do so, but no strong predictive pattern explains why the parole board chooses to apply enhancements to the other 30 percent.

Our primary limitation is a lack of variance in our sample. Since we looked at only those lifers who had been found suitable for parole, most of the members of our sample shared more in common than they would with the larger lifer population. The homogeneity of our sample made it more difficult to find any predictive effects, but this was unavoidable as our research question revolves around only those lifers who are granted parole. This helps explain why factors known to be correlated with a high risk of recidivism were not significant in our study as those who displayed a higher risk of recidivism were likely not found suitable for parole and thus excluded from our sample.

An additional limitation comes from the source of our data. Nearly all of our data was taken from Executive Case Summaries provided to the Governor by the Board of Parole Hearings. These reports are based on the data found in each inmates complete prison record, but they are only summaries of each inmate's more complete record. Our analysis relies on these ECS reports to accurately synthesize the pertinent information in the inmates' files, so our analysis will only be as accurate as the ECS reports they are based upon.

Board of Parole Hearings and Governing Statutes

History of Board of Parole Hearings and 'Great' Discretion

The Board of Parole Hearings was created in 2005.[53] Prior to 2005, the Board of Prison Terms handled the adult population eligible to receive parole.[54] The Board of Prison Terms was charged with parole hearings and revocation hearings for adults. Based on the recommendations of a task force assembled by then Governor Schwarzenegger the Board of Prison Terms was dissolved to form the Board of Parole Hearings[55] charged with similar responsibilities and governed by the same statutory language.[56] Among its many powers, the Board of Parole Hearings has the authority to determine parole suitability and set a date for parole release when an individual is found suitable for release.[57]

The Board of Parole Hearings' freedom to move within this statutory language is broad. The Board has a long history of its discretion being recognized as "great and almost unlimited."[58] In addition, the scope of the Board's discretion has been interpreted as including a "wide array of individualized factors" which has granted the Board significant latitude in making parole decisions that strike "a balance between the interests of the inmate and of the public."[59] Judges have been hesitant to hold the Board's decisions to a standard that would demand intense

[53] Cal. Penal Code § 5075 (West 2012).
[54] The Board of Prison Terms was preceded by Board of Community Release. *See In re Stanworth*, 654 P.2d 1311, 1312 (1982).
[55] CORRECTIONS INDEPENDENT REVIEW PANEL, REFORMING CORRECTIONS (2004).
[56] Cal. Penal Code § 5075.
[57] Cal. Penal Code §3041.
[58] *In re Powell*, 755 P.2d 881, 886 (1988) (Internal citations omitted).
[59] *In re Rosenkrantz*, 59 P.3d 174, 203 (2002).

scrutiny by the judiciary, finding that only "some evidence"[60] must be found to support the Board's release decisions. Our research deals with a discretionary lever not yet addressed by case law, specifically the amount of discretion the Board has in adding enhancements or time for additional offenses. However, far-reaching discretion has been granted in allowing the Board to make suitability determinations parole and to determine periods of confinement for individuals based on the nature of the crime.[61] This suggests that the authority of the Board to make determinations regarding enhancements falls within the spectrum of the broad authority the courts have thus far afforded to it.[62]

Courts have recognized two important limitations on discretion that bear on determinations by the Board to set parole release dates. First, despite general deference to the Board courts have recognized that exceeding statutory authority is not acceptable for any administrative agency including the Board.[63] Agencies such as the Board are limited by the language of their statutes and cannot promulgate or enforce regulations that exceed their authority as granted by the legislature. Assessing the actions of the Board in setting parole release dates requires an understanding of the statutory basis for the Board's decisions in addition to an analysis of how the Board has exercised this authority. Second, in *Blakely v. Washington* the Court declared that a sentence cannot be enhanced based on facts not found by a jury.[64] Presumably this standard extends to decisions made by the Board that set a future date for parole release thus extending the time an individual spends incarcerated.[65] If the Board relies on or applies penalties for facts not found by a jury they are exercising discretion in a way courts have found impermissible. Although the Board enjoys discretion and judicial deference they must only exercise their statutory authority in accordance with constitutional protections guaranteed by *Blakely*.

The Purpose of Discretion

The discretion afforded to the Board of Parole Hearings is an attempt to balance two competing interests. On the one hand, the Board is charged with protecting public safety in making suitability determinations. In determining whether an individual is suitable for parole the Board considers, among many factors, the possibility that he may continue to pose a future risk for society. The Board has the power to find an offender unsuitable for parole if they determine that he poses an unnecessary risk to society. In addition to this interest, however, is the stated

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[60] *See In re Powell*, 755 P.2d at 886.

