

July 9, 2021

## Memorandum 2021-11

**Sentencing Practices in California and Related Matters**

At its July 2021 meeting, the Committee will address sentencing practices and theories, with a particular focus on California's history of determinate and indeterminate sentencing and comparisons to other states.

This memorandum gives general background on both of these issues and collects possible recommendations for the Committee's consideration. A supplement to this memorandum, which will be released shortly, will present written submissions from panelists for the meeting.

## MODERN SENTENCING IN CALIFORNIA

California's current sentencing system is generally called a "determinate" one — a person sentenced to jail or prison receives a sentence with a set period of incarceration (rather than a range of time, which is "indeterminate") that must be served before release. But California's sentencing system has never been fully determinate. Even when determinate sentencing came online in July 1977, the most serious offenses such as murder and kidnapping for ransom still received indeterminate sentences with no set release date.<sup>1</sup> And people with determinate sentences always had "good time" credit available to them that could reduce their amount of incarceration.<sup>2</sup> People released from prison in California have always been subject to some sort of continued supervision in the community which, if they violated its terms, could result in more incarceration.<sup>3</sup>

<sup>1</sup> See April K. Cassou & Brian Traugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L. J. 5, 29 (1978). For ease of reference, this memorandum's explanations of California law in the 1970s will largely cite contemporaneous articles and other sources that are more readily accessible than the Penal Code from that time period.

<sup>2</sup> *Id.* at 25.

<sup>3</sup> *Id.* at 26. See also Sara Mayeux, *The Origins of Back-End Sentencing in California: A Dispatch from the Archives*, 22 Stanford Law & Policy Review 529 (2011).

And in jails, sheriffs have a wide range of options to allow partial or early release for people who are serving jail sentences.<sup>4</sup>

Since it shifted to determinate sentencing in 1977, California has continued to inject more indeterminacy into its sentencing system. With the adoption of its Three Strikes Law in 1994,<sup>5</sup> California began sentencing a large number of people to indeterminate life sentences because of prior convictions. And the “10-20-life” gun enhancement in 1998,<sup>6</sup> as well as the expansion to the gang enhancement in 2000,<sup>7</sup> created more potential indeterminate life sentences. Most recently, Proposition 57, adopted by the voters in 2016, allowed early release by the parole board for people convicted of a nonviolent offense, which added a strong dose of indeterminacy to these sentences.<sup>8</sup>

---

<sup>4</sup> See Brandon Martin & Ryken Grattet, *Alternatives to Incarceration in California*, Public Policy Institute of California, April 2015.

<sup>5</sup> Proposition 184, as approved by voters, General Elec. (November 8, 1994)

<sup>6</sup> Penal Code § 12022.53(b)–(d).

<sup>7</sup> Proposition 21, as approved by voters, March 7, 2000.

<sup>8</sup> Cal. Const., art. I, § 32(1)(A)

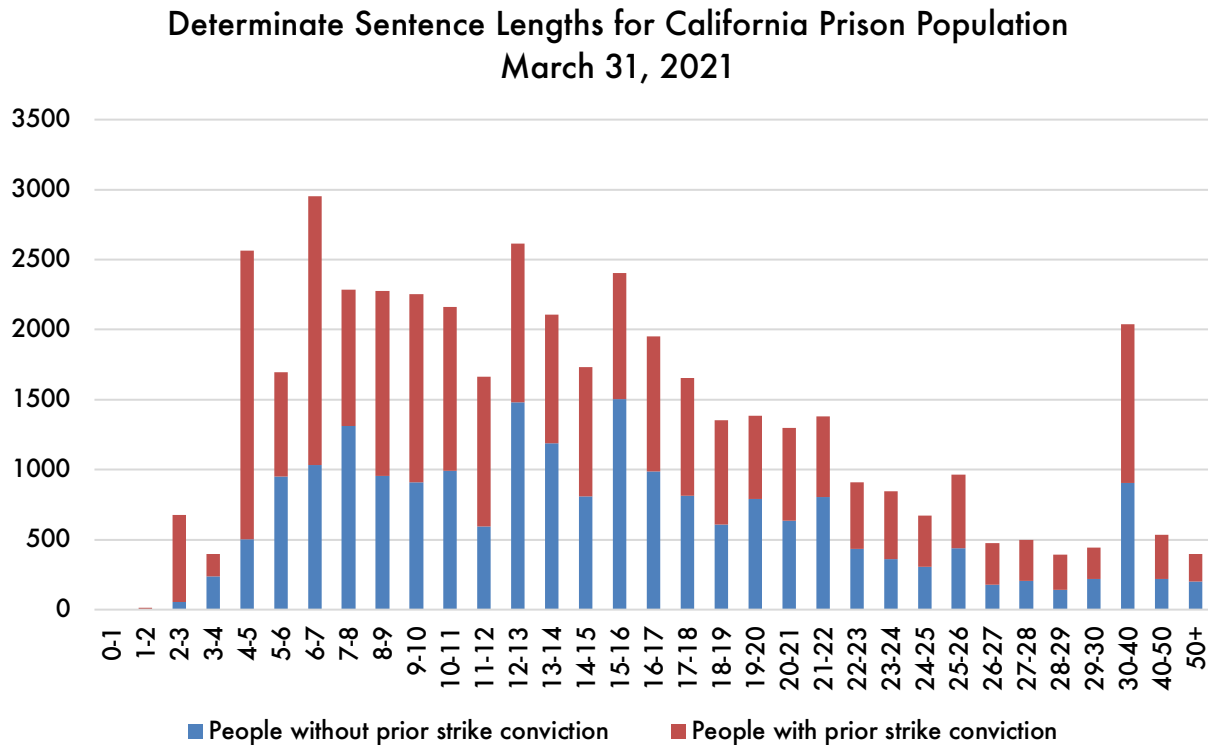
## CURRENT PRISON POPULATION INFORMATION

A large portion of California’s prison population is incarcerated for a small number of criminal offenses, as this chart of the top ten most frequently occurring controlling offenses shows:<sup>9</sup>

| <b>Offense</b>                              | <b>Number of people</b> | <b>Prison population</b> |
|---------------------------------------------|-------------------------|--------------------------|
| Murder 1                                    | 13,580                  | 13.8%                    |
| Robbery 2                                   | 10,773                  | 11.0%                    |
| Murder 2                                    | 6,311                   | 6.4%                     |
| Attempt murder 2                            | 5,340                   | 5.4%                     |
| Burglary 1                                  | 4,326                   | 4.4%                     |
| Lewd act, child under 14                    | 3,811                   | 3.9%                     |
| Voluntary manslaughter                      | 3,386                   | 3.4%                     |
| Assault with deadly<br>weapon (non firearm) | 3,377                   | 3.4%                     |
| Attempt murder 1                            | 3,138                   | 3.2%                     |
| Carjacking                                  | 2,335                   | 2.4%                     |
| <b>Total</b>                                | <b>56,377</b>           | <b>57.3%</b>             |

<sup>9</sup> Data provided by CDCR Office of Research. This data reflects the prison population as of May 31, 2021.

This chart shows the distribution of determinate sentences by length for California’s current prison population:<sup>10</sup>



#### BEFORE THE DETERMINATE SENTENCING LAW

The Determinate Sentencing Law that went into effect in July 1977 was a marked departure from California’s then-current sentencing laws.<sup>11</sup> The Determinate Sentencing Law was enacted because of widespread dissatisfaction with the indeterminate system.<sup>12</sup> That system, which had been established 1917,<sup>13</sup> gave a huge amount of power

<sup>10</sup> Data provided by CDCR Office of Research and is as of March 31, 2021. Sentence length measured in years. People with a prior strike conviction have their base term doubled under the Three Strikes law and must serve their sentence in state prison even if it would otherwise be served in county jail. Penal Code §§ 667, 1170.12.

