EXECUTIVE REVISION OF MINIMUM SENTENCES

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INTRODUCTION

For the crime of murder, Emory Cavender was sentenced to life in prison with the possibility of parole.[1] In 2008, when he first became eligible for release, he presented himself to the Kentucky Parole Board and argued his case.[2] The Board's decision came back just a few days later.[3] Citing the seriousness of his original offense—and taking into account no subsequent events—the Parole Board issued what is known in Kentucky law as a "serve out" order.[4] Cavender would never again even be eligible to appear before the Parole Board; he would spend the rest of his days in prison.[5] Suddenly, his sentence had effectively been increased to life without the possibility of parole, "the second most severe penalty permitted by law," based on the Board's view of the very same facts that were available to the sentencing court.[6]

In states like Kentucky, as Cavender's situation illustrates, the Parole Board serves as a supervisory sentencing authority Even when a court sets the ostensible minimum and maximum terms of imprisonment that are justified by a guilty defendant's crime, the Parole Board can deny parole based on the facts before the sentencing judge, and without regard for the defendant's post-sentencing conduct or efforts toward rehabilitation.[7] In effect, if the Parole

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[1] Cavender v. Mudd, No. 2008-CA-001988-MR, 2009 Ky. App. Unpub. LEXIS 749, at *1 (Ky. Ct. App. Sept. 4, 2009).

[2] *Id.*

[3] *Id.*

[4] *Id.* at *1–2.

[5] *Id.* at *2.

[6] Graham v. Florida, 560 U.S. 48, 69 (2010) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

[7] *See infra* notes 67–68, 94–97 and accompanying text; *see, e.g.*, *Cavender*, 2009 Ky. App. Unpub. LEXIS 749.

Board believes that permitting the defendant's release would "deprecate the seriousness of" the offense of conviction, it is empowered to raise the minimum sentence on that basis. Many state statutes permit paroling authorities to deny parole in this way, either explicitly or by granting the paroling authority broad discretion to establish release criteria.[8]

Do paroling authorities exist to gauge the defendant's readiness to return and contribute to society, or to pass judgment a second time on the punishment needed to reflect the defendant's culpability? Assuming the paroling authority is part of the executive branch of government, as is generally the case,[9] the latter position is in tension with the separation of powers: a parole denial that turns on moral condemnation of the same offense for which the defendant was originally sentenced appears to revise the trial court's judgment as to the proper minimum sentence.

In the popular imagination, it seems, the parole review process is intended to do just that. In 2018, New York government endured a wave of outrage when 70-year-old Herman Bell was granted parole release.[10] He had served 45 years' imprisonment on a sentence of 25

[8] *See, e.g.*, N.Y. EXEC. LAW § 259-I(2)(c)(A) (Consol. 2018) ("Discretionary release on parole shall . . . be granted . . . after considering if there is a reasonable probability that . . . release . . . will not so deprecate the seriousness of his crime as to undermine respect for law"); 13 R.I. GEN. LAWS § 13-8-14(a)(2) (1995)(similar); NEB. REV. STAT. § 83-1,114(1) (2006) (similar); 730 ILL. COMP. STAT. § 5/3-3-5(c)(1—2) (similar); MONT. CODE ANN. § 46-23-208(4)(a), (q) (2017) (similar); STATE OF MISSOURI DEP'T OF CORRS., BOARD OF PROBATION AND PAROLE, PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES ¶ 15(A) (2017), https://doc.mo.gov/sites/doc/files/2018-01/Blue-Book.pdf [https://perma.cc/C8FC-5NFX](similar); *see also* GA. CODE ANN. § 42-9-40(a) (1980) (requiring state parole board to adopt a "guidelines system for determining parole action," which "shall take into consideration the severity of the current offense, the inmate's prior criminal history, the inmate's conduct, and" other factors the board deems relevant); Bussiere v. Cunningham, 571 A.2d 908, 909–10 (N.H. 1990) (upholding, as a proper exercise of the parole board's discretion, a denial of parole after the minimum release date on the basis that potential parolee's "progress . . . made as an inmate . . . was overshadowed by the rights of the victims and the desire of the public to see justice done"); Rachel F. Cotton, Comment: *Time to Move On: The California Parole Board's Fixation with the Original Crime*, 27 YALE L. & POL'Y REV. 239, 242 (2008) (concluding that in California, "reliance on the commitment offense has swallowed the statutory mandate that parole 'normally' should be granted"); Kevin R. Reitz, *Reporter's Study: The Question of Parole-Release Authority*, *in* MODEL PENAL CODE: SENTENCING 126 (AM. LAW INST., Tentative Draft No. 2, 2011) (discussing states' use of offense seriousness as a factor in parole determinations).

[9] *See, e.g.*, Commonwealth v. Cole, 10 N.E.2d 1081, 1089 (Mass. 2014) (citing Commonwealth v. Amirault, 612 N.E.2d 631, 633 (Mass. 1993)); Jones v. Commonwealth, 319 S.W.3d 295, 298–99 (Ky. 2010); *In re* Roberts, 115 P.3d 1121, 1129 (Cal. 2005) (citing *In re* Rosenkrantz, 59 P.3d 174, 183–84 (Cal. 2002)); People v. Kelly, 666 N.E.2d 1348, 1350 (N.Y. 1996).

[10] Lori Bordonaro & Katherine Creag, *Cop Killer Herman Bell Released from Prison After 44 Years*, NBC (May 18, 201, 2:44 PM), https://www.nbcnewyork.com/news/local/nypd-cop-killer-herman-bell-parole-prison-release/497143/ [https://perma.cc/XDM2-9TNH].

years to life for his part in the 1971 killing of two police officers.[11] The Board cited evidence that Bell had been rehabilitated over the course of his lengthy incarceration and had taken responsibility for his offense of conviction.[12] Nevertheless, an opposition campaign roared into action, focusing on the nature of Bell's crime. The New York Police Department mounted a public campaign urging the Parole Board to reverse its decision;[13] the wife of one of Bell's victims tried to challenge the decision in court;[14] New York City mayor Bill DeBlasio sent a public letter to the Parole Board criticizing its decision because "[m]urdering a police officer in cold blood is a crime beyond the frontiers of rehabilitation or redemption."[15] Ultimately, the Parole Board held firm, and Bell was released.[16]

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[11] *Id.*; Al Baker, *Nearly 5 Decades Later, Man Who Killed New York Officers Wins Parole*, N.Y. TIMES (Mar. 15, 2018), https://www.nytimes.com/2018/03/14/nyregion/herman-bell-nypd-parole.html [https://perma.cc/QRA9-AXZ5].

[12] *Id.*

[13] *See generally* Rocco Parascandola & Thomas Tracy, *NYPD Commissioner Rips Impending Release of Cop Killer Herman Bell in Letter to Cuomo*, DAILY NEWS (Apr. 21, 2018, 4:18 PM), http://www.nycpba.org/news-items/daily-news/2018/nypd-commissioner-rips-impending-release-of-cop-killer-herman-bell-in-letter-to-cuomo/ [https://perma.cc/HP4R-ZTB]; Natasha Lennard, *How The NYPD Union Is Manufacturing Outrage About a 70-Year-Old Black Panther's Parole,* INTERCEPT (Apr. 25, 2018, 7:00 AM), https://theintercept.com/2018/04/25/herman-bell-nypd-release-parole-new-york-police/ [https://perma.cc/G3UJ-N24B].

[14] Matter of Piagentini v. N.Y. State Bd. of Parole, 76 N.Y.S.3d 364, 365 (Sup. Ct. 2018), *aff'g*, 108 N.Y.S.3d 481, 484 (App. Div. 2019).

[15] *Letter from Mayor Bill DeBlasio to New York State Parole Board*, NYPD (Mar. 23, 2018), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/parole-board-letter-bell.pdf [https://perma.cc/8D2V-W5P3].

[16] Baker*, supra* note 11. The parole board's handling of this matter contrasts with the case of Albert Victory, another man convicted of participating in the killing of a police officer. *See* C.J. Chivers, *Release of Officer's Killer Rallies Opponents of Parole*, N.Y. TIMES (Dec. 29, 1999), https://www.nytimes.com/1999/12/29/nyregion/release-of-officer-s-killer-rallies-opponents-of-parole.html [https://perma.cc/VVK7-DDJL]. Victory's 1999 parole grant was rescinded by the parole board following a pressure campaign led by the police union. *Id.* A judge subsequently overturned the board's rescission, holding it was not based on new evidence. *See id.*; Victory v. Pataki, 814 F.3d 47, 52–53 (2d Cir. 2016) (vacating dismissal of Victory's tort action against government officials related to the parole reversal); *Cop Killer Must Rot: Time for the Cell Door to Slam for Good on Albert Victory*, N.Y. DAILY NEWS (Feb. 16, 2009); https://www.nydailynews.com/opinion/killer-rot-time-cell-door-slam-good-albert-victory-article-1.393514 [https://perma.cc/5GY7-JSCK] (advocating for revocation of Victory's parole after he was pulled over for driving under the influence, and describing his parole release as "one of the great miscarriages of justice"). Cases involving violence against police recur in this Article, so I wish to emphasize here that I did not go looking for them. Rather, this paper's subject necessarily brings up the "recurring" issue of opposition to parole for people convicted of such crimes; in New York, police unions and others have long advocated "that an inmate convicted for the death of a law enforcement officer—even a nonshooter convicted of felony murder . . . should never be released on parole." Costello v. N.Y. State Bd. of Parole, 957 N.Y.S.2d 486, 490–91 (App. Div. 2012) (Spain, J., dissenting), *rev'd*, 18 N.E.3d 739 (N.Y. 2014); Natasha Lennard, *The NYPD Union's War Against Parole Reform*, THE NATION (Mar. 29, 2019),

Bell's case cuts to the core purpose of parole. If parole boards exist to effectuate the sentence given by the court, then a thoroughly rehabilitated, 70-year-old offender who has served nearly double the minimum sentence set by the sentencing court seems an entirely reasonable candidate for release. But if parole boards are expected to base their judgment on the reprehensibility of the original crime each time the prisoner comes before them, or on political judgments about the proper sentences for certain categories of crimes—in effect, giving the government another bite at the sentencing apple—then it might make sense to criticize the board for releasing someone convicted of a heinous crime.

This Article discusses the separation-of-powers implications of letting the parole board base its decision as to whether release would be appropriate on its view of the punishment necessary to reflect the severity of a potential parolee's crime of conviction. Since parole has been abandoned in the federal system,[17] I'm mainly concerned with the separation of powers among the branches of state governments. States' implementation of indeterminate sentencing varies widely—in fact, indeterminate sentencing structures can vary even between different offenses in a single jurisdiction—and I don't find it helpful in developing the constitutional issue to canvass these variations nationwide, except to point out that many states permit or require parole boards to base release decisions on their own minimum sentence assessments.[18] So I use New York as an example, with the understanding that many state governments share relevant constitutional features.[19]

In Part I, I lay out some background. First, I briefly summarize the history of indefinite detention schemes in the United States. I then describe the sentencing and parole system existing in New York today. In Part II, I explain the separation-of-powers doctrine implicated here, a bedrock rule shared by many United States jurisdictions: the judgment of a court cannot be revised or overturned by the executive or legislative branches. For convenience, I refer to

https://www.thenation.com/article/archive/nypd-parole-lynch-herman-bell/ [https://perma.cc/NSB9-2GM2]. Whether because of this political dynamic or for some other reason, many of the New York cases presenting these issues have involved individuals imprisoned for crimes against police officers.

[17] *See infra* note 69 and accompanying text.

[18] *See supra* note 8.

[19] *See infra* notes 120–126 and accompanying text.

this doctrine as the "nonrevision rule."[20] I also discuss the rule's operation in the criminal context, where the executive branch both carries out the judgment *and* litigates the case.

In Part III, I argue that state parole statutes permitting paroling authorities to deny release based on a determination that more punishment than the minimum sentence is necessary are in tension with the nonrevision rule. In effect, these laws give the parole board the power to overturn the minimum sentence component of the sentencing court's judgment. I also briefly consider some possible reforms to resolve this constitutional difficulty. Part IV concludes.

I. INDETERMINATE SENTENCING

A. Development of Indeterminate Sentencing and Parole

Indeterminate carceral sentencing in the modern sense—i.e., sentencing a defendant to incarceration for a time not fully set at sentencing but determined in part based on post-sentencing events[21]—arrived in the United States toward the end of the nineteenth century.[22] The reformers who brought about this change urged jurisdictions to refocus their penal systems on rehabilitating

[20] It might be less cumbersome to use a term like "finality" rather than "nonrevision," but "finality" has other related yet distinct meanings. *See, e.g.*, Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J. L. & POL'Y 121, 123, 123 n.8 (2014) (defining finality as the rule that "once the courts have completed direct review of the case, . . . the judgment then should not be revisited by a court at any future time," but also noting other meanings of the term). I opt to sacrifice felicity for the sake of clarity.