[61] *See In re Stanworth*, 654 P.2d at 1316 ("The panel had discretion to increase confinement if there were multiple victims, and to consider the inmate's sentencing status based on the sentencing court's imposition of consecutive sentences or youthful offender sentences. Relevant post conviction factors included prison offenses and any disciplinary offenses. Finally, the panel was authorized to increase the total period of confinement for use or possession of a weapon.") (internal citations omitted).

[62] *See In re Dannenberg*, 104 P.3d at 803 ("As we have seen, the Board has always enjoyed broad parole discretion with deferential judicial oversight.").

[63] The Board lacks discretion to promulgate regulations that are inconsistent with the governing statutes, and the judicial branch has the final word on questions of legal interpretation. See *Terhune v. Superior Court*, 65 Cal. App. 4th 864, 873 (1998).

[64] *Blakely v. Washington*, 542 U.S. 296 (2004)

[65] W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment* 109 COLUM. L. REV. 893 (2009).

interest of uniformity provided in the regulations that establish the Board's discretionary powers.[66] Even an individual who no longer poses a risk to society may continue to be held in order to provide for uniform sentences and to ensure that individuals with like crimes serve similar amounts of time. The guiding principle that establishes the Board's discretion is the idea that whatever sentencing scheme or lever of discretion is exercised, it should be applied in a manner that is uniform.

Statutory Issues with Back-End Sentencing

The authority of the Board of Parole Hearings comes from Cal. Penal Code § 3041. The Board has the regulatory authority to add weapon enhancements, additional time for other non-life crimes committed at the same time as the primary offense, and other life crimes committed alongside the primary offense.[67] These three mechanisms all can increase the amount of time an individual spends in prison even after a determination that an individual is suitable for parole. In the following section we discuss the statutory basis for applying weapon enhancements, additional time for non-life crimes, and additional time for life crimes compared to how the Board has applied the regulation in practice based on the data we reviewed and analyzed.

Weapon Enhancements

According to CCR Title 15 § 2406, the panel is given authority to add additional time to a base term calculation if an individual personally used a firearm during the commission of any life crime. This authority is discretionary, as the regulation specifies that the Board "may" add adjustments but are not required too. The most common reason given for not applying a two year enhancement in cases where an individual used a firearm in our sample was that the original sentence included a weapon enhancement already.[68]

The application of a weapon enhancement exists independent of the sentence issued by the judge. Even when a judge stays or strikes a weapon enhancement, the Board retains and exercises the authority to include a weapon enhancement in setting a release date. The regulation simply allows for additional years if a firearm was used; it does not contain language explaining how the Board will reach a determination that a firearm was used or an express prohibition from applying a firearm enhancement if the original sentence already included a firearm enhancement. In 47 instances, even when a judge expressly struck a firearm enhancement from the record or stayed an enhancement, the Board added on enhancements for use of a weapon during the commission of the life crime. Perhaps more interestingly, in some cases during 2011 the Board reversed[69] its own decision to apply a weapon enhancement because an original weapon enhancement had been stricken by a judge. The Board has, in some instances, applied a weapon enhancement in cases where a judge struck the weapon enhancement from the record and in other cases refused to apply a weapon enhancement specifically because a judge chose to strike

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[66] *See* Cal. Code Regs. Tit. 15, § 2280 (2012) ("A parole date set under this article shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude in respect to the threat to the public.").
[67] Cal. Code Regs. Tit. 15, §§ 2406, 2407 (2012).
[68] Based on the reports we reviewed, there were several instances where the Board did not apply a weapon enhancement because the original sentence included a weapon enhancement or upon review the Board struck a weapon enhancement because the original sentence included a weapon enhancement.
[69] The Board has established a process of decision review which reviews commissioners' decisions in setting lifers' release dates.

the enhancement from the record. There were also cases in which the Board applied a weapon enhancement even though the original sentence already included a weapon enhancement. This inconsistent application highlights the ambiguity in the way the regulation has been applied. The current regulation remains silent on which course of action the Board should take for stricken weapon enhancements, but the regulation has been more explicit in the past. Early actions by the Board of Prison Terms, the predecessor to the Board of Parole Hearings, suggest that the Board specifically contemplated the possibility of applying stricken counts and recommended applying one-half of punishments stricken by the court. [70]

Additional Time for Non-Life Crimes

According to § 2407(b), "If the court imposed concurrent nonlife sentences, the board may add an adjustment because the prisoner has been convicted of more than one crime." This gives the Board the authority to add additional time to a base term if an inmate was committed for multiple crimes. The authority to apply additional time for an offense exists independent of a judge's sentence according to the language of the regulation and the way it has been applied. The regulation specifically asks the Board to consider a court's original sentences, noting "since the court has discretion to order that the sentences for more than one crime be served consecutively, the board shall consider the court's action in determining the adjustment pursuant to this section."[71] The regulation leaves the door clearly open for offenses that have been included in a sentence to be used in calculating an enhancement for additional offenses. Despite other potential problems with the Board altering a sentence after determining an individual is suitable for parole, the authority for this course of action is clearly contained in the regulation. The data shows that the Board has exercised this authority with discretion, applying additional time in some cases and not in others. Interestingly there were a few instances of the Board determining that a concurrent sentence would be applied consecutively and then reversing this decision on review. In other words, the Board did not always exercise its authority to add enhancements for additional offenses and, in some cases, chose to reverse a decision that added enhancements for additional offenses.

