

ANNUAL REPORT AND RECOMMENDATIONS

Committee on Revision of the Penal Code



2020

- 03** Executive Summary
- 04** Introduction
- 08** Prefatory Notes
- 69** Administrative Report
- 78** Appendix

RECOMMENDATIONS

<ul style="list-style-type: none"> 14 Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses 19 Require that Short Prison Sentences Be Served in County Jails 26 End Mandatory Minimum Sentences for Nonviolent Offenses 30 Establish that Low-Value Thefts without Serious Injury or Use of a Weapon Are Misdemeanors 	<ul style="list-style-type: none"> 36 Provide Guidance for Judges Considering Sentence Enhancements 43 Limit Gang Enhancements to the Most Dangerous Offenses 48 Retroactively Apply Repealed Sentence Enhancements 52 Equalize Custody Credits for People Who Committed the Same Offenses, Regardless of Where or When They Are Incarcerated 	<ul style="list-style-type: none"> 56 Clarify Parole Suitability Standards to Focus on Risk of Future Violent or Serious Offenses 64 Establish Judicial Process for “Second Look” Resentencing
--	---	--

Table of Contents

Executive Summary

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

This is the Committee’s first report, and it details 10 reforms recommended unanimously by Committee members. Our recommendations span California’s entire criminal legal system, ranging from traffic court to parole consideration for people serving life sentences. If enacted, these reforms would impact almost every person involved in California’s criminal system and, we believe, measurably improve safety and justice throughout the state.

Our recommendations follow a year of studying California’s criminal punishments. We were guided by testimony from 56 expert witnesses, extensive public comment, staff research, and over 50 hours of public hearings and Committee deliberation. We believe the recommendations represent broad consensus among a wide array of stakeholders, including law enforcement, crime victims, civil rights leaders, and people directly impacted by the legal system. The report contains extensive support for each recommendation, including empirical research, experiences from other jurisdictions, and available data on California’s current approach to these issues.

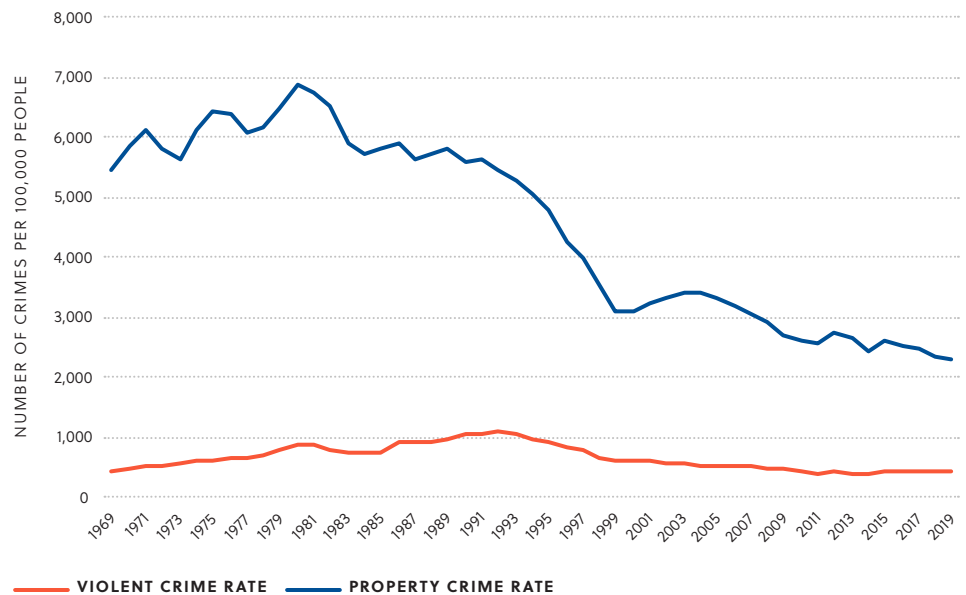
The recommendations are:

1. Eliminate incarceration and reduce fines and fees for certain traffic offenses.
2. Require that short prison sentences be served in county jails.
3. End mandatory minimum sentences for nonviolent offenses.
4. Establish that low-value thefts without serious injury or use of a weapon are misdemeanors.
5. Provide guidance for judges considering sentence enhancements.
6. Limit gang enhancements to the most dangerous offenses.
7. Retroactively apply sentence enhancements previously repealed by the Legislature.
8. Equalize custody credits for people who committed the same offenses, regardless of where or when they are incarcerated.
9. Clarify parole suitability standards to focus on risk of future violent or serious offenses.
10. Establish judicial process for “second look” resentencing.

Introduction

According to the most recent data from the California Department of Justice, California has the lowest crime rates since comprehensive statewide statistics were first recorded in 1969.¹ This continues a 30-year trend of steadily decreasing crime rates.² At the same time, the state has enacted laws that markedly reduced the number of people incarcerated in its state prison system.³ The Committee on the Revision of the Penal Code was established to rationalize and simplify California's criminal laws,⁴ and we are committed to advancing policies that continue the state's course of improving public safety while simultaneously reducing unnecessary incarceration.

CRIME RATES IN CALIFORNIA



Source: California Department of Justice, *Crime in California*, Table 1 (2019).

Despite the recent public safety accomplishments and reforms, aspects of California's criminal legal system are undeniably broken. California remains under numerous court rulings that our prisons and jails are unconstitutionally overcrowded. A decade ago, the United States Supreme Court affirmed that conditions within California's state prisons constitute cruel and unusual punishment.⁵ That case remains unresolved and only exacerbated by the COVID-19 pandemic.⁶

Many law enforcement and judicial leaders appeared before the Committee this year to address these problems and offer solutions that continue to protect public safety.⁷ Then-president of the District Attorneys Association, Nancy O'Malley of Alameda County, encouraged expanded programs for alternatives to incarceration, including for repeat offenders.⁸ Santa Clara District Attorney Jeff Rosen suggested that all prison sentences could be cut by 20% across the board.⁹ Former Governor and Attorney General Jerry Brown offered that all sentence enhancements could be eliminated and

¹ California Department of Justice, *Crime in California*, Table 1 (2019).

² Magnus Lofstrom and Brandon Martin, *Crime Trends in California*, Public Policy Institute of California (Oct. 2018).

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

⁴ Government Code § 8290.5(a).

⁵ *Brown v. Plata*, 563 U.S. 493 (2011).

⁶ "More than 4,400 of the state's 95,000 inmates currently have active infections." (Don Thompson, *California urged to move inmates to front of vaccine line*, Associated Press (Jan. 15, 2021).)

⁷ Videos of all Committee meetings are available at CLRC website.

⁸ Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 1:10:38-1:13:10.

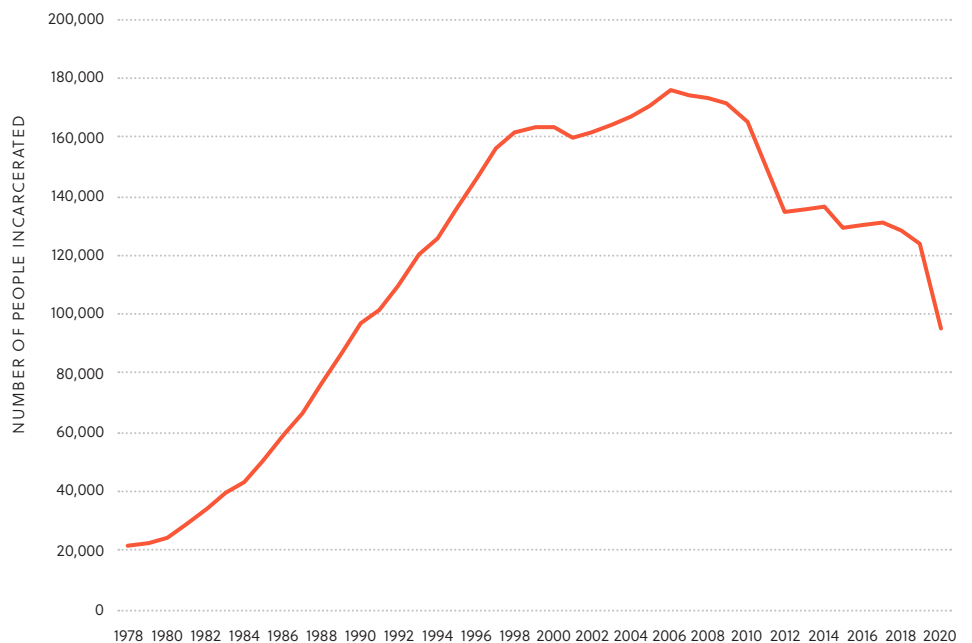
⁹ Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 1:24:14-1:24:50.

that more people should be granted parole.¹⁰ Los Angeles District Attorney George Gascón questioned the rationale of sentences longer than 20 years.¹¹ Likewise, Superior Court Judge Richard Couzens told the Committee that it would be “fundamentally fair” to allow any person incarcerated for more than 15 years to seek a “second look” re-evaluation of his or her sentence.¹² And San Mateo County District Attorney Stephen Wagstaffe, another former president of the California District Attorneys Association, agreed that many criminal laws in California have lacked consistency or public safety justification.¹³ As he explained to the Committee in October 2020, “[It’s] like the Winchester Mystery House. We just keep adding rooms. There’s no theme.”¹⁴

This testimony was supported by some of the nation’s leading criminologists who presented studies on the negative impact of extensive incarceration on long-term public safety, communities, families, and individuals.¹⁵ The Committee also heard from University of California Professor Craig Haney, a national expert on criminal justice policy, who testified powerfully at the Committee’s inaugural meeting in January 2020 that mismanaged criminal justice policies have undermined the general wellbeing of all members of society by increasing racial and economic disadvantage.¹⁶

Governor Newsom acknowledged many of these issues when he addressed the Committee, noting “jaw-dropping” racial disparities in sentencing across the state. He encouraged us to address the “deep racial overlays and the deep socioeconomic overlays that often determine the fate of so many in our system.”¹⁷

PRISON POPULATION IN CALIFORNIA



10 *Id.* at 0:17:08–0:17:55.
 11 Committee on Revision of the Penal Code, Meeting on Nov. 13, 2020, 0:7:52–0:11:15.
 12 Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:42:00–0:43:13.
 13 Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:4:23–0:5:33.
 14 *Id.*
 15 Committee on Revision of the Penal Code, Meeting on Jun. 24, 2020; Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020.
 16 Committee on Revision of the Penal Code, Meeting on Jan. 24, 2020, 1:02:04–1:03:07.
 17 *Id.* at 0:1:12–0:2:00. See also United States Department of Justice, *One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More Than Three Decades* (Sep. 23, 2014) (“High incarceration rates and longer than necessary prison sentences have not played a significant role in materially improving public safety, reducing crime, or strengthening communities. In fact, the opposite is often true.”); Brian Earp, Jonathan Lewis, and Carl Hart, *Racial Justice Requires Ending the War on Drugs*, *The American Journal of Bioethics*, 1 (2020).

Source: US Department of Justice, Bureau of Justice Statistics; CDCR Office of Research.

This past year has made these issues impossible to ignore. The killing of George Floyd last summer once again brought national attention to a truth that many involved in the criminal legal system know: The current system has deep racial inequity at its core. New data published for the first time in this report reveals that racial disparities may be even worse than many imagined. Data obtained by the Committee for this report confirms people of color are disproportionately punished under state laws – from traffic infractions to serious and violent felonies. In addition, the COVID-19 pandemic spotlighted the inadequate medical care and poor conditions within state prisons, including the root cause of overcrowding.

California’s criminal system is also extraordinarily expensive. The 2021-22 state budget for corrections is \$16 billion, the large majority of which funds California Department of Corrections and Rehabilitation operations.¹⁸ This figure does not include expenditures for county jails. California’s Director of Finance Keely Bosler appeared before the Committee in July 2020 and testified that it costs California around \$83,000 per year to house a person in prison.¹⁹ The Committee also heard from the president of Crime Victims United, Nina Salarno Besselman, who emphasized when she appeared before the Committee in October 2020 that the state’s fiscal expenditures do not include sometimes immeasurable costs to crime victims and communities. Nor does the state prison budget address the cost to individuals and families otherwise impacted by the system. We heard several stories of people who were incarcerated far longer than necessary and who are now successful community members and leaders.

Lived experiences in California, newly available data, and peer-reviewed empirical research prove that our mission to maintain or improve public safety while simultaneously reducing unnecessary incarceration is possible and necessary.

In 2020, the Committee studied every level of California’s system over eight public meetings, many of them two-day affairs. We heard from 56 witnesses, including Governor Newsom, former Governor Brown, Attorney General Xavier Becerra, and stakeholders from across California. Every major state law enforcement group contributed to the Committee’s work and research, as did public defenders, victims’ advocates, formerly incarcerated individuals, and other system-impacted people, including one person who joined a Committee meeting by video from behind prison walls.

The Committee also welcomed and heard extensive public comment at each meeting. Committee staff consulted with dozens of scholars, data analysts, and other experts from California and around the country, to whom we are grateful for their expertise and advice.

Throughout our review, the Committee discovered laws that were badly outdated, incoherent, unsupported by data, and frequently implemented harsh punishments without purpose or evidence of advancement of public safety. For example, California’s robbery law—covering one of the most common crimes in California—has been unchanged since 1872 and sweeps broadly, lumping serious and violent conduct with petty thefts.²⁰ The state standard for determining who to release on parole also involves statutory provisions and regulations that are inconsistent with each other.²¹

¹⁸ Governor’s Proposed Budget, 2021-22, California Department of Finance, available at State of California website.

¹⁹ Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:9:25–0:9:43.

²⁰ Penal Code § 211.

²¹ Penal Code § 3041(a)(2), (b)(1); 15 CCR § 2281(a).

The 10 recommendations in this report begin to address some of the most obvious problems that the Committee found and indicate where we believe there is widespread, multi-partisan support for reform. We were steered as much as possible by available data and empirical research. This report benefits from dozens of peer-reviewed studies and original research by Committee staff and partners. We also sought out reforms that would have as broad an impact as possible with general consensus across interest groups, keeping in mind the twin goals of improving public safety and creating a more humane system.

Although our recommendations are not a one-dose panacea and will not cure the deep, systemic problems with California's criminal legal system, the recommendations in this report represent a significant start to making our system more fair, more effective in terms of protecting public safety, less racist, and less wasteful.

Of course, these recommendations are not self-executing. It is only with partnerships from the Governor, the Legislature, state agencies, and county decision-makers that any of these recommendations will make a difference. And the Committee is not naive: The issues that are addressed every day in the criminal legal system are some of the most profound and perplexing in human experience. They arouse strong passion on every side.

The Committee also worked under a self-imposed limitation for this first year with a decision to not recommend any reform that would require a voter initiative or two-thirds vote in the Legislature in order to be enacted. This meant that some of the most important issues in California's criminal legal system and laws that impacted the largest number of people – such as the Three Strikes law, life-without-parole sentences, and the death penalty – were not part of our consideration this year.

This is not the first time that California has attempted a comprehensive review of its criminal laws. In 1963, the Legislature established the Joint Legislative Committee for the Revision of the Penal Code. According to that Committee's initial report to then-Governor Ronald Reagan, its mission was to address the "inadequacies of a code which has never undergone basic, comprehensive revision since its adoption almost a century ago."²² That same year, the Chief Justice of the California Supreme Court remarked that "although we are far along in the twentieth century, our Penal Code in many respects has scarcely entered it."²³ Members of that Committee consulted with experts, examined available data, and collaborated with colleagues from other states. Then, after six years of deliberation and study, the Committee unexpectedly and abruptly abandoned all its work and laid off its staff in 1969. None of its reforms were adopted.²⁴

It has now been almost 160 years since the Penal Code has undergone comprehensive revision. Since 1963, the scope of the system, the extremity of the sentences it metes out, and society's conception of the proper response to criminal offending have all changed. But one thing has remained the same: the need for a rational Penal Code that supports a criminal system that maximizes public safety, treats everyone fairly, and helps to improve communities and lives throughout the state.

We believe the reforms recommended in this report make important strides toward achieving those goals.

²² California Joint Legislative Committee for the Revision of the Penal Code, *Penal Code Revision Project, 1967 Report*, 7 (1967).

²³ Quoting an address given by Chief Justice of the Supreme Court of California Phil S. Gibson on Sep. 25, 1963. (Arthur H. Sherry, *Criminal Law Revision in California*, 4 University of Michigan J. L. Reform 429, 429 (1971).)

²⁴ "Criminal law revision had no champion in California. When the first gleam of publicity disclosed that the Penal Code Revision Project was well on the road to basic and serious law reform, no one spoke for it; it fell an easy prey to the defenders of the status quo." (*id.* at 432, 442.)

Prefatory Notes

PUBLIC SAFETY

Public safety and furtherance of justice are twin goals of any justice system. The Committee is well aware of the great strides California has made in improving crime rates over the past 30 years. Our recommendations are designed to maintain or improve that trend, relying on the most current empirical research and data.

We incorporated key findings from researchers who have studied incarceration trends, both nationally and in California, and the effects on crime rates and recidivism.

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

As also noted, crime rates in California began dropping in the 1990s, which is a significant accomplishment. That drop did not stop when the prison population began to decrease after 2006, including in the last decade when California enacted an ambitious agenda of reforms.²⁵ And while the Committee is not ignorant of the spike in homicides in 2020,²⁶ crime continues to be at historic lows.²⁷ The law enforcement representatives who appeared before the Committee this year generally supported the Committee's mission of continuing to both improve public safety and eliminating unnecessary incarceration.

This report also benefits from valuable input from members of the California judiciary, victims' rights organizations, defense attorneys, formerly incarcerated and other system-impacted people, academics, and additional community and interest-group advocates. We believe there are wide areas of common ground – evidenced by empirical research – supporting reforms that improve public safety and reduce wasteful incarceration at the same time.

²⁵ See Written Submission of Legislative Analyst's Office to Committee on Revision of the Penal Code, Jun. 24, 2020, available at CLRC website.

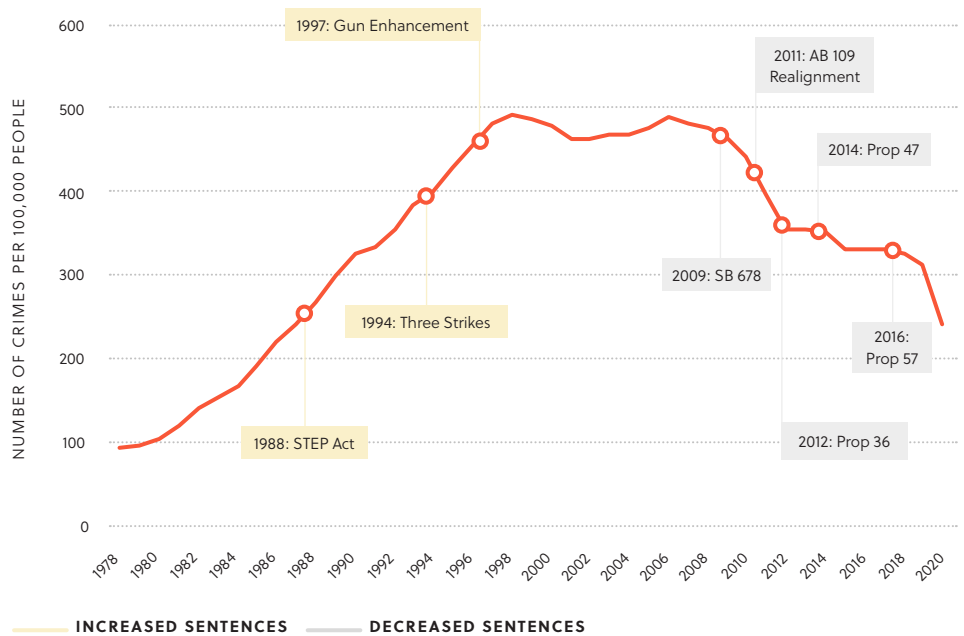
²⁶ See, e.g., Kevin Rector, *L.A. Hits 300 Homicides for first time in a decade*, Los Angeles Times (Nov. 22, 2020).

²⁷ Mike Males, *California's 2019 Crime Rate is the Lowest in Recorded State History*, Center on Juvenile and Criminal Justice (Sep. 2020).

INCARCERATION TRENDS

Starting in the 1970s, the rate of incarceration began to rapidly increase in an unprecedented manner, both nationally and in California.²⁸ Between 1990 and 2009, the average length of stay for people sent to prison in California increased by 51%.²⁹

PRISON INCARCERATION RATE IN CALIFORNIA



28 National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press, 34–37 (2014).

29 *Time Served: The High Cost, Low Return of Longer Prison Terms*, The Pew Center on the States (2012).

30 CDCR Office of Research, *Offender Data Points — Offender Demographics for the 24-Month Period Ending June 2019*, Table 3.3 (Oct. 2020).

31 Board of State and Community Corrections, *Jail Population Dashboard*.

32 CDCR Office of Research, *Offender Data Points — Offender Demographics for The 24-Month Period Ending June 2019*, Figure 1.2 (Oct. 2020).

33 Legislative Analyst’s Office, *How Many Prison Inmates Are There in California?* (last updated January 2019).

34 Committee on Revision of the Penal Code, Meeting on Jan. 24, 2020, 0:35:07–0:36:10; Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 233 (May 2013); State of *Recidivism: The Revolving Door of America’s Prisons*, The Pew Center on the States, 10–11 (2011).

35 *Id.* “[L]engthier terms of incarceration, beyond a few months, do not readily appear to reduce recidivism and, indeed, may increase it.” (Daniel Mears, Joshua Cochran, William Bales, et al., *Recidivism and Time Served in Prison*, *The Journal of Criminal Law and Criminology*, 122 (2016).)

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

37 *Id.* “[A]mong young adults who served more than three years in prison, longer prison stays were associated with increasing probabilities for recidivism.” (Daniel Mears, Joshua Cochran, William Bales, et al., *Recidivism and Time Served in Prison*, *The Journal of Criminal Law and Criminology*, 121 (2016).)

38 Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 233 (May 2013).

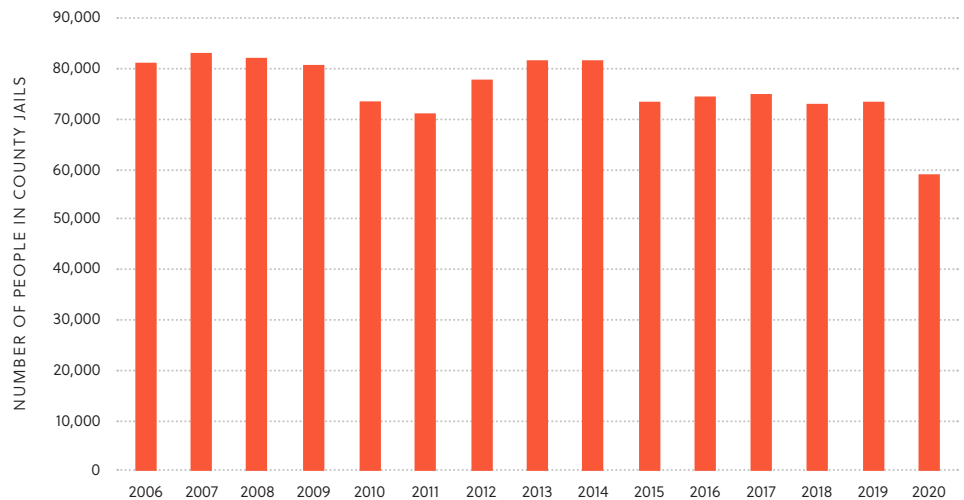
Source: U.S. Department of Justice, Bureau of Justice Statistics.

In 2019, a total of 35,390 people were sentenced to state prison³⁰ and over 900,000 were booked into county jails.³¹

California’s prison population boom began in 1976 with the enactment of the Determinate Sentencing Law, followed by the Street Terrorism and Enforcement Act of 1988 and the Three Strikes law in 1994.³² California’s prison population more than tripled from about 50,000 inmates in 1985 to a peak of 173,000 inmates in 2006.³³ At the same time, California’s prison recidivism rate was the second worst in the nation.³⁴

Researchers have found that lengthy sentences and high rates of incarceration have diminishing returns in reducing crime rates.³⁵ This is partly because people largely “age out of crime.”³⁶ The majority of violent crimes are committed by those less than 30 years old, and criminal involvement diminishes dramatically after age 40 and even more after age 50.³⁷ As University of California Professor Steven Raphael testified before the Committee in June 2020, the nationwide explosion in incarceration from 1989 to 2010 “had no measurable impact on overall violent crime rates.”³⁸

COUNTY JAIL AVERAGE DAILY POPULATION IN CALIFORNIA



Source: California Board of State and Community Corrections.

In recent years, California voters have embraced reforms to reduce California's prison population. Beginning in 2012, voters returned to the polls every two years, overwhelmingly passing ballot measures that reformed California's Three Strikes law (Proposition 36), punishments for nonviolent offenses (Proposition 47), drug laws (Proposition 64), and prison administration (Proposition 57).³⁹ These reforms built on the Legislature's intervention to alleviate prison crowding in response to federal lawsuits.⁴⁰ Today, according to one survey, even most crime victims in California support further reforms to the state's criminal legal system – including 75% of victims favoring reducing sentence lengths for people in prison who are assessed as a low risk to public safety.⁴¹

From its height in 2006, California's prison population dropped by 27%.⁴² In 2020, following emergency measures aimed at curtailing the COVID-19 pandemic, California's state prison and jail populations declined even further.⁴³ As of December 31, 2020, California's prison population was at a 30-year low of 95,456 people.⁴⁴ This is 45% below the prison population in 2006⁴⁵ but still significantly above the state prison's intended capacity.⁴⁶ And because some of the recent decrease in prison population was caused by pausing intake from county jails, the prison population will likely increase once intake resumes.⁴⁷

Despite these reforms, and California's sustained decrease in crime rates, people of color – Black men in particular – and people with mental health issues continue to be incarcerated disproportionately.⁴⁸ The Committee is committed to addressing these deep rooted systemic problems. There is no reason California cannot maintain historically low crime rates while correcting glaring racial inequities in our criminal justice system.

