December 7, 2020

Memorandum 2020-19

Updates on Possible Committee Recommendations

At its meeting in November 2020, the Committee discussed eight possible recommendations that had been identified by the Committee in prior meetings and further refined into research priorities by the Committee chair and staff.

This memorandum discusses two more potential recommendations — parole release and resentencings under Penal Code Section 1170(d)(1) — and also gives brief updates on other issues discussed by the Committee.

STAFF PROPOSALS

1. Revise parole release standard to ensure fairer decisions.

Current Law

Current law addresses the standard for parole release in multiple unharmonious ways. First, the Penal Code directs that the Board of Parole Hearings (BPH) "shall normally grant parole."[1] Second, the Penal Code also requires parole to be denied if the candidate poses a threat to "public safety" — but that term is not defined anywhere in statute or regulation.[2] Third, BPH has adopted regulations stating that parole should be denied if the candidate "pose[s] an unreasonable risk of danger to society."[3] Finally, case law limits BPH's ability to deny parole based entirely on "immutable circumstances," such as the heinous nature of the offense, and requires there be some connection between past offenses and current dangerousness.[4] BPH decisions to deny parole are upheld by a reviewing court if supported solely by "some evidence."[5]

Summary Staff Proposal

Revise the statutory standard for considering parole suitability in two ways. First, by specifying that parole should be granted unless there is a finding of an

1. Penal Code § 3041(a)(2).
2. Penal Code § 3041(b)(1).
3. 15 CCR § 2281(a); 15 CCR § 2402(a); 15 CCR § 2422(a); 15 CCR § 2432(a). Regulations also lists a number of factors that must be considered. See 15 CCR § 2281(c) (unsuitability) and (d) (suitability).
4. *In re* Lawrence, 44 Cal.4th 1181, 1212 (2008).
5. *In re* Rosenkrantz, 29 Cal.4th 616, 626 (2002); Lawrence, 44 Cal.4th at 1218–21.

imminent risk that the parole candidate will commit a "serious" or "violent" felony, as those terms are defined by existing law. Second, reduce subjectivity in the hearing process and increase predictability by creating presumptions for release, including if the parole candidate was found to be a low risk on a CDCR or BPH administered risk assessment.

Background

Ultimately, about half of CDCR's populations is eligible at some point for release by BPH.[6] BPH has stated their commitment to using "evidence-based practices and robust application of the law" to safely return incarcerated people to their communities. And the BPH has increased the number of cases in which it grants parole over the past 25 years while keeping recidivism rates around two to four percent.

But despite BPH's commitment to safely releasing people and the statutory directive to "normally grant parole," the most recent data show that BPH has a parole grant rate between 17 and 22%.[7]

Panelists at the November meeting discussed some of the driving factors behind California's low grant rate, including the problems inherent in parole commissioners' use of subjective and non-predictive factors.[8] California has "retained a recidivism rate for violence of less than one percent," according to USC Professor Heidi Rummel, and "we can release more people safely" without substantially increasing this rate.[9]

The seriousness of the committing offense is often over-emphasized, despite research showing that the severity of the offense does not affirmatively predict risk.[10] And BPH's reliance on subjective factors, such as whether the parole

6. This statistic comes from a June 2020 roster of people incarcerated in CDCR. The roster contains information for 124,280 people, which is used as CDCR's total population for the calculation. The following categories were used to determine who may be eligible for release by BPH: 27,068 people serving indeterminate life sentences, 6,810 people serving life sentences under the Three Strikes law, 13,469 people serving determinate sentences with a prior strike conviction (not including those convicted of offenses against person), and 12,314 peeople serving determinate sentences (not including those convicted of offenses against persons).

7. This statistical information from publicly-available BPH data. See CDCR, BPH, Parole Suitability Hearing and Decision Information, <https://www.cdcr.ca.gov/bph/statistical-data/>.

8. Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=KL-jf82XbCI> 7:00–8:05, 9:58–10:38.

9. Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=KL-jf82XbCI> 13:21–14:21.

