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Did *Brown v. Plata* Unleash a More Dangerous Genie?

Every society gets the kind of criminal it deserves. What is equally true is that every community gets the kind of law enforcement it insists on.
– Robert F. Kennedy

In 2002, former San Diego County District Attorney Paul Pfingst, along with Gregory Thompson and Kathleen Lewis, authored a law review article entitled *"The Genie's Out of the Jar": The Development of Criminal Justice Policy in California*.[1] Their premise that the "Genie is out" referred to the public's use of California's initiative and judicial election process to address legislative and judicial decisions that failed to support public safety. Faced with the legislature's failure to approve tougher laws and numerous harmful judicial decisions, prosecutors, law enforcement, and crime victim organizations went to the voters through multiple initiatives and elections to improve justice for crime victims and impose meaningful consequences on offenders.

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1 Pfingst, et al., *"The Genie's Out of the Jar": The Development of Criminal Justice Policy in California* (2002) 33 McGeorge L. Rev. 717.

These collective efforts produced results that expanded the criminal justice system's traditional focus on offenders to include improved treatment of victims and greater protection of the public from dangerous criminals:

- In 1982, the voters approved Proposition 8, *The Victims' Bill of Rights*, which created statutory and constitutional rights for crime victims and increased punishment for repeat offenders.
- In 1986, three justices who had repeatedly overturned capital murder convictions and/or death sentences were removed from the California Supreme Court by voters.
- In 1990, the voters approved Proposition 115, *The Crime Victims Justice Reform Act*, which expanded the definition of first-degree murder, established a new crime of torture, and made other procedural reforms affecting discovery, the grand jury, and hearsay evidence at preliminary hearings.
- In 1994, the voters approved Proposition 184, *The Three Strikes Sentencing Initiative*, which created a 25-years-to-life sentence for offenders who had committed two or more serious or violent felony offenses and then committed a third felony offense.
- In 2000, voters approved Proposition 21, *The Gang Violence and Juvenile Crime Prevention Act*, which expanded the ability to try juveniles who had committed violent offenses as adults.
- Finally, in 2008, six years after the publication of the "*Genie's Out of the Jar*" article, California voters approved Proposition 9, *Marsy's Law*, which extended and recodified the statutory and constitutional rights of crime victims provided in 1982 by Proposition 8.

These new tools were used extensively by prosecutors and have been widely credited for precipitous reductions in crime and more respectful treatment of crime victims in our court system. Regardless of the debate over the effectiveness of these new tools in reducing crime, there is no debate that more criminals went to prison and crime fell. But instead of the legislature embracing the will of the people, they refused to fund the criminal justice system, resulting in a shortage of prison space.

[2] "The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system. Unfortunately, as California's prison population has grown, California's political decision-makers have failed to provide the resources and facilities required to meet the additional need for space and for other necessities of prison existence." (*Schwarzenegger v. Plata* (2009) Three Judge Panel Order, Aug. 4, 2009).

Brown v. Plata

For years, California prisons remained overpopulated as the state declined to build more institution space.[2] Two class action lawsuits, one on behalf of inmates with mental disorders and one on behalf of inmates with serious medical conditions, went before a three-judge panel of the federal Ninth Circuit Court of Appeals, which ordered implementation of a two-year project to reduce California's burdened prison system to 137 percent of its capacity. The state appealed the authority of the panel to the U.S. Supreme Court. In *Brown v. Plata*,[3] Justice Kennedy, writing for the majority, chronicled a history of California's 80,000 prison beds at double their capacity for the prior 11 years. The Court found this overcrowding exceeded capacity so egregiously that it concluded the current levels of incarceration in California's prisons violated the Eighth Amendment against cruel and unusual punishment. The majority opinion agreed with the three-judge panel that the only means to reduce the prison population to meet the required capacity was through the release of inmates. The named defendant in the lead lawsuit was Governor Jerry Brown.

Brown had moved into the governorship in 2011 after serving as the California State Attorney General. Brown's staff when he was Attorney General had furiously fought against the three-judge panel and the prison reform movement. And Brown, personally an ardent death penalty opponent, had also defended the state's death penalty law in his capacity as Attorney General, thus fulfilling his constitutional duty "to see that the laws of the state are uniformly and adequately enforced.[4] During his tenure as Attorney General, he did not defend all laws that were challenged. But now Brown was governor, and the stage was set for major policy changes that would be claimed to be needed to meet the demands of *Plata*, and for the selective enforcement of laws in California.

In response to *Plata* (or at least blamed on *Plata*), the pendulum began to swing back as a new generation of criminal justice reformers focused on eliminating or weakening many of the so-called "tough on crime" measures previously approved by voters through the initiative process. This movement focused its sights and policy arguments on overcrowded state prisons, historical racial disparities in the criminal justice system, and the goals of

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[3] *Brown v. Plata* (2011) 563 U.S. 493.

[4] Cal. Const., Art. V, sec. 13.

offender rehabilitation and reform. *Plata* made it easy to ignore the successes of the "tough on crime" laws, and the federal court's decision provided the excuse to upend the criminal justice system. *Plata* gave politicians and activists cover to change the focus of criminal reform.

By contrast, in the 1990s and into the 2000s, California's criminal justice initiatives were supported largely by the grassroots efforts of people with family members who were victims of crime, including Mike Reynolds,[5] Marc Klaas,[6] and Dr. Henry T. Nicholas, III.[7] However, the next generation of criminal justice reforms received substantial funding by billionaire investors, corporate executives, and celebrities. We detail many of these measures in this article, but the three hallmarks of this movement are Governor Jerry Brown's prison realignment in AB 109, which shifted a large number of felony prison inmates to local jails administered by county sheriffs which was claimed to be in response to *Plata*; Proposition 47, *The Safe Neighborhoods and Schools Act*, which redefined many drug and theft offenses from felonies to misdemeanors; and Proposition 57, *The Public Safety and Rehabilitation Act*, which allowed "early release" to countless state prison inmates.

Over the last decade it has become increasingly clear that these new reformers have been largely successful in their policy goals of reducing prison populations, shortening sentences, and weakening many laws that once enjoyed broad public support. One of the most troubling criticisms of the criminal justice system from these reformers has centered on concerns about systemic racism and the system's disproportionate impact on people of color and those living in disadvantaged communities. However, it is equally clear that their efforts to address these impacts have not made Californians safer and more secure, nor have they lessened the disproportionate impact of crime on disadvantaged communities or on people of color.

In this article, we first discuss some of the foundational elements and definitional considerations that undergird this new reform movement. Second, we chronicle several of the most significant initiative and legislative changes that the movement's efforts have produced. Finally, we look at the impact of these changes both in the context of the crime data and anecdotal

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[5] Mike Reynolds's daughter Kimber was murdered in 1992.

[6] Marc Klaas's 12-year-old daughter Polly was murdered in 1993.

[7] Dr. Henry Nichols's sister Marsy was murdered in 1983; she is the namesake for Marsy's Law, California's Victims' Bill of Rights, enacted by voters as Proposition 9 in 2008.

examples. As the inevitable policy debate surrounding criminal justice continues, it is important to understand the impact of these changes on the rights afforded to victims of crime, whether these changes helped or hurt Californians, and whether they increased or reduced the effectiveness and fairness of our system of justice.

DEFINITIONS, NAMES, AND TITLES

Before we explore the full scope and impact of these criminal justice reforms, we must examine measurement nomenclature and definitions. If we define a "successful reform" as one that reduces crime, we should clarify what we mean by "reducing crime." For example, if reducing crime refers to a reduction in state prison commitments, then creating legislation that reduces the number of felony crimes can create a false perception that crime has declined. Similarly, reducing the number of felony offenses eligible for state prison commitment can be used to claim crime is going down.

We must be equally clear when we discuss rehabilitation. If our definition of "rehabilitation" is completing probation or parole without a violation, cutting the period for probation or parole (e.g., from three years to one year) significantly impacts data results and ultimately undermines the comparative value of the current data. If "successful rehabilitation" definitionally tolerates committing new offenses as long as the new offense is less "serious," that also increases the likely success of the "rehabilitation."

Recidivism

The definition of recidivism, as used to describe successes in recent years, has been substantially changed. Assembly Bill No. 1050, enacted in September 2013, required the Board of State and Community Corrections (BSCC), in consultation with the Secretary of CDCR and others, to develop definitions of key criminal justice terms, including recidivism "to facilitate consistency in local data collection, evaluation, and implementation of evidence-based programs."[8]

BSCC defines recidivism as "conviction of a new felony or misdemeanor committed within three years of release from custody or committed within three years of placement on supervision for a previous criminal conviction." Thus, beginning in 2016, CDCR shifted its primary measure of recidivism

[8] *https://www.cdcr.ca.gov/research/recidivism-reports/* [as of Oct. 18, 2023].

from the three-year *return-to-prison rate* to the *three-year conviction rate* consistent with the statewide definition of recidivism.

As a result, measuring recidivism rates of inmates released due to Proposition 47, Proposition 57, and Assembly Bill No. 109 does not use *arrest* as a criterion for recidivism. Instead, it uses *conviction within a three-year period* as a determinate of recidivism. Under this definition, an offender who commits a new offense two years after release and then has their criminal case concluded 13 months after the offense date would not be considered a recidivist. Generally, more serious criminal offenses with heavier potential sentences, like homicide and child sexual assault, take longer to move through the criminal justice system; therefore, getting a conviction for an offense that occurs within the three-year period is not always feasible, and thus, such an offense would not count as recidivism in CDCR data collection.

“Serious” and “Violent” Crimes

One way to re-frame criminal justice is to talk about what is legally covered under the serious or violent category. California uses separate code sections to define serious[9] and violent[10] felonies. There may be some crossover between the two terms, but there are many felonies most people would consider to be “serious” and/or “violent” that do not meet the Penal Code’s definition of those offenses. For example, under the Penal Code, rape may be both a serious and violent felony, while other types of sexual assault, such as sodomy, oral copulation, and sexual penetration of an intoxicated person, are considered serious but not violent offenses under California law. Similarly, domestic violence is unquestionably a crime of violence, but it does not constitute a serious or violent felony under California statutory law. And there are many more examples: assault with a deadly weapon, vehicular manslaughter, and certain gang crimes for example, do not meet the violent felony definition.

INITIATIVES

Understanding the Initiative Process

In California, new laws and constitutional change occur through either the legislature or the initiative process. The initiative process allows voters to impose change that bypasses resistance from their elected legislative

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[9] Pen. Code, § 1192.7(c).

[10] Pen. Code, § 667.5.

representatives, goes directly to the People, and has three stages. First, proponents of the measure submit written language to the Attorney General for a "title and summary"—a brief description of the initiative and its costs that will appear on the ballot. Then, proponents must obtain sufficient signatures of registered voters to qualify the measure for the ballot. The Secretary of State reviews the signatures to ensure the required number has been obtained. The third step involves voters approving the measure at an election.

