

November 10, 2021

Memorandum 2021-19

Draft of 2021 Annual Report

At its September 30, 2021, meeting, the Committee directed staff to prepare a draft 2021 Annual Report that included the recommendations that the Committee had discussed. The staff and Committee Chair have prepared the attached draft of the substance of that report for the Committee's review.

The draft report presents a description of each proposal the Committee discussed and an explanation of its purpose and rationale. The Committee has yet to make a final decision about whether to include a recommendation that appellate courts be given the power to reduce sentences in the interest of justice, and it is hoped that reviewing the draft recommendation may help the Committee reach a conclusion on this issue.

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 a graphic designer. Any changes made at this stage will not affect the substance of the Committee's report or recommendations. Such changes may include adding citations and data and other non-substantive stylistic, editorial revisions.

Does the Committee approve the attached draft as its 2021 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 2021 Annual Report
Committee on Revision of the Penal Code
November 2021

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Executive Summary

For nearly two years, the Committee on Revision of the Penal Code has undertaken an intensive investigation into California’s criminal legal system. Our guiding principle is to identify areas where California’s criminal laws can improve public safety and reduce unnecessary incarceration.

The Committee has placed a particular interest on sentencing for felony offenses, the area where the most serious punishments occur. At the same time, more than half of the Committee’s recommendations in this report address ways to improve California’s alternatives to incarceration and areas where criminal law intersects with mental health issues. As discussed below, we recommend that the Legislature enact evidence-based reforms that incentivize treatment and rehabilitation, from the time of sentencing to the time of release from custody and reentry.

The Committee’s recommendations build on the testimony it heard in 2020 as well as an additional 22 witnesses who addressed the Committee this year, including crime victims, law enforcement leaders, judges, and criminal defense experts and advocates.

The Committee was also guided by extensive public comment, staff research, outreach to stakeholders across the state, dialog with practitioners and experts throughout the country, and hours of Committee deliberation during seven public meetings. The report contains extensive support for each recommendation, including empirical research, experiences from other jurisdictions, and new data specially provided to the Committee by the California Department of Justice and Department of Corrections and Rehabilitation. If enacted, these reforms would impact almost every person involved in California’s criminal legal system, decrease racial disparities, reduce unnecessary incarceration, and improve the public safety efficacy of criminal punishments.

The recommendations are:

1. Strengthen the mental health diversion law.
2. Encourage alternatives to incarceration.
3. Expand CDCR’s existing reentry programs.
4. Equalize parole eligibility for all offenses.
5. Modernize the county parole system.
6. Allow appellate courts to reduce sentences in the interest of justice.
7. Repeal Three Strikes.
8. Create a review process for life without parole sentences.

Introduction

During the COVID-19 pandemic, California’s prison population reached its lowest level in thirty years,¹ and overall crime rates continued to fall to record lows.

At the same time, California experienced a sharp increase in homicides during the pandemic. Homicides in California increased and reached a level last seen in 2008.² The Committee devoted intensive research and resources to this issue, with assistance from researchers at the California Policy Lab at University of California Berkeley and Los Angeles. According to a comprehensive study, published in September 2021 and discussed in more detail below, California’s homicide rate rose significantly during the pandemic, but the state maintains a homicide rate well below the national average.

Also last year, California voters rejected a ballot measure that would have rolled back reforms enacted in 2016 that expand parole eligibility for people convicted of nonviolent crimes in prison.³ The Legislature enacted numerous reforms to reduce incarceration in California, including six recommendations from this Committee, and in September voters rejected a recall of Governor Gavin Newsom, fueled in part by his public support for criminal law reform and ending California’s death penalty.⁴

This landscape shows the continued need for the Committee’s work: rationalizing a Penal Code that has grown too complex and unsuited in many ways for the 21st century in a state as large and diverse as California. The Committee’s goals remain crafting a Penal Code that maximizes public safety, ensures racial equity, and helps to improve communities and lives throughout the state. We rely on the best available research around the world and unique access to data from California’s legal system, results of which are published in this report.

In the last year, the Committee once again heard from experts across the spectrum for their perspectives on the complicated task of updating California’s Penal Code. Kathleen Allison, Secretary of the Department of Corrections and Rehabilitation told the Committee that providing people in prison with rehabilitative opportunities and hope for future release has a

¹ On February 3, 2021, CDCR’s population was 94,306, the lowest population since sometime in 1989, and 46% of the population at CDCR’s peak of 173,643 on October 20, 2006. Since February 2021, the population has increased and is at 99,479 people as of November 3, 2021. See CDCR, Weekly Report of Population, As of Midnight, February 3, 2021, and November 3, 2021; CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, Figure 1.2 (October 2020) (historical population data).

² California Department of Justice, *Homicide in California* reports for 2020 and 2011, Table 2.

³ See California Secretary of State, *Statement of Vote*, General Election, November 3, 2020, 67 (results for Proposition 20).

⁴ See California Secretary of State, *Statement of Vote*, California Gubernatorial Recall Election, September 14, 2021; Governor’s Exec. Order N-09-19 (Mar. 13, 2019).

discernable impact on behavior.⁵ Matthew Cate, a former CDCR Secretary, encouraged the Committee to consider greatly expanding CDCR’s existing residential reentry programs so that people soon to be released from prison can prepare to rejoin their communities in non-incarcerative settings.⁶ Michele Hanisee, President of the Deputy District Attorney Association of Los Angeles County, centered the experience of victims but also acknowledged that some of the most extreme sentences in the system may be appropriate for reconsideration.⁷ Angela Chan, Policy Director and Senior Staff Attorney at Asian Americans Advancing Justice, told the Committee that over-reliance on incarceration limits spending on crime prevention strategies that make communities safer.⁸ Sentencing experts from around the country, with systems widely different from California’s, shared their perspectives on what worked and what didn’t about their systems.⁹

Leading academics and practitioners gave both scholarly and practical accounts of national trends and county-level analyses of California’s criminal legal system. The Committee also heard from and was inspired by multiple formerly incarcerated people about their individual journeys and the implications for the system at large.¹⁰ Justice J. Anthony Kline gave his unique perspective on what California’s Determinate Sentencing Law — which he helped draft in the late 1970s — hoped to accomplish and how it has played out, particularly for modern-day parole release.¹¹ Committee staff also had numerous conversations with other stakeholders and experts across the state and the country to ensure that these recommendations reflected current research and approaches.

In addition, in November, the Committee published the first comprehensive report on California’s death penalty in over a decade.

This report includes recommendations to improve California’s approach to low-level crimes committed by people with severe mental illness, incentivize rehabilitation, and expand reentry programs that have proven enormously successful at reducing recidivism.

Unlike the Committee’s 2020 recommendations, some of the recommendations in this report require a two-thirds majority vote in the Legislature or a voter initiative to become law. The Committee does not underestimate the significant political difficulty that such

⁵ Committee on Revision of the Penal Code, Meeting on May 13, 2021, Part 3, 0:14:24—0:20:58.

⁶ Committee on Revision of the Penal Code, Meeting on July 13, 2021, Part 4, 0:13:15—0:15:58.

⁷ Committee on Revision of the Penal Code, Meeting on May 13, 2021, Part 1, 0:11:53—0:15:23.

⁸ Committee on Revision of the Penal Code, Meeting on May 13, 2021, Part 2, 0:52:11—0:54:31.

⁹ Committee on Revision of the Penal Code, Meeting on July 13, 2021, Part 1 and 2.

¹⁰ Committee on Revision of the Penal Code, Meetings on May 13, 2021, Part 1 and 2, and July 13, 2021, Part 4.

¹¹ Committee on Revision of the Penal Code, Meeting on July 13, 2021, Part 1, 0:06:23—0:14:25. See also Written Submission of Justice J. Anthony Kline to Committee on Revision of the Penal Code, July 13, 2021.

recommendations represent. But the areas of the Penal Code that trigger these requirements — including the Three Strikes law and life without parole sentences — are among the most important to reform and present some of the most stark racial disparities in the system.

The Committee remains committed to thoroughly reviewing the Penal Code as written, understanding how it works in practice, studying the data, and listening to stakeholders on all sides of these issues as it works towards its goals of enhancing public safety while reducing unnecessary incarceration and improving racial equity. The recommendations in this report — which range from the lowest-level offenses in the system to the most serious — are important steps along this path.

Prefatory Notes

Crime Rates

Maximizing public safety is of paramount concern to the Committee. As noted, the Committee devoted special attention to this topic this year, including commissioning research on crime statistics in California during the COVID-19 pandemic.¹² A team of researchers at the California Policy Lab led by Professor Steven Raphael prepared a report and testimony for the Committee that showed that California outperformed the rest of the country in important respects. Violent crime — and homicide in particular — rose throughout the country in 2020.¹³ But though California experienced a larger percentage increase in its homicide rate than the rest of the country, California's 2020 homicide rate was 13% lower than the national average.¹⁴ And nationwide, violent crime increased almost four times faster than in California, which saw less than a 1% increase in violent crime between 2019 and 2020.¹⁵ Property crime (the overwhelming majority of reported crime) decreased by 8% in California between 2019 and 2020.¹⁶

Any increase in crime rates — especially homicides, where the victims are disproportionately men of color¹⁷ — is unacceptable. But this data should be put in historical context: even with

¹² Committee on Revision of the Penal Code, June 23, 2021 Meeting, 0:03:04–0:52:47.

¹³ See, e.g., Jeff Asher, *Murder Rose by Almost 30% in 2020. It's Rising at a Slower Rate in 2021*, The New York Times, Sept. 22, 2021.

¹⁴ Mia Bird, Omair Gill, Johanna Lacoé, Molly Pickard, and Steve Raphael, *Crime in California during the COVID-19 Pandemic*, California Policy Lab, at Table 1.

¹⁵ *Id.*

¹⁶ Mia Bird, Omair Gill, Johanna Lacoé, Molly Pickard, and Steve Raphael, *Crime in California during the COVID-19 Pandemic*, California Policy Lab, 1, September 2021. Among the rise in violent crime was a 31% increase in homicides and a 9% increase in aggravated assaults, but a 14% decrease in robbery and 8% decrease in rape. Though property crime rates decreased — including a 15% decrease in larceny — motor vehicle theft increased by 20%

¹⁷ See, e.g., California Department of Justice, *Homicide in California 2020*, Tables 3, 10.

these increases, crime rates in California remain much lower than during the 1980s and 90s. In 2020, California's violent crime rate was 60% below the peak violent crime rate recorded in 1992, and the property crime rate was 70% below the peak rate from 1980.¹⁸

Other analysis of California crime statistics shows that the overall crime rate — combining both property and violent crime — in 2020 was the lowest level since the relevant information began being recorded.¹⁹

Solutions aren't easy or intuitive. For example, county-level analysis of crime data showed that counties with higher incarceration rates also had higher rates of homicides and shoplifting.²⁰ The Committee remains committed to following the best-available research, evidence, and data to develop recommendations that make California's legal system the safest and fairest in the country.

Racial Disparities in Incarceration Rates

For more than a decade, California has taken steps to reduce the number of people it incarcerates.²¹ Despite this progress, disturbing racial disparities persist in the incarceration rate and other measures in California:

- The imprisonment rate for Black people is 9 times what it is for white people.²²
- The jail incarceration rate for Black people is almost 5 times what it is for white people.²³

¹⁸ *Id.* at 2.

¹⁹ Mike Males, *California's Crime Rate Falls to a Record Low in 2020; Counties with High Incarceration Rates Have More Crime and Worse Trends*, Center on Juvenile and Criminal Justice (September 2021).

²⁰ *Id.*, Table 2, Appendix. In the higher incarceration rate counties, homicide increased by 35% in 2020, while it increased by only 21% in lower incarceration counties. For example, Los Angeles County (with a 2020 incarceration rate of 450.3 per 100,000 population) saw a 34% increase in its homicide rate while Kings County (with a 2020 incarceration rate of 915.1 per 100,000 population) saw a 173% increase in its homicide rate. Similarly, the shoplifting rate in high incarceration counties (162.6 per 100,000 population) is higher than in low incarceration counties (159.3 per 100,000 population).

²¹ See, e.g., Mia Bird, and Ryken Grattet, *SB 678: Incentive-Based Funding and Evidence-Based Practices Enacted by California Probation Are Associated with Lower Recidivism Rates and Improved Public Safety*, California Probation Resource Institute (March 2020); Magnus Lofstrom, Heather Harris, and Brandon Martin, *California's Future: Criminal Justice*, Public Policy Institute of California, 1–2 (Jan. 2020); Magnus Lofstrom, Mia Bird, and Brandon Martin, *California's Historic Corrections Reforms*, Public Policy Institute of California (September 2016).

²² In 2019, Black people were imprisoned at a rate of 1,636 per 100,000 population. For white people, it was 180 per 100,000 population. Data is from CDCR Data Points. Population data is 5-year ACS estimates.

²³ In 2019, Black people were incarcerated in jail at a rate of 713 per 100,000 population. For white people, it was 147 per 100,000 population. Data is from the BJS Census of Jails. Population data is 5-year ACS estimates.

- Black people make up 6% of California’s population but account for 15% of all stops made by California’s eight largest law enforcement agencies, 25% of the jail population, 26% of the probation population, and about 29% of the prison population.²⁴

Though California is hardly unique in these racial disparities,²⁵ no other state has taken the same dramatic steps to reduce incarceration that California has. Governor Newsom directed this Committee to consider the “deep racial overlays and the deep socioeconomic overlays that often determine the fate of so many in our system,”²⁶ and as policy-makers consider changes to California’s criminal legal system, these racial disparities must be addressed.

Research on the Effects of Incarceration

Many of the underlying facts that motivate the Committee’s work are not novel. More than 50 years ago, a report by the Assembly Committee on Criminal Procedure concluded that “[t]here is no evidence that more severe penalties deter crime more effectively than less severe penalties.”²⁷ Empirical data from the same time confirmed that finding,²⁸ and, reflecting this research, the director of California’s prisons said more than 40 years ago that “Members of the public need to realize that the prison system, as we know it, speaking nationwide, is a proven

²⁴ Magnus Lofstrom and Brandon Martin, *California’s Future: Criminal Justice*, 3, Public Policy Institute of California (January 2021). Analysis is based on 2017 data.