[21] *See Indeterminate Sentencing*, BLACK'S LAW DICTIONARY (11th ed. 2019). This language is also sometimes used to distinguish between fixed sentences set by the legislature and applied to everyone convicted of a particular crime ("determinate") and sentence ranges set by the legislature, within which a judge sets a fixed sentence for the particular offender ("indeterminate"). *See, e.g.*, Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 3, 3 n.1 (2015). To be clear, that is not how I am using these terms here. In addition to parole, a sentence might be rendered indeterminate through the operation of a good time statute. "Good time" refers to systems present in many states in which credits are awarded to imprisoned people "for good behavior," and with which time "may be subtracted from the minimum term, to accelerate parole eligibility, or it may be subtracted from the maximum term, to provide an early mandatory (and sometimes a conditional form of) release." Nicolette Parisi & Joseph A. Zillo, *Good Time: The Forgotten Issue*, 29 CRIME & DELINQ. 228, 228 (1983). Good time thus functions somewhat similarly to parole, changing the total length of a sentence based on post-sentencing events.

[22] S*ee* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 958 (2013). There were, however, earlier experiments with commutations for good behavior during incarceration in some states earlier in the nineteenth century. *See* Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 10 (1925).

offenders for reintroduction into society.[23] They believed that "the moral cure of criminals, . . . their restoration to virtue and the spirit of a sound mind, is the best means of attaining the end in view—the repression and extirpation of crime."[24] The reformers sought to bolster the ability of government to achieve this "restoration" through incarceration by tailoring the duration of confinement to the extent of the offender's rehabilitation.[25] Under such a system, "a person w[ould] be supervised as long as he constitute[d] an unreasonable threat to life or property, but no longer."[26] That is, a prisoner could be released "immediately upon effective 'cure,' regardless of the severity of the underlying crime."[27] Individualized treatment and assistance of each prisoner would ensure successful reintegration.[28]

The idea of indeterminate sentencing, then, was utterly bound up with the rehabilitative ideal. One influential reformer wrote that the indeterminate sentence

> is an aid to reformatory discipline. It is nothing less, and it is nothing more. In itself it exerts no moral influence whatever. To apply it to prisoners in institutions not reformatory, in fact, is worse than absurd; it is criminal. It is ridiculous to intrust its practical working to officials who have no faith in the reformability of prisoners, or who are unfit . . . to exert a personal reformatory influence upon those under their care, or to apply the tests by which it is alone possible to determine with approximate accuracy the moment at which a convict

[23] *See* Doherty, *supra* note 22, at 977–78; Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 OHIO N. U. L. REV. 263, 266 (2018).

[24] E.C. WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA, MADE TO THE LEGISLATURE OF NEW YORK, 1867, at 61 (1867). For discussion of the social context in which these reformers operated—one grounded in "a growing optimism in the ability of new forms of knowledge to improve everyday life"—see James A. Beha II, Note, *Redemption to Reform: The Intellectual Origins of the Prison Reform Movement*, 63 N.Y.U. ANN. SURV. AM. L. 773, 805 (2008).

[25] Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 589–90 (2019); *see* United States v. Grayson, 438 U.S. 41, 46 (1978).

[26] Puzauskas & Morrow, *supra* note 23, at 265 (quoting Anderson v. Nelson, 352 F. Supp. 1124, 1129 (N.D. Cal. 1972)); *see Principles of Penitentiary and Reformatory Discipline Suggested for Consideration by the National Congress*, *in* TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 548, 551 (E.C. Wines ed., 1871) [Hereinafter *Principles*] ("sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.").

[27] Puzauskas and Morrow, *supra* note 23, at 267.

[28] Lindsey, *supra* note 22, at 24.

> can, with safety to society and benefit to himself, be conditionally discharged.[29]

The reformers were first able to put their ideas into practice in 1869, when New York authorized the creation of the Elmira Reformatory.[30] The authorities at Elmira granted their charges "marks" for good behavior and progress, which would lead to increased privileges and eventually release.[31] Under the authorizing statute, offenders sentenced to confinement at Elmira could be held there for up to "the maximum term provided by law for the crime for which the prisoner was convicted and sentenced"; within that range, the amount of time they would actually spend there would be decided by "the managers of the reformatory."[32] These managers were empowered to grant an absolute release freeing the offender of any remaining liability for their offense, but they could also grant a conditional form of release on a temporary basis through which the offender could prove that they had successfully been reformed; we would recognize this today as parole.[33] In practice, nearly all prisoners at Elmira earned enough "marks" to be paroled within their first three years of confinement, typically for a six-month period preceding full liberation.[34] A study conducted by Zebulon Brockway, the reformist warden of Elmira, found that some 78.5% of the reformatory's parolees went on to successfully reintegrate and avoid future criminal activity.[35]

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[29] FREDERICK HOWARD WINES, PUNISHMENT AND REFORMATION: A STUDY OF THE PENITENTIARY SYSTEM xii (New, Enlarged ed. 1910). As this passage suggests, reformers heavily emphasized the need for buy-in from corrections officers. *See Principles*, *supra* note 26, at 552 ("No prison can be made a school of reform till there is, on the part of the officers, a hearty desire and intention to accomplish this object. . . . [T]here must be a serious conviction, in the minds of prison officers, that [the incarcerated people] are capable of being reformed . . . .").

[30] Beha, *supra* note 24, at 798.

[31] Doherty, *supra* note 22, at 980–81; Beha, *supra* note 24, at 801–03.

[32] Lindsey, *supra* note 22, at 21–23; *see also* Snell Putney & Gladys J. Putney, *Origins of the Reformatory*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 437, 442 (1962) (observing that this structure was suggested as a compromise between reformers' desire for wholly indeterminate sentencing—with no minimum or maximum sentences at all—and the need to draft a bill that the legislature would actually pass).

[33] Lindsey, *supra* note 22, at 23; *see* Putney & Putney, *supra* note 32, at 443.

[34] Doherty, *supra* note 22, at 982.

[35] *See* Helen Leland Witmer, *The History, Theory and Results of Parole*, 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 24, 63 (1927); Putney & Putney, *supra* note 33, at 444; Doherty, *supra* note 23, at 980. However, one scholar has pointed out that this study included only those parolees whose "addresses could be found," which puts in question the reliability of this facially encouraging statistic, as less successful parolees might be less traceable. *See* Witmer, *supra*, at 63.

The apparent success at Elmira spurred reform in other states; eventually, every state adopted an indeterminate sentencing system, the linchpin of which was review by a paroling authority.[36] The federal government followed suit, enacting a statute providing for parole boards to supervise each federal penitentiary, which could release a prisoner if "there [was] a reasonable probability that such applicant [would] live and remain at liberty without violating the laws, and if in the opinion of the board such release [was] not incompatible with the welfare of society."[37]

These sentencing and correctional systems did not exactly replicate the Elmira model, however. They tended to provide for maximum and minimum sentences set by the sentencing court or by statute, with the paroling authority to determine the release date within that range based on the incarcerated person's post-sentencing progress.[38] Under a sentencing program based *exclusively* on rehabilitation, as the early reformers sought, there would be no need for the court to set a minimum or maximum sentence—the paroling authority could simply detain its charges until they were deemed "cured," and then release them.[39] But such a system "has rarely been used."[40] One reason for this suggests itself: if the paroling authority released the perpetrator of a well-publicized crime after only a brief period of imprisonment, the system would risk the scorn of the community and

[36] *See* Doherty, *supra* note 22, at 982–83; Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J. L. & POL'Y 345, 359–60 (2016); Quinn, *supra* note 25, at 589; Lindsey, *supra* note 22, at 30–40; Williams v. People of State of N.Y., 337 U.S. 241, 247–48 (1949).

[37] Parole Act, ch. 387, § 3, 36 Stat. 819 (1910).

[38] *See* Lindsey, *supra* note 22, at 39, 58, 69; Edwin M. Abbott, *Indeterminate Sentence and Release on Parole*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 543, 544–45 (1912) (surveying then-existing iterations of parole and indeterminate sentencing schemes); MODEL PENAL CODE § 6.06 cmt. at 91–92 (AM. LAW INST. 1985).

[39] *See* Gerald F. Flood, *The Model Sentencing Act: A Higher Level of Penal Law*, 9 CRIME & DELINQUENCY 370, 373 (1963) (advocating for the Model Sentencing Act's complete rejection of minimum sentences "to leave with the parole board unfettered authority to release a prisoner when it concludes that rehabilitation has been achieved or imprisonment has had its maximum effect"); Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L. J. 17, 24 (1900) (rejecting the argument that a sentence without limits could lead to overlong detention as "founded on the false notion that . . . confinement is a punishment for [an] offense" rather than a sort of treatment); *cf.* MODEL PENAL CODE § 6.06 cmt. at 91–92 (AM. LAW INST. 1985). As already noted, even at Elmira, the authorities could only restrain someone to the extent of the maximum sentence imposed by law. *See supra* note 32 and accompanying text.

[40] Sue Titus Reid, *A Rebuttal to the Attack on the Indeterminate Sentence*, 51 WASH. L. REV. 565, 566 (1976); *accord* Edward Lindsey, *What Should Be The Form of the Indeterminate Sentence and What Should be the Provisions as to Maximum and Minimum Terms if any?*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 534, 535 (1922) ("A strictly indeterminate sentence has nowhere been adopted. While it was advocated theoretically, it was recognized that public opinion would not sanction its adoption in its extreme form.").

punitive-minded reforms. Preempting that result, a minimum sentence could "assure the public that a particular offender will be imprisoned for at least a minimum period of time," advancing "general deterrence" and "maintain[ing] community respect for law at a high level."[41] On the other hand, society would also be outraged if a paroling authority detained for many years someone whose only offense was very minor, e.g., shoplifting a banana; this can be prevented by including a maximum sentence.[42] So, by adopting a sentencing scheme involving minimum and maximum sentence limits surrounding a range of indeterminacy, a jurisdiction can charge its legislature or judiciary (as the case may be) with determining the term of incarceration that is justified by the conviction offense itself—i.e., the least amount society demands and the most it will permit—while the paroling authority takes account of post-sentencing events to determine the release date within that range.[43]

Nationwide implementation of parole varied from the Elmira system in other ways as well. Rather than the individualized treatment and relatively predictable accumulation of "marks" that distinguished Elmira, at the peak of parole systems' use in the United States, paroling authorities had broad discretion to grant or deny release, and rehabilitative programs for incarcerated populations

[41] MODEL PENAL CODE § 6.06 cmt. at 128; *accord* Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1477–78 (1964); *see also Legislation—Indeterminate Sentence Laws—The Adolescence of Penocorrectional Legislation*, 50 HARV. L. REV. 677, 680 (1937) ("The explanation for minimum terms seems to lie largely in the unwillingness of legislatures, conscious or otherwise, to break away from the primitive feeling that a criminal should be made to suffer for the wrong he commits"); Lindsey, *supra* note 40, at 538 (asserting that the "demand" for minimum and maximum sentences stems partly from "the deterrent and . . . the retributory theories of punishment[,]" the latter of which "accords with the moral sentiments of the great mass of people, including criminals themselves").

[42] *See* Note, *supra* note 41, at 1478 (arguing that a maximum sentence "is properly expressed by the legislature," because it represents society's judgment as to the most punishment deserved for the crime); Lewis, *supra* note 39, at 23–24.

[43] *See* Note, *supra* note 41, at 1477–78 (arguing that New York should adopt an indeterminate sentencing system including a "court-imposed minimum" sentence—as indeed it did—"because the judge at the time of sentencing is best able to determine the term of imprisonment necessary both to avoid depreciating the seriousness of the offense and to reassure the community of sufficient protection"); Norval Morris, *The Future of Imprisonment: Toward a Punitive Philosophy* 72 MICH. L. REV. 1161, 1175 (1974) ("Retribution . . . not only limits the worst suffering we can inflict on the criminal[,] but also [sometimes] dictates the minimum sanction a community will tolerate"); Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 L. & CONTEMP. PROBS. 528, 541 (1958) (discussing factors considered in imposing minimum sentences and noting the need for courts to impose significant minimum sentences for some "serious offenses" because "it is at the time of sentence that the gravity of the crime is publicly assessed and prevention receives its proper emphasis"); Herbert Wechsler, *Correctional Practices and the Law*, 17 FED. PROBATION 16, 19–20 (1953).

remained under-resourced.[44] Professor Fiona Doherty has argued that it was largely government's failure to put forth "any effort to create certainty or transparency for prisoners" like the marks system at Elmira that would eventually lead to attacks on indeterminate sentencing as arbitrary and inequitable.[45]

B. Early Challenges to Parole Laws

Parole laws survived various constitutional challenges early in the 20th century.[46] Defendants argued that permitting executive agencies such as parole boards to determine the ultimate duration of confinement unconstitutionally delegated legislative or judicial power to the executive branch, but these arguments were rebuffed on the basis that legislatures continued to authorize sentence ranges and judges continued to impose them on defendants; it was only the form of the sentence that had changed.[47] Similarly, the statutes did not purport to remove the constitutional clemency power from the person of the executive, because parole was merely a mode of executing a sentence, not a pardon or commutation.[48] Courts also

[44] *See* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1018 (1991) ("Probably because of limited resources and doubt about the validity of coerced therapy, we never fully implemented treatment programs in prison. Even in the era that demonstrated great public interest and confidence in rehabilitation, actual resources remained minimal."); Jefferson-Bullock, *supra* note 36, at 361–64.