However, the "title and summary" process has become somewhat controversial in recent years. The broad authority granted to the Attorney General has been the subject of numerous lawsuits—from both liberals and conservatives—claiming the Attorney General used his or her authority to manipulate voter impressions of the measures. For those who feel the Attorney General's title and summary are biased, filing a suit in Sacramento County is the only recourse available. But courts historically have been hesitant to alter the title and summary as the courts have created a presumption in favor of the Attorney General's decision (which nowhere appears in the legislative implementation of the initiative process). The power becomes greater when competing measures exist.[11] In 2020, the Attorney General was sued six times over title and summary issues, a record since 2008.[12] There have been unsuccessful efforts to move this authority to non-partisan parts of the government. Such a neutralized process exists in other states[13] as well as in California for measures proposed by the Attorney General.[14]

Criminal Justice Reform Initiatives

Proposition 36: The *Three Strikes Reform Act* (2012)

Proposition 36, The Three Strikes Reform Act, was the first significant reform initiative that lessened the consequences for crime. This measure amended Proposition 184, the Three Strikes Law in California that was passed in 1994 on the heels of the murder of Polly Klaas, a 12-year-old girl kidnapped from her Petaluma home and murdered by Richard Allen Davis. At the time of

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[11] Christopher S. Elmendorf and Douglas M. Spencer, *Are Ballot Titles Biased? Partisanship in California's Supervision of Direct Democracy* (2013) 3 U.C. Irvine L. Rev. 511.

[12] Christopher, *Critics demand fairer prop ballot labels and summaries, but lawsuits tend to flame out*, Cal Matters (Aug. 7, 2020).

[13] *Id.*

[14] Elec. Code, § 9003.

[15] *Richard Allen Davis' Life of Crime*, SFGate (Aug. 6, 1996).

the crime, Davis, a habitual offender, was out of custody after serving half of a 16-year sentence for an earlier kidnapping.[15] Under Proposition 184, offenders with two or more serious or violent felonies who committed a third felony offense of any kind could have been subject to a minimum penalty of 25 years to life.

Still, while the Three Strikes Law may have been effective in removing hard-core criminals from society, there were instances where an offender's third strike involved a relatively minor offense. Such instances became key arguments for supporters of Proposition 36, as did California's overcrowded prison system and the decision in *Plata*. Los Angeles County District Attorney Steve Cooley and San Francisco County District Attorney George Gascón supported revamping the Three Strikes Law to require that the third strike be a serious or violent felony as defined in California law.[16]

Opponents of Proposition 36—including the majority of prosecutors, law enforcement, and victims' groups—highlighted the fact that the law would result in resentencing those already deemed to be so dangerous they received a 25-years-to-life sentence.[17] They also countered the instances of abuse by pointing out courts already had the authority to remove the imposition of a strike prior, if the interest of justice so dictated.[18] Finally, they noted the initiative impacted not only future offenders; it also meant resentencing offenders convicted under the Three Strikes Law where the third strike was neither serious nor violent. While not defined under California law as "serious" or "violent" offenses, there were many crimes, such as a felon in possession of a firearm, aggravated assault, domestic violence, and trafficking narcotics, that members of the public would certainly consider serious.

Proposition 47: *The Safe Neighborhoods and Schools Act* (2014)

Perhaps no initiative has brought more focus on the "title and summary" debate than 2014's Proposition 47, *The Safe Neighborhoods and Schools Act*. The initiative, which passed by overwhelming support—58 percent of the voters—caused a massive restructuring of California's sentencing system.

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[16] Ballot Pamp., Gen. Elec. (Nov. 6, 2012), argument in favor of Prop. 36.

[17] Ballot Pamp., Gen. Elec. (Nov. 6, 2012), argument against Prop. 36.

[18] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

On the heels of *Brown v. Plata*, reformers drafted the initiative to address prison overcrowding.[19] They sought to reduce many theft and narcotic offenses from felonies to misdemeanors, arguing that offenses previously eligible for sentencing to California's prison systems would now only be eligible for sentences served in local county jail facilities. Thus, even if the same number of offenses were committed post-enactment, California's state prison population would automatically go down because the offenses would no longer qualify for a prison sentence. This approach of moving offenders from the state-run prison facilities to local incarceration became a key tool in the effort to decrease state prison population and meet the requirements set by the three-judge panel in *Plata*.

Focusing on "non-serious felonies," Proposition 47 reduced many narcotics-possession felony offenses under Health and Safety Code sections 11350 and 11377 for hard drugs, like heroin, cocaine, and methamphetamine to misdemeanors. (And while not an issue at the time, Proposition 47 has the same impact on possession of fentanyl today.) Proposition 47 also increased the former dollar amount that qualified for felony theft offenses from $400 to $950. With this change, an offender who steals less than $950 may only be prosecuted as a misdemeanant. The initiative also eliminated the ability to charge repeated thefts as a felony. So, under this initiative, an offender who, for example, commits 10 unrelated thefts of less than $950 over several months can only be prosecuted with a misdemeanor violation.

Like Proposition 36, Proposition 47 operated not just prospectively but retroactively as well, thus authorizing numerous convicted state prison inmates to seek resentencing according to the new standards. There were, however, exceedingly narrow limitations on this resentencing for those previously convicted of certain violent offenses or certain sex offenses.

Where are the benefits for schools in *The Safe Neighborhoods and Schools Act?* The language of the initiative stated that the savings created by the reduced prison population were to be taken from the General Fund and placed into a Safe Neighborhoods and Schools Act fund, 25 percent of which was to go to truancy reduction. As for safe neighborhoods, the remainder of the savings was to be spent largely on drug rehabilitation programs and mental health programs.

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[19] Lynn, *Prop 47 Five years Later,* LA Progressive (Aug. 12, 2020).

The title and summary of Proposition 47 written by the Attorney General made the initiative's sweeping changes seem insignificant.[20] And the proponents raised $10,976,491 for the initiative.[21]

The opposition focused on the release of criminals back into society. Democratic U.S. Senator Dianne Feinstein stood out as one of the strongest opponents of Proposition 47, arguing that the crimes impacted by Proposition 47 were not minor offenses. Stealing a firearm, stealing livestock, stealing from commercial merchants, forgery, and fraud offenses would all constitute misdemeanor crimes unless the value stolen was over $950. Further, Feinstein pointed out that resentencing of convicted felons

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[20] The summary for Proposition 47 reads as follows:

> Criminal Sentences. Misdemeanor Penalties. Initiative Statute.
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> - Requires misdemeanor sentence instead of felony for certain drug possession offenses.
> - Requires misdemeanor sentence instead of felony for the following crimes when amount involved is $950 or less: petty theft, receiving stolen property, and forging/writing bad checks.
> - Allows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation or is registered sex offender.
> - Requires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk.
> - Applies savings to mental health and drug treatment programs, K–12 schools, and crime victims.
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> Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:
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> - Net state criminal justice system savings that could reach the low hundreds of millions of dollars annually. These savings would be spent on school truancy and dropout prevention, mental health and substance abuse treatment, and victim services.
> - Net county criminal justice system savings that could reach several hundred million dollars annually.

The text of Proposition 47 listed as its findings and declarations:

> The People enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, maximize alternatives for non-serious, nonviolent crime, and invest the savings generated from this Act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment. This Act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.

It went on to state the purpose and intent of the Act:

> In enacting this Act, it is the purpose and intent of the people of the State of California to:
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> 1. Ensure that people convicted of murder, rape, and child molestation will not benefit from this Act.
> 2. Create the Safe Neighborhoods and Schools Fund with 25% of the funds to be provided to the Department of Education for crime prevention and support programs in K-12 schools, 10% of the funds for trauma recovery services for crime victims, and 65% of the funds for mental health and substance abuse treatment programs to reduce recidivism of people in the justice system.
> 3. Require misdemeanors instead of felonies for non-serious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.
> 4. Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors.
> 5. Require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety.
> 6. This measure will save significant state corrections dollars on an annual basis. Preliminary estimates range from $150 million to $250 million per year. This measure will increase investments in programs that reduce crime and improve public safety, such as prevention programs in K-12 schools, victim services, and mental health and drug treatment, which will reduce future expenditures for corrections.

[21] California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014), Ballotpedia.

would occur unless they fell under a very narrowly tailored definition of dangerousness.[22] That standard required a court to find that the defendant would not only re-offend, but would re-offend by committing a handful of violent offenses, often referred to as super-strikes.[23] Thus, a Three Strikes defendant who had committed a series of robberies that were qualifying prior strike offenses, followed by a multitude of "an assault likely to commit death or great bodily injury," would be eligible for resentencing and would not meet the dangerous standard even if the defendant admitted to the court they planned to commit a series of similar assaults upon being released.

Proposition 47 also created a new Penal Code section called shoplifting, which punishes a defendant who enters a commercial establishment during business hours and commits theft of a value of under $950 with a misdemeanor.[24] That offense could previously be charged as second-degree burglary, a felony if it could be shown that they entered the structure with the intent to commit theft, regardless of value. In short, seemingly small changes—shoplifting and the dollar value change—created huge opportunities for the criminally inclined. While Proposition 47 may have created a lesser crime of shoplifting for the first-time offender,[25] it eliminated second-degree burglary as a potential charge for the repeat offender intent on entering open businesses to steal items of less than $950.

Proposition 47 also imposed the $950 minimum requirement for forgery. Prior to its passage, forging a check was a wobbler, an offense punishable as either a felony or misdemeanor. Proposition 47 required a felony forgery to involve passing a forged document worth $950 or more. A forger can now write millions of dollars in forged checks and only face misdemeanor consequences, so long as the value of each check remains under $950. In *People v. Hoffman*, the defendant was convicted of seven separate counts of writing forged checks.[26] The value of each check was less than $950, but the total aggregated value exceeded $950.[27] Hoffman entered her plea prior to the passage of Proposition 47 and petitioned for resentencing. The trial court denied the resentencing because the total aggregate value of the checks exceeded $950. The Court of Appeal reversed the trial court's

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[22] *Prop. 47 Will Make Californians Less Safe: Dianne Feinstein*, Los Angeles Daily News (Oct. 15, 2014, Aug. 28, 2017).

[23] Pen. Code, § 667(c)(2)(e)(iv).

[24] Pen. Code, § 459.5.

[25] Prior to Proposition 47, a prosecutor could already elect to charge a first-time offender with a misdemeanor offense of petty theft [Pen. Code, § 484/488 or 490.5].

[26] *People v. Hoffman* (2015) 241 Cal.App.4th 1304.