²⁵ See, e.g., Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (Oct. 2021) (finding that Black Americans are incarcerated in state prisons across the country at nearly five times the rate of whites, and Latinx people are 1.3 times as likely to be incarcerated than non-Latinx whites); Katherine A. Durante, *County-Level Context and Sentence Lengths for Black, Latinx, and White Individuals Sentenced to Prison: A Multi-Level Assessment*, Criminal Justice Policy Review, Vol. 32(9) (2021) (analysis of more than 500,000 sentences from 751 counties of people admitted to prison between 2015 and 2017 concluded that Black and Latinx people receive longer sentences than white people, even after controlling for relevant variables).

²⁶ See California Secretary of State, *Statement of Vote*, California Gubernatorial Recall Election, September 14, 2021; Governor’s Exec. Order N-09-19 (Mar. 13, 2019); Committee on Revision of the Penal Code, Meeting on January 24, 2020, 0:01:12–0:02:00.

²⁷ Assembly Committee on Criminal Procedure, *Deterrent Effects of Criminal Sanctions*, 25, 31–32 (May 1968).

²⁸ See, e.g., The President’s Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, 41-42 (1967) (describing results of randomly placing California youth in incarceral or diversionary settings); John E. Berecochea and Dorothy R. Jaman, *Time Served in Prison and Parole Outcome: An Experimental Study, Report No. 2*, California Department of Corrections — Research Unit, 4, 16 (June 1981) (describing results of randomly reducing three year terms of incarceration by six months); Dorothy R. Jaman and Robert M. Dickover, *A Study of Parole Outcome As A Function of Time Served*, California Department of Corrections — Research Division, 1 (Sept. 1969) (describing results of studying people convicted of burglary who were released earlier than others).

failure — and I have to tell them as a fiscal conservative that we have to stop funding our failures.”²⁹

More recently, a major analysis of more than 100 studies concluded that it was a “criminological fact” that incarceration is no better at reducing reoffending than noncustodial sanctions such as probation.³⁰ The analysis concluded that there was “no reason to expect that a new generation of studies will reveal their crime-reducing effects” and “no reason to believe that custodial settings will produce different effects unless they are fundamentally changed.”³¹

These findings across time, jurisdiction, and research method confirm what lived experience also teaches: California’s Penal Code must do more than incarcerate to make society safer for all its members.

Data Collection and Analysis

As the Committee noted in its 2020 report, there is unanimity across stakeholders that laws and policies in California’s criminal legal system should be based on data and rigorous empirical research. The Committee, which was given special power by the Legislature to gather information, has made major progress in its goal of creating an aggregated collection of administrative data related to the criminal legal system. Much work — particularly related to data gathering at the county level, where the vast majority of cases are resolved — remains to be done but, with the help of researchers from the California Policy Lab and others, many of the recommendations in this report rely on data and analysis presented here for the first time.

²⁹ National Council on Crime and Delinquency, *A New Correctional Policy for California: Developing Alternatives to Prison: Report to Joint Rules Committee of the California State Legislature*, 2 (May 1980) (quoting Howard Way) (citation omitted).

³⁰ Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, Crime and Justice, September 22, 2021.

³¹ *Id.*

Updates on Committee’s Prior Recommendations

The Committee made 10 recommendations in its 2020 Annual Report. Six of these recommendations were passed into law or policy in some form, as summarized here:

Committee Recommendation	Action	Remaining
Provide guidance for judges considering sentence enhancements.	SB 81, which was signed by the Governor on October 8, 2021.	None.
Limit gang enhancements to the most dangerous offenses.	AB 333, which was signed by the Governor on October 8, 2021.	None.
Retroactively apply sentence enhancements previously repealed by the Legislature.	SB 483, which was signed by the Governor on October 8, 2021.	None.
End mandatory minimum sentences for nonviolent offenses.	Elements related to certain drug offenses incorporated into SB 73, which was signed by the Governor on October 5, 2021.	Additional nonviolent offenses still have mandatory minimums.
Equalize custody credits for people who committed the same offenses, regardless of where or when they are incarcerated.	Elements related to people confined in state hospitals or other mental health facilities were incorporated into SB 317, which was signed by the Governor on October 6, 2021. Updates to CDCR regulations in May 2021 addressed disparities for people with prior strike convictions. 15 CCR § 3043.2(b)(3).	People with violent offenses still receive more credit in prison (33%) than jail (15%).
Establish judicial process for “second look” resentencing.	Elements incorporated in AB 1540, which was signed by the Governor on October 8, 2021.	Allow incarcerated people to bring their own requests after 15 years.
Eliminate incarceration and reduce fines and fees for certain traffic offenses.	Elements introduced as part of AB 907, which did not succeed.	Entire recommendation.
Establish that low-value thefts without serious injury or use of a weapon are misdemeanors.	Introduced as SB 82, which did not succeed.	Entire recommendation.
Require that short prison sentences be served in county jails.	No action.	Entire recommendation.
Clarify parole suitability standards to focus on risk of future violent or serious offenses.	No action.	Entire recommendation.

Additional data and analysis about some of these recommendations are included after the Recommendations in this report.

Language Used Throughout This Report

As the Committee’s 2020 report, this report avoids using the term “inmate,” “prisoner,” or “offender.” Instead, the report uses “incarcerated person” and similar “person-first” language. Other official bodies have made similar choices about language,³² and the Committee encourages stakeholders — including the Legislature when drafting legislation — to consider doing the same.

³² Nancy G. LaVigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, Urban Institute (Apr. 4, 2016); 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. Strengthen the Mental Health Diversion Law

Recommendation

More people can and should be safely diverted away from incarceration and into community-based mental health treatment programs.

The Committee therefore recommends the following:

Revise the mental health diversion law to presume that when a defendant has a diagnosis for a specified “mental disorder,” the statutory requirement that the mental disorder “was a significant factor in the commission of the charged offense” is satisfied.

Relevant Statutes

Penal Code § 1001.36(b)(1)(B)

Background and Analysis

A 2018 mental health diversion law is currently underutilized, despite a universally-acknowledged mental health crisis in California’s prisons and jails.

The closure of most California state mental hospitals beginning in the 1960s, accompanied by the state’s subsequent failure to build community-based treatment facilities, led to thousands of people with mental health conditions becoming homeless³³ or incarcerated in later decades.³⁴ Prison overcrowding and poor treatment of this population led to federal litigation, population cap orders, and monitoring of prison conditions.³⁵ Years after the initiation of this litigation, the problems have not been solved. County referrals of people who are incompetent to stand trial to the Department of State Hospitals increased 60% between 2013–14 and 2017–

³³ E. Fuller Torrey, *Out of the Shadows: Confronting America's Mental Illness Crisis*, John Wiley & Sons (1997); Christopher Jencks, *The Homeless*, Harvard University Press (1994); E. Fuller Torrey et al., *The Shortage of Public Hospital Beds for Mentally Ill Persons*, Treatment Advocacy Center; Doris A. Fuller, et al., *Going, Going, Gone: Trends and Consequences of Eliminating State Psychiatric Beds*, Office of Research and Public Affairs, Treatment and Advocacy Center (2016).

³⁴ See, e.g., Steven Raphael and Michael Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, *Journal of Legal Studies* (Jan. 2013) (finding significant rates of people incarcerated during 1980 through 2000 who would have been housed in mental institutions in years past, before deinstitutionalization occurred); Y. Nina Gao, *The Relationship Between Psychiatric Inpatient Beds and Jail Populations in the United States*, *J Psychiatr Pract.*, 27(1): 33-42 (Feb. 2021) (reducing local psychiatric inpatient beds results in corresponding increases in local jail populations).

³⁵ See *Coleman v. Brown*, Case No. 90-CV-520 LKK-JFM (N.D. Cal.); *Brown v. Plata and Coleman et al.*, 563 U.S. 493 (2011).

18.³⁶ Over 30,000 people in California’s prisons (nearly a third of the total population) currently receive mental health treatment, and around six thousand receive the highest level of treatment for their severe symptoms.³⁷ The average rate of suicides in California’s prisons increased by nearly 28% between 2001 and 2019.³⁸ California state prisons spent \$800 million on mental health care in the last fiscal year.³⁹

At the county level, the issue also remains dire. According to its director of mental health, the Los Angeles County Jail is the nation’s largest mental health institution.⁴⁰ The Los Angeles County Jail’s population with mental illness has doubled in the last decade to over 6,000 people, with its Twin Towers facility nearly entirely dedicated to “moderate” and “high” observation housing.⁴¹ More than 41% of those detained in the Los Angeles jails have identified mental health needs (38% of all men and 66% of all women),⁴² compared to only 14% back in 2009.⁴³ Other research on the Los Angeles jail population showed that Black people accounted for 41% of those receiving mental health services, even as they made up 30% of the overall jail population.⁴⁴ And in California’s jails overall, the average rate of suicides per 100,000 people increased by 31% between 2005 and 2019.⁴⁵

The Los Angeles Office of Diversion and Reentry found that large numbers of people jailed with mental illness are “charged with a crime for behavior in which their mental illness was a significant factor.”⁴⁶ The Department of State Hospitals similarly noted — based on research by

³⁶ From 2013–14 to 2017–18, there was a 60% increase in the average number of county referrals of people who were incompetent to stand trial to Department of State Hospitals. Department of State Hospitals Annual Report, 10 (2018).

³⁷ Data provided by CDCR Office of Research. Those in the highest level of care at CDCR are enrolled in the Enhanced Outpatient Program (“EOP”).

³⁸ E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons, 2000-2019*, U.S. Department of Justice, Bureau of Justice Statistics, 21 Table 11 (Oct. 2021) (This statistic includes both state and federal prisons in California).

³⁹ Scott Graves, *Many Californians in Prisons and Jails have Mental Health Needs*, California Budget & Policy Center (Mar. 2020).

⁴⁰ *America’s Mental Health Crisis Hidden Behind Bars*, NPR (Feb. 25, 2020). The second and third largest mental health institutions in the United States are also jails in Cook County, Illinois and Rikers Island, New York. *Id.*

⁴¹ Vera LA jail tracking data: <https://www.vera.org/care-first-la-tracking-jail-decarceration>; Francine Kiefer, *From LA Jail, Two Inmates Pioneer Care for Mentally Ill Peers*, Christian Science Monitor (May 18, 2021).

⁴² Vera LA jail tracking data: <https://www.vera.org/care-first-la-tracking-jail-decarceration> (LA current jail population is current from 9/22/21).

⁴³ Stephanie Brooks Holliday, Nicholas M. Pace, Neil Gowensmith, Ira Packer, Daniel Murrie, Alicia Virani, Bing Han, Sarah B. Hunter, *Estimating the Size of the Los Angeles County Jail Mental Health Population Appropriate for Release into Community Services*, RAND Corporation, 1 (2020).

⁴⁴ Oona Appel et al., *Differential Incarceration by Race-Ethnicity and Mental Health Service Status in the Los Angeles County Jail System*, *Psychiatric Services* 71:8, August 2020.

⁴⁵ E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons, 2000-2019*, U.S. Department of Justice, Bureau of Justice Statistics, 12 Table 3 (Oct. 2021). However, the rate of suicides in California jails was the same in 2001-04 and 2015-19. *Id.*

⁴⁶ Los Angeles County Men’s Central Jail Closure Workgroup, *Men’s Central Jail Closure Plan: Achieving a Care First Vision*, Los Angeles County Sheriff’s Department, Department of Health Services, Office of Diversion & Reentry, 64 (Mar. 31, 2021).

the University of California, Davis detailed below – that many people with serious mental illnesses “are being introduced into the criminal justice system because of crimes associated with untreated symptoms of psychosis or chronic homelessness.”⁴⁷ In the Los Angeles County jail, 20% of the mental health population had misdemeanor charges, compared to only 10% of the overall population.⁴⁸

As Sheriff Kory Honea of Butte County testified to the Committee in July 2020, while jails are regularly required to treat people with mental health needs due to a lack of adequate mental health facilities and care in the community, custodial environments “are not typically the best place to treat mentally ill individuals.”⁴⁹ Recently, the Cato Institute similarly recommended that California “stop using the prison system as a de facto mental health treatment program.”⁵⁰

In addition to the lack of quality mental health care available in prisons and jails, it is also much less expensive to treat people with mental illness in community-based facilities.⁵¹ Community-based mental health treatment costs over three times less than imprisonment – approximately \$20,000 per year compared to over \$75,000.⁵²

In 2018, the Governor signed AB 1810, which established a new mental health diversion law, Penal Code section 1001.36, to increase the numbers of people with mental illness diverted from incarceration into community-based treatment programs.⁵³ Under this new law, courts can divert people with mental health disorders who committed misdemeanors and most felonies out of the criminal system and into treatment,⁵⁴ but must deny people who pose an unreasonable danger to public safety.⁵⁵ To qualify for this diversion program, the defense must show that a candidate has a mental health disorder, and that the disorder “substantially contributed to” their commission of the offense.⁵⁶

Since the introduction of AB 1810, courts have denied many who have been identified as candidates for community based mental health treatment.⁵⁷ To increase the use of mental health diversion, the procedural process for obtaining diversion could be simplified by presuming that a defendant’s diagnosed mental disorder has a connection to their offense.⁵⁸ A

⁴⁷ Department of State Hospitals Annual Report, 10 (2018).

⁴⁸ Oona Appel et al., *Differential Incarceration by Race-Ethnicity and Mental Health Service Status in the Los Angeles County Jail System*, Psychiatric Services 71:8, August 2020.

⁴⁹ Submission of Sheriff Kory Honea, Butte County, to Committee on Revision of the Penal Code (July 23, 2020).

⁵⁰ Michael D. Tanner, *Cato’s Project on Poverty and Inequality in California: Final Report*, Cato Institute, 42 (Nov. 1, 2021).

⁵¹ Senate Floor Analysis of SB 215, 2-3 (Aug. 28, 2018).

⁵² *Id.*

⁵³ SB 215 amended AB 1810 in several ways, including by eliminating some offenses from consideration from diversion and authorizing courts to request hearings to require a candidate to show they are potentially eligible for diversion. *Id.* at 1.

⁵⁴ People who commit murder, manslaughter, rape and other sex offenses are not eligible for diversion under Penal Code § 1001.36.

