Admin. January 8, 2021

Memorandum 2021-1

Draft of 2020 Annual Report

At its December 2020 meeting, the Committee voted on the recommendations that it would include in its 2020 Annual Report, for submission to the Governor and Legislature. The staff and Committee Chair have prepared a draft of the substance of that report for the Committee's review. It is attached.

The attached draft presents all of the Committee's approved recommendations, with a description of each proposal and an explanation of its purpose and rationale. The draft also includes a report on administrative matters and the Committee's general plans for 2021. **The data referenced throughout the draft report is not final and should not be relied upon for any reason.**

The Committee now needs to decide whether to approve the attached draft, with or without changes. Upon approval of the Committee, the report will be finalized by committee staff with assistance from graphic design and copy-editing consultants. Any changes made at this stage will not affect the substance of the Committee's report or recommendations. Such changes may include adding citations, completing data charts, and other non-substantive stylistic, editorial revisions.

Because it is hoped that the Committee's recommendations can be introduced as bills this year, it would be very helpful to approve the attached draft at the January 2021 meeting. It would then be possible to provide the final report to the Governor, Legislature, and the public at the same time that implementing legislation is introduced.

Does the Committee approve the attached draft as its 2020 Annual Report, with or without changes, with the understanding that further revisions may be made by the staff, with approval of the Chair, before the report is formally submitted to the Governor and Legislature?

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

Draft Annual Report
Committee on Revision of the Penal Code
January 2021

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Executive Summary

When the Legislature and Governor Newsom established the Committee on Revision of the Penal Code, California launched its first concerted effort in decades to thoroughly examine its criminal laws. The Legislature gave the Committee special data gathering powers and directed it to study all aspects of criminal law and procedure and to make recommendations to "simplify and rationalize" the law.

This is the Committee's first report and contains ten recommended reforms. Our recommendations are informed by testimony from 56 expert witnesses, extensive public comment, staff research, and over 50 hours of public hearings and Committee deliberation over the past year. We believe they represent broad consensus among a broad array of stakeholders, including law enforcement, crime victims, and civil rights leaders. The report contains extensive support for each recommendation, including empirical research and available data on California's current approach to these issues.

Our recommendations span across California's entire criminal legal system, ranging from traffic court to parole release for people serving life sentences. If enacted, these reforms would impact almost every person involved in California's criminal system and, we believe, improve safety and justice throughout the state.

The recommendations are:

1. Reduce punishment, fines, and fees for driving without a license and driving on a license suspended for failure to pay a fine or appear in court.

2. Require that short prison sentences are served in county jail and ensure that time served in county jail does not exceed 5 years.

3. End mandatory minimum sentences for nonviolent offenses.

4. Expand misdemeanor theft to include offenses that do not involve weapons or serious injuries.

5. Provide guidance for when judges should dismiss sentence enhancements.

6. Focus gang enhancements on the most dangerous, violent, and coordinated criminal activities and ensure that evidence of gang involvement does not unfairly prejudice juries.

7. Apply repealed sentence enhancements retroactively.

8. Equalize custody credits for people who committed the same offenses regardless of where or when they are incarcerated.

9. Clarify parole suitability standard to focus on risk of future violent or serious offenses.

10. Establish judicial process for resentencing requests by law enforcement and permit people who have been incarcerated for 15 years to request resentencing in the interest of justice.

Introduction

In 2019, California had the lowest crime rates in the modern era.[1] This continued a trend that has extended for 30 years.[2] If the purpose of the Penal Code is to promote public safety, California has done remarkably well in recent times.

During much of this time, California enacted a historic series of reforms to the state's criminal laws that resulted in significantly less incarceration throughout the state while crime rates continued to steadily improve.[3]

Despite these public safety accomplishments and reforms, California remains under numerous court orders, including from the United States Supreme Court, that the state's prisons and jails are unconstitutionally overcrowded and that conditions within state prisons constitute cruel and unusual punishment.[4] These issues are especially acute due to the COVID-19 pandemic.

As California's Director of Finance Keely Bosler emphasized when she appeared before the Committee in July, California's criminal system is also extraordinarily expensive. We spend more than $12 billion for our prisons and parole operations, and the cost of the entire criminal legal system is approximately $50 billion a year. And that dollar figure does not include the costs to crime victims, individuals, families, and communities impacted by the system. While keeping all these costs in mind, this Committee was created to continue the steps that California has taken so far.

The Committee was formed by the Legislature to rationalize and simplify the substance and procedure of California's criminal law, and we are committed to developing policies that maintain or improve public safety while simultaneously reducing unnecessary incarceration.[5] Newly available data, peer-reviewed empirical research, and lived-experience in California prove that this mission is possible, and necessary.

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[1] Mike Males, *California's 2019 Crime Rate is the Lowest in Recorded State History*, Center on Juvenile and Criminal Justice, Sept. 2020 ("California's crime rate, as measured by Part I violent and property offenses reported to law enforcement agencies, fell to its lowest level in 2019 of any year since comparable statewide crime statistics first were compiled in 1969 (DOJ, 2020a). Over the past decade, crime rates have declined steadily amid transformative criminal justice reforms that reduced prison and jail populations and lessened penalties for low-level offenses.").

[2] Magnus Lofstrom and Brandon Martin, *Crime Trends in California*, Public Policy Institute of California, Oct. 2018 ("The state's violent crime rate increased dramatically from 1960 to 1980, from 236 to 888 violent crimes per 100,000 residents — a staggering 276% rise. After declining in the early 1980s, the rate rose to a peak of 1,104 in 1992. Since then, violent crime has decreased substantially. ... Like violent crime, property crime increased dramatically between 1960 and 1980 — from 3,140 per 100,000 residents in 1961 to a 50-year peak of 6,900 in 1980. But the property crime rate fell in the 1980s and '90s, and by 2011 it was down almost 63%.").

[3] Magnus Lofstrom, Heather Harris, and Brandon Martin, *California's Future: Criminal Justice*, Public Policy Institute of California, Jan. 2020, 1–2.

[4] Brown v. Plata, 563 U.S. 493 (2011).

[5] Government Code § 8290.5(a).

This past year has also made other problems impossible to ignore. The killing of George Floyd this summer once again brought national attention to a truth that many involved in the criminal legal system know: that the current system has deep racial inequity at its core. And the COVID-19 public health emergency showed the world that the health of people in our prisons and jails directly affects those outside it. Data obtained by the Committee for this report confirms people of color are disproportionally punished under state laws — from traffic infractions to serious and violent felonies.

Governor Newsom acknowledged many of these issues when he inaugurated the Committee in January of last year. He noted the "jaw dropping" disparities in sentencing across the state, and the "deep racial overlays and the deep socioeconomic overlays that often determine the fate of so many in our system."[6] We are also reminded of the words of former Attorney General of the United States Eric Holder that "[h]igh incarceration rates and longer than necessary prison sentences have not played a significant role in materially improving public safety, reducing crime, or strengthening communities. In fact, the opposite is often true."[7]

In 2020 the Committee studied every level of California's system — from traffic court to people serving life sentences. We did our work over eight public meetings, many of them two-day affairs. We heard from 56 witnesses, including Governor Newsom, Governor Brown, Attorney General Becerra, and stakeholders from across California.[8] Every major state law enforcement group participated in the Committee's work, as did public defenders, victims' advocates, formerly-incarcerated, and other systems-impacted people, including one person who joined a Committee meeting by video from behind prison walls. In addition to our formal public meetings, Committee staff consulted with dozens of scholars, data analysts, and other experts from California and around the country.

Throughout our review, the Committee discovered laws that didn't make sense, were unsupported by data, and frequently punished harshly without purpose or advancement of public safety. Many of our laws require updating. For example, California's robbery statute is unchanged since 1872.[9] Another example: the state standard for determining who to release on parole involves statutory provisions and regulations that are inconsistent with each other.

The ten recommendations in this report begin to address some of the most obvious problems that the Committee found, and where we believe there is broad, multi-partisan support for reform. But our recommendations are not a one-dose panacea and will not cure the deep, systemic problems with California's criminal legal system. The

[6] Committee on Revision of the Penal Code, Meeting on January 24, 2020, <https://www.youtube.com/watch?v=aynjN5vpLXk> 0:01:12–0:02:00.

[7] United States Department of Justice, *One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More Than Three Decades*, Sept. 23, 2014 < https://www.justice.gov/opa/pr/one-year-after-launching-key-setencing-reforms-attorney-general-holder-annouces-first-drop-0>.

[8] Videos of all Committee meetings are available at http://clrc.ca.gov/CRPC/Meetings/Video.html

[9] Penal Code § 211.

Committee is a permanent body and our future recommendations will reflect better access to data, and an understanding of how to maximize public safety.

Our recommendations are, however, a significant start to making our system more fair, more effective in terms of protecting public safety, less racist, and less wasteful. Of course, these recommendations are not self-executing. It is only with partnerships from the Governor and state agencies — including most significantly the California Department of Corrections and Rehabilitation — the Legislature, and county decision-makers that any of these recommendations will make a difference. And the Committee is not naive: the issues that are addressed every day in the criminal legal system are some of the most profound and perplexing in human experience. They arouse strong passion on every side.

The Committee was steered as much as possible by available data and empirical research. This report benefits from dozens of peer-reviewed studies and original research by Committee staff and partners. We also sought out reforms that would have as wide an impact as possible, with general consensus across interest groups, keeping in mind the twin goals of improving public safety and creating a more humane system.

The Committee also worked under a self-imposed limitation for this first year and decided to not recommend any legislation that would require a voter initiative or two-thirds vote in the Legislature. This meant that some of the most important issues in California's criminal legal system — such as the Three Strikes law, life without parole sentences, and the death penalty — were off the table, at least for now.

This is not the first time that the state has attempted a comprehensive review of its criminal laws. In 1963, the Legislature established the Joint Legislative Committee for the Revision of the Penal Code. According to that Committee's initial report to then-Governor Ronald Reagan, its mission was to address the "inadequacies of a code which has never undergone basic, comprehensive revision since its adoption almost a century ago."[10] That same year, the Chief Justice of the California Supreme Court remarked that "although we are far along in the twentieth century, our Penal Code in many respects has scarcely entered it."[11] Members of that Committee consulted with experts, examined available data, and collaborated with colleagues from other states. Then, unexpectedly, in 1969 after six years of deliberation and study, the Committee abruptly abandoned all its work and laid off its staff. None of its reforms were adopted.[12]

It is now almost 160 years since the Penal Code has undergone comprehensive revision. Since 1963, the scope of the system, the extremity of the sentences it metes out, and

[10] California Joint Legislative Committee for the Revision of the Penal Code, Penal Code Revision Project, 1967 Report, 7.

[11] Arthur H. Sherry, *Criminal Law Revision in California*, 4 U. Mich. J. L. Reform 429, 429 (1971) (quoting an address given by the Honorable Phil S. Gibson, Chief Justice of the Supreme Court of California, on September 25, 1963).

[12] *Id.* at 432, 442 ("Criminal law revision had no champion in California. When the first gleam of publicity disclosed that the Penal Code Revision Project was well on the road to basic and serious law reform, no one spoke for it; it fell an easy prey to the defenders of the status quo.").

society's conception of the proper response to criminal offending have all changed. But one thing hasn't: the need for a rational Penal Code that supports a criminal system that maximizes public safety, treats everyone fairly, acknowledges the undeniable role that race plays in these issues, and helps to improve communities and lives throughout the state.

Prefatory notes

Research into public safety

The development of the Committee's recommendations in this report incorporated key findings from researchers who have studied trends in incarceration in California and nationally and their effects on crime rates and recidivism.

We also relied on expertise from law enforcement leaders, including several elected district attorneys and the then-president of the California District Attorney's Association, and representatives from the California States Sheriffs' Association, California Police Chiefs' Association, Chief Probation Officers of California, the California Department of Corrections and Rehabilitation, the California Board of Parole Hearings, and the California Correctional Peace Officers Association.

As also noted, crime rates began dropping in the 1990s, which is a significant accomplishment. That drop did not stop when the prison population began to decrease after 2006, including in the last decade when California enacted an ambitious agenda of reforms.[13] And while the Committee is not ignorant of the spike in homicides this year,[14] crime continues to be at historic lows.[15] The law enforcement representatives who appeared before the Committee this year generally supported the Committee's mission of continuing to both improve public safety and eliminating unnecessary incarceration.

[Graphics of California's violent and property crime rates]

This report also benefits from valuable input from members of the California judiciary, victims' rights organizations, defense attorneys, formerly-incarcerated and other system-impacted people, academics, and other community and interest-group advocates.

Incarceration trends

Starting in the 1970s, the rate of incarceration began to rapidly increase in an unprecedented manner in California and nationally.[16] Criminologists found that this dramatic acceleration in the California prison population was not driven "by overwhelming or out of control crime rates," but instead was the result of "political

[13] See Written Submission of Legislative Analyst's Office to Committee on Revision of the Penal Code, June 24, 2020 < http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-07.pdf>

[14] See, e.g., Kevin Rector, *L.A. Hits 300 Homicides for first time in a decade*, Los Angeles Times, Nov. 22, 2020.

[15] Mike Males, *California's 2019 Crime Rate is the Lowest in Recorded State History*, Center on Juvenile and Criminal Justice, Sept. 2020.

[16] National Research Council 2014. The Growth of Incarceration in the United States: Exploring Causes and Consequences. Washington, DC: The National Academies Press, at 34-37.

decision-making."[17] California's prison boom began with the enactment of the Determinate Sentencing Law in 1976, followed by the Street Terrorism and Enforcement Act of 1988, and the Three Strikes law in 1994.[18] Between 1985 and 2006, California's prison population more than tripled from about 50,000 inmates in 1985 to a peak of 173,000 inmates in 2006.[19] By the mid-200s, California's prison recidivism rate was the second worst in the nation.[20]

Researchers have found that lengthy sentences and high rates of incarceration have diminishing returns in reducing crime rates.[21] This is partly because people largely "age out of crime."[22] The majority of violent crimes are committed by those less than 30 years old, and criminal involvement diminishes dramatically after age 40 and even more after age 50.[23] Professor Steven Raphael, who testified before the Committee in June 2020, noted that the nationwiden explosion in incarceration from 1989 to 2010 "had no measurable impact on overall violent crime rates."[24]

In recent years, California voters have embraced reforms to reduce California's prison population. Beginning in 2012, voters returned to the polls every two years overwhelmingly passing ballot measures that reformed California's Three Strikes law (Proposition 36), punishments for non-violent offenses (Proposition 47), drug laws (Proposition 64), and prison administration (Proposition 57).[25] These reforms built on the Legislature's intervention to alleviate prison crowding in response to federal lawsuits, with the enactment of Public Safety Realignment (AB 109) in 2011 and incentives to reduce probation revocations in (SB 678) in 2009.[26] Today, even a majority of crime victims in California support further reforms to the state's criminal legal

[17] Committee on Revision of the Penal Code, Meeting on January 24, 2020, <https://www.youtube.com/watch?v=aynjN5vpLXk> 26:43–27:15, 28:38–29:23.

[18] CDCR Office of Research, Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019, October 2020, Figure 1.2.

[19] Legislative Analyst's Office, How many prison inmates are there in California? <https://lao.ca.gov/PolicyAreas/CJ/5_cj_inmates>

[20] Committee on Revision of the Penal Code, Meeting on January 24, 2020, <https://www.youtube.com/watch?v=aynjN5vpLXk> 35:07–36:10; Steven Raphael and Michael A. Stoll, Why Are So Many Americans in Prison? at 233; "State of Recidivism: The Revolving Door of America's Prisons," Pew Center on the States, at 10-11 (2011).

[21] *Id.*

[22] "Life In Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California," Robert Weisberg, Debbie Mukamal, and Jordan Segall (2011) Stanford Law School Criminal Justice Center, at 17.

[23] *Id.*

[24] Steven Raphael and Michael A. Stoll, Why Are So Many Americans in Prison? at 233.

[25] See Written Submission of Legislative Analyst's Office to Committee on Revision of the Penal Code, June 24, 2020, 1–2 < http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-07.pdf>.

[26] *Id.* at 1.

system — including 75% of victims favoring reducing sentence lengths for people in prison who are assessed as a low risk to public safety.[27]

From its height in 2006 to 2018, California's prison population dropped by 27%.[28] Similarly, between 2014 and 2018, California's jail population declined by 10%.[29] Following emergency measures aimed at curtailing the COVID-19 pandemic, California's state prison and jail populations have declined even further.[30] As of December 31, 2020, California's prison population was at a 30-year low of 95,456 people.[31]

[Graphic of California prison population growth]

And despite reforms, researchers have found that people of color — and in particular Black men — and people with mental health issues continue to be incarcerated disproportionately.[32] The Committee is committed to addressing these issues, while preserving trends in decreasing incarceration and historically low crime rates.

Data collection and analysis

One of the Committee's most important objectives is the development of an aggregated collection of administrative data related to the criminal legal system. If there was one issue that found unanimous agreement across all stakeholders, it was that the state's criminal legal policy should be based on empirical evidence. As Attorney General Xavier Becerra told the Committee in October 2020, "data should be the base of where we launch."[33] Other law enforcement and related agencies, including the California Police Chiefs Association, the Chief Probation Officers of California, and the California

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[27] Crime Survivors for Safety and Justice and Californians for Safety and Justice, *California Crime Survivors Speak*, (2019) 1–2 ("The 2019 survey specifically found that victims support alternatives to incarceration for people with mental illness in the criminal justice system and support replacing lengthy mandatory sentences with increased judicial discretion, including for people convicted of serious or violent crime that are a low risk to public safety. The survey found that victims of violent crime and serious violent crime are just as likely to support these new safety solutions as victims of lesser crimes.").

[28] Generated using the Corrections Statistical Analysis Tool (CSAT) at www.bjs.gov

[29] Brandon Martin and Magnus Lofstrom, *California's County Jails*, Public Policy Institute of California, Oct. 2018, 1.

[30] Board of State and Community Corrections, Jail Population Dashboard (showing average daily population of California jails in September 2020 as 57,768; in February 2020 it was 70,841).

[31] California Department of Corrections and Rehabilitation, Weekly Report of Population, As of Midnight December 31, 2020 < www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/12/Tpop1d201230.pdf>. See also Anna Bauman, *California prison population drops below 100,000 for first time in 30 years*, San Francisco Chronicle, July 30, 2020.

[32] Committee on Revision of the Penal Code, Meeting on January 24, 2020, <https://www.youtube.com/watch?v=aynjN5vpLXk> 52:43–55:04, 47:10-51:16; "The Prevalence and Severity of Mental Illness Among California Prisoners On the Rise, Stanford Justice Advocacy Project, at 1 (2017).

[33] Committee on Revision of the Penal Code, Meeting on October 21, 2020 <https://www.youtube.com/watch?v=LHb6mJck1aI>, 0:16:17-0:16:20.

State Sheriffs' Association, agreed that research — particularly into the last decade of reform in California — is essential.[34] Judges from the Judicial Council and District Attorney Nancy O'Malley, past-president of the California District Attorneys Association, echoed that sentiment.[35]

Currently, such information is not readily available.[36] It's spread across the records of various state and local agencies, including the California Department of Corrections and Rehabilitation, the California Department of Justice, and the courts, sheriffs, prosecutors, and probation departments of California's 58 counties. And different agencies don't always use the same identifiers that might be used to link related information across the different agency datasets. California is not alone in this respect. We are aware of no other jurisdiction in the United States with a comprehensive collection of its criminal justice data.[37]

The Committee was granted special broad authority to gather data and to address the problems of incomplete and fragmented data. Government Code Section 8286 provides in part: "All state agencies, and other official state organizations, and all persons connected therewith shall give the … committee full information, and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control."With this authority, the Committee has begun the process of gathering the various agency datasets, for combination into a single correlated database. We have partnered with data analysts and security experts to ensure our research is sound and that confidential state data is protected by the highest security protocols.

The Committee also secured generous philanthropic support to establish a long-term relationship with the California Policy Lab, a policy-focused research lab at University of California, Berkeley and University of California, Los Angeles, to assist with collecting, analyzing, and understanding the data that the Committee collects.

"Violent" offenses

Many of the Committee's recommendations distinguish between how people convicted of violent and nonviolent offenses should be treated. This distinction is important

[34] Written Submission of Lassen County Sheriff Dean Growdon, First Vice-President of the California State Sheriffs' Association to Committee on Revision of the Penal Code, 1 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-14.pdf>; Written Submission of Chief Probation Officers of California to Committee on Revision of the Penal Code, 4 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-14s1.pdf>; Written Submission of Chief Eric Nuñez (Los Alamitos), President, California Police Chiefs Association to Committee on Revision of the Penal Code, 3–4 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-14s1.pdf>.

[35] Committee on Revision of the Penal Code, Meeting on April 23, 2020, <https://www.youtube.com/watch?v=OhKA8D_afoo&t=3s>, 0:38:10–0:38:55 (Judge Vlavianos); Committee on Revision of the Penal Code, Meeting on April 23, 2020, <https://www.youtube.com/watch?v=OhKA8D_afoo&t=3s>, 1:55:15–1:56:45 (DA O'Malley).

[36] See Mikaela Rabinowitz, Robert Weisberg, and Jessica McQueen Pearce, *The California Criminal Justice Data Gap*, Stanford Criminal Justice Center, (2019).

[37] See, e.g., Matt Ford, *The Missing Statistics of Criminal Justice*, The Atlantic, May 31, 2015; Bill Wichert, *NJ Criminal Justice Data Law Could Spur Reforms Elsewhere*, Law360, Nov. 15, 2020.

because so much of California's criminal law turns on these distinctions, and recommendations that did not grapple with them would be ignoring the reality of how cases are charged and prosecuted. While these terms can often be subjective, we recognize that the Legislature has created discrete lists of "serious" and "violent" felonies,[38] and in this report the Committee relies on those statutory definitions.

For important reasons, violent crimes receive a significant amount of public and political attention. However, it is also true that the vast majority of arrests in California (about 90%) are for misdemeanors and nonviolent felonies.[39] Over 80% of people facing felony charges in California receive a sentence of jail, probation, or a combination of the two.[40] Less than 20% of felony cases result in prison sentences.[41]

[Graphic of felony dispositions.]

We acknowledge that there is a growing consensus that a rigid distinction between violent and nonviolent offenses may be counter-productive.[42] For example, across the country people convicted of violent offenses often have lower recidivism rates than people convicted of nonviolent ones.[43] In California, the three year reconviction rate for people committed to prison for a non-serious/non-violent offense was 51%. For people committed to prison with a violent offense, it was 29%.[44] And research has shown that people who have committed violent offenses are often the victims of other violent offenses.[45] While the Committee is not at this time calling for abolishing the distinction between violent and nonviolent offenses, many of its recommendations are informed by this research and call for considering the totality of a person's background and offense, and not merely letting an offense's statutory classification be a definitive statement on what rehabilitative responses are appropriate.