39 See Written Submission of Legislative Analyst's Office to Committee on Revision of the Penal Code, 1–2 (Jun. 24, 2020), available at CLRC website.

40 *Id.* at 1.

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

42 Generated using the Corrections Statistical Analysis Tool (CSAT), available at Bureau of Justice Statistics website.

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

44 California Department of Corrections and Rehabilitation, *Weekly Report of Population* (as of Dec. 31, 2020, midnight), available at CDCR website.

45 California prisons held 173,000 people in 2006. (Legislative Analyst's Office, *How Many Prison Inmates Are There in California?* (last updated January 2019).)

46 "California's prisons are designed to house a population just under 80,000..." (*Brown v. Plata*, 563 U.S. 493, 502 (2011).)

47 *Governor's Budget Summary, 2021–22*, 173 (Jan. 2021).

48 Committee on Revision of the Penal Code, Meeting on Jan. 24, 2020, 0:52:43–0:55:04, 0:47:10–0:51:16.

DATA COLLECTION AND ANALYSIS

One of the Committee’s most important objectives is the development of an aggregated collection of administrative data related to the criminal legal system. If there was one issue that found unanimous agreement across all stakeholders, it was that the state’s criminal legal policy should be based on empirical evidence.

We agree wholeheartedly with Attorney General Becerra, who appeared before the Committee in October 2020 and advised that “data should be the base of where we launch.”⁴⁹ Other law enforcement and related agencies, including the California Police Chiefs Association, the Chief Probation Officers of California, and the California State Sheriffs’ Association, agreed that research – particularly into the last decade of reform in California – is essential.⁵⁰ Judges from the Judicial Council, prosecutors, defense lawyers, and community activists all echoed that sentiment.⁵¹

Despite such widespread support for data research and empirical analysis, such information is not readily available.⁵² California’s criminal justice data is spread across the records of various state and local agencies, including the California Department of Corrections and Rehabilitation, the California Department of Justice, and the courts, sheriffs, prosecutors, and probation departments of California’s 58 counties. California is not alone in this respect. We are aware of no other jurisdiction in the United States with a comprehensive collection of its criminal justice data.⁵³

We are committed to addressing this issue. The Committee was granted special broad authority to gather data and to address the problems of incomplete and fragmented data. The Committee’s enabling statute provides in part that “[a]ll state agencies, and other official state organizations, and all persons connected therewith shall give the ... Committee full information, and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control.”⁵⁴

With this authority, the Committee has begun the process of gathering the various agency datasets. We have partnered with data analysts and security experts to ensure our research is sound and that confidential state data is protected by the highest security protocols. We also received generous philanthropic support to establish a long-term relationship with the California Policy Lab, a policy-focused research lab at University of California, Berkeley, and University of California, Los Angeles, to assist with collecting, analyzing, and understanding the data that the Committee collects.

A NOTE ON “VIOLENT,” “NONVIOLENT,” AND “SERIOUS” OFFENSES

Many of the Committee’s recommendations distinguish between how people convicted of violent, serious, and nonviolent offenses should be treated. These distinctions are important because so much of California’s criminal law turns on the definitions of these terms, and recommendations that did not grapple with them would be ignoring the reality of how cases are charged and prosecuted. While these terms can often be subjective, we recognize that the Legislature has created discrete lists of “serious” and “violent” felonies,⁵⁵ and this report relies on those statutory definitions. Crimes that do not appear on the list of violent offenses are considered “nonviolent.”

49 Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:16:17–0:16:20.

50 Written Submission of Lassen County Sheriff Dean Growdon, First Vice President of the California State Sheriffs’ Association to Committee on Revision of the Penal Code, 1 (Oct. 21, 2020); Written Submission of Chief Probation Officers of California to Committee on Revision of the Penal Code, 4 (Oct. 21, 2020); Written Submission of Chief Eric Nuñez (Los Alamitos), President of California Police Chiefs Association to Committee on Revision of the Penal Code, 3–4 (Oct. 21, 2020).

51 Judge Richard Vlavianos, Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 0:38:10–0:38:55; District Attorney Nancy O’Malley, Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 1:55:15–1:56:45.

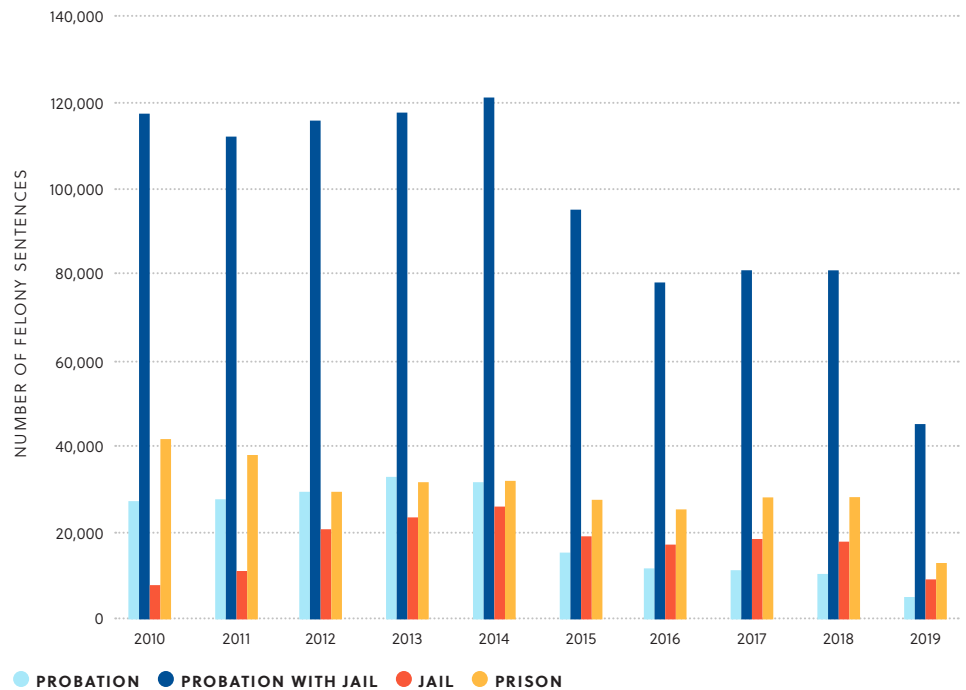
52 See Mikaela Rabinowitz, Robert Weisberg, and Jessica McQueen Pearce, *The California Criminal Justice Data Gap*, Stanford Criminal Justice Center (2019).

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

54 Government Code § 8286.

55 Penal Code § 11927(c); Penal Code § 6675(c).

FELONY SENTENCES BY TYPE OF PUNISHMENT IN CALIFORNIA



Source: California Department of Justice, *Crime in California*, Table 38B (2014); California Department of Justice, *Crime in California*, Table 38A (2019).

For important reasons, violent crimes receive a significant amount of public and political attention. However, it is also true that the vast majority of arrests in California (about 90%) are for misdemeanors and nonviolent felonies.⁵⁶ Over 80% of people facing felony charges in California receive a sentence of jail, probation, or a combination of the two.⁵⁷ Less than 20% of all felony charges result in prison sentences.⁵⁸

We acknowledge that there is a growing consensus that a rigid distinction between violent and nonviolent offenses may be counterproductive.⁵⁹ For example, across the country, people convicted of violent offenses often have lower recidivism rates than people convicted of nonviolent ones.⁶⁰ In California, the three-year reconviction rate for people committed to prison for a non-serious/nonviolent offense was 51%.⁶¹ For people committed to prison with a violent offense, it was 29%.⁶² Some of this apparent paradox is likely explained by long sentences imposed for violent crimes, which result in older parolees who are less likely to commit new crimes upon release. At the same time, nonviolent crimes are often associated with poverty, addiction, and homelessness — which are rarely cured by incarceration.

While the Committee is not calling for abolishing the distinction between violent and nonviolent offenses, many of its recommendations are informed by this research and call for considering the totality of a person's background and offense, not merely letting an offense's statutory classification be a definitive statement on what rehabilitative responses are appropriate.

⁵⁶ California Department of Justice, *Crime in California 2019*, Tables 23–25 (Jul. 2020).

⁵⁷ *Id.* at Table 38A. The California Department of Justice notes without further explanation that in 2019 “there was a decrease in the number of final dispositions and sentences for felony adult arrests reported to the California Department of Justice.” (*Id.* at Note b.)

⁵⁸ *Id.*

⁵⁹ See James Austin, Vincent Schiraldi, Bruce Western, and Anamika Dwivedi, *Reconsidering the “Violent Offender,”* The Square One Project (May 2019).

⁶⁰ *Id.* at Table 4.

⁶¹ CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Figure 8, Table 12 (Jan. 2020).

⁶² *Id.*; Research shows that people who have committed violent offenses are often the victims of other violent offenses. (James Austin, Vincent Schiraldi, Bruce Western, and Anamika Dwivedi, *Reconsidering the “Violent Offender,”* The Square One Project (May 2019).)

THREE-YEAR RECIDIVISM OUTCOMES FOR PEOPLE RELEASED FROM PRISON IN CALIFORNIA (2014-15)

TYPE OF RECONVICTION	NUMBER OF RELEASED PEOPLE CONVICTED OF NEW OFFENSES	% OF TOTAL PEOPLE RELEASED
Felonies Against Persons	2,788	7%
Other Felony Offenses	5,891	15%
Misdemeanors	9,556	24%
TOTAL RECIDIVISM	18,235	46%

Source: CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Table 1 (Jan. 2020).

Recidivism is also an important and often misunderstood term of criminal law. While prisons and jails should do as much as possible to encourage rehabilitation and reduce recidivism, we note that only 7% of people released from prison committed subsequent felony crimes against persons.⁶³ The remaining 93% committed misdemeanors, nonviolent felonies, or no crime at all.

LANGUAGE USED THROUGHOUT THIS REPORT

This report avoids using the term “inmate,” “prisoner,” or “offender.”⁶⁴ Instead, the report uses “incarcerated person” and similar “person-first” language. Other official bodies have made similar choices about language,⁶⁵ and the Committee encourages stakeholders – including the Legislature when drafting legislation – to consider doing the same.

⁶³ CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Table 1 (Jan. 2020).

⁶⁴ See Nguyen Toan Tran, et al., *Words Matter: A Call for Humanizing and Respectful Language to Describe People Who Experience Incarceration*, BMC International Health and Human Rights, 18, 41 (2018).

⁶⁵ 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 Godwin and Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That’s Changing*, Poynter (Jan. 4, 2021).

Recommendation	15
Relevant Statutes	15
Background and Analysis	15
Empirical Research	18
Insights from Other Jurisdictions	18

1. Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses

Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses

RECOMMENDATION

Two common traffic offenses – driving without a license and driving with a license suspended for failure to pay a fine or appear in court – can be punished as misdemeanors and carry significant fines, even though they have little relation to unsafe driving.

The Committee therefore recommends the following:

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

RELEVANT STATUTES

Penal Code § 19.8

Vehicle Code §§ 12500, 12810, 14601.1

BACKGROUND AND ANALYSIS

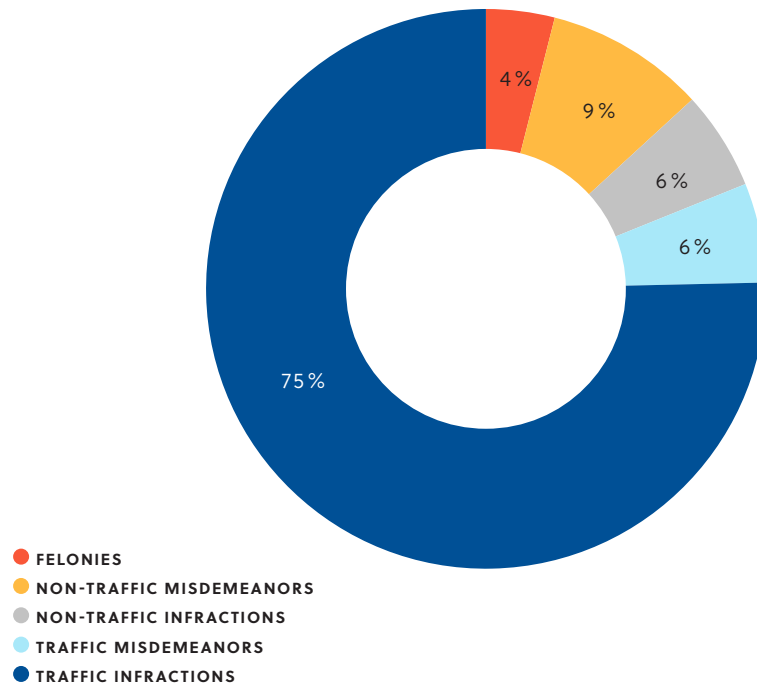
Under current law, people can be convicted of misdemeanors and incarcerated for driving without a license or driving with a license suspended for failure to pay a fine or appear in court.⁶⁶ These offenses are primarily financial in nature and are not connected to unsafe driving. Data also indicates that Black and Latinx motorists are disproportionately arrested for these offenses despite there being no documented difference in driving behavior.⁶⁷ The Committee recommends that they be considered infractions only and that no one should be incarcerated for them.

These cases make up a large portion of all criminal filings in California and consume considerable resources among police, courts, prosecution and defense offices, and county jails. In fact, the vast majority of all criminal filings in California are traffic cases – more than 81% or 3.6 million filings a year.⁶⁸

⁶⁶ “[E]very offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.” (Penal Code § 19; Vehicle Code §§ 14601.1(b)(1)–(2), 40000.11(b).)

⁶⁷ *Stopped, Fined, Arrested, Back on the Road California*, 1, 21 (Apr. 2016); John Macdonald & Steven Raphael, *An Analysis of Racial/Ethnic Disparities in Stops by Los Angeles County Sheriff’s Deputies in the Antelope Valley: Report Period: January–June 2019*, xi (Sep. 2020).

⁶⁸ Judicial Council of California, *Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19*, 124–25, Table 7a.

BREAKDOWN OF CRIMINAL FILINGS IN CALIFORNIA (2018-19)

Source: Judicial Council of California, Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19, 134–35 (Table 7a).

Annually, almost 260,000 traffic offenses are charged as misdemeanors,⁶⁹ and the people arrested and jailed for these offenses are disproportionately people of color.⁷⁰ Additional data confirms that license suspensions for failure to appear are correlated with high poverty rates and race, with the highest rates of suspensions in poorer neighborhoods with a high percentage of Black and Latinx residents.⁷¹

According to data provided to the Committee from the California Department of Motor Vehicles, approximately 600,000 people currently have their licenses suspended solely for failure to appear in court.⁷²

The number of prosecutions for driving without a license and driving on a suspended license is also large. In Los Angeles County, between 2010 and 2019, there were more than 180,000 charges for driving without a license and more than 92,000 charges filed for driving on a license suspended for failure to appear or pay a fine.⁷³

⁶⁹ This data is from the Judicial Council's Statewide Caseload Trend reports. See, e.g., Judicial Council of California, Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19, 134–35, Table 7a.

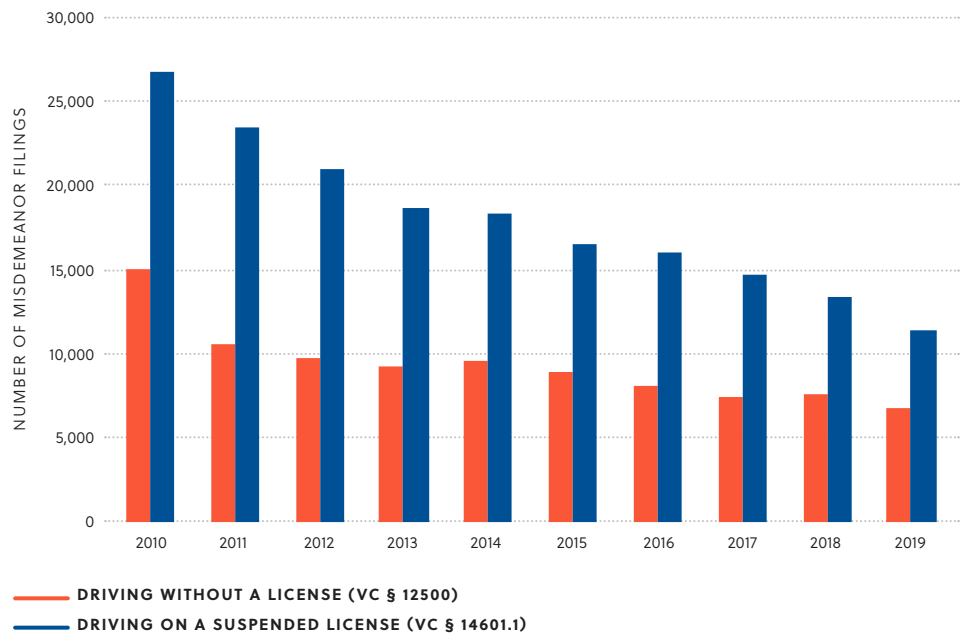
⁷⁰ Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California, Back on the Road California, 4–20 (Apr. 2016); California Department of Justice, Racial and Identity Profiling Advisory Board 2021 Annual Report.

⁷¹ Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California, Back on the Road California, 1, 9 (Apr. 2016).

⁷² Data provided by California Department of Motor Vehicles (Jan. 2021).

⁷³ This information was provided by the Los Angeles County Public Defender's Office.

MISDEMEANOR TRAFFIC FILINGS IN LOS ANGELES COUNTY



74 Commission on the Future of California's Court System, Report to the Chief Justice, 58 (2017).

75 American Association of Motor Vehicle Administrators, *Reducing Suspended Drivers and Alternative Reinstatement: Best Practices*, 3 (Nov. 2018).

76 Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:6:28–0:7:18.

77 Los Angeles County District Attorney Special Directive 20-07, 2-3 (effective Dec. 8, 2020); Santa Clara County District Attorney, Bend the Arc Reforms, 9 (Jul. 22, 2020) (noting disproportionate impact that this offense has on people of color); Memorandum from M.C. Molitor, Jose Egurbide, and Robert Cha, Re: Update to the Los Angeles City Attorney Filing Guidelines for Direct Citations — Changes Re: Vehicle Code Section 14601.1(a) (Feb. 22, 2020).

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

79 Vehicle Code § 14601.1.

80 Vehicle Code § 12500.

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

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

83 Via thirteen different code provisions, an infraction with a base fine of \$100 ends up costing \$815 once an initial deadline to pay is missed. (*Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, Back on the Road California, 23 (Apr. 2016).)

84 Vehicle Code § 12810 (specifying "point violation count"); *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, Back on the Road California, 22 (Apr. 2016); Vehicle Code § 12810(b) & (e). See also DMV, California Department of Motor Vehicles, *DMV Point System in California*, available at DMV website.

In 2017, California's Commission on the Future of California's Court System, convened by Chief Justice Tani Cantil-Sakauye, recommended that minor traffic court cases be handled entirely in civil court and not as criminal proceedings.⁷⁴ Likewise, the American Association of Motor Vehicle Administrators has long opposed suspending licenses for reasons unrelated to safety.⁷⁵ More generally, Attorney General Becerra told the Committee at its October 2020 meeting that "the fewer times we have to go to the justice system to deal with people on a criminal ground, the better off we'll always be."⁷⁶

In recognition of some of these issues, three large prosecutor's offices in California — the Santa Clara County District Attorney, the Los Angeles City Attorney, and the Los Angeles County District Attorney — have exercised their discretion to either decline filing charges in these cases or to always file them as infractions.⁷⁷ San Francisco does not suspend licenses for people who fail to appear for traffic court dates.⁷⁸

Although there is little relationship between unsafe driving and the two traffic misdemeanors at issue here — driving on a license suspended for failure to pay a fine or appear in court⁷⁹ and driving without a license⁸⁰ — prosecutors currently have the discretion to charge these offenses as misdemeanors.⁸¹ Therefore, not only can people can be arrested and jailed,⁸² but fines and fees can also be exorbitant.⁸³ In addition, a conviction for driving on a suspended license adds two "points" on the person's license — the same consequence as driving under the influence of drugs or alcohol.⁸⁴

California has taken recent steps to address the inequities inherent in some license suspensions, but it is unknown how many people still have misdemeanor charges pending despite these reforms.⁸⁵

In addition, California has some of the county's highest court costs and penalty fees for vehicle infractions.⁸⁶ The total cost in fines and fees for driving on a suspended license and driving without a license can amount to more than \$4,000. According to the Alliance for a Just Society, failures to appear and license suspensions are among "the most common ways courts are able to legally [] jail poor people."⁸⁷

These violations are often directly related to poverty and do not invariably reflect a disregard for the law.⁸⁸ Advocates note that many low-income people face "significant barriers to attending [court], including an inability to take time off work, lack of available transportation, lack of child care, or lack of a reliable or permanent address where they can receive notice of the hearing."⁸⁹ Other people may avoid coming to court, knowing they cannot pay a court fine or fee and fearing arrest.⁹⁰ The violations can also result in other significant consequences, including serving as the basis for arrest⁹¹ or vehicle impounding.⁹²

While every driver should take the steps to be properly licensed and appear in court, driving without a license does not necessarily indicate unsafe driving and frequently relates to income level. If someone without a license is driving in an unsafe manner, they can be separately cited and charged for those offenses.⁹³

EMPIRICAL RESEARCH

Recent research shows that license suspension for failure to appear in court is not the most effective way to coerce people to appear in court and pay their fines.⁹⁴ In fact, after California prohibited license suspensions for failure to pay court fees in 2017, on-time collections increased the following year. As the San Francisco Financial Justice Project concluded, "[t]he increase in collections without the use of driver's license suspensions indicates that the ability to suspend driver's licenses was not needed to ensure payment."⁹⁵

Other research shows that license suspensions have dramatic economic consequences. Data from New Jersey concludes that 42% of people surveyed lost a job while their license was suspended, 45% reported not finding another job, and 88% reported reduced income.⁹⁶ Another study showed that women with young children receiving public assistance were twice as likely to find employment if they had a driver's license — a bigger impact than having graduated from high school.⁹⁷

INSIGHTS FROM OTHER JURISDICTIONS

Seven states, including Virginia, Mississippi, and South Carolina, do not restrict driving privileges for failure to appear in court.⁹⁸ Six additional states, including Pennsylvania, Oregon, and New Jersey, do not criminalize a first offense for driving on a suspended license when the suspensions are not related to driving under the influence.⁹⁹

Connecticut, Oregon, Pennsylvania, Washington, and Wisconsin treat driving without a license as a traffic infraction.¹⁰⁰ Texas considers driving without a license a misdemeanor offense, but the penalty is limited to a \$200 fine.¹⁰¹

⁸⁵ In 2017, Governor Brown's budget stopped the practice of suspending licenses for people who did not pay court fees. (AB 103 (2017) (Committee on Budget) (Section 53 & 54).) After this change, the Department of Motor Vehicles voluntarily revoked all license suspensions that had been caused by failures to pay court fines. (California Department of Motor Vehicles, *DMV Removes Driving Suspensions for Failure to Pay Fines* (Mar. 15, 2018), available at DMV website.)

⁸⁶ *Paying More for Being Poor*, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, 1 (May 2017).

⁸⁷ Allyson Fredericksen and Linnea Lassiter, *Debtors' Prisons Redux: How Legal Loopholes Let Courts Across the Country Criminalize Poverty*, Alliance for a Just Society, 4 (Dec. 2015).

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* See also Brief of Legal Services of Northern California as Amici Curiae Supporting Appellant, *Hernandez v. Department of Motor Vehicles*, 49 Cal.App.5th 928 (2020).

⁹⁰ Allyson Fredericksen and Linnea Lassiter, *Debtors' Prisons Redux: How Legal Loopholes Let Courts Across the Country Criminalize Poverty*, Alliance for a Just Society, 2 (Dec. 2015).

⁹¹ Penal Code § 836 (allowing a police officer to arrest a person for a public offense committed in their presence); Penal Code § 15 (defining "public offense" as a violation of law punishable by death, imprisonment, fine, removal, or disqualification from office); Vehicle Code § 40303(a)-(b).

⁹² Vehicle Code § 22651(p).

⁹³ See, e.g., Vehicle Code §§ 23103 (reckless driving), 22350 (basic speed law), 22107 (unsafe lane change).

⁹⁴ Redesigned summons form and text messages reduced failures to appear on average by 13% and 21%, respectively. (Alissa Fishbane, Aurelie Ouss, and Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, Science (Nov. 6, 2020).)

⁹⁵ "And across California, on-time collections went up in the year following the end of driver's license suspensions for Failure to Pay." (*Driving Toward Justice*, San Francisco Financial Justice Project, 3 (Apr. 2020).) "[C]ollections have declined slightly in the year since, [but] the Judicial Council attributes the decline primarily to the continuing decline in the number of filings." (*Id.* at 5.)

⁹⁶ New Jersey Motor Vehicles Affordability and Fairness Task Force Final Report, xii (Feb. 2006).