⁵⁵ Penal Code § 1001.36 (b)(1)(A).

⁵⁶ Penal Code § 1001.36 (b).

⁵⁷ Judicial Council, *Mental Health Diversion Data Summary Report* (2019 - 2021 Q1).

⁵⁸ Penal Code § 1001.36(b)(1)(B).

judge could deny diversion for other reasons currently permitted under the law, including finding that the individual would pose an unreasonable risk to public safety if placed in a diversion program.⁵⁹

No similar nexus requirement between a candidate's mental health disorder and their crime exists in other California mental health diversion laws, including Penal Code sections 1170.9 (probation and mental health treatment for veterans) and 1001.80 (military pre-trial diversion program).⁶⁰

Empirical Research

Researchers from the University of California, Davis found that almost half of the people referred to the Department of State Hospitals for being incompetent to stand trial — meaning a court finds that they are unable to understand the nature of the court process, such as the charges against them and the parties involved in the court proceeding, or assist in their own defense, and refers them to the state hospital to have their competency restored⁶¹ — were unsheltered homeless individuals at the time of their arrest.⁶²

An estimated 61% of people in the Los Angeles County Jail's mental health population (3,368 people) were found to be appropriate for release into a community-based diversion program, according to a recent study by the RAND Corporation.⁶³ Another RAND study of a supportive housing program run by the Los Angeles Office of Diversion and Reentry, which predominantly serves people with mental illness found that 86% of the participants had no new felony convictions and 74% had stable housing after 12 months.⁶⁴

Researchers have recently found that drops in local psychiatric bed capacity appear to be associated with immediate reciprocal growth in local jail populations.⁶⁵ These findings are consistent with those of earlier studies finding that many people with mental illness in prison would have been housed in state mental hospitals.⁶⁶

⁵⁹ Penal Code § 1001.36(b)(1)(F).

⁶⁰ Penal Code §§ 1170.9, 1001.80. In evaluating veterans treatment court programs, Judicial Council noted that no nexus requirement between a veteran's mental health issues and the crime existed in either law, and thus recommended that courts not require such a nexus to be eligible for veterans treatment courts' diversionary programs. Judicial Council of California, *Re: Collaborative Justice: Survey and Assessment of Veterans Treatment Courts, as required under Senate Bill 339*, 15, 42 (June 12, 2020).

⁶¹ Penal Code §§ 1367-68.

⁶² Barbara E. McDermott, Katherine Warburton, Chloe Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, CNS Spectr. (Apr. 2020).

⁶³ Stephanie Brooks Holliday, Nicholas M. Pace, Neil Gowensmith, Ira Packer, Daniel Murrie, Alicia Virani, Bing Han, Sarah B. Hunter, *Estimating the Size of the Los Angeles County Jail Mental Health Population Appropriate for Release into Community Services*, RAND Corporation (2020).

⁶⁴ Sarah B. Hunter & Adam Scherling, *Los Angeles County Office of Diversion and Reentry's Supportive Housing Program: A Study of Participants' Housing Stability and New Felony Convictions*, Rand Corporation, 2-3 (2019).

⁶⁵ Y. Nina Gao, *The Relationship Between Psychiatric Inpatient Beds and Jail Populations in the United States*, J Psychiatr Pract., 27(1): 33-42 (Feb. 2021).

⁶⁶ Steven Raphael and Michael Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, Journal of Legal Studies (Jan. 2013).

Incarcerated people with mental illness are disproportionately placed in solitary confinement and restrictive housing, according to researchers.⁶⁷ This can lead to an exacerbation of their symptoms, as well as increased rule violations, self-injury, health problems, and subsequent placement in inpatient hospitals.⁶⁸ However, researchers have found that in-prison therapeutic diversion programs as alternatives to restrictive housing have had positive outcomes.⁶⁹

Insights from Other Jurisdictions

Most states have mental health diversion programs (generally on the county level) that allow people facing criminal charges — generally less serious felonies and misdemeanors — to be diverted to treatment rather than prison or jail.⁷⁰ In other states with a statutory framework, such as Florida and Illinois, the programs do not require the defense to show a nexus between the mental illness and the offense.⁷¹

⁶⁷ L Dellazizzo, *Is Mental Illness Associated with Placement into Solitary Confinement in Correctional Settings? A Systematic Review and Meta-Analysis*, *Int J Ment Health Nurs*. 2020; DH Cloud, *Public Health and Solitary Confinement in the United States*, *Am J Public Health* (2015).

⁶⁸ BA Williams, et al., *The Cardiovascular Health Burdens of Solitary Confinement*, *J Gen Intern Med*. 2019; S. Grassian, *Psychopathological Effects of Solitary Confinement*, *Am J Psychiatry* (1983); Molly Remch, *Impact of a Prison Therapeutic Diversion Unit on Mental and Behavioral Health Outcomes*, *American Journal of Preventive Medicine* (Sept. 2021).

⁶⁹ Molly Remch, *Impact of a Prison Therapeutic Diversion Unit on Mental and Behavioral Health Outcomes*, *American Journal of Preventive Medicine* (Sept. 2021).

⁷⁰ “Prevalence of Mental Health Diversion Practices,” Treatment Advocacy Center.

⁷¹ See, e.g., Eleventh Judicial Circuit of Florida, Criminal Mental Health Project; Florida Statute § 948.08(8)(a) (2021); 730 ILC § 168, Illinois Mental Health Court Treatment Act; State of Illinois, Circuit Court of Cook County, Mental Health Court Program. See also Utah Third District Mental Health Court, Policies & Procedures Manual, at 5; Seattle Municipal Court, Mental Health Court Eligibility Guidelines. But see King County District Court Regional Mental Health Court, Eligibility Criteria (requiring a nexus between the defendant’s mental health symptoms and the circumstances or behavior leading to his or her involvement in the criminal justice system).

2. Encourage Alternatives to Incarceration

Recommendation

California’s Penal Code lacks a clear statement about when incarceration is appropriate, unlike federal and other state laws.

The Committee therefore recommends the following:

1. Add a statement to the Penal Code that the disposition of a criminal case shall use the least restrictive means possible, including but not limited to diversion, restorative justice, probation, or incarceration.
2. Require that, unless otherwise prohibited, in all cases with nonviolent charges, an alternative to incarceration shall be imposed unless:
 - a. incarceration is necessary to prevent physical injury to others; or
 - b. failing to impose incarceration would depreciate the seriousness of the offense.

Relevant Statutes

Penal Code § 1170(a)(1)

Background and Analysis

California can safely reduce the number of people behind bars by modifying the Penal Code to explicitly encourage more restraint in the use of incarceration. While the Penal Code has numerous sections that require judges to impose incarceration,⁷² it contains few statements limiting or discouraging its use.⁷³

An increased use of alternatives to incarceration helped New York state reduce its prison population by 60% and New York City reduce its jail population by 40%.⁷⁴ During the Committee’s July 2021 meeting, Insha Rahman, Vice President of Advocacy and Partnerships at Vera Institute of Justice, explained that, unlike the California experience, New York’s incarcerated population fell without major action from its legislature or directives from federal

⁷² See, e.g., Penal Code §§ 462(a), 1203(e), 1203.045(a), 1203.049(a), 1203.055(a), 1203.06(a), 1203.07(a).

⁷³ One notable exception is Penal Code section 1210.1(a), which was created by Proposition 36. Under this section, a person convicted of a non-violent drug offense is entitled to receive probation, and with certain exceptions, courts are not allowed to impose incarceration as a condition of probation. (Penal Code § 1201.1; See also California Proposition 36, Probation and Treatment for Drug-Related Offenses Initiative (2000), Ballotpedia.

⁷⁴ Greg Berman and Robert V. Wolf, *Alternatives to Incarceration: The New York Story*, New York State Bar Assoc. Govt., Law and Policy Journal, Vol. 16 (Winter 2014); Judith A. Greene and Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration while Increasing Public Safety*, Federal Sentencing Reporter, Vol 29, No. 1, 22.

court.⁷⁵ Instead, the statewide decline in incarceration was driven by changes in New York City, which accounts for about half of the state population.⁷⁶

California should improve on the New York approach by formally incorporating a statement of restraint when imposing punishment. Such statements of “parsimony” are well-established legal principles in our criminal legal system and are embedded in federal law and laws of other states.⁷⁷

And at the Committee’s first meeting in January 2020, Professor Craig Hainey, professor of psychology at UC Santa Cruz, described a major report from the National Academy of Sciences concluding that incarceration in the United States could not be justified by any benefit to society and was itself a source of injustice and social harm.⁷⁸ Professor Hainey, who was a contributor to the report, told the Committee that the report made “unprecedented” policy recommendations as part of its report because mass incarceration had helped the United States “lose a sense of who we were as a society.”⁷⁹ One of those recommendations was that criminal legal systems should adopt statements of parsimony that “the violence of the criminal justice system should not be unleashed until it is absolutely necessary and only in those instances in which it is absolutely necessary to do so.”⁸⁰

The Committee’s recommendation that such a statement be included in the Penal Code — coupled with the directive that alternatives to incarceration should be imposed in nonviolent cases subject to a court’s defined discretion — can reduce our state’s reliance on incarceration while leaving judges with the option to incarcerate when necessary to protect public safety.

Empirical Research

Increasing the use of alternatives to incarceration may meaningfully reduce racial disparities in the criminal system. Research conducted by the Public Policy Institute of California in 2018 found that while Black people made up slightly less than 6% of California’s population, they accounted for 16% of all arrests, and their arrest rate (the number arrested per 100,000 people) was slightly more than three times that of whites.⁸¹ When California reduced penalties for several low-level felonies with the passage of Proposition 47 in 2014, disparities in the rate at which Black and white people were arrested fell by almost 6%, though Black people were still

⁷⁵ Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, 0:16:30–0:21:36; Ram Subramanian, Rebecka Moreno and Sharyn Broomhead, Vera Institute of Justice, *Recalibrating Justice: A Review of 2013 State Sentencing and Corrections Trends*, 4 (2014).

⁷⁶ Judith A. Greene and Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration while Increasing Public Safety*, *Federal Sentencing Reporter*, Vol 29, No. 1, 22; James Austin and Michael Jacobsen, *How New York City Reduced Mass Incarceration: A Model for Change?*, Jan. 2013.

⁷⁷ See Daryl Atkinson and Jeremy Travis, *The Power of Parsimony*, *The Square One Project*, 10–12 (2021).

⁷⁸ See, e.g., Committee on Revision of the Penal Code, January 24, 2020 Meeting, 0:21:34–0:29:23; 0:57:07–1:00:35 (describing National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, D.C.: The National Academies Press (2014)).

⁷⁹ *Id.* at 0:57:55–0:58:41.

⁸⁰ *Id.* at 0:59:19–1:00:35.

⁸¹ Magnus Lofstrom et al., *Racial Disparities in California Arrests*, Public Policy Institute of California, Oct. 2019.

arrested at disproportionate rates.⁸² Researchers found that other reforms undertaken since 2009, including Public Safety Realignment, Proposition 36, and Proposition 57, narrowed racial disparities in the proportion imprisoned on a given day.⁸³

Research also shows that some community diversion programs lead to better outcomes than incarceration. In a recent study funded by the National Institute of Justice, researchers examined prosecutor-led diversion programs in 11 jurisdictions across the country.⁸⁴ They concluded that in the programs examined, pretrial diversion participation led to reduced re-arrest rates, and involved a lesser resource investment than similar comparison cases.⁸⁵

In a recent study of cases in Harris County Texas (which includes Houston), researchers found that first-time felony defendants who were granted diversion — a pause in criminal proceedings that gives the defendant an opportunity to complete specified requirements, like participation in drug treatment, to earn a dismissal of their case — had better criminal justice and economic outcomes over a 10-year period.⁸⁶ Specifically, for those granted diversion, the probability of any future conviction declined by approximately 45% and the total number of future convictions fell by 75%.⁸⁷ Additionally, people who were granted diversion were also found to have higher quarterly employment rates and total earnings.⁸⁸

Insights from Other Jurisdictions

Other states have statements limiting the severity of punishments. In Alabama, Arkansas, Michigan, Minnesota, and Tennessee, sanctions are required to be the least restrictive or only as severe as necessary to achieve the purposes of sentencing.⁸⁹ New York law provides that “a minimum amount of confinement should be imposed consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.”⁹⁰ Federal law similarly requires sentences to be no greater than necessary.⁹¹

In addition to the statements of parsimony found in state and federal law, the newest version of the Model Penal Code: Sentencing states sentences should be no more severe than necessary.⁹²

⁸² Magnus Lofstrom, Brandon Martin, and Steven Raphael, *Proposition 47’s Impact on Racial Disparity in Criminal Justice Outcomes*, Public Policy Institute of California, 17–18 (2020). See also, Magnus Lofstrom et al., *Racial Disparities in California Arrests*, Public Policy Institute of California (Oct. 2019).

⁸³ *Id.*

⁸⁴ Michael Rempel et al., *National Institute of Justice’s Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness*, (Oct. 2017).

⁸⁵ *Id.* at viii.

⁸⁶ Michael Mueller-Smith and Kevin T. Schnepel, *Diversion in the Criminal Justice System*, Rev. of Economic Studies 88, 883–936 (2021).

⁸⁷ *Id.* 885.

⁸⁸ *Id.*

⁸⁹ Ala. Code § 12-25-2(b); Ark. Code § 16-90-801(c)(4); Mich. Comp. Laws 769.33a(4)(c); Minnesota Sentencing Guidelines and Commentary, at 1 (2015); Tenn. Code § 40-35-103(4).

⁹⁰ *People v. Notey*, 72 A.D.2d 279, 282–83 (1980) (citations and quotation marks omitted).

⁹¹ 18 U.S.C.A. § 3553(a)

⁹² Model Penal Code: Sentencing (Am. Law Inst. Prepublication Draft, 2021), § 1.02(2)(a)(iii). The Model Penal Code: Sentencing was drafted by national criminal justice experts and provides exemplary sentencing statutes for state legislatures.