[45] Doherty, *supra* note 22, at 1018; *see* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 95–97 (1972); *cf.* WINES, *supra* note 29, at 210 (arguing that while the indeterminate sentence could function as a "lever" to be used by "[the] competent and devoted prison superintendent . . . to subvert the criminality of the convict . . . [i]t is merely a tool. It is of no value if not used or in the hand of a man who does not know how to use it. It has in itself no reformatory power; it is a dead thing").

[46] *See* Lindsey, *supra* note 22, at 40–52.

[47] *See* State v. Mulcare, 66 P.2d 360, 362 (Wash. 1937) ("It is the function of the judicial branch of the government to determine the guilt of persons charged with crimes and to impose the sentence provided by law for the crime of which a particular individual has been found guilty. But the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature."); Johnson v. State, 152 S.E. 76, 79 (Ga. 1930); *Ex parte* Lee, 171 P. 958, 960 (Cal. 1918) (collecting cases); Dreyer v. People of State of Illinois, 187 U.S. 71, 84 (1902) (holding that federal courts would not review state separation-of-powers challenges to these laws). The Supreme Court of Michigan did hold an early indeterminate sentencing law to be unconstitutional as violative of the separation of powers, see People v. Cummings, 50 N.W. 310, 314 (Mich. 1891), but its holding was overturned by a constitutional amendment. *See* Manaca v. Ionia Circuit Judge, 110 N.W. 75, 77, 78 (Mich. 1906).

[48] *See* People v. Hale, 222 P. 148, 152 (Cal. Ct. App. 1923); State v. Duff, 122 N.W. 829, 830–31 (Iowa 1909); *Ex parte* Marlow, 68 A. 171, 173 (N.J. 1907); Lewis, *supra* note 39, at 26. For discussion of the distinctions between parole and clemency, see *infra* text accompanying notes 154–155.

found the sentences not to be unconstitutionally uncertain on the basis that, for purposes of a vagueness analysis, an indeterminate sentence "is in legal effect a sentence for the maximum term"; the defendant knows for a fact the full extent of their *potential* exposure to incarceration at the time of sentencing.[49]

Some courts reacted to defendants' challenges by suggesting that defendants ought to be grateful for the new sentencing scheme. In a case involving a defendant sentenced to confinement at Elmira, a New York appellate court complained,

> it is difficult to see upon what theory a defendant is prejudiced by the Legislature having made this humane provision in the interest of first offenders, to encourage them to reform, without suffering a period of imprisonment of such duration that they might abandon hope of opportunity to regain a standing in the community.[50]

As noted above, under the enabling statute for the Elmira reformatory, the sentence the defendant faced could potentially extend to "the maximum term provided by law for the crime for which [he] was convicted and sentenced," which seems a more reasonable basis for objection than the court gave him credit for.[51] In any event, courts would nearly universally uphold "humane" sentencing structures like these in the years to follow.[52]

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[49] *Lee*, 171 P. at 959; Murphy v. Commonwealth, 52 N.E 505, 509 (1899). In one early case, the Supreme Court of Pennsylvania considered whether a newly enacted statute giving sentencing courts discretion to set minimum terms could be applied to a defendant whose crime took place under the prior regime to impose a higher minimum sentence than was possible under the prior law. Commonwealth v. Kalck, 87 A. 61, 62 (Pa. 1913). The court held that there was no ex post facto problem because "a sentence for an indefinite term must be deemed a sentence for the maximum term prescribed by law as a punishment for the offense committed." *Id.* at 64. That is, "'the minimum sentence is merely an administrative notice by the court to the executive department, calling attention to the legislative policy that when a man's so-called minimum sentence is about to expire, the question of grace and mercy ought to be considered and the propriety of granting a qualified pardon be determined.'" *Id.* (quoting Commonwealth *ex rel.* Bates v. McKenty, 21 Pa. D. 589, 593 (Quar. Sess. 1912)). In other words, both before and after the passage of the new statute, the defendant's potential exposure to incarceration remained the same. This analysis probably shouldn't be taken out of the ex post facto and vagueness contexts, but the court's characterization of a minimum sentence as merely an "administrative notice" is of some interest in connection with the nonrevision rule discussed in this Article.

[50] People v. Madden, 105 N.Y.S. 554, 558 (App. Div. 1907).

[51] *Id.* at 557; *see supra* note 32 and accompanying text.

[52] *Madden*, 105 N.Y.S. at 558; *see* People v. Adams, 68 N.E. 636, 640 (N.Y. 1903) (upholding a different New York indeterminate sentencing law as a "merciful exercise of legislative power"

C. The 20th-Century Retreat From Indeterminate Sentencing

The dominance of rehabilitation as a goal of punishment faced a powerful challenge beginning in the 1960s. Rising crime in the mid-20th century,[53] and perhaps a reaction to progressive movements, led to attacks on the effectiveness of rehabilitative programs. Some argued that when it comes to rehabilitating offenders, "nothing works"—i.e., rehabilitation had been tried and failed.[54] At the same time, parole systems came under fire from progressives on the basis that the broad discretion exercised by parole authorities and judges led to disparities in duration of confinement.[55] A House Judiciary Committee report from this period asserted that "[t]he parole system has long been recognized as the single most inequitable, potentially

that was "constitutional, and in the interest of the defendant"). For an exceptionally purple example of this genre, see the Supreme Court of Indiana's decision in *Miller v. State*:

> [W]e are gravely told by appellant's learned counsel that this act violates the constitution, in placing it within the convict's power, by good conduct, fidelity, and trustworthiness while on parole, to mitigate the severity of his punishment . . . To say so would require us to turn back the hands on the dial of human progress a hundred years. To call these provisions "cruel punishment" is to mock at all humanizing efforts. It is to cast a stigma on all our benevolent institutions, which stand as noble monuments of the goodness of the human heart. In short, it is to deny the fatherhood of God and the brotherhood of man.

Miller v. State, 49 N.E. 894, 896 (Ind. 1898).

[53] *See generally* U.S. DEPARTMENT OF JUSTICE, CRIME AND JUSTICE ATLAS 2000, https://www.jrsa.org/projects/Historical.pdf [https://perma.cc/RYA7-PM8P].

[54] *See, e.g.*, Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379 (1979) (arguing that because rehabilitation had failed, sentencing ought now to be based upon an offender's just deserts); *see generally* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prisons*, 45 L. & SOC'Y REV. 33, 36–37 (2011); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1032–33 (1991). The idea that rehabilitation simply did not "work" picked up steam following the publication of research by Robert Martinson finding little progress made through existing rehabilitation methods. *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974). Martinson later skeptically revisited this study, and indeed argued for the extension of parole release to *more* offenders. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979). "But by that time, few were listening." Doherty, *supra* note 22, at 995.

[55] *See, e.g.*, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA, PREPARED FOR THE AMERICAN FRIENDS SERVICE COMMITTEE (1971). Some also connect these criticisms with Americans' suspicion of government programs following the upheavals of the 1960s and 1970s, including Vietnam and Watergate. *See* Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 321 (2013); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 9 (2003). For more extensive discussion of these arguments than I can include here, see Doherty, *supra* note 22, at 991–95; Vitiello, *supra* note 54, at 1018–26; Victoria J. Palacios, *Go and Sin no More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 570–71 (1994); David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1491–92 (2014).

capricious, and uniquely arbitrary corner of the criminal justice map."[56] Suddenly the use of incarceration primarily for the purpose of retribution, long out of favor,[57] was being fiercely advocated.[58]

In the 1970s, United States jurisdictions began directing parole authorities to consider the "seriousness" of the offense of conviction alongside traditional rehabilitative factors. The typical language used to support a parole denial based upon offense seriousness was some variation of the following: "release at this time would depreciate" (or "deprecate")[59] "the seriousness of the offense." The language apparently originated with the 1962 publication of the MODEL PENAL CODE, whose drafters intended it to mean that the duration of incarceration should not be so unduly brief as to "imply a license to commit" the offense of conviction.[60] The MODEL PENAL CODE included this language both in a list of factors sentencing judges must take into account when deciding whether to impose a term of imprisonment at all and in a list of factors parole boards must take into account in deciding whether to release an incarcerated person at a particular time.[61]

The earliest court decisions which used this "depreciate the seriousness" language date to the early 1970s;[62] by 1974, the U.S. Parole Board was using it with such frequency to deny parole that one court had cause to complain, "What does '. . . depreciate the seriousness of the offense' mean? This reason has been appearing in board denials with such frequency that it has become stereotyped and

[56] H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 3 (1975).

[57] *See, e.g.*, W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 24 (1972) (describing retribution as "the oldest theory of punishment, and the one which is least accepted today by theorists").

[58] Vitiello, *supra* note 54, at 1014–15; *see, e.g.*, A. VON HIRSCH, DOING JUSTICE (1976).

[59] "In the sense used, 'deprecate' and 'depreciate' have come to be synonymous." U.S. *ex rel.* Richerson v. Wolff, 525 F.2d 797, 802 (7th Cir. 1975).

[60] Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 468 (1961); *see* MODEL PENAL CODE § 305.9(1)(b) (AM. LAW INST. 1962).

[61] MODEL PENAL CODE §§ 7.01(1)(c); 305.9(1)(b). Under the MODEL PENAL CODE, a court was to sentence a defendant to probation unless it made one of several findings, one of which was that "a lesser sentence will depreciate the seriousness of the defendant's crime." *Id.* § 7.01(1)(c). If it made such a finding, in many cases the court was to set a minimum and a maximum sentence of incarceration. *See id.* §§ 6.06, 6.07, 6.09. *But see id.* § 6.08 (determinate sentences for ordinary misdemeanors).

[62] The first instance of the phrase "deprecate the seriousness" in a case appearing on Westlaw is a 1973 decision in an Illinois appellate court. People v. Mordis, 299 N.E.2d 769 (Ill. Ct. App. 1973). "Depreciate the seriousness" first appears, with the exception of one noncriminal case not relevant here, in 1970, also in Illinois. People v. Krebel, 264 N.E.2d 279 (Ill. Ct. App. 1970). Both cases dealt with sentencing decisions regarding probation.

appears to be a reason without substance."[63] That result is ironic, given that the MODERN PENAL CODE's parole eligibility criteria were intended "to express the policy that first releases should take place when men are eligible, unless a substantial reason for postponing the release appears."[64]

In 1976, Congress inserted language into the federal parole statute requiring that before releasing any prisoner, the Parole Commission must first find "that release would not depreciate the seriousness of his offense or promote disrespect for the law."[65] The conference report accompanying this legislation asserted that "[d]eterminations of just punishment are part of the parole process," and instructed the Commission to "weigh the concepts of general and special deterrence, retribution and punishment."[66] Courts held that under this statute, the Commission could deny parole, notwithstanding a strong showing of rehabilitation, based on the seriousness of a crime.[67] Along the same lines, in 1977, New York's legislature added to its parole statute language requiring the Parole Board to consider whether release would "so deprecate the seriousness of [the prisoner's] crime as to undermine respect for law."[68]

These reforms to parole systems did not satisfy the movement toward retribution over rehabilitation. The federal government, and some of the states, soon abandoned parole systems in favor of ostensibly fixed sentences.[69] Other jurisdictions have retained

[63] Soloway v. Weger, 389 F. Supp. 409, 411 (M.D. Pa. 1974). At the time, the federal statute authorizing release on parole contained no reference to crime seriousness, but the Board was charged with determining whether release would be "not incompatible with the welfare of society," and it used that authority to justify reliance on offense seriousness in this way. *See* Battle v. Norton, 365 F. Supp. 925 (D. Conn. 1973) (approving use of offense seriousness language during Board "pilot project" involving giving prisoners reasons for parole denials); *see also Richerson*, 525 F.2d at 802–04 (collecting district court cases discussing adequacy of the then-new parole board language).

[64] Wechsler, *supra* note 60, at 487.

[65] Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219, 223 (1976); *see* Deborah A. Blom, *Parole*, 71 GEO. L.J. 705, 706 (1982).

[66] H.R. CONF. REP. NO. 838, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 351, 358.

[67] *See, e.g.*, Staege v. U.S. Parole Comm'n, 671 F.2d 266, 267–69 (8th Cir. 1982); Garcia v. Neagle, 660 F.2d 983, 989–90 (4th Cir. 1981); *see also* Moore v. Nelson, 611 F.2d 434, 438 (2d Cir. 1979) (observing that under the Commission's implementation of the then-new federal law, "rehabilitation plays a minor part in the Commission's decision to parole a prisoner").

[68] Act of Aug. 11, 1977, 1977 N.Y. Laws ch. 904 (codified at N.Y. EXEC. LAW § 259-i(2)(c)(A) (Consol. 2021)).