10. 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).

candidate lacks "insight" or "remorse,"[11] are unsupported as predictors of recidivism, and pose particular problems for people with mental health issues who may be unable to articulate the appropriate responses.[12]

Some other states have already adopted measures to limit subjectivity and have practices that presume release when an incarcerated person first become eligible for parole.[13] This presumption can be overcome by a credible assessment indicating that the person poses an unreasonable risk of committing serious criminal conduct in the future. Presumptive parole systems also give greater weight to post-commitment factors such as the presence or absence of disciplinary issues in prison and participation in rehabilitative programming.[14]

In addition to issues with the legal standard for parole release, panelists noted that parole can often be denied because of failure to complete programs that were unavailable to the parole candidate.[15] They stressed the need for a higher level of collaboration between parole boards and prisons in identifying and providing the specific rehabilitative programming needed by each person that comes before the BPH.[16]

Several panelists also discussed the need for trauma-informed programming.[17] This type of programming addresses the needs of incarcerated people who were themselves victims of violence before being sent to prison.[18] In addition, past victimization should be more broadly considered at parole hearings.[19] California already acknowledges the special circumstances of certain groups, like those who were especially young when they committed the offense, and those who are

11. Committee on Revision of the Penal Code, Meeting on November 12, 2020, <https://www.youtube.com/watch?v=KL-jf82XbCI> 7:00–8:05, 9:58-10:38, 53:50-55:35; 1:05:44–1:06:55.

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

13. For example, Hawaii's statute grants parole at the earliest release date when the parole candidate is assessed as "low risk for re-offending" by a "validated risk assessment" actuarial tool, absent aggravating factors. Haw. Rev. Stat. § 706-670(1). Similarly, Michigan presumes release when the parole candidate receives a high score on its parole guidelines tool (scored either high, medium, or low) absent "substantial and compelling objective reasons" to depart from that decision. MCLS § 791.233e(2)(e)(6); *In re Parole of Cushing*, 2014 Mich. App. LEXIS 1098, *10–11 (2014). Low risk assessment results also play a significant role in early parole release in other states. See Nev. Admin. Code § 213.516; La. Stat. Ann. § 15:574.2C(2)(f).

14. See Haw. Rev. Stat. § 706-670(1)(b); La. Stat. Ann. § 15:574.2C(2)(b).

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

16. *Id.* at 1:05:06–1:05:49.

17. *Id.* at 1:05:06–1:05:49, 9:06–9:57.

18. See *id.*

19. The Penal Code directs BPH to give "great weight" to information that a parole candidate has experienced intimate partner battering, but limits the consideration to convictions that occurred before August 29, 1996;. Penal Code § 4801(b)(1).

elderly at the time of their parole hearing. The Committee should recommend revisions that direct BPH to give similar consideration to past victimization in parole determinations.

Staff Proposal

The Committee should consider the following recommendations:

- Revise the standard for denial of parole to require a finding of imminent risk that the parole candidate will commit a serious or violent felony as defined in PC 667.5(c) and 1192.7(c) if released.[20]
- Clarify the current standard that the board "shall normally grant parole"[21] by:
    - Adding presumption to grant parole if any of the following are true:
        1. The parole candidate has been designated low risk on a CDCR or BPH risk assessment.
        2. The parole candidate has no rule violations involving violence in past three years.
        3. The committing offense was non-violent.
        4. The parole candidate has average or above performance in work, school or vocational programming in last three years.
        5. The parole candidate has no rule violations involving violence in past three years.
        6. The committing offense has a connection to mental illness.
        7. The parole candidate can demonstrate that their criminal-system involvement resulted from retaliation against an abuser or was a result of abuse.
    - Specifying that a parole candidate's inability to satisfy one of these conditions does not mean that, for that reason alone, BPH should deny parole.
    - These presumptions are rebuttable and BPH can deny parole if it nonetheless believes that the candidate remains an imminent risk to commit a serious or violent felony. That explanation must be made on the record.

20. This language is taken from Norway's standard for preventive detention. See Norwegian Penal Code § 39(c)(1).

21. See Penal Code § 3041(a)(2) ("One year before the inmate's minimum eligible parole date a panel … shall again meet with the inmate and shall normally grant parole").

- Adding presumption to *deny* parole if:
    1. The parole candidate is designated high risk on a CDCR or BPH risk assessment, or
    2. The parole candidate was found guilty of violent rule violation in last 36 months

In addition to addressing the reforms described above, the Committee should consider the following additional recommendations:

- Revise statute to specify that a parole candidate's failure to complete a recommended program or work assignment that is unavailable to them cannot be a basis for denial of parole.
- If parole is denied, allow BPH to recommend assignment to facilities with appropriate programming.
- BPH should consider whether a parole candidate's risk can be mitigated outside of prison such as mandating a halfway house, or substance abuse treatment or mental health treatment. These requirements for release may be especially appropriate for people who would presumptively be released because of mental health issues or past victimization.
- Revising the standard for judicial review of BPH decisions. The standard — asking if there as merely "some evidence" to support BPH's decisions — does not come from a statute and is the lowest possible standard of review.