According to the drafters, “[t]he principle embodies a policy preference for the use of the least restrictive alternative in individual criminal sentences, and also guards against the needless expenditure of correctional resources.”⁹³ In another section of the Model Penal Code, sentences of incarceration are authorized on only two grounds: to incapacitate dangerous people, and when failure to incarcerate would diminish the seriousness of the offense, guideposts that this recommendation adopts.⁹⁴

Additional Considerations

- Alternatives to incarceration may also be appropriate in other cases beyond the nonviolent offenses discussed here. The preference for an alternative to incarceration recommended here should not be read as encouraging incarceration in violent cases.

⁹³ *Id.* at 58-59.

⁹⁴ *Id.* at § 6.11(2).

3. Expand CDCR’s Existing Reentry Programs

Recommendation

Community-based residential reentry programs have proven extremely successful in California, dramatically reducing recidivism according to recent empirical research.

The Committee therefore recommends the following:

1. Expand the current programs so that eventually all people released from prison sentences receive residential reentry services.
2. Allow the Board of Parole Hearings to grant release to a residential reentry program.

Relevant Statutes

Penal Code §§ 1170.05, 3410–3424, 6250–6259

15 CCR §§ 3078.1-3078.6

Background and Analysis

While more than 30,000 people are released from California’s prisons each year, nearly half (45%) of them are reconvicted within three years.⁹⁵ Matthew Cate, former Secretary of the Department of Corrections and Rehabilitation, informed the Committee in July 2021 that many people exit California’s prisons “inadequately prepared” for reentry, “destined to commit a new crime within three years,” and with a high likelihood of being “returned to the same broken system.”⁹⁶ This is in part because prisons are designed for security rather than rehabilitation, according to Cate, and they lack adequate space for therapeutic environments.⁹⁷

To ease the transition from prison back to communities, CDCR has a small number of programs where incarcerated people can spend up to their last two years of their prison sentence in community-based transitional housing.⁹⁸ The Legislature recently increased this timeframe via the passage of AB 145 in July 2021.⁹⁹ Two of these programs, the Male Community Reentry Program, and the women’s Custody to Community Transitional Reentry Program,¹⁰⁰ currently serve about 1,200 people at a time — about 1% of CDCR’s current population.¹⁰¹

⁹⁵ See CDCR Office of Research, Recidivism Report for Offenders Released in Fiscal Year 2015–16, 105, Table 45 (Sept. 2021).

⁹⁶ *Id.* Matt Cate, “California Reentry White Paper,” submitted to the Committee (July 2021).

⁹⁷ *Id.* Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, part 4, at 13:25-14:10.

⁹⁸ CDCR, *Male Community Reentry Program*.

⁹⁹ AB 145, a public safety trailer bill passed in July 2021, recently expanded the length of stay to “less than two years.” AB 145 (amendment to Penal Code Section 6258.1(c)).

¹⁰⁰ CCTRP houses women convicted of serious and/or violent crimes.

¹⁰¹ *Id.*; staff interview with Doug Bond, Executive Director of the Amity Foundation. A separate 24-bed Community Prisoner Mother Program allows parents to reside with their children up to age six. CDCR, Community Prisoner Mother Program. And an Alternative Custody Program permits some people to

These residential reentry programs provide various services close to participants' home counties, including transitional housing, job skills training, assistance finding employment, substance abuse treatment, mental health care, medical care, family reunification support, establishment of care with community-based medical and behavioral health treatment providers, and help locating permanent housing.¹⁰² Participants move to less restrictive settings as they demonstrate the ability to meet program requirements.¹⁰³ Doug Bond, Executive Director of MCRP contractor Amity Foundation, told the Committee that the program's therapeutic and rehabilitative environment is essential to helping individuals successfully reenter society from prison.¹⁰⁴

These programs can only accept a small fraction of people leaving prison due to the limited numbers of beds available only to people reentering in 13 counties.¹⁰⁵ Expanding these residential reentry programs could provide for a greater degree of specialization, including possible programs specifically for those returning home from lengthy sentences, people with substance abuse problems and mental health conditions, and survivors of domestic violence. For example, Susan Burton, Executive Director of A New Way of Life (and herself a formerly incarcerated person), noted that successful community-based reentry programs for women focus on their unique needs, including domestic violence and trauma survivorship.¹⁰⁶

These reentry programs cost about half as much as prison. Overall program costs range from \$100–175 per person per day (roughly \$37,000–\$64,000 per year)¹⁰⁷ compared to CDCR's average cost per incarcerated person of \$281 per day (\$102,736 per year).¹⁰⁸ And substantial savings could be realized if the prison population is reduced enough to close or repurpose existing prisons.¹⁰⁹

In addition to expanding the existing program, the Board of Parole Hearings should be given the ability to place people into a residential reentry program.¹¹⁰ Jennifer Shaffer, Executive

serve up to their last 12 months in a private residence, transitional care facility, or residential drug treatment program. CDCR, Alternative Custody Program.

¹⁰² CDCR, *Male Community Reentry Program*; Matt Cate, "California Reentry White Paper," submitted to the Committee (July 2021).

¹⁰³ Matt Cate, "California Reentry White Paper," submitted to the Committee (July 2021); staff communication with Doug Bond, Executive Director, Amity Foundation.

¹⁰⁴ Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, part 4, 10:25-10:55.

¹⁰⁵ CDCR, *Male Community Reentry Program*; CDCR, *Custody to Community Transitional Reentry Program*; Penal Code § 6258.1(a) & (e); Higuera, et al., *supra* at 18-19. Counties participating include Butte, Tehama, Nevada, Colusa, Glenn, Sutter, Placer, Yuba, Kern, Los Angeles, San Diego, San Joaquin, and Sacramento.

¹⁰⁶ *Id.* at 21:10-23:30; Staff interview with Susan Burton, Executive Director of A New Way of Life.

¹⁰⁷ Higuera, et al., *Effects of the Male Community Reentry Program (MCRP on Recidivism in the State of California)*, 13 (Jun. 2021); Doug Bond, Amity Foundation, Submission to Committee (July 2021).

¹⁰⁸ 2021–22 Governor's Budget, California Department of Corrections and Rehabilitation, CR-7 (estimated per capita costs for adult institutions).

¹⁰⁹ Matt Cate, "California Reentry White Paper," submitted to the Committee (July 2021).

¹¹⁰ Penal Code § 6253 allows the Director of Corrections to transfer people who have *already been granted* parole to Community Corrections Centers (MCRPs and CCTRPs).

Director of the Board of Parole Hearings, told the Committee that giving the Board this choice would be “a viable option for increasing [parole] approval rates.”¹¹¹

Expanding CDCR’s community-based reentry programs will give people leaving prison the support necessary to safely transition from prison to their communities while reducing recidivism.

Empirical Research

A study published in June 2021 that was prepared for CDCR by Stanford University’s Public Policy Program found that people who participated in MCRPs for nine months or longer were 92% less likely to be reconvicted than a control group that completed their sentences within California prisons.¹¹²

Additionally, according to CDCR’s recidivism reports, the three-year reconviction rate for women released in 2015-16 who participated in the CCTRP program was nearly half the overall female reconviction rate (20% for participants in the CCTRP program compared to 35% overall).¹¹³ And the reconviction rate remained low (24%) for women who participated in the Alternative Custody Program — a different CDCR program that allows some people to serve up to their last 12 months in a private residence, transitional care facility, or residential drug treatment program.¹¹⁴

Similarly, researchers found that formerly incarcerated participants in work-release focused Residential Community Release Programs in New Jersey (who participated 9–12 months before the end of their sentences) had fewer parole revocations due to technical violations and fewer returns to prison for any reason, compared to non-participants who were released into the community directly from prison.¹¹⁵ But they found no significant difference between the two groups in terms of number of days until rearrest, reconviction, or reincarceration.¹¹⁶ Researchers also noted that the program aided participants to transition from incarceration back into the community by helping them learn valuable employment skills and “build a resistance to criminal influences.”¹¹⁷

Additionally, a 2019 meta-analysis of nine studies examining the effects of residential reentry programs on recidivism found that they were “an effective correctional strategy for successful reentry,” but noted that further work was necessary to determine best programming practices.¹¹⁸

¹¹¹ Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, 24:20-28:10.

¹¹² Higuera, et al., *Effects of the Male Community Reentry Program* (MCRP on Recidivism in the State of California, 43 (Jun. 2021).

¹¹³ CDCR, Recidivism Report for Offenders Released in Fiscal Year 2015-16, at 108-109, Tables 48-49.

¹¹⁴ *Id.*; CDCR, Alternative Custody Program.

¹¹⁵ Douglas Routh & Zachary Hamilton, *Work Release as a Transition: Positioning Success Via the Halfway House*, *Journal of Offender Rehabilitation*, 248, 250-51 (2015).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 251.

¹¹⁸ Jennifer S. Wong, et al., *Halfway Out: An Examination of the Effects of Halfway Houses on Criminal Recidivism*, *International Journal of Offender Therapy and Comparative Criminology* 63(7), 1034 (2019).

Insights from Other Jurisdictions

The Federal Bureau of Prisons places people serving up to their final year of a federal sentence in community-based transitional housing run by contractors.¹¹⁹ Unlike in California, placement in one of these federal programs is mandatory in most cases.¹²⁰

Other jurisdictions also allow placement into residential reentry programs for a portion of the end of prison sentences. For example, Iowa allows people approved by the Board of Parole to leave prison and reside in non-secure community-based residential facilities on a work release program,¹²¹ New Jersey has a Residential Community Release Program that has had some positive outcomes (discussed above),¹²² and The Illinois Department of Corrections runs four residential Adult Transition Centers which focus on job training and work release.¹²³ Researchers have found that those who successfully complete the Illinois program have significantly higher post-release earnings and employment rates compared to nonparticipants and program drop-outs.¹²⁴

Canada similarly allows people to serve part of their custodial sentences in community-based residential facilities, where they may leave during the day for work, treatment, education, or other reasons.¹²⁵

Additional Considerations

- The location of the community-based reentry housing programs should be within close proximity to participants' counties of origin in order to best help them transition back to their communities.
- The Committee noted concerns about the operation of residential reentry programs by for-profit entities, as some believe they employ "exploitative practices," and their incentives may not be best-aligned with assisting people to successfully transition back to their communities and lower recidivism.¹²⁶

¹¹⁹ 18 U.S.C. § 3624(c)(1); US Courts, *Residential Reentry Centers Reference Guide*; Federal Bureau of Prisons, *Completing the Transition*.

¹²⁰ See United States Courts, *How Residential Reentry Centers Operate and When to Impose*; 18 U.S.C. § 3624(c)(1).

¹²¹ Iowa Department of Corrections, *About Community Based Corrections*.

¹²² New Jersey's programs include Millicent Fenwick House (50 bed women's reentry program), Clinton House-Mercer County (40 bed work-release program for men), and Hemm House (60-bed work-release program for men). New Jersey Association on Correction, *Reentry*.

¹²³ Illinois Department of Corrections, *Adult Transition Centers*.

¹²⁴ Haeil Jung, *Do Prison Work-Release Programs Improve Subsequent Labor Market Outcomes? Evidence from the Adult Transition Centers in Illinois*, *Journal of Offender Rehabilitation*, 397-98 (Jul. 3, 2014).

¹²⁵ Correctional Service Canada, *Community-Based Residential Facilities*; staff interview with David Crowley, Former Board Member, National Parole Board - Ontario Region (June 2021).

¹²⁶ AB 32, *Assembly Floor Analysis*, 2-3 (Sept. 10, 2019).

4. Equalize Parole Eligibility

Recommendation

California law provides early parole consideration for people convicted of nonviolent crimes. The program has been successful in incentivizing rehabilitation and allowing early release for people serving long sentences who no longer pose a threat to public safety. Eligibility for the parole review program should be expanded.

The Committee therefore recommends the following:

Expand parole eligibility in prison to people convicted of all offenses after they have served the term for their primary offense.

Relevant Statutes and Regulation

Penal Code § 3041(a)(1)
15 CCR § 3491(a)

Background and Analysis

California voters approved Proposition 57 in 2016, which allows people in prison for nonviolent offenses to be released to parole supervision after they have served the core part of their sentence.¹²⁷ But people convicted of violent offenses, including people imprisoned for their first offense, are left out entirely of the parole review process no matter how small a risk they present to public safety. Jennifer Shaffer, Executive Officer of the Board of Parole Hearings, informed the Committee that if this group of people were eligible for parole release, around 42,000 people would benefit.¹²⁸ As Professor John Pfaff told the Committee, given the proportion of people serving long sentences for violent offenses in California’s prisons, “reduc[ing] California’s prison population any further requires having serious questions about violence and serious violence.”¹²⁹

California has the administrative infrastructure to extend parole eligibility to this group of people. The current nonviolent parole review process, created in large part by Proposition 57, handles thousands of people a year with a “paper review” process that has resulted in a grant rate between 17% to 23%.¹³⁰ And the Board of Parole Hearings reviews thousands of other people for release every year under the traditional “lifer parole” process.

Though the costs of reviewing this additional group of people would be large, the state would benefit from reduced incarceration costs if people presenting a low risk to public safety were released from prison. When the current nonviolent parole review process first began as a

¹²⁷ Cal. Const., art. I, § 32(a)(1).

¹²⁸ More than 18,000 with a mix of violent and nonviolent convictions and more than 23,000 with violent convictions only. Jennifer P. Shaffer, Executive Officer, Board of Parole Hearings *Proposition 57 Nonviolent Parole Review Process*, 14–16 (July 2021) (report prepared for the Committee and available in the meeting materials for the July 2021 meeting).

¹²⁹ Committee on Revision of the Penal Code, July 13, 2021 Meeting, Part 1, 0:22:35–0:23:31.

¹³⁰ *Id.* at 7.

result of a federal court order, half of the people reviewed were found suitable for release.¹³¹ Jennifer Shaffer, Executive Officer of the Board of Parole Hearings, explained that the grant rate was initially high because the first wave of reviews considered people who had served long periods of time in prison.¹³² By similar logic, it is likely that the early years of a similar program applying to all people not currently eligible for parole release would have similar grant rates and a corresponding large decrease in correctional costs.

Allowing parole release from prison for everyone not currently eligible for it would simplify California's Penal Code and associated regulations. It would also incentivize positive behavior in prison and reduce unnecessarily long sentences for people who present a low risk to public safety. It would also help alleviate extreme sentences created by sentencing enhancements, helping safely reduce the number of people incarcerated in California's prisons.