<sup>11</sup> The Determinate Sentencing law was the result of two bills SB 40 in 1976 and AB 476 in 1977. The latter bill made major changes to the original determinate sentencing scheme in SB 40 and was signed only two days before determinate sentencing began on July 1, 1977. See Cassou & Traugher, *Determinate Sentencing in California*, 9 Pac. L. J. at 21–22.

<sup>12</sup> See, e.g., Cassou & Traugher, *Determinate Sentencing in California*, 9 Pac. L. J. at 11–13; Raymond I. Parnas & Michael B. Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 UC Davis L. Rev., 29, 30–31 (1978).

<sup>13</sup> Before indeterminate sentencing was created in 1917, California had a determinate sentencing structure (known then as “definite” sentencing) that was criticized for extreme variation in what sentences were imposed by judges. See Kara Dansky, *Understanding California Sentencing*, 43 University of San Francisco

to the parole board<sup>14</sup> because most felony offenses had life sentences (for example, the sentence for robbery in the second degree was one year to life).<sup>15</sup> Courts did not set the length of imprisonment — the sentencing decision courts made was whether someone should receive probation, a jail sentence, or a prison sentence.<sup>16</sup> When a court made that latter choice, the length of the sentence was out of its hands and the parole board determined when someone was released from prison.<sup>17</sup> There were almost no statutory or regulatory limits on how the parole board functioned.<sup>18</sup>

Beginning in 1972, the California Supreme Court began issuing a series of decisions that promised to deeply change the indeterminate system.<sup>19</sup> Among other things, the Court held in 1975 that the parole board had to set an upper limit on someone's sentence soon after they arrived in prison.<sup>20</sup> The decisions from the California Supreme Court during this period would have essentially converted the indeterminate system into a determinate one with set sentence lengths — except it would have been the parole board setting the maximum limit on incarceration, not the Legislature or courts.

---

Law Review 45, 49–52 (2008); Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 Law & Society Review 69, 71 (1985). Because there was no opportunity for early release on parole, the Governor was frequently called on to commute sentences. Messinger, *Foundations of Parole in California*, 19 Law & Society Review at 73–76. To help relieve the Governor of this role, parole was created in 1893. Dansky, *Understanding California Sentencing*, 43 University of San Francisco Law Review at 57–59.

<sup>14</sup> California has had some form of a parole board for more than a century. This memorandum uses the generic term when discussing historical developments.

<sup>15</sup> Paula A. Johnson, *Senate Bill 42 – The End of the Indeterminate Sentence*, 17 Santa Clara L. Rev. 133, 138–39, Appendix B (1977).

<sup>16</sup> Raymond I. Parnas, *Imprisonment in California: The Determinate Sentence Law After Ten Years*, Summer 1987, 98 (reprinted in appendix to materials for Joint Committee for Revision of the Penal Code, Hearing on Determinate and Indeterminate Sentencing, March 28, 1990).

<sup>17</sup> *Id.* at 133. (“The indeterminate sentence system prohibited the sentencing judge from specifying a designated term of imprisonment for each convicted felon, and required the felony to be sentenced for ‘the term prescribed by law.’” (citation omitted)). Later versions of the law specified that for prison sentences, the court “shall not fix the term or duration of the period of imprisonment.” *In re Rodriguez*, 14 Cal. 3d 639, 645 (1975) (citation omitted).

<sup>18</sup> *Id.* at 138; Sheldon L. Messinger & Phillip E. Johnson, *California's Determinate Sentencing Statute: History and Issues*, 1 *Determinate Sentencing: Reform or Regression* 13, 16 (1978) (the parole board had “an almost awesome freedom from legislative or judicial control”).

<sup>19</sup> See Cassou & Traugher, *Determinate Sentencing in California*, 9 Pac. L. J. at 9–16.

<sup>20</sup> *In re Rodriguez*, 14 Cal. 3d 639 (1975). See also *In re Butler*, 4 Cal. 5th 728, 745 (2018) (explaining that *Rodriguez's* holding about term setting “was necessary in a largely indeterminate sentencing regime — a regime that imposed life maximums for a wide range of offenses, serious and less serious.” (quotation marks and citation omitted)).

In addition to these judicial developments, the parole board's decisions were seen by many as arbitrarily harsh or lenient.<sup>21</sup> The primary sponsor of the Determinate Sentencing Law, Senator John Nejedly, explained that he was motivated to change sentencing because of the "terrible disparity in the state," including discrimination "on the basis of racial backgrounds, ethnic backgrounds generally, educational backgrounds, personal appearances, and a number of other factors."<sup>22</sup> There was also a powerful national sentiment in the mid 1970s that "nothing worked" for rehabilitation<sup>23</sup> and that the purpose of a criminal sentence should be only to punish.<sup>24</sup> Crime rates were also steadily increasing during this time.<sup>25</sup>

In short, there was a broad consensus across liberal-conservative lines in the 1970s that California's sentencing and parole system needed dramatic improvement.<sup>26</sup> The Determinate Sentencing Law was an attempt to repair this system.<sup>27</sup>

### THE DETERMINATE SENTENCING LAW

The most relevant changes that the Determinate Sentencing Law made are summarized here:

- Added a stark statement of purpose to the Penal Code: "The Legislature finds and declares that the purpose of imprisonment is punishment." While this statement of purpose also included references to proportionality and uniformity of sentences, the omission of any reference to rehabilitation was intentional.<sup>28</sup>

---

<sup>21</sup> Messinger & Johnson, *California's Determinate Sentencing Statute*, 1 *Determinate Sentencing: Reform or Regression* at 17; Albert J. Lipson and Mark A. Peterson, *California Justice Under Determinate Sentencing: A Review and Agenda for Research*, Rand, June 1980, 1–2.

<sup>22</sup> Testimony of Senator John Nejedly, Joint Committee for Revision of the Penal Code, Hearing on Determinate and Indeterminate Sentencing, March 28, 1990, at 5.

<sup>23</sup> See Robert Martinson, *What works? Questions and answers about prison reform*, 35 *The Public Interest*, 22–54 (1974).

<sup>24</sup> Johnson, *Senate Bill 42*, 17 *Santa Clara L. Rev.* at 134.

<sup>25</sup> Public Policy Initiative of California, *Crime Trends in California* (Feb. 2021) (chart showing crime rates beginning in 1969).

<sup>26</sup> Sanford H. Kadish, *Determinate Sentencing: Reform or Regression?*, National Institute of Law Enforcement and Criminal Justice, March 1978, ix.

<sup>27</sup> Cassou & Traugher, *Determinate Sentencing in California*, 9 *Pac. L. J.* at 36; Sheldon L. Messinger & Phillip E. Johnson, *California's Determinate Sentencing Statute*, 1 *Determinate Sentencing: Reform or Regression* 13, 13 (1978).