Language used throughout this report

This report avoids using the term "inmate," "prisoner," or "offender."[46] Instead, the report uses "incarcerated person" and similar "person first" language. Other official

[38] Penal Code § 11927(c); Penal Code § 667.5(c).

[39] California Department of Justice, *Crime in California 2019*, July 2020, Tables 23–25.

[40] *Id.* Table 38A.

[41] *Id.*

[42] See James Austin, Vincent Schiraldi, Bruce Western, and Anamika Dwivedi, *Reconsidering the "Violent Offender,"* The Square One Project, May 2019.

[43] *Id*. at Table 4.

[44] CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, January 2020, Figure 8 and Table 12.

[45] *Reconsidering the "Violent Offender"* at 7–14 (collecting research).

[46] Tran et al., *Words matter: a call for humanizing and respectful language to describe people who experience incarceration*, BMC International Health and Human Rights, 18, 41 (2018).

bodies have made similar choices about language,[47] and the Committee encourages other stakeholders — including the Legislature when drafting legislation — to consider doing the same.

[47] Nancy G. LaVigne, People first: Changing the way we talk about those touched by the criminal justice system, Urban Institute, Apr. 4, 2016 <www.urban.org/urban-wire/people-first-changing-way-we-talk-about-those-touched-criminal-justice-system> (noting that report of the Charles Colson Task Force on Federal Corrections, a bipartisan task force created by the United States Congress, deliberately did not use the word "offender" in its report); John E. Wetzl, *Pennsylvania Dept. of Corrections to discard terms 'offender,' 'felon' in describing ex-prisoners*, Washington Post, May 26, 2016; Karol Mason, *Guest Post: Justice Dept. agency to alter its terminology for released convicts, to ease reentry*, Washington Post, May 4, 2016; Morgan Godvin and Charlotte West, *The words journalists use often reduce humans to the crimes they commit. But that's changing*, Poynter, Jan. 4, 2021.

Recommendations

1. Reduce punishment for common traffic misdemeanors.

Recommendation

Two common traffic offenses are punished as misdemeanors even though they have little relation to unsafe driving. The Committee therefore recommends the following:

1. Eliminate misdemeanor charging for (a) driving without a license, and (b) driving with a license suspended for failure to pay a fine or appear in court. These offenses should be mandatory infractions.
2. Reduce fines and fees for these offenses.
3. Reduce DMV "points" to zero.

Relevant Statutes

Penal Code § 19.8
Vehicle Code §§ 12500, 14601.1, 12810.

Background

Under current law, people can be convicted of misdemeanors and incarcerated for driving without a license or driving with a license suspended for failure to pay a fine or appear in court. These offenses are primarily financial in nature and are not connected to unsafe driving. The Committee recommends that they be considered infractions only and that no one should be incarcerated for them.

These cases make up a large portion of all criminal filings in California and consume considerable resources. The vast majority of all criminal filings in California are traffic cases — more than 81% or 3.6 million filings a year.[48] Between 2006 and 2017, 4.5 million Californians failed to appear in court or pay fines, and by 2017, more than 600,000 people had their license suspended for one of those reasons.[49]

Although the two traffic misdemeanors at issue here — driving on a license suspended for failure to pay a fine or appear in court[50] and driving without a license[51] — have little

[48] *Judicial Council of California, Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19*, 124–25 (Table 7a).

[49] Sen. Com. On Public Safety, Analysis of Sen. Bill No. 185 (2017–2018 Reg. Sess.) March 20, 2017, p. 5. [Committee is awaiting receipt of more recent data.]

[50] Vehicle Code § 14601.1.

[51] Vehicle Code § 12500.

relationship to unsafe driving,[52] prosecutors currently have the discretion to charge these offenses as misdemeanors.[53] Annually, almost 260,000 traffic offenses are charged as misdemeanors[54], and the people arrested and jailed for these offenses are disproportionately people of color.[55]

The cases have real consequences: people can be arrested and jailed for them,[56] the fines and fees associated with them can also be significant,[57] and other repercussions have long-lasting effects, such as "points" on a license that can result in further suspensions and higher insurance payments.[58] A conviction for driving on a suspended license adds two "points" on the person's license — the same consequence as driving under the influence of drugs or alcohol.[59] A conviction for driving without a license adds one point to driver's license.[60]

California has taken recent steps to address the inequities inherent in some license suspensions. In 2017, Governor Brown's budget stopped the practice of suspending licenses for people who did not pay court fees.[61] After this change, the Department of Motor Vehicles voluntarily revoked all license suspensions that had been caused by failures to pay court fines.[62]

However, as illustrated below, over [ ] Californians still have their licenses suspended for failing to appear in court. These failures to appear are often directly related to

[52] See *Stopped, Fined, Arrested*, at 1 ("Rates of driver's license suspensions due to a failure to appear or pay a ticket are directly correlated with poverty indicators and with race. The highest suspension rates are found in neighborhoods with high poverty rates and high percentages of Black or Latino residents.").

[53] Penal Code § 19.8(a) (listing Vehicle Code § 12500 (driving without a license) and Vehicle Code § 14601.1 (driving on suspended license) as "subject to subdivision (d) of Section 17"); Penal Code § 17(d) (allowing the offenses in § 19.8(a) to be filed as infractions). A court may also reduce these misdemeanors to infractions with the defendant's consent. Penal Code § 17(d)(2).

[54] *Judicial Council of California, Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19, 124–25,* (Table 7a).

[55] Back on the Road California, *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, April 2016, 4–20.

[56] See, e.g., Vehicle Code § 14601.8 (allowing judge to permit "weekend jail" for people convicted under § 14601.1).

[57] *Stopped, Fined, Arrested* at 23 (showing that — via thirteen different code provisions — an infraction with a base fine of $100 ends up costing $815 once an initial deadline to pay is missed).

[58] Vehicle Code § 12810 (specifying "point violation count"); *Stopped, Fined, Arrested* at 22.

[59] Vehicle Code § 12810(b) & (e). See also DMV, DMV Point System in California <https://www.dmv.org/ca-california/point-system.php>

[60] Vehicle Code § 12810(f).

[61] AB 103 (2017) (Committee on Budget) (Section 53 & 54).

[62] DMV, DMV Removes Driving Suspensions For Failure To Pay Fines, Mar. 15, 2018 <https://www.dmv.ca.gov/portal/news-and-media/dmv-removes-driving-suspensions-for-failure-to-pay-fines/>.

poverty and do not invariably reflect a disregard for the law.[63] Instead, a low-income person's failure to appear in court is often a reflection of the instability of a home address (where a notice to appear may be sent).[64] Other people may avoid coming to court knowing they cannot pay a court fine or fee and fear arrest.[65] According to the Alliance for a Just Society, failures to appear and license suspensions are among "the most common ways courts are able to legally [] jail poor people."[66]

Driving without a license presents many similar issues. While every driver should take the steps to be properly licensed, driving without a license does not necessarily indicate unsafe driving and frequently relates to income level. If someone without a license is driving in an unsafe manner, they can be separately cited and charged for those offenses.[67]

The Commission on the Future of California's Court System, convened by Chief Justice Tani Cantil-Sakauye, recommended that minor traffic court cases be handled entirely in civil court and not as criminal proceedings.[68] Likewise, the American Association of Motor Vehicle Administrators has long opposed suspending licenses for non-safety related reasons.[69]

The fines and fees associated with these offenses are also excessive. California has some of the highest court costs and penalty fees in the country.[70] The total cost in fines and fees for both offenses can amount to more than $4,000:

[Graphic of fines and fees applicable to traffic infractions.]

Other significant consequences are associated with California's current treatment of these offenses:

[63] Allyson Fredericksen and Linnea Lassiter, *Debtors Prisons Redux,* Alliance for a Just Society, 2 (2015) ("For many low-income people, however, there can be significant barriers to attending, including an inability to take time off work, lack of available transportation, lack of child care, or lack of a reliable or permanent address where they can receive notice of the hearing.").

[64] Brief of Legal Services of Northern California as Amici Curiae Supporting Appellant, *Hernandez v. Department of Motor Vehicles*, 49 Cal.App.5th 928 (2020).

[65] *Debtors Prison Redux*, at 2.

[66] *Debtors Prisons Redux,* at 4.

[67] See, e.g., Vehicle Code §§ 23103 (reckless driving), 22350 (basic speed law), 22107 (unsafe lane change).

[68] Commission on the Future of California's Court System, Report to the Chief Justice, 2017, 58.

[69] American Association of Motor Vehicle Administrators, *Reducing Suspended Drivers and Alternative Reinstatement: Best Practices,* November 2018, 3.

[70] Lawyers' Committee for Civil Rights of the San Francisco Bay Area, *Paying More for Being Poor*, May 2017, 1.

- These offenses can serve as the basis for police officers to arrest people.[71]
- A police officer is permitted to impound the vehicle of a person cited for driving on a suspended license or driving without a license for up to one month.[72]

In recognition of some of these issues, three large prosecutor's offices in California — the Santa Clara County District Attorney, the Los Angeles City Attorney, and the Los Angeles County District Attorney — have exercised their discretion to either decline filing charges in these cases or to always file them as infractions.[73] San Francisco does suspend licenses for people who fail to appear for a traffic court date.[74]

Data

According to Back on the Road California, Black and Latino motorists are disproportionately arrested for driving with a suspended license and for warrants for failure to appear or pay on an infraction citation despite there being no documented difference in driving behavior.[75] Additional data confirms that that license suspensions for failure to appear are correlated with high poverty rates and race, with the highest rates of suspensions in poorer neighborhoods with a high percentage of Black and Latino residents.[76]

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[71] Penal Code § 836 (allowing a police officer to arrest a person for a public offense committed in their presence). Penal Code § 15 (defining "public offense" as a violation of law punishable by death, imprisonment, fine, removal, or disqualification from office); Vehicle Code § 40303(a) & (b).

[72] Vehicle Code § 22651(p).

[73] The Los Angeles District Attorney will not prosecute either offense. The Santa Clara County District Attorney and both the Los Angeles City Attorney treat driving on a suspended license for failure to appear in court as infractions. The Los Angeles City Attorney will also treat driving without a license as an infraction. Each office appears to have various limited exceptions to the overall policy. See Los Angeles County District Attorney Special Directive 20-07 (effective December 8, 2020), 2–3 <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf>; Santa Clara County District Attorney , Bend the Arc Reforms, July 22, 2020, 9 <https://www.sccgov.org/sites/da/newsroom/newsreleases/Documents/2020NRDocs/Bend%20The%20Arc%20Reforms%20Handout_%20Final.pdf> (noting disproportionate impact that this offense has on people of color); Memorandum from M.C. Molidor, Jose Egurbide, and Robert Cha, Re: Update to the Los Angeles City Attorney Filing Guidelines for Direct Citations — Changes Re Vehicle Code Section 14601.1(a), February 22, 2020.

[74] San Francisco Financial Justice Project, *Driving Toward Justice*, April 2020, 1 ("In 2018, the San Francisco Court also formalized a policy stopping the suspension of driver's licenses for missing a traffic court date, or Failure to Appear (FTA).").

[75] *Stopped, Fined, Arrested*, at 1, 21. See also John Macdonald & Steven Raphael, An Analysis of Racial/Ethnic Disparities in Stops by Los Angeles County Sheriff's Deputies in the Antelope Valley: Report Period: January–June 2019 (September 2020), xi ("Blacks are most likely to experience a misdemeanor arrest for driving without a license or on a suspended license, driving with expired registration, and/or not having evidence of insurance.") (report prepared as part of settlement between United States Department of Justice and Los Angeles County Sheriff's Department.

[76] *Stopped, Fined, Arrested* at 1. In San Joaquin County between 2013 and 2016, 223 people were arrested solely for the charge of driving on a suspended license and spent an average of .85 days in jails — but four people spent significantly longer, with one person staying in jail for three weeks. *Id.* at 9

According to data provided to the Committee from the California DMV, more than [ ] people have their licenses suspended solely for failure to appear in court.

[Graphic of license suspensions.]

The number of prosecutions for driving without a license and a driving on a suspended license is also large. In Los Angeles County, from 2010 to 2019, there were more than [ ] charges filed for driving on a suspended license for failure to appear or pay a fine and more than [ ] charges for driving without a license.[77]

[Graphic of selected Los Angeles County traffic charges.]

Empirical Research

Recent research shows that license suspension for failure to appear in court is not the most effective way to coerce people to appear in court and pay their fines.[78] After California prohibited license suspensions for failure to pay court fees in 2017, on-time collections increased the following year.[79]

Other research has shown that license suspensions have dramatic economic consequences. Data from New Jersey shows that 42% of people surveyed lost a job while their license was suspended, 45% reported not finding another job, and 88% reported reduced income.[80] Another study showed that women with young children receiving public assistance were twice as likely to find employment if they had a driver's license — a bigger impact than having graduated from high school.[81]

Insights From Other Jurisdictions

Driving on a suspended license for failure to appear in court: Seven states, including Virginia, Mississippi, and South Carolina, do not restrict driving privileges for failure to appear in court.[82] Six additional states, including Pennsylvania, Oregon, and New Jersey do not

[77] This information was provided by the Los Angeles County Public Defender's Office.

[78] Alissa Fishbane, Aurelie Ouss, Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear For Court*, Science, November 6, 2020 (redesigned summons form and text messages reduced failures to appear on average by 13 and 21%, respectively).

[79] San Francisco Financial Justice Project, *Driving Toward Justice*, April 2020, 3 ("And across California, on-time collections went up in the year following the end of driver's license suspensions for Failure to Pay. The increase in collections without the use of driver's license suspensions indicates that the ability to suspend driver's licenses was not needed to ensure payment."), 5 (noting that "collections have declined slightly in the year since, [but] the Judicial Council attributes the decline primarily to the continuing decline in the number of filings.").

[80] New Jersey Motor Vehicles Affordability and Fairness Task Force Final Report, Feb. 2006, xii.

[81] John Pawasarat and Lois M. Quinn, *Research Brief on ETI Driver's License Studies*, ETI Publications 186 (2017) 1.

[82] The states are Idaho, Iowa, Mississippi, South Carolina, South Dakota, Virginia, and Wisconsin. The Free to Drive Coalition conducted research into the laws governing license suspensions in these states

criminalize a first offense for driving on a suspended license when the suspensions are not related to driving under the influence.[83]

Driving without a license: Connecticut, Oregon, Pennsylvania, Washington, and Wisconsin treat driving without a license as a traffic infraction.[84] Texas considers driving without a license as a "misdemeanor" offense, but the penalty is limited to a $200 fine.[85]

and found that while various codes list the circumstances that can lead to license suspension, failure to appear is not one of them. <https://www.freetodrive.org/maps/#page-content>.

[83] Indiana, IC § 9-24-19-1; New Jersey, N.J.S.A. § 39:3-40; Oregon, O.R.S. § 811.175; Pennsylvania, 75 Pa. C.S.A. § 1543; Rhode Island, R.I. ST § 31-11-18(b); and Vermont, 23 V.S.A. § 676.

[84] Connecticut, C.G.S.A. § 14-36(i); Oregon, O.R.S. § 807.010; Pennsylvania, 75 Pa. C.S.A. § 1501; Washington, R.C.W.A. § 46.20.015; Wisconsin, W.S.A. § 343.05.

[85] V.T.C.A., Transp. §§ 521.021, 521.461.

2. Require short prison sentences to be served in jail.

Recommendation

Thousands of people go to prison every year for less than a year instead of finishing their sentences in county jail. The Committee therefore recommends the following:

1. Require counties to maintain custody of people who would serve less than 1 year in state prison.
2. Follow state practice of reimbursing counties if jail population increases as a result.
3. Ensure that no person serves more than five years in county jail.
4. Add tools to help manage jail populations, including increasing use of county parole release process, and specify "warm handoff" upon release from jails to state parole and county probation authorities.

Relevant Statutes

Penal Code § 1170

Background

A large number of people sent to state prison (37%) are incarcerated there for less than one year, as a result of time they have already served awaiting trial in county jails and available custody credits.[86] (The statistic addresses someone's actual length of stay — that is, how much time is left to serve on a sentence.) This is almost 10,000 people per year.[87]

At the same time, new research concludes that people with short sentences have a significantly lower recidivism rate if they serve their sentences in county jails or on probation. The study accounts for a wide array of criminogenic variables, including crimes committed and criminal histories.

Although state prison, administered by the California Department of Corrections and Rehabilitation (CDCR), generally provides more rehabilitative programming and other services compared with county jails, these benefits of state prison generally do not apply to people who are incarcerated there for less than one year. This is because people

[86] Committee on Revision of the Penal Code, Meeting on July 23, 2020, <https://www.youtube.com/watch?v=knYmBBCxXmk> 59:54–1:00:00. Committee staff also confirmed this information via email with CDCR on July 28, 2020: "over the last 3 years, for all individuals who are admitted to state prison, approximately 37% of those individuals are coming to prison with a determinate sentence and projected to serve one year or less in state prison, taking into consideration their credit earning capabilities."

[87] CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, October 2020, Table 3.5 (listing 24,883 admissions under the determinate sentencing law between July 2018 and July 2019).

entering state prison spend their first months (up to 120 days) in "Reception Centers" which have minimal programming and because waitlists for rehabilitative programming are often over one year long.[88] The combination of short stays, long waitlists, and initial confinement in Reception Centers means that people receive few meaningful rehabilitative opportunities while in CDCR custody if confined in prison for less than one year. As Governor Jerry Brown remarked to the Committee: "[these people] go to prison for a year [or] 18 months. What does that accomplish?"[89]

Reception Centers are also costly, from $19 to $47 million annually.[90] These costs are caused by transporting people to CDCR from local jails and performing the required intake evaluations of mental health, medical situations, and other important assessments.[91]

Since the enactment of Public Safety Realignment in 2011, many counties have shown sufficient capacity and expertise in managing people serving sentences of incarceration in county jail, even if that burden was initially unwanted. As Lassen County Sheriff Dean Growdon, First Vice-President of the California State Sheriffs' Association, told the Committee, the difference between jails before and after Realignment and other reforms is "night and day" because sheriffs have embraced rehabilitative programming and alternative custody arrangements.[92]

In addition, recent experience with the COVID-19 public health emergency provides another example of the ability of county jails to maintain custody over people sentenced to state prison sentences. In March 2020, CDCR stopped the transfer of people sentenced to state prison from jail to prison in an effort to curtail spread of the virus.[93] Though not without some significant difficulties — including issues with applying appropriate credit-earning — this experience demonstrates the ability of local authorities to incarcerate additional people sentenced to state prison, especially for periods less than a year.

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[88] CDCR Ombudsman, What To Expect — Reception and Classification Process <https://www.cdcr.ca.gov/ombuds/ombuds/entering-a-prison-faqs/>. California's 2020–21 budget reports that CDCR plans on reducing reception center time to "as few as 30 days instead of 90 to 120 days." California Department of Finance, California State Budget Summary 2020–21, 81–82.

[89] Committee on Revision of the Penal Code, Meeting on September 16, 2020, <https://www.youtube.com/watch?v=iknL7L1ywQs> 0:09:20–0:09:30.

[90] California Department of Corrections and Rehabilitation, 2020–21 State Budget, CR 19 <http://www.ebudget.ca.gov/2020-21/pdf/Enacted/GovernorsBudget/5210/5225.pdf> (annual amount budgeted for reception centers ranges from $47 to $19 million).

[91] CDCR, Division of Rehabilitative Programs, Rehabilitative Process <https://www.cdcr.ca.gov/rehabilitation/about/process/> (describing intake assessments).

[92] Committee on Revision of the Penal Code, Meeting on October 21, 2020, <https://www.youtube.com/watch?v=LHb6mJck1aI> 0:39:23–0:40:55.

[93] CDCR, COVID-19 Updates <https://www.cdcr.ca.gov/covid19/updates/>; CDCR, People Sentenced to CDCR Held in County Jail — FAQs <https://www.cdcr.ca.gov/covid19/positive-programming-credit-faqs/>.

Data

According to CDCR, 37% of all people with determinate sentences entering CDCR stay for less than a year after good conduct and other credits are applied to their sentence. This amounts to almost [ ] people per year.

[Graphic of CDCR admissions showing which portion stay less than a year.]

Empirical Research

As noted, according to a multi-county study of incarceration trends in California, people who served a sentence in jail and on probation had significantly lower felony reconviction rates (22% fewer felony convictions) compared to people sentenced to prison for the same crimes.[94] The research controlled for a number of variables, including criminal history, length of sentence, and conviction offense.

More information about the different outcomes is here:

	Percentage point difference (vs. prison)	*Percent difference (vs. prison)*
Overall 2-Year Reconviction		
Jail	-1.6	-3.9%
Jail and Probation	-5.6	-13.8%
Probation	-1.7	-4.2%
Felony 2-Year Reconviction		
Jail	-1.1	-3.9%
Jail and Probation	-6.6	-22.3%
Probation	-3.8	-13.4%

The study also examined five common offenses — burglary, motor vehicle theft, controlled substance possession, controlled substance possession with intent to sell, and weapons — and found that people sentenced locally to jail, probation, or jail and probation have lower reconviction rates than their prison-sentenced counterparts, except for jail sentences for burglary. In addition, people serving prison terms for these

[94] The reconviction rate was based on a two-year interval. Data was for 2013–17. Further information on this research can be found in the written submission from the researchers and in their presentation to the Committee. See Mia Bird and Ryken Grattet, Felony Sentencing and Recidivism Outcomes in California <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-08s1.pdf>; Committee on Revision of the Penal Code, Meeting on July 23, 2020 <https://www.youtube.com/watch?v=dYE0xPyPUZ8> 0:00:00–1:00:21. This report also includes additional information shared by the researchers after their presentation to the Committee. One of the researchers, Mia Bird, is part of a team at the California Policy Lab that has received funding to complete further research projects for the Committee.

five offenses spent more than twice the amount of time in custody compared with people who were sentenced to county jail.[95]

Representatives from the California State Sheriffs' Association agreed that county jails can provide better services and public safety benefits in the form of reduced recidivism. Butte County Sheriff Kory Honea, Second Vice President of the California State Sheriffs' Association, who appeared before the Committee in July stated that, with the right resources, "we at the local level can provide better outcomes"[96] and described a program in Butte County that had better recidivism outcomes than CDCR at the time.[97] Sheriff Honea noted that local officials have natural and direct incentives to develop programs with better public safety outcomes: "[If] we don't do anything to address the underlying causes of criminal behavior, and then we turn them back loose into our community, they're going to victimize members of our community, including my friends and my family, or perhaps me."[98] Sheriff Growdon agreed and noted that people in county jails may be able to "maintain those local ties and support that they might develop while they're in custody."[99] Other research has shown that counties that prioritized spending funds on re-entry services over enforcement had better recidivism rates.[100]

[95] Committee on Revision of the Penal Code, Meeting on July 23, 2020 <https://www.youtube.com/watch?v=dYE0xPyPUZ8> 0:11:25–0:12:00; 0:12:39-0:13:47; 0:23:24–0:24:07.