⁹⁷ John Pawasarat and Lois M. Quinn, *Research Brief on ETI Driver's License Studies*, ETI Publications 186, 1 (2017).

⁹⁸ The states are Idaho, Iowa, Mississippi, South Carolina, South Dakota, Virginia, and Wisconsin. The Free to Drive Coalition conducted research into the laws governing license suspensions in these states and found that, while various codes list the circumstances that can lead to license suspension, failure to appear is not one of them.

⁹⁹ Indiana Code § 9-24-19-1; New Jersey Stat. Ann. § 39:3-40; Oregon Rev. Stat. § 811.175; 75 Pennsylvania Code Stat. Ann. § 1543; Rhode Island Stat. § 31-11-18(b); and 23 Vermont Stat. Ann. § 676.

¹⁰⁰ Connecticut Gov't Stat. Ann. § 14-36(i); Oregon Rev. Stat. § 807.010; 75 Pennsylvania Code Stat. Ann. § 1501; Rev. Code Washington Ann. § 46.20.015; Wisconsin Stat. Ann. § 343.05.

¹⁰¹ Texas Code Ann., Transp. §§ 521.021, 521.461.

Recommendation	20
Relevant Statutes	20
Background and Analysis	20
Empirical Research	23
Insights from Other Jurisdictions	23
Additional Considerations	24

2. Require that Short Prison Sentences Be Served in County Jails

Require that Short Prison Sentences Be Served in County Jails

RECOMMENDATION

Thousands of people are sentenced to state prison every year for less than a year instead of serving their sentences in county jail, despite evidence indicating better public safety outcomes from local incarceration.

The Committee therefore recommends the following:

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

RELEVANT STATUTES

Penal Code § 1170

BACKGROUND AND ANALYSIS

A large number of people sent to state prison are incarcerated there for less than one year. Although their imposed sentence is almost always longer than one year, their actual time in state prison is short because of time they have already served awaiting trial in county jails and through available custody credits.¹⁰²

According to data provided to the Committee by the California Department of Corrections and Rehabilitation (CDCR), approximately 37% of people sentenced to state prison for determinate terms serve less than one year in CDCR custody. (The statistic addresses someone’s actual length of incarceration – that is, how much time is left to serve on a sentence.) This amounts to roughly 14,000 people annually. Approximately 5,000 people per year serve less than six months in CDCR custody.¹⁰³

¹⁰² Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:59:54–1:00:00.

¹⁰³ Information provided by CDCR Office of Research.

NUMBER OF PEOPLE WHO SERVED LESS THAN ONE YEAR IN PRISON

	2017	2018	2019
LESS THAN 6 MONTHS	5,103	4,822	5,461
6 MONTHS TO 1 YEAR	8,627	9,312	9,046
TOTAL	13,730	14,134	14,507

Source: Source: CDCR Office of Research.

At the same time, new data presented to the Committee in July 2020 by professors Mia Bird and Ryken Grattet concludes that people with short sentences have significantly lower recidivism rates (22% fewer felony convictions) if they serve their sentences in county jails or on probation, rather than state prison.¹⁰⁴ The study accounts for a wide array of criminogenic variables, including crimes committed and criminal histories.¹⁰⁵

In addition, at the Committee’s hearings in July and October 2020, representatives from the California State Sheriffs’ Association agreed that county jails can generally provide better services and public safety benefits in the form of reduced recidivism compared to CDCR.

California State Sheriffs’ Association First Vice President, Lassen County Sheriff Dean Growdon, told the Committee he was unsurprised that people incarcerated locally are less likely to commit new crimes compared to those sent to state prison for the same offenses. Sheriff Growdon explained that people incarcerated in county jails stay local and maintain their ties to their families and communities while serving their sentences. He also emphasized that sheriffs put extra effort into rehabilitative and reentry services, especially following the enactment of Public Safety Realignment in 2010.¹⁰⁶

Butte County Sheriff Kory Honea, Second Vice President of the California State Sheriffs’ Association, also agreed that county jails have better recidivism rates compared to CDCR. He told the Committee that “we at the local level can provide better outcomes,”¹⁰⁷ describing a program in his county that had lower recidivism rates than CDCR at the time.¹⁰⁸ Sheriff Honea noted that local officials have natural and direct incentives to develop programs with better public safety results: “[If] we don’t do anything to address the underlying causes of criminal behavior, and then we turn them back loose into our community, they’re going to victimize members of our community, including my friends and my family, or perhaps me.”¹⁰⁹ Sheriff Growdon noted that people in county jails may be able to “maintain those local ties and support that they might develop while they’re in custody.”¹¹⁰ Other research has shown that counties that prioritized spending funds on reentry services over enforcement had better recidivism rates.¹¹¹

¹⁰⁴ Written submission of Mia Bird and Ryken Grattet to Committee on Revision of the Penal Code (Jul. 2020).

¹⁰⁵ *Id.*

¹⁰⁶ Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:48:33–0:52:56.

¹⁰⁷ Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:50:33–0:51:00.

¹⁰⁸ See Jonathan W. Caudill, Ryan Patten, Sally Parker and Matt Thomas, *Breaking Ground: Preliminary Report of Butte County Sheriff’s Alternative Custody Supervision Program*, ii (Sep. 19, 2012), discussing Butte County’s alternative custody program.

¹⁰⁹ Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 1:06:52–1:07:39.

¹¹⁰ Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:51:01–0:51:19.

¹¹¹ Mia Bird and Ryken Grattet, *Do Local Realignment Policies Affect Recidivism in California?*, Public Policy Institute of California, 20 (Aug. 2014).

Although CDCR may have larger rehabilitative and reentry systems, those state prison benefits generally do not apply to people who are incarcerated there for less than one year. This is because people entering state prison spend their first months (up to 120 days) in “Reception Centers” which have minimal programming. In addition, waitlists for rehabilitative programming are often over one year in length.¹¹² The combination of short stays, long waitlists, and initial confinement in Reception Centers means that people receive few meaningful rehabilitative opportunities while in CDCR custody if confined in prison for less than one year.

As former Governor Brown remarked to the Committee in September 2020: “[These people] go to prison for a year [or] 18 months. What does that accomplish?”¹¹³ Governor Brown said that he favored having people serve shorter sentences locally rather than in prison and recommended that jails be given the resources to provide successful treatment and programming.¹¹⁴

The financial impact of short prison sentences is also significant. According to Director of Finance Keely Bosler, the intake costs for bringing people into CDCR (including transportation costs, security intake assessments, and health screens) are significant – up to \$47 million annually.¹¹⁵ A portion of these savings could be passed on to counties to offset additional costs of incarcerating more people locally.

Since the enactment of Public Safety Realignment in 2011, many counties have shown sufficient capacity and expertise in managing people serving sentences of incarceration in county jail, even if that burden was initially unwanted. As Sheriff Growdon told the Committee, the difference between jails before and after Realignment and other reforms is “night and day” because sheriffs have embraced rehabilitative programming and alternative custody arrangements, often with better public safety outcomes and reduced costs.¹¹⁶

Recent experience with the COVID-19 public health emergency provides another example of the ability of county jails to maintain custody over people sentenced to state prison sentences. In March 2020, CDCR stopped the transfer of people from jail to prison in an effort to curtail spread of the virus.¹¹⁷ Though not without some significant difficulties, this experience demonstrates the ability of local authorities to incarcerate additional people sentenced to state prison, especially for periods less than a year.

¹¹² CDCR Ombudsman, *What to Expect — Reception and Classification Process*, available at CDCR website. Once intake at CDCR resumes, the waiting times at reception centers is expected to be shorter. (California Department of Finance, *California State Budget Summary 2021–22*, 177 (Jan. 2021).)

¹¹³ Committee on Revision of the Penal Code, Meeting on Sep. 16, 2020, 0:9:20–0:9:30.

¹¹⁴ Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:32:22–0:34:30; 0:41:38–0:42:40.

¹¹⁵ California Department of Corrections and Rehabilitation, *2020–21 State Budget*, CR 19; Director Bosler explained that such wasted expenditures were key drivers for the passage of AB 109. (Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:19:00–0:21:30.)

¹¹⁶ Committee on Revision of the Penal Code, Meeting on Oc. 21, 2020, 0:39:23–0:40:55.

¹¹⁷ CDCR, *COVID-19 Updates*; CDCR, *People Sentenced to CDCR Held in County Jail — FAQs*, available at CDCR website.

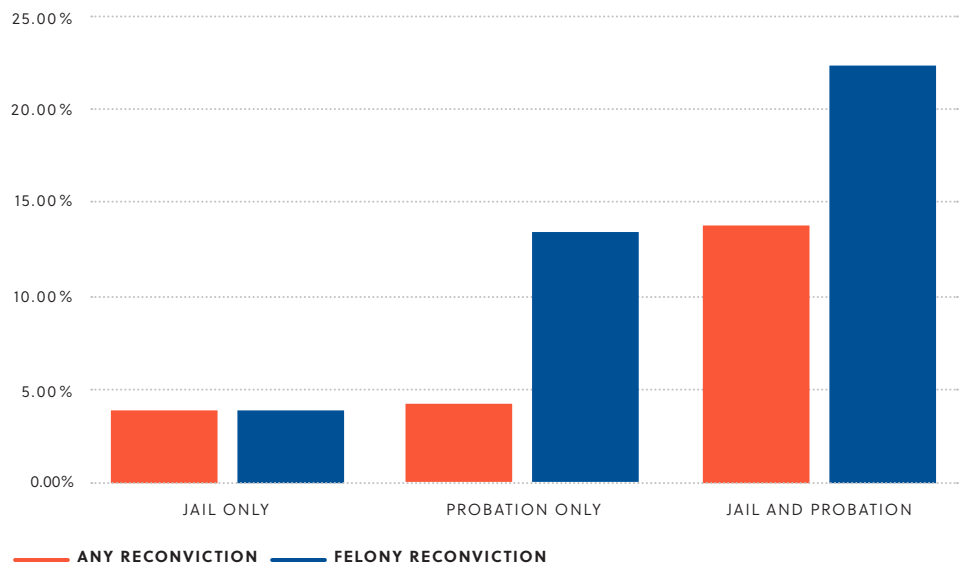
EMPIRICAL RESEARCH

As noted, according to a multi-county study of incarceration trends in California by professors Bird and Grattet, people who served a sentence in jail and on probation had significantly lower felony reconviction rates (23% fewer felony convictions) compared to people sentenced to prison for the same crimes.¹¹⁸ The research controlled for a number of variables, including criminal history, length of sentence, and conviction offense.

More information about the different outcomes is here:

IMPACT OF SENTENCE TYPE ON TWO-YEAR RECIDIVISM RATE

Bars Represent Percentage Decrease in Two-Year Reconviction Rate Relative to Prison Sentence.



Source: Source: Mia Bird and Ryken Grattet, Public Policy Institute of California (Jun. 2019).

The study also examined five common offenses – burglary, motor vehicle theft, controlled substance possession, controlled substance possession with intent to sell, and weapons – and found that people sentenced locally to jail, probation, or jail and probation have lower reconviction rates than their prison-sentenced counterparts, except for jail sentences for burglary.¹¹⁹ In addition, people serving prison terms for these five offenses spent more than twice the amount of time in custody compared to people who were sentenced to county jail.¹²⁰

INSIGHTS FROM OTHER JURISDICTIONS

According to the United States Department of Justice, the general rule and practice in criminal law is that sentences less than a year are served in county jail, whereas longer

¹¹⁸ Mia Bird and Ryken Grattet, *Felony Sentencing and Recidivism Outcomes in California*, Public Policy Institute of California (Jun. 2019); Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:00:00–1:00:21.

¹¹⁹ Mia Bird and Ryken Grattet, *Felony Sentencing and Recidivism Outcomes in California*, Public Policy Institute of California (Jun. 2019).
¹²⁰ Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:11:25–0:12:00, 0:12:39–0:13:47, 0:23:24–0:24:07.

sentences are served in state prisons.¹²¹ This is not the rule in California. Instead, following 2011's Public Safety Realignment,¹²² each felony offense in the Penal Code specifies whether a sentence of incarceration should be served in jail or in prison.¹²³ Under Realignment, some people can be sentenced to serve several years in jail, rather than in state prison.

Some states have addressed the recurring problem of short sentences by finding alternatives to state prison. For example, in Massachusetts there are "Houses of Correction" run by local sheriffs that are designated for some sentences up to two and a half years long.¹²⁴ In 2019, Pennsylvania enacted a short-sentence parole law that grants presumptive parole release to people whose minimum term of imprisonment is two years or less.¹²⁵

ADDITIONAL CONSIDERATIONS

- Current state policy provides for reimbursing counties for the cost of maintaining custody of people sentenced to state prison under Realignment.¹²⁶ If the Committee's recommendation for counties to maintain custody over people with short prison sentences results in an increased jail population, the state should follow its usual practice of reimbursing counties for that additional expense.
- If the Committee's recommendation is implemented, some counties may have extra capacity in their jails that neighboring counties may be able to use. Current law does not permit these transfers for people sentenced to state prison terms,¹²⁷ and the Legislature should consider allowing them to do so.
- As noted above, following Realignment, some people received lengthy jail sentences – more than five years. In 2016, the California State Sheriffs' Association reported that approximately 1,500 people statewide were serving sentences of more than five years in county jails as a result of Realignment.¹²⁸ People sentenced to five years or more should not be incarcerated in county jail facilities because jails are not built to incarcerate people for this long. Instead, these people should serve their time in state prison.
- Under current law, every county is expected to manage its local jail population through a "board of parole commissioners" that is empowered to release people from jail to county parole supervision.¹²⁹ However, county parole is rarely used,¹³⁰ and the law has not been updated to reflect current practices in community supervision. Counties should be encouraged to utilize this provision, which can become an important tool to incentivize rehabilitation, manage jail populations, and help reduce unnecessary local correctional costs.
- If enacted, this proposal would likely result in more people being released from jail custody to community supervision. There should be better coordination between local jail officials and authorities responsible for supervision upon a person's release from custody. This "warm handoff" between jails and probation and parole agencies should be as robust as possible. To ensure this,

¹²¹ "Prisoners sentenced to jail facilities usually have a sentence of one year or less." (United States Department of Justice, *Prisoners in 2018*, Bureau of Justice Statistics, 2.)

¹²² AB 109 (Committee on Budget), 2011 Cal. Stat. ch. 15.

¹²³ J. Richard Couzens and Tricia A. Bigelow, *Felony Sentencing After Realignment*, 6–8 (May 2017).

¹²⁴ Massachusetts General Laws, ch. 279, § 23.

¹²⁵ 61 Pennsylvania Code Stat. Ann. § 61371.

¹²⁶ The daily rate in 2010 was \$77.17. (Brian Albert, *State Prisoners in County Jails*, National Association of Counties, 6 (Feb. 2010).)

¹²⁷ Penal Code § 4016.5(a).

¹²⁸ See Letter of Cory Salzillo & Cathy Coyne, *Re: Updated Survey of Long-Term Offenders in Jail*, (Oct. 17, 2016). More current data is not available.

¹²⁹ Penal Code §§ 3075 (specifying that the board should have a sheriff's representative, a probation representative, and a member of the public selected by the presiding judge of the Superior Court); 3081(b) (authority to release).

¹³⁰ Asm. Com. on Public Safety, Analysis of Asm. Bill No. 884 (2013–2014 Reg. Sess.), 2 (Mar. 3, 2013).

current law that specifies what information CDCR must give to probation departments for people going on post-release community supervision should be made applicable to all people released from jail.¹³¹

- Conditions in many county jails are constitutionally inadequate.¹³² And even where conditions are not so dire, most jails simply do not operate with long-term stays in mind and may not provide access to the outdoors, contact visits, rehabilitative programming, or work opportunities. Counties should continue to take steps to improve the conditions of their jails in order to maximize the benefits of this proposal.

¹³¹ Penal Code § 3003(e)(1).

¹³² At the time of report publication, 19 county jail systems had court-ordered population caps and housed 65% of people in California jails. (Sarah Lawrence, *Court-Ordered Population Caps in California County Jails*, Stanford Criminal Justice Center, 6 (Dec. 2014); Prison Law Office, *Settlement Reached in Contra Costa County Jail Class Action Lawsuit* (Oct. 1, 2020); Prison Law Office, *Settlement Reached in Lawsuit Challenging Conditions in Santa Barbara County Jail* (Jul. 2020); Prison Law Office, *Settlement Reached in Class Action Challenging Conditions in Sacramento County Jail* (Jun. 2019); Prison Law Office, *Settlement Reached in Santa Clara County Jail Litigation* (Oct. 2018).) "Most county jails have a grossly inadequate system to serve people with mental health disabilities." (Written Submission of Aaron Fischer to Committee on Revision of the Penal Code, 4–5 (Jul. 23, 2020), available at CLRC website; Abbie Vansickle and Manuel Villa, *Who Begs to Go to Prison? California Jail Inmates*, The Marshall Project (Apr. 23, 2019).)

Recommendation	27
Relevant Statutes	27
Background and Analysis	27
Empirical Research	28
Insights from Other Jurisdictions	29

3. End Mandatory Minimum Sentences for Nonviolent Offenses

End Mandatory Minimum Sentences for Nonviolent Offenses

RECOMMENDATION

Many nonviolent offenses in California, including many drug crimes, require incarceration because the state does not have a coherent approach to probation eligibility.

The Committee therefore recommends the following:

Allow probation or other alternatives to incarceration for all nonviolent offenses.

RELEVANT STATUTES

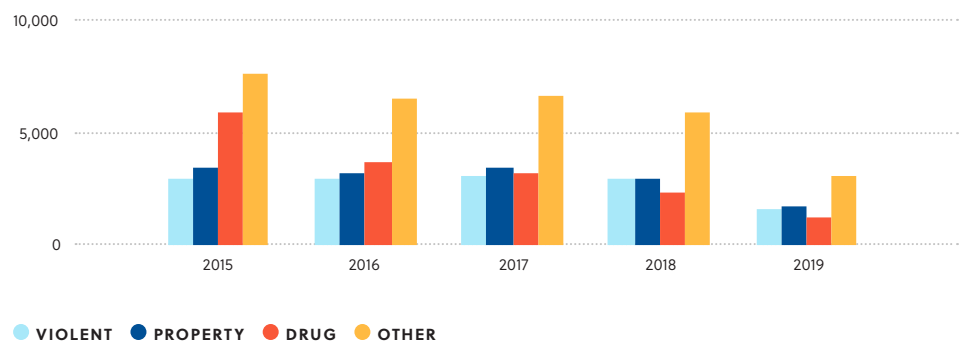
Penal Code § 1203, et seq.

BACKGROUND AND ANALYSIS

California law provides mandatory minimum sentences for many nonviolent crimes, including many drug crimes.¹³³ These laws remove all discretion from judges to fashion the most appropriate sanctions, even if a judge believes supervision and treatment on probation may be the most appropriate result in a case. By contrast, there is no mandatory minimum sentence for some violent crimes, including murder.¹³⁴ In total, 20% of straight probation sentences (i.e., without incarceration) are for violent offenses.¹³⁵

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

PROBATION SENTENCES BY TYPE OF OFFENSE IN CALIFORNIA



Source: California Department of Justice, *Crime in California*, Table 40 (2019).

¹³³ See, e.g., Penal Code §§ 462(a), 1203(e)(4), 1203.07(a)(1).

¹³⁴ See, e.g., *People v. Denner*, 2019 WL 5927604, *6 (3d District 2019).

¹³⁵ California Department of Justice, *Crime in California* 2019, Table 40 (Jul. 2020).

¹³⁶ Penal Code § 1203.07.

Los Angeles District Attorney George Gascón testified before the Committee in November 2020 that mandatory minimum sentences make especially little sense for nonviolent crimes.¹³⁶ He has also described mandatory minimum sentences as “cruel, ineffective, and actually exacerbate our recidivism and racial disparities across the

criminal justice system.”¹³⁷ A representative of the California District Attorneys Association, Larry Morse, recently said that “I don’t think most DAs have any heartburn about eliminating mandatory minimums.”¹³⁸

The Committee agrees that all relevant information should be considered in fashioning a sentence, and probation should be a permissible sentence for nonviolent crimes. A judge hearing the individual circumstances of a person’s case should determine the appropriate punishment. As San Mateo Chief of Probation John Keene, Secretary and Treasurer of the Chief Probation Officers of California, argued to the Committee in April 2020, probation eligibility should be determined by evaluating someone’s individual circumstances and not be guided solely by the offense charged against them.¹³⁹

The Committee also considered diversion programs and collaborative courts available in many counties.¹⁴⁰ Many of these programs depend on the availability of sentences to probation. For example, Alameda County District Attorney O’Malley told the Committee that successful diversionary programs can tailor sanctions to individuals and that in “a cost-benefit analysis, there’s no question that diversion wins out over incarceration.”¹⁴¹ San Joaquin County Superior Court Judge Richard Vlavianos agreed, testifying that recidivism was lower for certain offenses resolved with diversion programs.¹⁴² And former United States District Court Judge Thelton Henderson urged the Committee in December 2020 that “diversion programs ought to play a much larger role than they now do.”¹⁴³ The Committee was impressed by the steps that stakeholders have taken to expand alternatives to incarceration, and eliminating mandatory jail conditions would further support their efforts by removing statutory barriers. At the same time, most diversion programs and collaborative courts rely heavily on local stakeholders and resources, and aside from the elimination of mandatory incarceration for nonviolent offenses, the Committee does not currently make any specific recommendation to improve access alternatives to incarceration at the state level.

EMPIRICAL RESEARCH

Research shows that states can improve public safety outcomes by sentencing more people who commit lower-level and nonviolent crimes to probation and other intermediate community measures such as community service or treatment.¹⁴⁴ In 2016, the Brennan Center estimated that alternatives to prison, including probation, are likely more effective sentences for about 25% of the entire American prison population.¹⁴⁵ The Brennan Center study also concluded that incarceration does little to rehabilitate this group of lower-level offenders and can enhance the likelihood of recidivism.¹⁴⁶

Similar findings were reported from cost-benefit studies of incarcerated populations in eight states.¹⁴⁷ A study of New York, New Mexico, and Arizona found that the benefits of incapacitating 50% of males incarcerated in those states were not worth the high costs.¹⁴⁸ A subsequent study found that the risk of recidivism for a substantial number of incarcerated people in five additional states was too low to justify their incarceration on a cost-benefit basis.¹⁴⁹

In 2018, the Virginia Criminal Sentencing Commission found that, of the people who committed drug and property crimes for which the Virginia sentencing guidelines

¹³⁷ Alexei Koseff, *Jail Time for Nonviolent Drug Crimes in California Would Be Cut Under Scott Wiener*, San Francisco Chronicle (Dec. 15, 2020).

¹³⁸ *Id.*

¹³⁹ Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 0:42:27–0:44:39.

¹⁴⁰ Judicial Council of California, *Collaborative Justice Courts Fact Sheet* (Nov. 2020). Includes 400+ collaborative courts statewide.

¹⁴¹ Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 1:14:20–1:15:15, 1:12:27–1:12:37.

¹⁴² *Id.* at 0:10:10–0:12:00.

¹⁴³ Committee on Revision of the Penal Code, Meeting on Dec. 10, 2020, 0:19:50–0:20:10.

¹⁴⁴ *Id.*; Kevin Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, Behavioral Sciences & The Law, 210–211 (2020).

¹⁴⁵ James Austin, Lauren-Brooke Eisen, James Cullen, and Jonathan Frank, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, Introduction, 7–9 (2016).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; Anne Morrison Piehl, Bert Useem, and John J. Dilulio Jr., *Right-Sizing Justice: A Cost-Benefit Analysis of Imprisonment in Three States*, Manhattan Institute, 8–9, Endnote 17 (1999).

¹⁴⁸ Study findings translated the social costs and benefits of incarcerating people into dollars, and then compared them. (*Id.* at 3–9.)

¹⁴⁹ *Id.* at 9; Bert Useem and Anne Morrison Piehl, *Prison State: The Challenge of Mass Incarceration*, 67 (2008); Kevin Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, Behavioral Sciences & The Law, 210–211 (2020).

recommended prison time, 50% could be instead directed to community-based programs with little threat to public safety.¹⁵⁰

Finally, researchers have found “little evidence” that people on probation perceive a jail sentence to be substantially more punitive than community-based sanctions such as electronic monitoring, curfews, or community service.¹⁵¹

INSIGHT FROM OTHER JURISDICTIONS

In the last two decades, at least 28 states have undertaken reforms aimed at reducing or excising mandatory minimums from their state statutes and instead providing for probation or other community supervision.¹⁵²

These reforms have positively impacted crime rates and reduced prison populations. For example, in 2002, the Michigan Legislature repealed most mandatory minimum drug sentences.¹⁵³ Since then, Michigan’s prison population dropped by over 21%,¹⁵⁴ while the state’s property crime rate declined roughly 52%, the violent crime rate dropped by 15%, and homicides dropped by 11%.¹⁵⁵

In 2009, New York enacted similar reforms to its drug laws,¹⁵⁶ followed by great drops in violent and property crime rates and prison population.¹⁵⁷ Since 2011, New York has closed 17 prison facilities and realized \$193 million in annual savings due to the decrease in its prison population.¹⁵⁸ Maryland and Montana also recently eliminated their mandatory minimum sentences for nonviolent drug offenses.¹⁵⁹

In 2021, the Virginia Crime Commission recommended the wholesale elimination of mandatory minimum sentences for all offenses.¹⁶⁰ The New Jersey Criminal Sentencing and Disposition Commission also recommended that the Legislature eliminate mandatory minimum sentences for nonviolent drug and property crimes.¹⁶¹

In some states, the majority of people convicted of felonies are sentenced to straight probation (compared to only 7% in California). In Minnesota, between 2004 and 2018, 75% of those convicted of a felony were placed on probation.¹⁶² Similarly, in Kansas, over 70% of those convicted of a felony were placed on probation.¹⁶³

In other states, probation is presumed for nonviolent offenses.¹⁶⁴ In Maryland, sentencing preferences for probation and drug treatment programs were recently enacted for certain drug offenses.¹⁶⁵ Arkansas law requires judges to weigh 13 factors in favor of sentence suspension or straight probation¹⁶⁶ and includes an explicit directive that courts have the discretion to sentence those convicted of felonies to drug courts or other rehabilitation programs.¹⁶⁷

The Model Penal Code — as well as the American Bar Association and the Federal Judicial Conference — all recommend that no mandatory minimum prison sentences be attached to any offenses.¹⁶⁸ Instead, all favor judicial discretion to impose a sentence proportionate to the severity of the offense,¹⁶⁹ which could include probation and other forms of supervised release.