2. Encourage greater use of second-look sentencing.

Current Law

Under Penal Code Section 1170(d)(1), the Secretary of the Department of Corrections and Rehabilitation (CDCR), local prosecutors, the Board of Parole Hearings, and local sheriffs may request that an incarcerated person be resentenced.[22]

But there is no formal process specified in the law for what a court should do when receiving such a request. In many cases, such requests are denied or simply

22. Penal Code § 1170(d)(1).

ignored by courts. For example, a hearing is not required and courts may decide these matters without appointing counsel for the incarcerated person.[23]

There is also no ability for defendants to ask directly for resentencing.

Summary Staff Proposal

Part of the problem is that one statute, Penal Code Section 1170(d)(1), covers multiple circumstances for resentencing, which complicates the legal and bureaucratic process.

To simplify and clarify the process, staff recommends establishing a new resentencing statute that creates three types of resentencings: (1) recommendations for resentencing by law enforcement and CDCR with a presumption in favor of resentencing; (2) recommendations for resentencing consideration by law enforcement and CDCR without a presumption in favor of resentencing; and (3) requests for resentencing brought after 15 years by defendants themselves.

Each type of resentencing would have specified court procedures, including sometimes requiring a hearing and appointment of counsel. For all resentencings, a court would be required to send notice and provide an incarcerated person an opportunity to respond. Courts would also be required to give specific reasons when denying a request for resentencing.

This chart summarizes the categories and procedures:

	notice	reasons	counsel	hearing	presumption
Law enforcement-initiated; resentencing recommended	✓	✓	✓	✓	✓
Law enforcement-initiated; no position	✓	✓			
Defendant-initiated	✓	✓			

Background

At its November 2020 meeting, the Committee heard from both a practitioner and a judge about the resentencing process under Penal Code Section 1170(d)(1). This section of the Penal Code allows a prosecutor or CDCR to bring a case back to court for potential resentencing, even after many years has passed since the original sentencing.[24] The process currently has two parts: a prosecutor or CDCR requests that a court "recall" a sentence and, if the courts agrees, the person can

23. People v. McCallum, 269 Cal. Rptr. 3d 336, 342–47 (2020); People v. Frazier, 269 Cal. Rptr. 4d 806, 811–15 (2020). The litigation of the McCallum case is being led by Michael Romano, current Committee Chair.

24. Penal Code § 1170(d)(1).

then be resentenced. Such resentencings allow people who are serving very long sentences to receive shorter ones after they have shown they are safe to release. The process also allows CDCR to request that a sentence be adjusted in cases where there was an error in the original sentence or where it may be appropriate to apply recent changes in the law to people currently in prison.[25]

The Penal Code is silent on what procedure is required. As Judge Couzens told the Committee at its November meeting, the process is "amazingly sparse," "largely unstructured," and it would be appropriate to require courts to issue "affirmative responses, even if just in writing."[26] Without such guidance, many requests for resentencing have gone unanswered by the courts or have been denied without any meaningful input from the defendant.

For example, of 1,558 requests for resentencing that CDCR has made, almost a third have received no response from a court and only a third have resulted in resentencings.[27] This chart summarizes the situation as of November 30, 2020:

	Exceptional conduct	Change in law	Total
Referrals	153	1,442	1,595
Court responses	107	1,021	1,128
% court responses	70%	71%	71%
Resentencings	63	427	490
% resentenced	41%	30%	31%

Appellate courts have begun to weigh in on how these referrals are being handled. Because the Penal Code does not provide any process, appellate courts are allowing trial courts to provide the most minimal process while considering these requests, including denying them without holding a hearing[28] or even appointing counsel.[29] Similarly, there is no requirement that a court give any specific reason for denying a Section 1170(d)(1) request — and if no reason is given, appellate courts will assume that the court made the right decision.[30]

25. 15 CCR § 3076.1 (emergency regulations describing CDCR's process for making referrals under Penal Code § 1170(d)(1)).

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

27. This information was provided by the CDCR Office of Legal Affairs. These numbers do not include referrals made at the request of law enforcement. See 15 CCR § 3076.1(a)(4) (providing process for law enforcement to request CDCR refer someone for resentencing).

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

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

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

And aside from these procedural issues, local prosecutors must bear all the cost of investigating and litigating any requests for resentencing but share in none of the savings that might result in someone serving less incarceration. Local public defenders and courts also find themselves in similar situations. Finally, because defendants cannot bring a resentencing request on their own, these misaligned incentives may result in similarly-situated people being treated differently depending on the county of their conviction as some prosecutors will devote resources to investigating possible resentencings while others will not.