[96] Committee on Revision of the Penal Code, Meeting on July 23, 2020 <https://www.youtube.com/watch?v=knYmBBCxXmk> 0:50:33–0:51:00.

[97] Jonathan W. Caudill, Ryan Patten, Sally Parker and Matt Thomas, Breaking Ground: Preliminary Report of Butte County Sheriff's Alternative Custody Supervision Program, Sept. 19, 2012, ii ("[T]he projected one– year recidivism estimation suggested the [Butte County Alternative Custody Supervision Program] has a lower recidivism rate than the most recent California Department of Corrections and Rehabilitation (CDCR) one-year recidivism rate. Our analyses revealed the current ACS six-month recidivism rate just below 20 percent (0.19). Based on this number and previous time-to-recidivism research, we estimated the ACS program one-year recidivism rate at 0.327, while the most recent CDCR recidivism estimate for property and drug offenders was 0.492.").

[98] Committee on Revision of the Penal Code, Meeting on July 23, 2020 <https://www.youtube.com/watch?v=knYmBBCxXmk> 1:06:52–1:07:39.

[99] Committee on Revision of the Penal Code, Meeting on October 21, 2020, <https://www.youtube.com/watch?v=LHb6mJck1aI> 0:51:01–0:51:19.

[100] Mia Bird and Ryken Grattet, *Do Local Realignment Policies Affect Recidivism in California?*, Public Policy Institute of California, Aug. 2014, 20 ("We find that recidivism increased over the realignment period for PRCS offenders released to counties that prioritized enforcement relative to those released to counties that prioritized reentry services. We estimate the change in the felony rearrest rate under realignment was 3.7 percentage points greater for offenders released to enforcement-focused counties than for those released to reentry-focused counties. The felony reconviction rate followed a similar pattern. We find the change in the felony reconviction rate was 1.7 percentage points greater for offenders released to enforcement-focused counties.").

Insights From Other Jurisdictions

According to the United States Department of Justice, the general rule and practice in criminal law is that sentences less than a year are served in county jail, while longer sentences are served in state prisons.[101]

Some jurisdictions have nonetheless addressed the recurring problem of short prison sentences. In 2019, Pennsylvania enacted a short sentence parole law that grants presumptive parole release to people whose minimum term of imprisonment is two years or less.[102] Massachusetts has "Houses of Correction" run by local sheriffs that are designated for some sentences up two and a half years long.[103]

Additional Considerations

One year expected length of stay. In creating this policy, the Legislature should consider that the default amount of good time credit is 50%[104] — meaning that one year of a sentence can often be served in six months, and perhaps less if other types of earned credits apply. This means that in considering who would be covered by this policy, the law should consider the actual expected length of stay after expected credit earning. This may be significantly shorter than someone's full sentence as calculated without credits.

Reimbursement. Current state policy provides for reimbursing counties for the cost of maintaining custody of people sentenced to state prison.[105] If the Committee's recommendation for counties to maintain custody over people with short prison sentences results in an increased jail population, the state should follow its usual practice of reimbursing counties for that additional expense.

Long county jail sentences. Following Realignment, some people received lengthy — more than five years — jail sentences. In 2016, the California State Sheriffs' Association reported that less than 1,600 people statewide were serving sentences of more than 5 years as a result of Realignment.[106] People sentenced to five years or more should not be incarcerated in county jail facilities because jails are not built to incarcerate people for this long.

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[101] See United States Department of Justice, Bureau of Justice Statistics, Prisoners in 2018, 2 ("Prisoners sentenced to jail facilities usually have a sentence of one year or less").

[102] 61 Pa. C.S. § 6137.1.

[103] Mass. Gen. Laws ch. 279, § 23.

[104] Penal Code § 4019; 15 CCR § 3043.2.

[105] See, e.g., Brian Albert, *State Prisoners in County Jails*, National Association of Counties, Feb. 2010, 6 (noting that the daily rate in 2010 was $77.17).

[106] See Letter of Cory Salzillo & Cathy Coyne, Re: Updated Survey of Long Term Offenders in Jail, October 17, 2016. More current data is not available.

Strengthen county parole. Under current law, every county is expected to manage its local jail population through a "board of parole commissioners" that is empowered to release people from jail to county parole supervision.[107] However, county parole is rarely used,[108] and the law has not been updated to reflect current practices in community supervision.[109] The law should be revised to encourage greater use and provide state-wide uniformity, predictability, and accountability. County parole can become an important tool to manage jail populations that could help reduce unnecessary incarceration and significantly reduce local correctional costs.

Permit transfers between counties. If the Committee's recommendation is implemented, some counties may have extra capacity in their jails that neighboring counties may be able to use. Current law does not permit these transfers for people sentenced to state prison terms,[110] and the Legislature may wish to explore allowing them.

Ensure "warm handoffs." Because this proposal would likely result in more people being released from jail custody to community supervision, there should be better coordination between local jail officials and authorities responsible for supervision upon a person's release from custody. This "warm handoff" between jails and probation and parole agencies should be as robust as possible. To ensure this, current law that specifies what information CDCR must give to probation departments for people going on post-release community supervision should be made applicable to all people released from jail.[111]

Continue to improve jail conditions. Conditions in many county jails are constitutionally inadequate.[112] And even where conditions are not so dire, most jails simply do not

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[107] Penal Code §§ 3075 (specifying that the board should have a sheriff's representative, a probation representative, and a member of the public selected by the presiding judge of the Superior Court); 3081(b) (authority to release).

[108] Asm. Com. On Public Safety, Analysis of Asm. Bill No. 884 (2013–2014 Reg. Sess.) March 3, 2013, p. 2 ("According to the California State Sheriffs' Association, the sponsor of this bill, very few counties are currently utilizing county parole.").

[109] Each local county board of parole commissioners is empowered to "make and establish rules and regulations in writing stating the reasons therefor under which any [person] who is confined in or committed to any county jail ... may be allowed to go upon parole outside of such jail." Penal Code § 3076(b). The current law has several significant gaps: it does not specify when incarcerated people should be eligible for parole, what the release standard is, or how long supervisory periods can be.

[110] Penal Code § 4155.5(a).

[111] Penal Code § 3003(e)(1).

[112] See Sarah Lawrence, Court-Ordered Population Caps in California County Jails, Stanford Criminal Justice Center, December 2014, 6 (at time of report, 19 county jail systems had court-ordered population caps and housed 65% of people in California jails); Prison Law Office, Settlement Reached in Contra Costa County Jail Class Action Lawsuit, Oct. 1, 2020 <https://prisonlaw.com/news/settlement-reached-in-contra-costa-county-jail-class-action-lawsuit/>; Prison Law Office, Settlement Reached in Lawsuit Challenging Conditions in Santa Barbara County Jail, July 2020 <https://prisonlaw.com/news/santa-barbara-settlement/>; Prison Law Office, Settlement Reached in Class Action Challenging Conditions in Sacramento County Jail, June 2019 <https://prisonlaw.com/news/settlement-reached-in-class-action-challenging-conditions-in-sacramento-county-jail/>, Prison Law Office, Settlement Reached in Santa Clara County Jail Litigation, Oct. 2018 <https://prisonlaw.com/news/settlement-reached-in-santa-clara-county-jail-litigation/>. See also Written Submission of Aaron Fischer to Committee on Revision of the

operate with long-term stays in mind and may not provide access to the outdoors, contact visits, or other adequate programming and work opportunities. Because of these realities, some people prefer to be incarcerated in state prison instead of county jails. Counties should continue to take steps to improve the conditions of their jails.

Penal Code, July 23, 2020, 4–5 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-08s1.pdf> ("Most county jails have a grossly inadequate system to serve people with mental health disabilities … People with disabilities are regularly denied the reasonable accommodations they need to access jail programs and remain safe. … The risk of death, including suicides, is staggering in county jails."); Abbie Vansickle and Manuel Villa, *Who Begs To Go To Prison? California Jail Inmates*, The Marshall Project, Apr. 23, 2019 <themarshallproject.org/2019/04/23/who-begs-to-go-to-prison-california-jail-inmates>.

3. End mandatory minimum sentences for nonviolent offenses.

Recommendation

California does not have a coherent approach to probation eligibility and some nonviolent offenses are not eligible for probation. The Committee therefore recommends the following:

Allow probation — without any presumptions against it or mandatory jail conditions — for all nonviolent offenses.

Relevant Statutes

Penal Code § 1203, et. seq.

Background

California law provides mandatory minimum sentences for many nonviolent crimes, removing all discretion from trial courts to fashion the most appropriate sanctions.

By contrast, there is no mandatory minimum sentence for some violent crimes. For example, a person convicted of murder is generally eligible for probation,[113] but a person convicted of some nonviolent drug offenses is not.[114] Burglary in the first degree — which can be committed in a wide range of circumstances of greatly varying seriousness — is presumptively ineligible for probation.[115] And a probation sentence is strongly disfavored for any new felony if a person has two prior felony convictions, no matter how minor or old the prior convictions.[116]

Probation is the most common criminal sanction in the United States, yet California's laws governing who is eligible for probation (and who is not) lack coherence and consistency, create unintended mandatory minimum sentences, and fail to account for individual impact on public safety.

Instead of the current approach, all relevant information should be considered in fashioning a sentence, and probation should be a permissible sentence for all nonviolent crimes. A judge hearing the individual circumstances of a person's case should determine the appropriate punishment. As San Mateo Chief of Probation John Keene, Secretary/Treasurer of the Chief Probation Officers of California informed the Committee in April 2020, probation eligibility should be determined by evaluating

[113] See, e.g., People v. Denner, 2019 WL 5927604, *6 (3d District 2019) ("A conviction of second degree murder without more does not render defendant ineligible for probation.").

[114] See, e.g., Penal Code § 1203.07(a)(1) (forbidding probation sentence for possession for sale offense for heroin in excess of 14.25 grams).

[115] Penal Code § 462(a) (first-degree burglary).

[116] Penal Code § 1203(e)(4).

someone's individual circumstances, and not be guided solely by the offense charged against them.[117]

Prohibiting probation for any crime establishes a mandatory minimum term of incarceration, which makes little sense especially for nonviolent crimes. A representative of the California District Attorneys Association recently said that "I don't think most D.A.s have any heartburn about eliminating mandatory minimums."[118] Los Angeles District Attorney George Gascón went a step further, saying that they "are cruel, ineffective and actually exacerbate our recidivism and racial disparities across the criminal justice system."[119]

Instead of the current disjointed system, repealing the prohibitions and presumptions against probation[120] for nonviolent offenses would expand judges' discretion to fashion sentences that fit the specific circumstances of each individual offense.

Data

In California, straight probation sentences are received in only around 7% of felony convictions, while nearly all other felony sentences involve incarceration (including jail, prison, and sentences that combine jail and probation).[121] Approximately 20% of straight probation sentences are for violent offenses.[122]

[Graphic of probation sentences by case type.]

Empirical Research

Research shows that a significant percentage of people serving time in American prisons – in particular those serving time for nonviolent offenses – present far too low a public safety risk to justify their incarceration.[123] One study by the Brennan Center in

[117] Committee on Revision of the Penal Code, Meeting on April 23, 2020, < https://www.youtube.com/watch?v=aIvwcUX_J14>, 42:27–44:39.

[118] Alexei Koseff, "Jail Time for Nonviolent Drug Crimes in California would be Cut under Scott Wiener," San Francisco Chronicle (Dec. 15, 2020) <https://www.sfchronicle.com/politics/article/Jail-time-for-nonviolent-drug-crimes-in-15804570.php> (discussing an effort by state lawmakers to end mandatory minimum sentences for nonviolent drug crimes in California via SB 73, introduced in December 2020).

[119] *Id*.

[120] This would include repealing mandatory jail conditions. See, e.g., Penal Code § 463(a) (180 days in jail presumptively required as part of any probation sentence for looting).

[121] All disposition information is taken from California Department of Justice, Crime in California 2019, July 2020, Table 38A. Note "b" of this table states without further explanation that "In 2019, there was a decrease in the number of final dispositions and sentences for felony adult arrests reported to the California Department of Justice."

[122] California Department of Justice, Crime in California 2019, July 2020, Table 40.

[123] James Austin, Lauren-Brooke Eisen, James Cullen, Jonathan Frank, How Many Americans Are Unnecessarily Incarcerated? Introduction, 8–9 (Brennan Center for Justice, 2016) (recommending the reduction in percentage of people incarcerated for nonviolent offenses).

2016 estimated that "alternatives to prison are likely more effective sentences" for about 25% of the entire American prison population.[124] Prison does little to rehabilitate this group of lower level offenders and can actually enhance their recidivism.[125] Researchers found that these individuals could instead be sentenced to probation and other intermediate community measures such as community service, electronic monitoring, and treatment with better public safety outcomes.[126]

Similar findings were reported from cost-benefit studies of incarcerated populations in three states in 1999 and in five states in 2008.[127] The 1999 study of New York, New Mexico, and Arizona found that the social benefits of incapacitation of 50% of incarcerated males were not worth the expense of their incarceration, and that percentage was even higher for incarcerated females.[128] Similarly, the 2008 study found that the risk of recidivism for a substantial number of incarcerated people in five states was too low to justify their incarceration on a cost-benefit basis.[129]

The Virginia Criminal Sentencing Commission has used recidivism data over time to discover that 50% of people who committed drug and property crimes for whom the Virginia sentencing guidelines recommended prison time, could be instead directed to community-based diversion programs with little threat to public safety based on their low risk of felony recidivism.[130]

Finally, researchers have found "little evidence" that people on probation perceive a jail sentence to be substantially more punitive than community-based sanctions such as electronic monitoring, curfews, or community service.[131] This finding should reassure judges and others who might worry that a community-based sanction would not be experienced as a punishment.

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[124] *Id*. at Introduction, 7–8.

[125] *Id*.

[126] *Id*.

[127] Anne Morrison Piehl, Bert Useem & Jr. John J. DiIulio, Right-Sizing Justice: A Cost–Benefit Analysis of Imprisonment in Three States, 8–9 & Endnote 17 (Manhattan Institute, 1999) (based on surveys of people in New York, New Mexico, and Arizona prisons) < https://media4.manhattan-institute.org/pdf/cr_08.pdf>.

[128] *Id*. at 3–9 (discussing the findings of study that translated the social costs and benefits of incarcerating people into dollars, and then compared them).

[129] *Id*. at 9; Bert Useem & Anne Morison Piehl, Prison State: The Challenge Of Mass Incarceration 67 (2008). See also Kevin Reitz, The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy, Behav. Sci. Law 210-11 (2020) (discussing the 1999, 2008, and 2016 studies).

[130] *Id*. (citing Matthew Kleiman, Brian J. Ostrom & Fred L. Cheesman, II, Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia, 53 Crime & Delinq. 106 (2007); Virginia Criminal Sentencing Commission, Annual Report 2018 31–34 (2018)).

[131] Wodahl, Eric J., Brett E. Garland, and Kimberly Schweitzer "Are Jail Sanctions More Punitive than Community-Based Punishments? An Examination into the Perceived Severity of Alternative Sanctions in Community Supervision," Criminal Justice Policy Review 31(5), 696-720 at 713 (2020).. For example, 1 year on electronic monitoring was seen as equivalent to 1 year in jail. *Id*. at 699-700 Similarly, 14 days of living under a curfew was seen as the equivalent of 7 days in jail, and 30 hours of probationary community service was seen as equal to 14 days in jail. *Id*. at 709-10.

Insight from Other Jurisdictions

In the last two decades, at least 28 states have undertaken reforms aimed at reducing or excising mandatory minimums from their state statutes and instead providing for probation or other community supervision.[132]

These reforms have positively impacted prison population and crime rates. For example, in 2002, the Michigan legislature repealed most mandatory minimum drug sentences.[133] Since then, Michigan's prison population dropped by over 21%,[134] its property crime rate declined roughly 52%[135], its violent crime rate dropped by 15%, and homicides dropped by 11%.[136] In 2009, New York enacted similar reforms,[137] followed by a great drop in violent and property crime rates along with its prison population.[138] Since 2011, New York has closed 17 prison facilities and captured $193 million in annual savings due to the decrease in its prison population.[139]

In the past five years Maryland and Montana also eliminated their mandatory minimum sentences for nonviolent drug offenses.[140] The New Jersey Criminal Sentencing and Disposition Commission recommended in 2019 that the legislature

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[132] "Recent State-Level Reforms to Mandatory Minimum Laws," Families Against Mandatory Minimums (2017), <https://famm.org/wp-content/uploads/Recent-State-Reforms.pdf>.

[133] Affholter, P. and Wicksall, B. "Eliminating Michigan's mandatory minimum sentences for drug offenses," Michigan Senate Fiscal Agency at 1 (November/December 2002). <https://www.senate.michigan.gov/SFA/Publications/Notes/2002Notes/NotesNovDec02AffholterWicksall.pdf>.

[134] Michigan Department of Corrections, 2018 Statistical Report, at C-12 (Nov. 14, 2019) (end of year population in 2018 was 38,761); Michigan Department of Corrections, 2016 Statistical Report, at C-12 (Sept. 5, 2017) (end of year population in 2003 was 49,357); "Michigan Prison Population Continues to Decline," News 10 (Dec. 19, 2019) (Michigan prison population in December 2019 was down to 38,005).

[135] From 2003-2019, burglaries fell by 58%, robberies fell by 52.5%, motor vehicle theft fell by 69%, and larceny fell by 47%. Federal Bureau of Investigation Crime Data Explorer: Michigan <https://crime-data-explorer.fr.cloud.gov/explorer/state/michigan/shr>.

[136] *Id*.

[137] Jeremy Peters, "Albany Reaches Deal to Repeal '70s Drug Laws," New York Times (Mar. 25, 2009) < https://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html>.

[138]New York State Corrections and Community Supervision, "DOCCS Fact Sheet," at 3 (Sept. 1, 2020) < https://doccs.ny.gov/system/files/documents/2020/09/doccs-fact-sheet-september-2020.pdf>; Federal Bureau of Investigation Crime Data Explorer: New York <https://crime-data-explorer.fr.cloud.gov/explorer/state/michigan/shr>. In New York from 2010 to 2019, homicides dropped by 36%, violent crime dropped by 9%, and property crime dropped by 30%. *Id*.

[139] New York State Corrections and Community Supervision, "DOCCS Fact Sheet," at 3 (Sept. 1, 2020) <https://doccs.ny.gov/system/files/documents/2020/09/doccs-fact-sheet-september-2020.pdf>.

[140] "Governor Larry Hogan Announces Implementation of Justice Reinvestment Act" (2017), http://goccp.maryland.gov/governor-larry-hogan-announces-implementation-justice-reinvestment-act/ ("elimination of mandatory minimum sentences for controlled dangerous substance felonies"); "Recent State-Level Reforms to Mandatory Minimum Laws," Families Against Mandatory Minimums (2017), <https://famm.org/wp-content/uploads/Recent-State-Reforms.pdf>.

eliminate mandatory minimum sentences for nonviolent drug and property crimes,[141] and the Virginia Crime Commission recently advocated for the wholesale elimination of all mandatory minimum sentences in 2021.[142]

In some states, the majority of people convicted of felonies are sentenced to straight probation (compared to only 7% in California). In Minnesota between 2004 and 2018, 75% of those convicted of a felony were placed on probation.[143] Similarly, in Kansas, over 70% of those convicted of a felony were placed on probation.[144]

In other states, probation is presumed for nonviolent offenses.[145] In Maryland, sentencing preferences for probation and drug treatment programs were recently enacted for certain drug offenses.[146] Arkansas law requires judges to weigh 13 factors in favor of sentence suspension or straight probation,[147] and includes an explicit directive that courts have the discretion to sentence those convicted of felonies to drug courts or other rehabilitation programs.[148] California only has a similar policy in one area: nonviolent drug offenses.[149]

The Model Penal Code (MPC) — as well as the American Bar Association and the Federal Judicial Conference — all recommend that no mandatory minimum prison sentences be attached to any offenses.[150] Instead, all favor judicial discretion to impose a

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[141] New Jersey Criminal Sentencing & Disposition Commission, Annual Report at 21-23 (November 2019). <https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf>.

[142] Ned Oliver, "Virginia Crime Commission Recommends Eliminating All Mandatory Minimum Sentences," Virginia Mercury (Jan. 5, 2021).

[143] Minnesota Sentencing Guidelines Commission, "2019 Probation Revocations," at 2 (Sept. 2, 2020).

[144] The Council of State Governments Justice Center, Justice Reinvestment in Kansas

Update to the Kansas Sentencing Commission, 8 (Oct. 22, 2020).

[145] Pew Charitable Trusts, "35 States Reform Criminal Justice Policies Through Justice Reinvestment," July 2018 (since 2011, nine states have created some form of presumptive probation); Alison Lawrence, "Making Sense of Sentencing: State Systems and Policies, National Conference of State Legislatures," at 7 (June 2015) (describing presumptive probation systems in four states).

[146] Md. Code Ann. § 5-601(e)(3)(i) ("[T]he court shall suspend the execution of the sentence and order probation and, if the assessment shows that the defendant is in need of substance abuse treatment, require the . . . medically appropriate level of treatment . . . ."); "Maryland Justice Reinvestment Act," Maryland Alliance for Justice Reform <https://www.ma4jr.org/justice-reinvestment/>.

[147] Ark. Code Ann. § 5-4-301.

[148] Ark. Code Ann. § 5-4-313.

[149] Penal Code § 1210.1(a) ("Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation.").

[150] See Model Penal Code: Sentencing Pre Publication Draft (2020), Section 6.11(8) ("The court is not required to impose a minimum term of incarceration for any offense under this code."). *Id*. at 267-68; "ABA Opposes Mandatory Minimum Sentences," ABA (Aug. 15, 2017); "Sentencing, Corrections, and Re-Entry Reforms," ABA (Dec. 11, 2020) <https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/sentencing--corrections--and-re-entry-reforms/>; "Judicial Conference Addresses Judgeship Needs Issues," United States Courts (Mar. 16. 2016) ("The Judicial Conference has

sentence proportionate to the severity of the offense,[151] which could include probation and other forms of supervised release.