While the application of enhancements for additional offenses that were part of the sentence is clearly grounded in the Board's authority, the application of stayed and stricken counts presents a more interesting problem. The regulation is silent on whether a stayed or stricken count should remain off-limits for the Board and thus the Board has exercised its discretion consistent with an interpretation of the regulation that allows for the Board to apply an enhancement for additional offenses even when the additional offenses were stayed and stricken by the trial judge. The Board has applied enhancements for stayed counts in some cases, but noticeably not all cases thus suggesting the Board's authority to apply enhancements for stayed counts, if it exists, is not a mandatory requirement or has not been interpreted by the Board as a mandatory requirement.

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[70] "If the court struck the punishment upon a finding of circumstances in mitigation, the board shall consider any circumstances in mitigation. … The suggested adjustment is one-half the punishment that was stricken by the court." Cal. Code Regs. Tit. 15, § 2286 (c) (1981).

[71] Cal. Code. Regs. Tit. 15, § 2407(a) (2012).

Additional Time for Life Offenses

In cases where an individual has been sentenced to multiple life offenses, the Board has the authority to add an enhancement for the additional life offenses according to §2407(b)(3).The Board has applied this enhancement for other life crimes even when the two life crimes were ordered to be served concurrently, consistent with the language in § 2407(b)(3), representing another example of the Board shifting a concurrent sentence to a de facto consecutive sentence and presenting problems similar to those that exist when the Board exercises discretion in adding enhancements for non-life crimes.

Legal Issues Raised by Back-End Sentencing

Separation of Powers

The California Constitution separates the state's powers into legislative, executive, and judicial powers and bars any one branch from wielding the powers of the others.[72] "The courts have long recognized that [the] primary purpose [of the separation-of-powers doctrine] is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government."[73] To protect this purpose, courts have the power "to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[74]

For parole release of lifers in California, the possible separation of powers violation stems from the conflict between the executive branch's application of § 2407 and the judicial branch's powers under California Penal Code § 669. Pen.Code §669(a) states "When a person is convicted of two or more crimes . . . the second or other subsequent judgment upon which sentence is to be ordered shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively." A trial judge may make the decision to impose consecutive rather than concurrent subordinate sentences by considering certain factors of the crime such as the independence of the objectives of the crime, whether separate acts of violence were involved, and whether the crimes were committed in different times or places "rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."[75] A trial judge is not allowed to take into account any facts that are elements of the crime, that are already used to impose an aggravated term, or that are used in any other way to enhance a defendant's prison sentence.[76] A valid statement of reason must be given by the trial court if consecutive sentences are imposed.[77]

Section 2407(b)(3) and (b)(5) instruct the parole commissioners that in the case of concurrent sentences "the board may add an adjustment because the prisoner has been convicted of more than one crime." Section 2407 gives "suggested" adjustments including thirteen years

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[72] Cal. Const. Art., III, § 3.
[73] *Davis v. Municipal Court*, 757 P.2d 11, 17 (1988) (quoting *Parker v. Riley*, 113 P.2d 873 (1941), (alteration in original).
[74] *Kasler v. Lockyer*, 2 P.3d 581, 594 (2000) (quoting *Mistretta v. United States*, 488 U.S. 361, 382, (1989).
[75] California Rule of court 4.425.
[76] *Id*.
[77] *People v. McLeod*, 258 Cal.Rptr. 496, 499 (1989).

for first degree murder, eight years for second degree murder, and half the term imposed by the court for non-life crimes.

As a formal matter, the executive branch cannot force an offender to serve concurrent sentences as though they were consecutive. "The Board is without authority, on its own initiative, to provide that petitioner's terms shall run consecutively, and that any attempt on its part to order them to run consecutively would be void, since this involves a matter of judicial discretion solely within the province of the courts."[78] The court utilizes its discretion when considering all the relevant circumstances to decide the appropriate penalty[79] and choosing which sentences are to be consecutive instead of concurrent is as much a part of that discretion as choosing the lower, middle, or upper principal term. A trial judge who decides to issue consecutive sentences based on the factors of rule 4.425 listed above is making the conscious decision after evaluating the full circumstances of defendant's crime that the subordinate charges should be punished more like separate crimes by themselves instead of merely details of the principal charge.

