ANNUAL REPORT AND RECOMMENDATIONS

Committee on Revision of the Penal Code

2021

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Executive Summary

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

The Committee has placed a particular interest on sentences for felony offenses, the area where the most serious punishments occur. As discussed below, we recommend that the Legislature enact evidence-based reforms that increase effective alternatives to incarceration and incentivize treatment and rehabilitation, from the time of sentencing to the time of release from custody and reentry to the community.

The Committee's recommendations are unanimous and build on exhaustive research and testimony from 23 expert witnesses who addressed the Committee this year, including California Chief Justice Tani Cantil-Sakauye, Attorney General Rob Bonta, crime victims, law enforcement leaders, judges, and criminal defense experts and advocates.

The Committee was also guided by extensive public comment, data analysis, outreach to stakeholders across the state, dialogue with practitioners and experts throughout the country, and hours of Committee deliberation during seven public meetings this year. This report contains extensive support for each recommendation, including empirical research, experiences from other jurisdictions, and new data specially provided to the Committee by the California Department of Corrections and Rehabilitation.

If enacted, these reforms would impact almost every person involved in California's criminal legal system, decrease racial disparities, reduce unnecessary incarceration, and improve the public safety efficacy of criminal punishments.

As described in detail below, the recommendations are:

1. Strengthen California's mental health diversion law.
2. Encourage alternatives to incarceration.
3. Expand CDCR's existing reentry programs.
4. Equalize parole eligibility for all offenses.
5. Modernize the county parole system.
6. Repeal the Three Strikes law.
7. Create a review process for people serving sentences of life without the possibility of parole.

Introduction

Over the past year, during the COVID-19 pandemic, California's prison population reached its lowest level in thirty years.[1] In 2020 overall crime rates also continued to fall to record lows in the state — with the notable exception that California experienced a sharp increase in homicides, which reached a level last seen in 2008.[2]

The Committee devoted intensive research and resources to the issue of crime rates, with assistance from researchers at the California Policy Lab at the University of California Berkeley and UCLA. According to a comprehensive study, published in September and discussed in more detail below, overall crime fell in California in 2020. And while the state's homicide rate rose significantly, California maintains a homicide rate well below the national average.

In 2021, the Legislature enacted numerous reforms to reduce incarceration in California, including 6 recommendations from this Committee, which will significantly reduce unnecessary incarceration for thousands of Californians, reduce racial disparities in criminal sentencing, and save taxpayer dollars better spent on programs proven to improve public safety.

Our research shows the continued need for the Committee's work: rationalizing a Penal Code that has grown too complex and unsuited in many ways for the 21st century in a state as large and diverse as California. The Committee's goals remain developing reforms to California's Penal Code that maximize public safety, ensures equal justice and racial equity, reduces needless and counter-productive incarceration, and helps to improve communities and lives throughout the state. We rely on the best available research around the world and unique access to data from California's crimnal legal system, results of which are published in this report.

This year, the Committee once again heard from experts across the spectrum for their perspectives on the complicated task of updating California's Penal Code. Attorney General Rob Bonta urged the Committee to reject the "false choice" between public safety and a more equitable criminal legal system.[3] Kathleen Allison, Secretary of the Department of Corrections and Rehabilitation, explained that people are more incentivized to participate in prison rehabilitative programming when it is paired with some hope of future release.[4] California Chief Justice Tani Cantil-Sakauye cautioned the Committee that needed reforms are often delayed for years at a time because they lack clarity in retroactivity, application, and scope.[5] Matthew Cate, a former CDCR Secretary, encouraged the Committee to consider greatly expanding CDCR's existing residential reentry programs so that people soon to be released from prison can prepare to rejoin their communities in non-incarcerative settings.[6] Michele Hanisee, President of the Deputy District Attorney Association of Los Angeles County, centered the experience of victims but also acknowledged that some of the most extreme sentences in the system may be appropriate for reconsideration.[7] Angela Chan, Policy Director and Senior Staff Attorney at Asian Americans Advancing Justice, told the Committee that over-reliance on incarceration limits spending on crime prevention strategies that make communities safer.[8]

1 On February 3, 2021, CDCR's population was 94,306, the lowest population since sometime in 1989, and 46% of the population at CDCR's peak of 173,643 on October 20, 2006. Since February 2021, the population has increased and is at 99,622 people as of December 8, 2021. See CDCR, Weekly Report of Population, As of Midnight, February 3, 2021, and December 8, 2021; CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, Figure 1.2 (October 2020) (historical population data).

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

3 Committee on Revision of the Penal Code, Meeting on November 16, 2021, Part 1, 0:48:02–0:48:34.

4 Committee on Revision of the Penal Code, Meeting on May 13, 2021, Part 3, 0:17:30–0:20:58.

5 Committee on Revision of the Penal Code, Meeting on November 16, 2021, Part 1, 0:06:54–0:08:19.

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

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

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

Sentencing experts from around the country, with systems widely different from California's, shared their perspectives on what worked and what didn't in their states.[9] Leading academics and practitioners gave both scholarly and practical accounts of national trends and county-level analyses of California's criminal legal system. The Committee also heard from and was inspired by multiple formerly incarcerated people about their individual journeys and the implications for the system at large.[10] Justice J. Anthony Kline provided deep background and analysis on California's Determinate Sentencing Law (which he helped draft in the late 1970s), what it hoped to accomplish and how it has played out, particularly for modern-day parole release.[11] Committee staff also had numerous conversations with other stakeholders and experts across the state and the country to ensure that the recommendations in this report reflect the most current research and approaches.

Most of the recommendations in this report can be passed by a majority vote of the Legislature, and we encourage lawmakers to do so. Other recommendations in this report require a supermajority two-thirds legislative vote (or a voter initiative) to become law. The Committee does not underestimate the significant political difficulty that such recommendations represent. But the areas of the Penal Code that trigger these requirements — including the Three Strikes law and life without parole sentences — are among the most important to reform and present some of the most stark racial disparities in the system without proven public safety benefit. So despite the legal obstacles, we hope lawmakers and voters, if necessary, adopt these recommendations as well.

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

9 Committee on Revision of the Penal Code, Meeting on July 13, 2021, Parts 1 and 2.
10 Committee on Revision of the Penal Code, Meetings on May 13, 2021, Parts 1 and 2, and July 13, 2021, Part 4.
11 Committee on Revision of the Penal Code, Meeting on July 13, 2021, Part 1, 0:06:23–0:14:25. See also Written Submission of Justice J. Anthony Kline to Committee on Revision of the Penal Code, July 13, 2021.

Prefatory Notes

CRIME RATES

Maximizing public safety is of paramount concern to the Committee. As noted, the Committee devoted special attention to this topic this year, including commissioning research on crime statistics in California during the COVID-19 pandemic.[12]

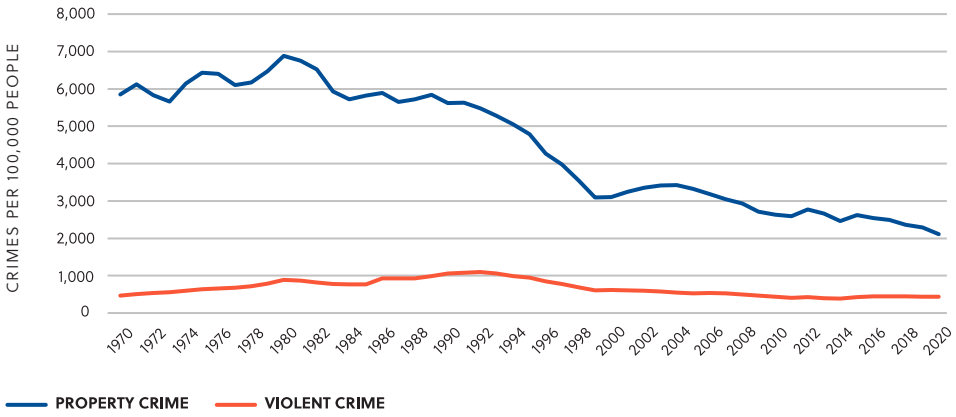
A team of researchers at the California Policy Lab led by Professor Steven Raphael prepared a report and testimony for the Committee that showed that California outperformed the rest of the country in important respects. Violent crime — and homicide in particular — rose throughout the country in 2020.[13] But though California experienced a larger percentage increase in its homicide rate than the rest of the country, California's 2020 homicide rate was 13% lower than the national average.[14] And nationwide, violent crime increased almost four times faster than in California, which saw less than a 1% increase in violent crime between 2019 and 2020.[15] Property crime (the overwhelming majority of reported crime) decreased by 8% in California between 2019 and 2020.[16]

Any increase in crime rates — especially homicides, where the victims are disproportionately men of color[17] — is unacceptable. But this data should be put in historical context: even with these increases, crime rates in California remain much lower than during the 1980s and 90s. In 2020, California's violent crime rate was 60% below the peak violent crime rate recorded in 1992, and the property crime rate was 70% below the peak rate from 1980.[18]

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

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

FIGURE 1: CALIFORNIA CRIME RATES (1970–2020)



Source: California Department of Justice, *Crime in California 2020*, Table 1.

12 Committee on Revision of the Penal Code, June 23, 2021 Meeting, 0:03:04–0:52:47.
13 See, e.g., Jeff Asher, *Murder Rose by Almost 30% in 2020. It's Rising at a Slower Rate in 2021*, The New York Times, Sept. 22, 2021.
14 Mia Bird, Omair Gill, Johanna Lacoe, Molly Pickard, and Steve Raphael, *Crime in California During the COVID-19 Pandemic*, California Policy Lab, Table 1, September 2021.
15 *Id.*
16 Mia Bird, Omair Gill, Johanna Lacoe, Molly Pickard, and Steve Raphael, *Crime in California During the COVID-19 Pandemic*, California Policy Lab, 1, September 2021. Among the rise in violent crime was a 31% increase in homicides and a 9% increase in aggravated assaults, but a 14% decrease in robbery and 8% decrease in rape. Though property crime rates decreased — including a 15% decrease in larceny — motor vehicle theft increased by 20%
17 See, e.g., California Department of Justice, *Homicide in California 2020*, Tables 3, 10.
18 *Id.* at 2.
19 Mike Males, *California's Crime Rate Falls to a Record Low in 2020; Counties with High Incarceration Rates Have More Crime and Worse Trends*, Center on Juvenile and Criminal Justice (September 2021).
20 *Id.*, Table 2, Appendix. In the higher incarceration rate counties, homicide increased by 35% in 2020, while it increased by only 21% in lower incarceration counties. For example, Los Angeles County (with a 2020 incarceration rate of 450.3 per 100,000 population) saw a 34% increase in its homicide rate while Kings County (with a 2020 incarceration rate of 915.1 per 100,000 population) saw a 173% increase in its homicide rate. Similarly, the shoplifting rate in high incarceration counties (162.6 per 100,000 population) is higher than in low incarceration counties (159.3 per 100,000 population).

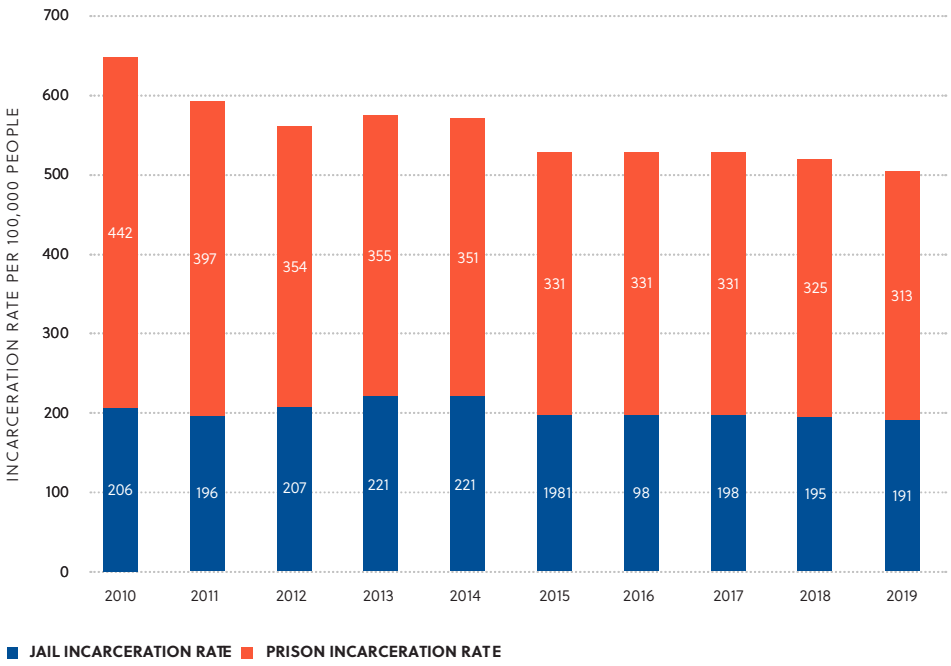
RACIAL DISPARITIES IN INCARCERATION RATES

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

- Black people make up 6% of California's population but account for approximately 30% of the state's prison population, 25% of the jail population, and 26% of the probation population.[22]
- The imprisonment rate for Black people is 9 times what it is for white people.[23]
- The jail incarceration rate for Black people is almost 5 times what it is for white people.[24]

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

FIGURE 2: CALIFORNIA OVERALL INCARCERATION RATES (2010–2019)



Source: Jail — 2010–2018: BJS *Survey of Jails*. 2019: BJS *Census of Jails*. Prison — 2010–2018: BJS Correctional Statistical Analysis Tool. 2019 and 2020: Tabulated from year end population report from CDCR. Population — 2010 from the 2010 Census, 2011–2019 from 5-year ACS estimates.

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

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

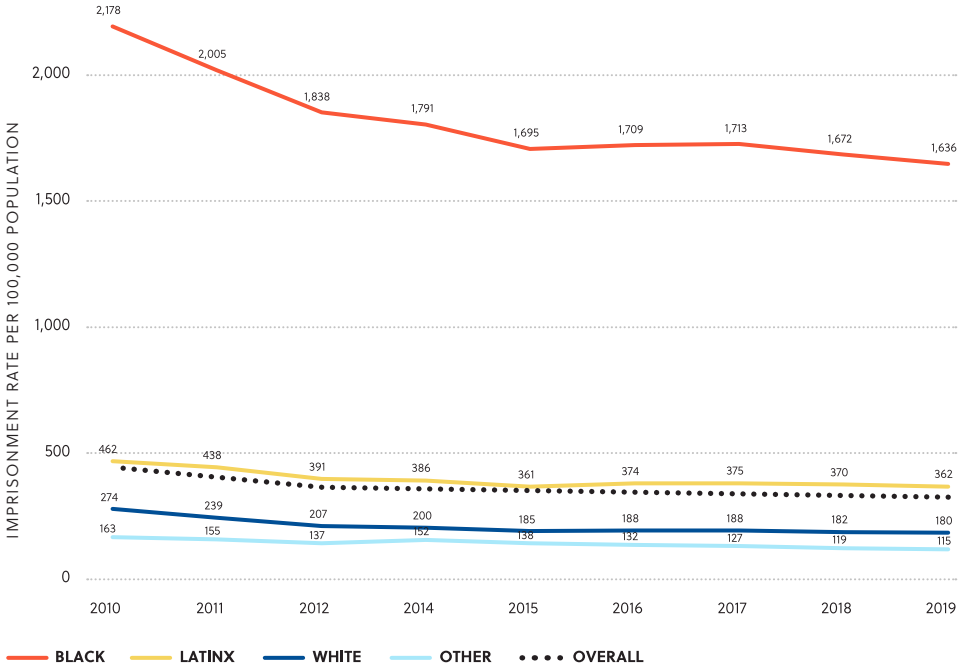
23 In 2019, Black people were imprisoned at a rate of 1,636 per 100,000 population. For white people, it was 180 per 100,000 population. Data is from CDCR Data Points. Population data is 5-year ACS estimates.

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

25 See, e.g., Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (Oct. 2021) (finding that Black Americans are incarcerated in state prisons across the country at nearly 5 times the rate of whites, and Latinx people are 1.3 times as likely to be incarcerated than non-Latinx whites); Katherine A. Durante, *County-Level Context and Sentence Lengths for Black, Latinx, and White Individuals Sentenced to Prison: A Multi-Level Assessment*, Criminal Justice Policy Review, Vol. 32(9) (2021) (analysis of more than 500,000 sentences from 751 counties of people admitted to prison between 2015 and 2017 concluded that Black and Latinx people receive longer sentences than white people, even after controlling for relevant variables).

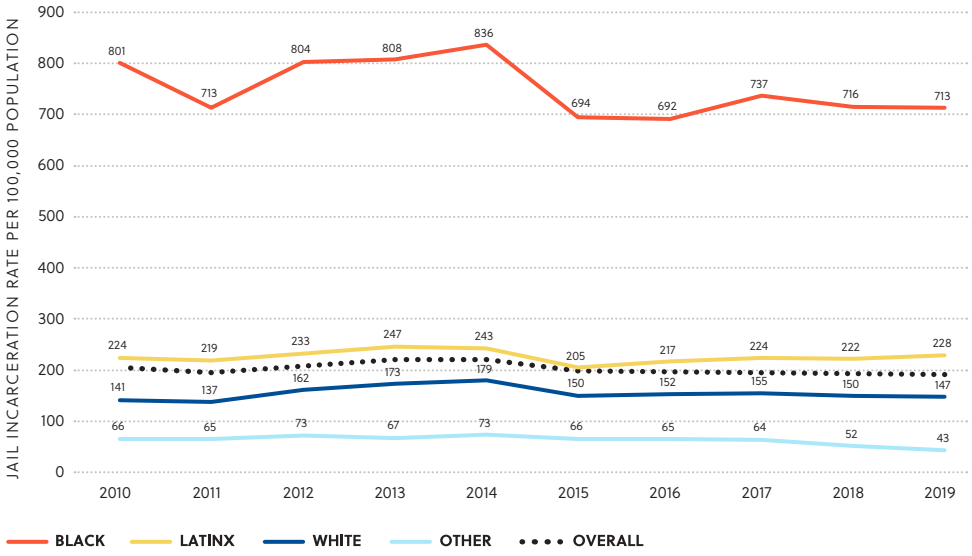
26 Committee on Revision of the Penal Code, Meeting on January 24, 2020, 0:01:12–0:02:00.

FIGURE 3: CALIFORNIA PRISON INCARCERATION RATES (2010–2019)



Source: 2010–2012: CDCR Prison Census Data. 2014–2019: CDCR Data Points, Table: In-Custody Population by Ethnicity. Data for 2013 were not available, therefore that year is omitted from the graph. Ethnicity is self-reported from a list of 28 ethnicity types. Some examples of ethnicity choices in the "Other" category are American Indian, Filipino, and Asian. This category also includes those whose ethnicity is unknown or not self-reported. Population estimates by race/ethnicity from Census 2010; ACS 5 year estimates for 2011, 2012, 2014-2019.

FIGURE 4: CALIFORNIA JAIL INCARCERATION RATES (2010–2019)



Source: 2010–2019: BJS *Survey of Jails*. 2019: BJS *Census of Jails*. Population data: 2010 from the 2010 Census, 2011–2019 from 5-year ACS estimates. "Other" includes Asian, Pacific Islander, Native American, or other race.

RESEARCH ON THE EFFECTS OF INCARCERATION

Many of the underlying facts that motivate the Committee's work are not novel. More than 50 years ago, a report by the Assembly Committee on Criminal Procedure concluded that "[t]here is no evidence that more severe penalties deter crime more effectively than less severe penalties."[27] Empirical data from the same time also showed that longer terms of incarceration did not reduce recidivism,[28] and, reflecting this research, the director of California's prisons said more than 40 years ago that "Members of the public need to realize that the prison system, as we know it, speaking nationwide, is a proven failure — and I have to tell them as a fiscal conservative that we have to stop funding our failures."[29]

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

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

DATA COLLECTION AND ANALYSIS

As the Committee noted in its 2020 report, there is unanimity across stakeholders that laws and policies in California's criminal legal system should be based on data and rigorous empirical research.

The Committee, which was given special power by the Legislature to gather information, has made major progress in its goal of creating an aggregated collection of administrative data related to the criminal legal system. Much work — particularly related to data gathering at the county level — remains to be done but, with the help of researchers from the California Policy Lab and others, many of the recommendations in this report rely on data and analysis presented here for the first time.

Unless otherwise noted, all data from the California Department of Corrections and Rehabilitation (CRCR) in this report is from July 2021. If a person had convictions from multiple counties, the conviction with the longest sentence was used for analysis. When a person was convicted of multiple offenses, we characterize their offense using the offense with the longest sentence (referred to as the controlling offense). The person's sentence may be influenced by conviction charges beyond the controlling offense (for example, someone convicted of multiple offenses with consecutive sentences) as well as by sentencing enhancements. However, the controlling offense provides the most serious charge associated with a given admission to prison.

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

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

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

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

31 *Id.*

UPDATES ON COMMITTEE'S PRIOR RECOMMENDATIONS

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

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

Additional data and analysis about aspects of 3 of these recommendations that have not yet been adopted are included after the new recommendations in this report.

LANGUAGE AND TERMINOLOGY USED THROUGHOUT THIS REPORT

As the Committee's 2020 report did, this report avoids using the term "inmate," "prisoner," or "offender." Instead, the report uses "incarcerated person" and similar "person-first" language. Other official bodies have made similar choices about language,[32] and the Committee encourages stakeholders — including those drafting legislation — to consider doing the same.[33]

This report also refers to CDCR's various levels of mental health care, which are explained in more detail here. People in the Correctional Clinical Case Management System (CCCMS) are provided a basic level of mental health care and those in Enhanced Outpatient Program (EOP) are treated at the highest level of outpatient mental health care in the prison mental healthcare system and have been diagnosed with symptoms that impact their ability to function within the prison's general population.[34]

32 Nancy G. LaVigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, Urban Institute (Apr. 4, 2016); John E. Wetzl, *Pennsylvania Dept. of Corrections to Discard Terms 'Offender,' 'Felon' in Describing Ex-prisoners*, Washington Post (May 26, 2016); Karol Mason, *Guest Post: Justice Dept. Agency to Alter Its Terminology for Released Convicts, to Ease Reentry*, Washington Post (May 4, 2016); Morgan Godvin and Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That's Changing*, Poynter (Jan. 4, 2021).