Additional Considerations

Under this proposal, probation is not required or presumed. Instead, it eliminates the prohibition of probation for nonviolent crimes and leaves the decision entirely to a judge, or for the parties to resolve via a plea bargain. As they currently are, a judge's decisions in imposing probation are guided by the California Rules of Court and are "normally based on an overall evaluation of the likelihood that the defendant will live successfully in the general community."[152]

Under this proposal, prosecutors retain their ability to argue why probation is inappropriate and incarceration must occur. These arguments may track some of the prohibitions currently built into the code, such as a defendant's prior convictions.

long-standing positions opposing mandatory minimums and supporting their repeal."); "Letter from Judge Bell to Chairman Leahy," (Sept. 17, 2013) <https://www.uscourts.gov/sites/default/files/judge-bell-chairman-leahy-mandatory-minimums.pdf>.

[151] See, e.g., Model Penal Code: Sentencing Pre Publication Draft, Commentary at 267-68.

[152] California Rules of Court 4.414, Advisory Committee Comment.

4. Treat minor thefts without serious injury or use of a deadly weapon as petty theft.

Recommendation

Minor thefts that do not result in serious injury or use of a deadly weapon should be considered misdemeanors. The Committee therefore recommends the following:

1. Thefts of property under $950 without injury or use of a deadly weapon must be charged as petty theft, punishable by up to one year in jail.

2. Exclude any theft with the use of a deadly weapon. This crime would constitute robbery (a violent felony with a 2-5 year prison sentence).

3. Exclude any theft that results in serious bodily injury. This crime would also remain a robbery.

4. Permit retroactive reductions.

Relevant Statutes

Penal Code §§ 211, 486

Background

California's theft statutes are out of date and require legislative consideration since the robbery statute has been greatly expanded by court interpretation and now encompasses even minor offenses. This is especially true given that robbery is an extremely common crime that is disproportionately applied against people of color.

California's robbery statute has not been updated since 1872.[153] It defines robbery as any taking of any property, regardless of value, if "accomplished by means of force or fear."[154] The force must be more than the "quantum of force necessary to accomplish the mere seizing of the property."[155] But once that threshold has been passed, "the degree of force is immaterial."[156] This broad definition of force allows robbery convictions where minimal force is used, such as when a person snatches a purse or cell phone.[157] And

[153] Penal Code § 211.

[154] *Id*.

[155] People v. Morales, 49 Cal. App. 3d 134, 139 (1975).

[156] People v. Garcia, 45 Cal. App. 4th 1242, 1246 (1996), disapproved on other grounds in People v. Mosby, 33 Cal. 4th 353, 365 n. 2, 3 (2004).

[157] See e.g. People v. Jones, 2 Cal. App. 4th 867, 869 (1992) (force used in taking victim's purse was sufficient to uphold robbery conviction. "In response to the prosecutor's question whether she was

beginning with *People v. Estes*[158] in 1983, California courts have allowed robbery to be applied in the shoplifting context.

"*Estes* robberies" are extremely common and include shoplifting offenses where the person has an encounter with a store employee or security personnel and makes a threat or simply pushes past them on their way out the store. The person committing the crime need not injure or touch the victim, and the value of the property is immaterial. A verbal threat is sufficient to elevate the crime from a misdemeanor to robbery, which is categorized as a violent felony, regardless of the circumstances of the crime.[159] This classification makes all robberies strike offenses and can subject a person to enhanced penalties, including a life sentence.[160] And even without any added enhancements, a robbery conviction carries a mandatory prison sentence of up to 5 years.[161]

Examples of extreme outcomes include a recent case where a person received an eleven-year prison term for an *Estes* robbery after he stole a candy bar and a bottle of water from a convenience store and pushed the store manager three times after she followed him outside and told him he had to pay for the items.[162] In another case, a woman was convicted of an *Estes* robbery because she was "uncooperative" with two male security guards, including one who had "grabbed her by both arms and took her back into the store" after she had stolen deodorant, cheese, meat, and two avocados.[163] Los Angeles County public defender Lisa Roth described a common *Estes* robbery scenario to the Committee, explaining, "generally, the person is walking out and some plainclothes security guard comes and grabs them from behind. Granted, they did something wrong, they stole. But often the tussle is because they don't even know who's grabbing them."[164]

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injured when appellant grabbed her purse, the victim testified, 'Well, not much. Only one of my fingers was a little blood [sic] and my shoulder a little bit.'" (alteration in original)).

[158] *People v.* Estes, 147 Cal.App.3d 23 (1983). The facts of the *Estes* case presented far more serious circumstances than many of those now categorized as *Estes* robberies. The defendant in *Estes* committed a theft from Sears, and when the security guard confronted him, Estes swung a knife at him and threatened to kill him. Under the revisions proposed in this section, the facts of the *Estes* case would likely still amount to robbery.

[159] Penal Code § 667.5(c)(9).

[160] Penal Code § 667.

[161] Penal Code § 213(2).

[162] People v. Trujillo, 2018 WL 3099531 (2018). When the responding police officer arrived, the store's manager was "visibly shaken and had tears in her eyes" but no apparent injuries. *Id.* at *2

[163] People v. Trujillo, 2018 WL 3099531 (2018); People v. Dean, 2008 WL 4917565, *1 (2008); See also People v. Edwards, 2018 WL 1516955 (2018) (*Estes* robbery where defendant stole two bottles of liquor from a CVS and shoved the store manager after being confronted); People v. Garcia, 2004 WL 886377, *1 (2004) (affirming 35-years-to-life sentence for an Estes robbery where the defendant stole 10 bottles of cologne, ran from a store manager and security guard, and tore the manager's shirt sleeve in a struggle after they caught the defendant).

[164] Committee on Revision of the Penal Code, Meeting on September 17, 2020, <https://youtu.be/865cBT5VQoE> 3:24 to 4:06.

In discussing the broad discretion that prosecutors wield when determining what charges to file for *Estes*-type offenses, the elected District Attorneys from Santa Clara and San Mateo counties suggested to the Committee that the Legislature could fix the issue by limiting prosecutors' charging discretion.[165] While prosecutors currently have the discretion not to charge a robbery when minimal force is used, according to defense practitioners throughout the state, they often do.[166] And when they do, a judge may not have discretion to reduce the case, or even offer the jury an instruction on a lesser offense.[167] While people charged in these types of cases often end up pleading guilty to a lesser offense, like grand theft from a person, the charging of an offense that carries such steep penalties greatly impacts a defendant's ability to negotiate.[168]

In consideration of the serious and life-long consequences that accompany robbery convictions, any revisions should be made retroactive. The retroactivity of this revision could be modelled on Propositions 47 and 64 and changes to the felony murder rule, which allow people to petition for resentencing if they would have been convicted of a lesser offense had updated laws been in effect at the time judgment was entered in their case.[169]

Data

Robbery is an extremely common offense As of June 2020, [ ]% of people in CDCR custody were convicted of robbery.[170] Of this group, [ ]% are people of color.[171]

[Graphic of CDCR population with robbery convictions, including demographics.]

[165] Santa Clara County District Attorney Jeffrey Rosen proposed "limiting the area of discretion. So, if it can now be anything from a misdemeanor to a strike offense, [] then maybe limiting that to [] anything from a misdemeanor to a felony, that's not a strike offense." Committee on Revision of the Penal Code, Meeting on September 17, 2020, <https://youtu.be/865cBT5VQoE?t=1007> 16:48-17:18; San Mateo County District Attorney Stephen Wagstaff shared his view that "if the Committee were to simply say, you know what, Estes, [ ] wasn't going to exist anymore, I wouldn't sit there and say, 'Oh my heavens, you've taken one of our great tools in protecting public safety.'" Committee on Revision of the Penal Code, Meeting on October 21, 2020, <https://youtu.be/E9UN2kkhLS8?t=3550> 59:10-101:46.

[166] In October 2020, a poll via the California Public Defender's Association asked Chief Public Defenders the following question: "Does your county's District Attorney charge shoplifting defendants with "Estes" robbery, even when the alleged violation did not involve any use of a weapon?" Responses were received from fifteen counties. All of those who responded answered in the affirmative.

[167] People v. Brew, 2 Cal.App.4th 99, 105 (1991); People v. Dorsey, 34 Cal.App.4th 684, 705 (1995).

[168] Caldwell, The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal, 63 CATH. U. L. REV. 51, 62 (2013).

[169] Penal Code § 1170.18; Health & Safety Code § 11361.8; Penal Code § 1170.95.

[170] This data comes from a June 2020 roster of people incarcerated in CDCR. The roster contains information for [ ] people, which is used as CDCR's total population for the calculations here.

[171] *Id.*

There were also almost 15,000 commercial robberies in 2019.[172] About half of all robberies are unarmed,[173] as this chart demonstrates:

[Graphic of proportion of unarmed robberies.]

Though the data from the California Department of Justice does not specify what percentage of these commercial robberies were unarmed, this chart applies the unarmed percentage for all robberies to commercial robberies to show the potential number of unarmed commercial robberies:

[Graphic of estimated unarmed commercial robberies.]

Empirical Research

Research on the effects of changing state theft penalties found that states that raised their theft thresholds saw crime and larceny rates fall without interruption.[174] California's Proposition 47, which established shoplifting under $950 as a nonmandatory misdemeanor, had no effect on violent crime and at worst a small effect on property crime.[175]

Insights from Other Jurisdictions

Unlike California's broad, one-size-fits-all robbery statute, most states acknowledge the wide range of behavior a person may use to steal and distinguish between offenses with different levels of seriousness. Fourteen of fifteen states examined had a system of statutes that created increasingly-serious degrees of robbery based on how the offense was committed.[176]

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[172] California Department of Justice, *Crime in California* 2019, July 2020, Table 6.

[173] *Id.*

[174] Gelb et al., *The Effects of Changing State Theft Penalties*, The Pew Charitable Trusts (2016).

[175] Bartos and Kubrin, *Can we downsize our Prisons and Jails Without Compromising Public Safety? Findings from California's Prop 47*, American Society of Criminology, Volume 17, Issue 3 (2018) ("[W]e find very little evidence to suggest that Prop 47 caused crime to increase in California. "); Mia Bird, Magnus Lofstrom, Brandon Martin, Steven Raphael, Viet Nguyen, *The Impact of Proposition 47 on Crime and Recidivism*, Public Policy Institute of California June 2018, 21 (finding "some evidence of Proposition 47's impact on property crime rates … primarily driven by larceny thefts, particularly thefts from motor vehicles and shoplifting").

[176] The states are Alabama, Alaska, Arizona, Colorado, Florida, Illinois, Massachusetts, New York, Oregon, Texas, Utah, Vermont, Washington, and West Virginia. See Ala. Code §§ 13-8-41– 13.8.43; Alaska Stat. §§ 11.41.500–11.41.510; Ariz. Rev. Stat. §§ 13-1902–13-1904; Colo. Rev. Stat. §§ 18-4-301–18-4-303; Fla. Stat. Ann. §§ 812.13, 812.131; 720 Ill. Comp. Stat. Ann. §§ 5/18-1–5/18-6; Mass. Stat. Ann. Ch. 265 §§ 17-21; N.Y. Penal Law §§ 160.00–160.15; Or. Rev. Stat. §§ 164.395, 164.405, 164.415; Tex. Penal Code Ann. §§ 29.02, 29.03, 31.03; Utah Code Ann. §§ 76-6-301–76-6-302; Vt. Stat. Ann. § 608; Wash. Stat. Ann. § 9A.56.190; W. Va. Code § 61-2-12. Only Nevada had a single degree of robbery. See Nev. Rev. Ann. § 200.380.

For example, the following states punish pushing a store employee while shoplifting as follows:

- New York: Class D felony carrying a sentence as low as probation[177]
- Oregon: Class C felony carrying a sentence as low as probation[178]
- Illinois: Class A misdemeanor with penalties as low as a $75 fine up to a year in jail[179]
- Texas: Class C misdemeanor punishable by a maximum of a $500 fine assuming no injuries[180]

In many states, any force used during the course of a theft will elevate a simple theft offense to less serious robbery as seen in the examples above. But some states have a heightened force requirement. For example, in Texas, a robbery conviction requires proof that the accused "intentionally, knowingly, or recklessly causes bodily injury to another" or "places another in fear of imminent bodily injury or death."[181] Similarly, Vermont's robbery statute requires some bodily injury to be inflicted for the offense to apply.[182]

Additional Considerations

The goal of this recommendation is to bring California in line with other states that distinguish between different types of thefts and to forbid thefts involving minor use of force or fear from being charged as robberies or other felonies.[183] The Penal Code currently divides theft into two degrees: grand and petty theft. Generally, grand theft occurs when the value of the stolen property exceeds $950[184] and theft that does not meet one of the definitions of grand theft is petty theft.[185] The Penal Code also has a

[177] N.Y. Penal Law §§ 160.05, 70.00(4).

[178] Or. Rev. Stat. §§ 164.395, 161.605.

[179] 720 Ill. Comp. Stat. Ann. §§ 5/16-25, 5/12-3; 730 Ill. Comp. Stat. Ann. § 5/5-4.5-55. In Illinois this conduct could hypothetically be charged as burglary under 720 Ill. Comp. Stat. Ann. §§ 5/19-1. However, it is extremely unlikely to be charged as such. See Interview, Former McHenry County Prosecutor, notes on file, Dec. 2020; Interview, Champaign County Deputy Federal Public Defender, notes on file, Dec. 2020.

[180] Tex. Penal Code Ann. §§ 31.03(e); 12.23.

[181] Tex. Penal Code Ann. § 29.02.

[182] 13 Vt. Stat. Ann. § 608; State v. Francis, 151 Vt. 296, 305 (1989).

[183] The Penal Code currently divides theft into two degrees: grand and petty theft. Penal Code § 486. Generally, grand theft occurs when the value of the stolen property exceeds $950. Penal Code §§ 487, 490.2(a).

[184] Penal Code § 487; Penal Code § 490.2(a).

[185] Penal Code § 488.

separate misdemeanor "shoplifting" offense for thefts less than $950.[186] Theft involving *any* force or fear is considered a robbery.[187]

This recommendation is to add a new offense to this hierarchy: petty theft in the first degree. This offense would cover any thefts from a person or commercial establishment that involved the use of force or fear but where no serious injury was caused and no deadly weapon was used. This new offense would be punished as a misdemeanor offense with a maximum punishment of one year in county jail. (For comparison, both the existing petty theft and shoplifting offenses are misdemeanors with a maximum of six months in county jail, while grand theft is a wobbler with punishment up to three years in county jail.)[188] As part of creating this new offense, the current petty theft offense should be reclassified as petty theft in the second degree.

In addition, this recommendation requires that the new theft offense be the exclusive charge where it would apply. This mirrors how the Penal Code treats shoplifting, where conduct that meets the definition of shoplifting is prohibited from being charged as a related offense, like burglary or fraud.[189]

This recommendation contemplates that first-degree petty theft is the appropriate charge in circumstances where fear is used to complete a theft, but no weapon is used, and no serious injury is caused. The Committee recognizes that some purely verbal altercations can be extremely traumatizing for the victim. These offenses should be treated seriously. However, the Penal Code has other offenses that may be appropriate to apply in these scenarios, such as criminal threats,[190] which can be charged as a felony strike offense.[191]

Finally, the Committee recognizes that its recommendation that this change in the law be made retroactive presents complicated issues in determining which facts it would apply to and the administrative burden on courts in such proceedings. However, given the seriousness and life-long consequences of a robbery conviction, these complications do not outweigh the benefit of retroactive application.

[186] Penal Code § 459.5(a).

[187] Penal Code § 211.

[188] Penal Code §§ 488 (petty theft), 459.5 (a) (shoplifting), 489(c) (grand theft).

[189] Penal Code § 459.5(b).

[190] Penal Code § 422(a).

[191] Penal Code § 422(a); Penal Code § 1192.7(c)(38).

5. Provide guidance for judges considering sentence enhancements.

Recommendation

Judges currently have authority to dismiss sentence enhancements "in furtherance of justice," but that standard has never been defined or clarified by the Legislature or courts. The Committee therefore recommends the following:

1. Establish presumptions (but not requirements) for judges to dismiss sentencing enhancements under any of the following circumstances:
    - The current offense is nonviolent.
    - The current offense is connected to mental health issues.
    - The enhancement is based on a prior conviction that is over 5 years old.
    - The current offense is connected to prior victimization or childhood trauma.
    - The defendant was a juvenile when he/she committed the current offense or prior offenses.
    - Multiple enhancements are alleged in a single case or the total sentence is over 20 years.
    - A gun was used in the current offense but it was inoperable or unloaded.
    - Application of the enhancement would result in a disparate racial impact.

2. Provide that the presumptions can be overcome if there is "clear and convincing evidence that dismissal of the enhancement would endanger public safety."

3. Clarify that the list is not exclusive. Judges maintain power to strike enhancements in other compelling circumstances.

Relevant Statute

Penal Code § 1385

Background

The vast majority of people in California's prisons (80%) are serving a term lengthened by a sentence enhancement.[192] The most common enhancements include extended

[192] Ryken Grattet, Sentence Enhancements: Next Target of Corrections Reform?, PPIC Blog, September 27, 2017 ("As of September 2016, 79.9% of prisoners in institutions operated by the California Department of Corrections and Rehabilitation (CDCR) had some kind of sentence enhancement; 25.5% had three or more."). See also Vitiello, et al., *A Proposal for Wholesale Reform of California's Sentencing Practice and Policy*, 38 Loy. L.A. L. Rev. 903, 921 (2005) (noting that between 1984 and 1991, California passed over 1,000 crime bills, many of them enhancing criminal sentences); *Time Served: The High Cost, Low Return of Longer Prison Terms*, The Pew Center on the States (2012) (noting that between 1990 and 2009, the average length of stay for people sent to prison in California increased by 51%).

sentences required by the Three Strikes law, the Street Terrorism Enforcement and Protection Act (gang enhancements), and the five-year serious felony enhancement.[193]

As Governor Jerry Brown explained to the Committee, the multitude of many sentencing enhancements added to the Penal Code have left us with a "tax code-like complexity."[194] Santa Clara District Attorney Jeff Rosen further described the impact of lengthy enhancements to the Committee, saying, "when I began as a prosecutor, enhancements could moderately shift the underlying sentence. Now they have become the tail that wags the dog. It's quite common now that the entire trial, and all pretrial negotiations are solely about the enhancement, not the crime itself."[195] Governor Brown suggested that creating guidance for judges and trusting them to exercise their discretion appropriately is one way to overcome the mistakes of the previous era.[196]

Judges currently have power to dismiss most sentencing enhancements when imposing a sentence. But this discretion may be inconsistently exercised and underused because the Penal Code does not currently provide guidance on how courts should exercise the power. The current standard is that judges exercise authority to dismiss a sentence enhancement when "in furtherance of justice."[197] Courts have not clarified or defined this standard. The California Supreme Court noted that the standard is an "amorphous concept."[198]

Although judges are charged with ensuring proportionality and uniformity in sentencing,[199] they lack basic guidance and data to evaluate sentencing decisions. The

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[193] *Id.* A study of felony sentences in San Francisco from 2005 to 2017 concluded that while only 13% of cases were enhanced, sentencing enhancements caused 25% of all time spent in jail or prison. Half of the time added by enhancements came from two criminal history enhancements, Three Strikes and a five-year enhancement for a prior serious felony conviction. The other half of the time added to sentences was largely driven by gun enhancements). See also Elan Dagenais, Raphael Ginsburg, Sharad Goel, Joseph Nudell, and Robert Weisberg, *Sentencing Enhancements and Incarceration: San Francisco, 2005–17*, Stanford Computational Policy Lab, October 17, 2019, 1.

[194] Committee on Revision of the Penal Code, Meeting on September 17, 2020,

<https://youtu.be/iknL7L1ywQs> 4:17 to 7:00.

[195] Committee on Revision of the Penal Code, Meeting on September 17, 2020 https://youtu.be/iknL7L1ywQs?t=3957 105:57 to 106:24.

[196] Committee on Revision of the penal Code, Meeting on September 17, 2020, <https://youtu.be/iknL7L1ywQs> 10:45 to 11:25.

[197] Penal Code § 1385(a).

[198] People v. Superior Court (Romero), 13 Cal. 4th 497, 530 (1996). The California Rules of Court do provide some guidance: "the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." Cal. Rules of Court, Rule 4.428(b). The California Supreme Court has also explained that "courts will exercise this power in a careful and thoughtful manner. The wise use of this power will promote the administration of justice by ensuring that persons are sentenced based on the particular facts of the offense and all the circumstances. It enables the punishment to fit the crime as well as the perpetrator." People v. Williams, 30 Cal. 3d 470, 489 (1981).

[199] Penal Code § 1170(a)(1).

lack of clarity is especially concerning given racial disparities in sentences.[200] A study in Florida showed that one judge sentenced two people convicted of the same offense with the same background to starkly different sentences: the white defendant received two years but the Black defendant received 26 years.[201] At minimum, lack of clarity in sentencing authority encourages subjectivity and inconsistency.

In other contexts, California law directs judges on how to exercise their sentencing discretion — for example, split sentences are presumptive in many scenarios[202] and probation is disfavored for some offenses unless there are "extraordinary circumstances."[203] The presumption recommended here builds on existing California Rules of Court that guide judges on what circumstances they should consider in aggravation and mitigation in imposing a felony sentence,[204] such as prior abuse,[205] recency and frequency of prior crimes,[206] and mental or physical condition of the defendant.[207] The presumption recommended here can be overcome with clear and convincing evidence that failing to impose the enhancement would endanger public safety.[208]

Judges should retain authority to impose sentence enhancements in appropriate cases. But providing guidance on how judges should evaluate the appropriateness of a sentence enhancement in furtherance of justice would provide more consistency,

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[200] See, e.g., Josh Salman, Emily Le Coz, and Elizabeth Johnson, *Florida's Broken Sentencing System*, Sarasota Herald Tribune, Dec. 12, 2016 (exploring racial disparities in Florida's criminal sentences); The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System*, Mar. 2018, 6–8.

[201] Bergeron, et al., *How a Spreadsheet Could Change the Criminal Justice System, A lack of data instills trial-court judges with enormous, largely unrestrained sentencing power*, The Atlantic (December 14, 2020).

[202] Penal Code § 1170(h)(5)(A) ("Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion."). California Rule of Court 4.415 provides further guidance to judges when applying this presumption.