<sup>28</sup> Parnas & Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 *UC Davis L. Rev.* at 31–32. The entire statement of purpose: "1170(a)(1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and

- Created five categories of offenses. The most serious offenses retained indeterminate life sentences (or harsher penalties) and four other categories each had a “triad” of sentencing options — a normal, mitigated and aggravated term.<sup>29</sup> The original aggravated term in each triad was no more than two years higher than the mitigated term.<sup>30</sup> The court was directed to sentence someone to the middle “normal” term unless there were “circumstances in aggravation or mitigation of the crime.”<sup>31</sup>
- Created a set of six sentencing enhancements:
  - Four “specific” enhancements that could variously add between one to three years to a sentence based on the nature of the offense, such as being armed or using a firearm, inflicting great bodily injury, or causing great loss of property.<sup>32</sup>
  - Two “general” enhancements based on prior convictions — a one-year enhancement for a prior prison term and a three-year enhancement for having a prior violent felony conviction if the current offense was also violent.<sup>33</sup> The one-year prior prison term enhancement had a five-year “washout period” and the three year-year prior violent conviction had a ten-year washout.<sup>34</sup>
- Created a formula for handling multiple charges.<sup>35</sup>
- Limited a sentence to no more than “double the base term,” though this limit had so many exceptions that its use was limited.<sup>36</sup>

During and shortly after the shift to determinate sentencing, it was uncertain whether the new sentencing triads would result in longer sentences than people served

---

declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the trial court with specified discretion.”

<sup>29</sup> Cassou & Traugher, *Determinate Sentencing in California*, 9 Pac. L. J. at 28–29. See also Testimony of Kenneth L. Maddy, Chairman, Joint Committee for Revision of the Penal Code, March 28, 1990, at 1.

<sup>30</sup> The original four triads were 1.3 - 2 - 3; 2 - 3 - 4; 3 - 4 - 5; 5 - 6 - 7. Johnson, *Senate Bill 42*, 17 Santa Clara L. Rev. at Appendix B.

<sup>31</sup> Cassou & Traugher, *Determinate Sentencing in California* 9 Pac. L. J. at 37.

<sup>32</sup> *Id.* at 23, 41–48.

<sup>33</sup> *Id.* at 23, 48–53.

<sup>34</sup> *Id.* at n. 142.

<sup>35</sup> *Id.* at 53–62.

<sup>36</sup> *Id.* at 64–65 (noting that this limitation “contains exceptions so numerous that it effectively limits only the terms of the nonviolent, nonprison crimes.”)

under the indeterminate sentencing law.<sup>37</sup> Though sentences served under the indeterminate system were “among the longest in the nation,”<sup>38</sup> the new triads were based on the actual length of stay under the indeterminate system and covered the time served for 80% of people convicted of the relevant offenses.<sup>39</sup>

Early research showed that people may have been serving slightly shorter terms under the new determinate sentencing law.<sup>40</sup> But whatever the law did to sentence lengths, California’s prison population continued to increase. As the following charts show,<sup>41</sup> before and after the start of determinate sentencing, both the sheer number of people sentenced to prison and the percentage of felony cases that resulted in a prison sentence increased each year.<sup>42</sup>

---

<sup>37</sup> *Id.* at 30; Lipson and Peterson, *California Justice Under Determinate Sentencing* at 25–31; David Brewer, Gerald E. Beckett, and Norman Holt, *Determinate Sentencing in California: The First Years’ Experience*, *Journal of Research in Crime and Delinquency*, Vol. 18, No. 2, 213–18.

<sup>38</sup> Messinger & Johnson, *California’s Determinate Sentencing Statute*, 1 *Determinate Sentencing: Reform or Regression* at 16. Johnson, *Senate Bill 42*, 17 *Santa Clara L. Rev.* at 146.

<sup>39</sup> Messinger & Johnson, *California’s Determinate Sentencing Statute*, 1 *Determinate Sentencing: Reform or Regression* at 30.

<sup>40</sup> Brewer, Beckett, and Holt, *Determinate Sentencing in California*, *Journal of Research in Crime and Delinquency*, Vol. 18, No. 2, 218; Lipson and Peterson, *California Justice Under Determinate Sentencing* at 26–29.

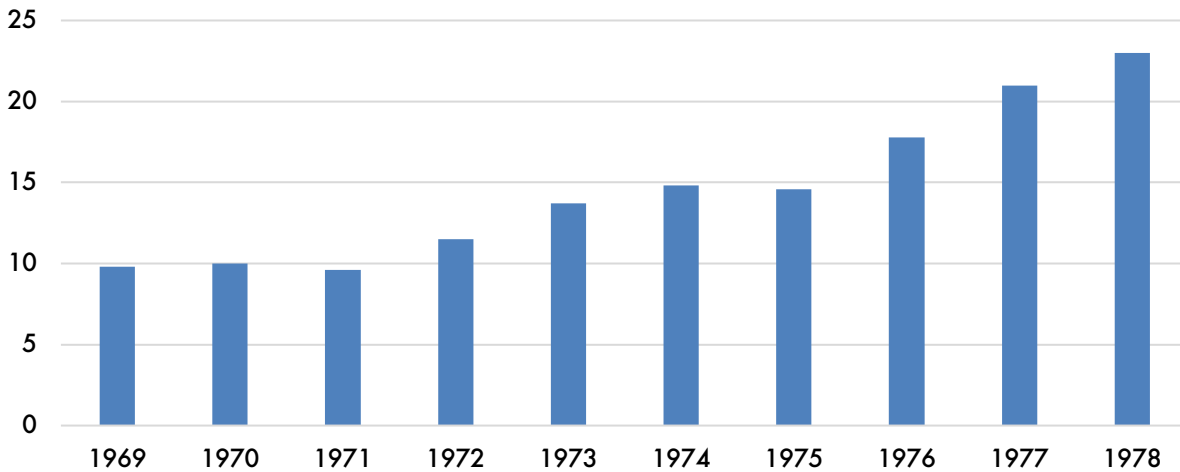
<sup>41</sup> The source for the chart showing the percentage of felony dispositions resulting in a prison sentence is Joint Committee on Rules, “Determinate and Indeterminate Sentence Law Comparison Study: Feasibility of Adapting Law to a Sentencing Commission Guideline Approach” (1980), Figure II-13. This chart appears to be based on California Department of Justice data. Experts familiar with how these statistics were kept in the 1970s and 1980s have indicated that the sentenced-to-prison rate maintained by the Department of Justice is unreliably low during this time, so the true rate is likely higher. See Brewer, Beckett, and Holt, *Determinate Sentencing in California*, *Journal of Research in Crime and Delinquency*, Vol. 18, No. 2, 206; Lipson and Peterson, *California Justice Under Determinate Sentencing* n.52; Sheldon L. Messinger et al., *Parolees Returned to Prison and the California Prison Population*, BCS Collaborative Report, January 1988, n.2.

The source for the chart showing new prison admissions is Sheldon L. Messinger et al., *Parolees Returned to Prison and the California Prison Population*, BCS Collaborative Report, January 1988 (data from 1969–1986); Carson, E. Ann and Mulako-Wangota, Joseph. Bureau of Justice Statistics. (Count of new court commitments). Generated using the Corrections Statistical Analysis Tool (CSAT) - Prisoners at [www.bjs.gov](http://www.bjs.gov) (data for 1987–89).