33 The data CDCR provided to the Committee includes only "male" and "female" categories. This report uses those categories while recognizing that not everyone in California's prisons identifies as "male" or "female."

34 CDCR, *The Mental Health Services Delivery System (MHSDS)*, 6–10 (Oct. 2020). CDCR also offers mental health crisis beds, typically for less than 10 days of intensive care, for people who are in acute distress or are a danger to themselves or others, as well as long-term psychiatric inpatient programs including those offered by the Department of State Hospitals. *Id.* at 11–12.

Recommendation 13
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Empirical Research 18
Insights from Other Jurisdictions 18

1. Strengthen the Mental Health Diversion Law

Strengthen the Mental Health Diversion Law

RECOMMENDATION

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

The Committee therefore recommends the following:

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

RELEVANT STATUTES

Penal Code § 1001.36(b)(1)(B)

BACKGROUND AND ANALYSIS

Despite a universally-acknowledged mental health crisis in California's prisons and jails, a 2018 law intended to divert people with mental health conditions out of the criminal legal system has been underused. The law, Penal Code section 1001.36, should be streamlined to encourage greater use in appropriate cases.

As common sense would predict, research has shown that large numbers of people jailed with mental health conditions are charged with offenses connected to their condition.[35] Common sense also predicts that when people with mental health conditions are given inadequate health care while incarcerated, and released without connection to ongoing care, their involvement in the criminal legal system is likely to continue.[36]

But California's prison and jails have not been able to adequately address this population. California's prison system and many of its largest county jails remain under court orders for failing to provide basic mental health care required by the constitution.[37]

Over 30,000 people in California's prisons (nearly a third of the total population) currently receive mental health treatment, and around 6,000 receive the highest level of treatment for their severe symptoms. Among incarcerated women, mental health conditions are even more prevalent: more than half of all women imprisoned in California are receiving mental health treatment. The average rate of suicides in California's prisons increased by nearly 28% between 2001 and 2019.[38] California state prisons spent $800 million on mental health care in the last fiscal year.[39] A special master appointed by a federal court has monitored mental health care in California's prisons since 1995.[40] Recently, the Cato Institute recommended that California "stop using the prison system as a de facto mental health treatment program."[41]

35 Department of State Hospitals Annual Report, 10 (2018); Los Angeles County *Men's Central Jail Closure Workgroup, Men's Central Jail Closure Plan: Achieving a Care First Vision, Los Angeles County Sheriff's Department*, Department of Health Services, Office of Diversion and Reentry, 64 (March 30, 2021). A current member of the Committee, Peter Espinoza, was the director of the Los Angeles Office of Diversion and Reentry until November 2021.

36 See Kevin Rector, *String of LAPD Shootings Exposes L.A.'s Broken Mental Health System, Officials Say*, Los Angeles Times (Nov. 18, 2021). See also, Marcos Bretón, *'It's a Nightmare'. The downtown Jail Incubates Dangerous Inmates and Unleashes Them on Us*, The Sacramento Bee (Nov. 10, 2021).

37 See, e.g., 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); Abbie Vansickle and Manuel Villa, *Who Begs to Go to Prison? California Jail Inmates*, The Marshall Project, Apr. 23, 2019.

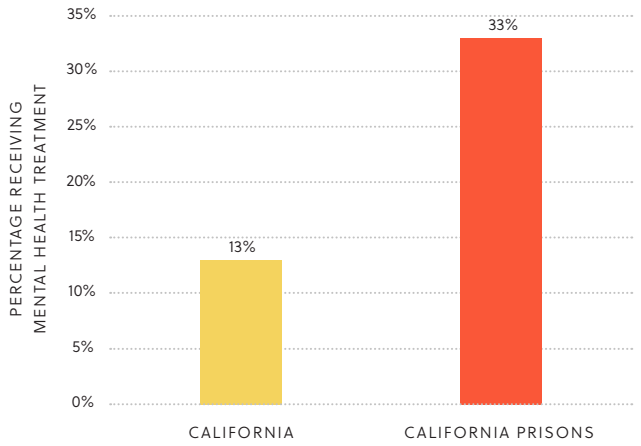
38 E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons, 2000–2019*, U.S. Department of Justice, Bureau of Justice Statistics, 21 Table 11 (Oct. 2021).

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

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

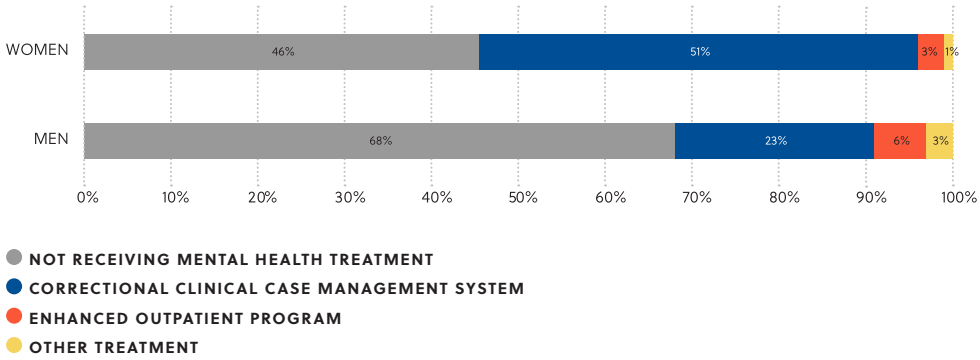
41 Michael D. Tanner, *Cato's Project on Poverty and Inequality in California: Final Report*, Cato Institute, 42 (Nov. 1, 2021).

FIGURE 5: ADULTS RECEIVING MENTAL HEALTH TREATMENT IN CALIFORNIA



Source: CDCR data provided by CDCR Office of Research and includes all people currently receiving mental health treatment in CDCR custody. "California" population is from SAMHSA, 2018–19 National Survey on Drug Use and Health, State-Specific Tables, Table 20, and includes people who received mental health services in the past year but does not include people experiencing homelessness who do not use shelters, active military personnel, and residents of institutional group quarters such as jails, nursing homes, mental institutions, and long-term care hospitals.

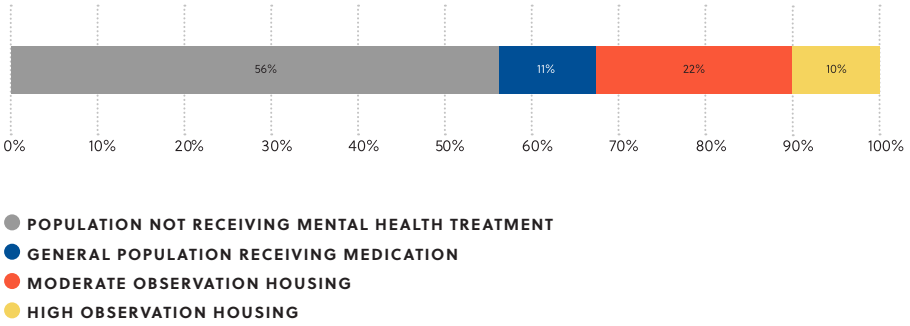
FIGURE 6: CDCR POPULATION RECEIVING MENTAL HEALTH TREATMENT



Source: Analysis of data provided by CDCR Office of Research. For definitions of CDCR's Correctional Clinical Case Management System and Enhanced Outpatient Program, see page 11. "Other Treatment" includes mental health crisis beds, intermediate care facilities, and the state hospital.

At the county level, the issue also remains dire. County referrals to the Department of State Hospitals of people who are incompetent to stand trial increased 60% between 2013–14 and 2017–18.[42] According to its director of mental health, the Los Angeles County jail system is the nation's largest mental health institution.[43] The Los Angeles County jail population with mental health conditions has doubled in the last decade to more than 5,500 people, with its Twin Towers facility almost entirely dedicated to "moderate" and "high" observation housing.[44] A total of 43% of those detained in the Los Angeles jails have identified mental health needs (41% of all men and 66% of all women),[45] compared to 14% in 2009.[46] Research on the Los Angeles jail population showed that Black people accounted for 41% of those receiving mental health services, even as they made up 30% of the overall jail population.[47]

FIGURE 7: LOS ANGELES COUNTY JAIL SYSTEM POPULATION RECEIVING MENTAL HEALTH TREATMENT

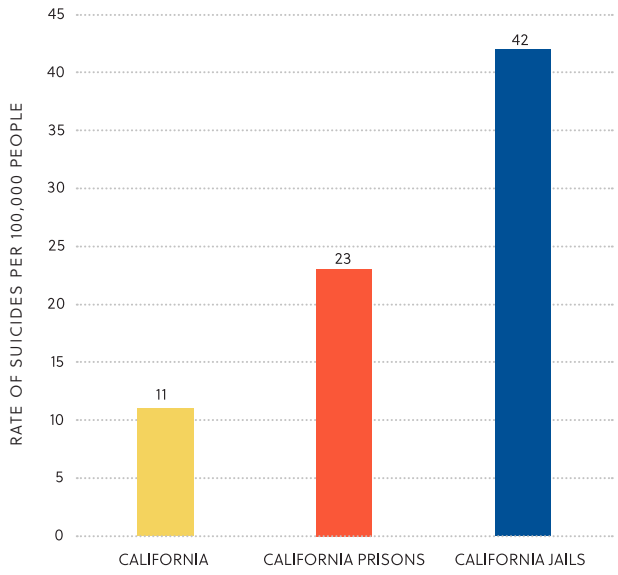


Source: Vera Institute of Justice, *Care First L.A: Tracking Jail Decarceration* (data is as of December 14, 2021).

Other California jails have similarly large populations of people with mental health conditions.[48] As Sheriff Kory Honea of Butte County testified to the Committee in July 2020, while jails are regularly required to treat people with mental health needs due to a lack of care in the community, custodial environments "are not typically the best place to treat mentally ill individuals."[49] And in California's jails overall, the average rate of suicides per 100,000 people increased by 31% between 2005 and 2019.[50]

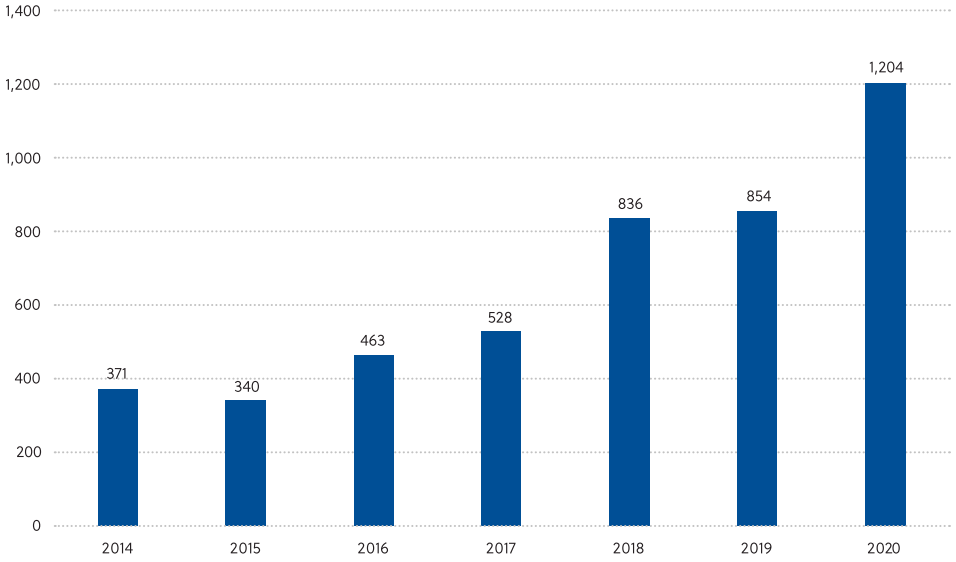
42 Department of State Hospitals Annual Report, 10 (2018).
43 America's Mental Health Crisis Hidden Behind Bars, NPR (Feb. 25, 2020). The second and third largest mental health institutions in the United States are also jails in Cook County, Illinois and New York City. *Id.*
44 Francine Kiefer, *From LA Jail, Two Inmates Pioneer Care for Mentally Ill Peers*, Christian Science Monitor (May 18, 2021).
45 Vera Institute of Justice, *Care First L.A: Tracking Jail Decarceration* (jail population is current from December 14, 2021).
46 Stephanie Brooks Holliday, Nicholas M. Pace, Neil Gowensmith, Ira Packer, Daniel Murrie, Alicia Virani, Bing Han, Sarah B. Hunter, *Estimating the Size of the Los Angeles County Jail Mental Health Population Appropriate for Release into Community Services*, RAND Corporation, 1 (2020).
47 Oona Appel et al., *Differential Incarceration by Race-Ethnicity and Mental Health Service Status in the Los Angeles County Jail System*, Psychiatric Services 71:8, August 2020.
48 See, e.g., Statement of Aaron Fischer to Committee on Revision of the Penal Code, 4 July 23, 2020.
49 Submission of Sheriff Kory Honea, Butte County, to Committee on Revision of the Penal Code (July 23, 2020).
50 E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons, 2000–2019*, U.S. Department of Justice, Bureau of Justice Statistics, 12 Table 3 (Oct. 2021). However, the rate of suicides in California jails was the same in 2001–04 and 2015–19. *Id.*

FIGURE 8: CALIFORNIA SUICIDE RATES (2015–2019)



Source: E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons, 2000–2019*, Table 3 and 11 (Oct. 2021); Centers for Disease Control and Prevention, National Center for Health Statistics, *Suicide Mortality by State*.

FIGURE 9: PEOPLE INCOMPETENT TO STAND TRIAL AWAITING ADMISSION TO STATE HOSPITAL OR JAIL-BASED COMPETENCY TREATMENT



Source: Department of State Hospitals, *2021–22 Governor's Budget Estimate*, 29, Figure 1.

To begin to address these problems, in 2018, California enacted AB 1810, which established a new mental health diversion law, Penal Code section 1001.36.[51] Under this law, courts can divert people with mental health conditions who committed misdemeanors and most felonies out of the criminal system and into treatment if they do not pose an unreasonable danger to public safety.[52] To qualify for this diversion program, the defense must show that a candidate has a specified "mental disorder," that "substantially contributed to" their commission of the offense.[53]

In addition to creating the mental health diversion law, in its 2018–19 budget, California dedicated almost $100 million over a three-year period to expand the development of county diversion programs for people with serious mental health conditions who face felony charges and could be determined to be incompetent to stand trial.[54]

While there is limited data on the use of mental health diversion, it appears that the law could be used much more frequently. For example, Los Angeles County has only diverted a few hundred people using the law.[55] Yet an estimated 61% of people in the Los Angeles County jail system's mental health population were found to be appropriate for release into a community-based diversion program, according to a recent study by the RAND Corporation.[56]

To increase the use of mental health diversion in appropriate cases, the procedural process for obtaining diversion could be simplified by presuming that a defendant's diagnosed "mental disorder" has a connection to their offense.[57] A judge could deny diversion if that presumption was rebutted or for other reasons currently permitted under the law, including finding that the individual would pose an unreasonable risk to public safety if placed in a diversion program.[58]

This modification of the mental health diversion statute would harmonize the law with other more specialized mental health diversion statutes that do not require showing such a connection, including Penal Code sections 1170.9 (post-conviction probation and mental health treatment for veterans) and 1001.80 (military pre-trial diversion program).[59] And research into the related area of drug courts has shown that "tight eligibility requirements" are the most important reason that drug courts have not contributed to a meaningful drop in incarceration.[60]

51 SB 215, also enacted in 2018, amended AB 1810 in several ways, including by eliminating some offenses from consideration from diversion and authorizing courts to request hearings to require a candidate to show they are potentially eligible for diversion. *Id.* at 1.
52 Penal Code § 1001.36(b)(1)(A).
53 Penal Code § 1001.36(b).
54 State of California, *California State Budget, 2018–19*, 53. See also California Department of State Hospitals, *DSH Diversion Program*.
55 Information provided by Los Angeles County Superior Court system to the Judicial Council and then Committee staff.
56 Stephanie Brooks Holliday, Nicholas M. Pace, Neil Gowensmith, Ira Packer, Daniel Murrie, Alicia Virani, Bing Han, Sarah B. Hunter, *Estimating the Size of the Los Angeles County Jail Mental Health Population Appropriate for Release into Community Services*, RAND Corporation (2020).
57 Penal Code § 1001.36(b)(1)(B).
58 Penal Code § 1001.36(b)(1)(F).
59 Penal Code §§ 1170.9, 1001.80. In evaluating veterans treatment court programs, Judicial Council noted that no connection requirement between a veteran's mental health problems and the offense existed in either law. Judicial Council of California, *Collaborative Justice: Survey and Assessment of Veterans Treatment Courts, as required under Senate Bill 339*, 15, 42 (June 12, 2020).
60 Eric L. Sevigny, Harold A. Pollack, Peter Reuter, *Can Drug Courts Help to Reduce Prison and Jail Populations?*, The ANNALS of the American Academy of Political and Social Science, 647(1): 190–212, 190, 206 (2013).

EMPIRICAL RESEARCH

As noted above, an estimated 61% of people with identified mental health conditions in the Los Angeles County jail system (more than 3,300 people) were found to be appropriate for release into a community-based diversion program, according to a recent study by the RAND Corporation.[61]

Research by the Department of State Hospitals and the University of California, Davis found that almost half of the people referred to the Department of State Hospitals for being incompetent to stand trial — meaning a court finds that they are unable to understand the nature of the court process, such as the charges against them and the parties involved in the court proceeding, or assist in their own defense, and refers them to the state hospital to have their competency restored[62] — were unsheltered at the time of their arrest.[63]

Supportive housing appears to help. Another RAND study of a housing program run by the Los Angeles Office of Diversion and Reentry, which serves people with mental health conditions, found that 86% of the participants had no new felony convictions and 74% had stable housing after 12 months.[64]

It is much less expensive to treat people with mental health conditions in community-based facilities compared to incarceration.[65] The cost of incarcerating people with the most serious mental health conditions in the Los Angeles County jail system is at least $650 a day, while diverting this population to community-based housing and clinical care costs approximately $180 per day.[66]

Researchers have recently found that drops in community psychiatric bed capacity appear to be associated with immediate reciprocal growth in local jail populations.[67] These findings are consistent with those of earlier studies finding that many people with mental health conditions in prison would have been housed in state mental hospitals.[68]

Once incarcerated, people with mental health conditions are disproportionately placed in solitary confinement and restrictive housing, according to researchers.[69] This can lead to an exacerbation of their symptoms, as well as increased rule violations, self-injury, health problems, and subsequent placement in inpatient hospitals.[70] However, researchers have found that in-prison therapeutic diversion programs as alternatives to restrictive housing have had positive outcomes.[71]

INSIGHTS FROM OTHER JURISDICTIONS

Most states have mental health diversion programs that allow people facing criminal charges — generally less serious felonies and misdemeanors — to be diverted to treatment rather than prison or jail.[72] In some states with a statutory framework, such as Florida and Illinois, the programs do not require the defense to show a connection between the mental health conditions and the offense.[73]

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

62 Penal Code §§ 1367–68.

63 Department of State Hospitals Annual Report, 10 (2018). See also Barbara E. McDermott, Katherine Warburton, Chloe Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, CNS Spectr. (Apr. 2020).

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

65 Council on Criminal Justice and *Behavioral Health, Behavioral Health Care and the Justice-Involved: Why is it so Important?*, 2

66 Los Angeles County Men's Central Jail Closure Workgroup, *Men's Central Jail Closure Plan: Achieving a Care First Vision, Los Angeles County Sheriff's Department*, Department of Health Services, Office of Diversion and Reentry, 56 (Mar. 301, 2021).

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

68 Steven Raphael and Michael Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, Journal of Legal Studies, 42(1) (Jan. 2013).

69 Laura Dellazizzo, *Is Mental Illness Associated with Placement into Solitary Confinement in Correctional Settings? A Systematic Review and Meta-Analysis*, Int. J. Ment. Health Nurs., 29(4) 2020; David H. Cloud, *Public Health and Solitary Confinement in the United States*, Am. J. Public Health, 105(1) (2015).

70 Brie A. Williams, et al., *The Cardiovascular Health Burdens of Solitary Confinement*, J. Gen. Intern Med., 34(10) (2019); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, Am. J. Psychiatry, 140(11) (1983); Molly Remch, *Impact of a Prison Therapeutic Diversion Unit on Mental and Behavioral Health Outcomes*, American Journal of Preventive Medicine, 61(5) (Sept. 2021).

71 Molly Remch, *Impact of a Prison Therapeutic Diversion Unit on Mental and Behavioral Health Outcomes*, American Journal of Preventive Medicine, 61(5) (Sept. 2021).

72 "Prevalence of Mental Health Diversion Practices," Treatment Advocacy Center.

73 See, e.g, Eleventh Judicial Circuit of Florida, Criminal Mental Health Project; Florida Statute § 948.08(8)(a) (2021); 730 ILC § 168, Illinois Mental Health Court Treatment Act; State of Illinois, Circuit Court of Cook County, Mental Health Court Program. See also Utah Third District Mental Health Court, Policies & Procedures Manual, at 5; Seattle Municipal Court, Mental Health Court Eligibility Guidelines.

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2. Encourage Alternatives to Incarceration

Encourage Alternatives to Incarceration

RECOMMENDATION

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

The Committee therefore recommends the following:

1. Add a statement to the Penal Code that the disposition of any criminal case shall use the least restrictive means possible, including but not limited to diversion, restorative justice, probation, or incarceration.

2. Require that, unless otherwise prohibited, in all cases with nonviolent charges, an alternative to incarceration shall be imposed unless:

    a. incarceration is necessary to prevent physical injury to others; or

    b. failing to impose incarceration would depreciate the seriousness of the offense.