[203] Penal Code § 462(a) (burglary of an inhabited dwelling house).

[204] Cal. Rules of Court, Rule 4.421 and 4.423.

[205] Cal. Rules of Court, Rule 4.423(a)(9).

[206] Cal. Rules of Court, Rule 4.423(b)(1).

[207] Cal. Rules of Court, Rule 4.423(b)(2).

[208] The "clear and convincing" evidence standard is a high one, but it is used throughout the Penal Code to overcome other presumptions., See, e.g, Penal Code § 231.7(e) (some peremptory challenges are presumed invalid "unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation"); Penal Code § 26 (minors under the age of fourteen are presumed to be incapable of committing a crime absent "clear proof" that they knew it was wrong); Penal Code § 18420(b) (presumption that a seized firearm should be returned to its owner at a second hearing unless it is shown by clear and convincing evidence that return of the firearm would "result in endangering the victim or person reporting the assault or threat.").

predictability, and reductions in unnecessary incarceration, while ensuring that sentencing enhancements are focused on protecting public safety.

Data

As of September 2016, 80% of people in CDCR's prisons had at least one sentencing enhancement and 25% had three or more.[209]

[Graphic showing most common sentencing enhancements for CDCR population.]

Empirical Research

Studies of decades of nationwide crime and incarceration data show that long sentences have little or no public safety value. As Professor Steven Raphael has written, "[t]here is very little evidence of an impact of extremely harsh punishments (that is, longer sentences, capital punishment) on the levels of the crimes they are intended to deter."[210] Professor Raphael also referred the Committee to recent research showing that people sentenced by harsher judges had higher recidivism rates than people sentenced by more lenient judges.[211]

Other studies show that a person's criminal involvement tends to be limited to a period of less than 10 years.[212]

Insights From Other Jurisdictions

The most common type of sentencing enhancement across other jurisdictions are enhancements based on prior convictions, including Three Strikes and habitual offender statutes.

Out of 20 jurisdictions examined by the Committee,[213] 12 have cut-off dates, or "wash-out" provisions, after which criminal history no longer counts for purposes of

[209] Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog, September 27, 2017 <https://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/>.

[210] Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?* (2013) 222. See also National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press (2014), at 134-140.

[211] Written Submission of Professor Steven Raphael to Committee on Revision of the Penal Code, June 26, 2020, 5 http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-07s1.pdf> (explaining research in Aizer, Anna and Joseph J. Doyle (2015), "Juvenile Incarceration, Human Capital, and Future Crimes: Evidence from Randomly Assigned Judges," Quarterly Journal of Economics, 130(2): 759-803 and Mueller Smith (2015), "The Criminal and Labor Market Impacts of Incarceration," University of Michigan Working Paper).

[212] Piquero, et al., *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)* (2013).

[213] The states examined were Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, Washington, and the federal system.

increasing the length of some sentences. For example, Florida, Illinois,[214] Michigan, Delaware, and the District of Columbia, and have 10-year cut-offs for counting most prior felony offenses.[215] Arkansas, Minnesota, and the federal government[216] have a cut-off for counting most felony priors at 15 years, and for misdemeanor priors at 10 years.[217] In Arizona, defendants are subject to a longer sentence for a new felony conviction if they committed certain felonies within the past 5 years, or more serious felonies within the past 10 years.[218] Similarly, Washington has a 5-year wash-out period for enhanced sentences based on most prior offenses and a 10-year wash-out period for more serious felony priors.[219]

[214] In Illinois, judges have discretion to subject people to "extended term sentencing" – a longer sentence based on certain factors – one of which is if they had a prior conviction within the last 10 years. 730 ILCS § 5/5-5-3.2(b)(1).

[215] 4 Del. Sentencing Accountability Comm'n Benchbook 25 (2020); D.C. Voluntary Sentencing Guidelines Manual § 2.2.3 (2020); Fla. Crim. Punishment Code: Scoresheet Preparation Manual 10 (2019); Mich. Sentencing Guidelines Manual Step.1.D (2020).

[216] To calculate criminal history for federal offenses, every prior sentence of 1 year and a month within the last 15 years counts, as does every sentence of imprisonment of 60 or more days within the last 10 years. U.S. Sentencing Guidelines Manual § 4A1.2 (2020).

[217] Arkansas Sentencing Standards Grid Offense Serious Rankings & Related Material 102-03 (2017); Minn. Sentencing Guidelines §§ 2.B.1.c and 2.B.3.e (2020).

[218] Arizona Rev. Stat. § 13-105(22)(b),(c); § 13-703(B)(C).

[219] Wash. State Adult Sentencing Guidelines Manual 53-54 (2020). Prior Class A and felony sex convictions are always counted for criminal history purposes. See *id.*

6. Limit gang enhancements to the most dangerous offenses.

Recommendation

Gang enhancements are applied inconsistently and disproportionately against people of color and fail to focus on the most dangerous, violent, and coordinated criminal activities. The Committee therefore recommends the following:

1. Focus the definition of "criminal street gang" to target organized, violent enterprises.
2. Remove nonviolent property crimes from the list of predicate felonies.
3. Require the defendant to know the person responsible for the predicate offenses.
4. Prohibit use of the current offense as proof of a "pattern" of criminal gang activity.
5. Require direct evidence of current and active gang involvement and violence and limit police expert witnesses.
6. Bifurcate direct evidence of gang involvement from the guilt determination at trial.

Background

92% of the people sentenced under California's gang enhancement statute are people of color.[220] It is difficult to imagine a statute, especially one that imposes criminal punishments, with a larger disparate racial impact.

California's gang enhancement was originally enacted pursuant to the Street Terrorism Enforcement and Prevention (STEP) Act of 1988 to "seek the eradication of criminal activity by street gangs."[221] At the time, the Legislature asserted that California was "in a state of crisis … caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods."[222] As originally enacted, the Act aimed to eliminate gangs by creating a three year enhancement for gang-related offenses.[223]

The law was controversial from the start. Then-member of the Legislature and future Attorney General Bill Lockyer went so far as predicting the law would be "laughed out of court."[224] But proponents of the law promised the enhancement would only apply

[220] Abené Clayton, *92% Black or Latino: the California Laws that Keep Minorities in Prison*, The Guardian, November 26, 2019.

[221] Penal Code § 186.21.

[222] *Id*.

[223] Penal Code § 186.22(b) (1988).

[224] Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California's AntiGang STEP Act*, 11 Berkeley J. Crim. L. 101, at 102, quoting, *Criminal Street Gang Bill Passes Committee*, Eagle Rock Sentinel, June 27, 1987.

when "the provable purpose of the gang is to commit serious and violent crime and [] it can be shown that a gang member knew that was the gang's purpose when he joined."[225]

But since the law's enactment, lawmakers, courts, and Proposition 21 in 2000 have increased the penalties that accompany the enhancement and broadened its application. In some circumstances, the enhancement can impose a life sentence.[226] In other cases, the enhancement can apply to nonviolent crimes and misdemeanors, and result in long mandatory prison sentences.[227] The list of predicate offenses, which must be established to prove the existence of a gang, has also ballooned, and includes many nonviolent offenses.[228] Courts have also held that the predicate offenses are not actually required to be gang-related.[229] Under current law, a person charged with a gang enhancement does not even have to know the person responsible for predicate offenses.[230]

As already noted, the expanded applicability of gang enhancements has disproportionately been applied against defendants who are Black and Latinx. Yet research shows that white people make up the largest group of youth gang members.[231] Indeed, scholars have questioned law enforcement's ability to accurately identify gang members.[232] As Director of Systemic Issues Litigation at the Office of the State Public Defender Lisa Romo explained to the Committee, "although social science tells us [gang] members come in all races and all ethnicities, law enforcement officers are taught that gang members are people of color. This means that communities of color are overpoliced, and white gang members can pass."[233]

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[225] *Stuck in the Thicket*, at 101, quoting, *Criminal Street Gang Bill Passes Committee*, Eagle Rock Sentinel, June 27, 1987.

[226] Penal Code § 186.22(b)(4)(C).

[227] People v. Superior Court (Johnson), 120 Cal.App.4th 950 (2004). Gang enhancements now add five years for a serious felony and ten years for a violent felony. Penal Code § 186.22(b).

[228] Penal Code Section 186.22(e)(1)-(33).

[229] People v. Gardeley, 14 Cal.4th 605, 621–622 (1996).

[230] People v. Prunty, 62 Cal.4th 59, 67–68 (2015).

[231] Greene, et al., *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Just. Pol'y Inst. (2007)

<https://www.justicestrategies.net/sites/default/files/publications/Gang_Wars_Full_Report_2007.pdf>

[232] As gang scholar Malcolm Klein explains, "because gangs are informal groups commonly lacking membership rosters, time clocks, written constitutions or organizational charts, they are inherently ambiguous. Every effort to provide a definition common to all gangs has failed. Efforts to determine who is and who is not a gang member similarly have failed, with the numbers of false positives and false negatives often approaching the numbers of agreed-upon membership. Klein, *What Are Street Gangs When They Get to Court?*, 31 Val. U.L. Rev. 515, 516 (1997).

[233] Committee on Revision of the Penal Code, Meeting on September 17, 2020, <https://youtu.be/865cBT5VQoE> 52:22 to 52:44.

Another problem with gang enhancements is that the evidence considered in court can be unreliable and prejudicial to a jury. In many cases, police officers testify as expert witnesses on the subject of gangs, including whether a person committed a particular crime for the greater benefit of a gang.[234] This testimony has been found to be extremely influential on juries — studies have shown that even merely associating an accused person with a gang makes it more likely that a jury will convict them.[235] Acknowledging the risk that gang evidence can improperly influence a jury's decision, Kevin Rooney, a gang prosecutor who testified to the Committee, said that bifurcation should be used more often "to reduce the risk that someone's going to be convicted in a case they wouldn't otherwise, just because of the gang evidence."[236] But the Legislature has taken no steps to limit the impact that this testimony has on juries, even though it has done so in other circumstances presenting special issues of reliability.[237]

Data

[Graphics of people in CDCR custody with gang enhancements, with breakdowns by county and demographic.]

Empirical Research

The California Attorney General's 2019 Annual Report on CalGang, the statewide intelligence database used by law enforcement to track purported gang members, found that the demographics of those entered into the CalGang system were 65% Latinx, 24%

[234] People v. Vang, 52 Cal. 4th 1038, 1041 (2011). In People v. Gardeley, 14 Cal.4th 605, 620 (1996), the court held that an expert witness could offer their opinion on the existence of a gang. In People v. Sengpadychitch, 26 Cal.4th 316, 324 (2001), the court ruled that an expert witness could offer their opinion on what a particular gang's primary activities are. In People v. Albillar, 51 Cal.4th 1038, 0141 (2011), the court held that an expert witness could offer an opinion on whether a gang engages in a pattern of criminal activity. And in People v. Castenada, 23 Cal.4th 743, 745-746 (2000), the court held that an expert could offer their opinion on whether a particular person or group of persons are gang members.

[235] Eisen, et al., *Examining the Prejudicial Effects of Gang Evidence,* 13 J. Forensic Psychol. Pract. 1 (2013); Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Disc. 2 (2014).

[236] Committee on Revision of the Penal Code, Meeting on September 17, 2020, <https://youtu.be/865cBT5VQoE?t=459> 1:16:32 to 1:17:09 (DA Rooney was generally supportive of the gang enhancement, though he noted that it could be improved in certain areas. He expressed concern that eliminating the enhancement would prevent law enforcement from using the enhancement's wiretap provisions. Since the Committee recommendation does not eliminate the enhancement altogether, the wiretap provisions will be unaffected.).

[237] Penal Code §§ 1111 (requires corroborating evidence of guilt for a conviction based on accomplice testimony), 111.5 (prohibits a conviction based on the uncorroborated testimony of an in-custody informant), 29 (limiting an expert testifying about a defendant's mental illness from offering an opinion on whether they possessed a required mental state).

Black, and 6% white.[238] Yet research shows that white people make up the largest group of youth gang members.[239]

Disproportionate identification of people of color as gang members is not an issue unique to California — a recent review of the Chicago Police Department's gang database found that 95% of the 65,000 individuals listed in it are Black or Latinx.[240] In Mississippi, a recent report found that every person arrested under the state's gang law between 2010 and 2017 was Black, even though the state's Association of Gang Investigators reports that 53% of the state's gang members are white.[241]

Survey data from California indicates that youth of different ethnicities self-identify as gang members at similar rates.[242] In 2015, the Anti-Defamation League found that California has a "uniquely large population of white supremacist gangs (from skinhead gangs to street gangs),"[243] and a recent sting by federal authorities of members of the Aryan Brotherhood confirms that white gangs remain extremely active in the state.[244]

Other research has shown that the introduction of gang testimony is extraordinarily prejudicial and can lead a jury to convict, even when there is reasonable doubt as to guilt.[245]

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[238] Attorney General's Annual Report on CalGang for 2019, <https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/ag-annual-report-calgang-2019.pdf>. Recent reports suggest many of these entries are inaccurate. A recent statewide audit of CalGang entries found unsubstantiated entries and glaring errors, including names of 42 people whose birth dates indicated they were one year of age or younger at the time they were entered into the database. Winton, *California gang database plagued with errors, unsubstantiated entries, state auditor finds*, Los Angeles Times (August 11, 2016).

[239] Greene, et al., *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Just. Pol'y Inst. (2007) at 37-38.

[240] Yousef, *Activists: Gang Database Disproportionately Targets Young men of* Color, NPR (January 27, 2018), <https://www.npr.org/2018/01/27/581103921/activists-gang-database-disproportionately-targets-young-men-of-color?eType=EmailBlastContent&eId=0b80a2c4-8465-4af0-9860-63350bb9cb70>

[241] Ladd, *Only Black People Prosecuted under Mississippi Gang Law Since 2010*, Jackson Free Press (March 29, 2018).

[242] This data was collected by the California Healthy Kids Survey (CHKS) and Biennial State CHKS and compiled by the Lucile Packard Foundation for Children's Health, <https://www.kidsdata.org/topic/437/gang-race/table#fmt=584&loc=2&tf=122&ch=7,11,70,10,72,9,73,127,1177,1176&sortColumnId=0&sortType=asc > The self-nomination method is considered valid and reliable among researchers. Hiestand, *Gang Membership, Duration, and Desistance: Empirical Literature Review*, DOJ Research Center

<https://oag.ca.gov/sites/all/files/agweb/pdfs/Ab90-Literature-Review-FINAL.pdf>

[243] Friedman, et al., *White Supremacist Prison Gangs in the United States, a Preliminary Inventory*, Anti-Defamation League (2016), < https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/CR_4499_WhiteSupremacist-Report_web_vff.pdf>

[244] Gartrell, *'Build an army': Aryan Brotherhood leaders attempted to rule over all white California prison gangs, feds say*, The Orange County Register (September 1, 2019).

[245] Eisen, et al., *Examining the Prejudicial Effects of Gang Evidence,* 13 J. Forensic Psychol. Pract. 1 (2013); Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Disc. 2 (2014).

Insights From Other Jurisdictions

All 50 states and the District of Columbia have enacted some form of anti-gang measures.[246] But in comparison to California, other states require more evidence of connection or organization between gang members for gang enhancements to apply. For example, in Illinois, to qualify as a criminal street gang, it must be shown that a group has "an established hierarchy."[247] In Arkansas, a person commits the offense of engaging in a criminal gang when they commit two or more predicate offenses "in concert" with two or more other persons.[248] In Maryland, a "criminal organization" is required to have an "organizational or command structure,"[249] and to convict a person of participating in a criminal organization, the prosecution must prove the defendant had knowledge of the pattern of criminality of members of the gang.[250]

Other state courts have treated expert witness testimony about an accused's gang membership with caution and required such testimony to be closely connected to direct evidence. For example, the Minnesota Supreme Court has warned "that criminal gang involvement is an element of the crime does not open the door to unlimited expert testimony," and gang activity must therefore be proven by "first-hand knowledge."[251] New Mexico's Supreme Court reached a similar result.[252]

At least three states (Indiana, Tennessee, and Rhode Island) require gang enhancements to be proven in a separate phase of trial.[253]

Additional Considerations

Revising the gang enhancement presents special challenges. Because the law was amended by Proposition 21 in 2000, some aspects of the law can only be changed by another voter initiative or a two-thirds vote in the Legislature. As discussed in the introduction, the Committee decided to not make any recommendations that would require a supermajority. The recommendations in this section therefore require only a

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[246] See Highlights of Gang-Related Legislation, NAT'L GANG CENTER, http://www.nationalgangcenter.gov/ Legislation/Highlights.

[247] 740 ILCS Section 147/10.

[248] A.C.A. Section 5-74-104(a)-(b).

[249] MD CRIM LAW § 9-801.

[250] MD CRIM LAW § 9-804(a)(1); Madrid v. State, 247 Md.App. 693 (2020).

[251] State v. DeShay, 669 N.W.2d 878, 885 (2003).

[252] In State v. Torrez, 146 N.M. 331, 339 (2009), the New Mexico Supreme Court disapproved the testimony of a police officer who testified as an expert witness on gangs and gave the opinion that a shooting was motivated by the defendant's gang membership. Citing the Minnesota Supreme Court, New Mexico's court noted that the prosecution failed to offer sufficient evidence that the shooting was gang-related and thus the admission of the expert testimony was more prejudicial than probative.

[253] Including: Rhode Island, RI ST Section 12-19-39(a)-(d); Indiana, IN ST 25-50-2-15(c) and; Tennessee, TN ST Section 40-35-121(h)(1).

majority vote in the Legislature because they do not involve aspects of the gang enhancement statute enacted by Proposition 21.

7. Apply repealed sentencing enhancements retroactively.

Recommendation

In recent years, the Legislature eliminated sentence enhancements for certain prior offenses in Senate Bill 136 (2017) and Senate Bill 180 (2019). The Committee therefore recommends the following:

1. Retroactively apply the elimination of sentence enhancements enacted in SB 136 and SB 180.
2. Remove these enhancements automatically without requiring court action for the new sentence, and do not limit how many enhancements can be removed per person.
3. Prevent renegotiation of plea bargains.

Relevant Statutes

Health & Safety Code § 11370.2; Penal Code § 667.5(b)

Background

In 2017 and 2019, the Legislature repealed sentencing enhancements that added a year of incarceration for each prior prison or jail term, and added three years to a sentence for some prior drug convictions.[254] The repeals of these enhancements applied prospectively only to new cases filed after SB 136 and SB 180 became law and most people already serving time for these enhancements could not benefit from the change in the law.[255]

As the data below shows, these enhancements are disproportionately applied against people of color. As the author of the bill that repealed the one-year enhancement, Sen. Scott Weiner, stated, "This injustice undermines the public trust in our laws, law enforcement, and our political institutions."[256] The *Los Angeles Times* editorial page also

[254] As of January 1, 2018, a three-year enhancement for prior drug convictions was repealed in almost all circumstances. SB 180 (Mitchell) (2017). The only prior drug convictions that still trigger this enhancement are those involving minors. See Health & Safety Code § 11370.2. As of January 1, 2020, a one-year enhancement for prior prison or jail terms was repealed in almost all cases. SB 136 (Weiner) (2019). The enhancement now only applies to a prior conviction for a "sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." Penal Code § 667.5(b). The enhancement now only applies to a prior conviction for a "sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." Penal Code § 667.5(b).

[255] See generally Penal Code § 3; People v. McKenzie, 9 Cal. 5th 40 (2020); In re Estrada, 63 Cal. 2d 740, 744 (1965). See, e.g., People v. Chamizo, 32 Cal. App. 5th 696, 700–01 (2019) (SB 180).

[256] Sen. Com. On Public Safety, Analysis of Sen. Bill No. 136 (2019–2020 Reg. Sess.) March 26,

2019, p. 2.

supported the repeal of this one-year enhancement as "good lawmaking in that it would roll back foolish lawmaking."[257]

It is difficult to justify a sentence that is longer than someone's else's merely because it was imposed at a slightly different date. This is especially true given the role that prior conviction enhancements play in perpetuating the harm of old criminal convictions that may have originated in a system that disproportionately impacts Black and Latinx people.

California has offered retroactive application for some of its most significant sentencing reforms: people serving life sentences under the Three Strikes law could seek resentencing under Proposition 36, people with certain felony convictions could be resentenced under Proposition 47, and marijuana convictions could be modified or vacated under Proposition 64.[258] And recent reforms to the felony murder rule were also given retroactive application.[259]

Data

[Graphics showing people in CDCR custody with the one year and three year enhancements, including breakdown by demographic.]

A significant number of people serving sentences in jail are also likely to have these enhancements. For example, drug-related sentences have been reported by the California State Sheriffs' Association as a common reason for people serving long sentences in jail.[260]

Empirical Research

Research has shown that modest reductions in sentences have no public safety impact. A study from the United States Sentencing Commission studied retroactive application of reductions to federal drug sentences, which resulted in an average 30 month reduction for more than 7,500 people with no measurable impact on recidivism rates.[261]

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[257] LA Times Editorial Board, *Editorial: It's time to take politics out of sentence enhancements*, LA Times, July 20, 2019. Prominent commentator, Michelle Alexander, also supported repeal of the drug enhancement. Michelle Alexander, *Op-Ed: Michelle Alexander: Sentence 'enhancement' for drug offenders is a tool of community destruction*, LA Times, May 9, 2016 ("Automatically adding years to a drug sentence is a weapon of individual and community destruction disguised as an expression of concern.").

[258] Penal Code § 1170.126; Penal Code § 1170.18; Health & Safety Code § 11361.8.

[259] Penal Code § 1170.95.

[260] Letter of Cory Salzillo & Cathy Coyne, Re: Updated Survey of Long Term Offenders in Jail, October 17, 2016 ("Most common crimes for those sentenced to 5–10 years = vehicle theft, drug trafficking, receiving stolen property, identity theft, commercial burglary. ¶ Largest number of crimes for over 10 years = drug trafficking. However, over 10 years is not exclusively drug trafficking.").