Staff Proposal

The Committee should consider the following recommendations:

- Create a new section of the Penal Code specifying three types of resentencings:
    1. Law enforcement or CDCR is in favor of resentencing. When such a request is made, there is a presumption in favor of resentencing that a court should only deny when there is evidence beyond a reasonable doubt that the resentenced person would commit a future violent offense. This would help codify the current practice of CDCR and prosecutors seeking resentencings for people who have shown exceptional rehabilitation.
    2. Law enforcement or CDCR takes no position on whether resentencing is appropriate. There would be no presumption in favor or against resentencing, and the matter would be left to the judge's discretion. This type of resentencing would codify CDCR's current practice of requesting sentence recalls when there is an error in a sentence or the law has changed.
    3. An incarcerated person or court brings a request for resentencing after fifteen years of incarceration. There would be no presumption in favor or against resentencing. Requests would only be allowed if the incarcerated person had at least 24 months left on their sentence.[31]

31. This category is based on a recommendation by the Model Penal Code. See Model Penal Code: Sentencing § 305.6.

- Create procedural requirements for each type of resentencing.
    - A court must always give notice of any actions it takes and give a defendant an appropriate amount of time to respond.
    - A court must allow presentation of evidence for or against the resentencing request.
    - A court must always specify reasons for any action it takes, including denying a request for recall.
    - If the sentence was a result of plea bargain, resentencing under these provisions would not be grounds for a prosecutor or court to withdraw its agreement to the original plea.[32]
    - For requests where law enforcement or CDCR supports resentencing, court must appoint counsel and hold a hearing.
    - For other types of resentencings, neither counsel nor a hearing is required.

- Specify that all requests for a recall of sentence are to be directed to the Chief Judge of the relevant Superior Court. The Chief Judge has 90 days to act on an initial request for recall of sentence, which may include reassigning the case to an appropriate judge.

- Specify that any resentencing under Section 1170(d)(1) is a "full resentencing" as described in People v. Buycks, 5 Cal. 5th 857 (2018), and that all matters related to the conviction and sentence, not just those related to the length of incarceration, can be considered. Appellate courts are currently split on this issue and it is set to be resolved by the California Supreme Court.[33]

- Channel savings from reduced prison incarceration to local entities. The state Department of Finance currently determines how much money the state has saved by reduced incarceration from other policies, such as the reduction in people sent to prison while on a probation sentence[34] and the reduction in incarceration attributed to Proposition 47,[35] and could

32. See People v. Stamps, 9 Cal. 5th 685, 702 (2020) (explaining that Legislature must specify when it is "chang[ing] well-settled law that a court lacks discretion to modify a plea agreement unless the parties agree to the modification."). Penal Code § 1170(d)(1) currently specifies that "The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice." Future versions of the law should contain similar language.

33. Compare People v. Lopez, 56 Cal. App. 5th 835 (2020) (while resentencing under Penal Code § 1170(d)(1), court could consider whether case should be transferred to juvenile court) with People v. Federico, 50 Cal. App. 5th 318, 325–328 (2020) (opposite conclusion). The California Supreme Court has agreed to review the latter case.

34. See, e.g., Penal Code § 1233.4.

35. Government Code § 7599.1.

make similar calculations when someone is resentenced at the request of a local prosecutor or sheriff. A portion of the savings — or a pre-determined flat amount of money for each resentencing — could then be sent to the local prosecutor's office that made the successful resentencing request as well as the public defender's office that represented the defendant.

OTHER UPDATES

At its November meeting, the Committee also directed staff to research other issues. Brief updates are provided here.

Retroactively applying increases in credit-earning implemented by CDCR after Proposition 57.

During discussion of a proposal to equalize credit-earning between jail and prison, the Committee directed staff to investigate the feasibility of retroactive application of the higher credit-earning rates created after Proposition 57. Proposition 57, which voters approved in 2016, gave CDCR broad "authority to award credits earned for good behavior and approved rehabilitative or educational achievements."[36] Using this power, CDCR increased how much credit many people in its custody could earn, but those increases were largely prospective only.[37] There appears to be no legal barrier to CDCR applying these credits retroactively as CDCR has wide constitutional authority to set credit-earning rules.

Applying good conduct and earned credit to calculate youth offender parole dates.