RELEVANT STATUTES

Penal Code § 1170(a)(1)

BACKGROUND AND ANALYSIS

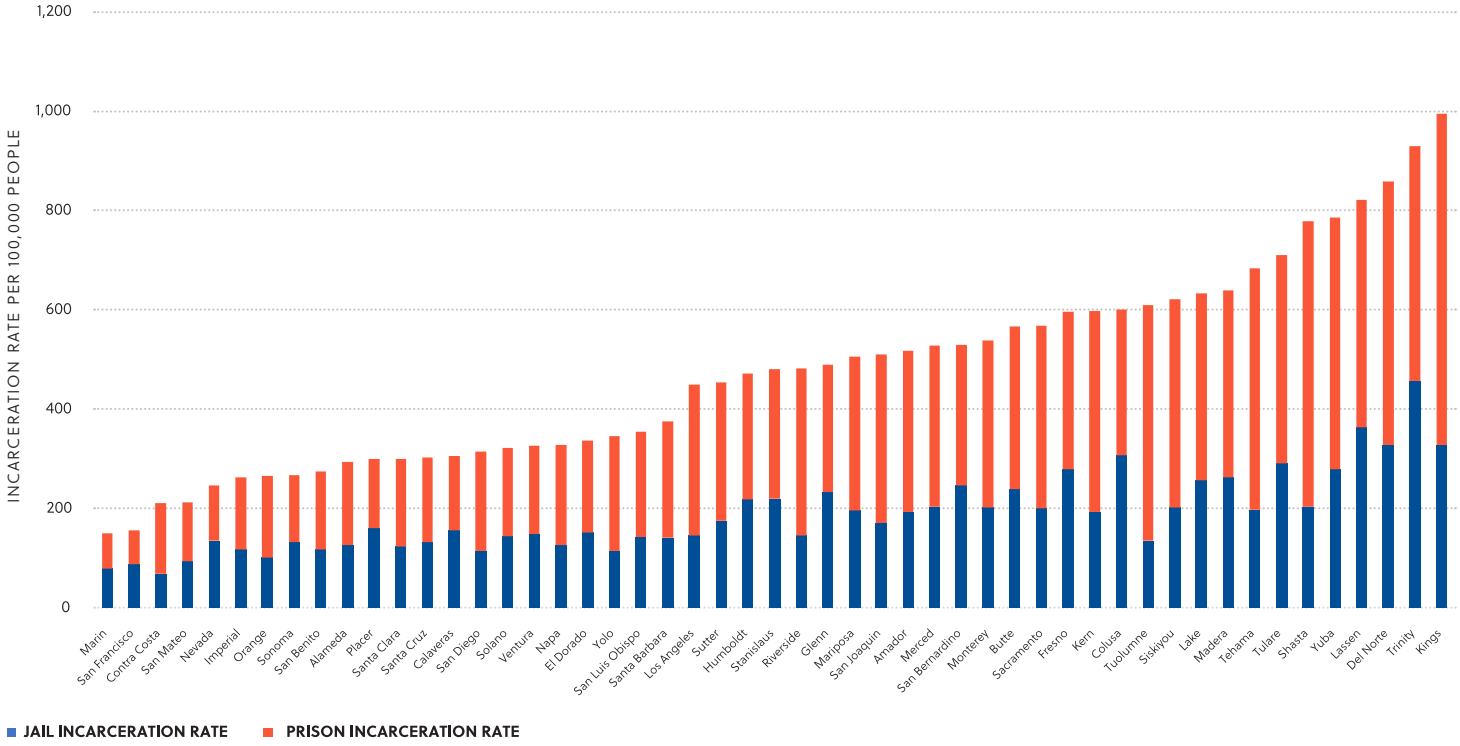
Community diversion programs often lead to better outcomes than incarceration. A recent study funded by the National Institute of Justice examined prosecutor-led diversion programs in 11 jurisdictions across the country and concluded that pretrial diversion participation led to reduced re-arrest rates, and involved a lesser resource investment than similar comparison cases.[74]

California can safely reduce the number of people behind bars by modifying the Penal Code to explicitly encourage more restraint in the use of incarceration. While the Penal Code has numerous sections that require judges to impose incarceration,[75] it contains few statements limiting or discouraging its use.[76]

74 Michael Rempel et al., *National Institute of Justice's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness* (Oct. 2017).
75 See, e.g., Penal Code §§ 462(a), 1203(e), 1203.045(a), 1203.049(a), 1203.055(a), 1203.06(a), 1203.07(a).
76 One notable exception is Penal Code section 1210.1(a), which was created by Proposition 36. Under this section, a person convicted of a non-violent drug offense is entitled to receive probation, and with certain exceptions, courts are not allowed to impose incarceration as a condition of probation.

Counties vary greatly in their overall incarceration rates, as Figure 10 shows.

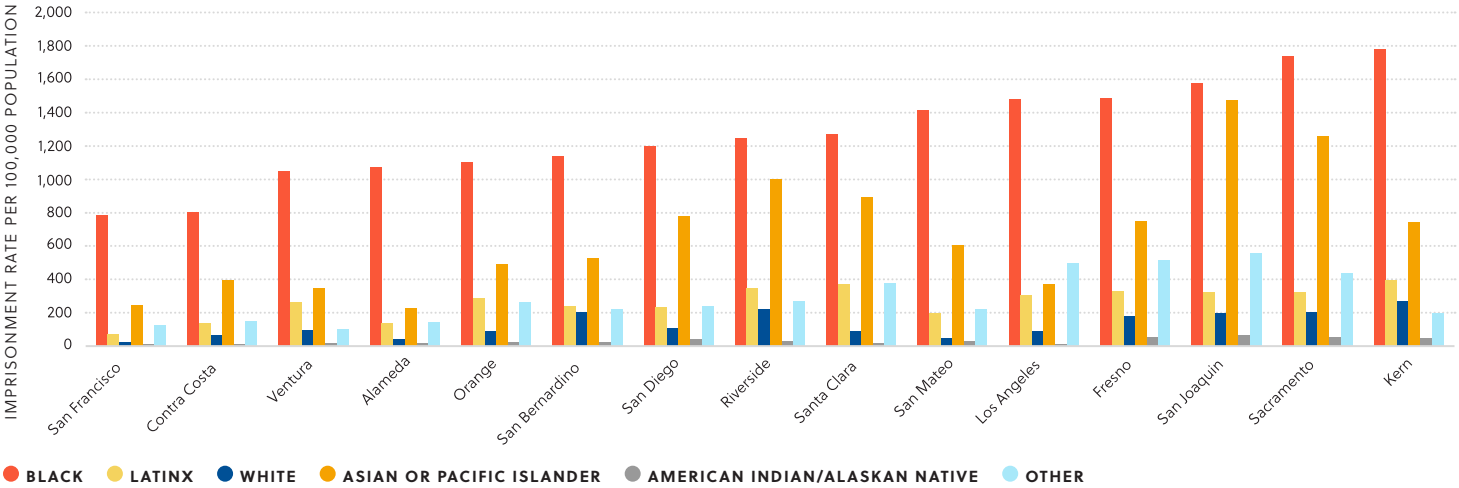
FIGURE 10: CALIFORNIA INCARCERATION RATES BY COUNTY



Source: Jail — BSCC Jail Profile Survey for June 2021 of sentenced and unsentenced average daily population. Prison — analysis of data provided by CDCR Office of Research and is as of July 2021. Population data is ACS 2019. Six counties that had less than 50 people in CDCR custody are excluded. Mendocino County is excluded because it did not report any jail population for June 2021.

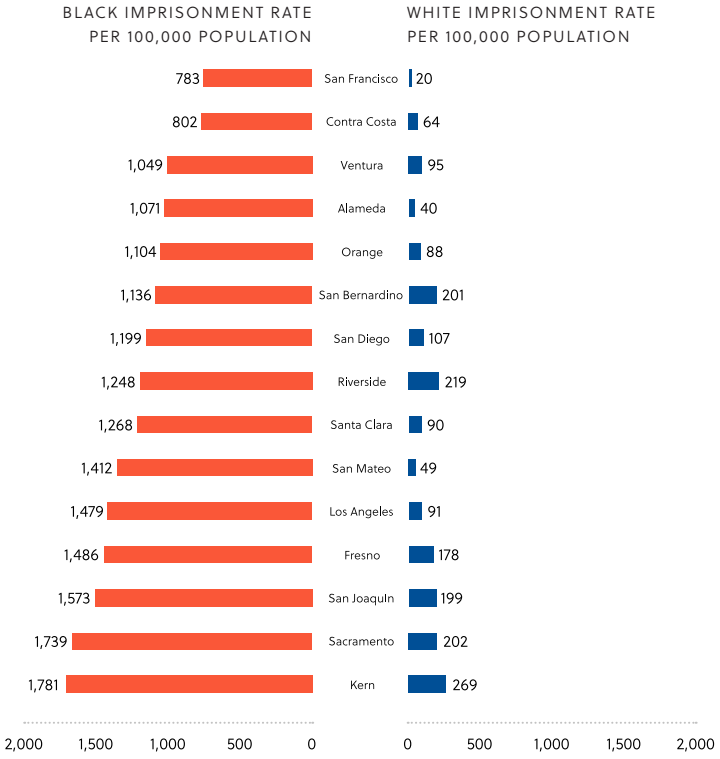
And every California county with sufficient data shows significant racial disparities in its imprisonment rate, as Figure 11 shows for California's 15 largest counties (covering more than 80% of the state's population). Full data is in Appendix B.

FIGURE 11: CALIFORNIA PRISON INCARCERATION RATES — 15 LARGEST COUNTIES



Source: Analysis of data provided by CDCR Office of Research. Population data is ACS 2019.

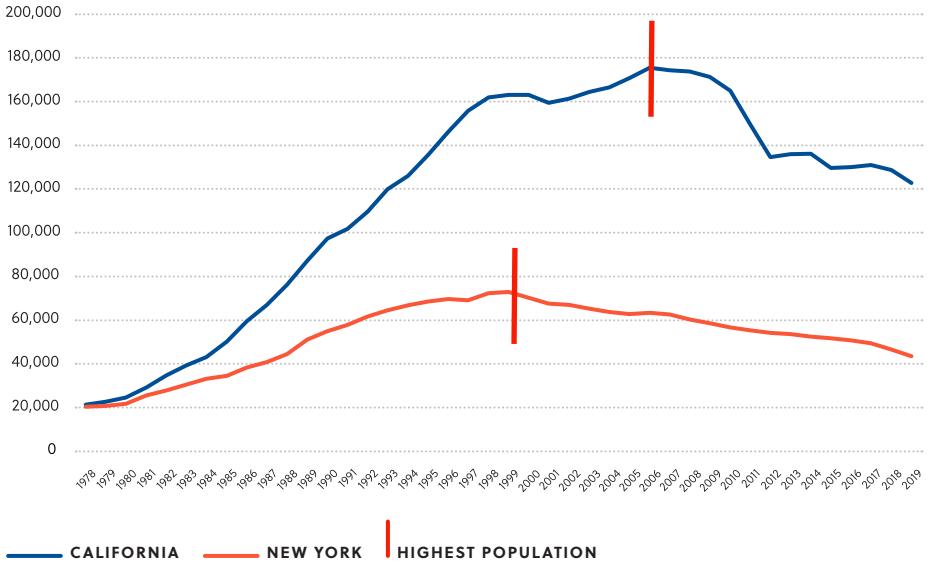
FIGURE 12: BLACK AND WHITE PRISON INCARCERATION RATES — 15 LARGEST COUNTIES



Source: Analysis of data provided by CDCR Office of Research. Population data is ACS 2019.

During the Committee's July 2021 meeting, Insha Rahman, Vice President of Advocacy and Partnerships at Vera Institute of Justice, explained that an increased use of alternatives to incarceration helped New York state safely reduce its prison population by 60% and New York City reduce its jail population by more than two-thirds.[77] Unlike the California experience, New York's incarcerated population fell without major action from its legislature or directives from federal court.[78] Instead, the statewide decline in incarceration was driven by changes in New York City, which accounts for about half of the state population, and an increased acceptance of alternatives to incarceration.[79]

FIGURE 13: CALIFORNIA AND NEW YORK PRISON POPULATIONS (1978–2019)



Source: BJS Correctional Statistical Analysis Tool.

California should improve on the New York approach by formally incorporating a statement of restraint when imposing punishment. Such statements of "parsimony" are well-established legal principles in our criminal legal system and are embedded in federal law and laws of other states.[80]

At the Committee's first meeting in January 2020, Professor Craig Hainey, professor of psychology at UC Santa Cruz, described a major report from the National Research Council which concluded that incarceration in the United States could not be justified by any benefit to society and was itself a source of injustice and social harm.[81] Professor Hainey, who was a contributor to the study, told the Committee that the report made "unprecedented" policy recommendations because mass incarceration had helped the United States "lose a sense of who we were as a society."[82] One of those recommendations was that jurisdictions enact statements of parsimony that "the violence of the criminal justice system should not be unleashed until it is absolutely necessary and only in those instances in which it is absolutely necessary to do so."[83]

77 Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, 0:16:30–0:21:36.
78 Greg Berman and Robert V. Wolf, *Alternatives to Incarceration: The New York Story*, New York State Bar Assoc Govt., Law and Policy Journal, Vol. 16 (Winter 2014); Ram Subramanian, Rebecka Moreno and Sharyn Broomhead, *Recalibrating Justice: A Review of 2013 State Sentencing and Corrections Trends*, 4, Vera Institute of Justice (2014).
79 Judith A. Greene and Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration while Increasing Public Safety*, Federal Sentencing Reporter, Vol 29, No. 1, 22; James Austin and Michael Jacobsen, *How New York City Reduced Mass Incarceration: A Model for Change?*, Jan. 2013.
80 See Daryl Atkinson and Jeremy Travis, *The Power of Parsimony*, The Square One Project, 10–12 (2021).
81 See, e.g., Committee on Revision of the Penal Code, January 24, 2020 Meeting, 0:21:34–0:29:23; 0:57:07–1:00:35 (describing National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, D.C.: The National Academies Press (2014)).
82 *Id.* at 0:57:55–0:58:41.
83 *Id.* at 0:59:19–1:00:35.

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

EMPIRICAL RESEARCH

As noted, research from the National Institute of Justice found that diversion programs across the country avoided unnecessary incarceration and reduced future arrests.[84]

In a recent study of cases in Texas' Harris County (which includes Houston), researchers found that first-time felony defendants who were granted diversion — a pause in criminal proceedings that gives the defendant an opportunity to complete specified requirements, like participation in drug treatment, to earn a dismissal of their case — had better criminal justice and economic outcomes over a 10-year period.[85] Specifically, for those granted diversion, the probability of any future conviction declined by approximately 45% and the total number of future convictions fell by 75%.[86] Additionally, people who were granted diversion were also found to have higher quarterly employment rates and earnings.[87]

Increasing the use of alternatives to incarceration may also meaningfully reduce racial disparities in the criminal system. Research conducted by the Public Policy Institute of California in 2018 found that while Black people made up slightly less than 6% of California's population, they accounted for 16% of all arrests, and their arrest rate (the number arrested per 100,000 people) was slightly more than three times that of white people.[88] When California reduced penalties for several low-level felonies with the passage of Proposition 47 in 2014, disparities in the rate at which Black and white people were arrested fell by almost 6%, though Black people were still arrested at disproportionate rates.[89] Researchers found that other reforms undertaken since 2009, including Public Safety Realignment, Proposition 36, and Proposition 57, narrowed racial disparities in the proportion imprisoned on a given day.[90]

84 Michael Rempel et al., *National Institute of Justice's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness* (Oct. 2017).
85 Michael Mueller-Smith and Kevin T. Schnepel, *Diversion in the Criminal Justice System*, Rev. of Economic Studies 88(2), 883–936 (2021).
86 *Id.* 885.
87 *Id.*
88 Magnus Lofstrom et al., *Racial Disparities in California Arrests*, Public Policy Institute of California, Oct. 2019.
89 Magnus Lofstrom, Brandon Martin, and Steven Raphael, *Proposition 47's Impact on Racial Disparity in Criminal Justice Outcomes*, Public Policy Institute of California, 17–18 (2020). See also, Magnus Lofstrom et al., *Racial Disparities in California Arrests*, Public Policy Institute of California (Oct. 2019).
90 *Id.*

INSIGHTS FROM OTHER JURISDICTIONS

Other states have statements limiting the severity of punishments. In Alabama, Arkansas, Minnesota, and Tennessee, sanctions are required to be the least restrictive or only as severe as necessary to achieve the purposes of sentencing.[91] New York law provides that "a minimum amount of confinement should be imposed consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."[92] Federal law similarly requires sentences to be no greater than necessary.[93]

In addition to the statements of parsimony found in state and federal law, the newest version of the Model Penal Code: Sentencing recommends that sentences should be no more severe than necessary.[94] According to the drafters, "[t]he principle embodies a policy preference for the use of the least restrictive alternative in individual criminal sentences, and also guards against the needless expenditure of correctional resources."[95] In another section of the Model Penal Code, sentences of incarceration are authorized on only two grounds: to incapacitate dangerous people, and when failure to incarcerate would diminish the seriousness of the offense.[96] This recommendation adopts these guideposts.

ADDITIONAL CONSIDERATIONS

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

91 Ala. Code § 12-25-2(b); Ark. Code § 16-90-801(c)(4); Minnesota Sentencing Guidelines and Commentary, at 1 (2015); Tenn. Code § 40-35-103(4).
92 *People v. Notey*, 72 A.D.2d 279, 282–83 (1980) (citations and quotation marks omitted).
93 18 U.S.C.A. § 3553(a).
94 Model Penal Code: Sentencing (Am. Law Inst. Prepublication Draft, 2021), § 1.02(2)(a)(iii). The Model Penal Code: Sentencing was drafted by national criminal justice experts and provides exemplary sentencing statutes for state legislatures.
95 *Id.* at 58–59.
96 *Id.* at § 6.11(2).

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3. Expand CDCR's Existing Reentry Programs

Expand CDCR's Existing Reentry Programs

RECOMMENDATION

Community-based residential reentry programs are widely used in the federal system and have proven extremely successful in California, dramatically reducing recidivism according to recent empirical research.

The Committee therefore recommends the following:

1. Expand the current programs so that eventually all people serve up to their last two years of prison in community-based residential reentry programs.

2. Allow the Board of Parole Hearings to grant release to a residential reentry program.

RELEVANT STATUTES

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

15 CCR §§ 3078.1–3078.6

BACKGROUND AND ANALYSIS

More than 30,000 people are released from California's prisons each year.[97] To ease the transition from prison, the California Department of Corrections and Rehabilitation has a small number of programs where incarcerated people can spend the last portion of a prison sentence in community-based transitional housing.[98] The Legislature recently expanded the amount of time a person could spend in these transitional housing programs to the final two years of their sentence.[99]

CDCR's programs appear to dramatically improve a person's prospects when they are released from prison. A study published in June 2021 that was prepared for CDCR by Stanford University's Public Policy Program found that people who participated in these community reentry programs for nine months or longer were 92% less likely to be reconvicted than a control group that completed their full sentences within California prisons.[100]

Expansion of these reentry programs would help address California's high recidivism rate.[101] As Matthew Cate, former Secretary of CDCR, informed the Committee in July 2021, many people exit California's prisons "inadequately prepared" for reentry because prisons are designed for security rather than rehabilitation.[102]

97 See CDCR Office of Research, *Recidivism Report for Offenders Released in Fiscal Year 2015–16*, 105, Table 45 (Sept. 2021).
98 See, e.g., CDCR, *Male Community Reentry Program*.
99 AB 145, a public safety trailer bill passed in July 2021, recently expanded the length of stay in the Male Community Reentry Program to "less than two years." AB 145 (amendment to Penal Code Section 6258.1(c)).
100 Higuera, et al., *Effects of the Male Community Reentry Program (MCRP) on Recidivism in the State of California*, 43 (Jun. 2021).
101 See CDCR Office of Research, *Recidivism Report for Offenders Released in Fiscal Year 2015–16*, 105, Table 45 (Sept. 2021). 45% of those released from prison are convicted of a new offense — including 22% who are convicted of felonies — within 3 years of release. *Id.* at 11, Table 3.
102 *Id.* Matt Cate, *California Reentry White Paper* (submitted to the Committee in July 2021); Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, part 4, at 13:25–14:10.

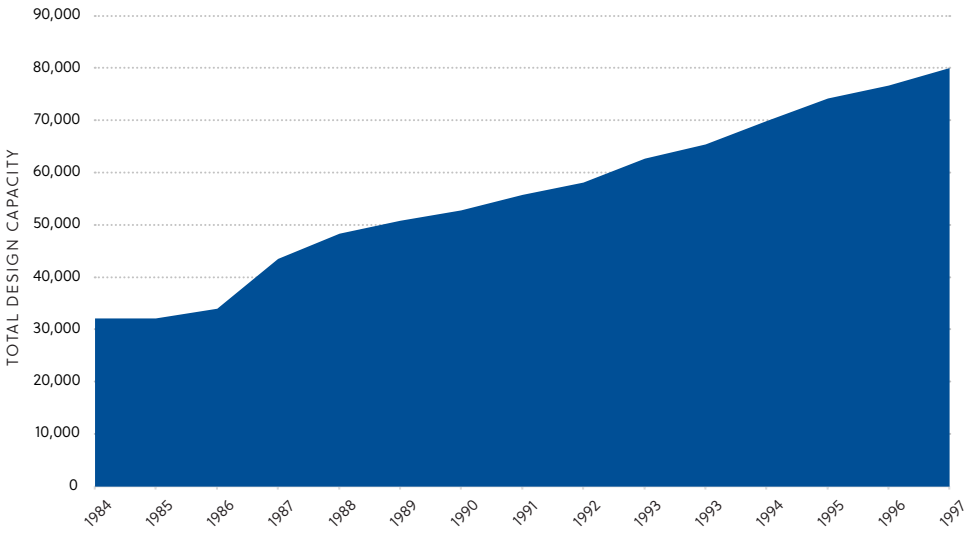
But residential reentry programs take a different approach and appear to have different results. They provide various services close to participants' home counties, including job skills training, medical and mental health care, and help locating permanent housing.[103] Participants move to less restrictive settings as they demonstrate the ability to meet program requirements.[104] Doug Bond, Chief Executive Officer of residential reentry program contractor Amity Foundation, told the Committee that the program's therapeutic and rehabilitative environment is essential to helping individuals successfully reenter society from prison.[105]

There is currently only room for about 1,000 people at a time in the existing programs.[106] Expanding these residential reentry programs — which are only available to people reentering in 13 counties[107] — could provide for a greater degree of specialization, including programs specifically for those returning home from lengthy sentences, people with substance abuse issues and mental health conditions, and survivors of domestic violence. For example, Susan Burton, Executive Director of A New Way of Life (and herself a formerly incarcerated person), noted that her program focuses on the unique needs of women by providing trauma and abuse counseling, and family reunification services to its participants.[108]

Costs are significantly lower for these reentry programs compared to prison. Overall program costs range from $100–175 per person per day (roughly $37,000–$64,000 per year)[109] compared to CDCR's average cost per incarcerated person of $281 per day ($102,736 per year).[110] Substantial savings to the state could be realized if the prison population was reduced enough to close existing facilities.[111]

While expansion of these programs would be a significant undertaking, California has shown that it can massively increase the size of its prisons — more than doubling the capacity of its prisons between 1984 and 1997 — and should take similar steps to increase the number of people in its residential reentry programs.