[261] United States Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions*, March 2018, 1, 3. See also United States Sentencing Commission, *Retroactivity & Recividism: The Drugs Minus Two Amendments*, July 2020, 1 (finding "no statistically significant difference in the

Another United States Sentencing Commission study on other retroactive sentence reductions had similar findings.[262]

Other research on the federal system shows that "average length of stay can be reduced by 7.5 months with a small impact on recidivism."[263] A similar analysis of the prison populations in Maryland, Michigan, and Florida concluded that a sentence reduction between three to twenty four months would have produced minimal public safety impacts for a significant portion of the prison population.[264]

Insights From Other Jurisdictions

As noted, more than 7,500 people incarcerated in federal prison for some drug offenses received an average sentence reduction of 30 months without impacting recidivism rates.[265]

Between 2004 and 2009, New York State retroactively reduced sentences for drug offenses and allowed more than 1,500 people to be resentenced.[266] Analysis of the first 284 people resentenced showed a low recidivism rate: about 3.9% of people returned to prison for a new offense within three years of release compared to a return rate of 11% for people convicted of drug offenses who were released without being resentenced.[267]

In New Jersey, the state Sentencing and Disposition Commission recommended that their changes to sentencing law for nonviolent drug and property offenses be applied retroactively.[268]

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recidivism rates of offenders released early pursuant to retroactive application of [certain drug-sentence reductions] and a comparable group of offenders who served their full sentences").

[262] United States Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, May 2014, 14–15 ("Offenders in the Retroactivity Group were estimated to receive retroactive sentences which were approximately twenty percent shorter than their original sentences due to retroactive application of the 2007 Crack Cocaine Amendment. … The Commission study found that the offenders in the two groups re-offended at similar rates.").

[263] Rhodes W, Gaes GG, Kling R, Cutler C., R*elationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables with Multiple Break Points*. Criminal Public Policy 17:731–69 (2018) at 758–59.

[264] *Time Served: The High Cost, Low Return of Longer Prison Terms*, The Pew Center on the States (2012) 35–38 ("Looking at only nonviolent offenders, 14 percent of the Florida release cohort, 18 percent of the Maryland cohort, and 24 percent of the Michigan cohort could have been safely released after serving between three months and two years less time behind bars.").

[265] United States Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions*, March 2018, 1.

[266] Bob Fredericks, *Just 67 Inmates Still Doing Time Under Rockefeller Drug Laws*, New York Post, July 17, 2015 ("After the reforms, 1,697 inmates applied to be resentenced, and 1,630 were released, said Linda Foglia, the state Department of Corrections spokeswoman.").

[267] William Gibney, *Drug Law Resentencing: Saving Tax Dollars With Minimal Community Risk*, Legal Aid Society, January 13, 2010, 8.

[268] New Jersey Sentencing and Disposition Commission, Annual Report, November 2019, 24–26. See also Tracey Tulley, *It Was a Landmark Crime Bill. Then a State Senator Added a Special Favor*, New York Times,

The Kansas Sentencing Commission is also considering a recommendation that would allow for early release of people convicted of certain drug offenses.[269]

Delaware in 2016 reformed its "three strikes law" and allowed people convicted under the old version of the law to apply for sentence modification.[270]

In 2012, the Maryland Supreme Court ruled that an error in jury instructions should have retroactive effect, which resulted in more than 200 people who had received long or life sentences being released from prison.[271] Only seven of these people have had parole violations or reconviction since release.[272]

Additional Considerations

Administrative removal. Because both of these sentencing enhancements have been repealed in almost all cases, it would waste court, prison, and prosecutorial resources to go to court to have each enhancement removed. Instead, the Legislature should create a mechanism that would allow sentences with these enhancements to be reduced without returning to court, including a clear deadline for when the removal of the sentencing enhancements must be completed.

Preserve plea bargains. Under current law, any reduction in a sentence may allow a prosecutor to withdraw consent to a plea bargain, which may require a case to start from scratch with significant uncertainty about the new outcome.[273] Because the enhancements at issue here were widely-used and 97% of felony cases are resolved with a guilty plea,[274] there could be significant relitigation of resolved cases if this issue is not

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Dec. 17 2020 (noting that relevant legislation was approved by the New Jersey legislature but is awaiting action by the governor).

[269] Minutes of the Kansas Sentencing Commission Zoom Meeting November 19, 2020, 2 <https://www.sentencing.ks.gov/docs/default-source/commission-meeting-minutes/2020/2020nov19-ksscmeeting-minutes.pdf?sfvrsn=12e7fe3f_2>.

[270] Jorge Renaud, *Eight Keys to Mercy: How to Shorten Excessive Prison Sentences*, Prison Policy Initiative, Nov. 2018, 5; 11 Del. C. § 4214(f).

[271] Michael Millemann Rebecca Bowman Rivas, and Elizabeth Smith, *Digging Them Out Alive*, 25 Clinical L. Rev. 365, 367–69 (2019) ("The court ordered new trials because, as grossly unfair and absurd as it may seem today, prior to 1981 State law required judges in criminal cases to instruct juries that they — the juries — had the ultimate responsibility to determine the law. Thus, judges told jurors that what they — the judges — said about the law was advisory only. This instructional error was not just an erroneous application of law; it nullified the rule of law itself.").

[272] Justice Policy Institute, *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, November 2018, 17. Committee staff obtained the latest recidivism information in November 2020 from a Maryland public defender who is tracking it.

[273] People v. Stamps, 9 Cal. 5th 685, 702 (2020) (explaining that the Legislature must specify when it is "chang[ing] well-settled law that a court lacks discretion to modify a plea agreement unless the parties agree to the modification").

[274] *Judicial Council of California, Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19,* 85.

addressed as part of any retroactive application of the enhancement repeals. To remove any doubt, the Legislature should specify that removing these sentencing enhancements is not a basis for disturbing plea bargains.[275]

[275] Stamps, 9 Cal. at 703 (Legislature "may bind the People to a unilateral change in a sentence without affording them the option to rescind the plea agreement" (citation omitted)).

8. Equalize credits between custody settings and time of incarceration.

Recommendation

People who committed the same crimes and have the same criminal histories receive different amounts of good conduct credits depending on whether they are housed in county jail, state prison, or state hospitals. The Committee therefore recommends the following:

1. Equalize good conduct credits between jail, prison, and state hospitals.

2. Apply good conduct credits implemented by CDCR pursuant to Proposition 57 retroactively and toward youth offender and elderly parole dates.

Relevant Statutes

Penal Code § 4019; 15 CCR § 3043.2

Background

Most people incarcerated in county jails and prisons are eligible to earn "good conduct credits" and have time taken off their sentence if they follow the rules. But current law awards differing credits to identically-situated people based solely on where they are incarcerated. For example, someone serving time on a violent offense who follows institutional rules in state prison currently earns 20% off their sentence in state prison, but only 15% off if incarcerated in a county jail.[276] Someone whose is found incompetent to stand trial and is confined to a state hospital does not get *any* good conduct credit,[277] which means that they may be incarcerated longer than someone whose offense was not a product of mental illness. As the California Supreme Court has acknowledged, in some cases, there are perverse incentives to delay transfer to prison and stay longer in county jail where there may be fewer services for better credit opportunities.[278]

This chart summarizes the differences:

[Graphic summarizing credit earning differences.]

Credits in jail settings are determined by the Penal Code, while prison credits are set by CDCR regulations. CDCR was given authority over credit rules with the passage of Proposition 57 in 2016. As a result of these dual sources of authority, there is no single body considering the credit-earning rules for each setting. Instead of this unaligned

[276] *Compare* 15 CCR § 3043.2(a)(2) (20% in prison) *with* Penal Code § 2933.1(c) (15% in jail).

[277] Penal Code § 4019(a)(8) (limiting good conduct credits for people found incompetent to stand trial to those confined only to "county jail treatment facilit[ies]"); People v. Waterman, 42 Cal. 3d 565, 571 (1986).

[278] People v. Thomas, 21 Cal.4th 1122, 1126 (1999).

system, similarly-situated people should not receive less good conduct credit simply because of a difference in their custodial setting.[279]

There are also three limits on how CDCR applies good conduct credits, depending on a person's date of incarceration or how old they are. First, CDCR increased the credit-earning capacity for many people in its custody in 2017, after the effective date of Proposition 57. But those rules only applied prospectively as of May 1, 2017.[280] Second, CDCR conduct credits implemented following Proposition 57 do not currently apply when calculating parole hearings dates for people eligible for youth parole.[281] Finally, these credits do not apply to setting hearing dates for elderly parole which means people must serve decades of actual incarceration before they are eligible.[282] While applying these credits to anyone who would be eligible, regardless of age or date of incarceration, may present significant technical challenges, there appears to be no legal barrier preventing CDCR from doing so.[283]

Although complicated, these credit schemes have real value and the way they are applied can change behavior. One Committee panelist, James King, described how Proposition 57, which gave people credit for completing programming, changed not just the volume of people signing up for programs, but also the type of person who signed up. Before Prop 57, programming tended to be completed by people serving long sentences. But after Prop 57, even people serving shorter sentences were incentivized to complete these programs.[284]

Data

Almost every incarcerated person can potentially benefit from good conduct credits. This means that equalizing credits between custody settings — even if the changes are

[279] In this context, whether someone is similarly-situated should be determined based on offense classification (for example, is the conviction offense violent or nonviolent) and someone's offense history (such as a prior strike conviction). This would allow for an easily-administrable rule defined by objective factors that do not change in each custodial setting.

[280] CDCR, CDCR Issues Amended Proposition 57 Regulations, November 19, 2017 <https://www.cdcr.ca.gov/news/2017/11/29/cdcr-issues-amended-proposition-57-regulations/>

[281] Penal Code § 3051(b).

[282] *Id*. Penal Code § 3055(a). The elderly parole eligibility date was modified by AB 2324 (Ting) (2019), which became effective on January 1, 2021.

[283] Cal. Const., art. I, § 32(2) (CDCR has "authority to award credits earned for good behavior and approved rehabilitative or educational achievements."). For more on some of the technical challenges associated with retroactive credit applications, see CDCR, Budget Change Proposal for Applying Credits to Advance Youth Parole Eligibility (AB 965), Jan. 8, 2002 <https://esd.dof.ca.gov/Documents/bcp/2021/FY2021_ORG5225_BCP3307.pdf> (requesting more than $2 million to apply some earned credits when calculating youth offender parole hearing dates).

[284] Written Submission of James King to Committee on Revision of the Penal Code, July 23, 2020, 2 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-08s1.pdf>

small — could have a profound effect on the amount of overall incarceration in California.[285]

For example, if nonviolent "second strikers" — people with a prior strike offense currently in prison for a nonviolent offense — earned the same credit in prison that they earned while in jail, each person would serve almost [ ] months in prison a year. As of June 2019, there were more than 18,000 nonviolent second strikers in CDCR custody.[286] If this group of people was allowed to earn the same credits for good conduct that other people convicted of nonviolent offenses do, there would be the equivalent of [ ] years less incarceration annually.[287]

Empirical Research

Studies of credit-earning systems in other states has shown that recidivism outcomes are not different for people who receive credits and end up serving less time incarcerated.[288] Other research has shown that people who have the opportunity to earn time off a sentence have fewer disciplinary violations.[289]

[285] See Allison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners*, National Conference of State Legislators, July 2009, 1 ("Benefits of appropriately tailored earned time policies can include cost savings and reduced recidivism. Even though some earned time laws offer inmates a fairly small reduction in prison terms, those few days can add up to a significant cost savings across hundreds or thousands of inmates."); Oregon Secretary of State Audit Report, Department of Corrections: Administration of Earned Time 1, 15 (December 2010) (in a correctional population of around 13,000 people, good conduct saved $25 million in one year).

[286] CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, October 2020, Table 1.22.

[287] In addition, this category of people already have increased punishment as a result of a prior strike conviction, which means their sentence must be doubled. Penal Code § 667(e)(1). They also must serve their sentence in prison, even if they would otherwise serve it in county jail based on the non-violent classification of the offense. Penal Code § 1170(h)(3).

[288] N.Y. Dept. of Corr. Services., *Merit Time Program Summary: October 1997–December 2006*, I–iii (2007) (lower recidivism rates for people who had earned "merit time" in New York State prison); E.K. Drake, R. Barnoski, and S. Aos, Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised, Washington State Institute for Public Policy 7–8 (April 2003) (finding that the three year "felony recidivism is reduced by 3.5 percent, while there has been no effect on violent criminal recidivism rates" and further finding a short-term increase in property crime caused by shortened prison stays).

[289] William D. Bales & Courtney H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, Journal of Criminal Justice 40 (2012), 401–02; John M. Memory, Guang Guo, Ken Parker & Tom Sutton, Comparing Disciplinary Infraction Rates of North Carolina Fair Sentencing and Structured Sentencing Inmates: A Natural Experiment, 79 Prison J. 45, 69–70 (1999) (incarcerated people who could earn good conduct credit had total higher infraction rates than those who could not).

Insights From Other Jurisdictions

The Model Penal Code recommends that good conduct credit be available to all incarcerated people at the same rate regardless of the nature of their offense and where they are incarcerated.[290]

Different credits for the same people in jail and prison also present significant constitutional issues. More than twenty years ago, Washington state was found to have violated the federal Equal Protection Clause by offering different amounts of good conduct to people while they were in jail or prison.[291] The constitutional violation occurred because people who could afford bail avoided any jail time and served their entire sentence in state prison, where the credit-earning rules were more favorable.[292] California state courts have found equal protection violations in similar situations,[293] as has the Montana Supreme Court.[294]

In 2017, Louisiana applied changes to good conduct credits retroactively, which led to a 45% increase in the number of people released because of their good time credits.[295]

[290] Model Penal Code: Sentencing § 11.01, Comment (b) (credits' "availability should not depend on the happenstance of where an offender serves all or a portion of his sentence — or whether an offender has served part of his sentence while awaiting trial and sentencing on the current charge.").

[291] MacFarlane v. Walter, 179 F.3d 1131 (9th Cir. 1999), judgment vacated and dismissed as moot, Lehman v. MacFarlane, 529 U.S. 1106 (2000).

[292] The opinion in MacFarlane was later vacated by the United States Supreme Court because the case had become moot. See Lehman v. MacFarlane, 529 U.S. 1106 (2000). Other United States Circuit Courts have reached different results. See Lemieux v. Kerby, 931 F.2d 1391 (10th Cir. 1991); Chestnut v. Magnusson, 942 F.2d 820 (1st Cir. 1991). These other results were largely based on the 1971 United States Supreme Court of McGinnis v. Royster, 410 U.S. 263 (1973), which said states were under no obligation to offer any good conduct credit to people incarcerated in jail. The Ninth Circuit held that McGinnis's holding was called into question by the 1983 United States Supreme Court case Bearden v. Georgia, 461 U.S. 660 (1983), which concluded that imprisoning someone for an inability to pay a fine violated the constitution unless there was finding the person willfully refused to pay. Bearden was in turn heavily relied upon by the California First Appellate District in *In re* Humphrey, 19 Cal.App.5th 1006 (2018), the landmark decision about the setting of bail in California. The Humphrey decision is currently being reviewed by the California Supreme Court.

[293] People v. Mobley, 139 Cal. App. 3d 320, 323 (1983) (equal protection violation if someone "serve[s] more custodial time than he would have served had he been able to post bail and thus avoid custodial restraint prior to commencing his term of commitment in" state prison). See also People v. Raygoza, 2 Cal. App. 5th 593, 602 n.4 (2016); People v. Lapaille, 15 Cal. App. 4th 1159, 1168–70 (1993); People v. Sage, 26 Cal.3d 498, 507 (1980) (equal protection violation when people detained for felonies could not received pretrial good conduct credit but people detained for misdemeanors could)

[294] MacPheat v. Mahoney, 299 Mont. 46, 53 (Supreme Court of Montana 2000).

[295] Louisiana Dept. of Public Safety & Corrections, Louisiana Commission on Law Enforcement, *Louisiana's Justice Reinvestment Reforms First Annual Performance Report*, June 2018, 16, 42; Louisiana Dept. of Public Safety & Corrections, Louisiana Commission on Law Enforcement, *Louisiana's Justice Reinvestment Reforms 2019 Annual Performance Report*, June 2012, 14 (noting that the spike in releases was caused by the "retroactive nature of some of the policies").

The federal system also recently made some good conduct credits retroactive, which led to early release of 3,100 people in July 2019, even though the change in credits was modest and amounted only to an extra week off a year.[296]

[296] The United States Department of Justice, Department Of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs Assessment System, July 19, 2019 < https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and>; Ames Grawert, *What Is the First Step Act — And What's Happening With It?*, Brennan Center for Justice, June 23, 2020.

9. Harmonize and clarify parole standards.

Recommendation

The statutes and regulations governing the parole release determinations by the Board of Parole Hearings (BPH) are not consistent. The Committee therefore recommends the following:

1. Refine the definitions of "danger to society" and "danger to public safety" to mean "imminent risk that the parole candidate will commit a serious or violent felony if released."

2. Establish a rebuttable presumption that a parole candidate does not present a danger to society if one or more of the below factors are true:

    - The commitment offense was nonviolent
    - The commitment offense has a connection to mental illness
    - The parole candidate is designated low risk on a CDCR or BPH risk assessment
    - The parole candidate has no violent prison rule violations in the past three years
    - The parole candidate has average or above average performance in programming in the past three years
    - The parole candidate's criminal-system involvement resulted from retaliation against an abuser or was a result of prior victimization, abuse, or trauma

3. Specify that the presumption can be overcome if parole hearing officers nonetheless determine that the parole candidate presents a risk to society if released.

4. Specify that failure to qualify for one or more of the presumptions listed above shall not be construed as a checklist of prerequisites for a grant of parole.

5. Specify that a parole candidate's failure to complete any recommended program or work assignment that is unavailable to them cannot be a basis for denial of parole.

6. Provide that, if parole release is denied, parole hearing officers may recommend housing with appropriate programming within CDCR.

7. Provide that parole hearing officers consider whether a parole candidate's risk can be mitigated outside of prison, such as by mandating a halfway house, substance abuse treatment, mental health treatment, electronic monitoring, or

other appropriate conditions. This release option is not intended to become BPH's default decision.

8. Increase judicial review of parole decisions to "abuse of discretion," and specify that a court can order a new hearing or grant release as the case may warrant.

Relevant Statutes

Penal Code § 3041(a) & (b)

Background

More than half of California's prison population is eligible at some point for release by BPH.[297]

But the various statutes and regulations governing the parole release standard administered by BPH hearing officers are internally inconsistent. For example, Penal Code Section 3041(a)(2) directs BPH to "normally grant parole."[298] Another section of the governing statute instructs BPH to deny parole if the candidate poses a threat to "public safety."[299] That term has never been defined by the Legislature.[300] Separately, BPH adopted regulations that parole should be denied if the candidate "pose[s] an unreasonable risk of danger to society."[301] Again, this term has not been defined. BPH decisions to deny parole are upheld by a reviewing court if supported by "some evidence."[302]

At least three courts have indicated the standards "danger to public safety" and "danger to society" require the BPH to present evidence showing a risk that the parole

[297] This data comes from a June 2020 roster of people incarcerated in CDCR. The roster contains information for [ ] people, which is used as CDCR's total population for the calculations here. The June 2020 roster indicates that [ ] people are serving indeterminate life sentences, [ ] are serving life sentences under the Three Strikes law, [] are serving determinate sentences with a prior strike conviction (not including those convicted of offenses against person), and [ ] are serving determinate sentences (not including those convicted of offenses against persons). People in the latter two categories are eligible for parole release under Proposition 57 when they have served their full principal term, not include sentencing enhancements or credit for good conduct. 15 CCR § 3490(f) & (d). Instead of a hearing, BPH completes a "paper review" to determine if the person poses a "current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity."15 CCR § 2449.4(c).

[298] Penal Code § 3041(a)(2).

[299] Penal Code § 3041(b)(1).

[300] Some courts interpret this standard to mean "an unreasonable risk" to commit "future violence if granted release on parole." *In re* Hunter, 205 Cal. App. 4th 1529, 1536 (2012).

[301] 15 CCR § 2281(a); 15 CCR § 2402(a); 15 CCR § 2422(a); 15 CCR § 2432(a). Regulations also list a number of factors that must be considered. See 15 CCR § 2281(c) (unsuitability) and (d) (suitability).

[302] *In re* Rosenkrantz, 29 Cal.4th 616, 626 (2002); Lawrence, 44 Cal.4th at 1218–21.

candidate will commit a *violent* crime if released.[303] But the standard has never been specifically addressed by courts.[304]

At the Committee's November meeting, BPH Executive Officer Jennifer Shaffer acknowledged that the current statutory and regulatory parole release standards are currently "muddled."[305] She also noted that a new standard squarely focused on risk of future violence "wasn't very far from where we are today."[306] USC Professor Heidi Rummel told the Committee that California can release more people safely on parole without incrementally increasing the recidivism rate,[307] which is currently less than one percent for people re-convicted of felonies for harming another person.[308]

BPH continues to evaluate and evolve its parole review process, including recently implementing a decision model known as "structured decision making."[309] But because the ultimate release standard remains vague and inconsistent, the process involves a great deal of unpredictability and concerns about inconsistency. In particular, research indicates that the severity of a person's offense does not predict future risk.[310] In addition, research indicates that consideration of subjective factors, such as whether the

[303] Hunter, 205 Cal. App. 4th at 1536 (reversing a denial of parole because there was no evidence "tending to show that [the parole candidate would] pose an unreasonable risk of future violence"); *In re* Jackson, 193 Cal. App. 4th 1376, 1388 (2011) (reversing a parole denial because parole candidate's lack of attendance in self-help programs did not necessarily indicate a likelihood he would "*commit violent crimes* ... and [thus] does not constitute some evidence that [the candidate] is currently dangerous."(emphasis added)); *In re* Morganti, 204 Cal. App. 4th 904, 921 (2012) (holding that the possibility that someone on parole might commit new nonviolent drug crimes did not support a finding of risk to society).

[304] The use of various ambiguous standards presents troubling due process issues by failing to give clear notice to those subject to the statute. See Johnson v. United States, 576 US. 591 (2015) (holding that part of a federal law's definition was impermissibly vague pursuant to the Fifth Amendment's Due Process Clause); Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (striking down the residual clause in 19 U.S.C. § 16(b) because it was unconstitutionally vague).

[305] Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=KL-jf82XbCI> 28:30–30:00.

[306] *Id.* at 58:18–58:25. Ms. Shaffer stated that the current standard the BPH uses to deny parole based on case law was "a current unreasonable risk to public safety." *Id.* at 30:19–30:30.

[307] *Id.* at 13:21–14:21.

[308] *Id.* at 22:10–22:22 ("Less than one percent of [people granted parole by the BPH] have been convicted of another crime involving harm to another person within three years of their release.").

[309] Written Submission of Jennifer Shaffer to Committee on Revision of the Penal Code, 24–25 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-15s1.pdf>.