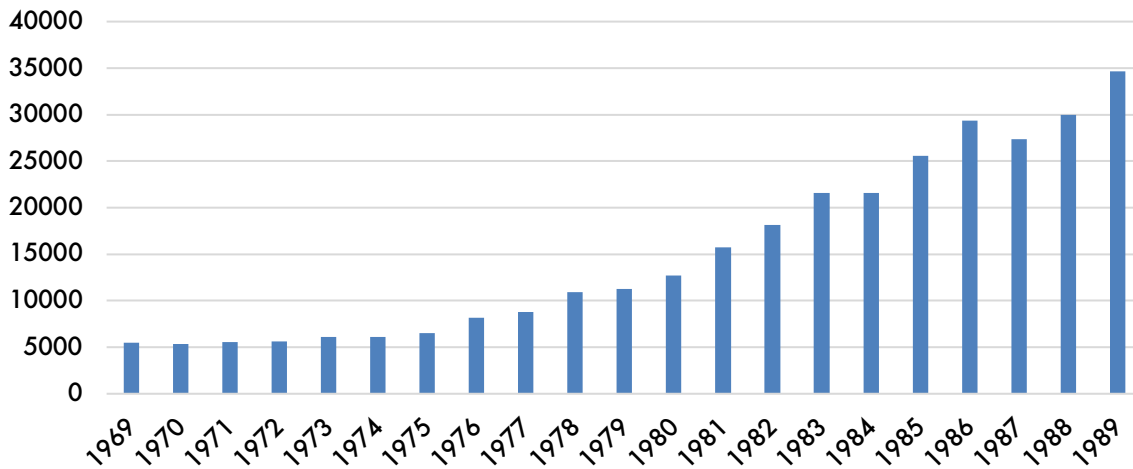
<sup>42</sup> Lipson and Peterson, *California Justice Under Determinate Sentencing* at 20–25.



### Percent of felony dispositions resulting in prison sentence 1969-1978



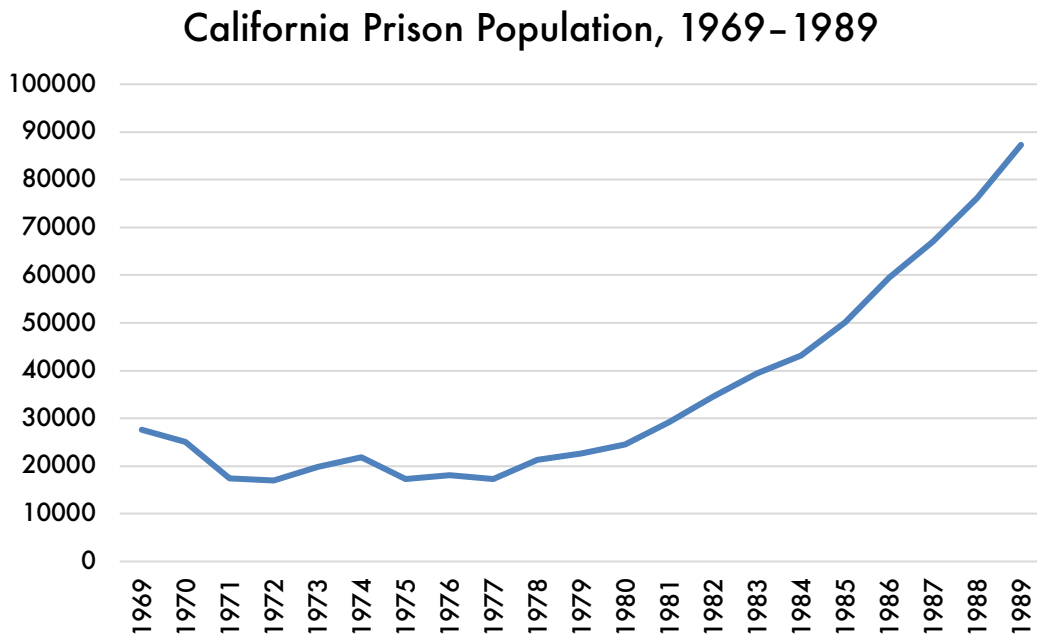
### Annual new court commitments to prison 1969-1989



In particular, from 1975 to 1986, “Superior Court felony convictions more than doubled. During the same period, the proportion of those convicted who were sentenced to state prison also more than doubled, rising from fewer than one in six to more than one in three.”<sup>43</sup>

<sup>43</sup> Sheldon L. Messinger et al., *Parolees Returned to Prison and the California Prison Population*, BCS Collaborative Report, January 1988, 1.

And though there was some variation in the overall prison population before the Determinate Sentence Law, it increased dramatically<sup>44</sup> in the years following:<sup>45</sup>



#### EVOLUTION OF DETERMINATE SENTENCING

A year and a half after determinate sentencing began, many of the sentencing triads were increased,<sup>46</sup> and the length of parole supervision for many released people was tripled from one to three years.<sup>47</sup>

<sup>44</sup> A significant portion of this increase was also because of people returning to prison for parole violations. See, e.g., Sheldon L. Messinger et al., *Parolees Returned to Prison and the California Prison Population*

<sup>45</sup> The source for this data is Bureau of Justice Statistics, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (1969–1977)*; Carson, E. Ann and Mulako-Wangota, Joseph. Bureau of Justice Statistics. (Count of total jurisdiction population). Generated using the Corrections Statistical Analysis Tool (CSAT) - Prisoners at [www.bjs.gov](http://www.bjs.gov) (1978–1989).

<sup>46</sup> Lipson and Peterson, *California Justice Under Determinate Sentencing* at 5.

<sup>47</sup> Lipson and Peterson, *California Justice Under Determinate Sentencing* at 6.

This chart shows the changes in sentencing ranges for selected offenses from indeterminate sentencing (ISL) to the current sentencing triads:<sup>48</sup>

| Offense                    | ISL                  | DSL '77                                                | DSL '79                 | Current                  |
|----------------------------|----------------------|--------------------------------------------------------|-------------------------|--------------------------|
| Murder 2                   | 5 to life            | 5 - 6 - 7                                              | 5 - 7 - 11              | 15 to life <sup>49</sup> |
| Voluntary manslaughter     | 6 months to 15 years | 2 - 3 - 4                                              | 2 - 4 - 6               | 3 - 6 - 11 <sup>50</sup> |
| Robbery 2                  | 1 to life            | 2 - 3 - 4                                              | 2 - 3 - 5 <sup>51</sup> |                          |
| Burglary 1                 | 5 to life            | 2 - 3 - 4                                              | 2 - 4 - 6 <sup>52</sup> |                          |
| Assault with deadly weapon | 6 months to life     | 2 - 3 - 4 or up to 1 year in county jail <sup>53</sup> |                         |                          |

More sentence increases followed. An analysis by researchers at Stanford Law School in 2007 concluded that there had been at least eighty substantive increases in sentencing since the Determinate Sentencing Law.<sup>54</sup> For example, in 1982, Proposition 8 created the “nickel prior,” which added five years to a new conviction for a violent or serious offense if someone had an earlier conviction for a similar offense.<sup>55</sup> Three Strikes came in 1994, and the 10-20-life gun law in 1998. What was left of the “no more than double the base term” restriction was repealed in 1997.<sup>56</sup>

In January 2007, the United States Supreme Court held that the triad structure was unconstitutional because it allowed a judge to impose the aggravated term based on facts that were not found by a jury or admitted by the defendant.<sup>57</sup> In response to this

<sup>48</sup> Lipson and Peterson, *California Justice Under Determinate Sentencing* at 5; Paula A. Johnson, *Senate Bill 42*, 17 Santa Clara L. Rev. 133, Appendix B (1977).

<sup>49</sup> Penal Code § 190(a). This sentence was set by Proposition 7 in 1978.

<sup>50</sup> Penal Code § 193(a).

<sup>51</sup> Penal Code § 213(a)(2).

<sup>52</sup> Penal Code § 461(1).

<sup>53</sup> Penal Code § 245(a)(1).