FIGURE 14: GROWTH OF CALIFORNIA PRISON DESIGN CAPACITY (1984–1997)



Source: Gabriel Petek, *The 2020–21 Budget: Effectively Managing State Prison Infrastructure*, Legislative Analyst's Office, Figure 1, Feb. 28, 2020. Capacity data on Northern California Women's Facility is from Center on Juvenile and Criminal Justice, *Women in California Prisons: Hidden Victims of the War on Drugs*, 7, May 1994. Data does not include any capacity added by "infill" facilities. "Design capacity" is the amount of people a prison was designed to hold.

103 CDCR, *Male Community Reentry Program*; Matt Cate, *California Reentry White Paper*.
104 Matt Cate, *California Reentry White Paper*, submitted to the Committee (July 2021); staff communication with Doug Bond, Chief Executive Officer, Amity Foundation.
105 Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, part 4, 10:25–10:55.
106 Written Submission of Doug Bond to Committee Committee on Revision of the Penal Code, July 2021. In addition to these programs, a separate 24-bed Community Prisoner Mother Program allows parents to reside with their children up to age six. CDCR, *Community Prisoner Mother Program*. The Alternative Custody Program permits some people to serve up to their last 12 months in a private residence, transitional care facility, or residential drug treatment program. CDCR, *Alternative Custody Program*.
107 CDCR, *Male Community Reentry Program*; CDCR, *Custody to Community Transitional Reentry Program*; Penal Code § 6258.1(a) & (e). Counties participating include Butte, Tehama, Nevada, Colusa, Glenn, Sutter, Placer, Yuba, Kern, Los Angeles, San Diego, San Joaquin, and Sacramento.
108 Committee on Revision of the Penal Code, Meeting on July 13, 2021, Part 4 at 02:21–08:10.
109 Higuera, et al., *Effects of the Male Community Reentry Program (MCRP) on Recidivism in the State of California*, 13 (Jun. 2021); Written Submission of Doug Bond to Committee on Revision of the Penal Code (July 2021).
110 2021–22 Governor's Budget, California Department of Corrections and Rehabilitation, CR-7 (estimated per capita costs for adult institutions).
111 Matt Cate, "California Reentry White Paper," submitted to the Committee (July 2021).

In addition to expanding the existing programs, the Board of Parole Hearings should be given the ability to place people into residential reentry programs.[112] Jennifer Shaffer, Executive Director of the Board of Parole Hearings, told the Committee that giving the Board this choice would be "a viable option for increasing [parole] approval rates."[113]

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

EMPIRICAL RESEARCH

In addition to the Stanford research noted above, CDCR's recidivism reports show that the three-year reconviction rate for women who participated in the women's residential reentry program was nearly half the overall female reconviction rate (20% for participants in the program compared to 35% overall).[114] And the reconviction rate remained low (24%) for women who participated in the Alternative Custody Program — a different CDCR program that allows some people to serve up to their last 12 months in a private residence or other residential setting.[115]

Additionally, a 2019 meta-analysis of nine studies examining the effects of residential reentry programs on recidivism found that they were "an effective correctional strategy for successful reentry," but noted that further work was necessary to determine best programming practices.[116]

Similarly, researchers found that formerly incarcerated participants in New Jersey's Residential Community Release Programs (who participated 9–12 months before the end of their sentences) had fewer parole revocations due to technical violations and fewer returns to prison for any reason, compared to non-participants who were released into the community directly from prison.[117] They also found no significant difference between the two groups in terms of recidivism.[118]

INSIGHTS FROM OTHER JURISDICTIONS

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

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

112 Penal Code § 6253 allows the Director of Corrections to transfer people who have already been granted parole to residential reentry centers.
113 Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, Part 1, 24:20–28:10.
114 CDCR, *Recidivism Report for Offenders Released in Fiscal Year 2015–16*, at 108–109, Tables 48–49 (Custody to Community Transitional Reentry Program).
115 *Id.*; CDCR, *Alternative Custody Program*.
116 Jennifer S. Wong, et al., *Halfway Out: An Examination of the Effects of Halfway Houses on Criminal Recidivism*, International Journal of Offender Therapy and Comparative Criminology, 63(7), 1034 (2019).
117 Douglas Routh & Zachary Hamilton, *Work Release as a Transition: Positioning Success Via the Halfway House*, Journal of Offender Rehabilitation 54(4), 248, 250–51 (2015).
118 *Id.* Researchers also noted that the program aided participants to transition from incarceration back into the community by helping them learn valuable employment skills and "build a resistance to criminal influences." *Id.* at 251.
119 18 U.S.C. § 3624(c)(1); US Courts, *Residential Reentry Centers Reference Guide*; Federal Bureau of Prisons, *Completing the Transition*.
120 See United States Courts, How Residential Reentry Centers Operate and When to Impose; 18 U.S.C. § 3624(c)(1).
121 Iowa Department of Corrections, *About Community Based Corrections*.
122 New Jersey's programs include Millicent Fenwick House (50 bed women's reentry program), Clinton House-Mercer County (40 bed work-release program for men), and Hemm House (60-bed work-release program for men). New Jersey Association on Correction, Reentry.
123 Illinois Department of Corrections, *Adult Transition Centers*.
124 Haeil Jung, *Do Prison Work-Release Programs Improve Subsequent Labor Market Outcomes? Evidence from the Adult Transition Centers in Illinois*, Journal of Offender Rehabilitation 53(5), 397–98 (Jul. 3, 2014).

Canada similarly allows people to serve part of their custodial sentences in community-based residential facilities, where they may leave during the day for work, treatment, education, or other reasons.[125] A study recently found that recidivism within three years is reduced by 15% in Quebec, Canada, for people who are granted early release and sent to residential facilities compared to similar people who finish serving their sentences in prison and are released directly to the community.[126]

ADDITIONAL CONSIDERATIONS

- The location of the community-based reentry housing programs should be within close proximity to participants' counties of origin in order to best help them transition back to their communities.

- The Committee noted concerns about the operation of residential reentry programs by for-profit entities, as some believe they employ "exploitative practices," and their incentives may not be best-aligned with assisting people to successfully transition back to their communities and lower recidivism.[127]

125 Correctional Service Canada, *Community-Based Residential Facilities*; staff interview with David Crowley, Former Board Member, National Parole Board — Ontario Region (June 2021).
126 Staff communication with Steeve Marchand in November 2021, who provided a preliminary summary of the forthcoming paper *Parole, Recidivism, and the Role of Supervised Transition: Preliminary Executive Summary*.
127 AB 32, Assembly Floor Analysis, 2–3 (Sept. 10, 2019).

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4. Equalize Parole Eligibility

Equalize Parole Eligibility

RECOMMENDATION

California law provides early parole consideration for people convicted of nonviolent offenses, allowing early release for people serving long sentences who no longer pose a threat to public safety. Eligibility for the parole review program should be expanded.

The Committee therefore recommends the following:

Expand parole review in prison to people convicted of all offenses after they have served the term for their primary offense and allow early release if the parole board finds no continuing threat to public safety.

RELEVANT STATUTES AND REGULATION

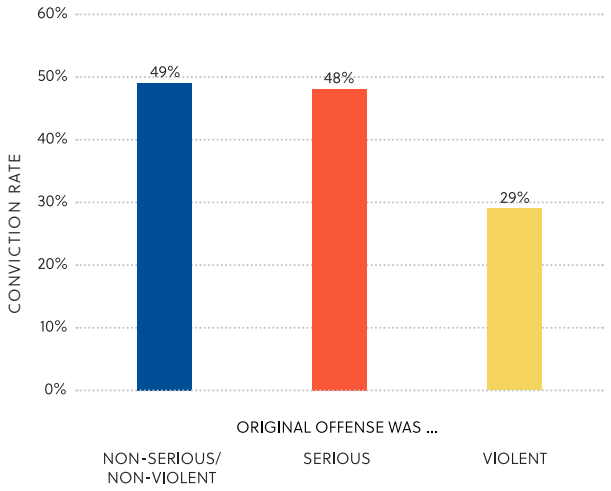
Penal Code § 3041(a)(1)
15 CCR § 3491(a)

BACKGROUND AND ANALYSIS

In 2016, California voters approved Proposition 57, which among other things allows people in prison for nonviolent offenses to be released to parole supervision if two conditions are met: they have served the core part of their sentence and the parole board is satisfied that they no longer endanger public safety.[128]

People convicted of violent offenses are left out entirely of this parole review process no matter how small a risk they present to public safety. But significant research shows that people convicted of "violent" offenses often have lower recidivism rates than people convicted of nonviolent offenses.[129] In California, the three-year reconviction rate for people committed to prison for a nonserious/nonviolent offense is 49% but is only 29% for people committed to prison for a violent offense.[130]

FIGURE 15: RECONVICTION RATE BY OFFENSE TYPE WITHIN THREE YEARS OF RELEASE

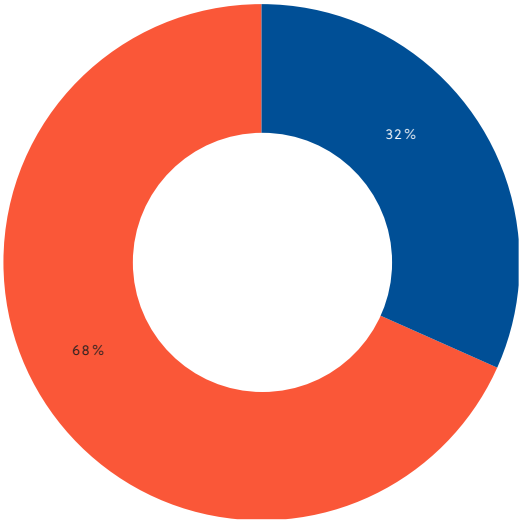


Source: CDCR Office of Research, *Recidivism Report for Offenders Released in Fiscal Year 2015–16*, Figure 21 (Sept. 2021).

128 Cal. Const., art. I, § 32(a)(1).
129 James Austin, Vincent Schiraldi, Bruce Western, and Anamika Dwivedi, *Reconsidering the "Violent Offender,"* The Square One Project, Table 4 (May 2019).
130 CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2015–16*, Figure 21 (Sept. 2021). For all people released from CDCR, new convictions are about evenly split between misdemeanors and felonies. *Id.*, Figure 1.

According to data provided by Jennifer Shaffer, Executive Officer of the Board of Parole Hearings, if parole eligibility was expanded to people serving determinate sentences for violent offenses, around 42,000 people could become eligible for review by the Board of Parole Hearings.[131] And as Professor John Pfaff told the Committee, given the proportion of people serving long sentences for violent offenses in California's prisons, "reduc[ing] California's prison population any further requires having serious questions about violence and serious violence."[132]

FIGURE 16: DETERMINATELY-SENTENCED PEOPLE ELIGIBLE FOR EARLY PAROLE REVIEW



ELIGIBLE
NOT ELIGIBLE

Source: Jennifer P. Shaffer, Executive Officer, Board of Parole Hearings, *Proposition 57 Nonviolent Parole Review Process: Report for the Committee on Revision of the Penal Code*, 12, 14, 16 (July 2021)

California has the administrative infrastructure to extend parole eligibility to this group of people. The current nonviolent parole review process, created in large part by Proposition 57, handles thousands of people a year with a "paper review" process that has resulted in a grant rate between 17%–23%.[133] And the Board of Parole Hearings reviews thousands of other people for release every year under the traditional "lifer parole" process.

Though the costs of reviewing this additional group of people would be large, the state would benefit from reduced incarceration costs if people presenting a low risk to public safety were released from prison. When the current nonviolent parole review process first began as a result of a federal court order, half of the people reviewed were found suitable for release.[134] Ms. Shaffer explained that the grant rate was initially high because the first wave of reviews considered people who had served long periods of time in prison and presented a low risk to public safety.[135] By similar logic, it is likely that the early years of a similar program for people not currently eligible for parole release would have similar grant rates and a corresponding large decrease in correctional costs.

131 More than 18,000 with a mix of violent and nonviolent convictions and more than 23,000 with violent convictions only. Jennifer P. Shaffer, Executive Officer, Board of Parole Hearings *Proposition 57 Nonviolent Parole Review Process*, 14–16 (July 2021) (report prepared for the Committee and available in the meeting materials for the July 2021 meeting).
132 Committee on Revision of the Penal Code, July 13, 2021 Meeting, Part 1, 0:22:35–0:23:31.
133 *Id.* at 7.
134 *Id.* at 7.
135 Committee on Revision of the Penal Code, July 13, 2021 Meeting, Part 2, 0:22:36–0:22:55.

Allowing parole review for people not currently eligible for it would simplify California's Penal Code and associated regulations. It would incentivize positive behavior in prison and safely reduce unnecessarily long sentences — including extreme sentences created by sentencing enhancements — for people who present a low risk to public safety.

EMPIRICAL RESEARCH

As noted above, people convicted of violent offenses tend to have lower recidivism rates than people convicted of nonviolent offenses.[136] While the lower recidivism rates for people convicted of violent offenses may in part be explained by people being older at release because their sentences are longer, other research shows that the severity of someone's crime of conviction does not predict a higher recidivism risk.[137]

INSIGHTS FROM OTHER JURISDICTIONS

Unlike California, many jurisdictions in the United States have retained fully indeterminate sentencing schemes that require every person in prison to be reviewed by a parole board to determine when they should be released.[138] For example, as Marshall Thompson, Vice-Chair, Utah Board of Pardons and Parole, told the Committee, judges in Utah do not set how long someone will be incarcerated — they instead determine whether someone will be sent to prison and the exact length of the sentence is determined by the parole board subject to a series of sentencing guidelines.[139] Such an approach allows for a more dynamic evaluation of someone's public safety risk, instead of freezing that determination at the time of sentencing.[140]

ADDITIONAL CONSIDERATIONS

- The current nonviolent parole review process does not calculate eligibility using good conduct or other earned credits.[141] This recommendation expanding parole eligibility should be implemented to allow such credits to apply to when someone becomes eligible for parole.

- If passed by a majority vote in the Legislature, this recommendation would cover a large number of people serving sentences for violent convictions, including many who received a lengthened sentence due to a prior strike conviction. But unless passed by a two-thirds majority in the Legislature or a voter initiative, this recommendation would not apply to people serving a mandatory minimum sentence created by voter initiative, including people sentenced to 25-to-life under the Three Strikes law for a serious or violent felony.[142]

136 CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2015–16*, Figure 21 (Sept. 2021).
137 Council on Criminal Justice, *New National Recidivism Report*, Sept. 1, 2020 (national data shows that "[p]eople released in 2012 who were convicted of homicide were the least likely to be rearrested, with 41.3% rearrested at least once over five years … people convicted of property crimes were most likely to be rearrested, at 78.3% over five years.").
138 Different authorities count the number of indeterminate states differently, but there are between 12–33 states that are considered indeterminate. See Robina Institute of Criminal Law and Criminal Justice, *The Continuing Leverage of Releasing Authorities: Finding From A National Survey*, 2016, 1 (12 states self-reported they were fully indeterminate); Allison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures, 2015, 5 ("33 states operate a primarily indeterminate sentencing system").
139 Submission of Marshall Thompson to Committee on Revision of the Penal Code, July 2021.
140 *Id.*
141 See 15 CCR § 3490(e); *In re* Canady, 57 Cal. App.5th 1022 (Ct. App. 2020).
142 See *People v. Cooper*, 27 Cal.4th 38, 47 (2002) (Legislature may address matters that an initiative measure does not specifically authorize or prohibit).

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5. Modernize the County Parole System

Modernize the County Parole System

RECOMMENDATION

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

The Committee therefore recommends the following:

1. Require that all counties review for county parole release everyone sentenced to jail who would be eligible for parole consideration if confined in state prison.

2. Specify that the term of county parole supervision cannot be longer than two years or however long the person would have spent in jail (including credits) — whatever is shorter.

3. Specify that the county parole board member appointed by the Presiding Judge have professional or lived experience in the areas of social work, substance use disorder treatment, foster care, rehabilitation, community reentry, or the effects of trauma and poverty.

4. Clarify that people released to county parole are to be supervised by the county probation department.

RELEVANT STATUTES

Penal Code §§ 3074–3089

BACKGROUND AND ANALYSIS

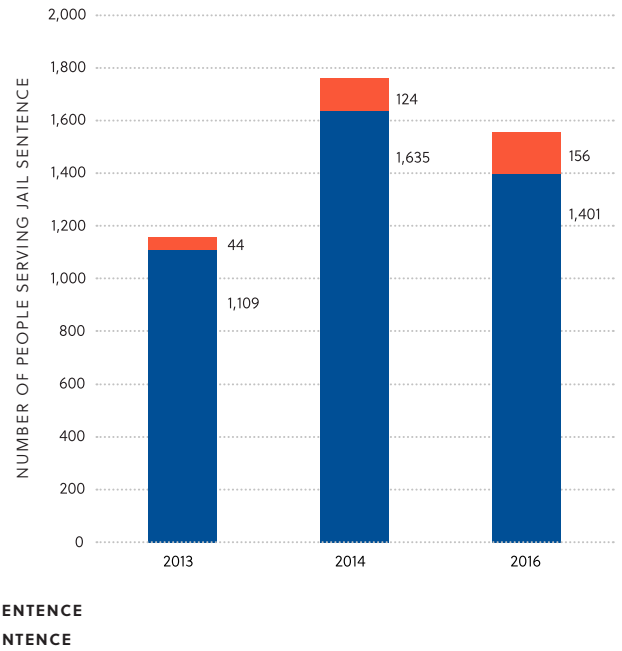
The Penal Code currently requires each county to have a county parole program,[143] but few (if any) counties comply with this law. Part of the problem is that there is confusion about how the law should be implemented.[144] Another part is that few stakeholders seem to know of the law's existence.

Many people are serving jail sentences of five years or more in California's jails, which were never designed or intended to house people for such long periods of time. This relatively new problem was caused by California's enactment of Public Safety Realignment in 2011. Realignment shifted where people convicted of many less serious felonies served their sentences and, after the law went into effect, many people who would have served their sentences in prison now do so in county jail.[145]

The most recent statewide survey, conducted by the California State Sheriffs' Association in 2016, showed that more than 1,500 people were serving a sentence of five years or more in county jail, with the longest sentence being 42 years.[146] In Los Angeles County in July 2020, more than 500 people had jail sentences of three years or more in length, 45% of the population confined with Realigned jail sentences.[147] Sheriff Kory Honea of Butte County also recently told the Committee that many jails have people serving sentences longer than 10 years and that the increased medical and mental health costs for this population is significant.[148]

143 Penal Code § 3075(a).
144 Committee on Revision of the Penal Code Staff Memorandum 2021–14, 16 (Sept. 14, 2021). See also Asm. Com. on Public Safety, Analysis of AB 884 (2013–2014 Regular Session), May 3, 2013, 2 (California State Sheriffs' Association noted that "very few counties are currently utilizing county parole").
145 See, e.g., J. Richard Couzens and Tricia A. Bigelow, *Felony Sentencing After Realignment*, 6 (May 2017).
146 Letter of Cory Salzillo and Cathy Coyne, California State Sheriffs' Association, Oct. 17, 2016.
147 Information provided to Committee staff by Los Angeles County Sheriff's Department.
148 Submission of Sheriff Kory Honea, Butte County, to Committee on Revision of the Penal Code, July 23, 2020. See also Magnus Lofstrom, Mia Bird, and Brandon Martin, *California's Historic Corrections Reforms*, Public Policy Institute of California, 9 (September 2016).

FIGURE 17: PEOPLE WITH JAIL SENTENCES OVER 5 YEARS



Source: Letter from California State Sheriffs' Association, Oct. 17, 2016. 2013 data represents 52 counties. 2014 data represents 44 counties. 2015 data is not available. 2016 data represents all 58 counties.