Following a recommendation from a panelist at the November 2020 meeting, the Committee asked staff to research the application of good conduct and other credits to youth offender parole hearings dates. A youth offender parole hearing allows people who committed their current offense before the age of 26 to be released after serving a certain period of time[38] — but good conduct and other

36. Cal. Const., art. I, § 32(2).
37. CDCR, Proposition 57: Credit-Earning for Inmates Frequently Asked Questions (FAQ), <https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq/> (listing pre- and post-Prop 57 credit-earning differences).
38. Penal Code § 3051(a)(1). If the person is serving a determinate term, they are eligible for a youth offender hearing after serving fifteen years. Penal Code § 3051(b)(1). For an indeterminate sentence less than 25-to-life, a youth offender hearing is available after serving twenty years. Penal Code § 3051(b)(2). For longer indeterminate sentences, a hearing is available after serving twenty-five years. Penal Code § 3051(b)(3). People convicted under the Three Strikes law are excluded from this type of release. Penal Code § 3051(h).

credits don't count when setting those parole hearing dates. Though the Penal Code specifies how the youth offender parole hearing dates are currently calculated, the law also explicitly allows CDCR to set "earlier youth parole eligible date[s] by adopting regulations pursuant" to Proposition 57.[39] In other words, the only barrier to credits being used in setting youth offender parole hearing dates appears to be CDCR's discretion.

Further defining "aggravated theft."

During discussion of a proposal to create a new offense of "aggravated shoplifting," the Committee directed staff to expand its research into other common theft scenarios, including thefts of purses and cell phones that result in robbery charges.

Thefts of purses and cell phones from a person's immediate possession are grand theft if only "incidental touching" occurs during the taking.[40] But if more than the "quantum of force necessary to accomplish the mere seizing of the property" is used, a robbery has occurred.[41] "[T]he degree of force is immaterial"[42] and theft of a purse from a person's shoulder has led to robbery convictions where the purse strap tugged against the person's shoulder and broke[43] or caused pain.[44]

One way to modernize and simplify this current law would be to create a new offense of "aggravated theft" that applies to thefts involving more than "incidental touching" but where no injury was caused and no weapon was used.

Revising definition of "inhabited dwelling."

Following a proposal from a panelist at the November Committee meeting, the Committee directed staff to research the various structures that can satisfy the "inhabited dwelling house" requirement for a residential burglary.[45] If a burglary is of an "inhabited dwelling house," the offense is first-degree burglary, a strike offense under the Three Strikes Law with a maximum penalty of six years in prison.[46] If a burglary is of a structure that is not considered an "inhabited

39. Penal Code § 3051(j)
40. Penal Code § 487(c); People v. Garcia, 45 Cal. App. 4th 1242, 1246 (1996), disapproved on other grounds in People v. Mosby, 33 Cal. 4th 353, 365 n. 2, 3 (2004).
41. People v. Morales, 49 Cal. App. 3d 134, 139 (1975).
42. Garcia, 45 Cal. App. 4th. at 1246.
43. People v. Roberts, 57 Cal. App. 3d 782, 787 (1976).
44. People v. Jones, 2 Cal. App. 4th 867, 869 (1992) ("In response to the prosecutor's question whether she was injured when appellant grabbed her purse, the victim testified, 'Well, not much. Only one of my fingers was a little blood [sic] and my shoulder a little bit.'" (alteration in original)).
45. Penal Code § 460(a).
46. Penal Code §§ 460, 461, 1192.7(c)(18).

dwelling," the offense is second-degree burglary, a non-strike punishable as a misdemeanor or felony, with a maximum sentence of three years.[47]

An inhabited dwelling house includes any structure "functionally interconnected with and immediately contiguous to other portions of the house."[48] This definition serves "not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety."[49] Courts have found that "inhabited dwellings" include a tent, a common-area laundry room,[50] a carport,[51] an enclosed patio,[52] and an attached garage.[53]

The Committee may want to consider modernizing the definition of "inhabited dwelling" to more appropriately capture the seriousness of some of these offenses.

CONCLUSION

The two primary topics explored in this memorandum strengthen the procedures used to release people serving lengthy terms of incarceration. California's experience has shown that such releases can be done safely while making the criminal legal system more fair and humane.

Respectfully submitted,

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47. *Id*.
48. People v. Ingram, 40 Cal. App. 4th 1397, 1404 (1995), disapproved on other grounds in People v. Dotson, 16 Cal. 4th 547, 560 n. 8 (1997).
49. People v. Gauze, 15 Cal. 3d 709, 715 (1975).
50. People v. Woods, 65 Cal. App. 4th 345, 347–50 (1998).
51. In re Christopher J., 102 Cal. App. 3d 76, 78–79 (1980).
52. People v. Cook, 135 Cal. App. 3d 785, 795 (1982).
53. People v. Fox, 58 Cal. App. 4th 1041 (1997); People v. Moreno, 158 Cal. App. 3d 109, 112 (1984).