The judiciary's control over sentencing makes intuitive sense when dealing with determinate sentences, but the issue becomes more complicated when considering indeterminate sentences. In an indeterminate sentence, the minimum number of years that an offender must serve is dictated by statute and does not fall under a trial judge's discretion.[80] For an indeterminate sentence, the executive branch sets the final term of imprisonment through the parole process and base term calculation described above.[81]

Because enhancements for additional crimes are added to an inmate's base term as part of fixing an indeterminate sentence, the Board of Parole Hearings can make a colorable argument that judicial discretion is not being infringed upon. The executive branch can reasonably interpret the law to read that once an inmate has been given an indeterminate sentence instead of a determinate one, Penal Code § 3041 grants the Board of Parole Hearings power over how that sentence is to be fixed.[82] The executive branch will also argue that the current system for determining base terms is necessary as part of the directive of the penal code to determine release dates "in a manner that will provide uniform terms for offenses of similar gravity and magnitude."[83] Using the example offenders from the term calculation section above, Offender A and Offender B have committed the same crimes, and it would be an injustice to allow Offender A to be released two years earlier than Offender B when their offenses were of "similar gravity and magnitude."

The Board of Parole Hearings can also point out that consecutive and concurrent sentences are not treated entirely alike as offenders who are sentenced to concurrent sentences will be eligible for their parole hearings at an earlier date than offenders with consecutive sentences.[84] Since judges are presumably aware of the base term calculation process, the Executive can claim that a trial judge's issuing of concurrent sentences paired with a life

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[78] *Ex parte Radovich*, 61 Cal. App.2d 177, 179 (1943).
[79] *People v. Rodriguez*, 726 P.2d 113, 144 (1986).
[80] Cal. Penal Code § 3046 (a) (West 2012).
[81] Cal. Penal Code §§ 1168 (b), 3041 (West 2012).
[82] *In re Lawrence*, 44 Cal. 4th 1181, 1201 (2008).
[83] Cal. Penal Code §3041 (West 2012).
[84] Cal. Penal Code § 669 (a) (West 2012).

sentence is merely the judge signaling to the Board of Parole Hearings that the sentenced inmate may meet with the parole board earlier than he or she would otherwise.

Upon closer examination, this interpretation ignores the practical results of § 2407. While it may be true in a technical sense that the commissioners are not actually changing determinate sentences when they apply concurrent sentences as consecutive sentences, the practical result of this application is that the determinate sentence imposed by the trial judge loses its meaning. The difference between a concurrent sentence and consecutive sentence must mean more than an earlier minimum eligible parole date. The opportunity for an earlier parole hearing, whether two years earlier or 20 years earlier, is meaningless if there is no possibility of actually being released from prison on parole any earlier than if one had been sentenced consecutively. The practical result of § 2407 – inmates being sentenced concurrently can be released no sooner than those sentenced consecutively – is executive re-sentencing of defendants after their trial.

Treating concurrent and consecutive sentences alike may be necessary in order for the executive to provide "uniform terms for offenses of similar gravity and magnitude," but this reasoning ignores the role that the judiciary plays in sentencing. If a trial judge sentences one defendant to concurrent terms and one defendant to consecutive terms for the same charges, the judge has already decided that these crimes were different in important ways. A consecutive sentence indicates that this offense was separate enough that it deserves additional punishment in addition to the principal sentence. For the Board of Parole Hearings to ignore that decision and treat all subordinate terms as if they were "of similar gravity and magnitude" directly contradicts the judiciary's use of its discretion in the sentencing process and ignores the penal code's direction that release dates be set in a matter complying with "any sentencing information relevant to the setting of parole release dates."[85]

This undermining of judicial discretion is especially obvious when one considers that judges do not have a clear way to sentence around the parole board's base term calculations. A judge who is aware of how concurrent sentences are treated in base term calculations might decide to stay or even strike counts rather than see an inmate serve time for them consecutively, but this is not an effective option under § 2407. Section 2407 is silent on whether stayed or stricken counts should be treated the same as consecutive or concurrent sentences, but in our sample seven lifers were given enhancements for stayed and stricken counts, and twenty were given enhancements for stayed weapon enhancements. Taken together, this indicates that currently there is no reliable or consistent way for a trial judge to sentence anyone convicted of a life crime in a way that prevents them from serving extra time for subordinate terms.

Binding Plea Bargains and Due Process

Aside from the separation of powers issues described above, additional problems surface if an offender agreed to a plea bargain on condition of receiving concurrent sentences. Plea bargaining is statutorily defined as:

> Any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead

[85] Cal. Penal Code § 3041 (a) (West 2012).

> guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.[86]

Because 90 to 95 percent of criminal cases are resolved through plea bargains,[87] the integrity of the plea bargain process is incredibly important to the criminal justice system. If the integrity of the system is in doubt, defendants lose much of their incentive to accept plea bargains and thus harm the efficiency of the criminal justice system.