Empirical Research

Research has consistently shown that people convicted of "violent" offenses often have lower recidivism rates than people convicted of nonviolent offenses. In California, the three-year reconviction rate for people committed to prison for a nonserious/nonviolent offense is 49% but is only 29% for people committed to prison with a violent offense.¹³³ While the lower recidivism rates for people convicted of violent offenses may in part be explained by people being older at release because their sentences are longer, other research shows that the severity of someone's crime of conviction does not predict recidivism risk.¹³⁴

Insights from Other Jurisdictions

Unlike California, many jurisdictions in the United States have retained fully indeterminate sentencing schemes that require every person in prison to be reviewed by a parole board to determine when they should be released.¹³⁵ For example, as Marshall Thompson, Vice-Chair, Utah Board of Pardons and Parole, told the Committee, judges in Utah do not set how long someone will be incarcerated — they instead determine whether someone will be sent to prison with the exact length of that sentence determined by the parole board subject to a series of sentencing guidelines.¹³⁶ Such an approach allows for a more dynamic evaluation of someone's public safety risk, instead of freezing that determination at the time of sentencing.¹³⁷

¹³¹ *Id.* at 7.

¹³² Committee on Revision of the Penal Code, July 13, 2021 Meeting, Part 2, 0:22:36–0:22:55.

¹³³ CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2015–16*, Figure 21 (Sept. 2021).

¹³⁴ Council on Criminal Justice, *New National Recidivism Report*, Sept. 1, 2020 (national data shows that "[p]eople released in 2012 who were convicted of homicide were the least likely to be rearrested, with 41.3% rearrested at least once over five years ... people convicted of property crimes were most likely to be rearrested, at 78.3% over five years."); James Austin, Vincent Schiraldi, Bruce Western, and Anamika Dwivedi, *Reconsidering the "Violent Offender,"* The Square One Project, Table 4 (May 2019).

¹³⁵ Different authorities count the number of indeterminate states differently, but there are between 12–33 states that are considered indeterminate. See Robina Institute of Criminal Law and Criminal Justice, *The Continuing Leverage of Releasing Authorities: Finding From A National Survey*, 2016, 1 (12 states self-reported they were fully indeterminate); Allison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures, 2015, 5 ("33 states operate a primarily indeterminate sentencing system").

¹³⁶ Submission of Marshall Thompson to Committee on Revision of the Penal Code, July 2021.

¹³⁷ *Id.*

Other Considerations

- The current nonviolent parole review process does not calculate eligibility using good conduct or other earned credits.¹³⁸ This recommendation expanding parole eligibility should be implemented to allow such credits to apply to when a parole decision is made.
- If passed by a majority vote in the Legislature, this recommendation would cover a large number of people serving sentences for violent convictions, including many who received a lengthened sentence due to a prior strike conviction. But unless passed by a two-thirds majority in the Legislature or a voter initiative, this recommendation would not apply to people serving a mandatory minimum sentence created by voter initiative, including people sentenced to 25-to-life under the Three Strikes law for a serious or violent felony.¹³⁹

¹³⁸ See 15 CCR § 3490(e); *In re Canady*, 57 Cal. App.5th 1022 (Ct. App. 2020).

¹³⁹ See, e.g., *People v. Cooper*, 27 Cal.4th 38, 47 (2002) (Legislature may address matters that an initiative measure does not specifically authorize or prohibit).

5. Modernize the County Parole System

Recommendation

Local governments are not using existing law allowing parole opportunities for people housed in county jails.

The Committee therefore recommends the following:

1. Require that all counties review for county parole release everyone sentenced to jail who would be eligible for parole consideration if confined in state prison.
2. Specify that the term of county parole supervision cannot be longer than two years or however long the person would have spent in jail (including credits) – whatever is shorter.
3. Specify that the county parole board member appointed by the Presiding Judge have professional or lived experience in the areas of social work, substance use disorder treatment, foster care, rehabilitation, community reentry, or the effects of trauma and poverty.
4. Clarify that people released to county parole are to be supervised by the county probation department.

Relevant Statutes

Penal Code §§ 3074–3089

Background and Analysis

More than a thousand people are serving jail sentences of five years or more in California’s jails, which were never designed or intended to house people convicted of felonies. This is a relatively new problem in California and was caused by California’s enactment of Public Safety Realignment 2011. Realignment shifted where people convicted of many less serious felonies served their sentences.¹⁴⁰ After Realignment many people who would have served their sentences in prison now do so in county jail.

Due to Realignment, many people are serving long sentences in jails, which were not designed for extended incarceration. The most recent statewide survey, conducted by the California State Sheriffs Association in 2016, showed that more than 1,500 people were serving a sentence of five years or more in county jail, with the longest sentence being 42 years.¹⁴¹ In Los Angeles County in July 2020, more than 500 people had jail sentences of three years or more in length, 45% of the population confined with Realigned jail sentences.¹⁴² Sheriff Kory Honea of Butte County also recently told the Committee that many jails have people serving sentences longer

¹⁴⁰ See, e.g., J. Richard Couzens and Tricia A. Bigelow, *Felony Sentencing After Realignment*, 6 (May 2017).

¹⁴¹ Letter of Cory Salzillo and Cathy Coyne, California State Sheriffs’ Association, Oct. 17, 2016.

¹⁴² Information provided to Committee staff by Los Angeles County Sheriff’s Department.

than 10 years and that the increased medical and mental health costs for this population is significant.¹⁴³

Ten years after Realignment, there has been no systemic solution to the problem of people serving long sentences in county jail. Many of the people with long jail sentences would be eligible for parole release under Proposition 57 if they were in prison.¹⁴⁴ But the law has had a perverse effect: people sent to prison because of their prior offense history have more opportunities for release than people in jail, who have a less serious offense history.¹⁴⁵

Little-used provisions in the Penal Code creating “county parole,”¹⁴⁶ could be modernized to address this problem. County parole has existed since at least the 1950s and allows people to be released from jail to supervision, if approved for release by a local county parole board. The Penal Code does not provide a legal standard for when a county parole application should be granted, instead giving each county parole board the authority to set its own “rules and regulations.”¹⁴⁷

The Penal Code appears to currently require each county to have a county parole program,¹⁴⁸ but few (if any) counties comply with this law. Part of the problem is that there is confusion about whether it is available to people serving Realigned jail sentences, as well as how long the appropriate terms of supervision should be and whether someone on supervision should have to pay for any portion of it.¹⁴⁹

County parole laws have not been significantly amended since 1978,¹⁵⁰ long before Public Safety Realignment shifted sentences for many offenses to county jail. The law could be modernized to allow county parole to be a meaningful tool for the post-Realignment world:

- To ensure equality between people sentenced to prison and jail, people who would receive a nonviolent parole review in prison should receive one in jail using the same eligibility and release standards.¹⁵¹

¹⁴³ Submission of Sheriff Kory Honea, Butte County, to Committee on Revision of the Penal Code, July 23, 2020. See also Magnus Lofstrom, Mia Bird, and Brandon Martin, *California’s Historic Corrections Reforms*, Public Policy Institute of California, 9 (September 2016).

¹⁴⁴ Cal. Const., art. I, § 32(a)(1) (Proposition 57’s nonviolent parole release authority).

¹⁴⁵ See Penal Code § 1170(h)(3) (requiring anyone with a prior strike conviction or required to register as a sex offender to serve their sentence in state prison).

¹⁴⁶ Penal Code § 3076(b).

¹⁴⁷ Penal Code § 3076(a).

¹⁴⁸ Penal Code § 3075(a) specifies: “There is in each county a board of parole commissioners ...”.

¹⁴⁹ Committee on Revision of the Penal Code Staff Memorandum 2021-14, 16 (Sept. 14, 2021). See also Asm. Com. on Public Safety, Analysis of AB 884 (2013–2014 Regular Session), May 3, 2013, 2 (California State Sheriffs’ Association noted that “very few counties are currently utilizing county parole”).

¹⁵⁰ See Stats. 1978, c. 918, p. 2884, § 1.

¹⁵¹ The California Attorney General recently noted that giving parole release opportunities to people convicted of more criminal offenses than other people raises constitutional equal protection issues. Petition for Review, *In re Mohammad Mohammad*, California Supreme Court Case No. S25999, 16 n.2 (citing *People v. McKee*, 47 Cal.4th 1172, 1202 (2010)); Respondent’s Opening Brief on the Merits, *In re Mohammad Mohammad*, California Supreme Court Case No. S25999, 39 n.16 (citing *People v. Valencia*, 3 Cal.5th 347, 376 (2017)).

- The current county parole law appears to authorize supervision up to three years.¹⁵² That length of time is out of step with other provisions of the Penal Code¹⁵³ and people serving county jail sentences should similarly be supervised for no more than two years, or whenever their sentences would have expired with the benefit of credits – whichever is shorter.
- The Penal Code provides that a county parole board has three members: a sheriff's representative, a probation representative, and a member of the public appointed by the presiding judge of the Superior Court.¹⁵⁴ There are no minimum qualifications for the person appointed by the presiding judge, but this person should have a background with experience relevant to the important decisions a county parole board makes. As the Penal Code suggests for parole commissioners at the state level, this professional or lived experience should be in the areas of social work, substance use disorder treatment, foster care, rehabilitation, community reentry, or the effects of trauma and poverty.¹⁵⁵
- Current law does not specify who supervises people on county parole.¹⁵⁶ The law should specify that the county probation department plays this role.

These modernizations to county parole are only a beginning. The law should continue to allow each county parole board to review additional people for release, as counties may find it appropriate to expand eligibility after they have revived their county parole board systems to meet the recommendation here.

Empirical Research

As the Committee noted in its 2020 report, research on people released from jails and prison in California shows that recidivism rates are lower for people released from jail.¹⁵⁷

Other Jurisdictions

No other state has people serving long sentences in jail like California does, but six states have unified correctional systems that centralize control of their places of incarceration and help provide uniform rules for release and other correctional issues.¹⁵⁸

¹⁵² Penal Code § 3081(b).

¹⁵³ Probation and parole supervision for most felonies is now limited to two years, as is parole supervision for many people. Penal Code § 1203.1(a); Penal Code § 3000.01(b)(1). Parole supervision is also to be terminated for many people after one year without a violation of conditions. *Id.*

¹⁵⁴ Penal Code § 3075(a). There are no minimum qualifications for the person appointed by the Presiding Judge except that they not be a “public official.” *Id.*

¹⁵⁵ Penal Code § 5075.6

¹⁵⁶ Penal Code § 3088.

¹⁵⁷ Committee on Revision of the Penal Code, 2020 Annual Report and Recommendations, 23.

¹⁵⁸ The six states are Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. See Christian Henrichson, *Vera's Incarceration Trends States Fact Sheets*, Vera Institution of Justice, December 3, 2019;

The administrator of New York City’s jail system has special power to release people serving jail sentences for a “compelling reason consistent with the public interest,” including working or seeking work, attending an education institution, obtaining medical treatment, or caring for family members.¹⁵⁹

Additional Considerations

- County parole should be available to people serving jail sentences regardless of their ability to pay. Consistent with recent actions by the Legislature, county parole release and supervision should have no fees or other monetary assessments associated with it.¹⁶⁰
- Current law allows courts at sentencing to deny eligibility for county parole.¹⁶¹ Courts have no such power over other types of parole release and should not have the ability to do so for county parole. A sentencing court should, as current law provides, be allowed to provide input into the county parole decision-making process¹⁶² but not be able to override it completely.

Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems*, National Institute of Corrections, September 1997.

¹⁵⁹ N.Y. Correct. Law § 150(4). These are sometimes referred to as “Article 6-A” releases.

¹⁶⁰ See AB 1869 (Committee on Budget 2020); AB 177 (Committee on Budget 2021).

¹⁶¹ Penal Code § 3076(b).

¹⁶² Penal Code § 3078(b).

6. Allow Appellate Courts to Reduce Sentences in the Interest of Justice

Recommendation

In California, appellate courts cannot modify a sentence they believe is harsh or otherwise inappropriate unless there is legal error.

The Committee therefore recommends the following:

1. Allow appellate judges to review sentences for excessiveness on appeal without giving deference to the decision of the sentencing judge.
2. Allow this power to be exercised on appeal even in cases where the defendant pleaded guilty.

Relevant Statutes

Penal Code §§ 1235, 1237, 1237.5

Background and Analysis

In California, as in most states, a firm line is drawn once a judge imposes a sentence in a criminal case. Even if a panel of appellate judges all agree that a sentence is too harsh, almost nothing can be done to reduce that sentence.¹⁶³ Though there is a constitutional limit on “cruel or unusual” sentences under the California constitution, that burden is almost impossible to meet.¹⁶⁴ Similarly, a trial court’s refusal to dismiss a sentence enhancement can only be reversed on appeal if the decision was “so irrational or arbitrary that no reasonable person could agree with it.”¹⁶⁵ The result of these legal doctrines is that though almost everyone would agree that “the punishment should fit the crime,” punishments are rarely ever meaningfully reviewed for such proportionality.

But as Professor Michael Tonry told the Committee at its July 2021 meeting, appellate courts in Europe and elsewhere routinely “second guess” criminal sentences.¹⁶⁶ Allowing appellate courts to review sentences from scratch – as they review numerous other aspects of a criminal cases – would create an important safety valve for sentences that are unnecessarily harsh and that may have been influenced by inappropriate factors, such as the so-called “trial tax” where a sentence imposed after trial is arbitrarily higher than a plea bargain offered before trial.

¹⁶³ See, e.g., *People v. Scott*, 9 Cal.4th 331, 353–54 (1994).

¹⁶⁴ *In re Lynch*, 8 Cal.3d 410 (1972); Submission of Hon. J. Anthony Kline to Committee on Revision of the Penal Code, 4 (August 26, 2021); Model Penal Code – Sentencing, § 10.10, Reporters Note (f)(2) (describing the “toothlessness” of such review).

¹⁶⁵ *People v. Carmony*, 33 Cal.4th 367, 377 (2004).

¹⁶⁶ Committee on Revision of the Penal Code, July 13, 2021 Meeting, Part 1, 1:03:00–1:07:00. See also President’s Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts*, 25 (1967) (“In all Western countries except the United States, grossly excessive sentences are subject to routine review and correction by appellate tribunals.”).