<sup>54</sup> Little Hoover Commission, *Solving California's Corrections Crisis: Time is Running Out*, January 2007, 68 (Appendix F, Report by Stanford Criminal Justice Center).

<sup>55</sup> Penal Code § 667(a)(1).

<sup>56</sup> SB 721 (Lockyer) Ch. 750, Stats. 1997.

<sup>57</sup> *Cunningham v. California*, 549 U.S. 270 (2007).

decision, the Legislature passed a law giving judges full discretion to pick any term in the triad.<sup>58</sup> This Legislative response — which came shortly after California had its highest-ever prison population<sup>59</sup> — increased, at least on paper, the sentencing range for every determinate offense because the middle term was no longer the presumptive “normal” term that could only be departed from after the court made special findings.<sup>60</sup>

More than forty years after the Determinate Sentencing Law attempted to impose uniformity on sentences across the states, there is still variation in how long counties send people to prison. For example, the charts below give a sense of the range of determinate sentences imposed for robbery in the second degree. (Note that county names are not provided because this analysis is preliminary and does not attempt to account for the many reasons that could lead to this variation.)<sup>61</sup>

---

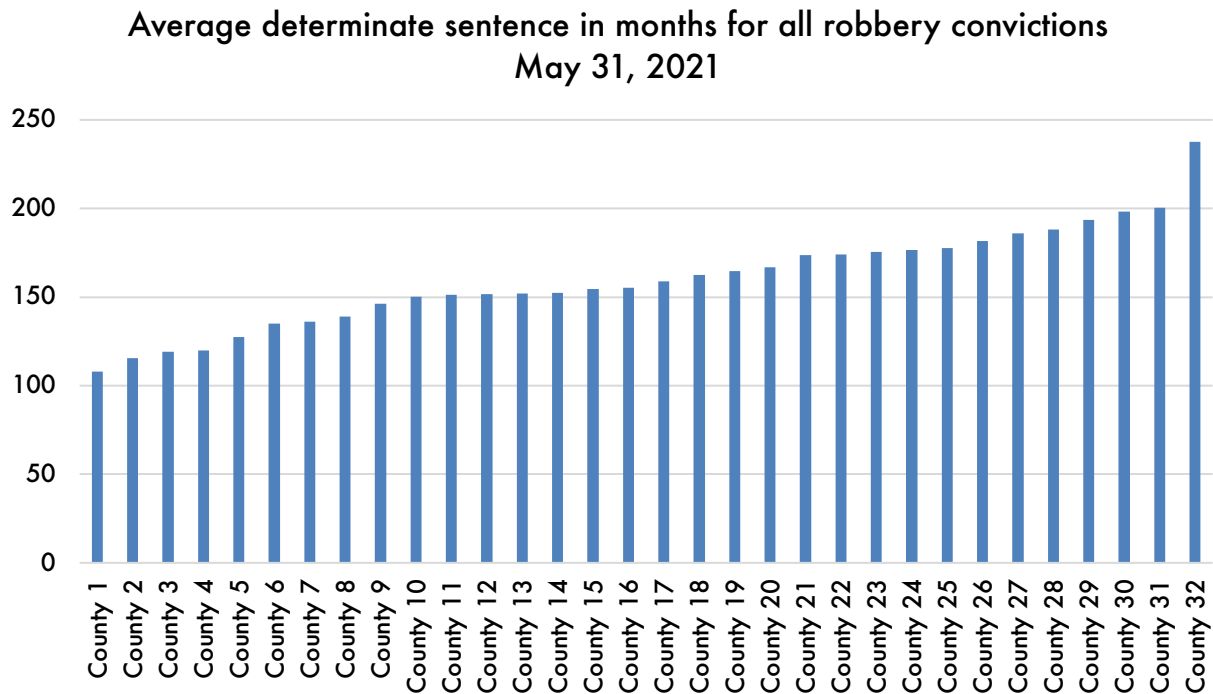
<sup>58</sup> SB 40 (Romero 2007). See also Travis Bailey, *California’s Determinate Sentencing Law: How California Got It Wrong ... Twice*, 12 Chap. L. Rev. 87 (2008).

<sup>59</sup> CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, October 2020, Figure 1.3. (highest recorded CDCR daily population was on October 20, 2006, at 173,643 people).

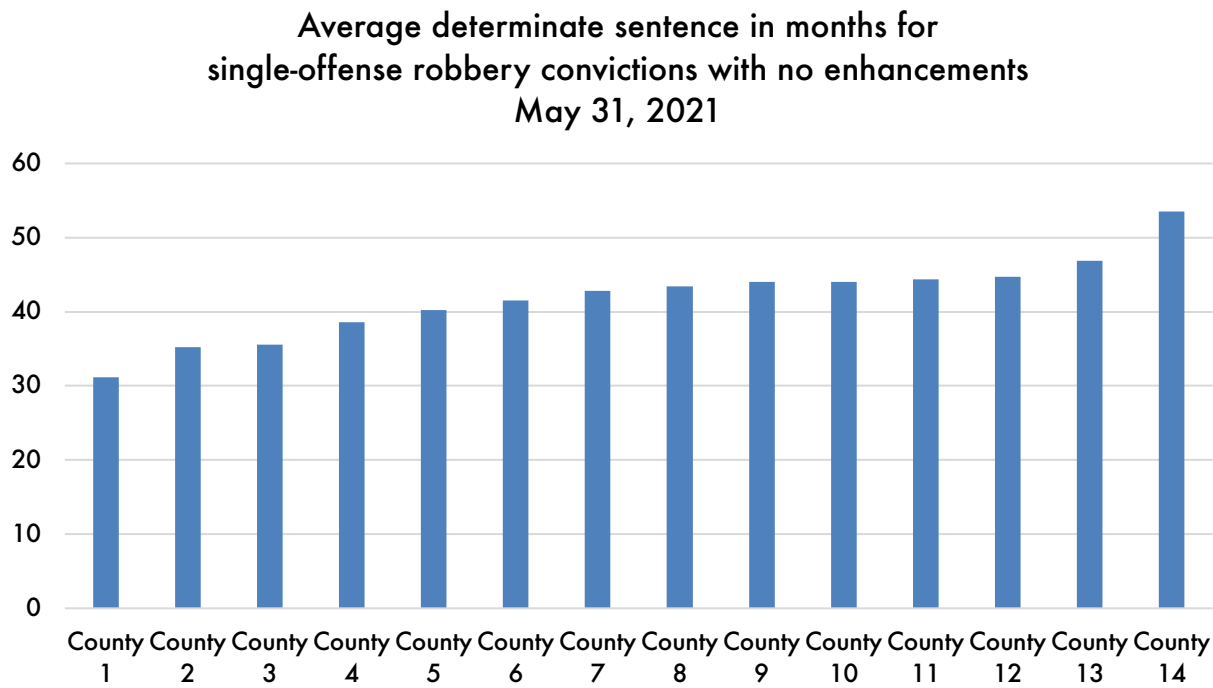
<sup>60</sup> The Legislature’s initial response to the United States Supreme Court’s decision had a sunset date of January 1, 2009, but it has been continually renewed with new sunset dates. Currently pending legislation, SB 567, would resolve this issue by setting the middle term as presumptive again and allowing a judge to impose the high term only when there are aggravating facts that have been found true by a jury or admitted by a defendant.

<sup>61</sup> Data provided by CDCR Office of Research. This data reflects the prison population as of May 31, 2021. For the average sentence for all robberies, it only includes counties that had at least twenty people currently serving time for the offense. For the average sentences for single-offense robberies without enhancements, it only includes counties that had at least ten people currently serving time for the offense.