Ten years after Realignment, there has been no systemic solution to the problem of people serving long sentences in county jail. Many of the people with long jail sentences would be eligible for parole release under Proposition 57 if they were in prison.[149] But the combination of Realignment and Proposition 57 has had a perverse effect and people sent to prison because of their prior offense history have more opportunities for release than people in jail, who have a less serious offense history.[150]

Little-used provisions in the Penal Code creating "county parole" could be modernized to address this problem. [151] County parole has existed since at least the 1950s and allows people to be released from jail to supervision if approved for release by a local county parole board. The Penal Code does not provide a legal standard for when a county parole application should be granted, instead giving each county parole board the authority to set its own rules and regulations.[152]

County parole laws have not been significantly amended since 1978,[153] long before Public Safety Realignment shifted sentences for many offenses to county jail. The law could be modernized to allow county parole to be a meaningful tool for the post-Realignment world:

- To ensure equality between people sentenced to prison and jail, people who would receive a nonviolent parole review in prison should receive one in jail using the same eligibility and release standards under Proposition 57.[154]

149 Cal. Const., art. I, § 32(a)(1) (Proposition 57's nonviolent parole release authority).
150 See Penal Code § 1170(h)(3) (requiring anyone with a prior strike conviction or required to register as a sex offender to serve their sentence in state prison).
151 Penal Code § 3076(b).
152 Penal Code § 3076(a).
153 See Stats. 1978, c. 918, p. 2884, § 1.
154 15 CCR §§ 2449.1; 2449.4(c); Cal. Const., art. I, § 32(a)(1). The California Attorney General recently noted that giving parole release opportunities to people convicted of more criminal offenses than other people raises constitutional equal protection issues. Petition for Review, *In re Mohammad Mohammad*, California Supreme Court Case No. S25999, 16 n.2 (citing *People v. McKee*, 47 Cal.4th 1172, 1202 (2010)); Respondent's Opening Brief on the Merits, *In re Mohammad Mohammad*, California Supreme Court Case No. S25999, 39 n.16 (citing *People v. Valencia*, 3 Cal.5th 347, 376 (2017)).

- The current county parole law appears to authorize supervision up to three years.[155] That length of time is out of step with other provisions of the Penal Code[156] and people serving county jail sentences should be supervised for no more than two years, or whenever their sentences would have expired with the benefit of credits – whichever is shorter.

- The Penal Code provides that a county parole board has three members: a sheriff's representative, a probation representative, and a member of the public appointed by the presiding judge of the Superior Court.[157] There are no minimum qualifications for the person appointed by the presiding judge, but this person should have a background with experience relevant to the important decisions a county parole board makes. As the Penal Code suggests for parole commissioners at the state level, this professional or lived experience should be in the areas of social work, substance use disorder treatment, foster care, rehabilitation, community reentry, or the effects of trauma and poverty.[158]

- Current law does not specify who supervises people on county parole.[159] The law should specify that the county probation department plays this role.

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

EMPIRICAL RESEARCH

As the Committee noted in its 2020 report, research on people released from jails and prison in California shows that recidivism rates are lower for people released from jail.[160]

INSIGHTS FROM OTHER JURISDICTIONS

No other state has people serving long sentences in jail like California does, but six states have unified correctional systems that centralize control of their places of incarceration and help provide uniform rules for release and other correctional issues.[161]

New Jersey applies the same parole eligibilty rules to people in prisons and county jails.[162] Massachusetts has parole release to people serving sentences in "houses of correction," facilities run by county sheriffs that incarcerate people serving shorter sentences.[163]

The administrator of New York City's jail system has special power to release people serving jail sentences for a "compelling reason consistent with the public interest," including working or seeking work, attending an education institution, obtaining medical treatment, or caring for family members.[164]

155 Penal Code § 3081(b).
156 Probation and parole supervision for most felonies is now limited to two years, as is parole supervision for many people. Penal Code § 1203.1(a); Penal Code § 3000.01(b)(1). Parole supervision is also to be terminated for many people after one year without a violation of conditions. *Id.*
157 Penal Code § 3075(a). There are no minimum qualifications for the person appointed by the Presiding Judge except that they not be a "public official." *Id.*
158 Penal Code § 5075.6.
159 Penal Code § 3088.
160 Committee on Revision of the Penal Code, 2020 Annual Report and Recommendations, 23.
161 The six states are Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. See Christian Henrichson, *Vera's Incarceration Trends States Fact Sheets*, Vera Institution of Justice, December 3, 2019; Barbara Krauth, *A Review of the Jail Function Within State Unified Corrections Systems*, National Institute of Corrections, September 1997.
162 N.J.S.A. 30:4-123.51(g) (anyone who has served more than 60 days of a sentence is eligible for parole release under the same rules as someone confined in state prison). With exceptions, people in New Jersey are generally eligible for parole release after serving one-third of their sentence. N.J.S.A. 30:4-123.51(a).
163 120 Code of Massachusetts Regulations 200.02(1) (someone serving a house of correction sentence longer than 60 days is generally eligible for parole release after serving half their sentence); Massachusetts General Laws, ch. 279, § 23 (limiting house of correction sentences to 2.5 years).
164 N.Y. Correct. Law § 150(4). These are sometimes referred to as "Article 6-A" releases.

ADDITIONAL CONSIDERATIONS

- County parole should be available to people serving jail sentences regardless of their ability to pay. Consistent with recent actions by the Legislature, county parole release and supervision should have no fees or other monetary assessments associated with it.[165]

- Current law allows courts at sentencing to deny eligibility for county parole.[166] Courts have no such power over other types of parole release and should not have the ability to do so for county parole. A sentencing court should, as current law provides, be allowed to provide input into the county parole decision-making process[167] but not be able to override it completely.

165 See AB 1869 (Committee on Budget 2020); AB 177 (Committee on Budget 2021).
166 Penal Code § 3076(b).
167 Penal Code § 3078(b).

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6. Repeal Three Strikes

Repeal Three Strikes

RECOMMENDATION

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

The Committee therefore recommends the following:

1. Repeal the Three Strikes law.

Because we appreciate that this is a difficult goal, the Committee offers the following secondary reforms:

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

The Committee recommends that any new amendments to the Three Strikes law be applied retroactively with provisions for resentencing.[168]

RELEVANT STATUTES

Penal Code §§ 667, 667.5, 1170.12

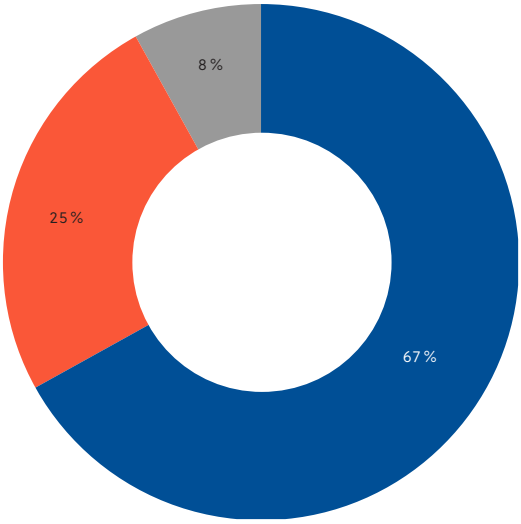
BACKGROUND AND ANALYSIS

More than 33,000 people in prison are serving a sentence lengthened by the Three Strikes law — including more than 7,400 people whose current conviction is neither serious nor violent. The population sentenced under the Three Strikes law is a third of the total prison population.[169]

80% of people sentenced under the Three Strikes law are people of color. As with the entire prison population, the racial disparities are even more prevalent for young people sentenced under the law: 90% of those who were 25 or younger at the time of the offense and serving a sentence under the Three Strikes law are people of color.[170]

168 When California voters amended the Three Strikes law by passing Proposition 36, its provisions were made retroactive. This allowed people serving life sentences for third strike convictions based on offenses that were not serious or violent to be resentenced. Prop. 36 as approved by voters, General Elec. (November 6, 2012).
169 As discussed below, this count includes people whose sentence is doubled by a prior strike and those sentenced to an indeterminate life term as "Third Strikers.
170 For the entire prison population, 88% of the people who were 25 or younger at the time of their offense were people of color.

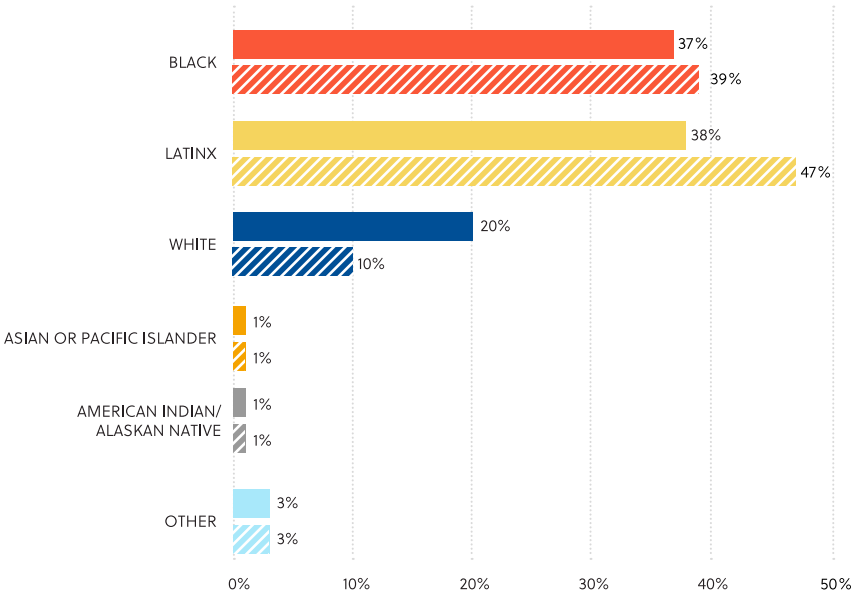
FIGURE 18: CDCR POPULATION BY STRIKE STATUS



- NOT SENTENCED UNDER THE THREE STRIKES LAW
- SENTENCE DOUBLED BY PRIOR STRIKE
- SENTENCED AS THIRD STRIKER

Source: Analysis of data provided by CDCR Office of Research.

FIGURE 19: RACE AND AGE DEMOGRAPHICS OF THREE STRIKES POPULATION

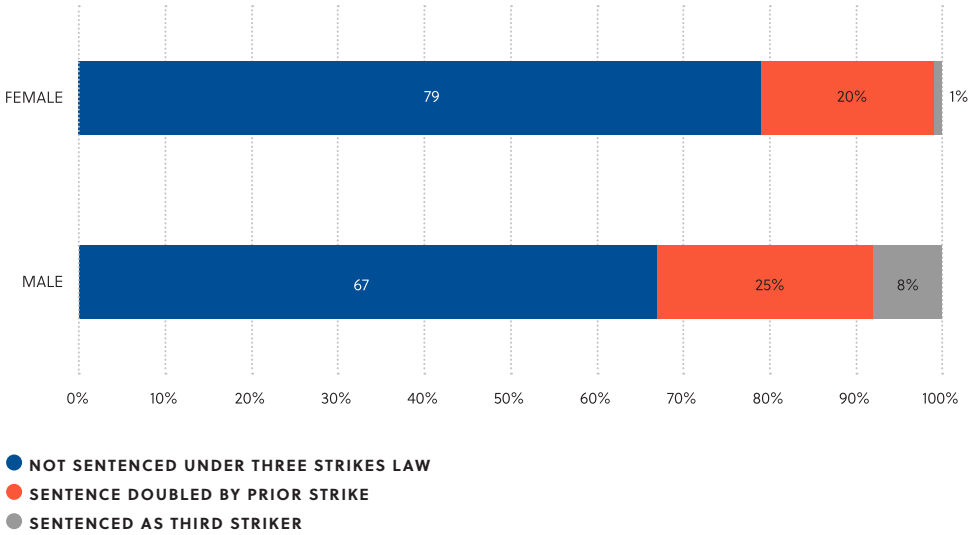


SOLID BARS REPRESENT THE OVERALL THREE STRIKES POPULATION.
STRIPED BARS REPRESENT THE THREE STRIKES POPULATION WHO WERE UNDER 26 AT THE TIME OF THE OFFENSE.

Source: Analysis of data provided by CDCR Office of Research and includes both people whose sentenced was doubled by a prior strike and people sentenced as Third Strikers.

Additionally, women, who make up less than 3% of the Three Strikes prison population, are less likely to be sentenced under the law.

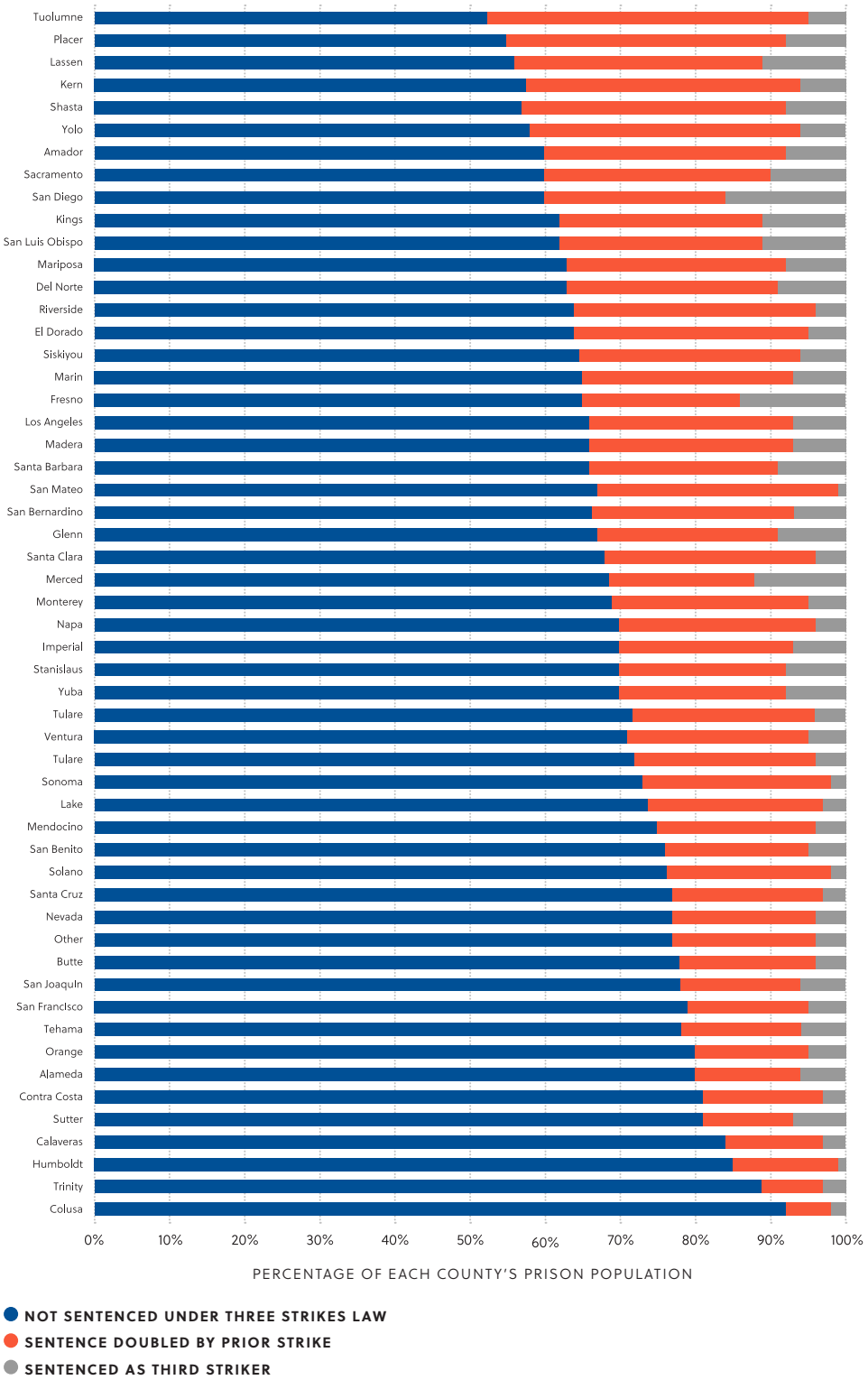
FIGURE 20: THREE STRIKES STATUS BY SEX



Source: Analysis of data provided by CDCR Office of Research.

Counties also appear to make extremely different use of the Three Strikes law. For some counties, almost 40% of the people they have sent to prison were sentenced under the law, while other counties used the law much more sparingly.

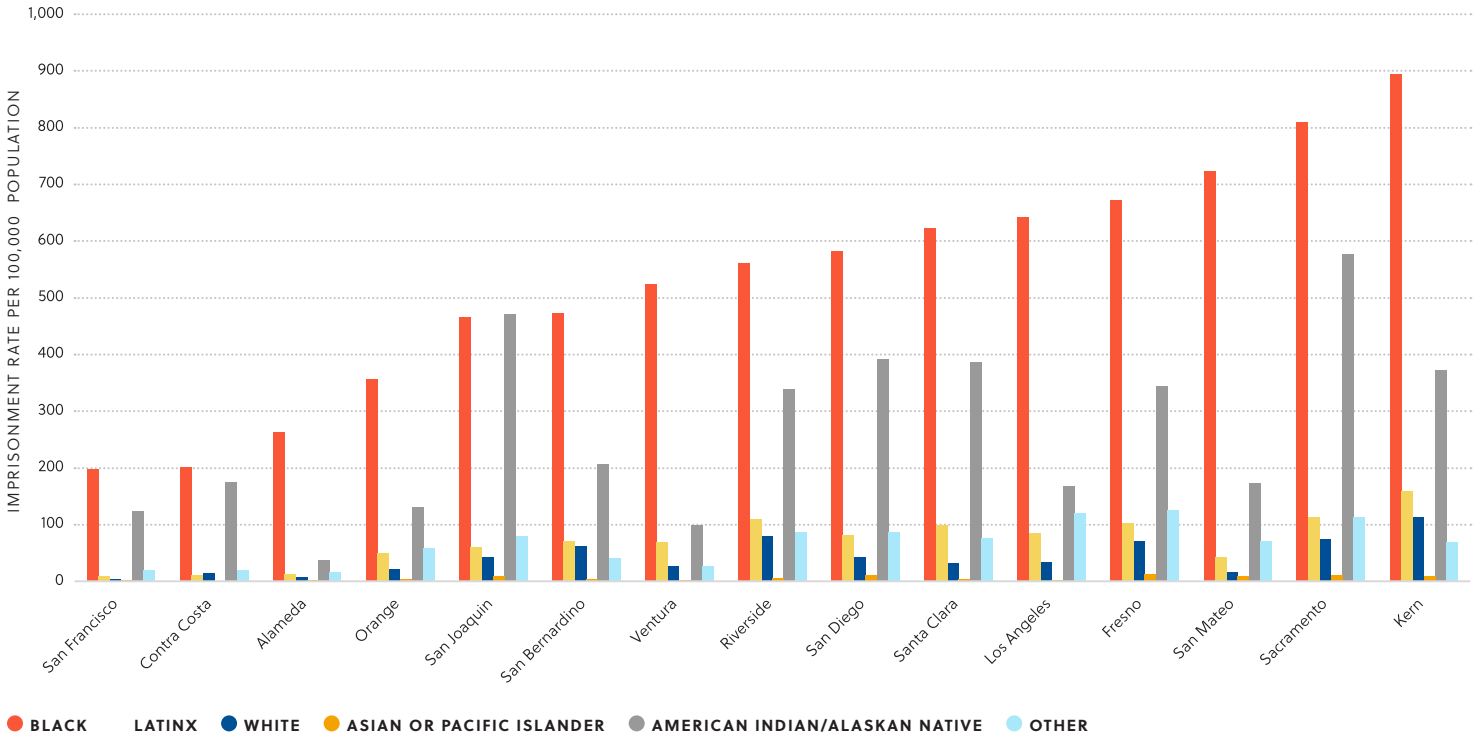
FIGURE 21: COUNTY VARIATION IN USE OF THE THREE STRIKES LAW



Source: Analysis of data provided by CDCR Office of Research.

The racial disparities seen in the state-level Three Strikes data are also widespread at the county level, as Figure 22 shows for the 15 largest counties in California. (Appendix B contains incarceration rates under the Three Strikes law by race for every county where sufficient data was available). Though not every county has the same extreme disparities, every county has them to some degree.

FIGURE 22: INCARCERATION RATES FOR PEOPLE SENTENCED UNDER THE THREE STRIKES LAW — 15 LARGEST COUNTIES



Source: Analysis of data provided by CDCR Office of Research and includes both people whose sentence was doubled by a prior strike and people sentenced as Third Strikers. Population data is ACS 2019.

Given the discretion that prosecutors have to charge and judges have to dismiss Three Strikes enhancements, this data suggests a disturbing trend: when the criminal system has the option to punish more harshly, it does so disproportionately against people of color. And though Three Strikes sentences are common in California, as one appellate court recently concluded in this context, "What has become routine should not blunt our constitutional senses to what shocks the conscience and offends fundamental notions of human dignity."[171]

The Three Strikes law was created by Proposition 184 in 1994 to reduce crime by incapacitating and deterring people who committed repeat offenses by dramatically increasing punishment for people previously convicted of a "serious" or "violent" offense.[172] Under the law, people who were previously convicted of a "strike" — a "serious" or "violent" felony such as robbery or certain assault crimes — and commit any new felony have their sentences doubled.[173] People who commit a third serious or violent felony after having been convicted of two prior serious or violent felonies face a mandatory minimum sentence of 25 years to life.[174]

Proponents of the law presented the murder of Kimber Reynolds by men recently released from prison as proof of the need for increasingly harsh penalties.[175] They asserted that the law would "keep murderers, rapists, and child molesters behind bars, where they belong."[176] Despite projections that the law would cause the state's prison population to increase substantially and result in additional costs of up to $6 billion annually,[177] nearly 72% of voters favored it.[178]

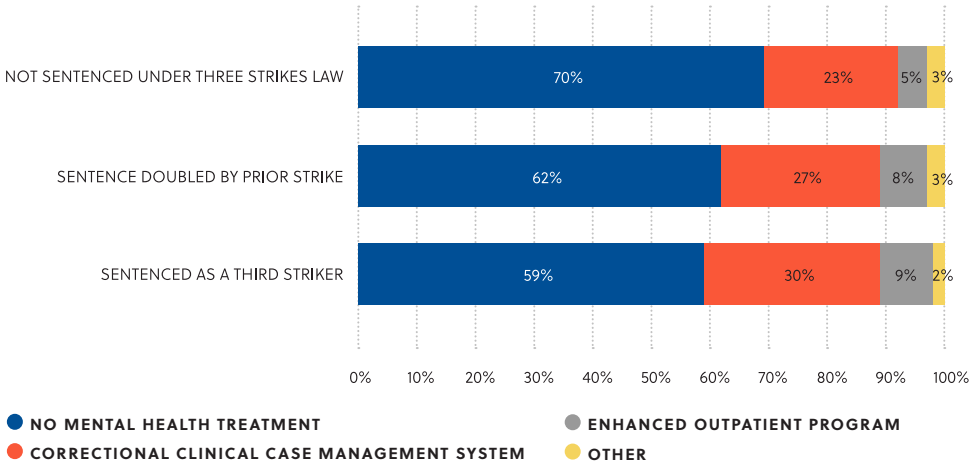
Though crime rates fell after the Three Strikes law was implemented, they had already been declining both in California and nationally for a number of years.[179] Research conducted by the Legislative Analyst's Office in 2005 found that crime rates fell at the same rates in counties regardless of how aggressively they used the Three Strikes law.[180]

Concerns that the law disproportionately impacted people of color began a few years after it was passed.[181] People of color, particularly Black people, are arrested and prosecuted at disproportionate rates,[182] and the Three Strikes law perpetuates these disparities by subjecting people to harsher penalties once they become justice-involved.[183] While Black people account for less than 30% of the entire prison population, they account for 45% of people serving a third strike sentence.