The vast majority of cases are resolved by guilty plea,¹⁶⁷ and though the dispositions that result in most cases are inappropriate for appellate modification, people who plead guilty should also have the ability to have an excessive sentence reduced to even out disparities across similar cases. Subjecting sentencing decisions to fresh review on appeal would help do this as appellate panels would review cases across judges, individual prosecutors, and counties. As the California Supreme Court has noted, “empirical studies revealed that the chief explanation for sentencing disparity was not the differences in defendants but the differences in judges.”¹⁶⁸

California has experimented in the past with post-conviction sentence review. As part of the shift to determinate sentencing in 1977, the parole board was given the duty to review all sentences for disparity to help produce uniformity in sentences throughout the state.¹⁶⁹ If a sentence was found to be disparate — which was done by comparing the characteristics of each case to a database of 75,000 criminal sentences — the case was sent back for possible resentencing.¹⁷⁰ This practice apparently ended in 1992.¹⁷¹ Today, if just 5% of criminal appeals resulted in a sentence reduction of some kind, approximately 270 cases would be affected every year.¹⁷²

Allowing appellate courts to reduce excessive sentences may also increase the efficiency and focus of the appellate process. As one federal appellate judge has remarked, when the length of a sentence is shielded from review, “the appellate tribunal cannot tackle the real issue in a forthright manner, it may, and often does, in its endeavor to strike down a harsh penalty, give the law [in other areas] a strained construction liable to work havoc in future cases.”¹⁷³

Granting sentence review power to appellate courts in California is not unprecedented. Appellate courts have always had the duty to weigh facts and make equitable determinations in criminal cases in the context of habeas corpus review, where they have “broad powers to fashion almost any relief.”¹⁷⁴

Empirical Research

Allowing appellate judges greater power to review and reduce sentences may help reduce the role of bias in the criminal legal system. Research has shown that “darker skin tone and greater

¹⁶⁷ Judicial Council Statewide Caseload Trends, Table 8a for 2018–2019 and 2019–20 (2% of felony cases are resolved with a trial).

¹⁶⁸ *People v. Martin*, 42 Cal.3d 437, 442 (1986) (quotation marks and citation omitted).

¹⁶⁹ Former Penal Code § 1170(f). The process is described in *Martin*, 42 Cal.3d 437 (1986).

¹⁷⁰ See *Martin*, 42 Cal.3d at 443.

¹⁷¹ Stats. 1992, ch. 695, § 10, p. 2977 (SB 97).

¹⁷² Judicial Council of California, 2020 Court Statistics Report, Statewide Caseload Trends, 2009–10 Through 2019–19, 40, Table 5 (“Appeals — Method of Disposition”) (in FY 18, 5,477 criminal appeals were disposed of; in FY, 5,357 criminal appeals were disposed of).

¹⁷³ President’s Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts*, 26 (1967) (quoting Chief Judge Simon E. Sobeloff of the Fourth Circuit Court of Appeals) (citation omitted).

¹⁷⁴ *In re Duval*, 44 Cal.App.5th 401, 411 (4th Dist. 2020). Courts of appeal share original jurisdiction with other courts in habeas corpus proceedings. Cal. const., art. V § 10. See also *In re Harris*, 5 Cal.4th 813, 851 (1993) (“a court, faced with a meritorious petition for a writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy”).

Afrocentric facial features were the cause of longer sentences.”¹⁷⁵ Because judges reviewing a sentence on appeal would not be exposed to these traits, such bias may play a smaller role in sentencing-related decisions.

Insights from Other Jurisdictions

New York grants appellate courts the “unfettered”¹⁷⁶ ability “as a matter of discretion in the interest of justice” to modify “a sentence, though legal, [that is] unduly harsh or severe.”¹⁷⁷ A claim that a sentence was harsh or severe does not need to have been raised in the trial court and can be brought on appeal even if the defendant pleaded guilty.¹⁷⁸ The highest state court in New York has explained the appellate court’s “broad, plenary power to modify a sentence that is unduly harsh or severe ... may be exercised, if the interest of justice warrants, without deference to the sentencing court.”¹⁷⁹ New York appellate courts make measured use of their power to reduce harsh sentences, and have exercised the power almost 200 times in the last three years.¹⁸⁰ New York courts have reduced incarceratory terms to probation,¹⁸¹ reducing sentences in murder cases,¹⁸² and modifying adult convictions to youthful offender adjudications.¹⁸³

Though different in their exact approaches, other states and countries, including Alaska and Connecticut, and Australia, Canada, England, New Zealand allow some form of sentencing review on appeal.¹⁸⁴ The European Convention on Human Rights also declares that everyone convicted of a criminal offense “shall have the right to have his conviction or sentence reviewed by a higher tribunal.”¹⁸⁵

¹⁷⁵ Hon. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 Yale L.J.F. 381 (2017) (collecting studies). See also, e.g., L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L.J. 862, 864 (2017) (“[R]esearch from the past several decades reveals that implicit racial biases can influence the behaviors and judgments of even the most consciously egalitarian individuals in ways of which they are unaware and thus unable to control.”).

¹⁷⁶ *People v. Felix*, 87 A.D.2d 529, 947 (N.Y. 1st Dep’t 1981).

¹⁷⁷ N.Y. Crim. Proc. Law § 470.15(6)(b).

¹⁷⁸ *People v. Thompson*, 60 N.Y.2d 513, 520 (1983). In some circumstances, an explicit condition of a guilty plea can include waiving the right to argue on appeal that a sentence was harsh or unjust. See *People v. Lopez*, 6 N.Y.3d 248, 253 (2006).

¹⁷⁹ *People v. Delgado*, 80 N.Y.2d 780, 783 (1992).

¹⁸⁰ Data provided by New York Appellate Division, First Department.

¹⁸¹ See, e.g., *People v. Jackson*, 132 A.D.3d 1417 (N.Y. 4th Dep’t 2015).

¹⁸² See, e.g., *People v. Naqvi*, 132 A.D.3d 779 (N.Y. 2d Dep’t 2015) (reducing minimum sentence in murder case by seven years).

¹⁸³ See, e.g., *People v. Kwame S.*, 95 A.D.3d 664 (N.Y. 1st Dep’t 2012).

¹⁸⁴ The Model Penal Code gathers numerous examples. See Model Penal Code — Sentencing, § 10.10, Reporters Notes (a). See also Alaska Stat. § 12.55.120(a) (unless the product of a guilty plea, felony sentences over two years can be reviewed for “excessiveness”); Conn. General Stats. 51-196 (unless the product of a guilty plea, sentences greater than three years can be appealed).

¹⁸⁵ European Convention on Human Rights, Seventh Protocol, art. 2 (1984).

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NOT FINAL — AWAITING COMMITTEE APPROVAL

The Model Penal Code endorses appellate sentencing review because, among other reasons, it allows for appellate courts to create a common law of sentencing, as they do in many other areas of the law.¹⁸⁶

¹⁸⁶ The Model Penal Code would not allow appellate review of most sentences entered as a result of a guilty plea and would also give the prosecution the ability to appeal a sentence on the ground that it was too lenient. See Model Penal Code — Sentencing, §§ 10.10(2), (3).

7. Repeal Three Strikes

Recommendation

The Three Strikes law has been applied inconsistently and disproportionately against people of color, and the crime-prevention effects the law aimed to achieve have not been realized.

The Committee therefore recommends the following:

1. Repeal the Three Strikes law.

Because total repeal may not be immediately possible, the Committee recommends the following secondary reforms:

1. Establish a 5-year washout period, after which prior offenses cannot be counted as strikes.
2. Establish that juvenile adjudications cannot be counted as strikes.
3. Disallow the doubling of sentences for prior strikes when the new offense is not serious or violent.

The Committee recommends that any new amendments to the Three Strikes law be applied retroactively with provisions for resentencing.¹⁸⁷

Relevant Statutes

Penal Code §§ 667.7, 1170.12

Background and Analysis

More than 35,000 people in prison are serving a sentence lengthened by the Three Strikes law – over a third of the total prison population.¹⁸⁸ 80% are people of color.¹⁸⁹ The racial disparities are even more prevalent for young people sentenced under the law: 90% of those who were 25 or younger at the time of the offense and are serving a sentence under the Three Strikes law are people of color.¹⁹⁰

The Three Strikes law was created by Proposition 184 in 1994 to reduce crime by incapacitating and deterring people who committed repeat offenses by dramatically increasing punishment

¹⁸⁷ When California voters amended the Three Strikes law by passing Proposition 36, its provisions were made retroactive. This allowed people serving life sentences for third strike convictions based on offenses that were not serious or violent to be resentenced. Prop. 36 as approved by voters, General Elec. (November 6, 2012).

¹⁸⁸ Data provided by CDCR Office of Research. Data is as of July 1, 2021.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

for people previously convicted of a “serious” or “violent” offense.¹⁹¹ Proponents of the law presented the tragic murder story of Kimber Reynolds by men recently released from prison as proof of the need for increasingly harsh penalties.¹⁹² They asserted that the law would “keep murderers, rapists, and child molesters behind bars, where they belong.”¹⁹³ Despite projections that the law would cause the state’s prison population to increase substantially and result in additional costs of up to \$6 billion annually,¹⁹⁴ nearly 72% of voters favored it.¹⁹⁵

Under the Three Strikes law, people who were previously convicted of a “strike” — a “serious” or “violent” felony such as robbery or certain assault crimes — and commit any new felony have their sentences doubled.¹⁹⁶ People who commit a third serious or violent felony after having been convicted of two prior serious or violent felonies face a mandatory minimum sentence of 25 years to life.¹⁹⁷

Though crime rates fell after the Three Strikes law was implemented, they had already been declining both in California and nationally for a number of years.¹⁹⁸ Research conducted by the Legislative Analyst’s Office in 2005 found that crime rates fell at the same rates in counties regardless of how aggressively they used the Three Strikes law.¹⁹⁹

Concerns that the law disproportionately impacted people of color began a few years after it was passed.²⁰⁰ People of color, particularly Black people, are arrested and prosecuted at disproportionate rates,²⁰¹ and the Three Strikes law perpetuates these disparities by subjecting people to harsher penalties once they become justice-involved.²⁰²

Despite recent reforms to the Three Strikes law made by Proposition 36 in 2012,²⁰³ many of the most concerning aspects of the law remain:

¹⁹¹ Voter Information Guide for 1994, General Election, 34 (1994) (Legislative Analyst’s Office analysis of Proposition 184).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ California Secretary of State, *Statement of Vote*, General Election, November 8, 1994, 107 (results for Proposition 184).

¹⁹⁶ Penal Code § 667(e)(1). The doubling of the sentence applies only to the imprisonment imposed for substantive offenses, not any sentencing enhancements.

¹⁹⁷ Penal Code § 667(e)(2).

¹⁹⁸ Legislative Analyst’s Office, *A Primer: Three Strikes — The Impact After More Than a Decade* (Oct. 2005).

¹⁹⁹ *Id.*

²⁰⁰ Greg Krikorian, *More Blacks Imprisoned Under ‘3 Strikes,’ Study Says*, Los Angeles Times, March 5, 1996.

²⁰¹ See, e.g., Magnus Lofstrum et al., *Racial Disparities in California Arrests*, Public Policy Institute of California, Oct. 2019; See also, Elizabeth Hinton, LeShae Henderson, and Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice, May 2018.

²⁰² Elizabeth Hinton, LeShae Henderson, and Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice, 5, May 2018.

²⁰³ Proposition 36 changed the Three Strikes law to, with some exceptions, only allow a life sentence when the new felony conviction is serious or violent. It also allowed resentencing of people serving a life sentence if their third strike conviction was not serious or violent. Prop. 36 as approved by voters, General Elec. (November 6, 2012).

- There is no limit on how old a prior strike can be,²⁰⁴ though many other states do have such “wash out” periods after 5 or 10 years.²⁰⁵
- Juvenile conduct can count as a strike, even though juvenile adjudications are not convictions and cannot be used to enhance sentences in other contexts, or by other states.²⁰⁶
- A prior strike conviction always doubles punishment, even if the current offense is not a strike. There are over 9,000 people serving a sentence for a non-strike felony that is lengthened by a prior strike conviction. Though courts have the ability to dismiss prior strikes,²⁰⁷ there is no data suggesting this occurs regularly.

If the Three Strikes law was eliminated, the Penal Code would still contain other recidivist statutes that impose additional punishment based on a person’s criminal history.²⁰⁸ The “nickel” prior²⁰⁹ — which adds an additional 5 years to a person’s sentence when they are convicted of a serious felony and have a prior conviction for a serious felony — is the most frequently used enhancement for people currently serving a prison term.²¹⁰

Eliminating or substantially limiting the use of the Three Strikes law would recognize the law’s failure to make California safer, and would be a significant step towards reducing racial disparities in our criminal legal system.

Empirical Research

Empirical research on the impact of the Three Strikes law in California has consistently found that the law has had no effects on crime rates.²¹¹ And in at least three studies, researchers

²⁰⁴ Penal Code § 667(c)(3).

²⁰⁵ Other states, including Washington and Arizona have five-year wash-out periods for enhanced sentences based on most prior offenses and 10-year wash-out periods for more serious felony priors. Arizona Rev. Stat. § 13-105(22)(b),(c); § 13-703(B)(C); Washington State Adult Sentencing Guidelines Manual 53-54 (2020). Wash-out periods were codified in since-repealed California laws that allowed for one and three-year enhancements for prior prison terms. See April K. Cassou and Brian Traugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L. J. 5, 48–53 (1978).

²⁰⁶ California Welfare and Institutions Code § 203. For example, a juvenile adjudication for driving under the influence does not count as an adult DUI prior. *People v. Bernard*, 204 Cal.App.3d Supp. 16, 18 (1988). Similarly, a juvenile adjudication for a “serious” felony cannot be used to impose a 5-year “nickel” enhancement. *People v. West*, 154 Cal.App.3d 100,107-108 (1984). But the Three Strikes law and the California Supreme Court authorize the use of juvenile adjudications as prior strikes in adult court. Penal Code §§ 667(d)(3), 1170.12(b)(3); *People v. Nguyen*, 46 Cal.4th 1007, 1015-1022 (2009).