[27] *Id.* at 1307. The check amounts were $325, $400, $280, $350, $325, $350, and $175.

decision because no legal basis exists to aggregate the forged checks.[28] The opinion references the concerns about the issue expressed in the Voter Information Guide: "California has plenty of laws and programs that allow judges and prosecutors to keep first-time, low-level offenders out of jail if it is appropriate. Prop. 47 would strip judges and prosecutors of that discretion … [T]here needs to be an option besides a misdemeanor slap on the wrist."[29] The Court of Appeal issued a similar opinion in *People v. Salmorin*, holding that even if the forged checks were part of a single count, the trial court could not aggregate the value of the checks.[30]

With *Plata* as a backdrop of impending doom, the arguments made by Proposition 47 supporters were too much for California voters to resist. As the *New York Post* said, voters were deceived by:

> … activists and politicians who tricked them into thinking they were voting for greater public safety. … The authors named the proposed law The Safe Neighborhoods and Schools Act. It promised to save money on costly incarceration and spend the savings on mental health and education programs. With a favorable ballot description written by then-Attorney General Kamala Harris, it passed 60% to 40%. Under Proposition 47, property thefts valued at less than $950 became an automatic misdemeanor, even if the stolen item was a handgun. The measure also made incarcerated felons eligible for resentencing and release if their past crimes retroactively qualified as misdemeanors. Californians quickly discovered that the promised "Safe Neighborhoods" generate a lot of car break-ins.[31]

Proposition 57: *The Public Safety and Rehabilitation Act of 2016*

Emboldened by their success, in 2016, the reformers—including then-Governor Jerry Brown—set out to completely revamp sentencing with Proposition 57. Titled *The Public Safety and Rehabilitation Act of 2016*, its stated purposed and intent was to:

1. Protect and enhance public safety.
2. Save money by reducing wasteful spending on prisons.
3. Prevent federal courts from indiscriminately releasing prisoners.
4. Stop the revolving door of crime by emphasizing rehabilitation,

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[28] *Id.* at 1308.

[29] Id. at 1311.

[30] *People v. Salmorin* (2018) 1 Cal.App.5th 738, 745.

[31] Shelley, *LA's smash-and-grab epidemic: Voters helped break California's justice system*; New York Post, Opinion, (Aug. 26, 2023, Aug. 27, 2023).

especially for juveniles.[32]

5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.

The measure again focused on the protection and enhancement of public safety by reducing state prison populations. It focused on the so called "wasteful" spending on prisons and referenced *Plata* by claiming federal courts were the ones indiscriminately releasing prisoners. Proposition 57 greatly expanded conduct credits to offenders and reduced the overall length of many sentences. Proposition 57 also granted eligibility for early release to any inmate convicted of a "non-violent" offense. These inmates become eligible for parole after completing the full term of their primary offense. According to the Legislative Analyst's Office, 30,155 inmates were eligible for early release under this Act; an additional 16,038 would be eligible after completing their primary term.[33] Finally, Proposition 57 granted broad discretion to the California Department of Corrections and Rehabilitation (CDCR) to create its own rules regarding prisoner release by awarding increased conduct credits to nearly all inmates, including violent rapists and murderers. This unfettered discretion resulted in numerous instances of offenders receiving early release with little justification, and then committed violent offenses.[34]

As stated in an August 2023 piece in the *New York Post* entitled "Voters helped break California's justice system," when it came to Proposition 57,

> [Then Attorney General] Harris wrote another favorable ballot description and Brown led a campaign that outspent opponents by roughly 15 to 1. [¶] It turned out that the list of crimes considered "nonviolent felony offenses" includes rape of an unconscious person, supplying a firearm to a gang member, hostage-taking, human trafficking, domestic violence with trauma, and attempting to explode a bomb at a hospital or school.[35]

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[32] This article does not delve into a discussion of the myriad changes in juvenile law. We discuss the topic of juveniles only as it applies to adult offenders characterized as juveniles for the purpose of juvenile parole.

[33] Under California Penal Code section 1170, et seq., California sentencing involves a mix of indeterminate and determinate term sentencing. Most felony crimes require the court to impose either the low, middle, or upper term of sentence for a given crime. Where an offender commits multiple crimes with determinate sentences, the court imposes sentences for those crimes to run either concurrently or consecutively. Where the sentence is imposed consecutively, the court imposes one-third of the middle term for that offense, unless special rules apply.

[34] Watts, "*Secret" Prop. 57 prison credits: Are most felons really "earning" early release?*, CBS News Sacramento (Oct. 10, 2022, Oct, 11, 2022); Walters, *Tricky measure allows release of violent felons*, CalMatters (Dec. 6, 2022).

[35] Shelly, *LA's smash-and-grab epidemic: Voters helped break California's justice system*; New York Post, Opinion (Aug. 26, 2023, updated Aug. 27, 2023).

Proposition 64: *The Adult Use of Marijuana Act* (2016)

The Adult Use of Marijuana Act is notable not because it legalized marijuana for personal use, but for the huge market it created for illicit marijuana growers and sellers. Under the initiative, large-scale illegal marijuana transportation into California now faces minimal penalties. While Proposition 64 regulated the sale of marijuana, it also reduced the penalties for individuals selling marijuana outside of regulated marijuana businesses. The crime of possession for sale of marijuana is largely now a misdemeanor[36] as is the transportation for sale of marijuana. There are no enhancements based on weight limits of marijuana. Those who import truckloads of marijuana into California face only misdemeanor charges.[37]

These four initiatives—Propositions 36, 47, 57, and 64—caused the resentencing of countless inmates, dramatically reduced the consequences for crime, and gave almost unfettered discretion to CDCR to release inmates, seemingly at will.

LEGISLATION

As demonstrated above, *Plata* gave politicians cover to enact changes that were never dreamed of. After watching the successes of initiative after initiative, this new generation of reformers next went to work enacting significant changes in the California Legislature. Indeed, more than 50 reform bills have been approved by the legislature since 2010. We now turn to some of the more significant legislative changes.

Assembly Bill No. 109: The California Public Safety Realignment

Using prison overcrowding as a backdrop, the California Legislature shifted the burden of housing inmates from the state to local jurisdictions. A key strategy in reducing state prison population involved housing more offenders at a local level. California had an offense known as petty theft with a prior[38] that elevated a petty theft to a felony if the offender had previously been convicted of petty theft, thus enhancing punishment for repeat offenders. In 2010, Assembly Bill No. 1844 (Fletcher) modified the applicable statute, Penal Code section 666, to require three or more prior convictions of theft before an offender would face the enhanced punishment.[39] In 2014, Proposition

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[36] Cal. Health & Saf. Code, § 11359. *Note:* Those who meet the requirements of subdivision (c) may be charged with a felony.

[37] Cal. Health & Saf. Code, § 11360(a)(2).

[38] Pen. Code, § 666.

[39] *Id.*

47 changed this section again by making it only apply to those with certain qualifying offenses.[40]

In 2011, Assembly Bill No. 109, *The California Public Safety Realignment Act*, allowed non-violent, non-serious offenders to be housed and supervised at a county level.[41] This legislation came out of the Budget Committee and moved quickly through the legislative process. (The bill was introduced on January 10, 2011, and by April 4, had already been approved by the legislature and signed into law by the Governor.) CDCR heralded the bill as enabling California to "close the revolving door of low-level inmates cycling in and out of state prisons."[42] What CDCR failed to mention was that now those same offenders would become part of the revolving door in county jail facilities. This additionally reduced the burden on state parole and shifted it instead to Post Release Community Supervision (PRCS), now handled by county probation departments. With fewer parolees, there would be fewer violations and the consequences of violations would be different, depending on whether an offender was on state parole or PRCS. Prior to Assembly Bill No. 109, parole violators faced a return to prison. Under Assembly Bill No. 109, violating PRCS would no longer result in a return to a state prison facility; instead, the violator would face short term "flash" incarceration in local jail, electronic monitoring, or community service.[43]

Defendants sentenced on many felony offenses are now punished by "imprisonment" in the county jail,[44] but Assembly Bill No. 109 failed to account for the already overflowing county jail populations. County jail facilities that previously held convicted offenders for a year at most on their misdemeanor sentence, now found themselves tasked with holding inmates with sentences that measured in years. In addition, county jails had to accommodate defendants awaiting trial for misdemeanor and felony offenses, convicted misdemeanor offenders, and convicted felony offenders who had been granted probation.

The new law also placed caps on the combined length of a jail sentence and the post-incarceration period of supervision. So, for example, a felony

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[40] Voter Information Guide for 2014, General Election (2014).

[41] Assembly Bill No. 109 directed the state to give counties a portion of sales tax and vehicle license fee revenue to fund the new responsibilities realigned from the state to the counties. To receive the funding, counties are required to have a Community Corrections Partnership (CCP) that creates and oversees an Assembly Bill No. 109 Realignment Implementation Plan, which identifies those programs that address the responsibilities for realigned offenders going through the local justice continuum.

[42] California Department of Corrections and Rehabilitation Fact Sheet (Dec. 19, 2013).

[43] Pen. Code, § 3455.

offender who faced a maximum sentence of three years, who received an actual sentence of one year, would only be subject to community supervision for two years. Under pre-existing law, this offender would have been subject to a five-year probation period after completing the one-year jail sentence.

Diversion Programs

Another tactic to reduce inmate populations involves reducing criminal convictions by diverting offenders out of the criminal justice system. Diversion programs are not new. Since 1972, drug diversion has existed for low-level drug possession and under-the-influence offenses.[45] Diversion also existed for other offenses, such as domestic violence, but that was repealed in 1996.[46] Under the diversion arrangement, an offender's plea of guilty would be entered in the system, but no sentencing would occur for a period; the offender would waive his or her speedy trial rights, and the offender's case would be continued. During that time, the offender could complete a program specified by the court. Upon successful completion of the program, the matter would be dismissed. As part of criminal justice reform, the Legislature instituted a series of diversion programs. A key component of some of these programs is the institution of a pre-plea diversion program. This type of program does not require offenders to plead guilty prior to joining the program. And offenders who fail to complete the terms of diversion, are returned to the same point in the criminal justice system that they were prior to entering the program. When the case is prosecuted months, and in some cases years, later, memories have often faded, evidence has degraded, and inevitably, the likelihood of a successful prosecution is reduced.

In 2018, Assembly Bill No. 1810, an omnibus health trailer budget bill, created Mental Health Diversion for All Criminals, a pretrial diversion program for individuals who could demonstrate their criminal activity was linked to a mental disorder and that disorder served as a significant factor in the commission of the charged offense.[47] In 2022, Senate Bill No. 1223 (Becker) created a presumption in Penal Code section 1001.36 that the mental health disorder "was a significant factor in the commission of the offense."[48] (Antisocial personality disorder, borderline personality disorder, and pedophilia are excluded as qualifying mental disorders.[49]) The Mental

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[44] Pen. Code, § 1170(h).

[45] Pen. Code, § 1000.

[46] Sen. Bill No. 169 (1995-1996 Reg. Sessions), c. 641 (Oct. 5, 1996).

[47] Pen. Code, § 1001.36(b).

[48] Sen. Bill No. 1223 (Becker), 2001-2022 Session.

[49] Pen. Code, § 1001.36(b)(1).