[69] Doherty, *supra* note 22, at 959–60. I say "ostensibly" because, as Fiona Doherty has pointed out, federal sentences continue to contain indeterminate components. *Id.* at 960. Almost every sentence handed down by a federal judge today includes a period of supervised release to be served after the conclusion of the defendant's carceral sentence; if the supervisee violates any condition of such "release," the supervisee is subject to a new term of incarceration. *See id.* at

parole, though some, such as New York, did so while enacting language seeming to authorize parole boards to punish rather than to rehabilitate.[70] At the same time, infrastructure supporting the rehabilitative ideal, such as educational programming, has been cut away.[71] Notwithstanding recent efforts to revive rehabilitation as a core purpose of punishment,[72] release rates have declined sharply in states that still use parole systems.[73]

960–61, 1014–15. About one-third of all federal offenders on supervised release are reincarcerated for violating release conditions, usually not by committing further crimes. *Id.* at 1015–16. Under these circumstances, whether indeterminate sentencing has actually been eliminated at the federal level is open to question. *See* Jacob Schuman, *Supervised Release is Not Parole*, 53 LOY. L.A. L. REV. 587, 592 (2020) (arguing that supervised release revocation is a more punitive form of indefinite sentencing than parole because it implies the possibility of penalties above and beyond the term of incarceration directly imposed, so greater procedural protections should apply in this context).

[70] *See supra* notes 8, 68 and accompanying text.

[71] *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 61–67 (2019) (observing that despite evidence that in-prison rehabilitative programs help releasees stay on the right side of the law, today, "prison programs are woefully underfunded and do not even come close to meeting the needs of those who are incarcerated."). In 1999, the former Chairman of the New York State Board of Parole and a co-author wrote that New York

> provides few of the rehabilitative resources which were in place prior to [then-Governor Pataki's] leadership of the state. Apparently, no serious thought has been given to the fact that these men and women have been sentenced to serve out their prison terms in the ostensible hope of being "rehabilitated". As a consequence, vocational training, graduated release, college programs, and even such basic necessities as a GED diploma, have either been severely curtailed, or eliminated completely. The clear result of these limitations is a protracted stay behind bars with little or no opportunity for educational and skill acquisition available to increase the prospects for success after release.

Edward R. Hammock & James F. Seelandt, *New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards' Discretion*, 13 ST. JOHN'S J. LEGAL COMMENT. 527, 545–46 (1999).

[72] *See, e.g.*, United States. v. K, 160 F. Supp. 2d 421, 429 (E.D.N.Y. 2001) (stating that "the pendulum is swinging back" in favor of rehabilitation); Cullen, *supra* note 55, at 347–49 (describing current trends in favor of increasing rehabilitative programs). Presumably, some of this movement relates to recent research suggesting that current carceral practices' net effect on crime is much diminished or even counterproductive—that is, lengthy and widespread incarceration, absent commensurate investment in prevention, reentry, and rehabilitation, seems to do much less than one might expect to reduce the incidence of crime in a community, and may actually increase it. *See, e.g.*, David Roodman, *The Impacts of Incarceration on Crime*, OPEN PHILANTHROPY PROJECT (2017); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1102 (2008); *see also* BARKOW, *supra* note 71, at 44–50 (discussing various related studies).

[73] *See* BARKOW, *supra* note 71, at 78; *see, e.g.*, Daniel Weiss, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1576 (2005) (observing that, at the time, California released less than one percent of eligible prisoners on parole).

D. Sentencing and Parole in New York

In this section, I provide a brief overview of New York's current approach to criminal sentencing and parole. I include this discussion not to limit the scope of the constitutional issue to New York, but to provide a specific grounding for the broader issue.

Under the New York Penal Law, most felony sentences are indeterminate in duration.[74] The court has discretion to set the minimum and maximum term within a statutorily defined range, except for the most serious felony convictions, for which the maximum term is always life.[75] Misdemeanor carceral sentences are nominally fixed in duration and last less than one year.[76] Even such "definite" misdemeanor sentences, however, are subject to early conditional release.[77]

Release decisions are made by the Board of Parole, an executive branch agency contained within but operating independently of the state Department of Corrections and Community Supervision.[78] The Board consists of up to nineteen members, "appointed by the governor with the advice and consent of the [state] senate," who must have experience in law, criminology, psychology, or a related discipline.[79] The state Executive Law specifies that an act of the Board should be "deemed a judicial function and shall not be reviewable if done in accordance with law."[80] Courts understand this statute to mean that they cannot review Board decisions "unless there has been 'a showing of irrationality bordering on impropriety.'"[81]

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[74] N.Y. PENAL LAW § 70.00(1) (Consol. 2021). There are exceptions, such as for lesser felonies, for which sentencing courts are authorized to impose a definite term lasting less than one year under certain circumstances. *Id.* § 70.00(4). The state Penal Law continues to provide for the possibility of a life sentence without parole for certain aggravated murder charges and to require such a sentence for other offenses, most of which relate to terrorism. *Id.* § 70.00(5).

[75] *See id.* § 70.00(2), (3).

[76] *Id.* § 70.15.

[77] *See id.* § 70.40(2); *see generally* Zurak v. Regan, 550 F.2d 86, 89–91 (2d Cir. 1977).

[78] N.Y. EXEC. LAW § 259-b(1) (Consol. 2021).

[79] *Id.* § 259-b(1), (2).

[80] *Id.* § 259-i(5); N.Y. CORRECT. LAW § 805 (Consol. 2021).

[81] Wallman v. Travis, 794 N.Y.S.2d 381, 386 (App. Div. 2005) (quoting Russo v. N.Y. State Bd. of Parole, 405 N.E.2d 225, 229 (N.Y. 1980)); *see, e.g.*, Collins v. Hammock, 465 N.Y.S.2d 84, 84 (App. Div. 1983). The "judicial function" component of the statute also places board determinations within the category of executive-branch actions that, among other things, cannot give rise to tort liability. *See* Tarter v. State, 503 N.E.2d 84, 87 (N.Y. 1986); *see generally* Hecht v. Monaghan, 121 N.E.2d 421, 424 (N.Y. 1954) (outlining the distinction between the "two broad categories, legislative and judicial" into which "the functions of an administrative agency fall"). Of course, this language doesn't mean that the board's acts are supposed to be

The Parole Board has "the power and duty" to determine whether a person should be released and upon what conditions.[82] When deciding whether to release an eligible person, the Board is required to consider whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law," whether "his release is not incompatible with the welfare of society," and—most importantly for our purposes—whether release "will not so deprecate the seriousness of his crime as to undermine respect for law."[83] To make those determinations, the statute further requires the Board to consider some eight factors including, once again, "the seriousness of the offense."[84]

The extent to which crime seriousness should dictate parole outcomes has been the subject of inconsistent decisions in the courts. A leading case is *King v. Division of Parole*, which involved a man convicted of felony murder for his involvement in a robbery that led to the death of a police officer.[85] He had demonstrated "exemplary" rehabilitation in the form of a college degree, devoted religious practice, and leadership within the prison, and by controlling the drug addiction that led to his involvement in the crime.[86] At the

"judicial" in the sense that the board could exercise constitutional judicial power; the legislature has not attempted to literally designate executive branch officials as judges for constitutional purposes, nor, presumably, could it. *Cf.* Heaney v. McGoldrick, 35 N.E.2d 641, 644–45 (N.Y. 1941) (distinguishing procedures in court from those required "[w]hen the Legislature confers upon an administrative officer or board authority to act in a judicial capacity"); *see also* Briguglio v. N.Y. State Bd. of Parole, 246 N.E.2d 512, 516 (N.Y. 1969); M.G. v. Travis, 667 N.Y.S.2d 11, 14 (App. Div. 1997).

[82] N.Y. EXEC. LAW § 259-c(1), (2), (6) (Consol. 2021).

[83] N.Y. EXEC. LAW § 259-i(2)(c)(A) (Consol. 2021). Another statute provides that the board "shall" release a potential parolee whose minimum sentence is less than eight years, and who has earned "a certificate of earned eligibility," "unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." N.Y. CORR. LAW § 805 (Consol. 2021). Conspicuously absent from this list of considerations, and in sharp contrast to the otherwise similar list in section 259-i(2)(c)(A) of the Executive Law, is any mention of whether release would deprecate the seriousness of the offense. This suggests that the parole board should not be considering offense seriousness in the same way when reviewing the case of a potential parolee who falls within the statute's ambit. *Cf.* Wallman v. Travis, 794 N.Y.S.2d 381, 386 (App. Div. 2005) (recognizing "a presumption in favor of parole release" for those qualifying under the statute); *But cf.* Thomas v. N.Y. State Div. of Parole, 729 N.Y.S.2d 160, 161–62 (App. Div. 2001) (upholding denial of parole under this provision, despite strong evidence that potential parolee posed no continued danger, based on offense seriousness and fact that potential parolee did not accept codefendant's version of crime).

[84] N.Y. EXEC. LAW § 259-i(2)(c)(A) (Consol. 2021).

[85] King v. N.Y. State Div. of Parole, 598 N.Y.S.2d 245 (App. Div. 1993), *aff'd*, 83 N.Y.2d 788 (1994). The Court of Appeals' memorandum affirming the lower appellate court's decision did not delve into these issues, noting only that "one of the Commissioners considered factors outside the scope of the applicable statute." *King*, 83 N.Y.2d at 791.

[86] *See King*, 598 N.Y.S.2d at 247.

parole hearing, one of the commissioners soliloquized about what he viewed as his dilemma, namely, "how much is enough" punishment for this type of offender.[87] The Parole Board then denied release, writing,

> Subject has effected an excellent institutional adjustment . . . Subject was 21 years and 10 months old when instantly involved, and he has used the capacity he had at that time to take full advantage of the program opportunities available to him over the last 22 years, to his great credit. The 23-year-old [victim]'s opportunities for further participation and growth ended when he entered the restaurant to purchase food for himself and his wife, who waited outside in the car. Mr. King is a well spoken, thoughtful, intelligent man, but release at this time would promote disrespect for the law and depreciate [*sic*] the seriousness of this offense.[88]

The reviewing court reversed and remanded for a de novo hearing,[89] finding that "the denial of petitioner's application was a result of the Board's failure to weigh all of the relevant considerations and there is a strong indication that the denial of petitioner's application was a foregone conclusion."[90] The further court noted that the Parole Board based its decision on "a fundamental misunderstanding of its role and its power":

> The establishment of penal policy is not the role of the Parole Board or of any other administrative agency . . . . The torturous and difficult decisions involved in determining the appropriate penalty to be imposed for the commission of a particular crime is fundamentally a function which belongs in the hands of elected officials to be performed in open and considered debate. It is the province of the legislative process, except insofar as the Legislature has entrusted, within certain parameters, the imposition of individual sentences to the judiciary. . . . The role of the Parole Board is not to resentence

[87] *See id.* at 247–48.
[88] *Id.* at 249 (alteration in original).
[89] *Id.* at 252 ("While we find it difficult to believe that petitioner would be denied parole after a hearing at which the statutory factors are fairly and properly applied, the Parole Board should have the opportunity to make that determination using the appropriate standard.").
[90] *Id.* at 250–51.

> petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all the relevant statutory factors, he should be released.[91]

Yet, notwithstanding its articulation of this division of authority among the branches of the government, the court then retreated to a statement that an offense involving "significantly aggravating or egregious circumstances" could still justify denial of parole as a statutory matter; reversal was required in this case because no such facts were present.[92]

Under *King*, then, it would appear that the Parole Board cannot deny release solely because of the seriousness of the offense, unless that offense was aggravated to an extreme degree.[93] Nevertheless, some New York appellate courts continue to uphold parole denials where the only factor weighing against release is the severity of the offense "so long as the Board considers the factors enumerated in the statute."[94] In fact, a few years after *King*, a panel of the same court—

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[91] *Id.* at 251.

[92] *See id.* The court applied this exception in *Phillips v. Dennison* when reviewing the Parole Board's denial of release to a former police officer who had "corruptly embarked on a pattern of extortion, in the course of which he committed a cold-blooded double homicide and shot a witness." *See* Phillips v. Dennison, 834 N.Y.S.2d 121, 125 (App. Div. 2007). It held that "the Board's concession that petitioner was an exemplary inmate who is now unlikely to pose a danger to the community did not necessarily outweigh the horrifying nature of the acts surrounding his crimes." *Id.*; *cf. In re* Lawrence, 190 P.3d 535, 565 (Cal. 2008) (holding that the Parole Board's denial of release solely based on the gravity of the committed offense violated the petitioner's due process rights, but also stating that "certain conviction offenses may be so 'heinous, atrocious or cruel' that an inmate's due process rights would not be violated if he or she were to be denied parole on the basis that the gravity of the conviction offense establishes current dangerousness").