[310] Danielle Sered, Accounting for Violence: How to Increase Safety and Break our Failed reliance on Mass Incarceration, Vera Institute of Justice, 19 (2017); Patrick Langan and David Levin, Recidivism of Prisoners Released in 1994, U.S. Department of Justice, Bureau of Justice Statistics, 1 (2002); Tracy Velazquez, The Pursuit of Safety: Sex Offender Policy in the United States, Vera Institute of Justice, 6 (2008).

parole candidate lacks "insight"[311] or "remorse,"[312] does not effectively predict recidivism. These issues are compounded for people with mental health issues who may be unable to articulate the appropriate presentation of insight or remorse.[313] In addition, parole can often be denied because of failure to complete programs that were unavailable to the parole candidate.[314]

Data

The parole grant rate in California in 2020 was 16%.[315]

	2017	2018	2019	2020
Scheduled hearings	5,335	5,226	6,061	6,932
Number of parole grants	915	1,136	1,184	1,106
Grant rate	17%	22%	20%	16%
Denial rate	42%	34%	37%	29%
% of hearings not held	41%	44%	43%	55%

While somewhat uneven, this rate has gradually increased since 2009.

[Graphic showing historical parole grant rates.]

Despite this recent increase in the grant rate, California remains among the states with the lowest parole grant rates. When a recent eight-year period was compared in a recently published study, California ranked among the five lowest states.

[Graphic showing comparative parole grant rates.]

As of June 2020, [ ]% of people with indeterminate sentences in CDCR custody scored as "low risk," compared to [ ]% of the total population.[316]

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[311] See *In re* Shaputis, 53 Cal. 4th 192, 217–221 (2011); *In re* Ryner, 196 Cal. App. 4th 533, 549 (2011) (proof of insight may include "acknowledg[ing] the material aspects of [the person's] conduct and offense, show[ing] an understanding of its causes, and demonstrat[ing] remorse.").

[312] 15 CCR § 2281(d)(3); Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=KL-jf82XbCI> 7:00–8:05, 9:58-10:38, 53:50-55:35; 1:05:44– 1:06:55.

[313] *Id.* at 1:05:44–1:06:55, 53:50–55:35. *See also* Jeremy Isard, Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity, California Law Review, vol. 105, n. 4 (2017).

[314] Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=KL-jf82XbCI> 8:37–8:46, 1:18:00–1:18:23.

[315] This statistical information from publicly-available BPH data. See CDCR, BPH, Parole Suitability Hearing and Decision Information <https://www.cdcr.ca.gov/bph/statistical-data/>. The grant rate in 2019 was 20%, in 2018 it was 22%, and in 2017 it was 17%. The grant rate of releases under Proposition 57 was 20% in 2018, the most recent data available. See Board of Parole Hearings, Report of Significant Events, 2019, 3.

[316] This data comes from a June 2020 roster of people incarcerated in CDCR. The roster contains information for [ ] people, which is used as CDCR's total population for the calculations here. The roster indicated there were [ ] people with indeterminate life sentences and [ ] were rated low risk. The roster

These risk assessments are supported by the observed recidivism rates of people released on parole. The most recent data from CDCR show that released lifers have a 2.3% reconviction rate — 9 misdemeanors and 7 felonies (including only 3 felony crimes against persons) — within three years of release.[317] As of 2011, among the 860 people convicted of murder in California since 1995, only five individuals have returned to prison for new felonies since being released, and none returned for life-term crimes.[318]

Empirical Research

The most robust data on recidivism prediction shows that older people are less likely to commit new crimes compared to younger people. This is particularly relevant in the context of parole because most parole candidates are older, having served a considerable sentence prior to becoming eligible for release consideration. As noted above, research indicates that most people's period of criminal involvement lasts less than 10 years.[319]

Other studies have found that people with the longest sentences and most serious convictions tend to have the lowest recidivism rates, including those released by parole boards in Michigan, New York, and Canada:

- In Michigan, only 2.7% of 2,558 homicide parolees returned to prison for committing any new crime.[320]

- In New York, 0.9% of people released from prison in 2012 after a murder conviction returned to prison for a new offense within three years, well below the average 9.2% rate. Between 1985 and 2012, the return rate for a new offense for people who had been released from prison after being convicted of murder was 1.9%.[321]

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also indicated there were [ ] people doing life sentences under the Three Strikes law and [ ] were rated low risk ([ ]%).

[317] CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, January 2020, Tables 5 & 6.

[318] "Life In Limbo" at 4 (concluding that California lifers found a "miniscule" recidivism rate of serious offenses).

[319] Piquero, et al., *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)* (2013)

[320] Citizens Alliance on Prisons and Public Spending, "Denying Parole at First Eligibility: How Much Public Safety Does it Actually Buy?" August 2009 at 4.

[321] New York State Department of Corrections and Community Supervision, 2012 Inmate Releases, Three Year Post-Release Follow Up <https://doccs.ny.gov/system/files/documents/2019/09/2012_releases_3yr_out.pdf> Table 5, Appendix C.

- In Canada, only 6.3% of paroled female lifers committed any new crimes upon release.[322]

In addition, research has found that there is no difference in violence between people with mental illness and their non-mentally ill neighbors,[323] and more specifically that formerly incarcerated people with mental illness are rearrested or reincarcerated at a rate similar to (and sometimes lower than) non-mentally ill people.[324] According to researchers, the risk of violence society ascribes to mental illness "vastly exceeds the actual risk presented."[325]

Studies also show that actuarial risk assessment tools are most accurate in identifying low-risk individuals rather than high risk individuals.[326] This research includes findings about three tools used by BPH: while the instruments were not very accurate in

[322] See Bonta, J., B. Pang, and S. Wallace Capretta 1995 "Predictors of recidivism among incarcerated female offenders" The Prison Journal 75: 277-294.

[323] See Torrey EF, Stanley J, Monahan J, et al: The MacArthur violence risk assessment study revisited; two views ten years after its initial publication. Psychiatr Serv 59:147–52, 2008; Steadman HJ, Mulvey EP, Monahan J, et al: Violence by people discharged from acute psychiatric inpatient facilities and by others in the same neighborhoods. Archives of General Psychiatry 55:393–401, 1998. This article presented the findings of the well-known MacArthur Violence Risk Assessment Study of 1,655 people who lived in three different U.S. cities, which found that there was no difference between violent acts committed by people with and without mental illness who lived in the same neighborhoods. See *id*.

[324] Kristen M. Zgoba, Rusty Reeves, Anthony Tamburello and Lisa Debilio, Criminal Recidivism in Inmates with Mental Illness and Substance Use Disorders, Journal of the American Academy of Psychiatry and the Law Online (February 2020), 3913-20 (finding that formerly incarcerated people with mental illness and no substance abuse disorders were arrested less frequently than those with no mental illness); Wilson JA, Wood PB, "Dissecting the relationship between mental illness and return to incarceration," J Crim Just 42:527–37, (2014) (finding that mentally ill formerly incarcerated people are no more likely than non mentally ill formerly incarcerated people to become reincarcerated); Bonta, J., Law, M., & Hanson, K.. The prediction of criminal and violent recidivism among mentally disordered offenders: A meta-analysis. Psychological Bulletin, 123(2), 123-142, 1998 (finding that people with mental illness were arrested or convicted of new crimes less often than those without them). Research has also found that when people with severe mental illness undergo regular outpatient treatment, including medication, their probability of arrest is diminished. Van Dorn HR, Demarais SL, Petrila J, et al: Effects of outpatient treatment on risk of arrest of adults with serious mental illness and associated costs. Psychiatr Serv 64:856–62, (2013).

[325] Torrey EF, Stanley J, Monahan J, et al: The MacArthur violence risk assessment study revisited; two views ten years after its initial publication. Psychiatr Serv 59:147–52, 2008.

[326] Model Penal Code: Sentencing § 6.11, Commentary at 296 (citing Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002); Hennessey D. Hayes and Michael R. Geerken, The Idea of Selective Release, 14 Just. Quarterly 353, 368-369 (1997) ("prediction scales used in the past to predict high-rate offenders' offense behavior actually perform better at predicting the offense behavior of low-rate offenders"); Kathleen Auerhahn, Selective Incapacitation and the Problem of Prediction, 37 Criminology 703 (1999) (a risk-prediction instrument developed by the RAND corporation failed at predicting dangerousness, but performed "very well in accurately identifying low-rate offenders")). A violence prediction tool developed by the Pennsylvania Sentencing Commission in 2018 was found by researchers to be 98% accurate in predicting which people were at low risk for violence, but not very accurate at predicting who was a high violence risk. The Commission concluded that the instrument should be focused on finding those who are low risk, and could be used to determine who could be safely rerouted from custodial sentences to community based programs. See Pennsylvania Commission on Sentencing, Revisions to the Proposed Risk Assessment Instrument (2018), at 3 tbl. 1.

predicting which people were a high risk for future violence, they were extremely accurate at predicting low risk for violence.[327]

With respect to parole candidates who are women, researchers have found that up to 94% of incarcerated women experienced physical and sexual violence prior to incarceration and that many were "were protecting themselves or a loved one from physical or sexual violence."[328]

Insights from Other Jurisdictions

In Norway, the standard for preventive detention mandates that there must exist "an imminent risk that the offender will again commit" a "serious violent felony."[329] Parole systems in New Jersey and Washington make a similar inquiry about future harm to others in some contexts. In New Jersey, the juvenile release standard requires in part that someone be paroled if they "will not cause injury to persons."[330] In Washington, people convicted of sex offenses must be released when their minimum sentence has expired unless "it is more likely than not that the offender will commit sex offenses if released."[331]

Several states, including Nevada, Hawaii, Maryland, Arkansas, Michigan, and Louisiana, rely on risk assessment scores as an important factor in parole determination.[332] For example, In Hawaii, the parole statute requires release for people deemed "low risk" by a validated risk assessment tool.[333] In Nevada, if a parole

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[327] The three tools that California's BPH uses to assess risk were all evaluated in this study, including the HCR-20 (violence risk), PCL-R (any criminal offending risk), and the Static-99 (sexual offending risk). See Seena Fazel, Jay P. Singh, & Helen Doll, Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis, 345 BR. MED. J. e4692 (2012) <https://www.bmj.com/content/345/bmj.e4692.long>.

[328] Justine van der Leun, "No Choice but to Do it," The Appeal (Dec. 17, 2020) <https://theappeal.org/criminalized-survivors-survey/>.

[329] See Norwegian Penal Code § 39 c ((1) ("there must be deemed to be an imminent risk that the offender will again commit" a "serious violent felony, sexual felony, unlawful imprisonment, arson or other serious felony impairing the life, health or liberty of other persons ... .").

[330] N.J. Rev. Stat. § 30:4-123.53(b) ("A juvenile inmate shall be released on parole when it shall appear that the juvenile, if released, will not cause injury to persons or substantial injury to property.").

[331] Wash. Rev. Code § 9.95.420(3)(a).

[332] Ark Code Ann. § 16-93-615 (a)(1)(B) (parole decisions "shall be made by reviewing information such as the result of the risk-needs assessment ... ."); La. Stat. Ann. § 15:574.2(C)(2)(f) (allowing parole to be granted by just a majority of the committee when the person "has obtained a low-risk level designation determined by a validated risk assessment instrument"); MCLS § 791.233e(3)(a). In Michigan, "statistical risk" is one of eight factors that determine a probability of parole score. See Michigan Dep't of Corr. Policy Directive: Parole Guidelines, Attachment A <https://www.michigan.gov/documents/corrections/06_05_100_330065_7.pdf>. The parole candidate must be released if he or she receives a "high" probability of parole score absent "substantial and compelling reasons." See e.g. Monroe Cty. Prosecuting Att'y v. Wilkins (In re Parole of Frederick Wilkins), 2020 Mich. LEXIS 1801, *1-2 (Oct. 21, 2020).

[333] Hawaii Stat. Ann. § 706-670(1)(""Except for good cause shown to the paroling authority, a person who is assessed as low risk for re-offending [via a validated risk assessment tool] shall be granted parole upon

candidate is assessed at low risk and their offense was low or medium severity, the parole board is directed to grant parole "at the initial eligibility date" for a low or medium severity crime, and at the "first or second meeting" for a high severity crime.[334] Maryland uses a combination of risk assessment score and offense type to determine a presumptive guidelines release range.[335]

Certain jurisdictions presume that people convicted of nonviolent offenses shall be granted parole. For example, Louisiana, Oklahoma, and Pennsylvania presumptively grant parole to many people.[336] In 2017, Louisiana authorized release without a hearing to people convicted of nonviolent offenses who served 25% of their sentences when certain conditions are met.[337]

Many states focus on in-prison programming as a gateway to early release. For example, Mississippi and Maryland grant release without a hearing at the earliest parole release date for some people who have met the requirements of their case plans.[338] For others, including Arkansas, Washington, and Louisiana, in-prison disciplinary behavior is a key parole factor.[339]

Additional Considerations

The parole standard recommended by the Committee—that a parole candidate shall be awarded parole unless there is "imminent risk that the parole candidate will commit a

completing the minimum sentence[of an indeterminate sentence], unless the person ..."). This requirement can be overcome if the person has committed serious misconduct in prison, among other reasons. *Id.*

[334] Nev. Ann. Code § 213.516, § 213.514 (2020). Nevada uses a matrix based on a person's risk assessment and offense severity to calculate release. Nev. Ann. Code § 213.516 (2020).

[335] Alexis Lee Watts, Brendan Delaney, Edward E. Rhine, "Profiles in Parole Release and Revocation: Maryland" at 5 (2018) <https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/maryland_parole_profile.pdf>.

[336] See HB 2286 (Oklahoma Reg. Session 2018) (creating an administrative parole process for people convicted of nonviolent offenses); 37 Pa. Code § 96.1 ("Eligible offenders generally are low-risk offenders who have not committed personal injury crimes ... ."); La. Rev. Stat. § 15:574.4; Senate Bill 139 (Louisiana Reg. Session 2017).

[337] "Louisiana's 2017 Criminal Justice Reforms," Pew Trust (March 1, 2018) <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/louisianas-2017-criminal-justice-reforms>.

[338] Miss. Code Ann. § 47-7-18(1) (2020) (incarcerated person also must meet requirements including a discharge plan, no serious or major violation reports within six months, and no hearing request by a victim); Md. Correctional Services Code Ann. § 7-301.1(g) (2020) (incarcerated person also cannot have committed a "category 1 rule violation," nor can a victim have requested a hearing).

[339] In Arkansas, the parole board may deny release of any person if they accrued multiple disciplinary violations in the past three years. AR Code § 16-93-101(3)(D)(ii). In Washington, people convicted of offenses committed when they were under 18 are disqualified from applying for early parole if they have committed a serious infraction in the last 12 months. Wash. Rev. Code § 9.94A.730(1). In Louisiana, parole can be authorized by less than a unanimous decision when no serious rule violations have been committed in the past year. La. Stat. Ann. § 15:574.2(C)(2)(b).

serious or violent felony if released"—is borrowed from Norwegian criminal law,[340] which has been recognized internationally as a model system.[341] The Penal Code has similar language for when determining if a person may be released from a custodial setting into the community in other circumstances.[342]

According to testimony before the Committee, incarcerated people can be denied parole because they have not completed specific programming that is not available to them because of where they are housed or lengthy waitlists. The recommendation that people should not be penalized for failing to complete unavailable programming acknowledges this issue. It is rectified in part by the additional proposal that the BPH may recommend that people serve the remainder of their sentences in a particular facility with better access to the required programming.

Parole release is currently a binary decision: the person is either going to stay incarcerated or be released to the community with supervision. The Committee's recommendation is to create additional types of release scenarios for parole candidates that BPH concludes are close to being entitled to full release but may still need additional structure, supervision, programming, and/or electronic monitoring prior to full release.[343]

Courts reviewing parole release decisions must currently apply an extremely deferential standard of review and may not intervene in parole decisions if there is "some evidence" supporting a parole denial.[344] This standard does not come from a statute and is entirely judge-made.[345] The Committee recommends that a higher standard of review — abuse of discretion — be required by statute. This standard of review, which is well-defined in other judicial contexts, would give appropriate deference to BPH's role in making parole decisions, while providing an important

[340] Norwegian Penal Code § 39(c)(1). This standard is used for "preventive detention," and is intended to retain the most dangerous people if they continue to be a risk to society but is seldom used. "Anders Breivik: Just How Cushy Are Norwegian Prisons?" BBC (March 16, 2016). For example, only 112 people total were imprisoned in Norway pursuant to "preventive detention" as of 2018. Norway Prison Statistics <https://www.ssb.no/en/fengsling/>.

[341] See, e.g., Henrik Pryser Libell and Matthew Haag, New York's Jails Are Failing. Is the Answer 3,600 Miles Away?, New York Times, Nov. 12, 2019.

[342] For example, some people awaiting a decision about whether they should be sent to a secured state hospital, may be incarcerated if they "pose an imminent risk of harm to [themselves] or to another." Penal Code § 1610. Someone arrested on a protective order violation in a domestic violence case may only be released by an arresting officer if doing so would not "imminently endanger[]" other people. Penal Code § 853.6(a)(2).

[343] See, e.g., Government of Canada, Parole Board, Types of Conditional Releases <https://www.canada.ca/en/parole-board/services/parole/types-of-conditional-release.html> (describing "day parole" which allows someone to "to participate in community-based activities in preparation for full parole or statutory release.").

[344] The origin of the "some evidence" standard was the United States' Supreme Court's decision in Superintendent, Mass. Correctional Institution at Walpole v. Hill, 472 US 445 (1985). The Court there explained that all that was required was a "modicum" of evidence and that due process was only violated "if the decision is not supported by *any* evidence." *Id.* at 455 (emphasis added).

[345] Rosenkrantz, 29 Cal. 4th at 652.

safety valve. Similarly, judge-made law limits what a court can do if it determines BPH made a legally erroneous decision to deny parole.[346] The Committee recommends that a court's options be made clear by the Penal Code: a court can order a new parole hearing (which is the only real choice courts now have), order release to parole, or other relief that the court finds appropriate. These remedies are consistent with courts' traditional powers of review in habeas corpus proceedings "to fashion almost any relief."[347]

[346] *In re* Prather, 50 Cal. 4th 238, 244 (2010) ("[A] decision granting habeas corpus relief in these circumstances generally should direct the Board to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider.").

[347] *In re* Duval, 44 Cal. App. 5th 401, 411 (2020) (quotation marks omitted).

10. Increase second look sentencing.

Recommendation

The administrations of Governors Newsom and Brown and the Legislature have expanded the use of "second look" sentencing by permitting law enforcement to recommend that courts revisit sentences of selected incarcerated people when "in the interest of justice." This practice should be clarified and expanded. The Committee therefore recommends the following:

1. Provide that resentencing is presumed if law enforcement officials recommend re-sentencing on a person's meritorious conduct while incarcerated.

2. Establish judicial procedures for evaluating resentencing requests.
    - In all cases, require notice, initial conference within 60 days, and written reasons for court decisions.
    - For all cases initiated by law enforcement, require appointment of counsel.

3. Expand second-look sentencing opportunities by allowing any person who has served more than 15 years to request a reconsideration of sentence by establishing that "continued incarceration is no longer in the interests of justice."

Relevant Statutes

Penal Code § 1170(d)(1)

Background

California has a special provision in the Penal Code that allows certain law enforcement officials, including the Secretary of CDCR or any elected District Attorney, to request that a person be resentenced at any time for any reason. A court that receives such a request is vested with authority to recall the person's sentence and issue a new, reduced punishment, if it is in the interest of justice.[348]

The law has existed for decades, but was largely unused until 2018, when then-Governor Brown allocated resources to CDCR to identify people incarcerated who demonstrated records of rehabilitation and deserved a reevaluation of their sentence in court. In 2018, the law was expanded to allow prosecutors to make similar resentencing requests.[349] Although the requests for resentencing are made by law enforcement, the ultimate decision whether to recall a person's sentence and reduce their punishment remains with the courts.

Despite these expansions to the resentencing statute, current law has failed to protect many important interests at stake. For example, because the Penal Code does not

[348] Penal Code § 1170(d)(1).

[349] AB 2942 (Ting, 2018).

provide any rules, many trial courts are providing only the most minimal process while considering these requests, including denying them without requiring input from the incarcerated person[350] or appointing counsel.[351] The law does not require a court to give any specific reason for denying a resentencing request.[352]

At the Committee hearing on this subject in November 2020, Judge Richard Couzens, a leading expert on California's criminal law, told the Committee that the current process is "amazingly sparse," "largely unstructured," and that it would be appropriate to require courts to issue "affirmative responses, even if just in writing."[353] Without such guidance, many requests for resentencing have gone unanswered by the courts or have been denied without any meaningful input from the defendant.

Prosecutors and CDCR do not make requests for resentencing lightly: CDCR has an extensive set of regulations about the process,[354] and Hillary Blout, Executive Director of For the People, described to the Committee the resource-intensive process that some prosecutors are beginning to use to review old cases.[355] Either of these entities may invest significant time and investigation before making a Section 1170(d)(1) referral only to have a court fail to rule on it, or deny it without giving any reasons.

In 2019, United States Senator Cory Booker and Congresswoman Karen Bass introduced a federal second look sentencing bill that would allow anyone who had served ten years of incarceration to apply for resentencing.[356] California has no such option, but as Judge Couzens told the Committee, "it seems to me fundamentally fair that if a person has been in custody for 15 years, that it's not unreasonable to say, 'Hey, has this person changed?' That's just not unreasonable."[357]

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[350] People v. McCallum, 269 Cal. Rptr. 3d 336, 342–47 (2020).

[351] People v. Frazier, 269 Cal. Rptr. 4d 806, 811–15 (2020).

[352] *Id.* at 814 ("[N]othing in section 1170, subdivision (d)(1), requires the court to state its reasoning when declining to exercise its discretion in response to the Secretary's recommendation. It is a fundamental tenet of appellate review that we presume on a silent record the court properly exercised its discretion.").

[353] Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=PqX2KkD-PME > 17:37–19:45, 44:07–44:19

[354] 15 CCR § 3076.1.

[355] Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/channel/UC9cuLHpDxs66Wnbx5lxD9jA> 0:10:05–0:10:38; 0:51:05–0:52:07. See also Written Submission of Hillary Blout to Committee on Revision of the Penal Code, November 10, 2020, 2 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-15s1.pdf>.

[356] H.R. 3795 — Second Look Act of 2019. The text of this proposed law is available at https://www.congress.gov/bill/116th-congress/house-bill/3795/text?r=4&s=1. To be resentenced, someone would need to show that they were "not a danger to the safety of any person or the community, a "readiness for reentry," and that "the interests of justice warrant a sentence modification." *Id*. (proposed Sec. 3627(a)(3)(A)(i), (ii) & (a)(3)(B)). Courts would also be required to consider "the age of the defendant at the time of the sentence modification petition and relevant data regarding the decline in criminality as the age of defendants increase." *Id*. (proposed Sec. 3627 (c)(1)(B)(ii)).