Health Diversion program applies to all felonies and misdemeanors except a small handful of offenses.[50] If a court finds that the defendant meets the criteria for mental health diversion, the defendant waives his or her right to a speedy trial and is then given a series of terms and conditions with which to comply. Upon "substantial" compliance, the court can order the matter dismissed and the arrest is removed from the defendant's record.[51] A defendant need not *completely* comply; *substantial* compliance, as determined by the court is sufficient.[52] Defendants granted mental health diversion are released into the community where they may commit additional offenses, including murder.[53] Mental health diversion addresses, in part, one of the concerns of *Plata*, namely, treatment for those with mental health disorders. The diversion program, however, occurs at a local level without incarceration, prior to entry of a plea, and results in complete dismissal of the charges.

Military diversion was created in 2014 as a part of Senate Bill No. 1227 (Hancock). It authorized a defendant to waive his or her speedy trial rights on a misdemeanor charge and permits a court to place the defendant in a pretrial diversion program for a misdemeanor if the defendant either was or is in the military and suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems resulting from his or her military service.[54] After receiving treatment for a period not exceeding two years, the defendant's matter is dismissed and his or her record of arrest removed.[55] Two of the most common misdemeanor offenses involve domestic violence and driving under the influence. Misdemeanor diversion did not appear to exclude either offense. In 2017, Senator Jackson successfully sought to amend Penal Code section 1001.80 with Senate Bill No. 725 to clarify that driving under the influence would not be excluded from military diversion, although the Department of Motor Vehicles retained the authority to restrict or suspend a driver's license for such a violation.[56]

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[50] The excluded offenses include murder or voluntary manslaughter, a registrable sex offense (excluding indecent exposure), rape, lewd or lascivious act on a child under 14 years of age, assault with intent to commit rape, sodomy, or oral copulation, commission of a rape or sexual penetration in concert with another person, continuous sexual abuse of a child, and a violation of subdivisions (b) or (c) of Penal Code section 11418. (Pen. Code, § 1001.36(d).)

[51] Pen. Code, § 1001.36(h).

[52] *Id.*

[53] Melugin and Pandolfo, *Innocent LA Father killed after DA Gascon gives violent career criminal multiple diversions*, Fox News (May 3, 2023).

[54] Pen. Code, § 1001.80.

[55] Pen. Code, § 1000.80(i).

[56] Pen. Code, § 1000.80(l)

Assembly Bill No. 208 (Eggman), also signed into law in 2017, brought about an extended pretrial diversion program for individuals who lacked any prior conviction for controlled substance offenses, where the charged offense involved no violence, and where the defendant's record does not indicate probation or parole had have been revoked without being completed and the defendant had not previously been granted diversion or had been convicted of a felony within five years. Under this program, the defendant would waive his or her speedy trial rights and enter a drug treatment program for up to 18 months. This program differed from the existing diversion program in that it no longer required a defendant to enter a plea of guilty prior to entering the program.[57]

In 2019, the Legislature passed Senate Bill No. 394 (Skinner), Diversion for Primary Caregivers of Minor Children.[58] This allowed primary caregivers to receive pretrial diversion for *any* offense—felony or misdemeanor—so long as the offense was not a serious or violent felony.[59] Once again, upon successful completion, the offense would be dismissed.

Accordingly, mental health diversion, veteran's diversion, and primary care diversion all remove an individual from the criminal justice system prior to a plea. Failure to complete the terms of probation merely brings their cases back into the criminal justice system, and the prosecution still bears the legal burden months or years later.

While diversion provides opportunities for some low-level offenders to avoid a criminal record, the broad sweeping paths for diversion create loopholes for more hardened criminals to avoid prosecution and remain to prey on the public. These programs remove individuals from the criminal justice system, thus impacting statistical reviews of the system that are based upon convictions or incarcerations in state prison.

Restructuring the Competency Process

California law prohibits a defendant from being convicted or punished while he or she is mentally incompetent,[60] and provides an alternative for those who are not competent to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.[61] This differs from a lack of competency at the time of the commission of the

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[57] Assem. Bill No. 208 (2017-2018 Reg. Sessions), c. 778 (Oct. 14, 1997).

[58] Sen. Bill No. 394 (2019-2020 Reg. Sessions), c. 593 (Oct. 8, 2019).

[59] Pen. Code, § 1001.83(d)(5).

[60] Pen. Code, § 1367.

[61] *Ibid.*; see also *People v. Webb* (1993) 6 Cal.4th 494.

offense. There is a separate statutory section for those defendants who are incompetent due to a mental disorder.[62] In the past, if a defendant was found mentally incompetent during the court process, criminal proceedings would be suspended. If, after a trial on the issue of competency, the defendant was found incompetent, the matter was suspended until the defendant became competent. Defendants found mentally incompetent would be sent to either a state hospital, a private or public placement facility, or outpatient treatment for competency training. If they regained competency within a period, generally three years, criminal proceedings would be reinstated. If they failed to regain competency, the court could initiate conservatorship proceedings and retain discretion to dismiss the case.

In 2017, the Legislature passed Senate Bill No. 1187 (Beall). This bill restructured the competency process in several major areas. First, it authorized the court to consider the defendant as a candidate for mental health diversion, which would last no more than two years. Second, the bill reduced the time to return a defendant to mental competency from three years to two years. Third, the bill provided that six months after sending the defendant for a competency evaluation, the court would receive a report from doctors indicating whether the doctors believe that the defendant could be returned to competency.[63]

In 2021, Senate Bill No. 317 (Stern) severely short-circuited the competency process for misdemeanor offenders. A misdemeanor defendant found incompetent to stand trial now must either receive misdemeanor diversion not to exceed one year, or have his or her case dismissed.[64]

Both bills resulted in a shorter amount of time to have a defendant regain mental competence as well as an earlier termination of services to the defendant. Once released from their criminal case—without additional treatment or consequence—these offenders end up back in the community unless a conservatorship is created.[65]

Redefining the Sentence

The term "life without the possibility of parole" would likely be interpreted by most members of the public as a sentence where the offender will never be paroled. After all, that is the plain meaning of "without the possibility

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[62] Pen. Code, § 1370.
[63] *Id.*
[64] Pen. Code, § 1370.01.
[65] Pen. Code, § 1370.

of parole." In California, however, that is not the case. "Life without the possibility of parole" does not actually mean "life without the possibility of parole." In 2016, Senate Bill No. 1084 (Hancock) was approved, which allows an individual who was a minor at the time of the offense and who was sentenced to life without the possibility of parole (LWOP) to request recall of their sentence after serving 15 years of that sentence.[66]

Most felony crimes in California are punished by a determinate sentence. A convicted defendant can be sentenced to one of three terms for their individual offense.[67] Historically, the court has broad discretion to sentence to the lower term, the middle term, or the upper term.[68] If a defendant committed multiple offenses, the court would impose sentence on the primary offense and then could impose sentence of any subordinate offenses either concurrently or consecutively.[69] Defendants who commit multiple offenses receive sentences for each of those offenses. If two offenses arose out of the same operative set of facts, they could be convicted of both offenses, but only punished under one offense. Penal Code section 654 required the court to impose the punishment for the most severe offense.

Recent legislation has markedly changed this process as well. Since Assembly Bill No. 518 (Wicks) was approved in 2021, the court may choose to impose a sentence on the less serious offense. Further, Senate Bill No. 567 (Bradford), also approved in 2021, now requires the court to impose no more than the middle term unless the circumstances in aggravation were stipulated to by the defendant or proven beyond a reasonable doubt at jury trial. This latter bill served to counteract changes made from the decision in *Cunningham v. California*, a 2007 case in which the United States Supreme Court ruled that California's determinate sentencing law is unconstitutional in that a court could impose an aggravated term based upon facts not determined to be true by a jury.[70] Following the Supreme Court's guidance, Senate Bill No. 40 (Romero) was passed in 2007 making the determination of an aggravated term discretionary with the court and not mandated by the pre-*Cunningham* rules. But Senate Bill No. 40 had a sunset provision of January 1, 2022.

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[66] Pen. Code, § 1170(d). *Note:* In 2023 Senate Bill No. 94 (Cortese) was introduced. This bill was not limited to minors; it proposed that anyone (with a few noted exceptions) whose offense occurred prior to June 5, 1990, and who served 25 years of their sentence could petition for recall and resentencing. Ultimately, the bill was placed on the inactive file, but it is likely to come up again 2024.

[67] Pen. Code, § 1170(b)(1).

[68] Cal. Rules of Court, rule 4.405(b).

[69] Pen. Code, § 669(a); Cal. Rules of Court, rule 4.425

[70] *Cunningham v. California* (2007) 549 U.S. 270.

Bradford's legislation (Sen. Bill No. 567) removed the model set in place by Senate Bill No. 40 and now requires a separate part of the trial to determine whether the circumstances in aggravation exist beyond a reasonable doubt.[71] Then in 2022, Assembly Bill No. 2167 (Kalra) made additional changes, requiring the court to consider alternatives to incarceration, including collaborative justice court programs,[72] restorative justice,[73] and probation. It set forth the legislature's intent that criminal cases be resolved using the least restrictive means available.[74]

Because of their severity, certain criminal offenses are ineligible for probation. But when the prohibition is removed, the court is allowed to consider probation for the offender. In 2021, Senate Bill No. 73 (Weiner) eliminated probation ineligibility for offenders who transported or possessed larger quantities—14.25 grams or more—of heroin or PCP. This provides a benefit, not to the low-level offender, but to mid-level drug traffickers. The bill also allowed a court to grant probation for these offenses to those who involved minors in their transportation, sale, or manufacture of the drug.[75]

Changes to Sentencing Enhancements

California law has long allowed enhancement of a sentence if certain aggravating circumstances exist. A *status* enhancement increases punishment if the offender has a history of certain criminal convictions, allowing for increased punishment for repeat offenders. *Conduct* enhancements increase a sentence based on certain conduct occurring during the commission of the offense.

One of the most common conduct enhancements involves the use of a firearm during the commission of the crime. For more than 30 years, courts did not have the discretion to dismiss this allegation regarding the use of a firearm, in large part because it is so serious, often leading to homicide. In 2017, however, Senate Bill No. 620 (Bradford) was signed to allow judges to determine on a case-by-case basis whether a 10-year, 20-year, or life-term enhancement is justified.

In 2017, Senate Bill No. 180 (Mitchell) eliminated the three-year enhancement for prior convictions for drug sales except for a prior conviction for a conspiracy to use a minor in the commission of drug sales.[76] Also in

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[71] Pen. Code, § 1170(b)(2).

[72] See *https://www.courts.ca.gov/programs-collabjustice.htm.*

[73] See *https://newsroom.courts.ca.gov/news/restorative-justice-healing-californias-youth.*

[74] Pen. Code, § 17.2(a).

[75] Pen. Code, § 1203.07.

[76] Health & Saf. Code, § 11370.1.

2018, Senate Bill No. 1393 (Mitchell) addressed the mandatory five-year prior enhancement term for each prior conviction of a serious felony and authorized the court to strike the five-year punishment for each prior serious felony conviction.[77]

In 2019, Senate Bill No. 136 (Wiener) eliminated the one-year enhancement for each prison term that the defendant had been previously sentenced, except if the prison term was for a sexually violent offense. For example, a defendant who had served five separate prison sentences for committing auto thefts and then committed a sixth auto burglary would not be subject to any enhancement of his or her sentence.