[93] *See, e.g.*, Rossakis v. N.Y. State Bd. of Parole, 41 N.Y.S.3d 490, 494–95 (App. Div. 2016) (holding that the Board cannot deny parole based solely on the seriousness of the offense); Gelsomino v. N.Y. State Bd. of Parole, 918 N.Y.S.2d 892, 892–93 (App. Div. 2011) (holding that when the Parole Board only cites the seriousness of the offense, without aggravating circumstances, it acts irrationally); Menard v. N.Y. State Bd. of Parole, No. 159376/17, 2019 N.Y. Misc. LEXIS 992, at *2–4 (N.Y. Sup. Ct. Mar. 11, 2019) (citing *Rossakis*, 41 N.Y.S.2d at 493).

[94] *See* Hamilton v. N.Y. State Div. of Parole, 990 N.Y.S.2d 714, 717–18 (App. Div. 2014) (noting disagreement with *King*); *see, e.g.*, Marcus v. Alexander, 862 N.Y.S.2d 414, 415 (App. Div. 2008) (upholding denial of parole on the basis that the "Board . . . was free to place greater emphasis on the heinous nature of this [crime]" than on the factors tending to favor release); Gaston v. Berbary, 791 N.Y.S.2d 781, 782 (App. Div. 2005) (holding the Board could properly deny parole based on crime seriousness where it "also considered" factors more favorable to petitioner). *But see, e.g.*, Ferrante v. Stanford, 100 N.Y.S.3d 44, 47–50 (App. Div. 2019) (upholding contempt sanctions against the Board for repeatedly denying plaintiff parole based on offense seriousness despite strong evidence of rehabilitation); Huntley v. Evans, 910 N.Y.S.2d 112, 114 (App. Div. 2010) (vacating parole denial where the Board "cited only the seriousness of the petitioner's

including two of the very same justices who decided *King*—unanimously rejected the argument that the Parole Board had erred by denying parole to a woman convicted of manslaughter based exclusively on the severity of her crime.[95] The court observed that the Board "noted in its decision that it had reviewed the entire record," and concluded that "'the weight to be accorded to each of the factors lies solely within the discretion of the Parole Board.'"[96]

As a result, the parole board continues to deny release based only on its view of the seriousness of the offense after the judicially-imposed minimum sentence has expired.[97] I turn next to the rule that calls this practice into question.

II. THE NONREVISION RULE

A. Development of the Doctrine

Underpinning this Article is the doctrine that I am calling the nonrevision rule: "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."[98] The rule is usually traced back to *Hayburn's Case*,[99] one of the earliest statements on the separation of powers to appear in the United States Reports.

Hayburn's Case involved the constitutionality of a statute that required judges to review pension claims submitted by Revolutionary War veterans, and to submit recommendations to the Secretary of

crime, and failed to mention in its determination any of the other statutory factors"); Johnson v. N.Y. State Div. of Parole, 884 N.Y.S.2d 545, 546 (App. Div. 2009) (vacating parole denial where the Board neither described aggravating circumstances nor considered factors other than offense seriousness); *see also* Hammock & Seelandt, *supra* note 71, at 534 (noting that "[b]lanket denials that merely restate the elements of the offense and label it 'serious'" were "currently in vogue in New York").

[95] Walker v. Travis, 676 N.Y.S.2d 52, 53–54 (App. Div. 1998).

[96] *Id.* at 53 (quoting Garcia v. N.Y. State Bd. of Parole, 657 N.Y.S.2d 415, 418 (1st Dep't 1997)). The court also discounted "petitioner's achievements and success" while incarcerated based on what it perceived as "the strong possibility that . . . [they] may be due to the continued supervision and control the authorities exercise under the present arrangement." *Walker*, 676 N.Y.S.2d at 54.

[97] *See* BENJAMIN HELLER ET AL., VERA INST. OF JUST., TOWARD A FAIRER PAROLE PROCESS, 5-6 (Dec. 2021), https://www.vera.org/publications/toward-a-fairer-parole-process [https://perma.cc/E6BN-8AFV] (analyzing a sample of New York parole denial decisions between 2009 and 2021, and determining that sixty percent of these decisions "cited the seriousness of the original crime as the only reason for parole denial").

[98] Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[99] Hayburn's Case, 2 U.S. 409 (1792).

War regarding the claims' validity and the amount to be paid.[100] The Secretary of War and the legislature could then either pay out the claim or override the determination of the court.[101] Three Circuit Court panels, on which were five of the six then-current Justices of the Supreme Court, each unanimously determined that the statute did not accord with the separation of powers.[102] The Attorney General then presented the matter to the Supreme Court itself, but the Court never ruled on the separation-of-powers issue because Congress changed the statute in the meantime.[103] So, when we talk about the merits of *Hayburn's Case*, we are talking about a lengthy footnote added by the Reporter discussing opinions expressed by the Circuit panels.

The Pennsylvania Circuit Court, with Justices Wilson and Blair on the panel, unanimously determined—in a letter to President Washington, rather than a formal opinion in a case[104]—that the statute impermissibly assigned to it duties that were "not of a judicial nature," because,

> if . . . the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle [the separation of powers] which is so strictly observed by the constitution of the United States.[105]

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[100] *See* United States v Ferreira, 54 U.S. 40, 49–50 (1851) (discussing context of *Hayburn's Case*).

[101] *Id.*

[102] *Hayburn's Case*, 2 U.S. at 410 n.*. This was apparently the first time that the judicial branch exercised the power of constitutional review of legislation, though because of the peculiar posture in which it was decided the case is not often remembered this way. *See* Maeva Marcus & Robert Teir, Hayburn's Case*: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 530–31 & n.25 (1988).

[103] *Hayburn's Case*, 2 U.S. at 409–10. In the meantime, the court, dividing 3-3, denied the Attorney General's motion to appear ex officio, that is, without a client, and without explicit presidential authorization, to seek a writ of mandamus ordering the Pennsylvania Circuit to adjust claims under the statute. Marcus & Teir, *supra* note 102, at 538–39. The Attorney General then appeared on behalf of Hayburn, a claimant under the statute. *Id.* at 539 & n.80.

[104] *Hayburn's Case*, 2 U.S. at 410 n.*.

[105] *Id.*

The New York and North Carolina Circuits' opinions were to the same effect, except that they believed judges acting in their individual capacity, rather than as judges of the United States courts exercising judicial power, could serve as "commissioners" and thus carry out the duties contemplated by the statute.[106]

So, the decisions of the three circuit courts in *Hayburn's Case* stand for the black-letter principle that courts' decisions may not be revised by the other branches of government.[107] More technically, they say that courts may not issue decisions that can be revised by the other branches, because such a task is not "judicial" business.[108] This "nonrevision rule" follows from the basic premise that the branches of government are coequal.[109] Judges cannot be made subordinate to the executive or legislative branches by subjecting their judgments, made in the exercise of constitutional judicial power, to review outside the judiciary.[110]

In addition to addressing structural concerns, the nonrevision rule protects litigants against the threat of government overreach. "In the absence of limits on executive or legislative revision, the government could force litigants into an intolerable no-win situation: if a litigant were to lose in court, she would lose once and for all, but even if she were to win in court, she might still lose at the discretion of the political branches."[111] In *Hayburn's Case*, had the judges acquiesced to hearing claims under the statute, a disability claimant could successfully establish a claim before the court but still "lose" at the pleasure of the Secretary of War or the legislature.[112]

Hayburn's Case is also often cited for the rule that federal courts lack power to issue advisory opinions[113] (though recent scholarship has called into question whether reliance on the case for that rule is

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[106] *Id.* The early Justices of the Supreme Court seem to have fairly regularly engaged in practices in their capacities as individuals that would have violated the separation of powers if performed by "the judicial branch." *See* Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269 (1989).

[107] *See, e.g.*, United States v. Ferreira, 54 U.S. 40, 50 (1851).

[108] *See id.*

[109] Pushaw, *supra* note 114, at 517.

[110] *Hayburn's Case*, 2 U.S. at 410 n.*; *see generally* Plaut v. Spendthrift Farm, 514 U.S. 211, 218–19 (1995); *see also* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1816–18 (2008) (gathering Founding-era support for the proposition that courts' judgments must be insulated from revision by other branches if the judiciary is to remain independent).

[111] Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2026 (1996).

[112] *See supra* text accompanying notes 100–101.

[113] *See* Clinton v Jones, 520 U.S. 681, 700 & n.33 (1997); *In re* Workmen's Compensation Fund, 119 N.E. 1027, 1028 (N.Y. 1918) (Cardozo, J.).

justified).[114] Courts have sometimes understood both the nonrevision rule and the rule against advisory opinions as implied by the scope of the federal courts' jurisdiction, which is limited to hearing cases and controversies.[115] In fact, the former principle is sometimes seen as a narrow expression of the latter: a decision that can be overturned by another branch of the government lacks finality, and so is "advisory" in a sense.[116] However, for a coordinate branch to actually overrule a judgment made by a court acting within its jurisdiction and in the exercise of judicial power seems to represent a more acute threat to the independence of the departments of government than an ordinary request for an advisory opinion outside a litigated case.[117]

The nonrevision rule and its cousin, the rule against advisory opinions, have been ratified repeatedly by the U.S. Supreme Court. Recently, in the 1995 case *Plaut v. Spendthrift Farm*, the Court held that Congress could not reopen actions previously dismissed by the courts on statute of limitations grounds.[118] The majority emphatically reaffirmed that "the Framers crafted th[e] charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."[119]

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[114] Marcus & Teir, *supra* note 102; *see also* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 513–14 (1993) (arguing that *Hayburn's Case* "never decisively rejected" the ability of the courts to offer advisory opinions). It turns out that at least one of the panels deciding *Hayburn's Case* took up the issue of the statute's validity before anyone so much as sought relief from the court—meaning its decision was the definition of advisory! *See* Marcus & Teir, *supra* note 102, at 534. Further, the footnote constituting this case largely recounts letters written by the courts to the President expressing their opinions on the constitutionality of the statute. *Hayburn's Case*, 2 U.S. at 410 n.*. Nevertheless, courts have long cited the case as support for the rule against advisory opinions, and for the "case or controversy" requirement in general. Marcus & Teir, *supra* note 102, at 541–46.

[115] *See* Clinton v Jones, 520 U.S. 681, 700 & n.33 (1997); *accord Workmen's Compensation Fund*, 119 N.E. at 1028 ("The function of the courts is to determine controversies between litigants. They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function." (citations omitted)). *But see* Pushaw, *supra* note 114, at 517 (arguing that "[t]he limitations on federal judicial power identified in," *inter alia*, *Hayburn's Case*, "rested explicitly on separation of powers grounds, not on any notion that Article III's 'Cases' and 'Controversies' language imposed a jurisdictional barrier").

[116] *See* Town of Deerfield, N.Y. v F.C.C., 992 F.2d 420, 428 (2d Cir. 1993).

[117] *See* discussion *infra* note 120.

[118] Plaut v. Spendthrift Farm, 514 U.S. 211 (1995).

[119] *Id.* at 218–19 (citing *Hayburn's Case*, 2 U.S. at 410); *see also* Miller v. French, 530 U.S. 327, 342 (2000); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113–14 (1948) (collecting cases); U.S. v. O'Grady, 89 U.S. 641, 647–48 (1874); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852). A memorable recent federal decision in this line is *Baez-Sanchez v. Barr*, in which the Seventh Circuit expressed its outraged disbelief at an agency action taken

More importantly for present purposes, state courts have broadly endorsed both the nonrevision rule generally and *Hayburn's Case* specifically.[120] The states, of course, have all adopted tripartite forms of government modeled on the form of the federal government.[121]

in open defiance of the Circuit's prior order in the case. Baez-Sanchez v. Barr, 947 F.3d 1033 (7th Cir. 2020).