¹⁵⁰ *Id.* (citing Matthew Kleiman, Brian J. Ostrom, and Fred L. Cheesman, II, *Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia*, 53 *Crime & Delinq.* 106 (2007)); Virginia Criminal Sentencing Commission, *Annual Report*, 31-34 (2018).

¹⁵¹ Eric J. Wodahl, Brett E. Garland, and Kimberly Schweitzer, *Are Jail Sanctions More Punitive Than Community-Based Punishments? An Examination into the Perceived Severity of Alternative Sanctions in Community Supervision*, *Criminal Justice Policy Review* 31(5), 696-720, 713 (2020).

¹⁵² *Recent State-Level Reforms to Mandatory Minimum Laws*, Families Against Mandatory Minimums (May 10, 2017), available at FAMM.org website.

¹⁵³ Patrick Affholter and Bethany Wicksall, *Eliminating Michigan's Mandatory Minimum Sentences for Drug Offenses*, Senate Fiscal Agency, 1 (Nov./Dec. 2002).

¹⁵⁴ Michigan Department of Corrections, *2018 Statistical Report*, C-12 (Nov. 14, 2019) (end of year population in 2018 was 38,761); Michigan Department of Corrections, *2016 Statistical Report*, C-12 (Sep. 5, 2017) (end of year population in 2003 was 49,357); Michigan Prison Population Continues to Decline, *News 10* (Dec. 19, 2019) (Michigan prison population in Dec. 2019 was down to 38,005).

¹⁵⁵ From 2003–2019, burglaries fell by 58%, robberies fell by 52.5%, motor vehicle theft fell by 69%, and larceny fell by 47%. (Crime Data Explorer: Michigan, Federal Bureau of Investigation, available at the FBI Crime Data Explorer website.)

¹⁵⁶ Jeremy Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, *New York Times* (Mar. 25, 2009).

¹⁵⁷ New York State Corrections and Community Supervision, *DOCCS Fact Sheet*, 3 (Sep. 1, 2020); Federal Bureau of Investigation Crime Data Explorer: New York, available at FBI Crime Data Explorer website.

¹⁵⁸ New York State Corrections and Community Supervision, *DOCCS Fact Sheet*, 3 (Sep. 1, 2020).

¹⁵⁹ “Elimination of mandatory minimum sentences for controlled dangerous substance felonies,” *Governor Larry Hogan Announces Implementation of Justice Reinvestment Act*, Governor’s Office of Crime Prevention, Youth, and Victim’s Services, (Oct. 3, 2017); *Recent State-Level Reforms to Mandatory Minimum Laws*, Families Against Mandatory Minimums (2017), available at FAMM.org website.

¹⁶⁰ Ned Oliver, *Virginia Crime Commission Recommends Eliminating All Mandatory Minimum Sentences*, *Virginia Mercury* (Jan. 5, 2021).

¹⁶¹ *New Jersey Criminal Sentencing & Disposition Commission, Annual Report*, 21–23 (Nov. 2019).

¹⁶² Minnesota Sentencing Guidelines Commission, *2019 Probation Revocations*, 2 (Sep. 2, 2020).

¹⁶³ *Justice Reinvestment in Kansas: Update to the Kansas Sentencing Commission*, The Council of State Governments Justice Center, 8 (Oct. 22, 2020).

¹⁶⁴ 35 States Reform Criminal Justice Policies Through Justice Reinvestment, The Pew Charitable Trusts (Jul. 2018) (since 2011, nine states have created some form of presumptive probation); Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures, 7 (Jun. 2015) (describing presumptive probation systems in four states).

¹⁶⁵ Maryland Code Ann. § 5-601(e)(3)(i); *Maryland Justice Reinvestment Act*, Maryland Alliance for Justice Reform, available at Maryland Alliance for Justice Reform website.

¹⁶⁶ Arkansas Code Ann. § 5-4-301.

¹⁶⁷ Arkansas Code Ann. § 5-4-313.

¹⁶⁸ *Model Penal Code: Sentencing Pre Publication Draft* (2020), Section 6.11(8); *Id.* at 267-68; ABA Opposes Mandatory Minimum Sentences, ABA (Aug. 15, 2017); *Sentencing, Corrections, and Re-Entry Reforms*, ABA (Dec. 11, 2020); *Judicial Conference Addresses Judgeship Needs Issues*, United States Courts (Mar. 16, 2016) (“The Judicial Conference has long-standing positions opposing mandatory minimums and supporting their repeal.”); *Letter from Judge Bell to Chairman Leahy*, Committee on Criminal Law of the Judicial Conference of the United States (Sep. 17, 2013), available at United States Courts website.

¹⁶⁹ See, e.g., *Model Penal Code: Sentencing Pre Publication Draft*, Commentary, 267-68.

Recommendation	31
Relevant Statutes	31
Background and Analysis	31
Empirical Research	34
Insights from Other Jurisdictions	35

4. Establish that Low-Value Thefts without Serious Injury or Use of a Weapon Are Misdemeanors

Establish that Low-Value Thefts without Serious Injury or Use of a Weapon Are Misdemeanors

RECOMMENDATION

Minor thefts that do not result in serious bodily injury and do not involve use of a deadly weapon are currently punished as violent felonies but should be considered misdemeanors.

The Committee therefore recommends the following:

1. Thefts of property under \$950 without serious bodily injury or use of a deadly weapon must be charged as petty theft, punishable by up to one year in jail.
2. Exclude any theft with the use of a deadly weapon. This crime would constitute robbery (a violent felony with a prison sentence of two to five years).
3. Exclude any theft that results in serious bodily injury. This crime would also constitute robbery.
4. Permit retroactive reductions.

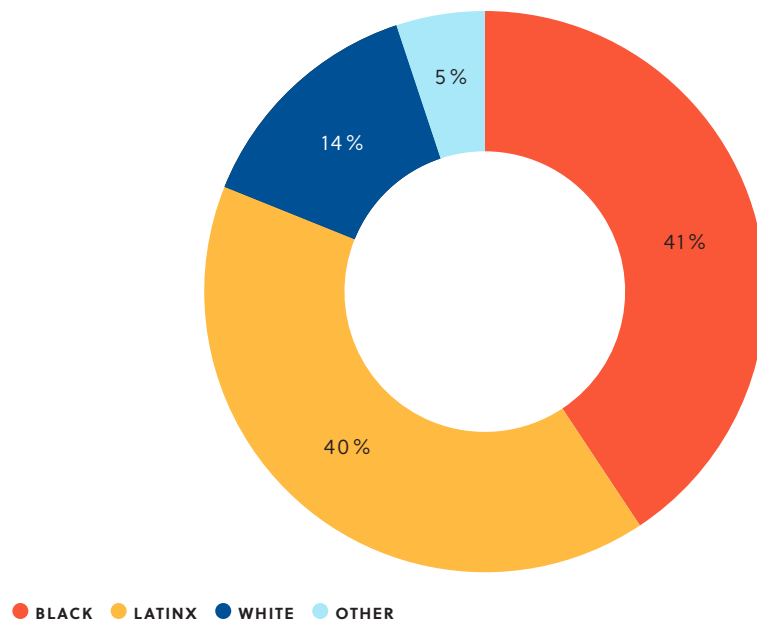
RELEVANT STATUTES

Penal Code §§ 211, 486

BACKGROUND AND ANALYSIS

California's robbery statute has not been updated since 1872.¹⁷⁰ Over the years, the punishment has been extended to a violent felony with a mandatory prison sentence of up to five years, without enhancements. At the same time, courts have also expanded the conduct that constitutes robbery to cover thefts of any value, even when there is no weapon involved nor physical injury to the victim. Additionally, the number of people currently in prison for robbery in California are disproportionately people of color.

¹⁷⁰ Penal Code § 211.

PERCENTAGE OF PEOPLE IN PRISON FOR ROBBERY IN CALIFORNIA BY RACE

Source: CDCR Office of Research.

The Penal Code defines robbery as any taking of any property, regardless of value, if “accomplished by means of force or fear.”¹⁷¹ Following the landmark *People v. Estes*¹⁷² case in 1983, courts have allowed prosecutors to charge robbery in cases that were previously considered simple shoplifting. In effect, shoplifting can be elevated from a mandatory misdemeanor to a violent crime with a mandatory sentence to state prison. Purse snatches and stealing a cell phone can also be considered robbery, even if a victim is not physically touched. In addition, robbery’s automatic classification as a “violent felony,” regardless of the circumstances, can subject a person to enhanced penalties, including a life sentence under the Three Strikes law.¹⁷³

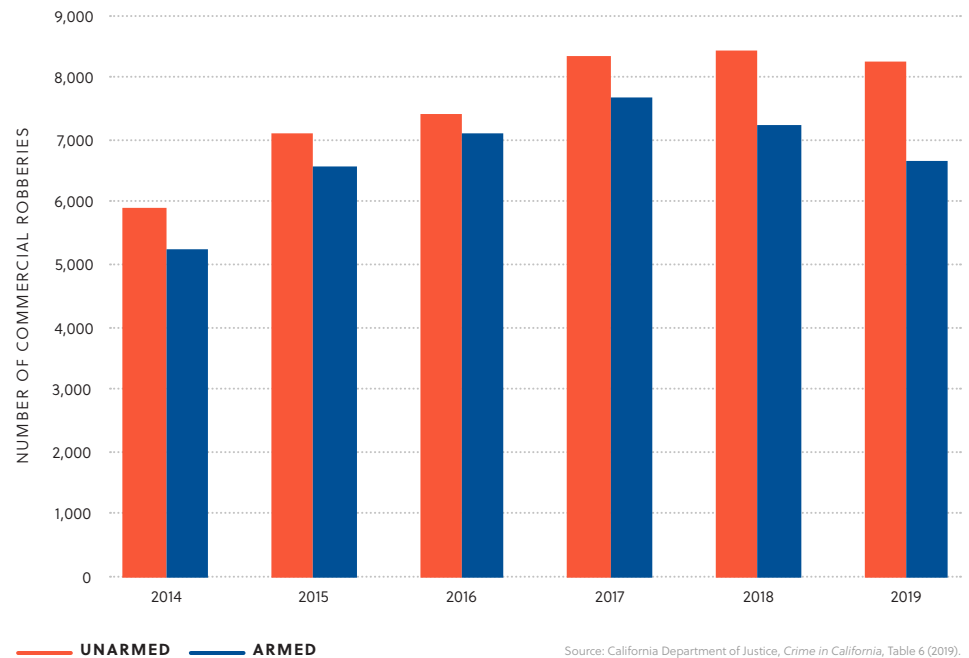
“*Estes* robberies” are extremely common. In 2019, over 8,000 unarmed commercial robberies were reported throughout the state.

¹⁷¹ *Id.*

¹⁷² *People v. Estes*, 147 Cal.App.3d 23 (1983).

¹⁷³ Penal Code § 667.

COMMERCIAL ROBBERIES IN CALIFORNIA



When Alameda District Attorney O’Malley, then-president of the District Attorneys’ Association, appeared before the Committee in April 2020, she said that *Estes* robberies are often low-level crimes that her office recommended for less severe sanctions, including diversion and treatment, rather than incarceration.¹⁷⁴

Santa Clara County District Attorney Jeff Rosen and San Mateo County District Attorney Stephen Wagstaffe also suggested limiting prosecutors’ ability to charge these types of cases as violent robberies.¹⁷⁵ District Attorney Wagstaff added that if *Estes* robberies were eliminated, “I wouldn’t sit there and say, ‘Oh my heavens, you’ve taken one of our great tools in protecting public safety.’”¹⁷⁶ While people charged in *Estes* cases often end up pleading guilty to a lesser offense, including grand theft from a person, charging an offense that carries steep penalties greatly impacts a defendant’s ability to negotiate a reasonable plea agreement.¹⁷⁷

California is currently out of step with other states, which distinguish between different types of thefts and forbid thefts involving minor use of force or fear from being charged as robberies or other felonies.¹⁷⁸

California’s Penal Code currently divides theft into two degrees: grand and petty theft. Generally, grand theft occurs when the value of the stolen property exceeds \$950,¹⁷⁹ and theft that does not meet one of the definitions of grand theft is petty theft.¹⁸⁰ The Penal Code also has a separate misdemeanor “shoplifting” offense for thefts from commercial establishments.¹⁸¹ Theft involving *any* force or fear is considered a robbery.¹⁸²

¹⁷⁴ Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 2:11:30–2:12:12.

¹⁷⁵ Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:16:48–0:17:18, 0:59:10–1:01:46.

¹⁷⁶ *Id.* at 59:10–101:46.

¹⁷⁷ H. Mitchel Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63, CATH. U. L. Rev. 51, 62 (2013).

¹⁷⁸ The Penal Code currently divides theft into two degrees: grand and petty theft. (Penal Code § 486.) Generally, grand theft occurs when the value of the stolen property exceeds \$950. (Penal Code §§ 487, 490.2(a).)

¹⁷⁹ Penal Code § 487; Penal Code § 490.2(a).

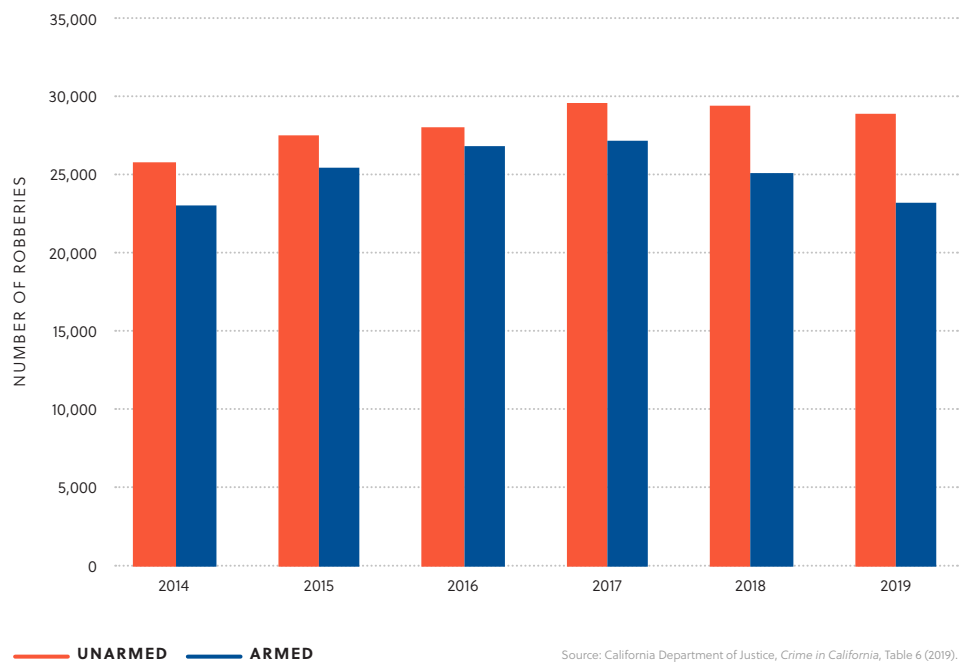
¹⁸⁰ Penal Code § 488.

¹⁸¹ Penal Code § 459.5(a).

¹⁸² Penal Code § 211.

The Committee recommends adding a new offense to this hierarchy: petty theft in the first degree, punished as a misdemeanor. The offense would cover any thefts from a person or commercial establishment that involved the use of force or fear but where no serious injury was caused and no deadly weapon was used.

TOTAL ROBBERIES IN CALIFORNIA



The Committee recognizes that some purely verbal altercations can be extremely traumatizing for the victim. These offenses should be treated seriously. However, the Penal Code has other offenses that may be appropriate to apply in these scenarios, such as criminal threats,¹⁸³ which can be charged as a felony strike offense.¹⁸⁴

EMPIRICAL RESEARCH

In 2016, The Pew Charitable Trusts researched the effects of changing state theft penalties and found that states that raised the dollar threshold of what constitutes a felony theft offense saw crime and larceny rates fall.¹⁸⁵ California's Proposition 47, which was enacted in 2016 by voter initiative and established shoplifting under \$950 as a mandatory misdemeanor, had no effect on violent crime and, at worst, a small effect on property crime.¹⁸⁶

¹⁸³ Penal Code § 422(a).

¹⁸⁴ Penal Code § 422(a), Penal Code § 1192.7(c)(38).

¹⁸⁵ Adam Gelb et al., *The Effects of Changing State Theft Penalties*, The Pew Charitable Trusts (2016).

¹⁸⁶ Bartos and Kubrin, *Can We Downsize Our Prisons and Jails Without Compromising Public Safety? Findings from California's Prop 47*, American Society of Criminology, Volume 17, Issue 3 (2018); Mia Bird, Magnus Lofstrom, Brandon Martin, Steven Raphael, and Viet Nguyen, *The Impact of Proposition 47 on Crime and Recidivism*, Public Policy Institute of California, 21 (Jun. 2018).

INSIGHTS FROM OTHER JURISDICTIONS

Most states acknowledge the wide range of behavior a person may use to steal and distinguish between offenses with different levels of seriousness. Of 15 examined states, 14 had a system of statutes that created increasingly serious degrees of robbery, based on how the offense was committed.¹⁸⁷

For example, in Texas¹⁸⁸ and Illinois¹⁸⁹, the crime of pushing a store employee while shoplifting is a misdemeanor. In New York and Oregon, the same crime is a low-level felony carrying a sentence as low as probation.¹⁹⁰

In Texas, a robbery conviction requires proof that the accused “intentionally, knowingly, or recklessly causes bodily injury to another” or “places another in fear of imminent bodily injury or death.”¹⁹¹ Similarly, Vermont’s robbery statute requires some bodily injury to be inflicted for the offense to apply.¹⁹²

¹⁸⁷ The states are Alabama, Alaska, Arizona, Colorado, Florida, Illinois, Massachusetts, New York, Oregon, Texas, Utah, Vermont, Washington, and West Virginia. (See Alabama Code §§ 13A-8-41–13A-8-43; Alaska Stat. §§ 11.41.500–11.41.510; Arizona Rev. Stat. §§ 13-1902–13-1904; Colorado Rev. Stat. §§ 18-4-301–18-4-303; Florida Stat. Ann. §§ 812.13, 812.131; 720 Illinois Comp. Stat. Ann. §§ 5/18-1–5/18-6; Massachusetts Stat. Ann. Ch. 265 §§ 17-21; N.Y. Penal Law §§ 160.00–160.15; Oregon Rev. Stat. §§ 164.395, 164.405, 164.415; Texas Penal Code Ann. §§ 29.02, 29.03, 31.03; Utah Code Ann. §§ 76-6-301–76-6-302; Vermont Stat. Ann. § 608; Washington Stat. Ann. § 9A.56.190; West Virginia Code § 61-2-12.) Only Nevada had a single degree of robbery. (Nevada Rev. Ann. § 200.380.)

¹⁸⁸ Texas Penal Code Ann. §§ 31.03(e), 12.23.

¹⁸⁹ 720 Illinois Comp. Stat. Ann. §§ 5/16-25, 5/12-3; 730 Illinois Comp. Stat. Ann. § 5/5-4.5-55.

¹⁹⁰ Oregon Rev. Stat. §§ 164.395, 161.605.

¹⁹¹ Texas Penal Code Ann. § 29.02.

¹⁹² 13 Vermont Stat. Ann. § 608; *State v. Francis*, 151 Vt. 296, 305 (1989).

Recommendation	37
Relevant Statutes	37
Background and Analysis	37
Empirical Research	42
Insights from Other Jurisdictions	42

5. Provide Guidance for Judges Considering Sentence Enhancements

Provide Guidance for Judges Considering Sentence Enhancements

RECOMMENDATION

Judges currently have authority to dismiss sentence enhancements “in furtherance of justice,” but that standard has never been defined or clarified by the Legislature or courts and can be applied inconsistently.

The Committee therefore recommends the following:

1. Establish guidelines and presumptions (but not requirements) that judges should consider dismissing sentencing enhancements in furtherance of justice when:
 - The current offense is nonviolent.
 - The current offense is connected to mental health issues.
 - The enhancement is based on a prior conviction that is over five years old.
 - The current offense is connected to prior victimization or childhood trauma.
 - The defendant was a juvenile when he/she committed the current offense or prior offenses.
 - Multiple enhancements are alleged in a single case or the total sentence is over 20 years.
 - A gun was used but it was inoperable or unloaded.
 - Application of the enhancement would result in disparate racial impact.
2. Provide that the presumptions can be overcome if there is “clear and convincing evidence that dismissal of the enhancement would endanger public safety.”
3. Clarify that the list is not exclusive. Judges maintain power to strike enhancements in other compelling circumstances.

RELEVANT STATUTES

Penal Code § 1385

BACKGROUND AND ANALYSIS

California’s Penal Code includes over 150 different sentence enhancements.¹⁹³ The vast majority of people in the state’s prisons (over 80%) are serving a term lengthened by a sentence enhancement.¹⁹⁴ More than 25% of current prisoners are serving sentences extended by three or more enhancements.¹⁹⁵ On average, enhancements more than double a defendant’s original sentence length.¹⁹⁶

¹⁹³ Data provided by CDCR Office of Research.

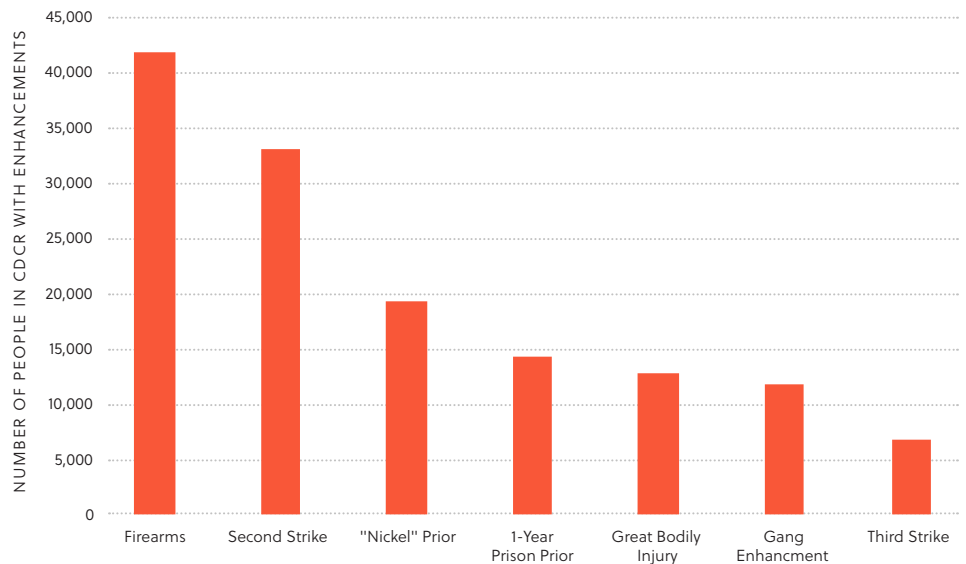
¹⁹⁴ Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog (Sep. 27, 2017). Between 1984 and 1991, California passed over 1,000 crime bills, many of them enhancing criminal sentences. (Michael Vitiello and Clark Kelso, *A Proposal for Wholesale Reform of California’s Sentencing Practice and Policy*, 38 Loy. L.A. L. Rev. 903, 921 (2005).)

¹⁹⁵ Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog (Sep. 27, 2017).

¹⁹⁶ Elan Dagenais, Raphael Ginsburg, Sharad Goel, Joseph Nudell, and Robert Weisberg, *Sentencing Enhancements and Incarceration: San Francisco, 2005–17*, Stanford Computational Policy Lab, 2 (Oct. 17, 2019).

The most common enhancements include extended sentences for use of a firearm, the Three Strikes law, the Street Terrorism Enforcement and Protection Act (gang enhancements), and the five-year serious felony enhancement (“nickel prior”).¹⁹⁷

MOST COMMON SENTENCING ENHANCEMENTS IN CALIFORNIA (2020)



Source: Source: CDCR Office of Research.*

These common enhancements are applied disproportionately against people of color and people suffering from mental illness.¹⁹⁸ Over 92% of people sentenced to prison for a gang enhancement statewide are Black or Latinx.¹⁹⁹ In Los Angeles, 95% of people sentenced to prison for a gang enhancement statewide are Black or Latinx.²⁰⁰ Yet, according to the Anti-Defamation League, California has a “uniquely large population of white supremacist gangs.”²⁰¹ People sentenced under the Three Strikes law are also more likely to be Black and suffer from a mental illness compared to those who do not face Three Strikes sentences.²⁰²

When former Governor Brown addressed the Committee in September 2020, he argued that California should “get rid of all of the enhancements” or change the law so that judges are steered towards not imposing enhancements.²⁰³

* See Penal Code §§ 12022(a), 12022.5(a), 12022.53(b)–(d) (firearm use); 667(e)(1) (second strike); 667(a)(1) (nickel prior); 6675(b) (1-year prison prior) (West 2018); 12022.7(a) and (e) (great bodily injury); 186.22(b)(1) (gang enhancement).