Finally in 2021, Senate Bill No. 81 (Skinner) broadly mandated that courts dismiss an enhancement if in the furtherance of justice, and further compelled the court to give great weight to the evidence offered by the defense as well as giving greater weight to specific mitigating circumstances[78] unless doing so would result in physical injury or serious danger to others.

Changes in Conduct Credits

State prison inmates can earn conduct credits toward reducing their sentence. Granting such credits is believed to encourage good conduct while in custody and participation in various rehabilitation programs. These credits are calculated according to statute. Altering the statute to increase credits or make credits more readily available to various classes of inmates creates a pathway to early release. Significantly, this type of sentencing reform avoids the public view. Starting with Realignment (Assembly Bill No. 109) in 2011, several measures increased the availability of credits for inmates:

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[77] Pen. Code, § 667.

[78] Under Pen. Code, § 1385, subdivision (c), proof of the presence of one or more of the following circumstances weighs greatly in favor of dismissing the enhancement:

(A) Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745.

(B) Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.

(C) The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.

(D) The current offense is connected to mental illness.

(E) The current offense is connected to prior victimization or childhood trauma.

(F) The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.

(G) The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.

(H) The enhancement is based on a prior conviction that is over five years old.

(I) Though a firearm was used in the current offense, it was inoperable or unloaded.

- In 2013, Assembly Bill No. 752 (Jones-Sawyer) authorized persons serving felony offenses in local county jail facilities to engage in a work furlough program and earn the same credits as if they were incarcerated in a state prison facility.[79]
- Also in 2013, Senate Bill No. 76 was added into the budget bill. It lets a Sheriff add additional conduct credits to any inmate sentenced in county jail at the rate of one day of credit for every one day served.[80]
- In 2014, Assembly Bill No. 2499 (Bonilla) created the same conduct credits for a person on electronic detention or work release as persons serving time in jail.[81]
- In 2016, Senate Bill No. 759 (Anderson) changed the credits received by inmates in Security Housing Units, and in Administrative Segregation for discipline or security. Previously, these inmates were ineligible to earn credits. This bill allowed inmates who were in isolation because of their behavior to receive the same credits as those inmates complying with rules and regulations of CDCR.[82]

Changes to Probation, Parole, Supervision, and Release

A series of bills have made it easier for youthful offenders to obtain parole.

- In 2013, Senate Bill No. 260 (Hancock) created Penal Code section 3051, which approved early parole to offenders who committed their crimes before the age of 18. The only offenders eliminated from this option were those who were sentenced under the Three Strikes Law, those who were sentenced to life imprisonment without the possibility of parole, or those who violated Jessica's Law.[83]
- In 2015, Senate Bill No. 261 (Hancock) expanded the scope of youthful offender parole hearings for offenders sentenced to state prison for committing specified crimes when they were under 23 years of age.[84]
- In 2017, Senate Bill No. 394 (Lara) extended youthful offender parole to those convicted prior to age of 18 for an offense that was punished by life without the possibility of parole.[85]

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[79] Pen. Code, § 1208.

[80] Pen. Code, § 4019.1.

[81] Pen. Code, § 2900.5, 4019.

[82] Pen. Code, § 2933.6.

[83] Jessica's Law was passed by California voters in 2006 as Proposition 83, increasing the punishment for sex offenders and prohibiting probation for sex offenses.

[84] Pen. Code, § 3051.

[85] Pen. Code, §§ 3051 and 4801.

- Then in 2019, Assembly Bill No. 965 (Stone) accelerated the hearing date for persons eligible for youthful offender parole by adopting regulations that award custody credits towards their parole eligibility date.[86]

On the other end of the age spectrum, Assembly Bill No. 1448 (Weber) in 2017 altered the age for consideration of elderly parole.[87] In 2019, Assembly Bill No. 3234 (Ting) reduced the age from 60 years to 50 [to qualify for elderly parole] and reduced the minimum time of continuous incarceration from 25 years to 20 years.[88] As a result of these bills, defendants with either indeterminate or determinate sentences were eligible [for early parole] (except for Three Strikes defendants or defendants who had received a sentence of LWOP or a sentence of death).

The early 2020s brought a series of bills broadly impacting probation, parole, and release for all populations:

- In 2020, Assembly Bill No. 2147 (Reyes) created a pathway to having records expunged for those who worked in fire camps or county hand crews. Defendants convicted of most felonies had the ability to petition for such relief.[89]
- That same year, the Governor signed Senate Bill No. 118, a bill introduced by the Committee on Budget and Fiscal Review, which, among other things, expanded the resentencing for terminally ill inmates from six months to having 12 months to live. It also reduced from parole of two years or three years to as little as 12 months.
- Also in 2020, Assembly Bill No. 1950 (Kamlager) shortened probation length, thereby increasing the probability that defendants will not have time to successfully complete programming and altered the expungement section under Penal Code section 1203.4 to prohibit judges from considering victim restitution when deciding whether to grant or deny expungement.[90] This bill all but guarantees that defendants will get their convictions dismissed even though they still owe restitution to crime victims, notwithstanding the California Constitution's provision *guaranteeing* restitution to victims.[91]
- In 2021, Assembly Bill No. 1228 (Lee) created a presumption that parole violators be released on their own recognizance prior to a violation

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[86] Pen. Code, § 3051(j).
[87] Pen. Code, §§ 3041, 3046, and 3055.
[88] Pen. Code, § 3055.
[89] Pen. Code, §§ 1203.4b, 2933.6, 2900.5.
[90] Pen. Code, §§ 1203a and 1203.1.
[91] Cal. Const., Art. 1, section 28(b)(13).

hearing.[92] This allows an individual who received the benefit of probation and then violated that probation to remain out of custody pending their hearing.

- In 2022, Assembly Bill No. 960 (Ting) added Penal Code section 1172.2, making it easier for ill state prison and jail inmates to obtain release, regardless of how much of their sentence they have completed. It added a presumption favoring release that can only be overcome by a finding that they represent an unreasonable risk to public safety. The bill then defined this unreasonable risk as the risk that the defendant will commit one of a very narrow list of violent felonies found in Penal Code section 667(c)(e)(2)(C)(iv).

The Attack on Accomplice Liability

California Penal Code section 31 states:

> [A]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, or persons who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

This means that the driver of a getaway vehicle is as equally culpable as the person who goes inside to rob the bank. Generally, aiders and abettors—often called accomplices—are liable for the natural and probable acts of the person directly committing the offense. This includes the crime of murder if it is a natural and probable consequence of the target criminal offense. Under such circumstances, the malice required for the crime of murder is imputed to the accomplice.

In 2018, Senate Bill No. 1437 (Skinner) dramatically changed accomplice liability, by stating that malice shall not be imputed to a person solely based on their participation of the crime.[93] Specifically, it amended Penal Code section 189 to restrict the ability to prove liability for murder under a theory of felony-murder. Murder liability for a participant in the commission of a

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[92] Pen. Code, §§ 1203.2 and 1203.25.

[93] Pen. Code, § 188(a)(3).

designated felony[94] when a death occurs can only be established if one of the following is proven: (1) the person was the actual killer; (2) the person acted with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life. The change applied not only prospectively, but retroactively as well.

Senate Bill No. 1437 also added Penal Code section 1170.95,[95] which established a procedure for permitting qualified persons with murder convictions to petition to vacate their convictions and obtain resentencing if they were previously convicted of felony murder or murder under the natural and probable consequences doctrine. This meant that *any defendant* convicted of murder could apply for resentencing and request judicial review of their conviction to determine if they were convicted under a theory of accomplice liability.[96] Even convicted murderers who were the sole participant in their offense were not prohibited from applying for consideration, subjecting family members of victims to the re-traumatization that the California Constitution sought to shield them from.

As more and more convicted murderers applied for these petitions a question arose whether the same qualifications necessary for accomplice liability under Senate Bill No. 1437 applied to crimes of attempted murder and manslaughter. In 2021, Senate Bill No. 775 (Becker) extended the murder-resentencing provisions in Penal Code section 1170.95 to both attempted murder and manslaughter.[97] It further required the appointment of counsel upon request if indicated in the petition. While courts had been allowed to make a preliminary determination of whether a defendant was properly qualified to bring the petition, Senate Bill No. 775 eliminated the ability of the court to determine whether a prima facie showing exists until after appointment of counsel and the filing of briefs by both sides.

Changes to Finality of Judgments

In 2021, Assembly Bill No. 1259 (Chiu) allowed defendants convicted at trial to have their convictions overturned on the grounds they did not understand the immigration consequences of their conviction.[98] Prior to that

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[94] Pen. Code, § 189(a).

[95] Renumbered as Penal Code section 1172.6 (Stats. 2022, Ch. 58, Sec. 10 (AB 200) Effective June 30, 2022).

[96] Pen. Code, § 1170.95.

[97] *Id.*

[98] Pen. Code, § 1473.7.

bill, defendants who had pleaded guilty had the ability to raise the lack of knowledge about the immigration consequences as a ground for overturning their plea. This inquiry was not something courts had routinely inquired about prior to Assembly Bill No. 1259.

In 2021, Assembly Bill No. 1540 (Ting) amended Penal Code section 1170(d) in 2021 to expand post-conviction resentencing. Historically, section 1170(d) allowed a court to resentence within 120 days of judgment or at any time at the request of CDCR for a limited purpose (i.e., sentencing error). Legislative amendments then expanded the scope of section 1170(d)'s authority by granting CDCR expansive powers and gave district attorneys and county correctional administrators the authority to also petition for resentencing. Assembly Bill No. 1540 then moved Penal Code section 1170(d)(1) resentencing provisions into new section 1170.03[99] and expanded them significantly by creating a presumption favoring resentencing; permitting resentencing even if a defendant is out of custody; requiring the court to apply any changes in the law that reduce sentences and authorize the exercise of judicial discretion even if a defendant's conviction was final before these new laws were effective; and requiring the court to consider if the defendant was under age 26 at the time of the crime, or experienced childhood trauma, or was a victim of domestic violence or human trafficking.

Also signed in 2021, Senate Bill No. 483 (Allen) invalidated the three-year enhancement for prior convictions for drug trafficking under Health and Safety Code section 11370.2, as well as Penal Code section 667.5(b). This change was fully retroactive, so that anyone currently serving a sentence could obtain a reduced sentence even though they were convicted prior to a change in the law.[100]

In 2022, Senate Bill No. 467 (Weiner) added an additional ground for habeas corpus petitions in that a "significant dispute has emerged" regarding expert testimony at trial such that it would have more likely than not changed the outcome at trial.[101]

Also in 2022, Senate Bill No. 1209 (Eggman) amended Penal Code section 1170.91 to expand military-trauma sentencing provisions beyond defendants who are facing a determinate term of imprisonment to include defendants who are facing a life sentence. Additionally, it expanded military-trauma

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[99] Penal Code section 1170.03 has since been re-numbered to section 1172.1.

[100] Pen. Code, §§ 1170 and 1171.1.