[120] *See, e.g.*, Gabler v. Crime Victims' Rights Bd., 897 N.W.2d 384 (Wis. 2017) (holding that the executive branch could not review the decision of a state court "and then sanction the judge for making a decision the agency disfavors"); State v. Bodyke, 933 N.E.2d 753, 766 (Ohio 2010); Moreau v. Fuller, 661 S.E.2d 841, 846 (Va. 2008); Evans v. State, 872 A.2d 539 (Del. 2005) (holding unconstitutional a legislative act purporting to reverse a judicial decision, and citing *Hayburn's Case*); Bush v. Schiavo, 885 So. 2d 321, 330–32 (Fla. 2004); People v. King, 37 P.3d 398 (Cal. 2002); Burton v. Town of Salisbury, 790 A.2d 394, 398 (Vt. 2001); *Ex parte* Jenkins, 723 So. 2d 649, 656 (Ala. 1998); Quinton v. General Motors Corp., 551 N.W.2d 677 (Mich. 1996) ("the doctrine of separation of powers bars the Legislature from reopening and setting aside orders entered by a court"); Mitchel v. Cropsey, 164 N.Y.S. 336, 340 (App. Div. 1917) (observing that the principles in *Hayburn* applied "equally" to the New York constitution); McManus v. Hornaday, 100 N.W. 33, 34 (Iowa 1904) (collecting cases); Bates v. Kimball, 2 D.Chip. 77, 89–90 (Vt. 1824) (holding unconstitutional a legislature's attempt to overturn a final judgment, citing *Hayburn's Case*); *see also In re* Constitutionality of House Bill 88, 64 A.2d 169 (Vt. 1949) (collecting state cases rejecting requests for advisory opinions); *In re* Application of Senate, 10 Minn. 78, 81 (1865) (relying on *Hayburn's Case* in declining to issue an advisory opinion). I have not encountered any case in the state courts that purports to allow executive review of a court's judgment in a litigated case. Some states do permit courts to issue advisory opinions. *See, e.g.*, ME. CONST., Art. VI, § 3; Couey v. Atkins, 355 P.3d 866, 899 (Or. 2015) (distinguishing *Hayburn's Case* in the context of advisory opinions that are not judgments in particular cases made reviewable by the executive); *In re* Interrogatories of Governor Regarding Certain Bills of Fifty-First Gen. Assembly, 578 P.2d 200, 211 (Colo. 1978) ("Colorado is one of only a few states in which the supreme court is constitutionally or statutorily authorized to give advisory opinions"); Op. to Governor, 174 A.2d 553 (R.I. 1961) (observing that an amendment to the state constitution to permit advisory opinions made Rhode Island an outlier among the states); Wyman v. De Gregory, 137 A.2d 512 (N.H. 1957). In those states, advisory opinions are usually abstract statements made by the judges as individuals at the request of a coordinate branch—and they do not involve nonfinal "judgments" as to the rights of particular parties. *See* Or. Med. Ass'n v. Rawls (*In re* Constitutional Test of House Bill 3017), 574 P.2d 1103, 1107 (Or. 1978). For that reason, and because of the greater sensitivity of a coordinate branch's purporting actually to overrule another, a statute purporting to allow for reversal of a particular litigated controversy already decided by the court would presumably still not fall within these grants of "extrajudicial" authority to the state courts. *See, e.g.*, State v. L.V.I. Group, 690 A.2d 960, 964 n.4 (Maine 1997) (endorsing the nonrevision rule and *Plaut* specifically); Powell v. City of Colorado Springs, 131 P.3d 1129, 1135 (Colo. Ct. App. 2005) ("We conclude, therefore, that the *Plaut* analysis of the separation of powers doctrine under the federal constitution is equally applicable to a consideration of the proper exercise of governmental powers under the state constitution."); *see also Couey*, 355 P.3d at 899 (noting the "particular institutional concerns that inhere in requests for judicial decisions that . . . are reviewable by other branches of government"); *cf. Workmen's Compensation Fund*, 119 N.E. at 1028 (noting that provision in some state constitutions for advisory opinions "is a survival of the days when the judges were members of the great council of the realm," and that, "[e]ven in those states . . . where such provisions are found, the opinions thus given have not the quality of judicial authority").

[121] Quinn, *supra* note 25, at 598.

Their constitutions incorporate separation of powers principles, often explicitly, and if not, then by implication.[122]

In the case *In re Richardson*, Chief Judge Cardozo provided a full-throated endorsement of the nonrevision rule under New York's Constitution.[123] The state Court of Appeals was presented with a statute empowering the Governor to designate a state judge to take evidence in a proceeding to remove a public officer, then deliver a report to the Governor, which the Governor could accept or reject.[124] Citing *Hayburn's Case* and other decisions to the same effect, Cardozo wrote that the statute impermissibly assigned mandatory, "nonjudicial" functions to state judges:

> At the word of command [a judge] is to give over the work of judging, and set himself to other work, the work of probing and advising. His findings when made will have none of the authority of a judgment. To borrow Bacon's phrase, they will not "give the rule or sentence." They will not be preliminary or ancillary to any rule or sentence to be pronounced by the judiciary in any of its branches. They will be mere advice to the Governor, who may adopt them, or modify them, or reject them altogether. . . . The function of the judges is to determine controversies between litigants. They are not adjuncts or advisers, much less investigating instrumentalities, of other agencies of government. Their pronouncements are not subject to review by Governor or Legislature. They speak "the rule or sentence."[125]

The *Richardson* court's acceptance of the nonrevision rule remains uncontroversial.[126]

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[122] Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999).

[123] *In re* Richardson, 160 N.E. 655 (N.Y. 1928) (Cardozo, J.).

[124] *Id.* at 655–57; *see* N.Y. PUB. OFF. LAW § 34.

[125] *Richardson*, 160 N.E. at 657 (internal quotation marks and citations removed).

[126] *See, e.g.*, Cuomo v Long Is. Lighting Co., 520 N.E.2d 546, 549 (1988) (discussing advisory opinions); Campaign for Fiscal Equity, Inc. v. State, 814 N.Y.S.2d 1, 8 (App. Div. 2006); Soares v. State, 121 N.Y.S.3d 790, 831–32 (Sup. Ct. 2020) (applying *Richardson* to strike down a statute purporting to require judges to issue nonbinding "recommendations"); *see also* Jonathan Lippman, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench*, 33 CARDOZO L. REV. 1341, 1349–63 (2012) (article by then-Chief Judge of the Court of Appeals discussing *Hayburn's Case*, *Richardson*, and related matters).

B. Nonrevision in Criminal Matters

The separation of powers is usually understood as intended to prevent "tyrannical control" by government over individuals' lives.[127] If that's the case, then the boundaries between the branches ought to be most carefully policed in the context of criminal prosecutions, which after all represent "the ultimate governmental power"[128] over individuals.[129] So the nonrevision rule, arising as it does from the basic tripartite structure of the government, should apply with full force in the "uniquely judicial" context of criminal sentencing.[130] While the issue does not seem to frequently come before the courts,[131] and has apparently been little studied, when the rule has been addressed in criminal matters, courts have assumed it would apply.[132]

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[127] MONTESQUIEU, THE SPIRIT OF THE LAWS, 154 (6th ed. 1792); *see* John Adams, *Letter to Richard Henry Lee, 15 Nov. 1775*, quoted *in* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 146 (2d ed. 1998); United States v. Brown, 381 U.S. 437, 443 (1965).

[128] Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

[129] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."). For the definitive treatment of this point, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006).

[130] *Mistretta*, 488 U.S. at 408.

[131] In general, scholars and litigants do not seem to have paid nearly so much attention to separation of powers issues in the criminal sphere as they have in the civil sphere. Barkow, *supra* note 129, at 992.

[132] *See, e.g.*, Evans v. State, 872 A.2d 539, 549–50 (Del. 2005) (striking down a statute purporting to overturn a judicial decision regarding the appellant's eligibility for conditional release, citing *Hayburn's Case*); People v. King, 37 P.3d 398 (Cal. 2002) (striking down a statute purporting to permit refiling of criminal charges in cases dismissed as time-barred, citing *Plaut*); *see also* State v. Bodyke, 933 N.E.2d 753 (Ohio 2010) (striking down a statute purporting to require the state attorney general to reclassify sex offenders already classified by courts, citing *Plaut* and *King*). The nonrevision rule received some attention around the creation of the federal Sentencing Commission, which promulgates the Sentencing Guidelines. *See* Comprehensive Crime Control Act of 1984, § 217(a), Pub. L. 98–473, S. 1762, 98 Stat. 1976 (1984), codified at 28 U.S.C. §§ 991–98. The Guidelines were challenged in multiple actions on the basis (among others) that the Commission required the participation of federal judges in the effectively legislative business of establishing ranges of permissible sentences. *See, e.g.*, United States v. Molina, 688 F. Supp. 819, 823–24 (D. Conn. 1988) (holding that this requirement violated the prescription in *Hayburn's Case* that judges must only be assigned "judicial business"); United States v. Olivencia, 689 F. Supp. 1319 (S.D.N.Y. 1988) (same). The Supreme Court ultimately upheld the Guidelines, distinguishing cases like *Hayburn's Case* and its progeny "in which Article III courts were asked to render judgments that were reviewable by an executive officer" on the grounds that jurists serving on the Commission acted "in their individual capacities," and that no individual judge was required to serve on the Commission on account of being a judge. *Mistretta*, 488 U.S. at 394 n.20, 402–06; *see also* United States v. Chambless, 680 F. Supp. 793, 799 (E.D. La. 1988). In any event, none of the courts to consider the issue apparently doubted that the nonrevision rule applies in the sentencing context.

In the United States, "the right to . . . impose the punishment provided by law" after a defendant is convicted of a crime "[i]ndisputably . . . is judicial."[133] That proposition seems to have gone unquestioned for most of this country's history.[134] In fact, Professor Mae C. Quinn has recently and persuasively argued that individual rights guaranteed by the United States Constitution demand that criminal sentencing be carried out by courts, and not by administrative agencies.[135] So, we can safely assume that a court that sentences a defendant, and issues a judgment including that sentence, exercises the core judicial power of the jurisdiction's government, triggering the nonrevision rule.[136]

The other two branches of tripartite government also have roles to play in the criminal sentencing process.[137] The legislature prohibits primary conduct and sets the permissible sentence or range of sentences to be imposed on violators; the courts determine guilt or innocence and, if the defendant is found guilty, rule on what the defendant's punishment shall be within the statutory range; and the executive prosecutes the case and carries out sentences.[138] As part of the latter role, in most states with parole systems, including New York, the executive determines when to release the defendant within the minimum-maximum time frame set by the sentencing court's judgment.[139] This is just the "combination of legislative enactment, judicial application, and executive implementation" that describes many government policy processes.[140]

So far, so good. However, another role of the executive in this area looks on a surface level like a built-in exception to the nonrevision rule: the clemency power. This power permits the executive to reduce

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[133] *Ex Parte* United States, 242 U.S. 27, 41–42 (1916). This should be distinguished from the right of courts to select the specific punishment, which has always been constrained by legislation to varying degrees. *See* Schuman, *supra* note 21, at 6–10.

[134] *See* Quinn, *supra* note 25, at 578–80 (cataloging authorities for the proposition that defendants must be sentenced by courts).

[135] *See generally id*. For example, the fact that sentencing is considered a "critical stage" of criminal proceedings requiring that the defendant be provided effective assistance of counsel suggests that sentencing by an executive agency in an informal hearing would be illegal. *Id*. at 582–83.

[136] *In re* Richardson, 160 N.E. 655, 657 (N.Y. 1928) (holding that the court's role is to announce "the rule or sentence").

[137] *See generally* Barkow, *supra* note 129.

[138] *See generally* Mistretta v. United States, 488 U.S. 361, 651 (1989); United States v. Grayson, 438 U.S. 41, 47 (1978); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 59394 (2001).

[139] *See* N.Y. EXEC. LAW § 259 *et seq*.

[140] United States v. Brown, 381 U.S. 437, 443 (1965).

or eliminate a court-imposed sentence upon deciding "that the public welfare will be better served by inflicting less than what the judgment fixed."[141] "Clemency" encompasses, among other things, the concepts of a "pardon," which entirely releases the defendant from the legal consequences of the judgment; "commutation," by which the executive substitutes a milder punishment for the one imposed by the court; and remission of fines and forfeitures.[142] Whatever form clemency takes, for our purposes, the upshot is the same: the governor steps in to halt or alter the effects of a duly issued final court judgment.

The seeming tension between the clemency power and the nonrevision rule turns out to be illusory, however, upon considering that when the executive exercises this power, it is not acting in its capacity as the enforcer that carries out the judgment but as the litigant that has obtained the judgment. The nonrevision rule can't mean the litigants have to literally carry out the judgment in full in every case; rather, it means that "judicial decisions must establish rights that prevailing litigants *may* enforce against their unsuccessful opponents."[143] For example, in a civil action, when a plaintiff wins a judgment against a defendant, the constitution doesn't require the plaintiff to immediately send the sheriff off to confiscate the defendant's property in full satisfaction. The plaintiff can still resolve the matter with the defendant for less than the full amount owed, or for some different consideration, or may decline enforcement completely. The court determines what rights the plaintiff has against the defendant, but those rights may be voluntarily waived by their holder. By the same token, the people, acting through governmental representatives, can let a defendant off the hook for part or all of a criminal judgment they have obtained.[144] So, when the government is the victorious party in a proceeding in court, it does not violate the nonrevision rule if it thereafter declines to enforce its victory to the hilt as an act of mercy.[145]

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[141] Biddle v. Perovich, 274 U.S. 480, 486 (1927); *see, e.g.*, N.Y. CONST. art. IV, § 4.

[142] Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575–78 (1991). New York's Constitution gives the governor authority to grant "reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper." N.Y. CONST. art. IV, § 4.

[143] Note, *supra* note 111, at 2030.

[144] *Id.* (collecting authorities for the proposition that "the government's ability to waive its rights is, at least, no less than that of a private litigant").