When a plea bargain has been accepted by the prosecutor and approved by the court, the state is statutorily bound by the agreement,[88] and a breach of the agreement is considered a violation of due process.[89] Importantly, case law has established that the parole board, acting as a state agent, is bound by promises of the state in plea bargains between a defendant and prosecutor.[90] In *Davis v. United States*[91] the parole commission was barred from using information regarding defendant's drug crimes after defendant pled guilty to two other crimes on the condition that no additional criminal charges would be brought against him. "The Court has no difficulty holding the United States Parole Commission bound by a promise made in a plea agreement. Both the United States Attorney and the Parole Commission are agents of the Government and are therefore bound by what are, in effect, *Government* promises."[92]

If CCR § 2407 violates plea bargains through its base term calculations, it does so, like the separation of powers argument, on practical results rather than formal grounds. Formally, the executive can argue that a plea bargain that specifies that a defendant is to serve his or her determinant sentences concurrently is not violated so long as the defendant is not forced to serve the determinant portion of his or her sentence before he or she is eligible for parole. The fact that a defendant (or defendant's counsel) is unaware of how parole base terms are calculated is immaterial to the validity of the plea bargain, as "A plea agreement violation claim depends upon the actual terms of the agreement, not the subjective understanding of the defendant or deficient advice by his attorney."[93]

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[86] Cal. Penal Code § 1192.7 (West 2012).
[87] LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING (2012).
[88] Cal. Penal Code § 1192.5 (West 2012); *See, e.g., People v. Green*, 142 Cal.App.3d 207, 215 (1982) ("A judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain."); *People v. Shepeard*, 169 Cal.App.3d 580, 586, (1985) ("A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound"); *Santobello v. New York* 404 U.S. 257, 262 (1971) ("When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").
[89] *See, e.g., People v. Mancheno*, 654 P.2d 211, 214 (1982) ("The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea, but that the requirements of due process attach also to the implementation of the bargain itself.") (quoting *Santobello*, 404 U.S. at 262) (internal citation omitted); *People v. Knox*, 20 Cal. Rptr. 3d 877, 880 (2004) ("In addition to their contractual qualities, plea agreements also have a constitutional dimension. A criminal defendant's constitutional due process right is implicated by the failure to implement a plea bargain according to its terms.).

[90] *See U.S. v. Anderson*, 970 F.2d 602, 605 at fn. 5 (9th Cir. 1992).
[91] *Davis v. United States*, 649 F. Supp. 754, 759 (C.D. Ill. 1986).
[92] *Id*. (emphasis in original).
[93] *In re Honesto*, 130 Cal. App. 4th 81, 92 (2005).

Practically speaking, this interpretation results in plea bargains that are without benefit for the defendants who agree to them. The state still receives the efficiency benefit of avoiding costly and time consuming trials, but the defendants who are promised concurrent sentences serve just as much time in prison as they would with consecutive sentences.

If concurrent sentences were the only benefit that a defendant received as part of his or her plea bargain, he or she could make a strong case that the plea bargain was void for lack of consideration. As the court stated in *People v. Gallego*, "Critical to plea bargaining is the concept of reciprocal benefits. When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made."[94] It seems reasonable that a defendant's understanding of a plea bargain avoiding consecutive sentences would entail some benefit, and while an erroneous subjective belief of a defendant is not enough to void a plea bargain, ambiguities in plea bargains are construed in favor of the defendant.[95] Giving the defendant the benefit of the doubt makes intuitive sense since "Focusing on the *defendant's* reasonable understanding also reflects the proper constitutional focus on what induced the *defendant* to plead guilty."[96]

The argument that CCR § 2407 potentially violates plea bargains is not a merely theoretical one. Of the 32 lifers who had time added to their base terms for concurrent or stayed terms, 15 had established a plea bargain of some type. This number increases to 33 if we consider those lifers who received firearm enhancements for stayed or stricken weapon enhancements from the trial court. While we do not have data on how many of these offenders' plea bargains contained concurrent sentencing or stricken weapon enhancements as part of their bargain, it is possible that many of them gave up their right to a jury trial and did not get the full benefit of what they bargained for from the state.

A defendant who pleads guilty gives up valuable rights in return for a lesser sentence. For the government to later claim that the lesser sentence cannot change the minimum amount of time a defendant serves in prison is misleading and unfair to the defendant. The court has recognized the danger to the integrity of the criminal justice system inherent in this type of reasoning by the government and has held against overly literal interpretations of plea bargains. As stated in *United States v. Bowler*, "The Government will not be allowed to avoid the obligation it thus incurred by claiming now that the language literally promises nothing to the defendant. A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language."[97] It is no defense in this case that the parole board's involvement is at a different point in the criminal justice procedure than the sentencing court, as the court has made clear in *Davis* that government promises must be kept to maintain the fairness of the system.