[101] Pen. Code, § 1473.

resentencing to eliminate the requirement that the defendant be sentenced prior to January 1, 2015, to obtain relief, and included inmates serving life sentences. It allows defendants to apply for resentencing regardless of when they were convicted and authorizes a court to either reduce the term of imprisonment or to sentence on lesser included or lesser related offenses with the consent of the defense and the prosecutor.[102]

RELEASE DOES NOT MEAN REFORM: REAL-LIFE EXAMPLES

Several real-life cases offer compelling examples of the extent to which the California criminal justice system has been reshaped, as well as highlight how releasing someone from prison does not necessarily mean they are reformed.

Timothy Bethell is an example of California's revolving prison doors. Bethell committed numerous thefts in Visalia businesses. In September 2021, he was released to a recovery program, but never reported. Eight days later, he pleaded guilty to stealing $2,800 from a Walgreens in Visalia. In the summer of 2022, Bethell pleaded guilty to six felonies of vandalism and theft at five separate businesses. He was sentenced to three years to be served in local county jail pursuant to Assembly Bill No. 109 but was released three days later due to jail overcrowding. Then, in March 2023, Bethell was sentenced to 64 months in Tulare County for committing 17 felonies. "The defendant epitomizes the dysfunction caused by the passage of soft-on-crime policies such as Assembly Bill No. 109 and Propositions 47 and 57," said Tulare County District Attorney Tim Ward.[103]

The Riverside County "Snake Burglar," Christopher Michael Jackson, pleaded guilty to 54 burglary counts on July 27, 2023, and was sentenced to seven months in jail but, with credit for time served, was freed before the day's end. He was ordered to wear an ankle monitoring bracelet for 12 years and to stay away from the 54 businesses, leading one of the victim store owners to say, "I don't feel like there's a justice system anymore."[104]

Simeon Tasfamarean represents an example of another failure. With felony convictions in 2018, 2019, and 2020, Tasfamarean, who was homeless, attacked Olympic Silver Medalist and *Sports Illustrated* swimsuit model Kim Glass with a metal pole, striking her in the head. Glass summed up the situation in her Instagram:

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[102] Pen. Code, § 1170.91.

[103] McEwen, *This man has 39 Felony Convictions Since 2014. DAs Point Finger at CA's 'Soft-on-Crime' Policies*, GV Wire (Mar. 31, 2023).

[104] Rokos, *'Ridiculous:' Riverside's Snake Burglar admits to 54 felonies, walks out of jail*, Riverside Press Enterprise (Jul. 27, 2023).

> Clearly, he's not mentally well and I do feel for him a lot. At the same time, feeling for somebody and holding them accountable doesn't have to be mutually exclusive … The more we keep letting this issue go on and on, and they keep getting out and they are on the streets, and we know that they are not healthy or mentally well and we're putting our citizens, our healthcare workers, our cops, everyone in harm's way. We're letting our society down … He has assaulted many people before me, and he's violated probation and he's violated paroles [sic] doing the same thing.[105]

Darnell Erby, a repeat felon with a lengthy history of violence was charged in Placer County with the murder and dismemberment of a 77-year-old woman. Erby had been serving a 24-year sentence for various offenses, and had had been denied parole in 2017, 2018, and 2020. He was granted release in 2021, but the district attorney's office was not given sufficient notice and the opportunity to provide input or object to his release.[106] This decision is particularly troubling because the parole board had previously found that he posed a "current unreasonable risk of violence."[107]

Smiley Martin, one of the defendants charged in a 2022 mass shooting in downtown Sacramento, had also previously been denied parole. Yet, Martin was released after serving less than half of his sentence. Both Martin and Erby also committed violations while in prison.

Troy Davis was a parolee charged with the 2021 murder of Mary Kate Tibbitts in her Sacramento home. Davis had been released prior to completing his sentence for a violent offense in 2018. Proposition 47 later decriminalized that offense after his release. Arrested for auto theft in 2021, Davis was allowed to remain out of custody due to the zero-bail policy enacted during the pandemic. Unsurprisingly, given the signals that the criminal justice system was sending the lawless, he failed to appear for arraignment on the auto-theft charge and had a warrant for his arrest at the time of the murder.[108]

Robert Eason was convicted in 2008 in Yolo County for burning thousands of acres as well as causing injury to a firefighter and killing numerous

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[105] Farrell, *'He needs to be off the streets'; US Olympic volleyball silver medalist calls for homeless man who hurled 10 inch metal pole at her head to get 11 years (but will woke LA DA George Gascon oblige?)*, Daily Mail (Jul. 13, 2022.)

[106] *Placer County District Attorney's office requests answers regarding the decision to release alleged murderer, https://www.placer.ca.gov/8182/Placer-County-District-Attorneys-Office-* [as of Oct. 18, 2023].

[107] Watts, *Why a repeat felon, now accused of dismembering a woman, was *really*released early,* CBS News Sacramento (Feb. 6, 2023).

[108] *Parolee arrested in connection with woman killed in home,* Associated Press (Sept. 6, 2021).

livestock. He was sentenced to a 40-year prison sentence, yet he was released after less than 14 years. Indeed, Eason had filed for release every year since 2017 and had been denied every year until 2022. During his criminal career, Eason, a volunteer firefighter, lit over 150 fires by manipulating some common store-bought items to create time-delay devices that caused the fires to ignite long after he was gone.[109]

Nathaniel Dixon stands accused of killing Selma Police Officer Gonzalo Carrasco, Jr. using a ghost gun in an ambush-style attack. Dixon had been convicted of second-degree robbery and was in custody until July 2020 and then released on probation. A month after release, Dixon was re-arrested for carrying a loaded firearm and possessing drugs. However, the drug charge qualified for zero bail and the gun charge only $10,000 bail. In August 2020, he was arrested again, this time for five felonies, including drug charges, possessing a firearm, and resisting law enforcement. He served time in jail until April 2022, when he was transferred to state prison. Because of credits earned and Assembly Bill No. 109, he was released on probation. In November 2022, he spent a mere two weeks in jail for a probation violation. He was arrested for killing Officer Carrasco on January 31, 2023.[110]

David Rivas was released from prison after serving one-third (18 months) of his five-year prison sentence for multiple arsons. Arson is considered a serious crime under California law but sentencing reforms and Proposition 57 gave CDCR the authority to grant early release of criminals, even those with priors for rape and murder. Rivas now faces trial on seven new counts of arson.[111]

Andrew Luster, heir to the Max Factor make-up fortune, committed multiple rapes by drugging his victims. *In 2003, he was convicted of 86 offenses* and sentenced to 124 years in prison. Luster's sentence was vacated on the ground that the original judge did not state the reasons for giving him the maximum on each count, and the new judge resentenced him to 50 years. Since several of the crimes of which Luster was convicted are defined as "non-violent" felonies under California law, he is set to receive the benefit of early release under Proposition 57, and even though he was denied parole in 2022, it is anticipated he will be released in the next four years.[112]

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[109] Grimes, *How Does a Convicted Serial Arsonist Get Early Parole with 1/3 Sentence Served?*, California Globe (Nov. 15, 2022).

[110] Gomez, *The criminal history of suspected Selma cop killer Nathaniel Dixon*, YourCentralValley.com (Feb. 1, 2023).

[111] *Convicted arsonist now accused of starting string of fires in North Hollywood*, ABC7 (Oct. 28, 2022).

[112] Schlepp, *Convicted rapist who was nabbed by Dog the Bounty Hunter denied parole*, ABC7 (Dec. 21, 2022).

Derrick John Thompson was sentenced to eight years after pleading guilty to multiple charges stemming from a 2018 police pursuit that ended in a crash that critically injured a pedestrian in Montecito. Thompson also admitted the allegation of personally inflicting great bodily injury (GBI), causing a comatose condition due to brain injury. The GBI allegation not only resulted in a sentence enhancement, but it also classified the crime as a "violent felony" under Penal Code section 667.5, subdivision (c)(8). Yet, Proposition 57 handed prison officials wide latitude to award additional custody credits toward early release as well as early parole opportunities. Accordingly, Thompson was released after serving only three years of his sentence. After his release, Thompson was jailed in Minnesota on suspicion of murder in connection with a crash that occurred after he sped off an interstate exit ramp in his full-size Cadillac Escalade SUV and struck a car going through an intersection. In short, early release in California resulted in five dead in Minnesota.[113]

SUCCESS OR FAILURE?

Violent Crime

The California Attorney General maintains crime data for California. A review of the crime data from before the passage of Proposition 36 and the flood of reforms showed a decrease in violent crime during the 10-year period after the Three Strikes Law was enacted.[114] The early commentary on Proposition 47, seemed to suggest that none of the horrors predicted by prosecutors had materialized.[115] But those early reports often failed to account for the reclassification of offenses, especially the impact on thefts from merchants. Instead, a deeper dive into the crime data shows a much different picture. When you reduce the number of offenses that make an offender eligible for actual state prison, reduce the application of both conduct and status enhancements for more serious offenders, and push the burden of housing many offenders to the already-overcrowded local jurisdictions, you most certainly will change the dynamics of the justice system and the data relied upon for purposes of analyzing crime.

We can start by looking at the most recent crime statistics issued by the Attorney General.[116] These statistics clearly demonstrate a rise in violent

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[113] Miller, *Son of former Rep. John Thompson arrested in crash that killed 5 women in Minneapolis*, Twin Cities Pioneer Press (Jun. 19, 2023).

[114] *Prosecutors' Perspective on California's Three Strikes Law*, California District Attorneys Association (Summer 2004).

[115] See, e.g., Bird, et al., *The Impact of Proposition 47 on Crime and Recidivism*, Public Policy Institute of California (June 2018).

[116] *Crime in California*, California Department of Justice (2022).

crime and a rise in property crime. The homicide rate was marginally reduced over the previous year.[117] Taking a broader view, we can look at homicides, violent crime, and property crime over the 16-year period since the passage of Proposition 36, and then again at the increase since the passage of Proposition 47, Assembly Bill No. 109, and Proposition 57. According to the Attorney General, between 2012 and 2022, homicides in California have increased 17.5 percent, from 1,878 to 2,206.[118] Since 2012, rape has almost doubled (7,828 to 14,346), robbery has reduced (56,491 to 47,669), and aggravated assault increased (94,432 to 128,798).[119] This resulted in an overall increase of violent crime from 160,629 to 193,019.[120] When viewed as a rate per 100,000, those numbers translate as follows:[121]

	2012	2022
Homicide	5.0	5.7
Rape	20.7	36.8
Robbery	149.3	122.1
Assault	249.6	330.0
Violent Crime	424.7	494.6

With this data in mind, it would be highly misleading to say that Californians are somehow safer than they were before the beginning of the reforms. Federal crime data reveals similar results as to violent crime:[122]

Year	Violent Crime Rate	Property Crime Rate
2012	423.5	2,761.8
2013	402.6	2,651.2
2014	396.4	2,441.7
2015	428.0	2,628.4
2016	444.8	2,550.0
2017	453.3	2,505.3
2018	447.5	2,386.2
2019	441.2	2,331.2

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117 *Id.* at p. 11.