197 Data provided by CDCR Office of Research.

198 *Id.* See also *The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise*, Stanford Justice Advocacy Project, 1 (2017).

199 Data provided by CDCR Office of Research.

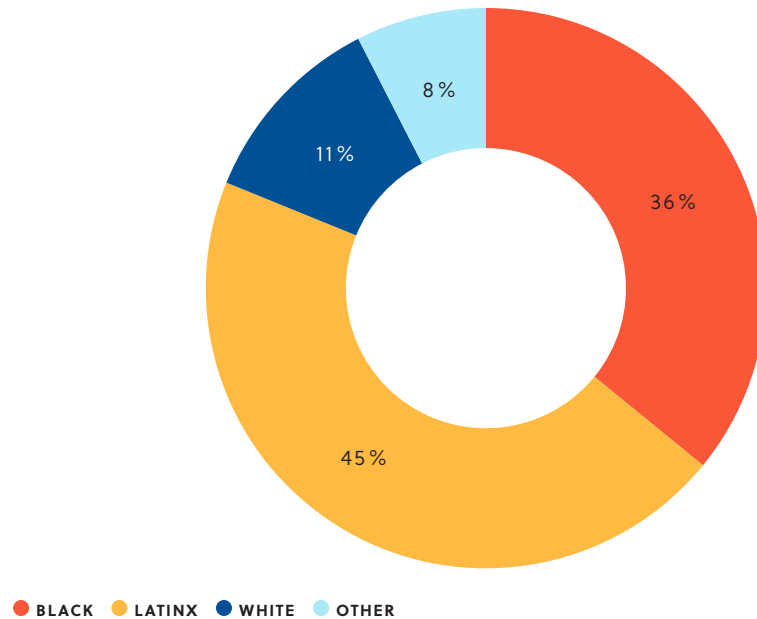
200 *Id.*

201 Anti-Defamation League, *White Supremacist Prison Gangs in the United States, A Preliminary Inventory* (2016).

202 *The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise*, Stanford Justice Advocacy Project, 1 (2017).

203 Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:17:08–0:17:55.

PERCENTAGE OF CALIFORNIA PRISON POPULATION WITH GUN ENHANCEMENT BY RACE (2020)



Source: CDCR Office of Research.

Santa Clara District Attorney Rosen testified before the Committee in September 2020 that enhancements have evolved to distort and dominate the criminal charging and sentencing process: “[W]hen I began as a prosecutor, enhancements could moderately shift the underlying sentence. Now they have become the tail that wags the dog. It’s quite common now that the entire trial and all pretrial negotiations are solely about the enhancement, not the crime itself.”²⁰⁴

Los Angeles District Attorney Gascón also told the Committee that enhancements were largely inappropriate, resulting in excessive sentences with “absolutely no connection to public safety.”²⁰⁵ One of District Attorney Gascón’s first acts in office was to instruct deputy prosecutors to avoid charging enhancements in almost all cases.²⁰⁶ Enhancement statutes are also arcane and opaque. Former Governor Brown said California’s enhancement laws had a “tax code–like complexity.”²⁰⁷

Despite prominent leaders calling for overhauls of California’s sentence enhancement laws, many of the most important and commonly used enhancements – such as Three Strikes, the five-year “nickel prior,” and certain gang enhancements – were enacted by voter initiative and cannot be modified by a majority vote in the Legislature.²⁰⁸ As previously noted, the Committee limited itself in this report only to those recommendations that could be passed by a majority vote, so the Committee does not currently advocate for complete revision of California’s enhancement laws, as misguided as they may be.

²⁰⁴ *Id.* at 1:05:57 to 1:06:24.

²⁰⁵ Committee on Revision of the Penal Code, Meeting on Nov. 13, 2020, 0:10:05–0:10:41.

²⁰⁶ James Queally, *On First Day as L.A. County D.A., George Gascón Eliminates Bail, Remakes Sentencing Rules*, Los Angeles Times (Dec. 7, 2020).

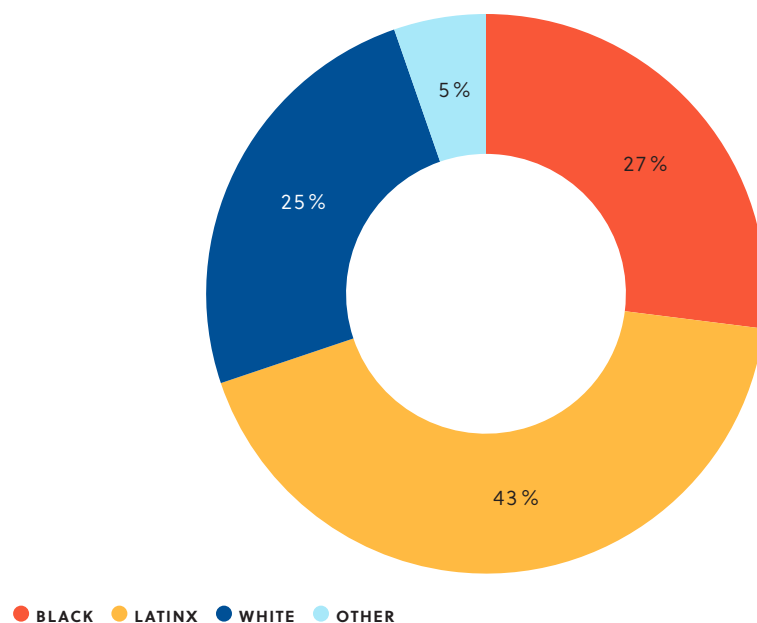
²⁰⁷ Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:4:17–0:7:00.

²⁰⁸ Penal Code § 667(j).

Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when “in furtherance of justice.”²⁰⁹ Courts have not clarified or defined this standard, and the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an “amorphous concept.”²¹⁰ As a result, this discretion may be inconsistently exercised and underused because judges do not have guidance on how courts should exercise the power.

The lack of clarity and guidance is especially concerning given demographic disparities in sentences.²¹¹ As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color.²¹² People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes law for nonviolent crimes.²¹³

PERCENTAGE OF NONVIOLENT SECOND STRIKERS CURRENTLY IN PRISON BY RACE (2020)



Source: Data provided by CDCR Office of Research.

²⁰⁹ Penal Code § 1385(a).

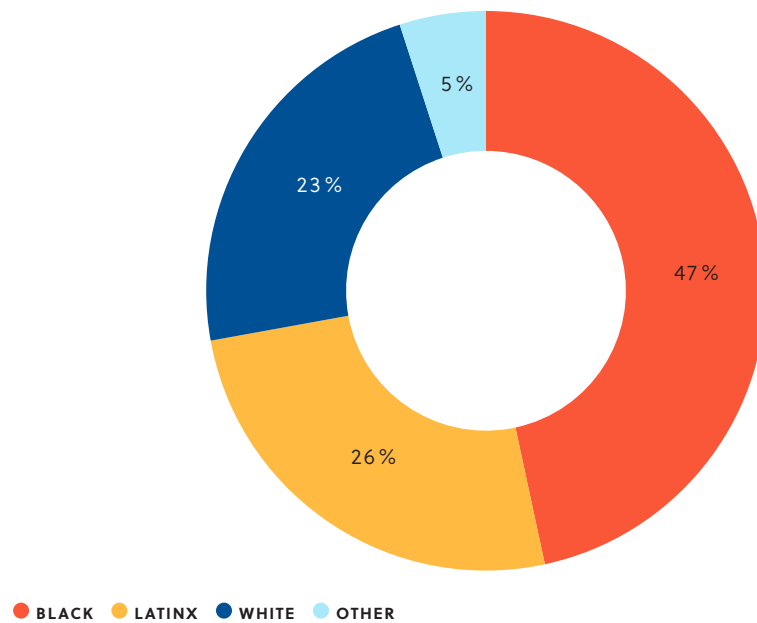
²¹⁰ *People v. Superior Court (Romero)*, 13 Cal.4th 497, 530 (1996).

²¹¹ See, e.g., Josh Salman, Emily Le Coz, and Elizabeth Johnson, *Florida's Broken Sentencing System*, Sarasota Herald Tribune (Dec. 12, 2016) (exploring racial disparities in Florida's criminal sentences); The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System*, 6–8 (Mar. 2018).

²¹² Data provided by CDCR Office of Research. See also *Letter of California Legislative Black Caucus, Re: Proposition 57 Regulations*, Notice File No. Z2017-0703-04 (Jul. 18, 2017).

²¹³ *The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise*, Stanford Justice Advocacy Project, 1 (2017).

PERCENTAGE OF THIRD STRIKERS CURRENTLY IN PRISON BY RACE (2020)



Source: CDCR Office of Research.

We appreciate that racial disparities in sentencing are hardly confined to California,²¹⁴ but they are especially concerning given the extreme prison terms required by many sentence enhancements. At minimum, lack of clarity in sentencing authority encourages subjectivity and inconsistency.

The Committee recommendation follows legal guidance provided to judges when exercising sentencing discretion in other contexts. For example, California law directs judges on how to exercise their sentencing discretion in the context of probation.²¹⁵ Furthermore, our recommendation builds on existing California Rules of Court that guide judges on what circumstances they should consider in aggravation and mitigation in imposing a felony sentence,²¹⁶ such as prior abuse, recency and frequency of prior crimes, and mental or physical condition of the defendant.²¹⁷ The Committee recommendations are also informed by the California Surgeon General's recent annual report, which recommends that the criminal legal system implement policies and practices that address trauma in justice-involved youth and adults.²¹⁸

Finally, the Committee believes that judges should retain authority to impose sentence enhancements in appropriate cases. The Committee's recommendation leaves to judges the authority to impose sentence enhancements to protect public safety. But providing guidance on how and when judges should evaluate the appropriateness of sentence enhancements would provide more consistency, predictability, and reductions in unnecessary incarceration while ensuring that punishments are focused on protecting public safety.

²¹⁴ See Bergeron, et al., *How a Spreadsheet Could Change the Criminal Justice System*, The Atlantic (Dec. 14, 2020). See also Elizabeth Tsai Bishop, Brook Hopkins, Chijindu Obiofuma, and Felix Owusu, *Racial Disparities in the Massachusetts Criminal System*, The Criminal Justice Policy Program, Harvard Law School, 64 (Sep. 2020).

²¹⁵ See, e.g., Penal Code §§ 1170(h)(5)(A); 1203(e); California Rule of Court 4.415 provides further guidance to judges when applying this presumption.

²¹⁶ California Rules of Court, Rules 4.421 and 4.423.

²¹⁷ California Rules of Court, Rules 4.423(a)(9), 4.423(b)(1), and 4.423(b)(2).

²¹⁸ Harris, et al., *Roadmap for Resilience: The California Surgeon General's Report on Adverse Childhood Experiences, Toxic Stress, and Health*, Office of the California Surgeon General (2020).

EMPIRICAL RESEARCH

There is a broad consensus among academic studies of decades of nationwide crime and incarceration data concluding that long sentences have little or no public safety value. As Professor Steven Raphael wrote, “[t]here is very little evidence of an impact of extremely harsh punishments (that is, longer sentences, capital punishment) on the levels of the crimes they are intended to deter.”²¹⁹ Professor Raphael also noted people sentenced by harsher judges had higher recidivism rates than people sentenced by more lenient judges.²²⁰

Other studies show that a person’s criminal involvement tends to be limited to a period of less than 10 years.²²¹

INSIGHTS FROM OTHER JURISDICTIONS

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

Many of these states have restrictions on the use of these enhancements. For example, out of 20 jurisdictions examined by the Committee,²²² 12 have cut-off dates or “wash-out” provisions, after which criminal history no longer counts for purposes of increasing the length of some sentences. Florida, Illinois,²²³ Michigan, Delaware, and the District of Columbia have 10-year cut-offs for counting most prior felony offenses.²²⁴ Arkansas, Minnesota, and the federal government²²⁵ have a cut-off for counting most felony priors at 15 years, and for misdemeanor priors at 10 years.²²⁶ In Arizona, defendants are subject to a longer sentence for a new felony conviction if they committed certain felonies within the past five years or more serious felonies within the past 10 years.²²⁷ Similarly, Washington has a five-year wash-out period for enhanced sentences based on most prior offenses and a 10-year wash-out period for more serious felony priors.²²⁸

²¹⁹ Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 222 (2013). See also National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press, 134-140 (2014).

²²⁰ Written Submission of Professor Steven Raphael to Committee on Revision of the Penal Code, 5 (Jun. 26, 2020) (explaining research in Anna Aizer and Joseph J. Doyle, *Juvenile Incarceration, Human Capital, and Future Crimes: Evidence from Randomly Assigned Judges*, *Quarterly Journal of Economics*, 130(2): 759-803 (2015) and Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, University of Michigan Working Paper (2015)).

²²¹ Alex R. Piquero, J. David Hawkins, Lila Kazemian, and David Petechuk, *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)*, (2013).

²²² The states examined in addition to the federal system were Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, and Washington.

²²³ In Illinois, judges have discretion to subject people to “extended term sentencing” — a longer sentence based on certain factors — one of which is if they had a prior conviction within the last 10 years. (730 Illinois Comp. Stat. § 5/5-5-3.2(b)(1).)

²²⁴ 4 Delaware Sentencing Accountability Comm’n Benchbook 25 (2020); D.C. Voluntary Sentencing Guidelines Manual § 2.2.3 (2020); Florida Crim. Punishment Code: Scoresheet Preparation Manual 10 (2019); Michigan Sentencing Guidelines Manual Step.1D (2020).

²²⁵ To calculate criminal history for federal offenses, every prior sentence of one year and a month within the last 15 years counts, as does every sentence of imprisonment of 60 or more days within the last 10 years. (United States Sentencing Guidelines Manual § 4A1.2 (2020).)

²²⁶ Arkansas Sentencing Standards Grid Offense Serious Rankings & Related Material 102-03 (2017); Minnesota Sentencing Guidelines §§ 2.B.1.c and 2.B.3.e (2020).

²²⁷ Arizona Rev. Stat. § 13-105(22)(b),(c); § 13-703(B)(C).

²²⁸ Washington State Adult Sentencing Guidelines Manual 53-54 (2020). Prior Class A and felony sex convictions are always counted for criminal history purposes. (*Id.*)

Recommendation	44
Relevant Statutes	44
Background and Analysis	44
Empirical Research	46
Insights from Other Jurisdictions	47

6. Limit Gang Enhancements to the Most Dangerous Offenses

Limit Gang Enhancement to the Most Dangerous Offenses

RECOMMENDATION

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

The Committee therefore recommends the following:

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

RELEVANT STATUTES

Penal Code § 186.22

BACKGROUND AND ANALYSIS

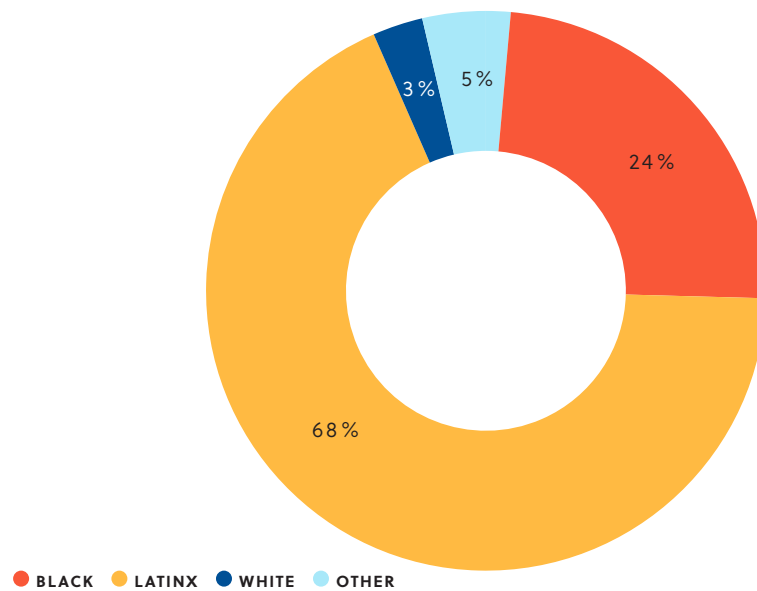
As previously noted, Black and Latinx people comprise 92% of the people sentenced under California’s gang enhancement statute.²²⁹ The racial disparity is even starker in the state’s largest jurisdiction: Over 98% of people sentenced to prison for a gang enhancement in Los Angeles are people of color.²³⁰ Yet research shows that white people make up the largest group of youth gang members.²³¹ It is difficult to imagine a statute, especially one that imposes criminal punishments, with a more disparate racial impact.

²²⁹ Data provided by CDCR Office of Research.

²³⁰ *Id.*

²³¹ Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Justice Policy Institute (2007).

PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WITH GANG ENHANCEMENTS BY RACE (2020)



Source: CDCR Office of Research.

California’s gang enhancement can result in life sentences and may apply to crimes as minor as misdemeanors.²³² The law was originally enacted in 1988 as the Street Terrorism Enforcement and Prevention (STEP) Act to “seek the eradication of criminal activity by street gangs.”²³³ The law was controversial from the start. Then-member of the Legislature and future Attorney General Bill Lockyer went so far as predicting the law would be “laughed out of court.”²³⁴ But proponents of the law promised the enhancement would only apply when “the provable purpose of the gang is to commit serious and violent crime, and it can be shown that a gang member knew that was the gang’s purpose when he joined.”²³⁵

At the time, the Legislature asserted that California was “in a state of crisis ... caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”²³⁶ As originally enacted, the Act aimed to eliminate gangs by creating a three-year enhancement for gang-related offenses.²³⁷ Since then, the scope of the enhancement and severity of related punishments have greatly expanded.

Lawmakers, courts, and voters who enacted Proposition 21 in 2000 have increased the penalties that accompany the enhancement and broadened its application. Not only were punishments made longer, but it became easier to charge gang enhancements. This is because the list of predicate offenses, which must be established to prove the existence of a gang, has also ballooned and includes many nonviolent offenses.²³⁸ Under current law, a person charged with a gang enhancement does not even have to know the person responsible for predicate offenses.²³⁹

²³² Penal Code §§ 186.22(b)(4)(C) & (d). Gang enhancements now add five years for a serious felony and 10 years for a violent felony. (Penal Code § 186.22(b).)

²³³ Penal Code § 186.21.

²³⁴ Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s AntiGang STEP Act*, 11 Berkeley J. Crim. L. 101, 102 (2006) (quoting *Criminal Street Gang Bill Passes Committee*, Eagle Rock Sentinel (Jun. 27, 1987).)

²³⁵ *Id.* at 101.

²³⁶ *Id.*

²³⁷ Penal Code § 186.22(b) (1988).

²³⁸ Penal Code § 186.22(e)(1)-(33).

²³⁹ *People v. Prunty*, 62 Cal.4th 59, 67–68 (2015).

The racially disproportionate application of gang enhancements is particularly concerning. Director of Systemic Issues Litigation at the Office of the State Public Defender Lisa Romo explained to the Committee in September 2020: “Although social science tells us [gang] members come in all races and all ethnicities, law enforcement officers are taught that gang members are people of color. This means that communities of color are overpoliced, and white gang members can pass.”²⁴⁰ Civil Rights attorney Sean Garcia-Leys testified to the Committee that police often have difficulties knowing the difference between active gang members, former gang members, and people who are non-members but are “meshed in a gang social network by virtue of family and neighborhood.”²⁴¹

Another problem with gang enhancements is that the evidence considered in court can be unreliable and prejudicial to a jury. San Joaquin County Deputy District Attorney Kevin Rooney, who specializes in gang prosecutions, agreed that bifurcating evidence of gang involvement from evidence related to the underlying charges would reduce the risk of unfairly prejudicing juries and convicting innocent people.²⁴² Empirical research corroborates this assessment.²⁴³ Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them.²⁴⁴

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

EMPIRICAL RESEARCH

Recent studies reveal the unreliability of gang evidence. For example, the California Attorney General’s 2019 Annual Report on CalGang, the statewide intelligence database used by law enforcement to track purported gang members, found that the demographics of those entered into the database were 65% Latinx, 24% Black, and 6% white.²⁴⁵ Yet evidence indicates that white people make up the largest group of youth gang members.²⁴⁶ Indeed, recent reports, including an audit by the Los Angeles Police Department, found that the CalGang database includes unreliable and false information.²⁴⁷

Survey data from California indicates that youth of different ethnicities self-identify as gang members at similar rates to each other.²⁴⁸ In 2015, the Anti-Defamation League found that California has a “uniquely large population of white supremacist gangs (from skinhead gangs to street gangs),”²⁴⁹ and a recent sting by federal authorities of members of the Aryan Brotherhood confirms that white gangs remain extremely active in the state.²⁵⁰

As noted, this problem is not limited to California. In Chicago, the police department’s gang database found that 95% of the 65,000 individuals listed in it are Black or Latinx.²⁵¹ In Mississippi, a recent report found that every person arrested under the state’s gang law between 2010 and 2017 was Black, even though the state’s Association of Gang Investigators reports that 53% of the state’s gang members are white.²⁵²

240 Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:52:22–0:52:44.

241 *Id.* at 1:04:02–1:04:45. Scholars have also questioned law enforcement’s ability to accurately identify gang members. (Malcolm W. Klein, *What Are Street Gangs When They Get to Court?*, 31 Val. U.L. Rev. 515, 516 (1997).)

242 Deputy District Attorney Rooney was generally supportive of the gang enhancement, though he noted that it could be improved in certain areas including bifurcating trials. (Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 1:16:32–1:17:09.)

243 Mitchell L. Eisen, Dayna M. Gomes, Lindsey Wandry, and David Drachman, *Examining the Prejudicial Effects of Gang Evidence*, 13 J. Forensic Psychol. Pract. 1 (2013); Mitchell L. Eisen, Brenna Dotson, and Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA Law Review Discourse 2 (2014).

244 Mitchell L. Eisen, Mitchell L. Eisen, Dayna M. Gomes, Lindsey Wandry, and David Drachman, *Examining the Prejudicial Effects of Gang Evidence*, 13 J. Forensic Psychol. Pract. 1 (2013); Mitchell L. Eisen, Brenna Dotson, and Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA Law Review Discourse 2 (2014).

245 Attorney General’s Annual Report on CalGang for 2019.

246 Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Justice Policy Institute, 37–38 (2007).

247 Los Angeles Police Department Intradepartmental Correspondence 114, Re: Review of CalGang Database Entries by the Metropolitan Division and the Gang Enforcement Details (Jul. 10, 2020) (audit limited to LAPD gang entries); Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries*, *State Auditor Finds*, Los Angeles Times (Aug. 11, 2016).

248 Data collected and published by the California Healthy Kids Survey (CHKS) and Biennial State CHKS and compiled by the Lucile Packard Foundation for Children’s Health, available at the CHKS website. See also Todd C. Hiestand, *Gang Membership, Duration, and Desistance: Empirical Literature Review*, DOJ Research Center (2018).

249 Anti-Defamation League, *White Supremacist Prison Gangs in the United States, A Preliminary Inventory* (2016).

250 Nate Gartrell, *‘Build an army’: Aryan Brotherhood Leaders Attempted to Rule Over All White California Prison Gangs*, *Feds Say*, The Orange County Register (Sep. 1, 2019).

251 Odette Yousef, *Activists: Gang Database Disproportionately Targets Young Men of Color*, NPR (Jan. 27, 2018).

252 Donna Ladd, *Only Black People Prosecuted Under Mississippi Gang Law Since 2010*, Jackson Free Press (Mar. 29, 2018).

INSIGHTS FROM OTHER JURISDICTIONS

All 50 states and the District of Columbia have enacted some form of anti-gang measures.²⁵³

But in comparison to California, other states require more evidence of connection or organization between gang members for gang enhancements to apply. For example, in Illinois, to qualify as a criminal street gang, it must be shown that a group has “an established hierarchy.”²⁵⁴ In Arkansas, a person commits the offense of engaging in a criminal gang when they commit two or more predicate offenses “in concert” with two or more other persons.²⁵⁵ In Maryland, a “criminal organization” is required to have an “organizational or command structure,”²⁵⁶ and to convict a person of participating in a criminal organization, the prosecution must prove the defendant had knowledge of the pattern of criminality of members of the gang.²⁵⁷

Other state courts have treated expert witness testimony about an accused’s gang membership with caution and required such testimony to be closely connected to direct evidence. For example, the Minnesota Supreme Court has warned “that criminal gang involvement is an element of the crime does not open the door to unlimited expert testimony,” and gang activity must therefore be proven by “firsthand knowledge.”²⁵⁸ New Mexico’s Supreme Court reached a similar result.²⁵⁹

At least three states (Indiana, Tennessee, and Rhode Island) require gang enhancements to be proven in a separate phase of trial.²⁶⁰

²⁵³ *Highlights of Gang-Related Legislation*, National Gang Center.

²⁵⁴ 740 Illinois Code Stat. § 147/10.