The first chart depicts the average sentence length for robbery in cases where the person was also sentenced to additional terms on other charges or enhancements:



The second chart shows the average sentence length for robbery where the person was only convicted of robbery and no other charges or enhancements:



## PROPOSITION 57 PAROLE

In 2016, Proposition 57 added even more indeterminacy into California’s criminal sentences.<sup>62</sup> Proposition 57, which expanded a release mechanism from the three-judge federal court overseeing litigation about California’s prisons,<sup>63</sup> amended the California constitution to allow early release for “any person convicted of a nonviolent felony offense.”<sup>64</sup> These people become eligible for Proposition 57 release after serving just the sentence for their “primary offense” — that is, without time added on by sentencing enhancements or any credit for good conduct.<sup>65</sup>

The Proposition 57 parole process is similar to the traditional parole process for people serving indeterminate life sentences. In both processes, the Board of Parole Hearings must determine whether the parole candidate presents a risk of current dangerousness. Specifically, for Proposition 57, current regulations direct hearing officers to consider “whether the inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity.”<sup>66</sup>

Unlike traditional parole hearings, most Proposition 57 determinations are a “paper review.” This means that unless the parole candidate is serving an indeterminate sentence under the Three Strikes law for a nonviolent offense,<sup>67</sup> there is no in-person hearing and the parole candidate does not have a right to counsel.<sup>68</sup> In the earliest days of Proposition 57, CDCR also performed a “public safety screening” that

---

<sup>62</sup> In addition to creating a parole process for all people convicted of a nonviolent offense, Proposition 57 also changed the law about how youths were transferred to adult court and expanded CDCR’s authority to offer good time and other credits to reduce how long someone served in prison.

<sup>63</sup> See, e.g., *Coleman v. Brown*, 90-CV-00520-KJM-DB, Doc. 5060, Feb. 10, 2014, 3 & Doc. 5237, Nov. 14, 2014, 2; *In re Ilasa*, 3 Cal. App. 5th 489, 495 (Ct. App. 2016).

<sup>64</sup> Cal. Const., art. I, § 32(a)(1)

<sup>65</sup> *In re Canady*, 57 Cal. App.5th 1022 (Ct. App. 2020). The California Supreme Court denied review on March 10, 2021.

<sup>66</sup> 15 CCR § 2449.4(c). Unlike traditional parole review for indeterminate life sentences, the Proposition 57 release standard comes entirely from BPH’s own regulations. See Cal. Const., art. I, § 32(b) This means that there is no statutory language directing BPH to “normally grant parole” as there is for traditional parole hearings.

<sup>67</sup> 15 CCR § 3497(b).

<sup>68</sup> *In re Kavanaugh*, 61 Cal. App. 5th 320, 353–360 (Ct. App. 2021) (approving BPH’s paper review process without a right to counsel). The California Supreme Court denied review on June 9, 2021. California’s Third Appellate District is also considering the appropriateness of the paper review process. See *In re Flores*, Case No. C089974.

prevented people from being reviewed for parole release, but this screening was struck down by an appellate court.<sup>69</sup>

Eligibility to be reviewed for release under Proposition 57 is still being resolved by the courts. Under Proposition 57's original regulations, nonviolent third strikers — people convicted of a nonviolent offense but serving a life sentence because of prior convictions under the Three Strikes law — and people with a past sex offense conviction were not eligible for review. Courts held that these people are eligible.<sup>70</sup> The California Supreme Court is currently considering another eligibility issue: whether someone convicted of a mix of violent and nonviolent offenses should be eligible for review, even if just one of the offenses is nonviolent.<sup>71</sup>

Between 2018 and 2020, the percentage of people approved for release under Proposition 57 varied from 23% to 17%.<sup>72</sup> In 2020, the rate was 17% and 6,590 people were referred to BPH for review.

Finally, Proposition 57 release is not available to people serving county jail sentences. This means that someone sent to state prison may be eligible for release before someone incarcerated in county jail solely because of where they are incarcerated. But the number of people affected by not having access to Proposition 57 release in jail may be small because county jail sentences may be less likely to have sentencing enhancements.

## TRENDS IN MODERN AMERICAN SENTENCING

California's experience with sentencing changes follows national trends. According to University of Minnesota law professor Michael Tonry, American sentencing policy has gone through four distinct stages in the past 50 years.<sup>73</sup> In 1970,

---

<sup>69</sup> *In re McGhee*, 34 Cal. App. 5th 902 (Ct. App. 2019). BPH did not appeal this appellate decision.

<sup>70</sup> *In re Gadlin*, 10 Cal. 5th 915 (2020).

<sup>71</sup> *In re Mohammad Mohammad*, 42 Cal. App. 5th 719 (2019) (lower court decision). Three of the four appellate courts to consider this issue have held that these people are not eligible for Proposition 57 release. See *In re Ontiveros*, 2021 WL 2525584 (Ct. App. June 21, 2021); *In re Viehmeyer*, 62 Cal. App.5th 973 (Ct. App. 2021); *In re Douglas*, 62 Cal. App.5th 726 (Ct. App. 2021).

<sup>72</sup> Submission of Jennifer Shaffer, Executive Officer, Board of Parole Hearings, to Committee on Revision of the Penal Code, July 2021, 7.

<sup>73</sup> Tonry, *Sentencing in America, 1975-2025*, 42 Crime & Just. 141 (2013).

every state and the federal system used an indeterminate sentencing system, with rehabilitation as the primary goal.<sup>74</sup> As in California, statutes set broad ranges for sentence lengths, judges decided who to send to prison, and parole boards made individualized decisions of when a person was ready for release.<sup>75</sup> During this period, the nationwide incarceration rate was relatively low — about 150 per 100,000.<sup>76</sup>

Indeterminate systems nationwide began to face heavy scrutiny due to allegations of sentencing disparities, lack of transparency, and a distrust of the rehabilitative process.<sup>77</sup> By 1975, the United States began shifting into a second phase of sentencing policy, which used determinate sentencing and sentencing guidelines to promote procedural fairness, proportionality in sentences, and equal treatment of similarly-situated defendants.<sup>78</sup> California was the second state to implement a determinate sentencing scheme (after Maine), and other states soon followed. As a result of these and other changes, people were sent to prison more frequently and served longer sentences. By 1986, the nationwide incarceration rate had risen to 313 per 100,000.<sup>79</sup>

California's turn toward harsher sentencing following its shift to determinate sentencing also fits into a national pattern. In this third period, from the mid-1980s through 1996, sentences became more severe through the use of mandatory minimum sentences, three-strikes laws, and shifting more offenses from indeterminate to determinate sentences to promote "truth-in-sentencing."<sup>80</sup> According to Professor Tonry, the policies of this period were more political than in the past and the new, harsher laws had an "indirect appeal to white voters threatened by the civil rights

---

<sup>74</sup> *Id.* at 1-2, 7-9.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 3, 9-10.

<sup>78</sup> *Id.* at 9.

<sup>79</sup> *Id.* at 10.

<sup>80</sup> *Id.*



movement.”<sup>81</sup> The reforms of this period caused the nationwide incarceration rate to increase to 615 per 100,000 in 1996.<sup>82</sup>

The fourth and current period, which began after 1996, has not been characterized by a clear philosophical approach to punishment.<sup>83</sup> While some reforms have made incremental improvements, most of the harshest laws remain,<sup>84</sup> even while there is a renewed focus on rehabilitation with the emergence of diversion and restorative programs.<sup>85</sup> According to Professor Tonry, these modest changes are not enough to move American sentencing policies back into the mainstream with other Western countries.<sup>86</sup> To do so, states should repeal all mandatory minimum, three-strikes, and LWOP laws, establish presumptive sentencing guidelines, and re-establish parole release systems for use across the board.<sup>87</sup>

---

<sup>81</sup> *Id.* at 6, 45-46.