> Moreover, in accordance with the governing case law, the Court declines to so strictly construe the plea agreement that the Government is able to get in through the back door

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[94] *People v. Gallego*, 90 Cal. App. 3d Supp. 21, 29, (1979) (Citing *People v. Collins*, 577 P.2d 1026, 1029 (1978)).
[95] *People v. Toscano*, 124 Cal. App. 4th 340, 345 (2004).
[96] *Id.* citing *U.S. v. De la Fuente*, 8 F.3d at p. 1337, fn. 7. (emphasis in original); *See also United States v Arnett*, 628 F.2d 1162,1164 (9th Cir. 1979) ("The dispositive question ... is what the parties to this plea bargain reasonably understood to be the terms of the agreement.") (omission in original).
[97] *See United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978).

> what it clearly cannot through the front. The integrity of the plea bargaining process is preserved by fairness. In this context fairness means that the left hand is bound by the actions of the right hand, even if each hand does not know what the other is doing.[98]

Policy Recommendations

Ambiguity in Regulations

The regulations that govern base term enhancements are problematic as written. Section 2407 is silent on whether the parole board is allowed to apply enhancements to a lifer's base term for stayed or stricken counts. The regulation merely states that enhancements may be added to the base term if the prisoner has been committed to prison for more than one offense.[99] The regulation specifically mentions concurrent and consecutive sentences, so the absence of stayed and stricken counts seems to imply that no enhancements should be given for sentences outside of concurrent and consecutive counts. In 2011, the parole board did not typically add stayed or stricken counts as enhancements, but they did do so for seven cases. Weapon enhancements were treated even more inconsistently. Stayed and stricken weapon enhancements were regularly added to base terms, but the parole board also commonly refused to add these enhancements precisely because a judge had stayed or stricken the enhancements at the trial level.

This ambiguity in the regulation should be fixed, as stayed and stricken counts are not trivial and can add a significant number of years to an inmate's base term. The power to add enhancements based on stayed and stricken counts exacerbates the separation of powers issues explained above as it leaves judges without a way to reliably prevent a defendant from being punished for certain counts. For this reason, it is recommended that the regulation be amended to exclude stayed and stricken counts.

Third 'Strikers' and Term Calculations

The term calculations and regulatory framework explored in this paper were designed to handle a population of lifers mostly sentenced under a sentencing structure that California has since abandoned. Many of these inmates have been sentenced to serious crimes, such as first degree murder. However, a new population of lifers waits on the horizon for California – individuals sentenced to life in prison under California's Three Strikes law. Although the Three Strikes law is outside the scope of our research, it is worth noting that these 'strikers' will be eligible for parole starting in 2019.[100] Unlike the population of lifers analyzed in the preceding pages, the range of commitment offenses is vast and the regulatory framework in place is inadequate to deal with these offenders. The existing structure of matrixes does not seem capable of handling third strikers.

Because third strikers will not be eligible for parole until they have served a lengthy prison term (twenty-five years) it is possible to shift the guiding force behind the Board's

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[98] *Davis*, 649 F. Supp. at 759.

[99] *Id.*

[100] California's Three Strikes law was passed in 1994, so in 2019 individuals receiving a 25-life sentence will begin to seek parole eligibility. Note that this does not include those third strikers who were convicted of non-violent, non-serious crimes who are eligible for earlier (non-parole) release based on Proposition 36.

decisions away from uniformity and instead renew a focus on public safety. Currently, the Board uses its discretion to increase prison terms even after an individual has been found suitable for parole because it has determined that the need for uniform sentences demands an individual continue to serve time even after they no longer pose an unreasonable risk to society. But the need for uniform sentences among the third-striker population is reduced because these individuals have already served uniform, lengthy sentences of at least twenty-five years. The interest of uniformity existed when the range of offenses inmates had committed was small, so comparing to a similar crime was easier, and the principle term was short, such as seven years to life. The third striker population includes a huge range of offenses, making comparison to like crimes a burdensome exercise, and the principle term ensures that each individual serves a lengthy sentence before appearing before the Board. The interest in uniform sentences for the striker population has already been met before an inmate appears before the Board.

Instead of focusing on uniformity, the Board should focus on determining whether an individual poses an unreasonable risk to society. When the interest of uniformity is removed, in the case of the striker population, the focus on public safety becomes the primary focus for the Board. Under this guiding principle the back-end sentencing regime analyzed in this paper becomes unnecessary. If individuals pose a suitable risk to society, release them. When the Board desires to add time to an individual's sentence it should be done through the suitability determination, not in the setting of release dates. Individuals who need to serve more time in furtherance of the public interest should be found unsuitable for parole rather than being told they are eligible for parole and given a release date years in the future.