²⁰⁷ Penal Code § 1385; *People v. Romero*, 13 Cal.4th 497 (1996).

²⁰⁸ See Penal Code §§ 236.4(c), 667(a), 667.5(a), 667.5(b), 667.6(a), 667.6(b), 667.7(a).

²⁰⁹ Penal Code § 667(a)(1).

²¹⁰ Data provided by CDCR Office of Research.

²¹¹ Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, Crime and Justice, Vol. 38, No. 1, 98, Table 3 (2009) (summarizing the findings of 15 empirical studies and concluding that the Three Strikes Law has not affected crime rates).

concluded that the law actually increased murder rates.²¹² In the few studies that concluded the law reduced crime rates, the crime-reduction impacts were estimated to be moderate at best.²¹³

Insights from Other Jurisdictions

The first three strikes law was enacted in Washington state in 1993.²¹⁴ After California passed its version in 1994, 23 states and the federal government followed suit.²¹⁵ The offenses that counted as strikes, the number of strikes needed to trigger increased punishment, and the penalties imposed upon conviction varied by state.²¹⁶ Most states, including California, already had enhanced penalties for people with prior convictions at the time the three strikes laws were enacted.²¹⁷ However, in most states, three strikes laws were drafted to apply only to a narrow class of people with repeat violent offenses, and generally implemented longer sentences that carried mandatory minimums.²¹⁸ California's second-strike provision, which mandated doubling the length of sentence for any new felony once a person had been convicted of a strike, was unique.²¹⁹

The frequency that California imprisoned people under the new law also made the state a harsh outlier among other states. For instance, in Washington state between December 1993 and September 1997, only 85 people were admitted to state prison under its three strikes law.²²⁰ By 1998, 3 states that implemented three strikes laws had not sentenced anyone under the law, 12 states had a dozen or fewer convictions, and the federal government had sentenced only 35

²¹² *Id.* The three studies are: Tomislav Kovandzic et al., *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effect of 'Three Strikes' in U.S. Cities (1980–1999)*, *Criminology and Public Policy* 1(3), 399–424 (2002); Thomas B. Marvell and Carlisle E. Moody, *The Lethal Effects of Three Strikes Laws*, *Journal of Legal Studies* 30(1), 89–106 (2001); Carlisle E. Moody, Thomas B. Marvell, and Robert J. Kaminski, *Unintended Consequences: Three-Strikes Laws and the Murders of Police Officers*, Cambridge, MA: National Bureau of Economic Research (2003).

²¹³ National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, D.C.: The National Academies Press (2014).

²¹⁴ National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin (Oct. 2010).

²¹⁵ Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, *Crime and Justice*, Vol. 38, No. 1, p. 69 (2009). The states that passed Three Strikes laws were: Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Montana, New Mexico, North Carolina, North Dakota, New Jersey, Nevada, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wisconsin. National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin (Oct. 2010).

²¹⁶ National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin, Exhibit 9, Oct. 2010.

²¹⁷ John Clark, James Austin, and D. Alan Henry, *"Three Strikes and You're Out": A Review of State Legislation*, National Institute of Justice, p. 2 (Sept. 1997).

²¹⁸ *Id.*

²¹⁹ *Id.* See also Elsa Y. Chen, *Impacts of 'Three Strike and You're Out' on Crime Trends in California and Throughout the United States*, *Journal of Contemporary Criminal Justice*, Vol. 24, No. 4 (Nov. 2008).

²²⁰ John Clark, James Austin, and D. Alan Henry, *"Three Strikes and You're Out": A Review of State Legislation*, National Institute of Justice, p. 3 (Sept. 1997).

people under its law.²²¹ In contrast, by 1998, with the law being used for only 4 years, California had sentenced 40,511 people under its Three Strikes law.²²² Research conducted in 2006 found that many states continued to rarely use their three strikes provisions.²²³ In the same year, more than 44,000 people sentenced under the law were in California's prisons.²²⁴

Many states have revised various aspects of their three strikes laws.²²⁵ Several states have eliminated mandatory minimum penalties associated with the law and have given judges more discretion on the penalties to impose.²²⁶ Others have eliminated the life or life without parole sentences that were previously allowed.²²⁷ In 2018, the federal First Step Act changed the punishment under the federal three strikes law from a life sentence to 25 years.²²⁸

Additional Considerations

- Because the Three Strikes law was created by voter initiative, all of the reforms recommended here would require a two-thirds vote in the Legislature or a voter initiative to become law.

²²¹ Elsa Y. Chen, *Impacts of 'Three Strike and You're Out' on Crime Trends in California and Throughout the United States*, *Journal of Contemporary Criminal Justice*, Vol. 24, No. 4, p. 7 (Nov. 2008), citing W. J. Dickey, *"Three Strikes": Five Years Later*. Washington DC: Campaign for an Effective Crime Policy (2008).

²²² *Id.*

²²³ *Id.*

²²⁴ California Department of Corrections, *Prison Census Data as of December 31, 2006*, Table 10, March 2007.

²²⁵ National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin, p.4 (Oct. 2010).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Ames Grawert and Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, Brennan Center for Justice (Jan. 4, 2019).

8. Create a Review Process for Life without Parole Sentences

Recommendation

Life without the possibility of parole sentences have become much more common in California and have disturbing racial disparities without demonstrated improvements to public safety.

The Committee therefore recommends the following:

1. Restore judicial authority to dismiss special circumstances in furtherance of justice.
2. Require people sentenced to life without parole to be reviewed for resentencing after 25 years.
3. Require the Board of Parole Hearings to review people serving life without parole sentences for clemency recommendations.

Relevant Statutes

Penal Code §§ 189, 190.2

Background and Analysis

People sentenced to life without parole in California have been convicted of some of the most serious offenses in the Penal Code. But over time, life without parole sentences have become more prevalent, more severe, and inconsistent with international views on human rights.²²⁹

Once rarely used,²³⁰ there are now over 5,000 people serving life without parole sentences in California prisons.²³¹ Between 2003 and 2016, while violent crime decreased by 26%,²³² the number of people sentenced to life without parole in California rose by over 280%.²³³ Yet life without parole sentences do not result in any greater public safety benefits than life with parole sentences.²³⁴ And racial disparities in life without parole sentencing — 79% of people

²²⁹ Christopher Seeds, *Life Sentences and Perpetual Confinement*, Annual Review of Criminol. 4:287–309 (2021). See also, Written Submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021.

²³⁰ *Id.*

²³¹ Data provided by CDCR Office of Research.

²³² Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, The Sentencing Project, Table 1 (2021).

²³³ *Id.* at 21.

²³⁴ Ross Kleinstuber and Jeremiah Coldsmith, *Is Life Without Parole an Effective Way to Reduce Violent Crime? An Empirical Assessment*, Criminology & Public Policy 19(2), 625 (2020).

servicing life without parole are people of color.²³⁵ — suggest that inappropriate factors may be playing a role in who receives this sentence.²³⁶

A sentence of either life without parole or death is required in California when a person is convicted of first-degree murder — which generally requires a willful, deliberate, and premeditated killing — and in addition, a jury finds any one of 22 special circumstances to be true.²³⁷ There were only 6 special circumstances prior to 1978 that could lead to a life without parole sentence,²³⁸ but passage of Proposition 7 vastly increased the list of special circumstances with the stated intention of making every murder eligible for the harshest penalties.²³⁹ Special circumstances today include committing a murder for financial gain, lying in wait, committing multiple murders, and committing a murder in the course of an enumerated felony.²⁴⁰

Recent research concluded that special circumstances could be charged in 95% of all first-degree murder convictions and in 59% of all second-degree murder and voluntary manslaughter convictions in California.²⁴¹ The availability of special circumstance charging to nearly every murder places tremendous discretion in the hands of local district attorneys, but very little is known about how prosecutors decide to charge special circumstances.²⁴² However, recently published research has found that people accused of killing white victims were more likely to be charged with a special circumstance.²⁴³ Similar research has uncovered racial disparities in the application of certain special circumstances — such as those involving gangs and felony-murder.²⁴⁴

With nearly every first-degree murder eligible for special circumstance charging, it is up to county prosecutors to decide in which cases charging is appropriate. But, as Michele Hanisee, President of the Deputy District Attorney Association of Los Angeles County and representative of the California District Attorneys Association told the Committee, prosecutors are not always aware of all the circumstances — such as whether the defendant is a victim of abuse or trauma

²³⁵ Data provided by CDCR Office of Research.

²³⁶ Christopher Seeds, Life Sentences and Perpetual Confinement, Annual Review of Criminol. 4:287–309, 302 (2021).

²³⁷ Penal Code § 190.2.

²³⁸ Voter Information Guide for 1978, General Election (1978).

²³⁹ *Id.* In 2000, California voters approved Proposition 21, which added an additional special circumstance for participation in a criminal street gang. Proposition 21, as approved by voters, March 7, 2000 (creating Penal Code § 190.2(22)).

²⁴⁰ Penal Code § 190.2.

²⁴¹ David C. Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. Empirical Legal Stud. 693 (2019).

²⁴² Cal. Comm. on the Fair Administration of Justice, Final Report, Death Penalty, 152 (2008).

²⁴³ Letter of Catherine M. Grosso, Jeffrey Fagan, and Michael Laurence, to Committee on Revision of the Penal Code, March 22, 2021, 2–3.

²⁴⁴ Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394, 1426 (2019) (reviewing cases from 1978–2002).

— that can impact whether they should be charged.²⁴⁵ And while courts previously had discretion to dismiss or strike special circumstances, which could avoid a life without parole sentence in appropriate circumstances, this authority was eliminated in 1990 by Proposition 115.²⁴⁶

In addition to the expansion of the scope and frequency of life without parole sentences, the very meaning of the sentence has grown more harsh over time.²⁴⁷ As Dr. Christopher Seeds explained to the Committee in its May 2021 meeting, life without parole did not really mean confinement without hope of release until the late twentieth century.²⁴⁸ Until 1994, California parole board regulations mandated a review for all people sentenced to life without parole for recommendations regarding reprieves, pardons, and commutations.²⁴⁹ Today, the parole board has statutory authorization to refer people to the Governor for clemency, but is only required to do such reviews when requested by the Governor.²⁵⁰

Jarret Harper and Susan Bustamante — both convicted of killing their long-time abusers — testified at the Committee’s May 2021 meeting about the rare experience of having their life without parole sentences commuted and later obtaining release by the Board of Parole Hearings.²⁵¹ Both described that even in an environment devoid of incentives to change, years of self-reflection and maturation led to a transformation in their thinking and understanding of what led to their crimes.²⁵² They also explained that many people just like them are still imprisoned without hope of release.²⁵³ Their experiences demonstrate that some people sentenced to life without parole have the capacity to change, and when they do, can be safely released.

Recent reforms such as Proposition 57 parole, youth offender parole, and elderly parole have expanded parole consideration to those who were previously ineligible for it, but these reforms explicitly do not apply to people serving life without parole sentences.²⁵⁴ In a recent case, California Supreme Court Justice Goodwin Liu questioned the lawfulness and rationality of youth offender parole’s exclusion of people sentenced to life without parole, and encouraged

²⁴⁵ Committee on Revision of the Penal Code, Meeting on May 13, 2021, part one, 0:32:42–0:34:04. Ms. Hanisee supported life without parole sentences but suggested that post-conviction reviews could be appropriate if they required evidentiary hearings and the evidence presented was not available at trial.

²⁴⁶ Proposition 115, as approved by voters, June 5, 1990 (creating Penal Code § 1385.1).

²⁴⁷ Written Submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021

²⁴⁸ *Id.*

²⁴⁹ See *Ross v. Schwarzenegger*, 2008 WL 4937599, *2 (E.D. Cal. 2008) (describing 15 CCR § 2817). Originally, this review was to be conducted after 12 years of incarceration and every third year thereafter. The regulation was revised to require review after 30 years of incarceration in 1982, before being completely repealed in 1994. The repealed version of the regulation is on file with Committee staff.

²⁵⁰ Penal Code § 4812(a).

²⁵¹ Committee on Revision of the Penal Code, Meeting on May 13, 2021, part one.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See Cal. Const., art. I, § 32(1) (Proposition 57 parole), Penal Code §§ 3051(h) (youth offender parole), 3055(g) (elderly parole).

the Legislature to consider revisions.²⁵⁵ Justice Liu’s comments added to the growing momentum to revise California’s approach to life without parole.

Recent revisions to life without parole sentencing laws in California have focused on people who committed the offense when they were under 18 years old.²⁵⁶ The revised laws allow these people to petition for resentencing after 15 years of incarceration and be considered for parole after 25 years of incarceration.²⁵⁷ Still, many people serving life without parole sentences in California were very young at the time of the commission of the offense — 61% were 25 years old or younger.²⁵⁸ Data indicates that racial disparities are even more prevalent among this group — 86% are people of color (vs. 79% of the total life without parole population).²⁵⁹

The Committee recommends that factors such as the person’s age, medical conditions, history of victimization, abuse, or trauma, and others similar to those detailed in the juvenile resentencing process be considered in any review or resentencing process.²⁶⁰ The Committee also recommends creating provisions for periodic reevaluations of people who are denied resentencing or clemency recommendations.²⁶¹ Whether in resentencing procedures or clemency evaluations, the tremendous loss suffered by crime victims and their families cannot be ignored, and victims’ families should be given full participation in accordance with existing laws.²⁶²

Requiring review of life without parole sentences after 25 years of incarceration — the penalty for first-degree murder without special circumstances²⁶³ — and reestablishing a formal review process by the parole board would allow California to hold people accountable for the most serious crimes while recognizing that many people are capable of change and would present limited risk to public safety if released.

²⁵⁵ *People v. Montelongo*, 2021 Cal. LEXIS 620, *4 (Jan. 27, 2021) (J. Liu, Concurrence) (“it is questionable whether there is a rational basis for [youth offender parole’s] exclusion of 18- to 25-year-olds sentenced to life without parole.”).

²⁵⁶ SB 9 (Yee), Ch. 828, 2012; SB 394 (Lara), Ch. 684, Stats. 2017. Both bills aimed to bring California’s laws in compliance with United States Supreme Court rulings that people who commit crimes as juveniles are generally less culpable, and that courts must consider a person’s youth before imposing a life without parole sentence. See *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

²⁵⁷ Penal Code §§ 1170(d)(2)(A)(i), 3051(b)(4).