<sup>82</sup> *Id.* at 10.

<sup>83</sup> *Id.* at 10-11.

<sup>84</sup> *Id.* at 7, 10-11.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 47.

<sup>87</sup> *Id.*

## PROFILES OF OTHER STATES

Committee staff spoke to sentencing experts across the country and identified a four states that may have useful insights for the Committee’s consideration of sentencing practices. These jurisdictions are briefly profiled below (along with California to provide context for some of the comparisons). With the exception of Michigan, each of the profiled states has a significantly lower imprisonment rate than California.

### California

**Prison population (2019):**<sup>88</sup> 120,751

**Imprisonment rate (2019):**<sup>89</sup> 310 per 100,000 people

**National rank:**<sup>90</sup> 18th lowest rate of imprisonment

**Sentencing scheme:** Determinate, with indeterminate sentences available for some very serious offenses and under the Three Strikes law.

**Parole release standard:** For life sentences, the parole board “shall normally grant parole”<sup>91</sup> unless “it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.”<sup>92</sup> For nonviolent offenses, the question is “whether the inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity.”<sup>93</sup>

**Parole grant rate (2020):** For people serving life sentences, 16%.<sup>94</sup> For people serving nonviolent offenses, 17%.<sup>95</sup>

**Further background:** As discussed above, California uses determinate sentencing for most offenses, with indeterminate sentences reserved for the most serious offense and the Three Strikes law. In addition to traditional parole release, California also allows people serving nonviolent prison sentences to be released after serving the sentence for their “primary offense.”

---

<sup>88</sup> Prison population in the state profiles is from Carson, E. Ann and Mulako-Wangota, Joseph. Bureau of Justice Statistics. (Count of total custody population (including private prisons)). Generated using the Corrections Statistical Analysis Tool (CSAT) - Prisoners at [www.bjs.gov](http://www.bjs.gov).

<sup>89</sup> Imprisonment rate information in the state profiles is from The Sentencing Project, State-by-State Data, State Rankings.

<sup>90</sup> *Id.*

<sup>91</sup> Penal Code § 3041(a)(2).

<sup>92</sup> Penal Code § 3041(b)(1).

<sup>93</sup> 15 CCR § 2449.4(c).

<sup>94</sup> Board of Parole Hearings, 2020 Report of Significant Events, 1.

<sup>95</sup> *Id.* at 3.

## Minnesota

**Prison population (2019):** 8,837

**Imprisonment rate (2019):** 176 per 100,000

**National rank:** 4th lowest rate of imprisonment

**Sentencing scheme:** Determinate

**Parole release standard:** Not applicable.

**Parole grant rate:** Not applicable.

**Further background:** In 1980, Minnesota became the first state to transform from an indeterminate to a determinate system that uses sentencing guidelines drafted by a sentencing commission.<sup>96</sup> Its parole system was abolished in 1982.<sup>97</sup> Judges are required to sentence within the guidelines range unless they order a departure based on legally valid reasons.<sup>98</sup> People serve two-thirds of their court ordered sentence in prison and the last third on post-prison supervised release, unless they have received disciplinary violations which add prison time.<sup>99</sup> Minnesota was also the first state to require its sentencing commission to consider the capacity of its prisons when formulating sentencing rules and policies.<sup>100</sup>

## New York

**Prison population (2019):** 43,515

**Imprisonment rate (2019):** 224 per 100,000

**National rank:** 10th lowest rate of imprisonment

**Sentencing scheme:** Both determinate and indeterminate

**Parole release standard:** Whether there is a “reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.”<sup>101</sup>

**Parole grant rate (2017):** Overall parole grant rate is 29%, but for property offenses it is 40%.<sup>102</sup>

---

<sup>96</sup> Minn. Sentencing Guidelines Comm’n, Report to Legislature 2 (Jan. 1, 1980). Each year, the sentencing commission’s recommended modifications to the sentencing guidelines must be submitted to the Minnesota legislature on January 15th, and they become effective on August 1st unless vetoed by the legislature. Minn. Stat. § 244.09, subd. 11.

<sup>97</sup> Currently the Department of Corrections Commissioner must decide whether the few lifers in the system can be freed. Sawyer, *Could parole board make a comeback in Minnesota?* StarTribune, Mar. 24, 2019. As of 2019, Minnesota prisons housed around 600 lifers — many of whom were found guilty of first-degree murder, and thus must serve a minimum of 30 years before being considered for supervised release. See *id.*

<sup>98</sup> Minn. Sentencing Guidelines § 2.D.1.

<sup>99</sup> Minn. Stat. § 244.101, subd. 1.

<sup>100</sup> Minn. Stat. § 244.09, subd. 5; Robina Institute, *Sentencing Guidelines Resource Center: Minnesota*.

<sup>101</sup> N.Y. Exec. Law § 259-i 2(c)(A).

<sup>102</sup> New York Board of Parole Legislative Report, 2017, 4 (this is the most recently available report).

**Further background:** New York’s sentencing system uses indeterminate sentencing for some offenses and determinate for others.<sup>103</sup> The state used a fully indeterminate scheme from 1877 to 1995, when it shifted to determinate sentences for people convicted of a new violent offense who also had a prior felony conviction.<sup>104</sup> Determinate sentencing was extended to all violent felony offenses in 1998, drug offenses in 2004, and sex offenses in 2007.<sup>105</sup> People serving determinate sentences are ineligible for parole release but can receive good conduct credits that reduce a sentence by up to 1/7.<sup>106</sup> For indeterminate sentences, a judge sets the minimum and maximum boundaries of the sentences.<sup>107</sup> A person sentenced indeterminately may be paroled at “any time” after the expiration of their minimum term of incarceration and that minimum term can be reduced through time credits.<sup>108</sup>

## Utah

**Prison population (2019):** 5,102

**Imprisonment rate (2019):** 206 per 100,000

**National rank:** 7th lowest rate of imprisonment

**Sentencing scheme:** Indeterminate

**Parole release standard:** The Board of Pardons and Parole uses sentencing guidelines to determine the minimum release date, and release is discretionary based on the “nature and severity of the crime(s) committed, including the harm done to the victim and society, the continued risk posed by the inmate, and the inmate’s behavior and programming efforts while incarcerated.”<sup>109</sup> The Board may parole someone before their minimum release date,<sup>110</sup> but no later than the statutory maximum sentence.<sup>111</sup>

**Parole grant rate:** Not published.

**Further background:** The great majority of people who commit crimes in Utah are punished with a suspended sentence that may include jail and probation.<sup>112</sup> Judges use discretionary sentencing guidelines from the Utah Sentencing Commission to determine whether to sentence an individual

---

<sup>103</sup> N.Y. Penal Law § 70.00.

<sup>104</sup> The switch to determinate sentencing for these offenses was prompted by federal truth-in-sentencing laws that incentivized states to adopt harsher penalties. New York State Permanent Commission on Sentencing, *A Proposal for “Fully Determinate” Sentencing for New York State*, 2-3 (Dec. 2014).; In 2014, the Commission recommended that the state shift to a fully determinate system. *Id.* The Legislature has yet to act on this recommendation.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> N.Y. Penal Law § 70.00(1).