171 *People v. Avila*, 57 Cal. App. 5th 1134, 1151 (Ct. App. 2020)
172 Voter Information Guide for 1994, General Election, 34 (1994) (Legislative Analyst's Office analysis of Proposition 184).
173 Penal Code § 667(e)(1). The doubling of the sentence applies only to the imprisonment imposed for substantive offenses, not any sentencing enhancements.
174 Penal Code § 667(e)(2).
175 *Id.*
176 *Id.*
177 *Id.*
178 California Secretary of State, *Statement of Vote*, General Election, November 8, 1994, 107 (results for Proposition 184).
179 Legislative Analyst's Office, *A Primer: Three Strikes — The Impact After More Than a Decade* (Oct. 2005).
180 *Id.*
181 Greg Krikorian, *More Blacks Imprisoned Under '3 Strikes,' Study Says*, Los Angeles Times, March 5, 1996.
182 See, e.g., Magnus Lofstrom et al., *Racial Disparities in California Arrests*, Public Policy Institute of California, Oct. 2019; See also Elizabeth Hinton, LeShae Henderson, and Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice, May 2018.
183 Elizabeth Hinton, LeShae Henderson, and Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice, 5, May 2018.

Mental health needs are also higher in the Three Strikes population.

FIGURE 23: MENTAL HEALTH TREATMENT IN CDCR BY STRIKE STATUS



Source: Analysis of data provided by CDCR Office of Research. For definitions of CDCR's Correctional Clinical Case Management System and Enhanced Outpatient Program, see page 11. "Other Treatment" includes mental health crisis beds, intermediate care facilities, and the state hospital.

Despite reforms to the Three Strikes law made by Proposition 36 in 2012,[184] many of the most concerning aspects of the law remain:

- There is no limit on how old a prior strike can be,[185] though many other states do have such "wash out" periods after 5 or 10 years.[186]
- Juvenile conduct can count as a strike, even though juvenile adjudications are not convictions and cannot be used to enhance sentences in other contexts or by other states.[187]
- A prior strike conviction always doubles punishment, even if the current offense is not a strike. Almost 25% of people serving a sentence doubled by a prior strike are doing so for a current offense that the Penal Code does not classify as either violent or serious.[188] Of these offenses, many are "wobblers," meaning prosecutors have discretion to charge them as misdemeanors or felonies.[189] Though courts have the ability to dismiss prior strikes and to not consider them during sentencing,[190] there is no data suggesting this occurs regularly.

If the Three Strikes law was eliminated, the Penal Code would still contain other recidivist statutes that impose additional punishment based on a person's criminal history,[191] including the "nickel" prior which adds 5 years to a person's sentence when they are convicted of a serious felony and have a prior conviction for a serious felony.[192]

Eliminating or substantially limiting the use of the Three Strikes law would recognize the law's failure to make California safer, and would be a significant step towards reducing racial disparities in our criminal legal system. For those reasons, any changes to the law should be applied retroactively, as California has done for many of its most significant sentence reforms.[193]

184 With some exceptions, Proposition 36 changed the Three Strikes law to only allow a life sentence when the new felony conviction is serious or violent. It also allowed resentencing of people serving a life sentence if their third strike conviction was not serious or violent. Prop. 36 as approved by voters, General Elec. (November 6, 2012).
185 Penal Code § 667(c)(3).
186 Other states, including Washington and Arizona have five-year wash-out periods for enhanced sentences based on most prior offenses and 10-year wash-out periods for more serious felony priors. Arizona Rev. Stat. § 13-105(22)(b),(c); § 13-703(B)(C); Washington State Adult Sentencing Guidelines Manual 53–54 (2020). Wash-out periods were codified in since-repealed California laws that allowed for one and three-year enhancements for prior prison terms. See April K. Cassou and Brian Traugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L. J. 5, 48–53 (1978).
187 Welfare and Institutions Code § 203. For example, a juvenile adjudication for driving under the influence does not count as an adult DUI prior. *People v. Bernard*, 204 Cal.App.3d Supp. 16, 18 (1988). Similarly, a juvenile adjudication for a "serious" felony cannot be used to impose a 5-year "nickel" enhancement. *People v. West*, 154 Cal. App.3d 100, 107–108 (1984). But the Three Strikes law and the California Supreme Court authorize the use of juvenile adjudications as prior strikes in adult court. Penal Code §§ 667(d)(3), 1170.12(b)(3); *People v. Nguyen*, 46 Cal.4th 1007, 1015–1022 (2009).
188 The ten most frequent offenses for people serving these sentences in CDCR are: Penal Code § 29800(a)(1) — felon in possession of a firearm; Penal Code § 273.5(a) — domestic violence causing corporal injury; Penal Code § 245(a)(4) — assault likely to cause great bodily injury; Vehicle Code § 2800.2(a) — evading a police officer; Penal Code § 666.5 — vehicle theft with a prior vehicle theft; Penal Code § 459 — second-degree burglary; Vehicle Code § 10851(a) — vehicle theft; Health & Safety Code § 11370.1(a) — possession of a controlled substance while armed with a loaded firearm; Penal Code § 69 — obstructing or resisting a police officer; Health & Safety Code § 11378 — possession of a controlled substance for sale. People convicted of these ten offenses account for over 50% of the entire population of people who are serving a doubled sentence for a non-serious, non-violent felony.
189 Of the top 10 offenses listed above, 6 are wobblers.
190 Penal Code § 1385; *People v. Romero*, 13 Cal.4th 497 (1996).
191 See Penal Code §§ 236.4(c), 667(a), 667.5(a), 667.5(b), 667.6(a), 667.6(b), 667.7(a).
192 Penal Code § 667(a)(1).
193 See, e.g., Penal Code § 1170.126; Penal Code § 1170.18; Health & Safety Code § 11361.8.

EMPIRICAL RESEARCH

Empirical research on the impact of the Three Strikes law in California has consistently found that the law has had no effects on crime rates.[194] And in at least three studies, researchers concluded that the law actually increased murder rates.[195] In the few studies that concluded the law reduced crime rates, the crime-reduction impacts were estimated to be moderate at best.[196]

INSIGHTS FROM OTHER JURISDICTIONS

The first three strikes law was enacted in Washington state in 1993.[197] After California passed its version in 1994, 23 states and the federal government followed suit.[198] The offenses that counted as strikes, the number of strikes needed to trigger increased punishment, and the penalties imposed upon conviction varied by state.[199] Most states, including California, already had enhanced penalties for people with prior convictions at the time the three strikes laws were enacted.[200] However, in most states, three strikes laws were drafted to apply only to a narrow class of people with repeat violent offenses, and generally implemented longer sentences that carried mandatory minimums.[201] California's second-strike provision, which mandated doubling the length of a sentence for any new felony once a person had been convicted of a strike, was unique.[202] As California's courts have acknowledged, California's Three Strikes law is "among the most extreme" in the county.[203]

The frequency with which California imprisoned people under the new law also made the state a harsh outlier among other states. For instance, in Washington state between December 1993 and September 1997, only 85 people were admitted to state prison under its three strikes law.[204] By 1998, 3 states that implemented three strikes laws had not sentenced anyone under the law, 12 states had a dozen or fewer convictions, and the federal government had sentenced only 35 people under its law.[205] In contrast, by 1998, with the law being used for only 4 years, California had sentenced 40,511 people under its Three Strikes law.[206] Research conducted in 2006 found that many states continued to rarely use their three strikes provisions.[207] In the same year, more than 44,000 people sentenced under the law were in California's prisons.[208]

Many states have revised various aspects of their three strikes laws.[209] Several states have eliminated mandatory minimum penalties associated with the law and have given judges more discretion over what penalties to impose.[210] Others have eliminated the life or life without parole sentences that were previously allowed.[211] In 2018, the federal First Step Act changed the punishment under the federal three strikes law from a life sentence to 25 years.[212]

ADDITIONAL CONSIDERATIONS

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

194 Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, Crime and Justice, Vol. 38, No. 1, 98, Table 3 (2009) (summarizing the findings of 15 empirical studies and concluding that California's Three Strikes Law has not affected crime rates).
195 *Id.* The three studies are: Tomislav Kovandzic et al., *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effect of 'Three Strikes' in U.S. Cities (1980–1999)*, Criminology and Public Policy 1(3), 399–424 (2002); Thomas B. Marvell and Carlisle E. Moody, *The Lethal Effects of Three Strikes Laws*, Journal of Legal Studies 30(1), 89–106 (2001); and Carlisle E. Moody, Thomas B. Marvell, and Robert J. Kaminski, *Unintended Consequences: Three-Strikes Laws and the Murders of Police Officers*, Cambridge, MA: National Bureau of Economic Research (2003).
196 National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, D.C.: The National Academies Press (2014).
197 National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin (Oct. 2010).
198 Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, Crime and Justice, Vol. 38, No. 1, 69 (2009). The states that passed Three Strikes laws were: Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Montana, New Mexico, North Carolina, North Dakota, New Jersey, Nevada, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wisconsin. National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin (Oct. 2010).
199 National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin, Exhibit 9, Oct. 2010.
200 John Clark, James Austin, and D. Alan Henry, *"Three Strikes and You're Out": A Review of State Legislation*, National Institute of Justice, 2 (Sept. 1997).
201 *Id.*
202 *Id.* See also Elsa Y. Chen, *Impacts of 'Three Strike and You're Out' on Crime Trends in California and Throughout the United States*, Journal of Contemporary Criminal Justice, Vol. 24, No. 4 (Nov. 2008).
203 *People v. Avila*, 57 Cal. App.5th 1134, 1149 (Ct. App. 2020) (quotation marks and citation omitted).
204 John Clark, James Austin, and D. Alan Henry, *"Three Strikes and You're Out": A Review of State Legislation*, National Institute of Justice, 3 (Sept. 1997).
205 Elsa Y. Chen, *Impacts of 'Three Strike and You're Out' on Crime Trends in California and Throughout the United States*, Journal of Contemporary Criminal Justice, Vol. 24, No. 4, 7 (Nov. 2008), citing W. J. Dickey, *"Three Strikes": Five Years Later*, Washington DC: Campaign for an Effective Crime Policy (2008).
206 *Id.*
207 *Id.*
208 California Department of Corrections, Prison Census Data as of December 31, 2006, Table 10, March 2007.
209 National Conference of State Legislatures, *Sentencing and Corrections Policy Updates*, E-Bulletin, 4 (Oct. 2010).
210 *Id.*
211 *Id.*
212 Ames Grawert and Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, Brennan Center for Justice (Jan. 4, 2019).

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7. Create a Review Process for Life without Parole Sentences

Create a Review Process for Life without Parole Sentences

RECOMMENDATION

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

The Committee therefore recommends the following:

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

RELEVANT STATUTES

Penal Code §§ 190.2, 1385.1, 1170, 4812

BACKGROUND AND ANALYSIS

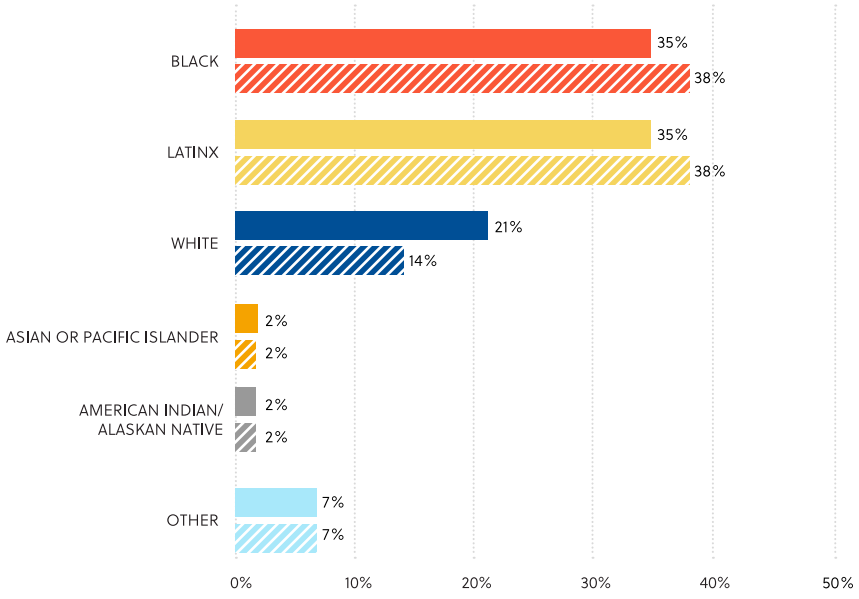
No issue has dominated public comment before the Committee more than sentences of life without the possibility of parole.

People sentenced to life without parole in California have been convicted of some of the most serious offenses in the Penal Code. But over time, life without parole sentences have become more common, more severe, and inconsistent with international views on human rights.[213]

Once rarely used,[214] there are now over 5,000 people serving life without parole sentences in California prisons. Between 2003 and 2016, while violent crime decreased by 26%,[215] the number of people sentenced to life without parole in California rose by over 280%.[216] Yet life without parole sentences do not result in any greater public safety benefits than life with parole sentences.[217] And racial disparities in life without parole sentencing — 79% of people serving life without parole are people of color — suggest that inappropriate factors may be playing a role in who receives this sentence.[218]

213 Christopher Seeds, *Life Sentences and Perpetual Confinement*, Annual Review of Criminol. 4:287–309 (2021). See also, Written Submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021.
214 *Id.*
215 Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, The Sentencing Project, Table 1 (2021).
216 *Id.* at 21.
217 Ross Kleinstuber and Jeremiah Coldsmith, *Is Life Without Parole an Effective Way to Reduce Violent Crime? An Empirical Assessment*, Criminology & Public Policy 19(2), 625 (2020).
218 Christopher Seeds, *Life Sentences and Perpetual Confinement*, Annual Review of Criminol. 4:287–309, 302 (2021).

FIGURE 24: RACE AND AGE DEMOGRAPHICS OF LIFE WITHOUT PAROLE POPULATION



SOLID BARS REPRESENT THE OVERALL LIFE WITHOUT PAROLE POPULATION.
STRIPED BARS REPRESENT THE LIFE WITHOUT PAROLE POPULATION WHO WERE UNDER 26 AT THE TIME OF THE OFFENSE.

Source: Analysis of data provided by CDCR Office of Research.

The overwhelming majority (96%) of people sentenced to life without parole in California have been convicted of first-degree murder – which generally requires a willful, deliberate, and premeditated killing – with an additional "special circumstance" that sets it apart from other first-degree murders.[219] "Special circumstances" include committing a murder for financial gain, lying in wait, committing multiple murders, and committing a murder in the course of an enumerated felony, also known as "felony murder."[220] There are more than 13,000 people serving a prison sentence for first-degree murder, but only about 40% have a life without parole sentence.[221]

California created special circumstances in the 1970s to identify murders that deserved the harshest punishment.[222] But the original list of 7 gradually expanded to the current 21 special circumstances, seriously diluting the law's ability to separate more serious offenses from others.[223] Recent research concluded that special circumstances could be charged in 95% of all first-degree murder convictions and in 59% of all second-degree murder and voluntary manslaughter convictions in California.[224]

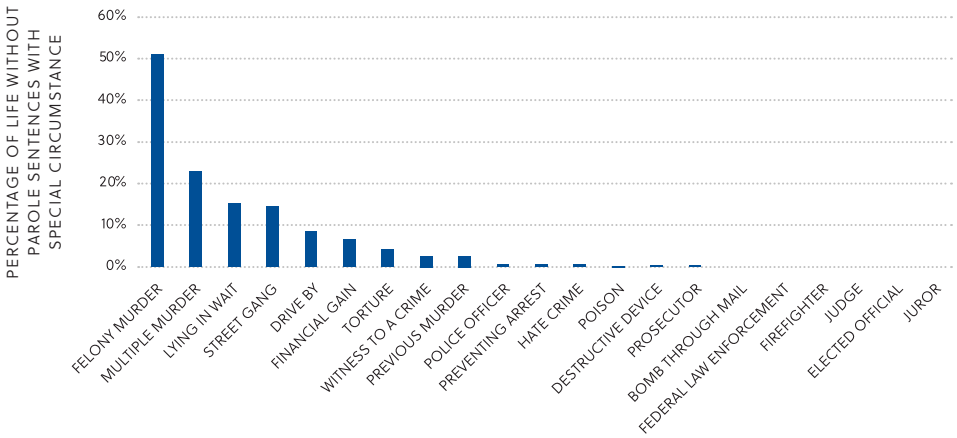
The availability of special circumstance charging to nearly every murder places tremendous discretion in the hands of local district attorneys, but very little is known about how prosecutors decide to charge special circumstances.[225] However, recently published research has found that people accused of killing white people were more likely to be charged with a special circumstance.[226] Similar research has uncovered racial disparities in the application of certain special circumstances – such as those involving gangs and felony murder.[227]

219 Penal Code §§ 189(a), 190.2.
220 *Id.*
221 Count of people with first-degree murder convictions is as of May 31, 2021 and was provided by CDCR Office of Research.
222 See Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394, 1440–1442 (2019).
223 *Id.*
224 David C. Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. Empirical Legal Stud. 693 (2019).
225 Cal. Comm. on the Fair Administration of Justice, Final Report, Death Penalty, 152 (2008).
226 Letter of Catherine M. Grosso, Jeffrey Fagan, and Michael Laurence, to Committee on Revision of the Penal Code, March 22, 2021, 2–3.
227 Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394, 1426 (2019) (reviewing cases from 1978–2002).

Michele Hanisee, President of the Deputy District Attorney Association of Los Angeles County, told the Committee that prosecutors are not always aware of all the circumstances – such as whether the defendant is a victim of abuse or trauma – relevant to whether a life without parole sentence should be pursued.[228] And while courts previously had the power to dismiss special circumstances after a guilty verdict, which could avoid a life without parole sentence in appropriate circumstances, this authority was eliminated in 1990 by Proposition 115.[229]

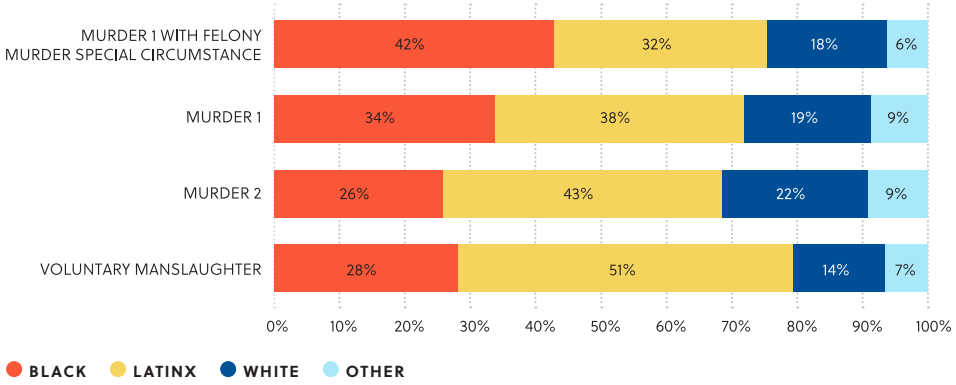
Data shows that special circumstances do not seem to be channeling the most culpable people to life without parole sentences. An analysis of more than 2,300 life without parole cases – almost half of the life without parole population – shows that 6 of the 21 special circumstances have not been used at all and 2 have only been used once.[230] The most common special circumstance is felony murder, which under California's highly-criticized law can apply to people who did not actually kill another person.[231] And Black people are disproportionately sentenced to life without parole under the felony murder special circumstance: 42% are Black compared to only 34% of the overall first-degree murder population and 26% of the second-degree murder population.[232]

FIGURE 25: FREQUENCY OF SPECIAL CIRCUMSTANCE FINDINGS IN LIFE WITHOUT PAROLE SENTENCES



Source: UCLA Special Circumstances Conviction Project. Data is based on 2,363 conviction reports (almost half of the people serving life without parole sentences in California) and includes cases from 51 counties including Los Angeles, Orange, Riverside, San Bernardino, and Sacramento Counties. This data counts special circumstances found true in the cases surveyed and some cases have more than one special circumstance present.

FIGURE 26: RACE DEMOGRAPHICS OF CDCR POPULATION CONVICTED OF HOMICIDE OFFENSES



Source: Felony-murder data provided by the UCLA Special Circumstances Conviction Project. All other data provided by CDCR Office of Research and is as of May 31, 2021.

228 Committee on Revision of the Penal Code, Meeting on May 13, 2021, Part 1, 0:32:42–0:34:04. Ms. Hanisee supported life without parole sentences but suggested that post-conviction reviews could be appropriate if they required evidentiary hearings and the evidence presented was not available at trial.

229 Proposition 115, as approved by voters, June 5, 1990 (creating Penal Code § 1385.1). See also *People v. Johnwell*, 18 Cal. App. 4th 1267, 1283–85 (Ct. App. 2004).