[145] *Id.* at 2029 ("Any formulation of a rule against executive or legislative revision must acknowledge that the government may waive the benefit of a judgment in its favor."). The issue

Clemency, then, gives the executive branch the ability to control how much punishment is warranted in a given case, rather than mechanistically carrying out the judgment.[146] The power is usually justified on the basis that it "soften[s] the rigour of the general law,"[147] which may sometimes be "too sanguinary and cruel."[148]

> [T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.[149]

This explanation of clemency maps nicely onto the rights-protective rationale for the separation of powers itself.[150] If the

was convincingly dispatched by a Seventh Circuit panel in *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1113 (7th Cir. 1997). The case involved a challenge to the federal extradition statute on the basis that, once a federal judge certified that the defendant was extraditable, the Secretary of State could decline to extradite the defendant. *Id.* Judge Easterbrook was not impressed:

> A certificate of extradition is no different from a search warrant or an order approving a deportation: it authorizes, but does not compel, the executive branch of government to act in a certain way. The police may change their mind about the need for a search; the Board of Immigration Appeals may grant the alien's request for reopening. The Constitution itself allows the President to block enforcement of a criminal judgment by issuing a pardon. *Judgments give victorious litigants rights but not duties; only the losers are placed under obligations, and a judgment may be called "advisory" only when it does not bind the unsuccessful litigant*. A victor in civil litigation may forego collecting the award of damages; no one thinks that this makes the judgment advisory. The police need not search, the Attorney General need not deport, the victorious plaintiff need not collect—and the Secretary of State need not extradite.

Id. (emphasis added).

146 Of course, the executive also prosecutes, so it can also significantly control punishment in that fashion prior to sentencing by declining to bring charges or by tweaking the charges brought, depending on how much the legislature has restricted the courts' discretion to set sentences upon a finding of guilt. *See generally* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L. J. 1681, 1723–24 (1992).

147 4 WILLIAM BLACKSTONE, COMMENTARIES *397.

148 THE FEDERALIST No. 74 (Alexander Hamilton); *see also* Harbison v. Bell, 556 U.S. 180, 192 (2009) ("[C]lemency is . . . the historic remedy for preventing miscarriages of justice where judicial process has been exhausted" (quoting Herrera v. Collins, 506 U.S. 390, 411-12 (1993))); *Ex parte* Grossman, 267 U.S. 87, 120–21 (1925).

149 JAMES IREDELL, ADDRESS TO THE NORTH CAROLINA RATIFYING CONVENTION, (July 28, 1788), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 17 (Philip B. Kurland & Ralph Lerner eds. 1987).

150 *See* Note, *supra* note 111, at 2034 (observing that the pardon power "does not violate the constitutional scheme of separated powers but is rather an integral part of that scheme").

executive is empowered to halt the overly harsh operation of a law, then all three arms of the government must agree before an individual can be subjected to criminal punishment: the legislature by defining crimes and punishments,[151] the courts by applying the general laws to the specific facts and considering what punishment must be imposed in the particular case, and the executive by relaxing enforcement of the resulting penalty if it is too harsh.[152] Put differently, each branch has ways of *limiting* punishment, none of which can be superseded by another branch.[153]

Parole differs from the clemency power in important ways, but is no less in harmony with the nonrevision rule. When the executive uses its clemency power, it supersedes the judgment of the court as to the application of the criminal law in the particular case. By contrast, parole is a fundamental component of the judgment. Rather than a discretionary process by which the executive may forgive an offense, it is a determination that the executive is required to make as to whether it makes more sense for the prisoner to be released back into society than to be detained longer.[154] That is, when a court

[151] Recently, California state courts have been presented with the question of whether that state's legislature violated the separation of powers by authorizing convicted defendants to petition for the reopening of their judgments of conviction under a newly-enacted statutory definition of a crime. In *People v. Lamoureux*, the intermediate appellate court held that the legislature could enact such a provision. People v. Lamoureux, 255 Cal. Rptr. 3d 253 (Ct. App. 2019); *see also* People v Newsome, No. E083206, 2020 Cal. App. Unpub. LEXIS 5788, at *27–30 (Cal. Ct. App. Sept. 4, 2020) (unpublished decision) (following *Lamoureux*); People v. Hill, No. E072935, 2020 Cal. App. Unpub. LEXIS 4310, at *28–30 (Cal. Ct. App. Jul. 9, 2020) (unpublished decision) (same). The *Lamoureux* court emphasized that "[p]ower is diffused between coequal branches of government not as an end to itself, but rather to protect the liberty of individuals." *Lamoureux*, 255 Cal. Rptr. 3d at 269 (citing Buckley v. Valeo, 424 U.S. 1, 122 (1976)). On this basis, the court distinguished cases in which the state Supreme Court had applied the nonrevision rule to hold that a judgment of dismissal in a criminal case based on a statute of limitations, once final, could not be reopened based on a newly extended limitations period. *Id.* at 269–70 (discussing People v. King, 37 P.3d 398 (Cal. 2002); People v. Bunn, 37 P.3d 380 (Cal. 2002)). Unlike those cases, the California statute at issue in *Lamoureux* "provides potentially ameliorative benefits to the only individuals whose individual liberty interests are at stake in a criminal prosecution—the criminal defendant himself or herself." *Id.* at 270. The court thus held that legislation reopening a judgment of conviction stood on a different footing from legislation targeting any other sort of judicial determination, and therefore did not violate the separation of powers. *Id.*

[152] *See* Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913–14 (1999); Barkow, *supra* note 129, at 1014, 1031; *see also* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 1014 (2019).

[153] The judicial branch has another brake in the form of jury nullification, which is usually defended on grounds similar to the rationale for the clemency power. *See, e.g.*, Paul Butler, *Jurors Need to Know that They can Say No*, N.Y. TIMES, Dec. 21, 2011, at A39.

[154] *See* Kobil, *supra* note 142, at 578; Puzauskas and Morrow, *supra* note 23, at 277–84; *see, e.g.*, KY. REV. STAT. ANN. § 439.340(2) (West 2017) ("A parole shall be ordered only for the best

imposes a minimum and a maximum sentence, the judgment contemplates that the parole board must review the propriety of release within that window. If the executive branch were to fail to do this and instead simply detain the defendant without any review, it would pretty clearly be violating the judgment.[155]

On the other hand, the paroling authority cannot release someone before the minimum term set by the judgment and relevant statutes,[156] whereas the executive exercising the clemency power can reduce the sentence even below the statutory minimum sentence that the court could impose, including to nil.[157] On the whole, parole is a matter of carrying out the commands of the legislature and judiciary, discretionary only as to the result of the release decision the executive is required to make from time to time, while clemency is a pure executive prerogative derived from constitutional text.

Parole review, then, unlike clemency, should be thought of as consistent with the nonrevision rule not because of the government's power to forgive part of a judgment, but because it is actually *necessary* to the judgment. When it considers parole release, the executive acts as the enforcer of the sentence, not the litigant that obtains the sentence.

To sum up, then, it is entirely consistent with the nonrevision rule for the executive branch to consider releasing an incarcerated person early as a matter of clemency, or, in an indeterminate sentencing jurisdiction, after the minimum term expires through its paroling authority. The executive cannot, however, revise a sentence *upward* relative to a final court judgment, because all three branches must be aligned before punishment can be imposed.[158]

interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon.").

155 The judgment might also be said to contemplate the potential for release on parole in the practical sense that legislatures and sentencing courts, realizing that release before the maximum term is likely in an indeterminate scheme, will rationally set maximum sentences exceeding what they view as the "ideal" term of incarceration for a particular offense. *Cf.* Jon O. Newman, *A Better Way to Sentence Criminals*, 63 A.B.A. J. 1562, 1565 (1977) (contending that much of the variation among sentences imposed on similar defendants in indeterminate sentencing schemes results from judges' differing "predictions of when the parole board would permit release"). That being the case, declining to give due consideration to release prior to the expiration of the maximum sentence would tend to result in longer sentences than those coordinate branches really intended.

156 *See, e.g.*, N.Y. PENAL LAW § 70.40(1)(a)(i) (McKinney 2020).

157 *See supra* notes 141–42 and accompanying text; *see also* Kobil, *supra* note 142, at 596 & n.176.

158 *See* sources cited *supra* note 152 and accompanying text. *Cf.* Quinn, *supra* note 25, at 589 (observing that the constitutional clemency power "makes clear that executive intervention is

III. EXECUTIVE REVISION OF CRIMINAL SENTENCES

A. The Problem

Consider the following situation. A defendant embezzles money from an elderly person in their care, and is convicted of grand larceny in the second degree, which New York categorizes as a class C felony.[159] The judge sentences them to a term of incarceration to last not less than two and not more than eight years.[160] As the end of their minimum term approaches, the defendant comes before the parole board for the first time. The board denies the defendant release on the basis that the crime of conviction was so serious that releasing the defendant on parole would undermine public confidence in the legal system. What, then, was the point of the minimum sentence set by the judge?

We know from *Hayburn's Case* and its progeny that when the court renders a decision, it has to be *deciding* something about the rights of the parties that cannot be changed by the other branches.[161] Sentencing courts in New York and similar jurisdictions are instructed by statute to consider and decide when the defendant's earliest potential release date ought to be,[162] while the paroling authority sets the actual release date later in time with the benefit of information about post-sentencing events.[163] So when a court sets a minimum sentence, it must be deciding that given the facts available to the court at that time (such as the facts of the crime), it would be appropriate under the jurisdiction's penal laws for the defendant to be released at the end of the minimum term under at least *some* future circumstances.[164] In other words, the court's judgment closes the book on the question "what is the very least punishment society demands?" If the minimum sentence doesn't decide at least that, then it decides nothing.

However, when a parole board decides to deny release on the basis that to do so would deprecate the seriousness of the offense, it is

solely for the purpose of softening or reducing a given sentence, not to impose a penalty or expand it").

159 N.Y. PENAL LAW § 155.40.

160 *See id.* § 70.00(1), (2)(c), (3)(b).

161 *See, e.g.*, Gordon v. United States, 117 U.S. 697, 702 (1865) (observing that a court cannot be required to "express an opinion on a case . . . where its judgment would not be final and conclusive upon the rights of the parties").

162 *See supra* notes 74–77 and accompanying text.

163 *See supra* notes 78–84 and accompanying text.

164 *See supra* notes 39–44 and accompanying text.

saying that irrespective of anything that has happened since sentencing, more punishment must take place. The incarcerated person is presented with a "no-win situation": even if our hypothetical defendant successfully argued at sentencing for a two-year minimum sentence rather than the five-year minimum sought by the prosecution, they may yet nevertheless be denied serious consideration for parole until five years (or more) have passed based on the parole board's view of the seriousness of the offense and the punishment it requires.[165] Thus, when a parole board declines to grant parole after the minimum term's conclusion on this basis, it seems the effect of that decision is to nullify the minimum sentence component of the judgment.[166] This bears the hallmarks of a nonrevision problem.

In the case of Emory Cavender, whose possibility of parole was foreclosed by the Kentucky Parole Board's "serve-out order,"[167] the Parole Board's decision to overrule the minimum sentence is especially stark. A sentence of life without parole, which Cavender ended up with,[168] represents a conclusion that the defendant is incorrigible—it "forswears altogether the rehabilitative ideal."[169] Perhaps such a conclusion can be justified by an inmate's failure to demonstrate efforts toward rehabilitation throughout a lengthy confinement. To reject the possibility that a defendant may ever be rehabilitated, however, based *solely on the commitment offense*, when the sentence provided for the possibility of release, must mean that the parole board has substituted its view of the commitment offense and of basic purposes of sentencing for the courts and legislatures.

Recognizing this fact, Cavender himself, who appeared *pro se*, argued that the Board's serve-out order violated the separation of powers by overruling the jury's decision to allow for the possibility of parole.[170] The court dismissed this contention out of hand, saying only that "the power to grant parole is purely an executive

[165] Note, *supra* note 111, at 2026; *see supra* text accompanying notes 111–114.

[166] *Cf.* Reitz, *supra* note 8, at 127 ("The reference points of proportionality ordinarily do not change or become more knowable between the sentencing hearing and later parole-board hearings. It is thus difficult to explain why the parole board should be permitted to recast the proportionality judgment of the sentencing court.").

[167] *See supra* notes 1–6 and accompanying text. The serve-out order was issued under a state regulation giving the Board discretion as to whether to provide more than one parole hearing. Cavender v. Mudd, No. 2008-CA-001988-MR, 2009 WL 2835173, at *2 (Ky. App. Sept. 4, 2009).

[168] *Id.*

[169] Miller v. Alabama, 567 U.S. 460, 473 (2012) (quoting Graham v. Florida, 560 U.S. 48, 74 (2010)).

[170] *Cavender*, 2009 WL 2835173, at *2.

function."[171] To say this misses the point would be an understatement.

As discussed above, courts currently disagree about whether New York law permits the board to deny parole based on offense seriousness alone.[172] However, there is a nonrevision tension regarding whether the parole board relies *solely* upon its view of the minimum punishment required by the seriousness of the offense in denying parole, as in the case of Emory Cavender's serve-out order, or considers this among other factors. If the board would have denied or granted parole irrespective of the board members' views as to "the seriousness of the offense," then the result is the same as if the factor was not included in the parole statute at all. On the other hand, if the board would have granted release absent this factor, then the board has denied release because it found the minimum sentence ought to be longer than the one imposed. So, whenever it matters to the outcome that the board has relied on its conception of minimum punishment, the nonrevision rule is transgressed.