²⁵⁵ Arkansas Code Ann. § 5-74-104(a)-(b).

²⁵⁶ Maryland Crim. Law § 9-801.

²⁵⁷ Maryland Crim. Law § 9-804(a)(1); *Madrid v. State*, 247 Maryland App. 693 (2020).

²⁵⁸ *State v. DeShay*, 669 N.W.2d 878, 885 (2003).

²⁵⁹ *State v. Torrez*, 146 N.M. 331, 339 (2009).

²⁶⁰ Rhode Island Stat. § 12-19-39(a)-(d); Indiana Stat. § 25-50-2-15(c);

Tennessee Stat. § 40-35-121(h)(1).

Recommendation	49
Relevant Statutes	49
Background and Analysis	49
Empirical Research	50
Insights from Other Jurisdictions	51
Additional Considerations	51

7. Retroactively Apply Repealed Sentence Enhancements

Retroactively Apply Repealed Sentence Enhancements

RECOMMENDATION

In recent years, the Legislature eliminated certain sentence enhancements in Senate Bills 136 (2017) and 180 (2019), but these reforms apply only to new cases.

The Committee therefore recommends the following:

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

RELEVANT STATUTES

Penal Code § 667.5(b)

Health & Safety Code § 11370.2

BACKGROUND AND ANALYSIS

In 2017 and 2019, the Legislature repealed sentencing enhancements that added one year of incarceration to a defendant for each prior prison or jail term he or she previously served and added three years to a sentence for some prior drug convictions.²⁶¹ These reforms apply prospectively only to new cases filed after SB 136 and SB 180 became law. Most people already serving time for these enhancements did not benefit from the change in the law.²⁶²

As with other sentence enhancements discussed above, the enhancements eliminated by SB 136 and SB 180 were disproportionately applied against people of color. As the author of SB 136, Sen. Scott Weiner, stated, “This injustice undermines the public trust in our laws, law enforcement, and our political institutions.”²⁶³ The Los Angeles Times editorial page also supported the repeal of this one-year enhancement as “good lawmaking in that it would roll back foolish lawmaking.”²⁶⁴

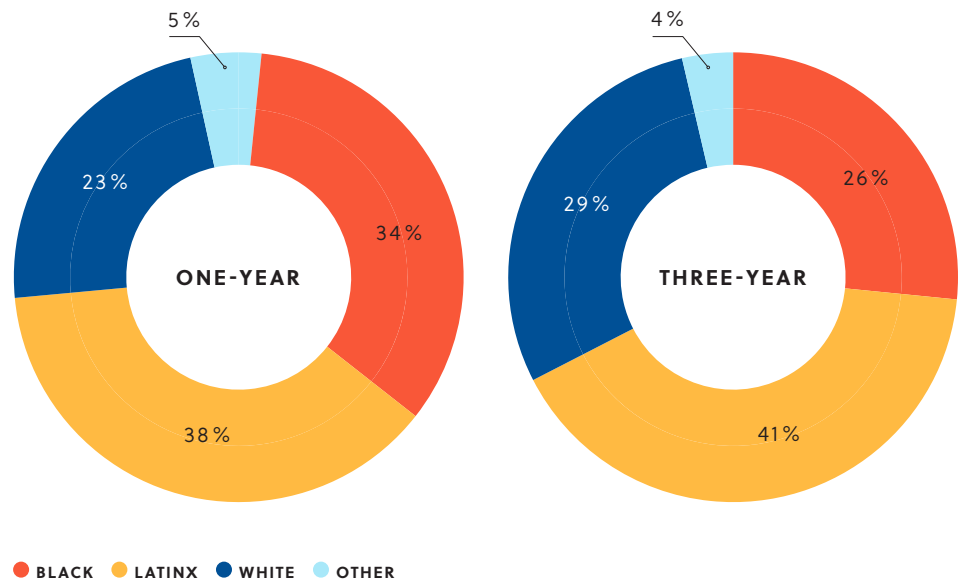
²⁶¹ Health & Safety Code § 11370.2; Penal Code § 667.5(b).

²⁶² Penal Code § 3; *People v. McKenzie*, 9 Cal.5th 40 (2020); *In re Estrada*, 63 Cal.2d 740, 744 (1965); *People v. Chamizo*, 32 Cal.App.5th 696, 700–01 (2019) (SB 180).

²⁶³ Sen. Com. On Public Safety, Analysis of Sen. Bill No. 136 (2019–2020 Reg. Sess.) 2 (Mar. 26, 2019).

²⁶⁴ Los Angeles Times Editorial Board, *Editorial: It's Time to Take Politics out of Sentence Enhancements*, Los Angeles Times (July 20, 2019). See also Michelle Alexander, *Op-Ed: Michelle Alexander: Sentence 'Enhancement' for Drug Offenders Is a Tool of Community Destruction*, Los Angeles Times (May 9, 2016).

PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WITH ONE- AND THREE-YEAR SENTENCE ENHANCEMENTS BY RACE (2020)



Source: CDCR Office of Research.

It is difficult to justify a sentence that is longer than someone's else's merely because it was imposed at a slightly different date. California has offered retroactive application for some of its most significant sentencing reforms: People serving life sentences under the Three Strikes law could seek resentencing under Proposition 36, people with certain felony convictions could be resentenced under Proposition 47, and marijuana convictions could be modified or vacated under Proposition 64.²⁶⁵ Recent reforms to the felony murder rule were also given retroactive application.²⁶⁶ The same principle should apply here.

EMPIRICAL RESEARCH

Research has shown that modest reductions in sentences, as recommended here, have no public safety impact. In 2018, the United States Sentencing Commission studied retroactive application of reductions to federal drug sentences, which resulted in an average reduction of 30 months for more than 7,500 people with no measurable impact on recidivism rates.²⁶⁷ Another United States Sentencing Commission study on other retroactive sentence reductions had similar findings.²⁶⁸

Additional research on the federal system shows that "average length of stay can be reduced by 7.5 months with a small impact on recidivism."²⁶⁹ A similar analysis of the prison populations in Maryland, Michigan, and Florida concluded that a sentence reduction of three to 24 months would have produced minimal public safety impacts for a significant portion of the prison population.²⁷⁰

²⁶⁵ Penal Code § 1170.126; Penal Code § 1170.18; Health & Safety Code § 11361.8.

²⁶⁶ Penal Code § 1170.95.

²⁶⁷ United States Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions*, 1, 3 (Mar. 2018); United States Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendments*, 1 (Jul. 2020).

²⁶⁸ United States Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, 14–15 (May 2014).

²⁶⁹ William Rhodes, Gerald G. Gaes, Ryan Kling, and Christopher Cutler, *Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables with Multiple Break Points*, *Criminal Public Policy* 17:731–69, 758–759 (2018).

²⁷⁰ *Time Served: The High Cost, Low Return of Longer Prison Terms*, The Pew Center on the States, 35–38 (2012).

INSIGHTS FROM OTHER JURISDICTIONS

As noted, after a change to the Federal Sentencing Guidelines in 2011, more than 7,500 people incarcerated in federal prison for some drug offenses received an average sentence reduction of 30 months without impacting recidivism rates.²⁷¹

Between 2004 and 2009, New York State retroactively reduced sentences for drug offenses and allowed more than 1,500 people to be resentenced.²⁷² Analysis of the first cohort resentenced showed a low recidivism rate: About 4% of people returned to prison for a new offense within three years of release, compared to a return rate of 11% for people convicted of drug offenses who were released without being resentenced.²⁷³

In New Jersey, the state Sentencing and Disposition Commission recommended that their changes to sentencing law for nonviolent drug and property offenses be applied retroactively.²⁷⁴

The Kansas Sentencing Commission is also considering a recommendation that would allow for early release of people convicted of certain drug offenses.²⁷⁵

Delaware reformed its Three Strikes law in 2016 and allowed people convicted under the old version of the law to apply for sentence modification.²⁷⁶

In 2012, the Maryland Supreme Court ruled that an error in jury instructions should have retroactive effect, which resulted in more than 200 people who had received long or life sentences being released from prison.²⁷⁷ Only seven of these people have had parole violations or reconviction since release.²⁷⁸

ADDITIONAL CONSIDERATIONS

- Because both of these sentencing enhancements have been repealed in almost all cases, it would waste court, prison, and prosecutorial resources to involve courts in removing each enhancement. Instead, the Legislature should create a mechanism that would allow sentences with these enhancements to be reduced without returning to court, including a clear deadline for when the removal of the sentencing enhancements must be completed.
- Because the enhancements at issue here were widely used and 97% of felony cases are resolved with a guilty plea,²⁷⁹ retroactive elimination of these enhancements could invite significant relitigation of resolved cases. To remove any doubt, the Legislature should specify that removing these sentencing enhancements is not a basis for disturbing plea bargains.²⁸⁰

²⁷¹ United States Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions*, 1 (Mar. 2018).

²⁷² "After the reforms, 1,697 inmates applied to be resentenced, and 1,630 were released," said Linda Foglia, the state Department of Corrections spokeswoman." (Bob Fredericks, *Just 67 Inmates Still Doing Time Under Rockefeller Drug Laws*, New York Post (Jul. 17, 2015).)

²⁷³ William Gibney, *Drug Law Resentencing: Saving Tax Dollars With Minimal Community Risk*, Legal Aid Society, 8 (Jan. 13, 2010).

²⁷⁴ New Jersey Sentencing and Disposition Commission, *Annual Report*, 24–26 (Nov. 2019). Relevant legislation was approved by the New Jersey legislature but is awaiting action by the governor. (Tracey Tulley, *It Was a Landmark Crime Bill. Then a State Senator Added a Special Favor*, New York Times (Dec. 17, 2020).)

²⁷⁵ Minutes of the Kansas Sentencing Commission Zoom Meeting, 2 (Nov. 19, 2020).

²⁷⁶ Jorge Renaud, *Eight Keys to Mercy: How to Shorten Excessive Prison Sentences*, Prison Policy Initiative, 5 (Nov. 2018); 11 Del. Code § 4214(f).

²⁷⁷ Michael Millemann Rebecca Bowman Rivas, and Elizabeth Smith, *Digging Them Out Alive*, 25 *Clinical L. Rev.* 365, 367–69 (2019).

²⁷⁸ Justice Policy Institute, *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, 17 (Nov. 2018). Committee staff obtained the latest recidivism information in November 2020 from a Maryland public defender who is tracking it.

²⁷⁹ Judicial Council of California, *Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19*, 85.

²⁸⁰ *Stamps*, 9 Cal. at 703 (Legislature "may bind the People to a unilateral change in a sentence without affording them the option to rescind the plea agreement" (citation omitted)).

Recommendation	53
Relevant Statutes and Regulations	53
Background and Analysis	53
Empirical Research	55
Insights from Other Jurisdictions	55

8. Equalize Custody Credits for People Who Committed the Same Offenses, Regardless of Where or When They Are Incarcerated

Equalize Custody Credits for People Who Committed the Same Offenses, Regardless of Where or When They Are Incarcerated

RECOMMENDATION

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

The Committee therefore recommends the following:

1. Equalize good conduct credits between jail, prison, and state hospitals.
2. Retroactively apply good conduct credits implemented by CDCR pursuant to Proposition 57 and toward youth offender and elderly parole dates.

RELEVANT STATUTES AND REGULATIONS

Penal Code § 4019
15 CCR § 3043.2

BACKGROUND AND ANALYSIS

Most people incarcerated in county jails and prisons are eligible to earn “good conduct credits” which take time off their sentence if they follow institutional rules. But current law awards differing credits to different people, based solely on where they are incarcerated. For example, someone serving time on a violent offense who follows institutional rules currently earns 20% off their sentence if they are housed in state prison, but only 15% off if incarcerated in a county jail.²⁸¹ Someone who is found incompetent to stand trial and is confined to a state hospital does not get *any* good conduct credit,²⁸² which means that they may be incarcerated longer than someone whose offense was not related to mental illness.

“GOOD CONDUCT” CREDITS IN CALIFORNIA JAILS AND PRISONS

CONVICTION TYPE	JAIL	PRISON
Nonviolent offense with no prior strike conviction	50%	50%
Nonviolent offense with a prior strike conviction	50%	33.3%
Violent offense	15%	20%

Source: Penal Code §§ 4019, 4019.1, 4019.4; 15 CCR §§ 3043.2, 3043.3, 3043.4, 3043.5.

²⁸¹ Compare 15 CCR § 3043.2(a)(2) (20% in prison) with Penal Code § 2933.1(c) (15% in jail).

²⁸² Penal Code § 4019(a)(8) (limiting good conduct credits for people found incompetent to stand trial to those confined only to “county jail treatment facilit[ies]”); *People v. Waterman*, 42 Cal.3d 565, 571 (1986).

Almost every incarcerated person can potentially benefit from good conduct credits. This means that equalizing credits between custody settings – even if the changes are small – could have a profound effect on the amount of overall incarceration and on the state budget.²⁸³ For example, if nonviolent “second strikers” (people with a prior strike offense currently in prison for a nonviolent offense) earned the same credit in prison that they earned while in jail, each person would serve almost two less months per year in prison. As of June 2019, there were more than 18,000 nonviolent second strikers in CDCR custody.²⁸⁴ If this group of people were allowed to earn the same credits for good conduct as other people convicted of nonviolent offenses, the cumulative impact would be approximately 3,000 fewer years of incarceration annually.²⁸⁵

Good conduct credits also incentivize positive rehabilitative programming and positive institutional behavior. In July 2020, James King appeared before the Committee to describe how increased credit eligibility by CDCR greatly increased the number of people in prison registering for educational, vocational, and rehabilitation programs, including drug treatment and victim awareness.²⁸⁶

“EARNED” CREDITS IN CALIFORNIA JAILS AND PRISONS

JAIL	PRISON
All earned credits capped at six weeks per year	Milestone Completion Credits: Up to 12 week reduction per year for various academic, vocational, or rehabilitative goals
	Rehabilitative Achievement Credits: Up to 40 day reduction per year for various self-help and public service activities
	Education Merit Credits: 180 day reduction for earning high school diploma and other educational achievements

Source: Penal Code § 4019.4; 15 CCR §§ 3043.3, 3043.4, 3043.5.

Part of the reason why prison and jail credits do not match is because credits in jail settings are determined by the Penal Code and prison credits are set by CDCR regulations. CDCR was given authority over credit rules with the passage of Proposition 57 in 2016. As a result of these dual sources of authority, there is no single body considering the credit-earning rules for each setting, and similarly situated people can receive less good conduct credit simply because of a difference in their custodial setting. As the California Supreme Court has acknowledged, in some cases, there are perverse incentives to delay transfer to prison and stay longer in county jail where there may be fewer services but better credit opportunities.²⁸⁷

There are also limits on how CDCR applies good conduct credits, depending on a person’s date of incarceration or how old they are. First, CDCR increased the credit-earning capacity for many people in its custody after the effective date of Proposition 57, but those rules only applied prospectively as of May 1, 2017.²⁸⁸ Second, CDCR

283 Allison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners*, National Conference of State Legislators, 1 (Jul. 2009); *Department of Corrections: Administration of Earned Time*, Oregon Secretary of State Audit Report, 1, 15 (Dec. 2010).

284 CDCR Office of Research, *Offender Data Points — Offender Demographics for the 24-Month Period Ending June 2019*, Table 1.22 (Oct. 2020).

285 Data provided by CDCR Office of Research.

286 Written Submission of James King to Committee on Revision of the Penal Code, 2 (Jul. 23, 2020).

287 *People v. Thomas*, 21 Cal.4th 1122, 1126 (1999).

288 CDCR, *CDCR Issues Amended Proposition 57 Regulations*, News Release (Nov. 19, 2017).

conduct credits implemented following Proposition 57 do not currently apply when calculating parole hearings dates for people eligible for youth or elderly parole.²⁸⁹

While applying these credits to anyone who would be eligible – regardless of age or date of incarceration – may present technical administrative challenges at CDCR, the Committee reiterates its belief that peoples’ sentences and length of incarceration should not depend on the date they were convicted. We also reiterate that fundamental fairness demands that reforms with prospective application should generally be applied retroactively as well.

EMPIRICAL RESEARCH

Studies of credit-earning systems in other states have shown that recidivism outcomes are not different for people who receive credits and end up serving less time incarcerated.²⁹⁰ Other research has shown that people who have the opportunity to earn time off a sentence have fewer disciplinary violations.²⁹¹

INSIGHTS FROM OTHER JURISDICTIONS

The Model Penal Code recommends that good conduct credits be available to all incarcerated people at the same rate, regardless of the nature of their offense and where they are incarcerated.²⁹²

Different credits for the same people in jail and prison also present significant constitutional issues. More than twenty years ago, Washington state was found to have violated the federal Equal Protection Clause by offering different amounts of good conduct to people while they were in jail or prison.²⁹³ California state courts have found equal protection violations in similar situations,²⁹⁴ as has the Montana Supreme Court.²⁹⁵

In 2017, Louisiana retroactively applied changes to good conduct credits, which led to a 45% increase in the number of people released because of their good conduct credits.²⁹⁶

The federal system also recently made some good conduct credits retroactive, which led to the accelerated release of 3,100 people in July 2019, even though the change in credits was modest and amounted only to an extra week off a year.²⁹⁷

²⁸⁹ Penal Code § 3051(b).

²⁹⁰ See N.Y. Dept. of Corr. Services., *Merit Time Program Summary: October 1997–December 2006*, 1–iii (2007); E.K. Drake, R. Barnoski, and S. Aos, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised*, Washington State Institute for Public Policy, 1, 7–8 (Apr. 2009).

²⁹¹ William D. Bales and Courtney H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, *Journal of Criminal Justice* 40, 401–402 (2012).

²⁹² Model Penal Code: Sentencing § 11.01, Comment (b).

²⁹³ *MacFarlane v. Walter*, 179 F.3d 1131 (9th Cir. 1999), judgment vacated and dismissed as moot, *Lehman v. MacFarlane*, 529 U.S. 1106 (2000).

²⁹⁴ See e.g., *People v. Raygoza*, 2 Cal.App.5th 593, 602 n.4 (2016); *People v. Mobley*, 139 Cal.App.3d 320, 323 (1983); *People v. Lapaille*, 15 Cal.App.4th 1159, 1168–70 (1993); *People v. Sage*, 26 Cal.3d 498, 507 (1980).

²⁹⁵ *MacPheat v. Mahoney*, 299 Mont. 46, 53 (2000).

²⁹⁶ Louisiana Dept. of Public Safety & Corrections, Louisiana Commission on Law Enforcement, *Louisiana's Justice Reinvestment Reforms First Annual Performance Report*, 16, 42 (Jun. 2018). The spike in releases was caused by the “retroactive nature of some of the policies.” (Louisiana Dept. of Public Safety & Corrections, Louisiana Commission on Law Enforcement, *Louisiana's Justice Reinvestment Reforms 2019 Annual Performance Report*, 14 (Jun. 2012).)

²⁹⁷ The United States Department of Justice, *Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System* (Jul. 19, 2019); Ames Grawert, *What Is the First Step Act — And What's Happening With It?*, Brennan Center for Justice (Jun. 23, 2020).

Recommendation	57
Relevant Statutes and Regulations	58
Background and Analysis	58
Empirical Research	61
Insights from Other Jurisdictions	62
Additional Considerations	62

9. Clarify Parole Suitability Standards to Focus on Risk of Future Violent or Serious Offenses

Clarify Parole Suitability Standards to Focus on Risk of Future Violent or Serious Offenses

RECOMMENDATION

The statutes and regulations governing the parole release determinations by the Board of Parole Hearings (BPH) are not consistent with each other.

The Committee therefore recommends the following:

1. Clarify that the definitions of “danger to society” and “danger to public safety” mean “imminent risk that the parole candidate will commit a serious or violent felony if released.”
2. Establish a rebuttable presumption that a parole candidate is suitable for release (i.e., does not present an imminent risk to commit a serious or violent felony) if one or more of the following factors are true:
 - The commitment offense was nonviolent.
 - The commitment offense has a connection to mental illness.
 - The parole candidate is designated low-risk on a CDCR or BPH risk assessment.
 - The parole candidate has no violent prison rule violations in the past three years.
 - The parole candidate has average or above average performance in programming in the past three years.
 - The parole candidate’s criminal system involvement resulted from retaliation against an abuser or was a result of prior victimization, abuse, or trauma.
3. Specify that the presumption can be overcome if parole hearing officers nonetheless determine that the parole candidate presents an imminent risk to commit a serious or violent felony if released.
4. Specify that failure to qualify for one or more of the presumptions listed above shall not be construed as a checklist of prerequisites for a grant of parole.
5. Specify that a parole candidate’s failure to complete any recommended program or work assignment that is unavailable to them cannot be a basis for denial of parole.
6. Provide that, if parole release is denied, parole hearing officers may recommend housing with appropriate programming within CDCR.
7. Provide that parole hearing officers consider whether a parole candidate’s risk can be mitigated outside of prison, such as by mandating a halfway house, substance abuse treatment, mental health treatment, or other appropriate conditions. This release option is not intended to become BPH’s default decision.

- 8. Increase the standard for judicial review of parole decisions to “abuse of discretion,” and specify that a court can order a new hearing or grant release as the case may warrant.
- 9. Increase the data that BPH releases to the public.

RELEVANT STATUTES AND REGULATIONS

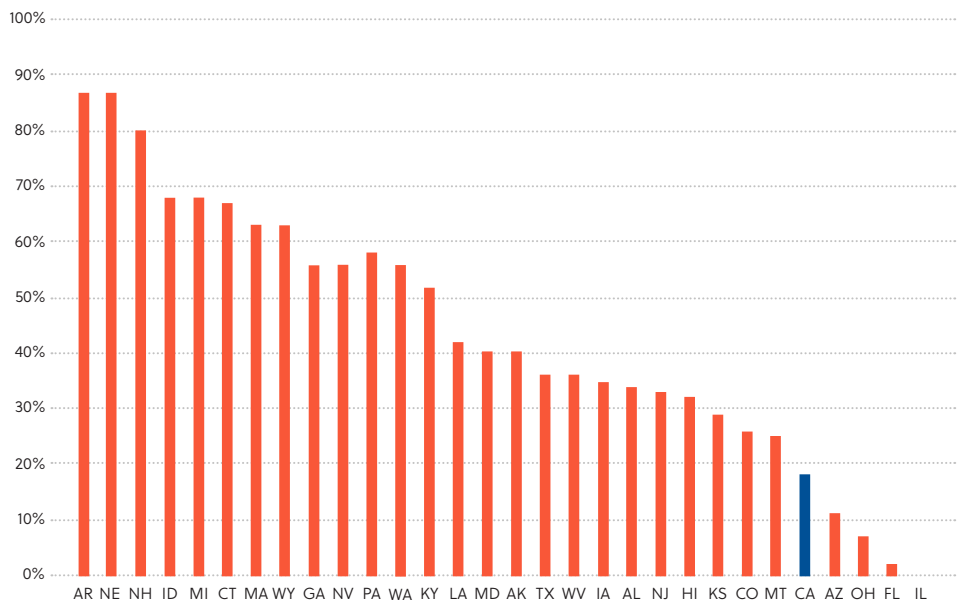
Penal Code § 3041(a) & (b)
 15 CCR § 2281

BACKGROUND AND ANALYSIS

More than half of California’s prison population is eligible at some point for release by parole authorities.²⁹⁸

Compared to other states, California has among the lowest parole grant rates. In 2020, California’s parole grant was 16%.²⁹⁹ The figure is especially low given that 82% of people up for review by California parole authorities score as “low risk” to reoffend,³⁰⁰ according to an actuarial risk assessment tool developed and administered by CDCR and researchers at the University of California, Irvine.³⁰¹

PAROLE GRANT RATES BY STATE



298 Board of Parole Hearings Executive Officer Jennifer Shaffer informed the Committee that 55% of the current CDCR population will go through a parole review process at some point. (Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 1:34:52– 1:35:50.) This includes people sentenced to indeterminate life terms and people eligible for parole consideration under Proposition 57. (See 15 CCR §§ 3490(f) & (d), 2449.4(c).)

299 CDCR, BPH, Parole Suitability Hearing and Decision Information, available at CDCR website; Board of Parole Hearings, Report of Significant Events, 3 (2019).

300 Data provided by CDCR Office of Research.

301 See Susan Turner, James Hess, Jesse Jannetta, Development of the California Static Risk Assessment Instrument (CSRA), Center for Evidence-Based Corrections at the University of California, Irvine, 1 (Nov. 2009).

SOURCE: MARIEL E. APLER, BY THE NUMBERS: PAROLE RELEASE AND REVOCATION ACROSS 50 STATES, ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE (2016).

Furthermore, the relatively few people who have been granted parole by BPH have remarkably low recidivism rates.³⁰² According to the most recent CDCR Outcome Evaluation Report, only 2.3% of people found suitable by parole authorities and released from custody were convicted of a new crime, the majority of which were misdemeanors.³⁰³

PAROLE HEARING OUTCOMES IN CALIFORNIA

	2017	2018	2019	2020
NUMBER OF PAROLE GRANTS	915	1,136	1,184	1,106
TOTAL SCHEDULED HEARINGS	5,335	5,226	6,061	6,932
GRANT RATE	17%	22%	20%	16%
DENIAL RATE	42%	34%	37%	29%
HEARINGS NOT HELD	41%	44%	43%	55%

Source: CDCR Office of Research.