²⁵⁸ Data provided by CDCR Office of Research.

²⁵⁹ *Id.*

²⁶⁰ Penal Code § 1170(d)(2) governs the recall and resentencing process for juveniles sentenced to life without parole and instructs courts to consider factors such as whether the person was convicted pursuant to felony murder or aiding and abetting murder provisions, suffered from psychological or physical trauma, or had cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced their involvement in the offense, has performed acts that indicate rehabilitation or the potential for rehabilitation, has maintained family ties or connections with others, or has had no disciplinary actions for violent activities in the last five years in which they were determined to be the aggressor.

²⁶¹ The timeline for reevaluations in the existing resentencing and youth offender parole processes are detailed in Penal Code §§ 1170(d)(2)(H), and 3051(g).

²⁶² See, Cal. Const., art. I, § 28; See also Penal Code §§ 1170(d)(2)(E), 3041.5, 3043.

²⁶³ Penal Code § 190.

Empirical Research

Research on the crime-reduction effects of life without parole sentences is very limited.²⁶⁴ However, recently published research indicates that such sentences are no more effective in reducing violent crime than life with parole sentences.²⁶⁵

There is also a longstanding research consensus that lengthy prison sentences are not effective in reducing crime. As noted above, in 2014, the National Research Council noted that insufficient evidence exists to support the general assumption that harsher penalties yield measurable deterrent effects and, “[n]early every leading survey of the deterrence literature in the past three decades has reached the same conclusion.”²⁶⁶ Similarly, according to the prominent criminologist and Carnegie Mellon professor Daniel Nagin, “[t]here is little evidence that increases in the length of already long prison sentences yield general deterrent effects” large enough to justify their use.²⁶⁷

Insights from Other Jurisdictions

Life without parole sentences are authorized in every state in the country with the exception of Alaska.²⁶⁸ California has the third highest number of people in the United States serving life without parole sentences, behind Florida and Pennsylvania.²⁶⁹ Five states — California, Florida, Louisiana, Michigan and Pennsylvania — account for approximately half of the life without parole sentences in the country.²⁷⁰

In 2014, the European Court of Human Rights declared life without parole sentences to be unconstitutional, making them illegal throughout virtually all of Europe.²⁷¹ Few other countries authorize life without parole sentences and the number of people sentenced to life without parole in California exceeds that of any other nation.²⁷²

²⁶⁴ Christopher Seeds, *Life Sentences and Perpetual Confinement*, Annual Review of Criminology, Vol. 4, 302 (2021).

²⁶⁵ Ross Kleinstuber and Jeremiah Coldsmith, *Is Life Without Parole an Effective Way to Reduce Violent Crime? An Empirical Assessment*, Criminology & Public Policy 19(2), 625 (2020). According to the authors, “to the extent that incarceration can produce lower crime rates, the effect of increasing sentencing severity maxes out at some point prior to LWOP. Thus, LWOP does not seem to produce any additional crime reduction beyond that which is produced by parole-eligible life sentences (and possibly by other long-term sentences).” *Id.*

²⁶⁶ National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, D.C.: The National Academies Press, 90 (2014).

²⁶⁷ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, Crime & Justice, 42, 201 (2013).

²⁶⁸ Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment*, The Sentencing Project, Table 1 (2021).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See Written Submission of Dr. Joshua Kleinfeld to Committee on Revision of the Penal Code, May 11, 2021, citing *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317.

²⁷² See Written Submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021, citing Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis*, Harvard University Press (2019).

Additional Considerations

- Restoring courts' authority to dismiss special circumstances in the interests of justice would require a two-thirds majority vote in the Legislature because Penal Code section 1385.1, which prevents courts from doing so, was created by Proposition 115.²⁷³
- Requiring the Board of Parole Hearings to review people serving life without parole sentences for clemency recommendations could be implemented through the Board of Parole Hearings rulemaking process or with a majority vote in the Legislature, as this revision does not implicate any law passed by voter initiative.

²⁷³ Proposition 115, as approved by voters, June 5, 1990.

Additional Analysis and Data on Past Committee Recommendations

Short Prison Stays

In its 2020 report, the Committee noted that almost 40% of all people entering prison in California stay there for less than a year. The Committee recommended allowing these people to complete their incarceration in county jail, instead of undergoing the expense to the state and disruption of being transferred to state prison. Though no action was taken on this recommendation, the Committee offers additional data here to better describe the source of these short stays in prison.

[Additional data forthcoming.]

Parole Hearing Process

In its 2020 Annual Report, the Committee identified a number of issues with California’s parole hearing system, primarily that the parole grant rate has been only 16–22% in recent years. None of the Committee’s proposals were adopted by the Legislature or BPH, and the problems identified by the Committee remain. The Committee reiterates that the recommendations made in its 2020 report — including revising the legal standard for who is suitable for parole release — would help address these problems.

To further support the Committee’s recommendations, the Committee offers the following data which suggests that BPH could safely grant parole to more people.

The most recent recidivism data shows that people granted parole release by BPH have extremely low recidivism rates: less than 1% of people released by BPH were convicted for a new crime against a person.²⁷⁴ Overall, women released by BPH had a 0.0% reconviction rate within three years of release and men had a 3.2% reconviction rate — that is, there was *not even one* new female conviction and only 23 new male convictions within 3 years (13 felonies and 10 misdemeanors) among the 720 people who had been released in 2015–16.²⁷⁵ The three year reconviction rate for all people released from CDCR during the same timeframe was 44.6% (35% female convictions and 45% male convictions).²⁷⁶

Thirty percent of parole candidates who were evaluated as “low risk” by BPH’s own risk assessment tool were denied parole in 2020. And nearly 80% of those evaluated as “moderate

²⁷⁴ CDCR Office of Research, Recidivism Report for Offenders Released in Fiscal Year 2015–16, 110-111 (Sept. 2021). Only 1 person of the 110 released via the Elderly Parole process and 5 of the 96 released via Youth Offender Parole were reconvicted within 3 years. *Id.* at 112. CDCR did not report whether the convictions were for misdemeanor or felony offenses.

²⁷⁵ *Id.* at 110–111, 99, Table 39. There were 5 felony convictions for crimes against a person, 1 felony drug/alcohol crime, 1 felony property crime, and 6 “other” felony crimes. The 10 misdemeanors included 5 drug/alcohol misdemeanors, 1 property misdemeanor, and 4 “other” misdemeanors.

²⁷⁶ *Id.* at 105, Table 45.

risk” were denied or stipulated to a denial of parole.²⁷⁷ Justice J. Anthony Kline told the Committee that BPH’s heavy reliance on their uncorroborated prediction of whether an inmate remains dangerous enables the imposition of disproportionate punishment and exacerbates prison overcrowding.²⁷⁸ While risk assessment instruments’ predictions that certain people are a “low risk” of future violence have repeatedly been found by researchers to be quite accurate,²⁷⁹ the accuracy of “high risk” predictions remains extremely unreliable.²⁸⁰

Other large states have higher parole grants for similarly serious offenses. In Texas, the parole grant rate for “aggravated violent offenses” is 35% and for just homicide offenses it is 22%.²⁸¹ In New York, the grant rate for people convicted of homicide offenses at their initial appearance before the parole board is 29%.²⁸² Though the parole grant rate in California has increased significantly in the last decade, it is significantly less than what it is in these comparable states.²⁸³

The Committee acknowledges that parole release is a complicated and sensitive topic. But as Kathleen Allison, the current Secretary of the Department of Corrections and Rehabilitation, explained to the Committee, people in prison are capable of extraordinary change and she has witnessed first-hand the rehabilitative transformations that occur for many people serving prison sentences.²⁸⁴

For these reasons, the Committee reiterates its view that the parole grant in California could be higher without significant impacts to public safety. The recommendations from the Committee’s 2020 report would help reach this goal by, among other changes, clarifying the standard for release and providing clearer guidelines for how someone could prepare themselves for release.

²⁷⁷ Cliff Kusaj, BPH Chief Psychologist, *Analysis of Comprehensive Risk Assessments Administered in 2020*, 3–4, 40 (Oct. 2021).

²⁷⁸ Justice Anthony Kline, *Memorandum Re: Legislation Compelling the Parole Board to Consider During the Parole Process Whether Denial of Parole May Result in Disproportionate Punishment and to Corroborate its Predictions of Dangerousness*, Submission to the Committee on Revision of the Penal Code, 1 (Aug. 26, 2021).

²⁷⁹ Seena Fazel, Jay P. Singh, and Helen Doll, *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and MetaAnalysis*, 345 BR. MED. J. e4692 (2012).

²⁸⁰ Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà vu All Over Again*, 48 Crime and Justice 439, 450 (2019).

²⁸¹ The Texas Board of Pardons and Paroles, Annual Statistical Report, FY 2019, 5 (11,424 “violent aggravated non-sexual” cases considered and 3,974 cases approved). The grant rate for FY 2021 homicide offenses is 21.91% and was provided by the Texas Board of Pardons and Paroles to Committee staff. For initial appearances it's 16.62% and for subsequent appearances it's 23.43%.

²⁸² New York Board of Parole Legislative Report, 2017, 5.

²⁸³ BPH, Suitability Hearing Summary Calendar Year 1978 through Calendar Year 2020.

²⁸⁴ Committee on Revision of the Penal Code, May 13, 2021 Meeting, Part 3 at 16:00–21:30.

2021 Administrative Report

The inaugural year of the Committee on Revision of the Penal Code ended on January 1, 2022. 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.²⁸⁵

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.²⁸⁶ Neither body has any authority over the substantive work of the other.²⁸⁷ The two bodies have different statutory duties.²⁸⁸

The Committee has seven members. Five are appointed by the Governor for four-year terms.²⁸⁹ One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules.²⁹⁰ The Governor selects the Committee’s chair.²⁹¹

Function and Procedure of the Committee

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.²⁹²

The Committee is required to prepare an annual report for submission to the Governor and the Legislature.²⁹³

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.²⁹⁴ In 2021, it held nine meetings, three of which were two-day meetings. Due

²⁸⁵ See 2019 Cal. Stat. ch. 25; Gov’t Code § 8280(b).

²⁸⁶ See Gov’t Code § 8281.5(d).

²⁸⁷ Gov’t Code § 8290(c). The Commission and Committee submit their reports and recommendations directly to the Governor and Legislature, not to each other. Gov’t Code § 8291.

²⁸⁸ Compare Gov’t Code §§ 8289, 8290 (duties of Commission) with Gov’t Code § 8290.5 (duties of Committee).

²⁸⁹ Gov’t Code § 8281.5(a), (c).

²⁹⁰ Gov’t Code § 8281.5(a).

²⁹¹ Gov’t Code § 8283.

²⁹² Gov’t Code § 8290.5(a).

²⁹³ Gov’t Code § 8293(b).

²⁹⁴ Gov’t Code §§ 11120–11132.

to the COVID-19 pandemic, meetings were conducted entirely by teleconference.²⁹⁵ In addition to this report, the Committee issued a report in November 2021 recommending that the death penalty be abolished in California.

Personnel of the Committee

In 2021, the following persons were members of the Committee:

CHAIR

Michael Romano

LEGISLATIVE MEMBERS

Senator Nancy Skinner
Assemblymember Alex Lee

GUBERNATORIAL APPOINTEES

Hon. Peter Espinoza
Hon. Thelton E. Henderson
Hon. Carlos Moreno
Priscila Ocen

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
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

²⁹⁵ This was made possible by Executive Orders N-25-20 and N-29-20.

Debora Larrabee
Chief of Administrative Services

Committee Budget

The 2020–21 state budget included \$576,000 for the Committee on Revision of the Penal Code. An additional \$494,000 was included in the 2021–22 state budget.

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

Planned Activities for 2021

In 2022, the Committee expects to follow the same general deliberative process that it used in 2020 and 2021. 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 2021 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
(in order of appearance)

Panelists
(in alphabetical order)

Philanthropic and Other Support

The Committee is also deeply grateful to Arnold Ventures and the Chan-Zuckerberg Initiative for providing generous support relating to the Committee's research and data analysis. The Committee also extends special thanks to the personnel at the California Department of

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Corrections and Rehabilitation who assisted the Committee’s data-gathering efforts. The Committee also received generous support from staff and faculty at Stanford Law School in developing our recommendations and drafting this report.

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

Appendix A: Biographies of 2021 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 and other civil rights organizations. Romano was a law clerk for the Honorable Richard Tallman at the United States 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.

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 1984 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.

Thelton E. Henderson, of Berkeley, has been Distinguished Visiting Professor of Law at the University of California, Berkeley since 2017. Henderson served as a U.S. District Court Judge at the U.S. District Court for the Northern District of California from 1980 to 2017. He was Assistant Dean at Stanford Law School from 1968 to 1976 and a Professor at Golden Gate Law School from 1977 to 1980. Henderson was Director of the East Bayshore Neighborhood Legal Center from 1966 to 1968. Henderson was a Corporal in the U.S. Army, serving as a Clinical Psychology Technician from 1956 to 1958. He earned a Juris Doctor degree from the University of California, Berkeley School of Law.

Assemblymember Alex Lee, of Milpitas, was elected in November 2020 to represent California's 25th Assembly District, which includes the Alameda County communities of Fremont and Newark, and the Santa Clara Communities of Milpitas, San Jose, and Santa Clara. Assemblymember Lee previously worked on policy and legislation for both the California State Senate and California State Assembly. Assemblymember Lee is a graduate of UC Davis, where he served as Student Body President.

Carlos Moreno, of Los Angeles, has been a self-employed JAMS arbitrator since 2017. Moreno was United States 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 United States 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.

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NOT FINAL – AWAITING COMMITTEE APPROVAL

Priscila Ocen, of Los Angeles, is a Professor of Law at Loyola Law School, where she teaches criminal law, family law and a seminar on race, gender and the law. Ocen received the inaugural PEN America Writing for Justice Literary Fellowship and served as a 2019–2020 Fulbright Fellow, based out of Makerere University School of Law in Kampala, Uganda, where she studied the relationship between gender-based violence and women’s incarceration. Ocen is also a member of the Los Angeles Sheriff’s Oversight Commission. She earned a juris doctor degree from University of California Los Angeles, School of Law.

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 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.