118 *Id.*

119 *Id.*

120 *Id.* Note: These numbers, of course, do not tell the full story: We should never forget these numbers mean 32,390 more human beings were victimized in 2022 than in 2012. This number includes 328 additional lives lost to homicide, 6,518 additional women suffered the violence and degradation of rape, and 34,364 more Californians were violently assaulted.

121 *Id.* at p. 12.

122 California Crime Rates 1960-2019, *https://www.disastercenter.com/crime/cacrime.htm* [as of Oct. 18, 2023]; FBI Uniform Crime Reports, Crime in the United States 2019.

Moreover, California's major cities have been hit hardest. In March 2023, *USA Today* reported that Los Angeles experienced an 11 percent increase in overall crime between 2019 and 2022, including both violent crimes (rape, robbery, armed assault, homicide) as well as property crimes (burglary, arson, vehicle theft).[123] Los Angeles is also believed to have the nation's largest homeless population.[124] The downtown area of Los Angeles experienced a 25 percent increase in violent crime and a 57 percent increase in property crime.[125] The most significant rise was auto-part thefts at an increase of 219 percent over 2018.[126] The FBI's statistics showed Los Angeles as having 732 violent crimes per 100,000 people.[127]

Los Angeles is not the only city with rampant crime. According to FBI crime statistics, Oakland is California's third most violent city with a violent crime rate of 1,271 violent crimes per 100,000 residents, including 78 homicides, 372 rapes, 2,859 robberies, and 2,211 aggravated assaults annually.[128] San Francisco has a violent crime rate of 670 per 100,000 residents with 40 murders, 324 rapes, 3,055 robberies and 2,514 aggravated assaults.[129] The state capital Sacramento has a violent crime rate of 627 with 34 murders, 127 rapes, 1,039 robberies, and 2,023 aggravated assaults.[130]

Property Crimes

San Francisco has become a haven for retail thefts. Videos of thefts from high-end retail stores, including Neiman Marcus, and drug stores, including CVS and Walgreens, have gone viral.[131] After 35 years in the city, Nordstrom closed its San Francisco store due to an increase in theft.[132] Widespread retail thefts have also taken place in neighborhoods previously believed to be safe like Irvine and Arcadia.[133] One family-owned hardware store in Fremont lost $700,000 in 2022.[134] The National Retail Security Survey found retailers lost

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[123] Palladio and Abdullah, *Which Los Angeles neighborhoods are safest? See the latest trends in the LA Crime rates,* USA Today (Mar. 20, 2023).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] FBI Uniform Crime Report, Crime in the United States 2019, Table 8.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Ortiz and Ward, *After San Francisco shoplifting video goes viral, officials argue thefts aren't rampant*, NBC News (Jul. 14, 2021).

[132] Valinsky, *Nordstrom Closes San Francisco Store after 35 Years*, CNN (Aug. 28, 2023).

[133] Lloyd, *Irvine jewelry store thieves smash cases and steal $900,000 in merchandise*, NBC News (Aug. 1, 2023); Campa, *Flash mobs rob Riverside and Arcadia stores-the latest in a string of such crimes*, Los Angeles Times (Aug. 1, 2023).

[134] Keene, *Family-owned hardware store lost $700K in just one year due to retail theft*, New York Post (Aug. 1, 2023).

an estimated $94.5 billion nationwide in 2021.[135] While retail theft may be a national issue, according to the Retail Industry Leaders Association President Brian Dodge, "California is truly in a league all its own."[136] The National Retail Federation's 2022 Retail Security Survey ranked Los Angeles as the most hard-hit metropolitan area for the fourth year in a row, with the Bay Area finishing second, and Sacramento seventh.[137]

Interestingly, both state and federal reports suggest a decrease in theft offenses. For a period from 2017–2022, the Attorney General reported over a 50 percent decrease in petty theft, a 6.6 percent decrease in thefts, a 25.4 percent decrease in burglary, and a 27.6 percent drop in vehicle theft.[138] However, these numbers do not tell the whole story, because this theft data only includes commercial burglary and robbery, *and not traditional retail theft.*

According to the Public Policy Institute of California, the commercial burglary rate in California has reached its highest level since 2008, and the commercial robbery rate rose to roughly where it was in 2017. Commercial burglaries went up in 14 of California's largest counties between 2019 and 2022, with Orange County seeing a 54 percent jump in these crimes.[139] Data reveals that in 2022 commercial shoplifting increased 28.7 percent, commercial burglaries increased 5.8 percent, and commercial robberies increased 9.1 percent.[140]

Safe Schools and Communities

California schools are not safer since Proposition 47. California has seen the most school shootings with at least one victim injury or death since 2012.[141] Neighborhoods are not safer since Proposition 47. When examining the impact of crime on neighborhoods, burglars tend to stay within a relatively small distance from their home and commit crimes in either their own communities or in communities with less social cohesion.[142] Violent crime has increased. While the statistics claim a decrease in theft, those numbers do not reflect the realities of communities.

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135 Johnston, *The rising toll of organized crime*, National Retail Federation (Aug. 28, 2023).

136 Genoese, *Organized retail crime 'particularly acute' in California, industry expert says*, Fox News (Aug. 16, 2023).

137 Keene, *Family-owned hardware store lost $700K in just one year due to retail theft*, New York Post (Aug. 1, 2023).

138 *Crime in California*, California Department of Justice (2022).

139 Lofstrom and Martin, *Retail Theft and Robbery Rates Have Risen across California*, Public Policy Institute of California (Sept. 7, 2023).

140 *Id.*

141 Gillian and Lurye, *States with the Most School Shootings*, U.S. News & World Report (Mar. 31, 2023); *Shooting Incidents at K-12 Schools* (Jan 1970-Jun 2022), Center for Homeland Defense and Security.

142 Chamberlain and Boggess, *Relative Difference and Burglary Location: Can Ecological Characteristics of a Burglar's Home Neighborhood Predict Offense Location?*, 53 J. Res. Crime Delinq. 6.

Retail theft continues to plague California communities, despite efforts to apply technology.[143] Shoplifting, whether by an organized ring or by individuals has been called "de facto legal" in California.[144] California's major cities have been targets for both large-scale and small-scale retail theft. While there have been recent efforts to curb those thefts, the new legislation targets only organized crime and not the individual offenders.

Homelessness and Crime

From 2014-2022 homelessness rose 51 percent in California while it dropped by 11 percent nationwide.[145] California has six of the top 10 cities with the highest rate of homelessness:[146] San Francisco ranks 9th, San Diego 8th, Sacramento 6th, Oakland 5th, and San Jose 4th. Los Angeles leads the nation with the highest rate of homelessness at 16.9 per 1,000 residents.[147] What became of those who would have received treatment before Propositions 47 and 57 and Assembly Bill No. 109? With no incentive to seek drug treatment, unfortunately, many of these individuals get no help for their addiction issues, become chronically homeless, often resort to crime, and sadly suffer high mortality rates from overdose and other conditions.[148] In many jurisdictions, once robust drug treatment and drug court programs have been dramatically curtailed due to the lack of demand on the part of the offenders.[149]

Those found to be mentally incompetent to stand trial now receive less treatment and get funneled into a program designed to divert them out of the criminal justice system. That does not mean they receive the necessary resources and treatment they need.

Prison Closures

The impetus for California's criminal justice reform revolved around a need to reduce state prison population in response to *Plata*. As California reduced the population of its state prisons within guidelines, it now seeks to close prisons rather than use them to house inmates. The Legislature continues to chip away at conduct and status enhancements resulting in less consequence for the serious offenders. It should not be surprising that even using the

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[143] Leahy, *San Francisco Security Gates Fail as Rampant Theft Continues, Staff Says*, San Francisco Standard (Jul. 31, 2023).

[144] Ohanian, *Why Shoplifting is now de facto legal in California*, Hoover Institution (Aug. 3, 2021).

[145] Streeter, Jialu L., Stanford Institute for Economic Policy Research (SIEPR), from presentation to the California District Attorneys Association (CDAA) on July 13, 2023.

[146] Haines, *The 25 U.S. Cities with the Largest Homeless Populations*, U.S. News & World Report (Mar. 22, 2023)

[147] *Id*.

[148] See, e.g., *https://endhomelessness.org/resource/opioid-abuse-and-homelessness/ [as of Oct. 18, 2023]; https://www.addictioncenter.com/addiction/homelessness/ [as of Oct. 18, 2023]; https://www.sdcda.org/content/MediaRelease/Homeless%20Data%20and%20Plan%20News%20Release%20FINAL%203-21-22.pdf* [as of Oct. 18, 2023].

[149] Dura, *Carrots but no stick: Participation in California drug courts has plummeted, CalMatters* (Jul. 25, 2022, updated Jul. 7, 2022).

Attorney General's report of crime statistics that violent crime continues to rise. California has shifted from housing felons in state prison to housing felons in local jails, where overcrowding leads to early release and early termination of sentences.

A Note About COVID-19

Any article written since 2019 would be incomplete without mentioning the impact that the COVID-19 pandemic has had on the criminal justice system. In California, the State Supreme Court issued special rule changes related to the processing of criminal cases. Law enforcement changed policies about interacting on cases, especially proactive law enforcement. Shelter-in-place mandates kept people at home, and some crimes that peak during the school year—like child abuse—were impacted, while others, such as domestic violence, may also have been underreported as offenders and victims were sheltered in their homes together. Jails struggled to balance keeping dangerous offenders in custody while maintaining healthy environments, often resulting in the release of offenders. Local courts imposed zero-bail structures, which created the immediate release of offenders who would have normally been held in custody. Zero-bail policies were absolute failures.[150] As we came out of the pandemic, counties struggled to handle the tsunami of criminal cases that built up as courts were either shuttered or reduced to minimal staffing. Arrests slowed and the court process slowed. This created a need for either increased plea bargaining or even the outright dismissal of cases due to the lack of courtrooms to provide a trial. Thus, conviction and prison commitment numbers most certainly reflect less crime than truly occurred.

One other aspect of COVID that must be mentioned is how the government reacted to the pandemic. Reminiscent of when President Ronald Regan was shot in 1981, many government officials came forward and stated they were "in control."[151] The executive, legislative, and to some extent, the judicial branches all worked together, in what some believed was the right thing to do. However, much like Alexander Haig, they may have got it wrong.[152] This has not stopped the legislature from continuing to enact COVID-type regulations.

One such bill, signed in 2022, was Assembly Bill No. 2098 (Low), which was designed to regulate doctors' conversations with their patients. The

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[150] Hernandez, *Los Angeles Prosecutors agree with 50 Cent that eliminating bail is a disaster for the city*, New York Post (Jul. 11, 2023).

[151] Quoting Secretary of State Alexander Haig, "As of now, I am in control here, in the White House." (Allen, *When Reagan was shot, who was 'in control' at the White House?* Washington Post (Mar. 25, 2011).)