B. Some Potential Solutions

State legislators—who are sworn to defend their state constitutions[173]—ought to remedy this situation. Parole statutes were drafted to advance the rehabilitative ideal, then modified in the era of "nothing works" to promote a punitive ideology; it is now not clear whether they represent a considered balance between the desire to punish and deter[174] and the goal to rehabilitate, or just an inconsistent hodgepodge resulting from historical accretion. Either way, relying on the courts to hack out unconstitutional portions of the laws does not seem likely to lead to good policy. Legislatures should decide what they want to achieve by incarcerating people and tailor their statutes to produce that result in a manner that complies with the separation of powers.[175]

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[171] *Id.* (quoting Simmons v. Commonwealth, 232 S.W.3d 531, 535 (Ky. App. 2007)).

[172] *See supra* notes 94–96 and accompanying text.

[173] *See, e.g.*, N.Y. CONST. Art. XIII, § 1; ME. CONST. Art. IX, § 1.

[174] As I have already noted, whether current carceral punishment systems actually tend to deter crime—or, rather, tend to create it—is at minimum open to question. *See supra* note 72; *see also* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997) (examining potential undesired effects of criminalizing behavior).

[175] Pending a legislative fix, perhaps the executive branch could simply decline to consider offense seriousness, recognizing that to deny release on this basis transgresses the nonrevision rule. This type of executive constitutional review remains somewhat controversial. *Compare In re* Aiken County, No. 11-1271, 2012 WL 3140360, at *1 n.1 (D.C. Cir. Aug. 3, 2012)

To avoid offending the nonrevision rule, a state should at least modify its statutes such that they do not require (or permit) consideration of the minimum sentence needed to reflect the seriousness of the crime at both the judicial sentencing and parole stages. So, a legislature could get away with either striking the provision for judicially imposed minimum sentences, in effect giving the paroling authority the power to determine the minimum in each case, or eliminating independent consideration of offense seriousness as a factor at the parole stage, so that the judiciary bears the responsibility for making this determination.

Permitting the parole board to set the minimum sentence, and removing this authority from the judiciary, would be generally in line with the nineteenth-century reformers' vision of highly indeterminate sentencing.[176] This could be the result of a court finding that the nonrevision rule prohibits paroling authorities' reconsideration of minimum sentences: as in *Hayburn's Case*, the court cannot issue a judgment that's subject to revision by the executive branch, so the minimum sentence imposed is not "judicial business," hence outside the court's jurisdiction and a nullity.[177] Such a scheme would represent an extension of the broad sentencing discretion that was so much criticized by opponents of indeterminate sentencing in the 1970s,[178] and it would place that discretion firmly in the hands of executive-branch officials who may be susceptible to political pressure.[179] Relocating minimum sentencing to a parole hearing would also have implications for defendants' constitutional

(Kavanaugh, C.J., concurring) ("the Executive generally may decline to follow a statutory mandate or prohibition if the President concludes the statute is unconstitutional, unless a final Court decision in a justiciable case rejects the constitutional objection."), *with* Hebel v. West, 803 N.Y.S.2d 242, 246–48 (App. Div. 2005) (holding that local mayor could not disregard law against same-sex marriage on the basis that he believed it was unconstitutional). *See generally* Rebecca D. Maller, Note, *Intrastate Interventions: The State Executive's Response to Local Nonenforcement*, 36 CARDOZO L. REV. 1533 (2015) (considering state officials' nonenforcement of law at both statewide and local levels); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213 (2014); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L. J. 1613 (2008).

[176] *See supra* notes 26–27 and 39 and accompanying text.

[177] *See supra* text accompanying notes 98–107. *But cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (invalidating an act of Congress purporting to overturn a judicial decision, which decision remained intact). Such a challenge would, if successful, mean that *every* minimum sentence should be struck, which would incentivize courts to bend over backward to avoid acknowledging the constitutional problem.

[178] *See supra* note 55.

[179] *See supra* notes 11–16 and accompanying text.

rights, which are typically fewer before a parole board than before a sentencing court.[180]

Alternatively, the state could leave the duty of assigning minimum sentences to the courts. This approach would match sentencing responsibilities to the decisionmaker equipped to carry them out: the judge sets minimum and maximum ranges using the information available at sentencing, while the remaining variation in possible periods of incarceration accounts for the defendant's future progress, which will, hopefully, be known to the parole board when it conducts its review.[181] It might also encourage incarcerated people to participate in rehabilitative programs, if they believe that such participation will lead to serious consideration for parole release rather than a summary denial based on their original offense.[182] Legislatures could make certain that the minimum duration of incarceration necessary to reflect the seriousness of the crime is still considered by explicitly directing courts to consider this at sentencing, if the relevant statutes don't do so already.[183]

Under this sentencing structure, crime seriousness will play a part in a parole release determination to the extent it affects the paroling authority's view of the amount of rehabilitation needed and, more broadly, the likelihood that the potential parolee will recidivate.[184] As a practical matter, if states prevent paroling authorities from

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[180] *See* Quinn, *supra* note 25; *see, e.g.*, Briguglio v. N.Y. State Bd. of Parole, 246 N.E.2d 512 (N.Y. 1969) (distinguishing between sentencing, in which context a defendant had the right to counsel and other procedural rights, and a parole hearing, at which these rights did not apply); *see also* Reitz, *supra* note 8, at 136–41 (detailing the relative lack of process afforded potential parolees).

[181] *See* Jefferson-Bullock, *supra* note 36, at 367; Weiss, *supra* note 73, at 1599–600 (observing that a parole board lacks information about the original offense comparable to that considered by the sentencing judge, but possesses information about "the person the inmate has strived to become over the years of incarceration"); Tappan, *supra* note 43, at 533 (arguing for placing the final release decision with parole authorities, because it "can be better be made on the basis of [the incarcerated person's] response to treatment and his plans for freedom than it could at the time of sentencing"); MODEL PENAL CODE § 6.06 cmt. at 122, 129 (AM. LAW INST. 1985). For a related argument that the range of indeterminacy in a sentence should be limited to a small fraction of the maximum sentence length, and should not account for a reevaluation of desert, see Edward E. Rhine et al., *The Future of Parole Release*, 46 CRIME & JUST. 279, 289–99 (2017).

[182] *Cf.* Doherty, *supra* note 22, at 1018.

[183] For an argument that it eventually begins to violate due process for a parole board to deny release based on offense seriousness as the offense recedes into the distant past, and that the minimum sentence is an appropriate cut-off point after which offense seriousness should not be considered, see Cotton, *supra* note 8. *See also* Weiss, *supra* note 73 (arguing for the elimination of retrospective factors in parole release decisions). For a contrary view, see Kathleen Noone, Note, *Keeping the Commitment: Why California Should Maintain Consideration of the Commitment Offense in Determining Parole for Life Inmates*, 37 HASTINGS CONST. L. Q. 789 (2010).

[184] *See* Rhine et al., *supra* note 181, at 298.

denying release based on their view of the appropriate minimum punishment for the offense, it would not be surprising to see the paroling authorities turn to other rationales to justify denial decisions that are really about crime seriousness (i.e., transforming the "deprecates the seriousness" rubber stamp into a "needs more rehabilitation" rubber stamp, or something similar).[185] Nevertheless, such denials may be less effective given legislative action removing the parole board's authority to rely on offense seriousness. The judiciary can take corrective action when the executive falters.

The major obstacle facing either of these two reforms—eliminating one of the state's two bites at the apple—is a practical one: they could be seen as tending to favor incarcerated people, and it goes without saying that political acts that are perceived as advantaging the incarcerated tend to be unpopular, or at least seen by politicians as unpopular.[186] Recently, in New York, after a Democratic majority in the state legislature did away with cash bail for certain offenses, the state Republican party used the issue to win seats away from Democratic incumbents.[187] I do not think that either reform discussed so far would necessarily tend to advantage the incarcerated in reality; for example, if minimum sentencing were kept strictly in the courts, sentencing judges would have reason to believe that paroling authorities would give serious consideration to releasing defendants upon first review, and would consequently tend to impose higher minimum sentences than they would if the parole board tended to initially deny parole based on crime seriousness.[188] Unfortunately, the political world might ignore such nuances.[189]

More drastic changes to our approach to sentencing are of course available; people have always been inventive in finding ways to

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[185] *Cf.* Soloway v. Weger, 389 F. Supp. 409, 411 (M.D. Pa. 1974), discussed *supra* note 63.

[186] *See* Norval Morris & David J. Rothman, *Introduction*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY x (Norval Morris & David J. Rothman eds., 1998) ("[W]hatever practices are followed in a society at any time, the majority of citizens perceive these practices as too lenient toward the criminal."); *see also* Barkow, *supra* note 71, at 105–24 (discussing political dynamics leading to increasingly harsh penal laws); Cotton, *supra* note 8, at 240 & n.6 (discussing California governors' appointment of "parole board members who are unlikely to grant parole" in response to fears of negative political consequences of releasing offenders).

[187] *See* Emma G. Fitzsimmons, *Some Suburban Strongholds Swing Back to G.O.P. in N.Y. and Across U.S.*, N.Y. TIMES, Nov. 5, 2020, at P18.

[188] *Cf.* Newman, *supra* note 155, at 1565.

[189] Respecting the separation of powers in this context could, however, have one effect that would benefit the incarcerated. It could reduce the likelihood that they would have to participate in a parole hearing which would be a charade with a foregone conclusion.

punish one another.[190] One obvious possibility would be to follow the example of the federal government and just do away with parole, replacing it with "determinate" sentencing. Eliminating parole would effectively mean that the entire sentence would be based on presentencing conduct—i.e., it would signal a rejection of consideration of postsentencing rehabilitation as a primary determinant of sentence length.[191] The desirability or undesirability of such a move has been discussed extensively elsewhere and need not be rehearsed here.[192] It's worth pointing out, however, that this change by itself would not address the status of the many people currently imprisoned with minimum sentences already set by courts.[193]

IV. CONCLUSION

This is no mere starchy formalism. The nonrevision rule represents nothing more or less than the basic idea that courts are not subordinate but equal to legislatures and executives, so that their actions in particular cases cannot be trumped by those equals. A realistic recognition that the branches of government are interrelated

[190] Ancient Athenians used a variety of forms of punishment ranging from "public denunciation" to "precipitation" (that is, hurling the offender off a cliff). Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 3, 5–6 (Norval Morris & David J. Rothman eds., 1998).

[191] Of course, it would still be possible to include rehabilitative programs in prisons, allow for "good time," exercise the clemency power in favor of some lucky rehabilitated people, etc. To say that the state rejects the rehabilitative ideal in *sentencing* does not necessarily mean that the state completely gives up on any attempt to reduce the likelihood of recidivism by people it confines, or to recognize rehabilitation when it occurs.

[192] *See, e.g.*, Jeanine M. Schupbach, Note, *New York's System of Indeterminate Sentencing and Parole: Should it be Abolished?*, 13 FORDHAM URB. L. J. 395 (1984) (arguing for the abolition of parole in favor of determinate sentencing); Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377 (2005) (advocating a novel indeterminate sentencing system); *cf.* Pritikin, *supra* note 72, at 1105–06 (arguing in favor of an emphasis on rehabilitation as the only evidence-based approach to actually reducing the incidence of crime).

[193] New York considered abolishing indeterminate sentencing in the 1980s; under the proposed legislation, the parole board would have continued to exist "to supervise and determine the release dates of those sentenced prior to the enactment of the new sentencing laws." Schupbach, *supra* note 192, at 435 (discussing NEW YORK STATE COMMITTEE ON SENTENCING GUIDELINES, DETERMINATE SENTENCING: A PRELIMINARY PROPOSAL FOR PUBLIC COMMENT (Jan. 15, 1985)). *Cf.* Stephen Betts, *Number of Maine Prisoners Under Parole Authority Down to 4*, BANGOR DAILY NEWS (June 7, 2014), https://bangordailynews.com/2014/06/07/news/number-of-maine-prisoners-under-parole-authority-down-to-4/ (discussing several prisoners remaining under the jurisdiction of the Maine Parole Board nearly four decades after Maine putatively abolished parole during the "truth in sentencing" movement of the 1970s).

doesn't require "that what is of the essence of the judicial function may be destroyed by turning the power to decide into a pallid opportunity to consult and recommend."[194]

For the legislature or executive to revise a criminal defendant's sentence upward undermines the structure of government that constitutional framers devised to protect against arbitrary government power, requiring the agreement of all three branches of government before applying a sentence to an individual person.[195] It goes to the heart of the separation of powers, which ought to be enforced most vigorously in the context of criminal sentencing and punishment, when government power is at its maximum and the individual is most vulnerable. The practice of permitting parole boards to overrule court-imposed minimum sentences must stop.

[194] *In re* Richardson, 160 N.E. 655, 657 (N.Y. 1928) (Cardozo, C.J.).
[195] *See supra* notes 152, 153 and accompanying text.