<sup>108</sup> N.Y. Penal Law § 70.40.

<sup>109</sup> Utah Bd. Pardons & Parole, *FAQ: Hearings: How does the Board Decide who gets out of Prison*.

<sup>110</sup> All people in prison except those with LWOP or capital felony sentences can be released at any time and are not subject to true mandatory minimums. See Utah Code Ann. §§ 77-27-9(1)(b), 76-3-206.

<sup>111</sup> Utah Code Ann. §§ 76-3-203, 76-3-204.

<sup>112</sup> Staff interview with Daniel Strong, Director, Utah Sentencing Commission.

to prison or other alternatives.<sup>113</sup> Judges have no discretion as to the length for prison sentences.<sup>114</sup> Instead, the individual is sentenced to the minimum and maximum prison sentence prescribed by law. For example, to punish most first-degree felonies, the prison sentence meted out by the judge would be “five years to life.”<sup>115</sup>

## Michigan

**Prison population (2019):** 38,053

**Imprisonment rate (2019):** 381 per 100,000

**National rank:** 29th lowest rate of imprisonment

**Sentencing scheme:** Indeterminate

**Parole release standard:** Whether the board has “reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner’s mental and social attitude, that the prisoner will not become a menace to society or to the public safety.”<sup>116</sup>

**Parole grant rate (April 2021):** 51%<sup>117</sup>

**Further background:** Michigan uses an indeterminate sentencing system in which judges sentence people to a minimum term that cannot exceed two-thirds of the statutory maximum.<sup>118</sup> When sentencing, judges are required to consider guidelines drafted by a sentencing commission.<sup>119</sup> Judges were required to sentence within the guidelines, which were effective in 1998, until a state supreme court decision in 2015 made them advisory.<sup>120</sup> When a person is sent to prison, they become eligible for parole after serving the minimum sentence.<sup>121</sup> Credit earning against the minimum sentence was eliminated in 1998 but recent reforms have reintroduced credits in some cases.<sup>122</sup> The board is required to use parole guidelines in its decision-making process but can depart from the guidelines for “substantial and compelling reasons, put into writing.”<sup>123</sup>

## AREAS FOR FURTHER EXPLORATION

Despite more than a decade of reforms to its criminal laws, California’s sentencing system has not had a comprehensive restructuring since 1977. And while

---

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Utah Courts, *The Sentencing Process*; Utah Code Ann. §§ 76-3-203, 76-3-301.

<sup>116</sup> Mich. Comp. Laws § 791.233.

<sup>117</sup> Mich. Dept. of Corr., *Parole Decisions Report* (April 2021).

<sup>118</sup> Mich. Comp. Laws § 769.34(2).

<sup>119</sup> 1998 Mich. Pub. Acts 317 § 34(1–2).

<sup>120</sup> *People v. Lockridge*, 870 N.W.2d 502, 520-21 (2015).

<sup>121</sup> Mich. Comp. Laws §§ 791.233, 791.234

<sup>122</sup> See Mich. Comp. Laws §§ 791.233, 791.234, 800.34.

<sup>123</sup> Mich. Admin. Code r. 791.7716.

California's prison population has dropped dramatically since its peak in 2006, its overall imprisonment rate is still considerably higher than states such as New York and Massachusetts, which has the lowest imprisonment rate in the country.<sup>124</sup> Policies to safely reduce the number of people incarcerated in California must focus not just on the length of sentences, but also the number of people facing any incarceration.<sup>125</sup> The proposals sketched here focus only on the first part of this formula.

### *Revise the purpose of sentencing*

The Penal Code currently states that “the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice.”<sup>126</sup> This statement of purpose could be revised to include clearer standards for balancing these interests, including when incarceration is appropriate and what purposes it should achieve.<sup>127</sup>

### *Reexamine sentence triads for common offenses*

The sentencing triads for many of the most common offenses resulting in prison sentences have not been changed in more than forty years. The Committee may wish to consider a targeted review of the sentencing triads for these offenses.

### *Reset enhancements to earlier levels*

As described above, the Determinate Sentencing Law included a handful of sentencing enhancements that added between one to three years to a sentence. Enhancements could be reset to these original levels.

---

<sup>124</sup> The Sentencing Project, State-by-State Data, State Rankings (Massachusetts' imprisonment rate is 133 per 100,000 people).

<sup>125</sup> This formula has been dubbed the “Iron Law of Prison Populations.” See Todd R. Clear and James Austin, *Reducing Mass Incarceration: Implications of the Iron Law on Prison Populations*, 3 Harv. L. & Pol'y Rev. 307, 312 (2009) (“The Iron Law of Prison Populations states that the size of a prison population is completely determined by two factors: how many people go to prison and how long they stay. If either of these factors changes, the size of the prison population will also change. The corollary to this iron law is equally important: There is no way to change the prison population without changing either the number of people who go to prison or how long they stay there.”).

<sup>126</sup> Penal Code § 1170(a)(1).

<sup>127</sup> The National Research Council's landmark 2014 report on incarceration in the United States noted that “explicit and transparent expression[s] of normative principles ha[ve] been notably missing as U.S. incarceration rates dramatically rose over the past four decades.” National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 8 (2014)

### *Expand Proposition 57*

As described above, early release under Proposition 57 only applies to people serving a sentence for a nonviolent offense in prison. It does not apply to people serving jail sentences. When setting the release date, it also does not give people credit for good conduct or completion of rehabilitative programming. The standard for release is also not entirely clear. The Committee may wish to consider extending and refining Proposition 57 so that it covers these areas.

### *Expand appellate review of sentences*

Some states allow appellate courts to review sentences in the interest of justice.<sup>128</sup> An appellate court may reduce a sentence — even one imposed as part of a guilty plea — without the need to find a legal error. The Committee may wish to consider creation of a similar appellate review of excessive sentences in California, which could help ensure greater uniformity in sentences across the state.

### *Serve the final portion of incarceration in a community reentry center*

Some jurisdictions, including the federal system,<sup>129</sup> require that the final portion of someone's incarceration be served in community reentry centers or other custodial environments that prepare people for reentry. California has experimented with a similar program in very limited numbers,<sup>130</sup> and the Committee may wish to explore recommendations to expand this program.

---

<sup>128</sup> See N.Y. Code of Crim. Proc. § 470.15(2)(c).

<sup>129</sup> See Federal Bureau of Prisons, Residential Reentry Management Centers <[www.bop.gov/about/facilities/residential\\_reentry\\_management\\_centers.jsp](http://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp)>

<sup>130</sup> CDCR, Male Community Reentry Program <[www.cdcr.ca.gov/rehabilitation/mcrp/](http://www.cdcr.ca.gov/rehabilitation/mcrp/)>; CDCR, Custody to Community Transitional Reentry Program <[www.cdcr.ca.gov/adult-operations/custody-to-community-transitional-reentry-program/](http://www.cdcr.ca.gov/adult-operations/custody-to-community-transitional-reentry-program/)>.

## CONCLUSION

California led the nation in shifting to a determinate sentencing scheme more than 40 years ago. But it has not examined fundamental changes to its overall sentencing structure since the 1970s. Given the dramatic decrease in crime and increase in incarceration since then, it may be appropriate for the Committee to consider such changes now that would reduce unnecessary incarceration while preserving public safety.

Respectfully submitted,

Thomas M. Nosewicz  
Legal Director

Rick Owen  
Staff Counsel

Lara Hoffman  
Fellow, Stanford Law School