Adopting a focus on public safety alleviates extraordinary pressure that will soon be applied to the Board when the striker population becomes eligible for parole. Currently, when an individual appears before the Board for which the matrix to calculate a release date does not provide a base term the Board is required to find calculate a Base Term "by comparison to offenses of similar gravity and magnitude in respect to threat to the public."[101] As individuals sentenced to the huge range of crimes captured under Three Strikes appear before the Board this comparison will become unreasonable and create a new lever of discretion as the Board determines crimes of similar gravity. This lever of discretion can be eliminated entirely if the Board instead extends time not by declaring someone suitable and setting their release date years in the future but by denying them parole in the first place. This not only increases the clarity of a suitability hearing, it offers a solution for how to handle the next wave of lifers that will appear before the Board. The central question is how to extend time for an individual the Board has decided should stay in custody. This paper advances the suggestion that this decision should be made at the point of the suitability hearing, rather than in base term and release date calculations that may prove unworkable when applied to a new population of lifers for which these regulations were never designed.

Conclusion

The number of inmates who actually spend more time in prison because of CCR Title 15 §§ 2406 and 2407 is not large, and it is tempting to look at the ten lifers affected in 2011 with future parole release dates and dismiss them as outliers, but this would be a grave mistake. The number of additional years in prison for those few who are affected by these regulations can be

[101] Cal. Code Regs. Tit. 15, §2286(a) (2012).

immense, and it would be wrong to overlook the regulations' drastic effects because only a few are affected.

The most striking example of how pronounced an effect the regulations can have in our sample is a lifer who was originally assessed enhancements of 168 months for concurrent crimes and 60 months for stayed weapon enhancements. Because of the enhancements, this particular lifer was given a parole release date set 21 years after he was found suitable for parole. This offender would have to serve, at minimum, 42 years in prison before he could be released on parole for his 14 years to life sentence. Years later, the Board adjusted his release date earlier by seven years "in the interests of justice." This particular lifer is notable for the extreme number of years added to his base term as enhancements, but his example is not unique, and it was common in our sample for the lifers affected to be serving more than five additional years in prison due to their enhancements.

The regulations' system of base term calculation is complex, inconsistent, and not at all apparent from the sentences issued by trial judges. The Board of Parole Hearing's attempt to enforce the goal of uniform sentencing, "like punishments for like crimes," harms the integrity of the criminal justice system at the trial court level. Trial judges are unable to issue meaningfully different sentences between lifers, and defendants who plea bargain for non-consecutive sentences or stricken weapon enhancements are gaining no benefit for their part of the bargain. These two facts harm the consistency and reliability of the criminal justice system and lend a feeling of dishonesty to the proceedings of criminal trials and the resulting sentences imposed by judges.

The current application of the base term calculations is also inconsistent, lessening the goal of attaining uniform sentencing. The regulations dictate that enhancements for multiple offenses and firearm use are to be applied unless the parole board provides a reason for not applying them. Despite this, the parole board only applied enhancements for concurrent sentences in thirty percent of all cases where they could have done so, and the parole board rarely provided reasons for not applying enhancements. Other than our tentative findings linking enhancements to offense type, police force opposition, and possibly individual parole commissioners, no predictive factors adequately explain this inconsistent application of the regulations.

Enhancements for concurrent sentences are so inconsistently applied that the goal of uniform sentencing is not being met. Regardless, this unmet goal is not worth pursuing at the cost of undermining judicial discretion and delivering a blow to the integrity of the plea bargaining system. For this reason, the authors of this paper recommend that CCR Title 15 §§ 2406 and 2407 be amended to explicitly honor the sentence that the trial court imposes. Specifically, the amendment should recognize the differences between consecutive, concurrent, stayed, and stricken counts and weapon enhancements just as a trial judge has done in drafting their original sentence. In the alternative, the Board of Parole Hearings should at least consider adding language to § 2407 to clarify the authority of the parole board regarding stayed and stricken counts, and should also seriously consider abandoning the matrix system for the calculation of base terms for lifers convicted under the three strikes law. These recommendations would not place a tremendous burden on the Board's ability to execute its critical function of protecting public safety. Instead, they serve to clarify a regulatory framework that will soon be forced to handle a new population of inmates it was never designed to handle, increase the clarity

and truth of trial sentences, and prevent the state from changing the rules of the game once an individual has signed a plea agreement.

The idea that the sentence an individual receives bears a resemblance to the amount of time they spend in correctional control is fundamental to criminal justice. Addressing the modes of back-end sentencing does not always require a massive overhaul. Often times it requires creative research to explore the phenomenon and straightforward policy suggestions to address the problems it creates for the criminal justice system. In a back-end sentencing regime, a sentence only guarantees that an individual will spend an uncertain amount of time under correctional control. While uncertainty is unavoidable for those given indeterminate sentences, the government should strive to make the process behind that uncertainty as clear and consistent as possible. Amending both the text and the application of the regulations governing base term enhancements is an important step in achieving those goals.