230 Data provided to Committee staff by the UCLA Special Circumstances Conviction Project.

231 *Id.* The California Supreme Court has commented that California's felony murder rule is a "barbaric" concept, rooted in the English Common Law, that "erodes the relation between criminal liability and moral culpability." *People v. Dillon*, 34 Cal.3d 441, 463 (1983), citing *People v. Phillips*, 64 Cal.2d 574, 583, fn. 6 (1966) and *People v. Washington*, 62 Cal.2d 777, 783 (1965). See also SB 1437 (Skinner), Ch. 1015 (2018), which reformed the felony murder rule but did not make any changes to the felony murder special circumstance.

232 Felony murder data provided by UCLA Special Circumstances Conviction Project. All other data provided by CDCR Office of Research and is as of May 31, 2021..

Surprisingly, the actual experience of a life without parole sentence has grown more harsh over time.[233] As Dr. Christopher Seeds explained to the Committee in May 2021, life without parole did not really mean confinement without hope of release until the late twentieth century.[234] For example, until 1994, California parole board regulations mandated a review for all people sentenced to life without parole for recommendations regarding clemency.[235] Today, the parole board has statutory authorization to refer people to the Governor for clemency, but is only required to do such reviews when requested by the Governor.[236]

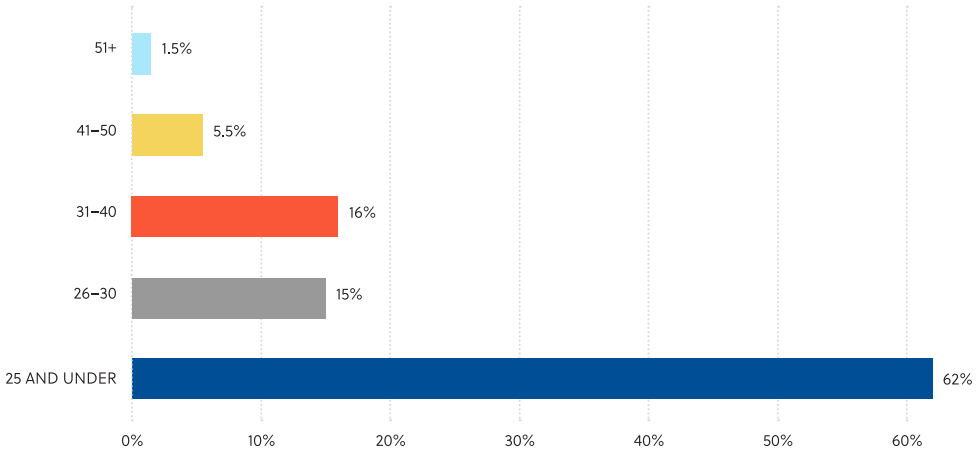
Testimony to the Committee confirmed that some people sentenced to life without parole have the capacity to change, and when they do, can be safely released. Jarret Harper and Susan Bustamante — whose convictions both involved killing their long-time abusers — testified at the Committee's May 2021 meeting about the rare experience of having their life without parole sentences commuted and later obtaining release by the Board of Parole Hearings.[237] Both described that even in an environment devoid of incentives to change, years of self-reflection and maturation led to a transformation in their thinking and understanding of what led to their crimes.[238] They also explained that many people just like them are still imprisoned without hope of release.[239]

Recent revisions to life without parole sentencing laws in California have focused on people who committed offenses when they were under 18 years old.[240] These reforms have not gone far enough. Many people serving life without parole sentences in California were not under 18 but still very young at the time of the commission of the offense — 62% were 25 years old or younger. When compared to the entire prison population, people serving life without parole sentences were the youngest at the time of the offense.[241] Racial disparities are even more prevalent among people who were 25 or younger at the time of the offense and received a life without parole sentence — 86% are people of color (vs. 79% of the total life without parole population).[242]

And despite recent acknowledgement from the Legislature that people who were 25 or younger at the time of their offense should receive special consideration from the parole board, people serving life without parole were excluded from these youth offender reforms.[243] California Supreme Court Justice Goodwin Liu and at least eleven other appellate judges have criticized excluding people with life without parole sentences from the youth offender laws.[244]

233 Written Submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021
234 *Id.*
235 See *Ross v. Schwarzenegger*, 2008 WL 4937599, *2 (E.D. Cal. 2008) (describing 15 CCR § 2817). Originally, this review was to be conducted after 12 years of incarceration and every third year thereafter. The regulation was revised to require review after 30 years of incarceration in 1982, before being completely repealed in 1994. The repealed version of the regulation is on file with Committee staff.
236 Penal Code § 4812(a).
237 Committee on Revision of the Penal Code, Meeting on May 13, 2021, Part 1.
238 *Id.*
239 *Id.*
240 Penal Code §§ 1170(d)(2)(A)(i), 3051(b)(4); SB 9 (Yee), Ch. 828, 2012; SB 394 (Lara), Ch. 684, Stats. 2017. Both bills aimed to bring California's laws in compliance with United States Supreme Court rulings that people who commit crimes as juveniles are generally less culpable, and that courts must consider a person's youth before imposing a life without parole sentence. See *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190 (2016).
241 62% of people with life without parole sentences were 25 or younger at the time of the offense. For people on death row, it is 46%, for people with indeterminate sentences it is 43% for people with determinate sentences it is 39%.
242 *Id.*
243 Penal Code §§ 3051(h) (youth offender parole).
244 *People v. Montelongo*, Case No. S265597 (Cal. Jan. 27, 2021) (concurring statement of Justice Liu); *People v. Jackson*, Case No. S267812 (Cal. June 9, 2021) (concurring statement of Justice Liu) (cataloging cases).

FIGURE 27: AGE AT OFFENSE FOR LIFE WITHOUT PAROLE POPULATION



Source: Analysis of data provided by CDCR Office of Research.

The Committee recommends that age, medical condition, history of victimization, abuse, or trauma, and similar facts be considered in any review or resentencing process.[245] The Committee also recommends creating provisions for periodic reevaluations of people who are denied resentencing or clemency recommendations.[246] Whether in resentencing procedures or clemency evaluations, the tremendous loss suffered by crime victims and their families cannot be ignored, and victims' families should be given full participation in accordance with existing laws.[247]

Requiring review of life without parole sentences after 25 years of incarceration — the penalty for first-degree murder without special circumstances[248] — and reestablishing a formal review process by the parole board would allow California to hold people accountable for the most serious crimes while recognizing that many people are capable of change and would present limited risk to public safety if released.

EMPIRICAL RESEARCH

Research on the crime-reduction effects of life without parole sentences is very limited.[249] However, recently published research indicates that such sentences are no more effective in reducing violent crime than life with parole sentences.[250]

There is also a longstanding research consensus that lengthy prison sentences are not effective in reducing crime. As noted above, in 2014, the National Research Council noted that insufficient evidence exists to support the general assumption that harsher penalties yield measurable deterrent effects and, "[n]early every leading survey of the deterrence literature in the past three decades has reached the same conclusion."[251] Similarly, according to the prominent criminologist and Carnegie Mellon professor Daniel Nagin, "[t]here is little evidence that increases in the length of already long prison sentences yield general deterrent effects" large enough to justify their use.[252]

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

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

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

248 Penal Code § 190.

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

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

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

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

INSIGHTS FROM OTHER JURISDICTIONS

Life without parole sentences are authorized in every state in the country with the exception of Alaska.[253] California has the third highest number of people in the United States serving life without parole sentences, behind Florida and Pennsylvania.[254] Five states — California, Florida, Louisiana, Michigan and Pennsylvania — account for approximately half of the life without parole sentences in the country.[255]

In 2014, the European Court of Human Rights declared life without parole sentences to be unconstitutional, making them illegal throughout virtually all of Europe.[256] Few other countries authorize life without parole sentences and the number of people sentenced to life without parole in California exceeds that of any other nation.[257]

ADDITIONAL CONSIDERATIONS

- Restoring courts' authority to dismiss special circumstances in the interests of justice after a guilty verdict would require a two-thirds majority vote in the Legislature because Penal Code section 1385.1, which prevents courts from doing so, was created by Proposition 115.[258] The Committee made a similar recommendation in its Death Penalty Report.

- Requiring the Board of Parole Hearings to review people serving life without parole sentences for clemency recommendations could be implemented through the Board of Parole Hearings rulemaking process or with a majority vote in the Legislature, as this revision does not implicate any law passed by voter initiative.

253 Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, The Sentencing Project, Table 1 (2021).
254 *Id.*
255 *Id.*
256 See Written Submission of Dr. Joshua Kleinfeld to Committee on Revision of the Penal Code, May 11, 2021, citing *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317.
257 See Written Submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021, citing Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis*, Harvard University Press (2019).
258 Proposition 115, as approved by voters, June 5, 1990.

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Additional Analysis and Data on Past Committee Recommendations

Additional Analysis and Data on Past Committee Recommendations

A handful of the Committee's recommendations from its 2020 Annual Report have not been adopted. The Committee continues to strongly endorse these proposals as vehicles to make California safer and more equitable. To this end, the Committee includes the following additional information to support our recommendations on short prison stays (2020 Recommendation No. 2), parole reform (2020 Recommendation No. 9), and second look resentencing (2020 Recommendation No. 10).

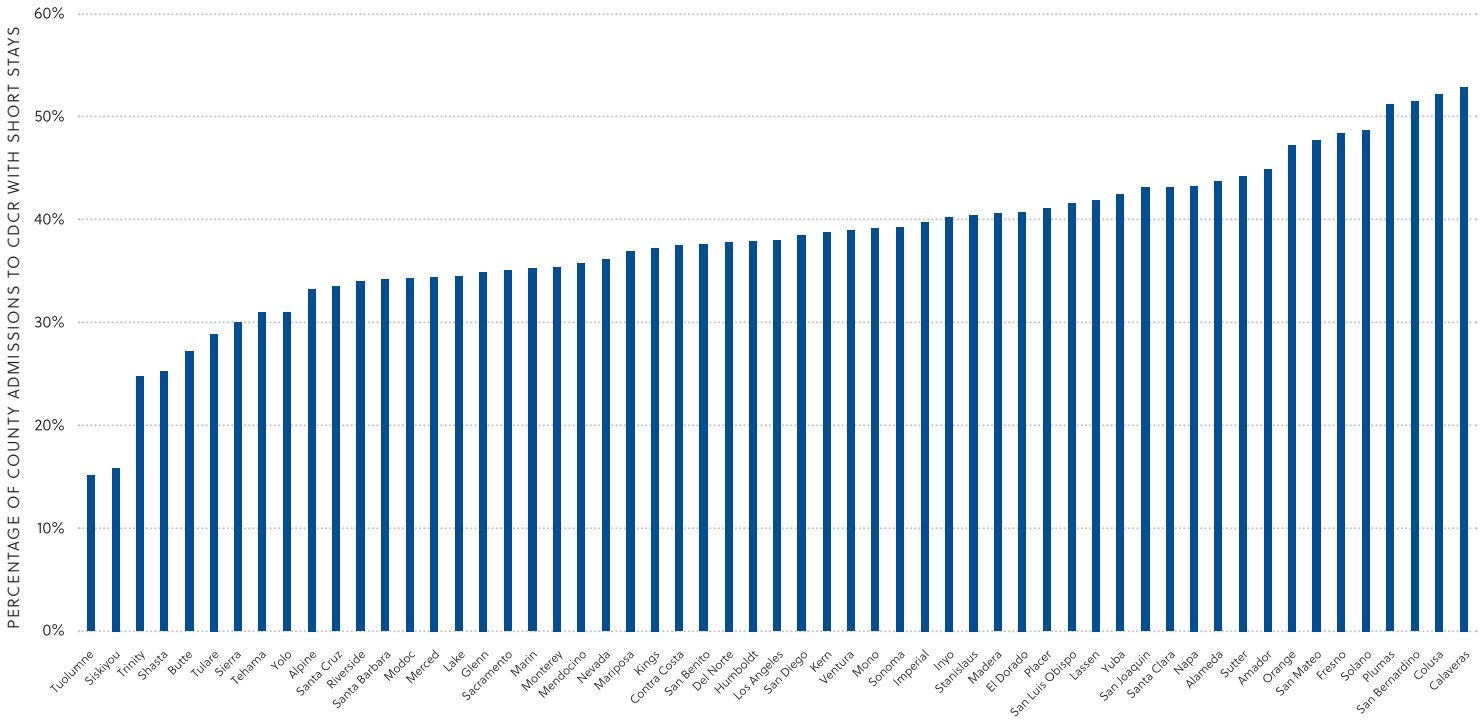
SHORT PRISON SENTENCES

In its 2020 report, the Committee noted that almost 40% of all people entering prison in California actually serve less than a year in prison custody because of the amount of time left on their sentence. The Committee recommended allowing these people to complete their incarceration in county jail instead of undergoing the expense to the state and disruption of being transferred to state prison. The Committee also noted data indicating that serving a sentence locally in a county jail, rather than state prison, may reduce recidivism.[259]

The Committee offers additional data here to better describe the source of these short stays in prison, which is considered to be a stay of one year or less. Figure 28 shows local variation in what proportion of people sent to prison from a particular county stay for less than a year.

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

FIGURE 28: COUNTY VARIATION IN SHORT SENTENCE ADMISSIONS TO CDCR (2015–2018)



Source: Analysis of data provided by CDCR Office of Research.

Similarly, the conviction offenses for the short sentence population vary widely. Overall, out of all short-stay terms in CDCR between 2015–2018, 74% were convictions for a non-violent/non-serious offense, 23% were convictions for a serious offense, and 3% were convictions for a violent offense. As indicated in the table below, many of the most common offenses are "wobblers" that a prosecutor can charge as either a misdemeanor or felony. If charged as misdemeanors, people convicted of these offenses would not serve prison sentences at all. And while Public Safety Realignment generally required prison sentences for non-serious, non-violent, non-sex offenses to be served in county jails rather than prison, many of the most common offenses resulting in short prison stays are non-serious, non-violent, and non-sex offenses that were left out of the Realignment scheme.

OFFENSES RESULTING IN SHORT PRISON SENTENCES (2015–2018)

CODE SECTION	OFFENSE	% OF SHORT STAYS	SERIOUS	VIOLENT	SEX OFFENSE	REALIGNED	WOBBLER
PC § 29800(a)(1)	Felon in possession of a firearm	11%	No	No	No	No	No
PC § 273.5(a)	Domestic violence resulting in corporal injury	7%	May	No	No	No	Yes
PC § 459 1st	First-degree burglary	7%	Yes	May	No	N/A	No
PC § 245(a)(4)	Assault likely to cause great bodily injury	7%	May	No	No	No	Yes
VC § 2800.2(a)	Evading a police officer	6%	No	No	No	No	Yes
PC § 245(a)(1)	Assault with a deadly weapon	5%	Yes	No	No	N/A	Yes
PC § 422	Criminal threats	4%	Yes	No	No	N/A	Yes
VC § 10851(a)	Vehicle theft	3%	No	No	No	Yes	Yes
PC § 459 2nd	Second-degree burglary	3%	No	No	No	Yes	Yes
PC § 30305(a)	Possession of ammunition by person prohibited from owning a firearm	2%	No	No	No	No	No

Source: Analysis of data provided by CDCR Office of Research. Offenses listed as "N/A" in the Realigned category are strike offenses that always result in a prison sentence. "May" indicates that the offense can be classified as serious or violent depending on the underlying facts and how the offense is charged. The three offenses in this category breakdown as follows: Of the assault likely to cause great bodily injury convictions resulting in a short stay, 18% are serious felonies, while approximately 1% are violent felonies. Of the domestic violence causing corporal injury convictions resulting in a short stay, 2% are serious felonies and 1% are violent felonies. Of the first-degree burglary convictions resulting in a short stay, 6% are violent felonies.

PAROLE HEARING PROCESS

In its 2020 Annual Report, the Committee identified a number of issues with California's parole hearing system, primarily that the parole grant rate has been only 16–22% in recent years. [260]

None of the Committee's proposals were adopted by the Legislature or the Board of Parole Hearings, and the problems identified by the Committee remain. BPH Executive Officer Jennifer Shaffer has appeared as a witness twice before the Committee with thorough presentations and reports and the Committee commends BPH for its transparency and willingness to answer our questions. The Committee also recognizes that the recidivism rate of people who were serving life sentences and were released from prison by the parole board is exceptionally low. The Committee maintains that more people can be safely released on parole and that the statutes and regulations governing the parole process are overly complex, vague, and internally inconsistent in some places.

As discussed below, the Committee also notes that parole grant rates for homicide offenses from other large states (including New York, Texas, and Massachusetts) are measurably higher than the parole grant rate in California; that the risk that a person released on parole will commit a new crime of violence is incredibly low; and that in many cases where parole candidates are evaluated as "low risk" by BPH psychologists or have spotless disciplinary records, parole is still very often denied. To that end, Justice J. Anthony Kline recommended at the Committee's July 2021 meeting that BPH have a "much higher burden" to meet when denying candidates parole than it currently does.[261]

The Committee reiterates that the recommendations made in its 2020 report – including revising the legal standard for who is suitable for parole release – would help address these problems.

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

Recidivism rates. The most recent recidivism data shows that people who were serving life sentences and were released by the parole board have extremely low recidivism rates: less than 1% were convicted of a new crime against a person.[262] The three year reconviction rate for all people released from CDCR (which includes those who were released after serving a determinate term) during the same timeframe was 44.6%.[263]

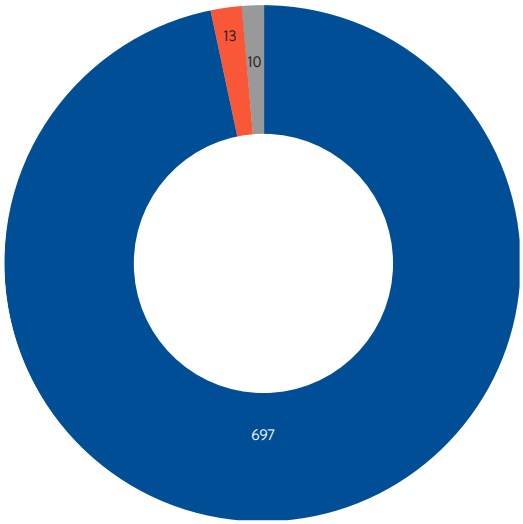
260 California Board of Parole Hearings, *Suitability Hearing Summary Calendar Year 1978 through Calendar Year 2020*. The traditional "lifer" parole grant rate — the number of people granted parole over everyone eligible for a parole hearing — was 17% in 2015, 16% in 2016, 17% in 2017, 22% in 2018, 20% in 2019, and 16% in 2020. The grant rate for BPH's nonviolent parole review process (created by Proposition 57) was 19% in 2017, 23% in 2018, 20% in 2019, and 17% in 2020. Jennifer P. Shaffer, Executive Officer, Board of Parole Hearings Proposition 57 *Nonviolent Parole Review Process*, 7 (July 2021).

261 Committee on Revision of the Penal Code, July 13, 2021 Meeting, Part 1 at 30:03–31.25.

262 CDCR Office of Research, *Recidivism Report for Offenders Released in Fiscal Year 2015–16*, 110–111 (Sept. 2021). Overall, women released by BPH had a 0% reconviction rate within three years of release and men had a 3% reconviction rate — that is, there was not even one new female conviction and only 23 new male convictions within 3 years (13 felonies and 10 misdemeanors) among the 720 people who had been released in 2015–16. *Id.* at 110–111, 99, Table 39. In addition, only 1 person of the 110 released via the Elderly Parole process and 5 of the 96 released via Youth Offender Parole were reconvicted within 3 years. *Id.* at 112. CDCR did not report whether the convictions were for misdemeanor or felony offenses.

263 *Id.* at 105, Table 45.

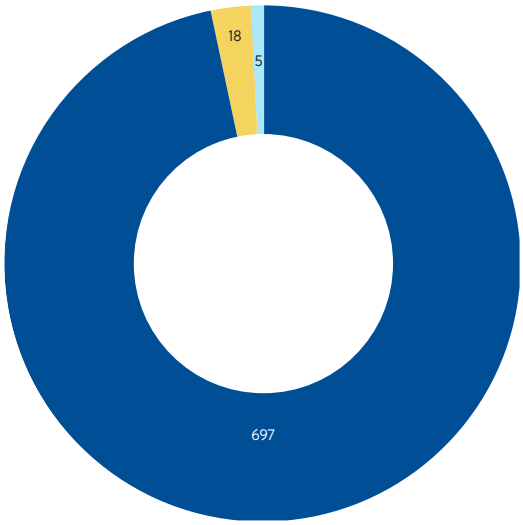
FIGURE 29: NEW CONVICTIONS FOR LIFERS RELEASED BY BPH IN 2015–16



NONE FELONY MISDEMEANOR

Source: CDCR Office of Research, *Recidivism Report for Offenders Released in Fiscal Year 2015–16*, Table 51 (Sept. 2021).

FIGURE 30: NEW CONVICTION TYPES FOR LIFERS RELEASED BY BPH IN 2015–16



NONE OTHER OFFENSES CRIMES AGAINST PERSONS

Source: CDCR Office of Research, *Recidivism Report for Offenders Released in Fiscal Year 2015–16*, Table 51 (Sept. 2021).