[357] Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=PqX2KkD-PME > 42:07-42:20.

Data

CDCR — which has initiated the vast majority of resentencing requests under Section 1170(d)(1) — has made 1,603 requests for resentencing since April 2018:

	Exceptional conduct	Change in law	Total
Referrals	153	1,448	1,603
Court responses	110	1,023	1,133
% court responses	71%	71%	71%
Resentencings	64	411	475
% resentenced	41%	28%	30%

Empirical Research

As noted elsewhere in this report, empirical research has long established that the older someone is, the less likely they are to commit offenses.[358] The recidivism rate for California's prison population bears this out: older people simply do not commit as many crimes as younger people do.[359] This data supports the conclusion that after some period of time, a sentence may deserve reevaluation.

[Graphic showing three-year reconviction rates by age of release for CDCR population.]

In Washington D.C., more than 50 people have been recently resentenced for offenses committed before they were 18. None of those released have been reconvicted of a new violent crime.[360]

Insight from Other Jurisdictions

Following the enactment of the federal Second Look Act of 2018, people incarcerated in federal prison may request sentence reduction with a motion to the trial court. Since 2018 when defendants were first allowed to file these motions themselves, more than 2,000 of these requests have been granted, including many that were done to help combat the speed of COVID-19 in federal prisons.[361]

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[358] See also *In re* Ivan Von Staich, 56 Cal.App.5th 53, 77 (2020) ("The strong correlation between age and crime is one of the most tested and established in the field of criminology. (See, e.g., the seminal study in Sampson & Laub, Life-Course Desister? Trajectories of Crime Among Delinquent Boys Followed to Age 70 (2003) 41 Criminology 555.)"), review granted and cause transferred back to appellate court by California Supreme Court, 2020 WL 7647921 (2020).

[359] CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, January 2020, Figure 18.

[360] Hailey Fuchs, *D.C. Passes Bill to Give Young Offenders Chance at Reduced Sentences*, New York Times, Dec. 15, 2020.

[361] Federal Bureau of Prisons, First Step Act <https://www.bop.gov/inmates/fsa/>.

In the District of Columbia, any person who was under 18 years old at the time of their offense and has served at least 15 years in prison may request a new sentence.[362] The court must issue a reduced sentence if it concludes that "the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification."[363] The law was recently expanded to anyone who was under 25 years of age at time of their offense and who has served at least 15 years.[364]

The Model Penal Code (MPC) suggests that states enact "second look sentencing" that allow someone to ask a judge for resentencing after serving 15 years of imprisonment.[365] The New Jersey Sentencing & Disposition Commission also recently unanimously agreed that second-look sentencing laws were important reforms.[366]

Additional Considerations

Creation of a new Penal Code section. A new Penal Code section is necessary because the current placement of the resentencing provisions within an extremely long section obscures the importance of these resentencings. The current version of the law is a single subsection of the longer law and itself consists of lengthy sentences that muddy the exact application of the law.

Presumption when law enforcement officials recommend re-sentencing on a person's meritorious conduct while incarcerated. When law enforcement support resentencing because an incarcerated person has shown exceptional rehabilitation or their continued incarceration is otherwise unjust, resentencing should be all but assured. For that reason, a presumption in favor of resentencing that enables immediate release should be created. That presumption should only be overcome if a court finds beyond a reasonable doubt that the resentenced person would commit a future violent offense.[367]

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[362] D.C. Code § 24-403.03(a), (a)(1).

[363] D.C. Code § 24-403.03(a)(2).

[364] Hailey Fuchs, *D.C. Passes Bill to Give Young Offenders Chance at Reduced Sentences*, New York Times, Dec. 15, 2020.

[365] Model Penal Code: Sentencing § 305.6. Commentary in the MPC explains that this "provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition." Model Penal Code: Sentencing § 305.6, Comment (a).

[366] New Jersey Sentencing and Disposition Commission, *Annual Report*, November 2019, 35.

[367] This high burden for a court to deny resentencing is appropriate because of the extraordinary nature of the request from law enforcement. Fact-finders already apply this high burden elsewhere in the criminal legal system in evaluating the possibility of future conduct when determining whether someone is a "sexually violent predator" who "is likely [to] … engage in sexually violent criminal behavior." Welf. & Inst. Code §§ 6600(a)(1), 6604. Similarly, when evaluating constitutional error in a criminal case, courts must determine whether the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Though the interest in liberty after serving a lengthy period of incarceration has yet be found to have a constitutional dimension, it is sufficiently serious to require such an exacting burden — particularly where law enforcement is the party initiating the request.

When law enforcement is not explicitly in favor of resentencing but has recommended that a court consider resentencing a defendant because of changes in the law, no presumption in favor of resentencing will apply. Instead, well-settled law from the Penal Code Section 1170(d)(1) context will guide courts in making decisions: a sentence may be recalled "for any reason rationally related to lawful sentencing."[368]

Preservation of plea bargains. Any updates to the law should continue to reflect Penal Code Section 1170(d)(1)'s ability to reduce sentences without undoing plea bargains that may have resulted in the initial sentence.[369] Preserving this ability is especially important for resentences that result from a defendant's own request that may be unsupported or even opposed by a local prosecutor. In these situations, the local prosecutor will have ample opportunity to argue why resentencing should be appropriate, but a defendant should not be rigidly held to a bargain that was made long before a current resentencing, where material facts about someone's rehabilitation or lack of danger to public safety may have changed.

[368] People v. Dix, 53 Cal. 3d 442, 456 (1991).

[369] People v. Stamps, 9 Cal. 5th 685, 702 (2020) (explaining that the Legislature must specify when it is "chang[ing] well-settled law that a court lacks discretion to modify a plea agreement unless the parties agree to the modification").

2020 Administrative Report

The inaugural year of the Committee on Revision of the Penal Code ended on January 1, 2021. The following report summarizes its activities during the past year from an administrative standpoint and briefly describes the Committee's future plans.

Creation of the Committee

On January 1, 2020, the Committee on Revision of the Penal Code was formed.[370]

For administrative and budgetary purposes, the Committee was located within the California Law Revision Commission. There is no substantive overlap in the work of the two bodies. By law, no person can serve on both the Commission and the Committee simultaneously.[371] Neither body has any authority over the substantive work of the other.[372] The two bodies have different statutory duties.[373]

The Committee has seven members. Five are appointed by the Governor, for four-year terms.[374] One is an Assembly Member selected by the Speaker of the Assembly; the last is a Senator selected by the Senate Committee on Rules.[375] The Governor selects the Committee's Chair.[376]

Function and Procedure of Commission

The principal duties of the Committee are to:

(1) Simplify and rationalize the substance of criminal law.
(2) Simplify and rationalize criminal procedures.
(3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders.
(4) Improve the system of parole and probation.[377]

[370] See 2019 Cal. Stat. ch. 25; Gov't Code § 8280(b).

[371] See Gov't Code § 8281.5(d).

[372] See Gov't Code § 8290(c) ("The approval by the commission of any recommendations by the committee is not required."); see also Gov't Code § 8291 (Commission and Committee submit their reports and recommendations directly to Governor and Legislature, not to each other).

[373] *Compare* Gov't Code §§ 8289, 8290 (duties of Commission) *with* Gov't Code § 8290.5 (duties of Committee).

[374] Gov't Code § 8281.5(a), (c).

[375] Gov't Code § 8281.5(a).

[376] Gov't Code § 8283.

[377] Gov't Code § 8290.5(a).

The Committee is required to prepare an annual report for submission to the Governor and the Legislature.[378]

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.[379] In 2020, it held eight meetings, with five of those being two-day meetings. Its first meeting was held in the State Capitol. As a result of the COVID-19 pandemic, its remaining meetings were conducted entirely by teleconference.[380]

Personnel of Committee[381]

In 2020, the following persons were members of the Committee:

Chair
Michael Romano

Legislative Members[382]
Senator Nancy Skinner
Assemblymember Sidney Kamlager-Dove

Gubernatorial Appointees
Hon. John Burton
Hon. Peter Espinoza
Hon. Carlos Moreno
Song Richardson

The following persons are on the Committee's legal staff:

THOMAS M. NOSEWICZ
Legal Director

RICK OWEN
Staff Attorney

The following persons provide substantial support for the Committee's legal work:

LARA HOFFMAN

NICK STEWART-OATEN

NATASHA MINSKER

DANIEL SEEMAN

The following persons are staff of the California Law Revision Commission, who also provide managerial and administrative support for the Committee:

BRIAN HEBERT
Executive Director

BARBARA GAAL
Chief Deputy Director

DEBORA LARRABEE

[378] Gov't Code § 8293(b).

[379] Gov't Code §§ 11120-11132.

[380] This was made possible by Executive Orders N-25-20 and N-29-20.

[381] See also *Biographies of 2020 Committee Members*, Appendix A *infra*.

[382] The Senate and Assembly members of the Commission serve at the pleasure of their respective appointing powers, the Senate Committee on Rules and the Speaker of the Assembly. Gov't Code § 8281.5(b)(1).

Associate Governmental Program Analyst

Committee Budget

In the 2019-20 state budget, $576,000 was added to the California Law Revision Commission's budget to offset the costs associated with the new Committee on Revision of the Penal Code. An equivalent amount was included in the 2020-21 state budget.

Most of that amount goes toward staff salaries and benefits. The remainder is used for operating expenses.

Planned Activities for 2021

In 2021, the Committee expects to follow the same general deliberative process that it established in 2020. It will hold frequent public meetings, with speakers representing all groups that have an interest in reform of the criminal justice system. At those meetings, the Committee will identify, debate, and develop reforms that would reduce unnecessary levels of incarceration and increase public safety.

The Committee will also continue its work to establish a secure compendium of empirical data from various law enforcement and correctional sources in California. That data will be used by the Committee as a tool in evaluating the effect of possible reforms.

Acknowledgements

Many individuals and organizations participated in Committee meetings in 2020, or otherwise contributed towards this report. The Committee is deeply grateful for their assistance.

The keynote speakers and panelists are listed below. Inclusion of an individual or organization in this list in no way indicates that person's view on the Committee's recommendations.

Many other persons testified during the public comment portion of Committee meetings, submitted written comments, or otherwise assisted in the work of the Committee. It is not possible to list everyone here, but the Committee thanks all of them for their efforts and encourages them to continue to participate in the Committee's work going forward.

Keynote Speakers
(by order of appearance)

HON. GAVIN NEWSOM
Governor of California

PROF. CRAIG HANEY
University of California, Santa Cruz

KEELY BOSLER
Director, California Dep't of Finance

HON. EDMUND G. BROWN, JR.
Former Governor of California

XAVIER BECERRA
Attorney General of California

GEORGE GASCÓN
District Attorney, Los Angeles County

HON. THELTON E. HENDERSON
United States District Court, Northern District of California

Panelists
(in alphabetical order)

ANTHONY ADAMS
Deputy Public Defender, Mendocino County

SUJATHA BALIGA
Director, Restorative Justice Project, Impact Justice
Collaborative Fellow, Just Beginnings

CATHLEEN BELTZ
Assistant Inspector General, Inspector General, Los Angeles County

NINA SALARNO BESSELMAN
President, Crime Victims United

PROF. MIA BIRD
Goldman School of Public Policy, University of California, Berkeley

HILLARY BLOUT
Executive Director, For the People

HON. LAWRENCE BROWN
Superior Court of California, County of Sacramento
Vice Chair, Collaborative Justice Courts Advisory Committee, Judicial Council of California

CHARLES CALLAHAN
Deputy Director (A), Facility Support — Division of Adult Institutions, California Dep't of Corrections & Rehabilitation

BRIDGET CERVELLI
Legal Services for Prisoners with Children

HON. J. RICHARD COUZENS (RET.)
Superior Court of California, County of Placer

KATIE DIXON
San Francisco

AARON FISCHER
Disability Rights California

NEIL FLOOD
Vice President, California Correctional Peace Officers Ass'n

SEAN GARCIA-LEYS
Civil Rights Attorney

OBED GONZALEZ
California City Correctional Facility

PROF. RYKEN GRATTET
Chair, Dep't of Sociology, University of California, Davis

DEAN GROWDON
Sheriff of Lassen County
First Vice President, California State Sheriffs' Ass'n

KORY L. HONEA
Sheriff of Butte County
Second Vice President, California State Sheriffs' Ass'n

MAX HUNTSMAN
Inspector General, Los Angeles County

ANNE IRWIN
Director, Smart Justice California

JAY JORDAN
Executive Director, Californians for Safety and Justice

JOHN KEENE
Chief of Probation, San Mateo County
Secretary/Treasurer and Legislative Chair, Chief Probation Officers of California

ADNAN KHAN
Executive Director, Re:Store Justice

JAMES KING
Ella Baker Center

NICOLE KIRKALDY
Program Coordinator, Yolo County District Attorney's Neighborhood Court Program

PROF. CHARIS E. KUBRIN
Dep't of Criminology, Law & Society, University of California, Irvine

SAM LEWIS
Executive Director, Anti-Recidivism Coalition

JARED LOZANO
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The Committee regrets any errors or omissions made in compiling these acknowledgments.

Appendix A: Biographies of 2020 Committee Members

Michael Romano, of San Francisco, serves as Chair of the Committee on Revision of the Penal Code. Romano teaches criminal justice policy and practice at Stanford Law School and has been director of the Stanford Justice Advocacy Project since 2007. Romano has collaborated with numerous local, state, and federal agencies, including the United States Department of Justice and Office of White House Counsel under President Obama. He has also served as counsel for the NAACP Legal Defense and Educational Fund. Romano was a law clerk for the Honorable Richard Tallman at the U.S. Court of Appeals for the Ninth Circuit from 2003 to 2004 and a legal researcher for the Innocence Project from 2000 to 2001. He earned a Juris Doctor degree with honors from Stanford Law School and a Master of Laws degree from Yale Law School.

John L. Burton, of San Francisco, has been a partner and consultant for public affairs at Burton and the Brains since 2018. Burton was an attorney at John Burton Attorney at Law from 2004 to 2018. He was Chairman of the California Democratic Party from 1973 to 1974 and 2009 to 2017. Burton founded John Burton Advocates for youth in 2005. He was a senator in the California State Senate from 1996 to 2004. Burton served as a representative in the U.S. House of Representatives from 1974 to 1983. He served as a member of the California State Assembly from 1965 to 1974. He earned a Juris Doctor degree from the University of San Francisco School of Law.

Peter Espinoza, of Los Angeles, has served as director of the Office of Diversion and Reentry at the Los Angeles County Department of Health Services since 2016. He served as a commissioner and judge at the Los Angeles County Superior Court from 1990 to 2016. Espinoza was an attorney at Peter Espinoza Attorney at Law from 1981 to 1990. Espinoza was a deputy public defender at the Orange County Public Defender's Office from 1981 to 1983. He earned a Juris Doctor degree from the University of California, Los Angeles School of Law.

Assemblymember Sydney Kamlager, of Los Angeles, has been a member of the Assembly since 2018. She earned a Master's degree in arts management from the Heinz College at Carnegie Mellon University.

Carlos Moreno, of Los Angeles, has been a self-employed JAMS arbitrator since 2017. Moreno was U.S. Ambassador to Belize from 2014 to 2017. He was of counsel at Irell & Manella LLP from 2011 to 2013. Moreno was an associate justice of the California Supreme Court from 2001 to 2011 and served as a judge at the U.S. District Court, Central District of California from 1998 to 2001. Moreno was a judge at the Los Angeles County Superior Court from 1993 to 1998 and at the Compton Municipal Court from 1986 to 1993. Moreno was senior associate at Kelley, Drye & Warren from 1979 to 1986. He was a deputy city attorney at the Los Angeles City Attorney's Office from 1975 to 1979. Moreno earned a Juris Doctor degree from Stanford Law School.

L. Song Richardson, of Irvine, is Dean at the University of California, Irvine School of Law from 2018 to July 2021, and as a professor of law there from 2014 to 2017. She was a professor of law at the University of Iowa College of Law from 2012 to 2014. Richardson was an associate professor of law at American University from 2011 to 2012 and at DePaul University of Law from 2006 to 2011. Richardson was a partner at Schroeter,

Goldmark and Bender from 2001 to 2006. She was assistant public defender at The Defender Association from 1999 to 2001. Richardson was an assistant federal public defender at the Federal Public Defender's Office, Western District of Washington from 1997 to 1999. She was an attorney at Goldmark and Bender from 2001 to 2006 and assistant counsel at the NAACP Legal Defense and Educational Fund from 1995 to 1997. She was a Skadden Public Interest Fellow at the National Immigration Law Center in Los Angeles from 1994 to 1995 and at the Legal Aid Society's Immigration Law Unit in Brooklyn from 1993 to 1994. Richardson is a member of the American Law Institute and the executive committee of the Association of American Law Schools. She earned a Juris Doctor degree from Yale Law School.

Senator Nancy Skinner, of Berkeley, has been a member of the Senate since 2016. She was a member of the Assembly from 2006 to 2014. Senator Skinner represents California's 9th Senate District, which includes Oakland, Berkeley, and Richmond, and chairs the Senate Budget Committee. Senator Skinner is a longtime justice reform advocate and the author of two landmark California laws: SB 1421, which made police misconduct records available to the public for the first time in 40 years, and SB 1437, which reformed the state's felony-murder rule so that people who do not commit murder can't be convicted of that crime. She also authored bills to reduce gun violence and allow people with prior felony convictions to serve on juries. Her legislative efforts have also resulted in cuts to the number of juveniles incarcerated in state facilities by half, established a new dedicated fund to reduce prison recidivism, reduced parole terms, and banned the box for higher education. She earned a Master's degree in education from the University of California, Berkeley.

Appendix B: Statute Governing the Committee on Revision of the Penal Code

(Consisting of relevant parts of Article 2 (commencing with Section 8280) of Chapter 3.5 of Division 1 of Title 2 of the Government Code)

Gov't Code § 8280. Creation; "Committee" defined

8280. (a) ….

(b) Commencing January 1, 2020, there exists within the California Law Revision Commission the Committee on Revision of the Penal Code.

(c) For purposes of this article, the following terms have the following meanings:

(1) "Commission" means the California Law Revision Commission.

(2) "Committee" means the Committee on Revision of the Penal Code, unless otherwise specified.

Gov't Code § 8281.5. Membership of Committee

8281.5. (a) The Committee on Revision of the Penal Code consists of one Member of the Senate appointed by the Senate Committee on Rules, one Member of the Assembly appointed by the Speaker of the Assembly, and five members appointed by the Governor.

(b) (1) The Members of the Legislature appointed to the committee serve at the pleasure of the appointing power and shall participate in the activities of the committee to the extent that the participation is not incompatible with their respective public offices as Members of the Legislature.

(2) For purposes of this article, those Members of the Legislature constitute a joint interim investigating committee on the subject of Section 8290.5 and, as a joint interim investigating committee, have the powers and duties imposed on those committees by the Joint Rules of the Senate and Assembly.

(c) (1) The members appointed by the Governor shall be appointed for a term of four years. The terms of the members first appointed expire as follows:

(A) Three terms expire on January 1, 2022.

(B) Two terms expire on January 1, 2024.

(2) When a vacancy occurs in any office within the committee filled by appointment by the Governor, the Governor shall appoint a person to the office, who shall hold office for the balance of the unexpired term of the person's predecessor.

(d) Members of the committee shall not be members of the commission.

Gov't Code § 8282. Compensation and expenses

8282. (a) The members of the … committee shall serve without compensation, except that each member appointed by the Governor shall receive one hundred dollars ($100) for each day's attendance at a meeting of the … committee.

(b) Each member of the … committee shall be allowed actual expenses incurred in the discharge of the member's duties, including travel expenses.

Gov't Code § 8283. Chair; quorum

8283. (a) ….

(b) The Governor shall select one of the committee members to serve as chairperson. Three members constitute a quorum of the committee.

Gov't Code § 8286. Access to agency information

8286. The material of the State Library shall be made available to the … committee. All state agencies, and other official state organizations, and all persons connected therewith shall give the … committee full information, and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control.

Gov't Code § 8287. Assistance of State Bar

8287. The Board of Trustees of the State Bar shall assist the … the committee in any manner the … committee may request within the scope of its powers or duties.

Gov't Code § 8290.5. Duties of Committee

8290.5. (a) The committee shall study and make recommendations on revision of the Penal Code to achieve all of the following objectives:
(1) Simplify and rationalize the substance of criminal law.
(2) Simplify and rationalize criminal procedures.
(3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders.
(4) Improve the system of parole and probation.
(b) In making recommendations pursuant to subdivision (a), the committee may recommend adjustments to the length of sentence terms. In making that recommendation, the committee may consider any factors, including, but not limited to, any of the following:
(1) The protection of the public.
(2) The severity of the offense.
(3) The rate of recidivism.
(4) The availability and success of alternatives to incarceration.
(5) Empirically significant disparities between individuals convicted of an offense and individuals convicted of other similar offenses.
(c) The approval by the commission of any recommendations by the committee is not required.

Gov't Code § 8291. Submission of reports

8291. (a) The … committee shall submit [its] reports, and [its] recommendations as to revision of the laws, to the Governor and the Legislature.
(b) Notwithstanding Section 9795, the … committee may provide a copy of a recommendation to each member of a legislative committee that is hearing legislation that would implement the recommendation.

Gov't Code § 8292. Content of reports

8292. The … committee may, within the limitations imposed by Section 8293, include in [its] reports the legislative measures proposed by [the committee] to effect the adoption or enactment of the proposed revision. The reports may be accompanied by exhibits of various changes, modifications, improvements, and suggested enactments prepared or proposed by the … committee with a full and accurate index thereto.

Gov't Code § 8293. Annual Report

8293. (a) ….
(b) The committee shall prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year.

Gov't Code § 8294. Printing of reports

8294. The … committee's reports, exhibits, and proposed legislative measures shall be printed by the State Printing Office under the supervision of the … committee…. The exhibits shall be so printed as to show in the readiest manner the changes and repeals proposed by the … committee.

Gov't Code § 8295. Cooperation with legislative committees

8295. The … committee shall confer and cooperate with any legislative committee on revision of the law and may contract with any other committee for the rendition of service, by either for the other, in the work of revision.

Gov't Code § 8296. Cooperation with State Bar and other associations

8296. The … committee may cooperate with any bar association or other learned, professional, or scientific association, institution, or foundation in any manner suitable for the fulfillment of the purposes of this article.