APPENDIX A – Matrix for Base Term of Second Degree Murder

Second Degree Murder	A. *Indirect*	B. *Direct or Victim Contribution*	C. *Severe Trauma*
Penal Code § 189 (in years and does not include post conviction credit as provided in § 2410)	Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing.	Death was almost immediate *or* resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner. This does not include victims acting in defense of self or property.	Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with weapon not resulting in immediate death or actions calculated to induce terror in the victim.
I. *Participating Victim* Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred, e.g., crime partner, drug dealer, etc.	15–16–17	16–17–18	17–18–19
II. *Prior Relationship* Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. This category shall not be utilized if victim had a personal relationship but prisoner hired and/or paid a person to commit the offense.	16–17–18	17–18–19	18–19–20
III. *No Prior Relationship* Victim had little or no personal relationship with prisoner *or* motivation for act resulting in death was related to the accomplishment of another crime, e.g., death of victim during robbery, rape, or other felony.	17–18–19	18–19–20	19–20–21

APPENDIX B – Text of Title 15 CCR § 2406

§ 2406. Adjustment for Weapons, Great Loss and Prior Prison Terms.

(a) General. Effective January 1, 1979, Penal Code Section 669 was amended to permit the court to impose enhancements under Penal Code Sections 12022, 12022.5, 12022.6 and 667.5 consecutive to a life sentence (Stats. 1978, Ch. 579). Since the court has discretion whether to impose or strike the punishment upon a finding that the prisoner used a deadly or dangerous weapon, was armed with a firearm, used a firearm, caused great loss or served prior prison terms, the board shall consider the court's action in determining the adjustment under this section.

(b) Punishment Imposed by the Court. If the court imposed the consecutive punishment for the enhancement, the board shall not add an additional adjustment for using a deadly or dangerous weapon, being armed with a firearm, using a firearm, causing great loss in committing the murder, or having served a prior prison term.

(c) Punishment Stricken by Court. If the court struck the punishment upon a finding of circumstances in mitigation, the board shall consider any circumstances in mitigation. The board may add an adjustment for using a deadly or dangerous weapon, being armed with a firearm, using a firearm, causing great loss or having served a prior prison term. The suggested adjustment is one-half the punishment that was stricken by the court.

(d) No Allegation or Finding. If the board finds that the prisoner used a deadly or dangerous weapon, was armed with a firearm, used a firearm, caused great loss or served a prior prison term although that fact was not found to be true at the time of the prisoner's conviction, the board may add an adjustment based on that finding. The adjustment should be less than the adjustment suggested in subdivision (c) of this section.

In adding adjustments for prior prison terms under this subsection, the panel should consider the length of time between the prisoner's release from custody and commission of a new offense.

APPENDIX C – Text of Title 15 CCR § 2407

§ 2407. Adjustments for Other Offenses.

(a) General. Effective January 1, 1979 Penal Code Section 669 was amended to permit the court to impose sentences for other crimes to be served consecutively to a life sentence (Stats. 1978, Ch. 579). Since the court has discretion to order that the sentences for more than one crime be served consecutively, the board shall consider the court's action in determining the adjustment pursuant to this section.

(b) Multiple Convictions.

(1) General. The board shall not add adjustments for convictions for which the prisoner has been pardoned or which have been reversed by an appellate court.

(2) Consecutive Life Sentences Imposed by the Court. If the court imposed consecutive life sentences the board shall determine the base crime and base term as provided in Section 2403(a). The board shall add adjustments for the remaining life crimes. The adjustment for each remaining life crime shall be a period of time commensurate with the nature of the crime but no less than the period of parole ineligibility for the crime. In no case will the parole date for consecutive sentences be earlier than the parole date for concurrent sentences.

(3) Concurrent Life Sentences Imposed by the Court. If the court imposed concurrent life sentences, the board may add an adjustment because the prisoner has been convicted of more than one crime. The suggested adjustment is the greater of:

(A) Time served on the nonbase life crime prior to reception on the base offense; or

(B) The following adjustment:

1. First degree murder: 13 years for a first degree murder committed on or after November 8, 1978.

2. Second degree murder: 8 years for a second degree murder committed on or after November 8, 1978.

3. One-half the period of parole ineligibility for other life crimes.

(4) Consecutive Nonlife Sentences Imposed by the Court. If the court imposed consecutive nonlife sentences the Board shall not add additional adjustment for the nonlife crime.

(5) Concurrent Nonlife Sentences Imposed by the Court. If the court imposed concurrent nonlife sentences, the board may add an adjustment because the prisoner has been convicted of more than one crime. The suggested adjustment is the greater of:

(A) Time served for the nonlife crime prior to reception on the life offense; or

(B) One-half the determinate term imposed by the court; or

(C) One-half the term that would be established under Section 2271(e) for crimes which carry a sentence of one year and one day.