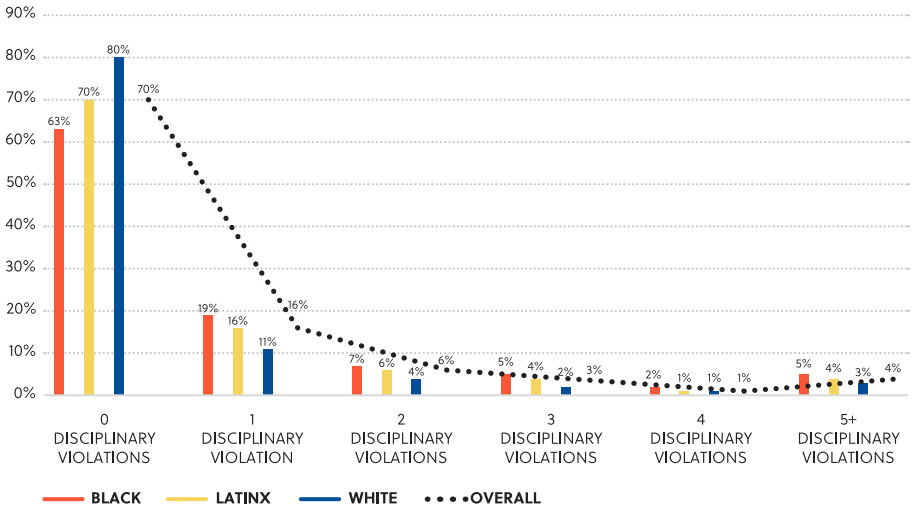
Risk assessments. 30% of parole candidates who were evaluated as "low risk" by BPH psychologists on risk assessments were denied parole in 2020, and nearly 80% of those evaluated as "moderate risk" were denied or stipulated to a denial of parole.[264] While risk assessment instruments' predictions that certain people are a "low risk" of future violence have repeatedly been found by researchers to be quite accurate,[265] the accuracy of "high risk" predictions remains extremely unreliable.[266]

Analysis of 2019–2020 parole hearings. The Committee, with its research partners at the California Policy Lab, analyzed information about all parole hearings held in FY 2019–2020.[267] This information does not include the more than 40% of people eligible for a parole hearing who did not proceed to a hearing for various reasons.[268] But among the more than 3,400 hearings examined, several trends are apparent:

- The great majority of people with a parole hearing (70%) had no recent disciplinary violations of any kind.[269] But more than half (54%) of these people were denied parole.
- There are racial disparities in who had any recent disciplinary violations.[270] 80% of white people appearing before the parole board had no recent disciplinary violations, while 70% of Latinx people had none and 63% of Black people had none.
- Unlike the other parts of the criminal legal system, in the one-year sample of parole hearings discussed here — which, as noted does not include any information about the large number of eligible people who do not proceed to a parole hearing — parole grant rates across racial groups showed little disparities: white people were granted parole at a rate of 36%, Black people at 34%, and Latinx people at 34%.[271]
- The differences in grant rates changed slightly when examining who was granted parole by the number of disciplinary violations they had at the time of their hearing. White people with no disciplinary violations were granted parole 43% of the time, Black people 47%, and Latinx people 45%. With one recent disciplinary violation, white people were granted parole 16% of the time, Black people 20%, and Latinx people 14%.

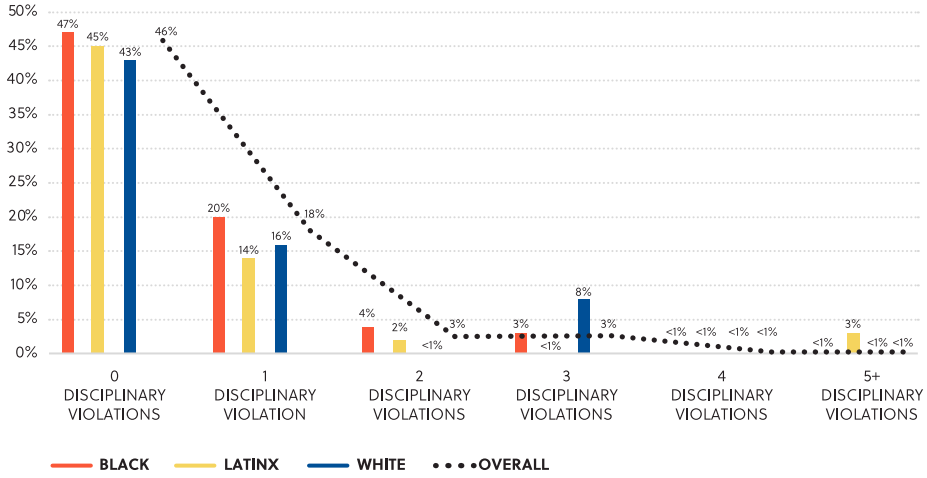
264 Cliff Kusaj, BPH Chief Psychologist, *Analysis of Comprehensive Risk Assessments Administered in 2020*, 3–4, 40 (Oct. 2021).
265 Seena Fazel, Jay P. Singh, and Helen Doll, *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and MetaAnalysis*, 345 BR. MED. J. e4692 (2012).
266 Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà vu All Over Again*, 48 Crime and Justice 439, 450 (2019).
267 The Board of Parole Hearings provided the Committee with information about one full year of parole hearings held in Fiscal Year 2019–2020. The data did not include any information about people who were eligible but did not have a hearing. Over 3,400 parole hearings were included in the data, including 7 people who had two hearings during this time. Transcripts of individual hearings were not examined.
268 California Board of Parole Hearings, *Report of Significant Events* for 2019 and 2020.
269 The data contained information about rules violations reports from March 2016 to the date of the hearing.
270 The Board of Parole Hearings does not control who is given disciplinary violations.
271 The small disparities across these three groups are not statistically significantly different from zero. That is to say, the patterns observed for the time period analyzed are consistent with the hypothesis that there are no overall racial disparities for these three groups in grant rates for those who go through parole hearings.

FIGURE 31: COUNT OF DISCIPLINARY VIOLATIONS FOR PEOPLE WHO HAD A PAROLE HEARING (2019–2020)



Source: Analysis of data provided by California Board of Parole Hearings.

FIGURE 32: GRANT RATES BY NUMBER OF DISCIPLINARY VIOLATIONS FOR PEOPLE WHO HAD A PAROLE HEARING (2019–2020)



Analysis of data provided by California Board of Parole Hearings.

Grant Rates in Other States. Because a large portion of California's parole-eligible population is convicted of homicide offenses, the Committee obtained parole grant rates for homicide offenses from comparable other states. Though the parole grant rate in California has increased significantly since 2008, it is lower than the homicide parole grant rates in other states.[272] In New York, the grant rate in 2017 (the latest available data) for people convicted of homicide offenses at their initial appearance before the parole board was 29%.[273] The comparable grant rate in California is 12–15%.[274] In Massachusetts, the grant rate for people convicted of homicide offenses was 30% in 2018 and 35% in 2019.[275] The parole grant rate in California was 22% in 2018 and 20% in 2019. In Texas, the parole grant rate for "aggravated violent offenses" was 35% in Fiscal Year 2019 and for just homicide offenses it was 22% in 2020.[276] California's parole grant rate was 16% in 2020.

The Committee acknowledges that parole release is a complicated and sensitive topic. But as Secretary Allison emphasized to the Committee, people in prison are capable of extraordinary change and she has witnessed first-hand the rehabilitative transformations that occur for many.[277]

For these reasons, the Committee reiterates its view that the parole grant in California could be higher without significant impacts to public safety. The recommendations from the Committee's 2020 report would help reach this goal by, among other changes, clarifying the legal standard the parole board should apply when determining whether someone is suitable for relase and providing clearer guidelines for how someone could prepare themselves for a parole hearing.

272 Board of Parole Hearings, *Suitability Hearing Summary Calendar Year 1978 through Calendar Year 2020*.
273 New York Board of Parole, Legislative Report 2017, 5.
274 The grant rate for initial parole hearings is not available for 2017, but it was 14% in 2018, 15% in 2019, and 12% in 2020. California Board of Parole Hearings, *Report of Significant Events* for 2018, 2019, and 2020.
275 Data provided by the Massachusetts Parole Board. In 2018, 41 people convicted of a homicide offense were granted parole out of 136 eligible people. In 2019, 44 people convicted of a homicide offense were granted parole out of 124 eligible people.
276 The Texas Board of Pardons and Paroles, *Annual Statistical Report, FY 2019*, 5 (11,424 "violent aggravated non-sexual" cases considered and 3,974 cases approved). The grant rate for FY 2021 homicide offenses is 21.91% and was provided by the Texas Board of Pardons and Paroles to Committee staff. For initial appearances it is 16.62% and for subsequent appearances it is 23.43%.
277 Committee on Revision of the Penal Code, May 13, 2021 Meeting, Part 3 at 16:00–21:30.

SECOND-LOOK SENTENCING

Last year, the Committee noted that California law provided a unique process for law enforcement to recommend resentencing for any person, no matter how old the conviction was.

The California Department of Corrections and Rehabilitation has been a particularly active user of this law and has recommended more than 1,900 people for possible resentencing for various reasons, including a person's exceptional rehabilitation, high risk of fatal illness while incarcerated, or changes in sentencing laws.

RESENTENCING REFERRALS BY CDCR (MARCH 2018–OCTOBER 2021)

	EXCEPTIONAL CONDUCT	CHANGE IN LAW	COVID	TOTAL
Referrals	193	1600	112	1905
Court Responses	139	1135	58	1332
% Court Responses	72%	71%	52%	70%
Resentencings	76	474	50	590
% Resentenced	39%	30%	36%	31%

Source: CDCR Office of Legal Affairs.

Several of the Committee's recommendations for improving this process were adopted into law, but a key component of the Committee's recommendation was not: allowing any incarcerated person to ask a court for resentencing after fifteen years. The Committee continues to urge the Legislature to create this mechanism, which would allow review of long sentences that may no longer be appropriate or in the interests of justice. Such second look resentencing would be a particularly apt way to address changes in the law that the Legislature did not make retroactive in all cases or that have yet to be definitively interpreted by the courts.

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2021 Administrative Report

2021 Administrative Report

The second year of the Committee on Revision of the Penal Code will end on January 1, 2022. The following report summarizes its activities during the past year from an administrative standpoint and briefly describes the Committee's future plans.

CREATION OF THE COMMITTEE

On January 1, 2020, the Committee on Revision of the Penal Code was formed.[278]

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.[279] Neither body has any authority over the substantive work of the other.[280] The two bodies have different statutory duties.[281]

The Committee has seven members. Five are appointed by the Governor.[282] One is an Assemblymember selected by the Speaker of the Assembly; the last is a Senator selected by the Senate Committee on Rules.[283] The Governor selects the Committee's chair.[284]

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.[285]

The Committee is required to prepare an Annual Report for submission to the Governor and the Legislature.[286]

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.[287] In 2021, it held nine meetings, three of which were two-day meetings. Due to the COVID-19 pandemic, meetings were conducted entirely by teleconference.[288] In addition to this report, the Committee issued a report in November 2021 recommending that the death penalty be abolished in California.

278 See 2019 Cal. Stat. ch. 25; Gov't Code § 8280(b).
279 See Gov't Code § 8281.5(d).
280 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.
281 Compare Gov't Code §§ 8289, 8290 (duties of Commission) with Gov't Code § 8290.5 (duties of Committee).
282 Gov't Code § 8281.5(a), (c).
283 Gov't Code § 8281.5(a).
284 Gov't Code § 8283.
285 Gov't Code § 8290.5(a).
286 Gov't Code § 8293(b).
287 Gov't Code §§ 11120–11132.
288 This was made possible by Executive Orders N-25-20 and N-29-20.

PERSONNEL OF THE COMMITTEE

The following people were members of the Committee when this report was approved:

CHAIR
Michael Romano

LEGISLATIVE MEMBERS
Senator Nancy Skinner
Assemblymember Alex Lee

GUBERNATORIAL APPOINTEES
Hon. Peter Espinoza
Hon. Thelton E. Henderson
Hon. Carlos Moreno
Priscilla Ocen

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

Thomas M. Nosewicz
Legal Director

Rick Owen
Staff Attorney

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

Lara Hoffman
Natasha Minsker
Daniel Seeman

The following people from the California Policy Lab provide data analysis and research support to the Committee:

Mia Bird
Omair Gill
Johanna Lacoe
Molly Pickard
Steven Raphael
Alissa Skog

The following people 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
Chief of Administrative Services

This report was designed by Ison Design.

COMMITTEE BUDGET

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

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

PLANNED ACTIVITIES FOR 2022

In 2022, the Committee expects to follow the same general deliberative process that it used in 2020 and 2021. It will hold regular public meetings with speakers representing all groups that have an interest in reform of the criminal legal system. At those meetings, the Committee will identify, debate, and develop reforms that would reduce unnecessary levels of incarceration and increase public safety.

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

ACKNOWLEDGEMENTS

Many individuals and organizations participated in Committee meetings in 2021 or otherwise contributed towards this report. The Committee is deeply grateful for their assistance.

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

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

KEYNOTE SPEAKERS

(in order of appearance)

Hon. Tani Cantil-Sakauye
Chief Justice of California

Hon. Rob Bonta
Attorney General of California

PANELISTS

(in alphabetical order)

Jeffrey Aaron
Mendocino County Public Defender

Kathy Allison
Secretary of the California Department of Corrections and Rehabilitation

Doug Bond
Chief Executive Officer, Amity Foundation

Susan Burton
Founder and President, A New Way of Life

Susan Bustamante
California Coalition of Women Prisoners

Matt Cate
President, Cate Consulting; Former Secretary of the Dept of Corrections and Rehabilitation; Former Executive Director of the CA State Association of Counties

Angela Chan
Policy Director and Senior Staff Attorney, Asian Americans Advancing Justice

Amy Fettig
Executive Director, The Sentencing Project

Michele Hanisee
President, Deputy District Attorney Association of Los Angeles County

Jarrett Harper
Ambassador, Represent Justice

Dr. Joshua Kleinfeld
Professor of Law, Northwestern Pritzker School of Law

Justice J. Anthony Kline
Presiding Justice, California First District Court of Appeal

Barbara R. Levine
Former Executive Director, Citizens Alliance on Prisons and Public Spending (Michigan); Former Commissioner of Michigan Criminal Justice Policy Commission

Kelly Mitchell
Chair of the Minnesota Sentencing Guidelines Commission, Executive Director of the Robina Institute of Criminal Law and Criminal Justice

Professor John Pfaff
Professor of Law, Fordham University School of Law

Insha Rahman
Vice President, Advocacy & Partnerships, Vera Institute of Justice

Mike Reynolds
Author of Three Strikes ballot initiative

Dr. Christopher Seeds
Assistant Professor of Criminology and Law and Society, UC Irvine

Jennifer Shaffer
Executive Officer, California Board of Parole Hearings

Marshall Thompson
Vice-Chair, Utah Board of Pardons and Parole; Former Director, Utah Sentencing Commission

Professor Michael Tonry
Professor of Criminal Law and Policy, University of Minnesota Law School

Earlonne Woods
Producer, Co-Host, Co-Creator, Ear Hustle Podcast

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. The Committee also received generous support from staff and faculty at Stanford Law School in developing our recommendations and drafting this report.

73 Appendix A: Biographies of 2021 Committee Members

75 Appendix B: Additional Data

Appendix

Appendix A: Biographies of 2021 Committee Members

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

Peter Espinoza, of Los Angeles, served as director of the Office of Diversion and Reentry at the Los Angeles County Department of Health Services from 2016 until November 2021. He served as a commissioner and judge at the Los Angeles County Superior Court from 1990 to 2016. Espinoza was a deputy public defender at the Orange County Public Defender's Office from 1981 to 1983. He earned a juris doctor degree from the University of California, Los Angeles, School of Law.

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

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

Carlos Moreno, of Los Angeles, has been a self-employed JAMS arbitrator since 2017. Moreno was United States Ambassador to Belize from 2014 to 2017. He was of counsel at Irell & Manella LLP from 2011 to 2013. Moreno was an Associate Justice of the California Supreme Court from 2001 to 2011 and a District court Judge for 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.

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

Senator Nancy Skinner, of Berkeley, has been a member of the California State 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. 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

County-level Prison Incarceration Rates by Race

COUNTY-LEVEL PRISON INCARCERATION RATES BY RACE

Source: Analysis of data provided by CDCR Office of Research. Population data is ACS 2019. Six counties that had less than 50 people in CDCR custody are excluded. "NA" indicates that less than 50 people were sentenced in a particular category. Incarceration rates are per 100,000 of the relevant population.

COUNTY	BLACK	WHITE	LATINX	AMERICAN INDIAN/NATIVE ALASKAN	ASIAN OR PACIFIC ISLANDER	OTHER
Alameda	1,071	40	138	15	230	142
Amador	1,651	230	487	945	2,008	350
Butte	2,454	306	287	76	1471	176
Calaveras	317	152	109	NA	2,174	NA
Colusa	781	264	306	NA	NA	465
Contra Costa	802	64	138	12	395	149
Del Norte	1,224	499	387	110	1,132	388
El Dorado	1,753	178	190	45	582	129
Fresno	1,486	178	327	53	753	514
Glenn	1,554	222	265	NA	1,023	209
Humboldt	1,422	212	235	NA	1,086	114
Imperial	747	182	126	38	453	117
Kern	1,781	269	395	48	744	193
Kings	2,028	441	680	138	2,418	360
Lake	2,104	316	287	NA	1,402	289
Lassen	727	298	821	NA	1,303	147
Los Angeles	1,479	91	306	14	374	496
Madera	1,195	239	405	158	1,035	548
Marin	905	42	104	7	228	99
Mariposa	395	266	357	NA	2,154	294
Mendocino	3,355	274	292	52	1,804	202
Merced	1,575	211	341	59	859	524
Monterey	1,388	166	395	79	1,709	440
Napa	1,475	134	255	61	491	262
Nevada	2,092	102	107	NA	242	91
Orange	1,104	88	285	25	491	263
Placer	1,132	116	172	14	947	158
Riverside	1,248	219	347	28	1,004	266

County-level Prison Incarceration Rates by Race

(CONTINUED)

COUNTY	BLACK	WHITE	LATINX	AMERICAN INDIAN/NATIVE ALASKAN	ASIAN OR PACIFIC ISLANDER	OTHER
Sacramento	1,739	202	320	53	1,260	437
San Benito	220	97	194	56	NA	258
San Bernardino	1,136	201	238	22	527	224
San Diego	1,199	107	233	39	778	241
San Francisco	783	20	69	9	245	125
San Joaquin	1,573	199	322	66	1,473	557
San Luis Obispo	1,487	149	331	29	662	145
San Mateo	1,412	49	195	31	604	219
Santa Barbara	1,284	114	330	16	437	252
Santa Clara	1,268	90	372	19	891	375
Santa Cruz	803	101	287	16	3,242	74
Shasta	3,498	548	428	200	1,764	270
Siskiyou	1,316	381	201	122	2,160	247
Solano	659	94	139	30	877	132
Sonoma	1,068	84	195	42	1,536	132
Stanislaus	1,300	218	245	46	645	527
Sutter	1,960	275	323	13	960	207
Tehama	3,390	453	439	305	1,461	414
Trinity	4,724	451	431	NA	430	NA
Tulare	2,074	263	455	103	1,401	718
Tuolumne	1,266	455	559	117	917	131
Ventura	1,049	95	264	18	347	103
Yolo	1,913	131	332	26	1,810	215
Yuba	1,879	524	422	56	1,515	363

County-level Incarceration Rates by Race for People Sentenced Under the Three Strikes Law

COUNTY-LEVEL INCARCERATION RATES BY RACE FOR PEOPLE SENTENCED UNDER THE THREE STRIKES LAW

Source: Analysis of data provided by CDCR Office of Research. Population data is ACS 2019. Six counties that had less than 50 people in CDCR custody are excluded. "NA" indicates that less than 50 people were sentenced in a particular category. Incarceration rates are per 100,000 of the relevant population.

COUNTY	BLACK	WHITE	LATINX	AMERICAN INDIAN/NATIVE ALASKAN	ASIAN OR PACIFIC ISLANDER	OTHER
Alameda	262	6	12	38	1	16
Amador	1,061	100	169	402	NA	NA
Butte	868	62	60	412	NA	46
Calaveras	NA	19	36	1,087	NA	NA
Colusa	391	26	16	NA	NA	NA
Contra Costa	201	13	10	176	NA	19
Del Norte	667	164	203	360	NA	155
El Dorado	631	63	66	388	22	48
Fresno	672	71	102	344	13	126
Glenn	518	90	60	512	NA	209
Humboldt	524	29	19	192	NA	14
Imperial	232	73	35	NA	38	NA
Kern	894	113	159	372	10	68
Kings	1,116	169	220	780	NA	168
Lake	751	82	83	260	NA	58
Lassen	421	84	496	474	NA	NA
Los Angeles	642	33	85	168	3	121
Madera	671	90	114	582	32	258
Marin	344	16	24	NA	NA	41
Mariposa	395	86	153	923	NA	147
Mendocino	1,597	77	41	647	52	NA
Merced	717	77	95	107	20	127
Monterey	671	62	103	488	32	160
Napa	612	48	50	246	26	71
Nevada	628	22	32	NA	NA	NA
Orange	357	21	49	131	4	58
Placer	645	56	54	291	7	69
Riverside	561	80	110	338	6	88

County-level Incarceration Rates by Race for People Sentenced under the Three Strikes Law

(CONTINUED)

COUNTY	BLACK	WHITE	LATINX	AMERICAN INDIAN/NATIVE ALASKAN	ASIAN OR PACIFIC ISLANDER	OTHER
Sacramento	811	73	114	576	11	113
San Benito	220	34	42	NA	NA	86
San Bernardino	472	62	71	206	3	41
San Diego	582	43	81	393	12	87
San Francisco	199	4	9	122	1	20
San Joaquin	466	42	60	471	9	80
San Luis Obispo	917	53	105	265	10	79
San Mateo	724	17	42	173	9	71
Santa Barbara	618	41	107	125	4	47
Santa Clara	623	32	100	386	5	75
Santa Cruz	281	29	51	1,746	NA	21
Shasta	1,724	234	184	716	33	111
Siskiyou	585	127	73	1,080	NA	49
Solano	208	20	21	80	3	19
Sonoma	500	26	40	512	NA	26
Stanislaus	496	80	55	161	NA	151
Sutter	475	56	50	480	NA	0
Tehama	636	101	63	562	NA	155
Trinity	787	58	NA	NA	NA	NA
Tulare	847	101	114	539	32	192
Tuolumne	633	201	363	393	NA	66
Ventura	525	28	70	99	2	27
Yolo	1,023	55	124	1,056	3	69
Yuba	705	176	88	337	NA	97