Despite current efforts by BPH, former Governor Brown testified before the Committee that he supported additional measures that would result in “earlier parole for more people.”³⁰⁴ And University of Southern California Law Professor Heidi Rummel, an expert in California’s parole process, emphasized that the low recidivism rate of parolees proved that California could release more people safely on parole without endangering public safety.³⁰⁵

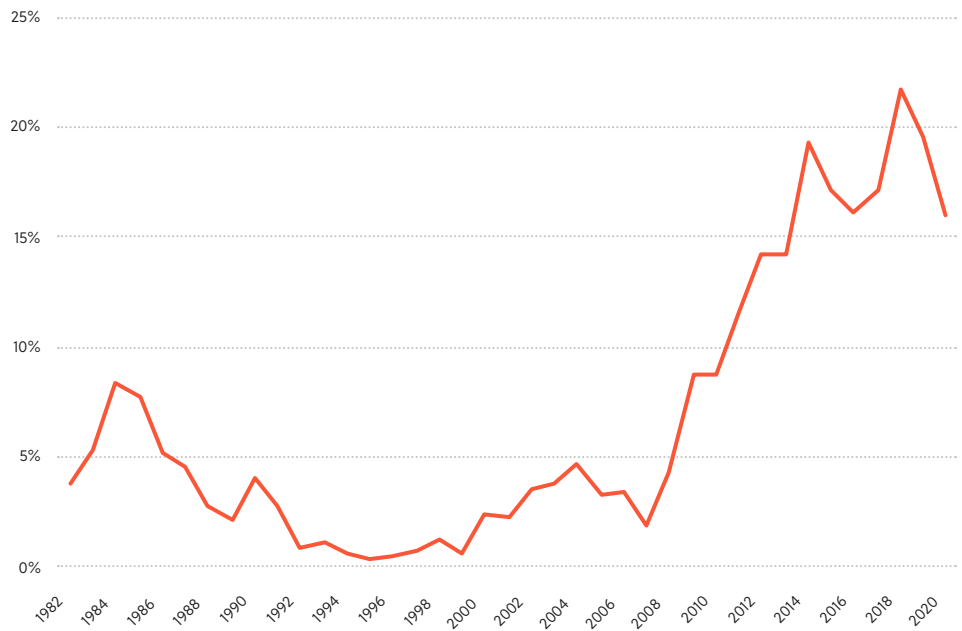
³⁰² California lifers have had a “miniscule” recidivism rate for serious offenses. (Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo*, Stanford Criminal Justice Center, 17 (2011).)

³⁰³ CDCR, Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15, viii (Jan. 2020). As of September 2011, among the 860 people convicted of murder in California paroled since 1995, only five individuals have returned to prison for new felonies since being released. (Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo*, Stanford Criminal Justice Center, 17 (2011).)

³⁰⁴ Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:17:55–0:18:10.

³⁰⁵ *Id.* at 0:13:21–0:14:21.

CALIFORNIA PAROLE HEARING GRANT RATE BY YEAR



Source: CDCR Office of Research.

Part of the problem is that the various statutes and regulations governing California's parole release standard are vague and internally inconsistent. They should be harmonized to provide better transparency and equal application.

For example, Penal Code Section 3041(a)(2) directs parole authorities to “normally grant parole.”³⁰⁶ Another section of the governing statute instructs parole authorities to deny parole if the candidate poses a threat to “public safety.”³⁰⁷ That term has never been defined by the Legislature.³⁰⁸ Separately, BPH adopted regulations that parole should be denied if the candidate “pose[s] an unreasonable risk of danger to society.”³⁰⁹ Again, this term has not been defined.³¹⁰

Although these terms have never been squarely reconciled or addressed by courts or the Legislature, at least three courts of appeal have indicated the standards “danger to public safety” and “danger to society” combine to mean parole should be granted unless the parole candidate is at risk to commit a violent crime if released.³¹¹ Likewise, the Penal Code utilizes similar language focused on an imminent risk of violence in other circumstances where authorities must determine whether people may be released from custodial settings into the community.³¹²

BPH Executive Officer Jennifer Shaffer agreed that risk of violence was the principal concern considered by parole commissioners—and “wasn't very far from where we are today” in terms of a de facto standard at suitability hearings—even though the statutes and regulations make no such specification.³¹³ She also acknowledged that the current statutory and regulatory parole release standards are “muddled.”³¹⁴

306 Penal Code § 3041(a)(2).

307 Penal Code § 3041(b)(1).

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

309 15 CCR § 2281(a); 15 CCR § 2402(a); 15 CCR § 2422(a); 15 CCR § 2432(a). Regulations also list a number of factors that must be considered. (See 15 CCR § 2281(c) (unsuitability) and (d) (suitability).)

310 See *In re Rosenkrantz*, 29 Cal.4th 616, 626 (2002). BPH decisions to deny parole are upheld by a reviewing court if supported by “some evidence.” (*Lawrence*, 44 Cal.4th, 1218–1221)311 *Hunter*, 205 Cal.App.4th at 1536 (reversing a denial of parole because there was no evidence “tending to show that [the parole candidate would] pose an unreasonable risk of future violence”); *In re Jackson*, 193 Cal.App.4th 1376, 1388 (2011) (reversing a parole denial because parole candidate's lack of attendance in self-help programs did not necessarily indicate a likelihood he would “commit violent crimes ... and [thus] does not constitute some evidence that [the candidate] is currently dangerous.”); *In re Morganti*, 204 Cal.App.4th 904, 921 (2012) (holding that the possibility that someone on parole might commit new nonviolent drug crimes did not support a finding of risk to society).

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

313 Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 58:18–0:58:25. Executive Officer Shaffer stated that the current standard the BPH uses to deny parole based on case law was “a current unreasonable risk to public safety.” (*Id.* at 0:30:19–0:30:30.)314 *Id.* at 0:28:30–0:30:00.

While the Committee appreciates that parole authorities continue to evaluate and refine its parole review process, including recently implementing a “structured decision making” evaluation process,³¹⁵ we urge legislative action because the ultimate release standard remains vague and inconsistent and the process involves a great deal of subjectivity, unpredictability, and concerns about inconsistency.

Research suggests that factors that currently play central roles in parole determinations may have little predictive value. For example, studies indicate that the severity of a person’s offense does not predict future recidivism risk.³¹⁶ Research also indicates that consideration by parole authorities of subjective factors, such as whether the parole candidate lacks “insight”³¹⁷ or “remorse,”³¹⁸ does not effectively predict recidivism. These issues are compounded for people with mental health issues who may be unable to articulate the appropriate presentation of insight or remorse.³¹⁹

In addition, parole can often be denied because of failure to complete programs that were unavailable to the parole candidate.³²⁰ For example, Shanae Polk, Director of Operations at 2nd Call, described to the Committee the great difficulties she faced in trying to fulfill BPH’s release requirements because of class unavailability and a lack of assistance in preparing for her parole hearing.³²¹ Now that she has been released, and frustrated by the lack of appropriate programming, Ms. Polk volunteers to teach the only domestic violence class offered at a women’s prison.³²²

EMPIRICAL RESEARCH

The most robust data on recidivism prediction shows that older people are less likely to commit new crimes compared to younger people.³²³ This is particularly relevant in the context of parole because most parole candidates are older, having served a considerable sentence prior to becoming eligible for release consideration. As noted above, research indicates that a person’s period of criminal involvement generally lasts less than 10 years.³²⁴

Studies of other states show that, as in California, people with the most serious convictions tend to have the lowest recidivism rates.³²⁵ For example, in Michigan, 2.7% of 2,558 homicide parolees returned to prison for committing any new crime.³²⁶ In New York, 0.9% of people released from prison in 2012 after a murder conviction returned to prison for a new offense within three years, well below the average 9.2% rate for all offenses.³²⁷

In addition, research has found that there is no difference in violence between people with mental illness and their non-mentally ill neighbors,³²⁸ and more specifically that formerly incarcerated people with mental illness are rearrested or reincarcerated at a rate similar to (and sometimes lower than) non-mentally ill people.³²⁹ According to researchers, the risk of violence society ascribes to mental illness “vastly exceeds the actual risk presented.”³³⁰

Studies also show that actuarial risk assessment tools are particularly reliable in identifying low-risk individuals.³³¹ For example, a violence prediction tool developed by the Pennsylvania Sentencing Commission in 2018 is 98% accurate in predicting which people are at low risk for committing a new violent crime.³³²

315 Written Submission of Jennifer Shaffer to Committee on Revision of the Penal Code, 24–25 (Nov. 12, 2020).

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

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

318 15 CCR § 2281(d)(3), Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:7:00–0:8:05, 0:9:58–0:10:38, 0:53:50–0:55:35, 1:05:44–1:06:55.

319 *Id.* at 1:05:44–1:06:55, 0:53:50–0:55:35; Jeremy Isard, *Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity*, California Law Review, vol. 105, n. 4 (2017).

320 Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:8:37–0:8:46, 1:18:00–1:18:23.

321 *Id.* at 1:25:25–1:28:30, 1:33:46–1:35:28.

322 *Id.* at 1:31:36–1:33:45.

323 Robert Weisberg, Debbie Mukamal, and Jordan Segall, *Life in Limbo*, Stanford Law School Criminal Justice Center, 17 (2011).

324 Alex R. Piquero, J. David Hawkins, Lila Kazemian, David Petchuk, *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)* (2013).

325 Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo*, Stanford Criminal Justice Center, 17 (2011).

326 Citizens Alliance on Prisons and Public Spending, *Denying Parole at First Eligibility: How Much Public Safety Does It Actually Buy?*, 4 (Aug. 2009).

327 New York State Department of Corrections and Community Supervision, *2012 Inmate Releases, Three Year Post-Release Follow Up*, Table 5, Appendix C (Dec. 2016) (noting that between 1985 and 2012, the return rate for a new offense for people who had been released from prison after being convicted of murder was 1.9%).

328 See E. Fuller Torrey, Jonathan Stanley, John Monahan, Henry J. Steadman, *The MacArthur Violence Risk Assessment Study Revisited; Two Views Ten Years After Its Initial Publication*, *Psychiatry Serv* 59, 147–52 (2008); H.J. Steadman, E.P. Mulvey, J. Monahan, et al.: *Violence by People Discharged From Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, *Archives of General Psychiatry* 55, 393–401 (1998).

329 See J.A. Wilson and P.B. Wood, *Dissecting the Relationship Between Mental Illness and Return to Incarceration*, *J. Crim. Just.* 42, 527–37 (2014); Kristen M. Zgoba, Rusty Reeves, Anthony Tamburello, and Lisa DeBilio, *Criminal Recidivism in Inmates With Mental Illness and Substance Use Disorders*, *Journal of the American Academy of Psychiatry and the Law Online* 3913–3920 (Feb. 2020) (finding that formerly incarcerated people with mental illness and no substance abuse disorders were arrested less frequently than those with no mental illness); J. Bonta, M. Law, and K. Hanson, *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-analysis*, *Psychological Bulletin*, 123(2), 123–142 (1998).

330 E. Fuller Torrey, Jonathan Stanley, John Monahan, Henry J. Steadman, *The MacArthur Violence Risk Assessment Study Revisited; Two Views Ten Years After Its Initial Publication*, *Psychiatry Serv* 59, 147–52 (2008).

331 Model Penal Code: Sentencing § 6.11, Commentary at 296 (citing Brian J. Ostrom et al., *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (2002) (noting that actuarial risk assessment tools were less accurate in predicting high risk of violence); Hennessey D. Hayes and Michael R. Geerken, *The Idea of Selective Release*, 14 *Just. Quarterly*, 353, 368–369 (1997); Kathleen Auerhahn, *Selective Incapacitation and the Problem of Prediction*, 37 *Criminology* 703 (1999) (same).

332 Pennsylvania Commission on Sentencing, *Revisions to the Proposed Risk Assessment Instrument*, 3, Table 1 (2018).

Three risk assessment tools used by BPH and CDCR were also found to be extremely accurate in predicting which people were low risk for future violence.³³³ One study of over 24,000 people conducted over 50 months found that 91% of people evaluated as low risk of future violence did not go on to commit a violent crime.³³⁴

INSIGHTS FROM OTHER JURISDICTIONS

Several states, including Nevada, Hawaii, Maryland, Arkansas, Michigan, and Louisiana, rely on risk assessment scores as an important factor in parole determination.³³⁵ For example, In Hawaii, the parole statute requires release for people deemed “low-risk” by a validated risk assessment tool.³³⁶ In Nevada, if a parole candidate is assessed as low-risk and their offense was of low or medium severity, the parole board is directed to grant parole “at the initial eligibility date” for a low- or medium-severity crime, and at the “first or second meeting” for a high-severity crime.³³⁷ Maryland uses a combination of risk assessment score and offense type to determine a presumptive guidelines release range.³³⁸

In Norway (which many experts see as a model for modern criminal law),³³⁹ the standard for preventive detention mandates that there must exist “an imminent risk that the offender will again commit” a “serious violent felony.”³⁴⁰ Parole systems in New Jersey and Washington make a similar inquiry about future harm to others in some contexts.³⁴¹ For example, in New Jersey, the juvenile release standard requires in part that someone be paroled if they “will not cause injury to persons.”³⁴²

Some jurisdictions presume that people convicted of nonviolent offenses shall be granted parole. For example, Louisiana, Oklahoma, and Pennsylvania presumptively grant parole to many people.³⁴³ In 2017, Louisiana authorized release without a hearing to people convicted of nonviolent offenses who served 25% of their sentences when certain conditions are met.³⁴⁴

Many states focus on in-prison programming as a gateway to early release. For example, Mississippi and Maryland grant release without a hearing at the earliest parole release date for some people who have met the requirements of their case plans.³⁴⁵ For others, including Arkansas, Washington, and Louisiana, in-prison disciplinary behavior is a key parole factor.³⁴⁶

ADDITIONAL CONSIDERATIONS

- Parole authorities should be encouraged to release more data concerning their process and parole hearing outcomes. BPH currently releases information about the number of scheduled parole hearings and their outcomes.³⁴⁷ They also release an annual Report of Significant Events that includes additional information and provide to members of the public free transcripts of any parole hearings.³⁴⁸ These efforts are an excellent start to providing transparency into BPH’s operations, but BPH should release on a routine basis additional information about who is and who is not granted parole, including the parole hearing outcomes for sentence type, type of parole hearing, and important demographic information such as race, gender, and county of commitment.

333 Three tools that California’s BPH uses to assess risk were all evaluated in this study, including the HCR-20 (violence risk), PCL-R (any criminal offending risk), and the Static-99 (sexual offending risk), among others. (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 Meta-Analysis*, 345 BR. MED. J. e4692 (2012).)

334 *Id.*

335 Arkansas Code Ann. § 16-93-615 (a)(1)(B) (providing that parole decisions “shall be made by reviewing information such as the result of the risk-needs assessment”); Louisiana Stat. Ann. § 15:574.2(C) (2)(f) (providing that parole can be granted by just a majority of the committee when the person “has obtained a low-risk level designation determined by a validated risk assessment instrument”); MCLS § 791.233e(3)(a) (providing that “statistical risk” is one of eight factors that determine a probability of parole score); *Michigan Department of Corr. Policy Directive: Parole Guidelines*, Attachment A, available at State of Michigan website; *Monroe City Prosecuting Attorney v. Wilkins* (In re Parole of Frederick Wilkins), 2020 Mich. LEXIS 1801, *1-2 (Oct. 21, 2020) (holding that the parole candidate must be released if he or she receives a “high” probability of parole score absent “substantial and compelling reasons”).

336 “Except for good cause shown to the paroling authority, a person who is assessed as low risk for re-offending [via a validated risk assessment tool] shall be granted parole upon completing the minimum sentence [of an indeterminate sentence].” (Hawaii Stat. Ann. § 706-670(1)). This requirement can be overcome if the person has committed serious misconduct in prison, among other reasons. (*Id.*)

337 Nevada Ann. Code § 213.516, § 213.514 (2020). Nevada uses a matrix based on a person’s risk assessment and offense severity to calculate release. (Nevada Ann. Code § 213.516 (2020).)

338 Alexis Lee Watts, Brendan Delaney, and Edward E. Rhine, *Profiles in Parole Release and Revocation: Maryland*, Robina Institute of Criminal Law and Criminal Justice, 5 (2018).

339 See, e.g., Henrik Pryser Libell and Matthew Haag, *New York’s Jails Are Failing. Is the Answer 3,600 Miles Away?*, *New York Times* (Nov. 12, 2019).

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

341 Washington Rev. Code § 9.95.420(3)(a) (In Washington, people convicted of sex offenses must be released when their minimum sentence has expired unless “it is more likely than not that the offender will commit sex offenses if released.”)

342 New Jersey Rev. Stat. § 30:4-123.53(b) (“A juvenile inmate shall be released on parole when it shall appear that the juvenile, if released, will not cause injury to persons or substantial injury to property.”)

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

344 *Louisiana’s 2017 Criminal Justice Reforms*, The Pew Trust (Mar. 1, 2018).

345 In Mississippi, an incarcerated person also must meet requirements including a discharge plan, no serious or major violation reports within six months, and no hearing request by a victim. (Mississippi Code Ann. § 47-7-18(1) (2020).) In Maryland, an incarcerated person also cannot have committed a “category 1 rule violation,” nor can a victim have requested a hearing. (Maryland Correctional Services Code Ann. § 7-301.1(g) (2020).)

346 Arkansas Code § 16-93-101(3)(D)(i); Washington Rev. Code § 9.94A.730(1); Louisiana Stat. Ann. § 15:574.2(C)(2)(b).

347 See BPH, *Parole Suitability Hearing and Decision Information*, available at CDCR website.

348 BPH, *Request for Parole Suitability Hearing Transcript*, available at CDCR website.

- The parole standard recommended by the Committee – that a parole candidate shall be awarded parole unless there is “imminent risk that the parole candidate will commit a serious or violent felony if released” – is borrowed from Norwegian criminal law,³⁴⁹ which has been recognized internationally as a model system.
- Parole release is currently a binary decision: The person is either going to stay incarcerated or be released to the community with supervision. The Committee’s recommendation is to create additional types of release scenarios for parole candidates that BPH concludes are close to being entitled to full release but may still need additional structure, supervision, or programming prior to full release.³⁵⁰
- Courts reviewing parole release decisions must currently apply an extremely deferential standard of review and may not intervene in parole decisions if there is “some evidence” supporting a parole denial.³⁵¹ This standard does not come from a statute.³⁵² The Committee recommends that parole decisions should instead be reviewed for “abuse of discretion.” This standard of review, which is well-defined in other judicial contexts, would give appropriate deference to BPH’s role in making parole decisions while providing an important safety valve.

³⁴⁹ Norwegian Penal Code § 39(c)(1). This standard is used for “preventive detention” and is intended to retain the most dangerous people if they continue to be a risk to society but is seldom used. (*Anders Breivik: Just How Cushy Are Norwegian Prisons?*, BBC (Mar. 16, 2016).) For example, only 112 people total were imprisoned in Norway pursuant to “preventive detention” as of 2018. (Norway Statistics, *Imprisonment* (Jun. 29, 2020).)

³⁵⁰ For example, in Canada, “day parole” allows someone to “to participate in community-based activities in preparation for full parole or statutory release.” (Government of Canada, Parole Board, *Types of Conditional Releases*.)

³⁵¹ The origin of the “some evidence” standard was the United States Supreme Court’s decision in *Superintendent, Mass. Correctional Institution at Walpole v. Hill*, 472 US 445 (1985). The Court there explained that all that was required was a “modicum” of evidence and that due process was only violated “if the decision is not supported by any evidence.” (*Id.* at 455 (emphasis added).)

³⁵² *Rosenkrantz*, 29 Cal.4th at 652.

Recommendation	65
Relevant Statutes	65
Background and Analysis	65
Empirical Research	67
Insights from Other Jurisdictions	68

10. Establish Judicial Process for “Second Look” Resentencing

Establish Judicial Process for "Second Look" Resentencing

RECOMMENDATION

The administrations of Governor Newsom and former Governor Brown and the Legislature have expanded the use of "second look" sentencing by authorizing courts to revisit sentences of selected incarcerated people when recommended by law enforcement authorities. This practice should be clarified and expanded.

The Committee therefore recommends the following:

1. Establish judicial procedures for evaluating resentencing requests.
 - In all cases, require notice, initial conference within 60 days, and written reasons for court decisions.
 - For all cases initiated by law enforcement, require appointment of counsel.
2. Establish that resentencing is presumed if law enforcement officials recommend resentencing because a sentence is unjust or because of a person's exceptional rehabilitative achievement while incarcerated.
3. Expand "second look" sentencing opportunities by allowing any person who has served more than 15 years to request a reconsideration of sentence by establishing that "continued incarceration is no longer in the interest of justice."

RELEVANT STATUTES

Penal Code § 1170(d)

BACKGROUND AND ANALYSIS

California has a special provision in the Penal Code that allows certain law enforcement officials, including the Secretary of CDCR or any elected district attorney, to request that a person be resentenced at any time for any reason. A court that receives such a request is vested with authority to recall the person's sentence and issue a new, reduced punishment, if "circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice."³⁵³

The law has existed for decades but was given new life in 2018 when then-Governor Brown allocated resources to CDCR to identify incarcerated people who demonstrated records of rehabilitation and deserved a reevaluation of their sentence in court. The law was then expanded to allow prosecutors to make similar resentencing requests.³⁵⁴ Prosecutors and CDCR do not make requests for resentencing lightly. CDCR has an extensive set of regulations guiding the process.³⁵⁵ Hillary Blout, Executive Director of For the People, described to the Committee the resource-intensive procedures that some prosecutors are beginning to use to review old cases.³⁵⁶ Although the requests for resentencing are made by law enforcement authorities, the ultimate decision to recall a person's sentence and reduce their punishment remains with the courts.

³⁵³ Penal Code § 1170(d)(1).

³⁵⁴ AB 2942 (Ting, 2018).

³⁵⁵ See 15 CCR § 3076.1.

³⁵⁶ Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:10:05–0:10:38, 0:51:05–0:52:07; Written Submission of Hillary Blout to Committee on Revision of the Penal Code, 2 (Nov. 10, 2020).

Despite these expansions to the resentencing statute, current law has failed to protect many important interests at stake. For example, because the Penal Code does not provide any rules, many trial courts provide virtually no process while considering these requests, including denying resentencing requests without providing notice to the parties, appointing counsel, or giving parties an opportunity to be heard.³⁵⁷ The law does not require a court to give any specific reason for denying a resentencing request.³⁵⁸

RESENTENCING REFERRALS BY CDCR (2019-20)

	EXCEPTIONAL CONDUCT	CHANGE IN LAW	TOTAL
REFERRALS	155	1,448	1,603
COURT RESPONSES	110	1,023	1,133
% COURT RESPONSES	71%	71%	71%
RESENTENCINGS	64	411	475
% RESENTENCED	41%	28%	30%

Source: CDCR Office of Research.

Placer County Superior Court Judge Richard Couzens, a leading expert on California's criminal law, appeared before the Committee in November to encourage better process and expanded use of California's "second look" sentencing law.³⁵⁹ He told the Committee that the current process is "amazingly sparse," "largely unstructured," and that it would be appropriate to require courts to issue "affirmative responses, even if just in writing."³⁶⁰ Without such guidance, many requests for resentencing have gone unanswered by the courts or have been denied without any meaningful input from the person who is to be resentenced.³⁶¹

Judge Couzens also endorsed wider use of the resentencing process to allow prisoners who have served a significant portion of their sentence to petition courts for reevaluation of their punishment and early release: "[I]t seems to me fundamentally fair that if a person has been in custody for 15 years, that it's not unreasonable to say, 'Hey, has this person changed?' That's just not unreasonable."³⁶² Sam Lewis, Executive Director of the Anti-Recidivism Coalition, also supported the proposal to encourage and incentivize rehabilitation for people sentenced to long prison terms.³⁶³

As of June 2020, almost 30,000 people had served more than fifteen years in CDCR custody.

³⁵⁷ *People v. McCallum*, 55 Cal.App.5th 202 (2020); *People v. Frazier*, 55 Cal.App.5th 858 (2020).

³⁵⁸ "[N]othing in section 1170, subdivision (d)(1), requires the court to state its reasoning when declining to exercise its discretion in response to the Secretary's recommendation. It is a fundamental tenet of appellate review that we presume on a silent record the court properly exercised its discretion." (*Id.* at 814.)

³⁵⁹ Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:17:37–0:19:45, 0:44:07–0:44:19.

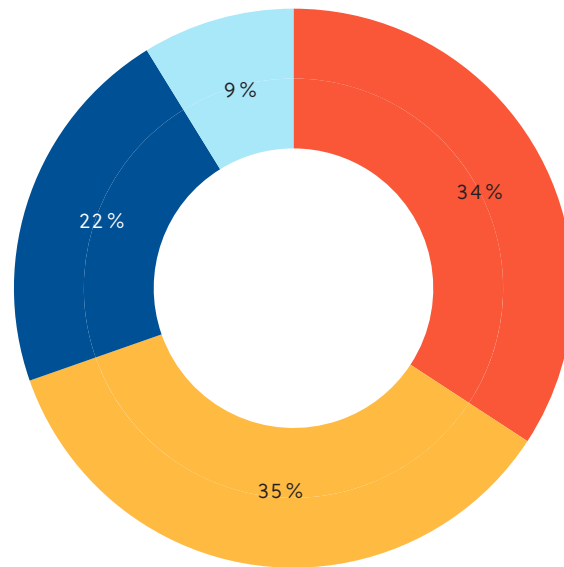
³⁶⁰ *Id.*

³⁶¹ Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:10:05–0:10:38; 0:51:05–0:52:07; Written Submission of Hillary Blout to Committee on Revision of the Penal Code, 2 (Nov. 10, 2020).

³⁶² Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:42:07–0:42:20.

³⁶³ *Id.* at 1:19:15–1:21:30.

PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WHO HAVE SERVED MORE THAN 15 YEARS BY RACE (2020)



● BLACK ● LATINX ● WHITE ● OTHER

Source: CDCR Office of Research.

This idea, and the Committee's recommendation, mirrors a proposal from United States Senator Cory Booker and Congresswoman Karen Bass, who in 2019 introduced legislation that would allow any person in federal prison who had served 10 years of incarceration to apply for resentencing.³⁶⁴

EMPIRICAL RESEARCH

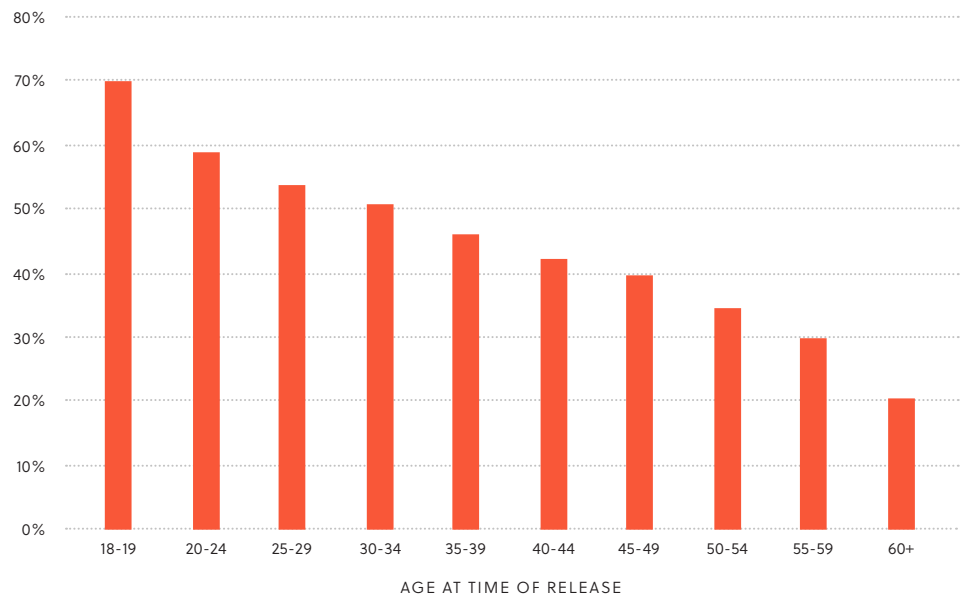
As noted elsewhere in this report, empirical research has long established that the older someone is, the less likely they are to commit offenses.³⁶⁵ The recidivism rate for California's prison population bears this out: Older people simply do not commit as many crimes as younger people do.³⁶⁶ This data supports the conclusion that, after some period of time, a sentence may deserve reevaluation.

³⁶⁴ H.R. 3795 — Second Look Act of 2019. To qualify for relief, someone would need to show that they were "not a danger to the safety of any person or the community," a "readiness for reentry," and that "the interests of justice warrant a sentence modification." (*Id.*; proposed Sec. 3627(a)(3)(A)(i), (ii) & (a)(3)(B).)

³⁶⁵ "The strong correlation between age and crime is one of the most tested and established in the field of criminology." (*In re Ivan Von Staich*, 56 Cal.App.5th 53, 77 (2020), review granted and cause transferred back to appellate court by California Supreme Court, 2020 WL 7647921 (2020).)

³⁶⁶ CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released From the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Figure 18 (Jan. 2020).

THREE-YEAR RECIDIVISM RATE BY AGE AT TIME OF RELEASE FROM PRISON



Source: CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15*, Figure 1 (Jan. 2020).

INSIGHT FROM OTHER JURISDICTIONS

In 2018, Congress enacted the federal First Step Act, which allowed people incarcerated in federal prison to request sentence reduction with a motion to the trial court.³⁶⁷ More than 2,000 of these requests have been granted by federal courts around the country, including many to help combat the speed of COVID-19 in federal prisons.³⁶⁸

In the District of Columbia, any person who was under 18 years old at the time of their offense and has served at least 15 years in prison may request a new sentence.³⁶⁹ The court must issue a reduced sentence if it concludes that “the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.”³⁷⁰ The law was recently expanded to anyone who was under 25 years of age at the time of their offense and who has served at least 15 years.³⁷¹ Approximately 50 people have been recently resentenced in the District of Columbia for offenses committed before they were 18. None of those released have been reconvicted of a new violent crime.³⁷²

The Model Penal Code suggests that states enact “second look” sentencing that allows someone to ask a judge for resentencing after serving 15 years of imprisonment.³⁷³ The New Jersey Sentencing & Disposition Commission also recently unanimously agreed that “second look” sentencing laws were important reforms.³⁷⁴

³⁶⁷ See 18 U.S.C. § 3582(c) (providing that a federally incarcerated applicant must show that “extraordinary and compelling reasons” warrant a sentence reduction).

³⁶⁸ Federal Bureau of Prisons, *First Step Act*, available at Federal Bureau of Prisons website.

³⁶⁹ D.C. Code § 24-403.03(a).

³⁷⁰ *Id.*

³⁷¹ Hailey Fuchs, D.C., *Passes Bill to Give Young Offenders Chance at Reduced Sentences*, New York Times (Dec. 15, 2020).

³⁷² *Id.*

³⁷³ Model Penal Code: Sentencing § 305.6, Comment (a) (“[This] provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.”).

³⁷⁴ New Jersey Sentencing and Disposition Commission, *Annual Report*, 35 (Nov. 2019).

Creation of the Committee	70
Function and Procedure	70
Personnel of the Committee	71
Committee Budget	72
Planned Activities for 2021	72
Acknowledgments	72
Keynote Speakers	73
Panelists	73
Philanthropic and Other Support	77

2020 Administrative Report

2020 Administrative Report

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

CREATION OF THE COMMITTEE

On January 1, 2020, the Committee on Revision of the Penal Code was formed.³⁷⁵

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.³⁷⁶ Neither body has any authority over the substantive work of the other.³⁷⁷ The two bodies have different statutory duties.³⁷⁸

The Committee has seven members. Five are appointed by the Governor for four-year terms.³⁷⁹ One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules.³⁸⁰ The Governor selects the Committee's chair.³⁸¹

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.³⁸²

The Committee is required to prepare an annual report for submission to the Governor and the Legislature.³⁸³

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.³⁸⁴ In 2020, it held eight meetings, five of which were two-day meetings. Its first meeting was held in the State Capitol. As a result of the COVID-19 pandemic, its remaining meetings were conducted entirely by teleconference.³⁸⁵

³⁷⁵ See 2019 Cal. Stat. ch. 25; Gov't Code § 8280(b).

³⁷⁶ See Gov't Code § 8281.5(d).

³⁷⁷ "The approval by the commission of any recommendations by the committee is not required." (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.)

³⁷⁸ Compare Gov't Code §§ 8289, 8290 (duties of Commission) with Gov't Code § 8290.5 (duties of Committee).

³⁷⁹ Gov't Code § 8281.5(a), (c).

³⁸⁰ Gov't Code § 8281.5(a).

³⁸¹ Gov't Code § 8283.

³⁸² Gov't Code § 8290.5(a).

³⁸³ Gov't Code § 8293(b).

³⁸⁴ Gov't Code §§ 11120–11132.

³⁸⁵ This was made possible by Executive Orders N-25-20 and N-29-20.

PERSONNEL OF THE COMMITTEE

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

CHAIR

Michael Romano

LEGISLATIVE MEMBERS

Senator Nancy Skinner

Assemblymember Sidney Kamlager-Dove

GUBERNATORIAL APPOINTEES

Hon. John Burton

Hon. Peter Espinoza

Hon. Carlos Moreno

L. Song Richardson

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

Thomas M. Nosewicz

Legal Director

Rick Owen

Staff Attorney

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

Lara Hoffman

Nick Stewart-Oaten

Natasha Minsker

Daniel Seeman

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

Brian Hebert

Executive Director

Barbara Gaal

Chief Deputy Director

Debora Larrabee

Associate Governmental Program Analyst

This report was copyedited by Nicole Antonio and designed by Taylor Le.

COMMITTEE BUDGET

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

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

PLANNED ACTIVITIES FOR 2021

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

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

ACKNOWLEDGMENTS

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

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

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

KEYNOTE SPEAKERS

(in order of appearance)

HON. GAVIN NEWSOM
Governor of California

PROF. CRAIG HANEY
University of California, Santa Cruz

KEELY BOSLER
Director, California Department of Finance

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

XAVIER BECERRA
Attorney General of California

GEORGE GASCÓN
District Attorney, Los Angeles County

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

PANELISTS

(in alphabetical order)

ANTHONY ADAMS
Deputy Public Defender, Mendocino County

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

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

NINA SALARNO BESSELMAN
President, Crime Victims United

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

HILLARY BLOUT
Executive Director, For the People

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

CHARLES CALLAHAN
*Deputy Director (A), Facility Support – Division of Adult Institutions,
California Department of Corrections & Rehabilitation*

BRIDGET CERVELLI
Legal Services for Prisoners with Children

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

KATIE DIXON
Community Rights Organizer, Legal Aid at Work

AARON FISCHER
Disability Rights California

NEIL FLOOD
Vice President, California Correctional Peace Officers Association

SEAN GARCIA-LEYS
Civil Rights Attorney

OBED GONZALEZ
California City Correctional Facility

PROF. RYKEN GRATTET
Chair, Department of Sociology, University of California, Davis

DEAN GROWDON
*Sheriff of Lassen County
First Vice President, California State Sheriffs' Association*

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

MAX HUNTSMAN
Inspector General, Los Angeles County

ANNE IRWIN
Director, Smart Justice California

JAY JORDAN
Executive Director, Californians for Safety and Justice

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

ADNAN KHAN
Executive Director, Re:Store Justice

JAMES KING
Ella Baker Center

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

PROF. CHARIS E. KUBRIN
Department of Criminology, Law & Society, University of California, Irvine

SAM LEWIS
Executive Director, Anti-Recidivism Coalition

JARED LOZANO
Associate Director, High Security (Males),
California Department of Corrections & Rehabilitation

HON. DANIEL J. LOWENTHAL
Superior Court of California, County of Los Angeles

HON. STEPHEN MANLEY
Superior Court of California, County of Santa Clara
Member, Collaborative Justice Courts Advisory Committee,
Judicial Council of California

HON. NANCY O'MALLEY
District Attorney, Alameda County
President, California District Attorneys Association

CAITLIN O'NEIL
Senior Fiscal & Policy Analyst, Legislative Analyst's Office

ERIC NUÑEZ
Chief of Police, Los Alamitos
President, California Police Chiefs Association

PAUL M. NUÑEZ
Deputy District Attorney, Los Angeles County District Attorney's Office

SHANAE POLK
Director of Operations, 2nd Call

PROF. STEVEN RAPHAEL
Goldman School of Public Policy, University of California, Berkeley

KEVIN ROONEY
*Supervising Deputy District Attorney, Violent Criminal Enterprise Unit,
San Joaquin County*

LISA ROMO
Director of Systemic Issues Litigation, Office of the State Public Defender

JEFF ROSEN
District Attorney, Santa Clara County

LISA ROTH
Deputy Public Defender, Los Angeles County

HEIDI RUMMEL
Director, Post-Conviction Justice Project, USC Gould School of Law

JENNIFER SHAFFER
Executive Officer, Board of Parole Hearings

TAINA VARGAS-EDMOND
Executive Director, Initiate Justice

J. VASQUEZ
*Participatory Defense & Policy Coordinator,
Communities United for Restorative Youth Justice*

HON. RICHARD A. VLAVIANOS
*Superior Court of California, County of San Joaquin
Chair, Collaborative Justice Courts Advisory Committee, Judicial Council of California*

STEPHEN M. WAGSTAFFE
*District Attorney, San Mateo County
Former President, California District Attorneys Association*

KEITH WATTLEY
Founder and Executive Director, UnCommon Law

PROF. ROBERT WEISBERG
*Stanford Law School
Co-Director, Stanford Criminal Justice Center*

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 Corrections and Rehabilitation who assisted the Committee's data-gathering efforts and facilitated the testimony of Obed Gonzalez, as well as the California Department of Motor Vehicles for other data assistance. We also greatly appreciate additional research support provided by Rio Scharf and Emma Briger. 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.

- 79 Appendix A:
Biographies of
2020 Committee
Members
- 81 Appendix B:
Additional Data

Appendix

Appendix A: Biographies of 2020 Committee Members

Michael Romano, of San Francisco, serves as chair of the Committee on Revision of the Penal Code. Romano teaches criminal justice policy and practice at Stanford Law School and has been director of the Stanford Justice Advocacy Project since 2007. Romano has collaborated with numerous local, state, and federal agencies, including the United States Department of Justice and Office of White House Counsel under President Obama. He has also served as counsel for the NAACP Legal Defense and Educational Fund 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.

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

Peter Espinoza, of Los Angeles, has served as director of the Office of Diversion and Reentry at the Los Angeles County Department of Health Services since 2016. He served as a commissioner and judge at the Los Angeles County Superior Court from 1990 to 2016. Espinoza was an attorney at Peter Espinoza Attorney at Law from 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.

Assemblymember Sydney Kamlager, of Los Angeles, has been a member of the Assembly since 2018. She represents the 54th Assembly District, encompassing Baldwin Hills, the Crenshaw community, all of Culver City, Ladera Heights, Leimert Park, Mar Vista, Mid-City Los Angeles, Palms, Pico-Union, Westwood, and Windsor Hills. As chair of the Select Committee on Incarcerated Women, Assemblymember Kamlager is focused on reviewing and reforming policies to support the health, dignity, and rehabilitation of women in prison. She also sits on the Assembly Public Safety Committee and Speaker Rendón's Select Committee on Police Reform. In 2020, Assemblymember Kamlager passed AB 1950, which reformed the California probation system by setting maximum terms of two years for felony offenses and one year for misdemeanor offenses. She earned a master's degree in arts management from the Heinz College at Carnegie Mellon University.

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

L. Song Richardson, of Irvine, is dean at the University of California, Irvine, School of Law, from 2018 to July 2021, and was a professor of law there from 2014 to 2017. She was a professor of law at the University of Iowa College of Law from 2012 to 2014. Richardson was an associate professor of law at American University from 2011 to 2012 and at DePaul University of Law from 2006 to 2011. Richardson was a partner at Schroeter, Goldmark and Bender from 2001 to 2006. She was assistant public defender at The Defender Association from 1999 to 2001. Richardson was an assistant federal public defender at the Federal Public Defender's Office, Western District of Washington, from 1997 to 1999. She was assistant counsel at the NAACP Legal Defense and Educational Fund from 1995 to 1997. She was a Skadden Public Interest fellow at the National Immigration Law Center in Los Angeles from 1994 to 1995 and at the Legal Aid Society's Immigration Law Unit in Brooklyn from 1993 to 1994. Richardson is a member of the American Law Institute and the executive committee of the Association of American Law Schools. She earned a juris doctor degree from Yale Law School.

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

Appendix B: Additional Data

Cost of Misdemeanor Citations in Traffic Court

COST OF MISDEMEANOR CITATIONS IN TRAFFIC COURT

STATUTE	ASSESSMENT	AMOUNT OWED
Maximum misdemeanor fine	\$1,000	\$1,000
State penalty assessment (Penal Code § 1464)	\$10 for every \$10 base fine	\$1,000
State criminal surcharge (Penal Code § 1465.7)	20% surcharge on base fine	\$200
Court operations assessment (Penal Code § 1465.8)	\$40 fee per fine	\$40
Court construction (Gov't Code § 70372)	\$5 for every \$10 in base fine	\$500
County fund (Gov't Code § 76000)	\$7 for every \$10 in base fine	\$700
DNA Fund (Gov't Code § 76104.6 and 76104.7)	\$5 for every \$10 in base fine	\$500
Emergency Medical Air Trans. Fee (Gov't Code § 76000.10)	\$4 fee per fine	\$4
EMS Fund (Gov't Code § 76000.5)	\$2 for every \$10 in base fine	\$200
Conviction assessment (Gov't Code § 70373)	\$30 per fine for misdemeanor	\$30
Night court assessment (Vehicle Code § 42006)	\$1 per fine	\$1
ACTUAL COST OF CITATION		\$4,175
DMV Warrant/hold assessment fee (Vehicle Code § 40508.6)	Up to \$10 fee (may vary by county)	+\$10
Fee for failing to appear (Vehicle Code § 40508.5)	\$15 fee	+\$15
Civil assessment for failure to appear/pay (Penal Code § 1214.1)	\$300 fee	+\$300
COST OF CITATION IF INITIAL DEADLINE IS MISSED		\$4,500

Source: Source: Stopped, Fined, Arrested, Back on the Road California, 23 (Apr. 2016).

Number of People Who Served Less than One Year in CDCR by County

NUMBER OF PEOPLE WHO SERVED LESS THAN ONE YEAR IN CDCR BY COUNTY

COUNTY	2017	2018	2019
Alameda	287	220	203
Alpine	no data given	no data given	no data given
Amador	22	27	29
Butte	80	86	97
Calaveras	14	23	18
Colusa	19	23	23
Contra Costa	142	165	142
Del Norte	22	27	17
El Dorado	46	45	63
Fresno	681	743	764
Glenn	16	12	18
Humboldt	40	57	87
Imperial	58	70	90
Inyo	7	6	7
Kern	527	495	544
Kings	153	140	134
Lake	51	45	43
Lassen	10	21	23
Los Angeles	3,613	3,865	4,124
Madera	76	82	122
Marin	23	31	22
Mariposa	3	10	5
Mandocino	45	43	41
Merced	107	89	98
Modoc	1	5	7
Mono	3	3	4
Monterey	161	149	165
Napa	54	52	53
Nevada	10	11	12
Orange	776	826	935
Placer	141	120	109
Plumas	9	10	11

Number of People Who Serve Less than One Year in CDCR by County

(CONTINUED)

COUNTY	2017	2018	2019
Riverside	908	969	916
Sacramento	561	583	546
San Benito	20	14	15
San Bernardino	1,583	1,645	1,560
San Diego	951	955	957
San Francisco	51	39	68
San Joaquin	331	321	332
San Luis Obispo	83	100	95
San Mateo	183	188	188
Santa Barbara	105	118	103
Santa Clara	433	401	379
Santa Cruz	34	45	63
Shasta	81	91	120
Sierra	0	2	1
Siskiyou	10	11	13
Solano	173	168	118
Sonoma	97	98	112
Stanislaus	281	276	257
Sutter	65	60	46
Tehama	36	51	48
Trinity	2	7	9
Tulare	162	143	163
Tuolumne	19	12	5
Ventura	243	197	237
Yolo	63	70	54
Yuba	58	69	92
TOTAL	13,730	14,134	14,507

Source: CDCR Office of Research.

Number of People Currently in Prison with One- and Three- Year Sentence Enhancements (2020)

NUMBER OF PEOPLE CURRENTLY IN PRISON WITH ONE- AND THREE-YEAR SENTENCE ENHANCEMENTS (2020)

COUNTY OF SENTENCING	1-YEAR ENHANCEMENT	3-YEAR ENHANCEMENT
Alameda	369	4
Alpine	0	0
Amador	19	1
Butte	149	2
Calaveras	10	0
Colusa	9	0
Contra Costa	177	3
Del Norte	27	0
El Dorado	43	1
Fresno	564	3
Glenn	6	0
Humboldt	37	0
Imperial	27	0
Inyo	2	0
Kern	727	13
Kings	139	1
Lake	43	0
Lassen	22	0
Los Angeles	3885	68
Madera	57	2
Marin	36	0
Mariposa	14	0
Mendocino	63	2
Merced	125	0
Modoc	3	0
Mono	1	0
Monterey	141	5
Napa	28	1
Nevada	9	0
Orange	609	11

Number of People Currently in Prison with One- and Three- Year Sentence Enhancements (2020)

(CONTINUED)

COUNTY OF SENTENCING	1-YEAR ENHANCEMENT	3-YEAR ENHANCEMENT
Placer	111	5
Plumas	5	0
Riverside	1450	35
Sacramento	563	18
San Benito	17	2
San Bernardino	823	12
San Diego	1147	25
San Francisco	83	0
San Joaquin	216	8
San Luis Obispo	106	5
San Mateo	118	4
Santa Barbara	159	9
Santa Clara	507	10
Santa Cruz	67	1
Shasta	188	12
Sierra	1	0
Siskiyou	40	3
Solano	93	2
Sonoma	102	6
Stanislaus	243	2
Sutter	30	1
Tehama	58	4
Trinity	2	0
Tulare	342	4
Tuolumne	47	4
Ventura	210	7
Yolo	129	5
Yuba	26	0

Source: Source: Data provided by CDCR Office of Research.

Number of People Currently in Prison with Gang Enhancements by County (2020)

NUMBER OF PEOPLE CURRENTLY IN PRISON WITH GANG ENHANCEMENTS BY COUNTY (2020)

COUNTY	NUMBER
Alameda	369
Amador	19
Butte	149
Calaveras	10
Colusa	9
Contra Costa	177
Del Norte	27
El Dorado	43
Fresno	564
Glenn	6
Humboldt	37
Imperial	27
Inyo	2
Kern	727
Kings	139
Lake	43
Lassen	22
Los Angeles	3885
Madera	57
Marin	36
Mariposa	14
Mendocino	63
Merced	125
Modoc	3
Mono	1
Monterey	141
Napa	28
Nevada	9

Number of People Currently in Prison with Gang Enhancements by County (2020)

(CONTINUED)

COUNTY	NUMBER
Orange	609
Placer	111
Plumas	5
Riverside	1450
Sacramento	563
San Benito	17
San Bernardino	823
San Diego	1147
San Francisco	83
San Joaquin	216
San Luis Obispo	106
San Mateo	118
Santa Barbara	159
Santa Clara	507
Santa Cruz	67
Shasta	188
Sierra	1
Siskiyou	40
Solano	93
Sonoma	102
Stanislaus	243
Sutter	30
Tehama	58
Trinity	2
Tulare	342
Tuolumne	47
Ventura	210
Yolo	129
Yuba	26

Source: CDCR Office of Research.

Percentage
of People
Currently
in Prison
with Gang
Enhancement
by County and
Race (2020)

**PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WITH GANG ENHANCEMENT
BY COUNTY AND RACE (2020)**

COUNTY	BLACK	LATINX	WHITE	OTHER
Alameda	42%	45%	1.56%	3.125
Amador	0%	16.66%	33.33%	50%
Butte	0%	50%	30%	20%
Calaveras	0%	0%	0%	100%
Colusa	0%	75%	0%	25%
Contra Costa	48.12%	44.37%	2.5%	5%
Del Norte	0%	100%	0%	0%
El Dorado	0%	0%	100%	0%
Fresno	21.97%	63.22%	2.69%	12.1%
Glenn	0%	100%	0%	0%
Humboldt	0%	100%	0%	0%
Imperial	0%	100%	0%	0%
Kern	34.19%	63.22%	1.61%	0.96%
Kings	13.2%	79.24%	5.66%	1.88%
Lake	20%	40%	40%	0%
Lassen	0%	100%	0%	0%
Los Angeles	32.11%	63.65%	1.22%	3.3%
Madera	11.42%	85.71%	2.85%	0%
Marin	0%	100%	0%	0%
Mendocino	0%	66.66%	0%	33.33%
Merced	8.27%	82.75%	4.13%	4.82%
Monterey	2.36%	92.91%	0%	4.72%
Napa	0%	92%	8%	0%
Orange	6.36%	80.18%	6.48%	6.95%
Placer	100%	0%	0%	0%
Riverside	26.72%	67.24%	4.16%	1.26%
Sacramento	47.57%	35.92%	3.55%	12.94%
San Benito	0%	100%	0%	0%
San Bernardino	35.85%	57.41%	5.08%	1.64%
San Diego	28.46%	60.57%	2.5%	8.461%

Percentage of People Currently in Prison with Gang Enhancement by County and Race (2020)

(CONTINUED)

COUNTY	BLACK	LATINX	WHITE	OTHER
San Francisco	68.75%	25%	6.25%	0%
San Joaquin	23.25%	58.13%	1.66%	16.94%
San Luis Obispo	17.64%	76.47%	5.88%	
San Mateo	10.9%	83.63%	3.63%	1.81%
Santa Barbara	6%	87.33%	5.33%	1.33%
Santa Clara	9.07%	78.5%	1.77%	10.64%
Santa Cruz	0%	97.56%	2.43%	0%
Shasta	0%	71.42%	14.28%	14.28%
Siskiyou	0%	25%	3%	0%
Solano	14.28%	71.42%	14.28%	0%
Sonoma	1.53%	84.61%	6.15%	7.69%
Stanislaus	2.46%	79.01%	4.93%	13.57%
Sutter	7.14%	82.14%	7.14%	3.57%
Tehama	0%	80%	0%	20%
Tulare	2.38%	90.88%	1.95%	4.77%
Tuolumne	0%	66.6%	33.3%	%0
Ventura	5.31%	87.76%	6.38%	0.53%
Yolo	3.12%	89.06%	4.68%	3.12%
Yuba	12%	64%	8%	16%

Source: CDCR Office of Research.