[152] Raymond, *California counties' pandemic gun store closures unconstitutional, court rules*, Reuters, (Jan. 20, 2022).

bill was immediately challenged in court as being unconstitutional. In four separate courts, judges ruled both for and against the new law. However, the Governor's spokesperson said that the administration would not appeal the two Sacramento cases where the court issued the narrow injunction (blocking the law). The plaintiffs' lawyers had expected the state to appeal the decision, thinking all four lawsuits would then be decided by the appellate courts, providing greater clarity for all parties.[153,154]

The selective choices made by the executive branch to defend (or not) initiatives, statutes, or other legal rulings have a significant impact on the criminal justice system, as well. The process whereby the Attorney General fails to represent the state or chooses not to represent the state in criminal matters has become a significant problem in recent years, so much so that it could be asked if that office is part of the reform movement.

Abandonment of Victims' Rights

The California Constitution declares that criminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern.[155] These rights encompass the expectation shared with all of the people of California: that those who commit felonious acts causing injury to innocent victims will be appropriately and thoroughly investigated, appropriately detained in custody, brought before the courts of California even if arrested outside the state, tried by the courts in a timely manner, and sentenced and sufficiently punished so that public safety is protected and encouraged as a goal of highest importance.[156] Victims of crime are also entitled to finality in their cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims and their families, and must come to an end.[157]

Many of the new and novel criminal justice reforms approved by the legislature that are discussed here have largely ignored the express statutory and constitutional rights that California voters first granted to crime victims

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[153] Wolfson, *California's COVID misinformation law is entangled in lawsuits, conflicting rulings*, Los Angeles Times (Mar. 17, 2023).

[154] Assembly Bill No. 2098 was repealed by a subsequent bill, Senate Bill No. 815 (Roth), which was signed by the Governor on September 30, 2023).

[155] Cal Const., art I, § 28(a)(1).

[156] Cal Const., art I, § 28(a)(4).

[157] Cal Const., art I, § 28(a)(6).

and their families more than more than 40 years ago when they adopted Proposition 8, the Victims' Bill of Rights of 1982, and a quarter century later when they adopted and enhanced Proposition 8's legal rights in Proposition 9, the Victims' Bill of Rights of 2008, Marsy's Law. Time after time, when local prosecutors have argued against the constitutionality of the more recent criminal justice reforms by the legislature, they have faced an Attorney General's office that all too often supports the defendants' claims on appeal. This "Genie out of the bottle" questionable practice of not defending judgments is occurring with greater frequency and at greater risk to the public.

An example of this trend occurred with the case of *Ellis v. Harrison*.[158] The procedural history of this case, can best be explained in United States Court of Appeal, Ninth Circuit, Judge Callahan's dissent:

> At every stage of the post-trial proceedings recounted thus far—from the motion for a new trial and appeal, to the state habeas petitions, to the federal habeas petition and each of the three habeas appeals to our court—the State ably and persuasively defended against Ellis' challenges to his conviction. [¶] But after the panel denied relief and Ellis filed a petition for rehearing en banc, the State did an about-face. In a stark reversal from its previous position, the State declared in its response to Ellis' petition for en banc rehearing, "The Attorney General agrees that where, as here, the record shows that defense counsel harbored extreme animus toward a defendant's racial group, prejudice should be presumed." [¶] The State joined Ellis in asking us to review the case en banc and overrule precedent "to the extent necessary to hold that prejudice will be presumed like the one at issue here." [¶] Acknowledging that its requested new rule would normally be barred on collateral review, the State expressly offered to waive the *Teague* bar and any other procedural bars. [¶] According to the State, its new position was justified because "it is important that there be no ambiguity about the law's appreciation of, and intolerance for, the insidious effects of the deep-seated racism revealed by the present record." ¶ We took the case en banc and appointed the Criminal Justice Legal Foundation ("CJLF") as amicus curiae to defend the State's former position that the writ should not issue. The San Bernardino County District Attorney—the governmental entity that originally prosecuted Ellis at trial—also filed

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[158] *Ellis v. Harrison* (9th Cir. 2020) 947 F.3d 555.

> a separate amicus brief, advocating against the requested relief and the proposed new rule, effectively opposing the newfound State position as represented by the California Attorney General. [¶] At en banc oral argument, Ellis and the State shared time advocating for a novel rule, while also conceding that Ellis' Sixth Amendment claim would lose under the *Strickland* or *Sullivan* standards. When asked whether, given the State's newfound agreement with Ellis' position, there was still a case or controversy before us, the State provided little response.[159]

Many might argue that the Attorney General has unfettered discretion in deciding whether to litigate a case or not, but there are limits to what they can or cannot do. For example, Judge Callahan, stated it this way:

> When the State took Ellis' case to trial, it presumably did so as part of its duty to "protect the innocent and convict the guilty," and in pursuit of justice for those who were wronged by Ellis' crimes. Criminal Justice Standards for the Prosecution Function § 3-8.1. When the State chose to defend Ellis' conviction every time it was challenged on direct or collateral review, the State presumably did so because the conviction had been fairly obtained, and because defending the conviction served the interest of "justice within the bounds of the law." *Id.* § 3-8.1. Presumably then, an abandonment of that defense leaves unprotected the just interests that the State once served.[160]

The *Ellis* case involved unknown/late discovered racist language used by the defense attorney. The dispute was not whether Ellis was represented competently, because he conceded he should lose his appeal/writ if he had to show sub-standard representation or that he had been prejudiced by the lawyer's failings; the dispute was about whether any race-related issue was enough by itself to require a reversal. The court was able to dodge the actual question and rely on the Attorney General's stipulation to the reversal. However, the California Legislature went where the Ninth Circuit feared to tread and enacted the Racial Justice Act (RJA)[161] where even harmless errors cannot be ignored in the furtherance of their goal "to eliminate racial bias from California's criminal justice system…."[162]

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[159] *Id.* at 567–568 (footnotes omitted).

[160] *Id.* at 569.

[161] Pen. Code, § 745.

[162] *People v. Simmons*, 2023 Cal.App.Lexis 787, at *14.

In *People v. Simmons*, the Second District Court of Appeal, Division Six, was faced with evaluating the RJA, but once again, the Attorney General conceded the prosecutor violated the RJA and that the defense counsel, therefore, rendered ineffective assistance. This concession amounted to an agreement that the case should be reversed because the RJA eliminated the showing of prejudice that has been required for the past 100 years.

As the dissenting justice stated, "The Legislature's goal is laudable, but to achieve that goal it has resorted to an extreme unconstitutional measure that may wreak havoc on the criminal justice system," namely, that the legislature, rather than the court, can decide whether an error during trial results in a miscarriage of justice.[163] Justice Yegan also noted the problem created when the Attorney General sides with the defendant:

> The Attorney General and appellant agree with the majority opinion. Therefore, it is unlikely that a party will file a petition for review in the California Supreme Court. "If no petition for review is filed, the Supreme Court may, on its own motion, order review of a Court of Appeal decision ...." (Cal. Rules of Court, rule 8.512(c)(1).) If neither party files a petition for review, I urge the Supreme Court to grant review on its own motion. [164]

The majority were also aware of the issues raised by Justice Yegan, stating in the very first paragraph of the opinion:

> The Racial Justice Act (RJA) seeks to eliminate racism from criminal trials in California. Here we decide the RJA does not violate article VI, section 13 of the California Constitution. We acknowledge the dissent's cogent argument that the RJA violates article VI because section 13 states that it is the province of the court to decide whether an error results in a miscarriage of justice. We are hopeful, indeed confident, that our Supreme Court will resolve this issue ... soon.[165]

When legislation is passed, no matter how laudable the goals (be it dealing with a pandemic or racism), it must function within the rest of our constitutional protections. Legislation that erodes the finality of judgments of hard-won criminal convictions should be questioned. It is up to the Attorney General to defend those convictions, and when that office refuses to do so,

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[163] *Id.* at *38.
[164] *Id.* at *29.
[165] *Id.* at *1.

or concedes error, or agrees to free an inmate for reasons that violate the Criminal Justice Standards for the Prosecution Function, the results should be questioned. And when the courts are asked to participate in this erosion with blind fidelity, it must be questioned, as Justice Yegan did in his *Simmons* dissent:

> The courts' core function to interpret the California Constitution is defeated and materially impaired by the Legislature's direction that a violation of the RJA constitutes a miscarriage of justice within the meaning of [article VI,] section 13 [of the Constitution]. We have been applying the "miscarriage of justice" constitutional rule for at least the last one hundred years. The application of this rule involves the exercise of judgment by appellate court justices based upon their legal knowledge and experience. The Legislature has no comparable knowledge or experience. It is ill-equipped to dictate how we should perform our judicial functions. [¶] In addition to violating the separation of powers clause, the Legislature has created a statutory scheme that will waste scarce judicial resources and undermine the public's confidence in the fairness of our criminal justice system. Defense counsel will scour trial transcripts in search of the new and magical reversal ticket: "During the defendant's trial, ... the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (Pen. Code, § 745, subd. (a)(2).) If judgment was entered after January 1, 2021, and counsel discovers such language or such an exhibition of "bias or animus," counsel may be able to obtain a reversal of the defendant's conviction even if the violation of the RJA was innocuous and the evidence of the defendant's guilt was overwhelming.[166]

CONCLUSION

When one examines the full breadth of the changes detailed in this article from realignment, the sweeping initiatives and the legislature's relentless weakening of criminal law, and government officials' refusal to defend judgments, there is little doubt that the new reformers have profoundly reshaped California's criminal justice system.

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166 *Id.* at *35–37.

Of course, they have succeeded in their goal to reduce the state's prison population following *Brown v. Plata*; and can now boast a 47 percent reduction from the peak of 173,673 inmates[167] to a current population of 91,933.[168] But they accomplished this feat by shifting housing responsibilities for tens of thousands of inmates to local government, through ballot initiatives that redefined numerous drug and theft offenses as misdemeanors, and by granting thousands of felons early release with enhanced credit awards and through broad changes in parole eligibility. They have approved a mountain of reform legislation, dramatically altering sentencing law and rules, expanding time credits, granting diversion eligibility to much more serious offenses, weakening or outright eliminating many sentencing enhancements, and then making many of these changes fully retroactive, thereby permitting countless inmates to request resentencing. For full measure, the new reformers have also shortened authorized parole and probation periods and changed definitions of important success measurements like "recidivism." And it's worth noting that the state first met the capacity requirement under *Plata* on February 17, 2015.[169] Yet, notwithstanding this milestone, criminal justice reform continued unabated.

Along this path, the new generation of reformers advocated that such proposals would restore balance and fairness to the system, prioritize treatment over incarceration, encourage rehabilitation, and reduce racial disparities.[170] Yet, have these reformers really accomplished their stated objectives beyond reducing the prison population?

One's view of the criminal justice system's fairness is likely a matter of perspective. No doubt offenders receiving reduced sentences, early parole, and myriad other benefits afforded, consider the reforms as increased fairness. But what about crime victims? Their rights to finality, restitution, truth in sentencing, and many other express constitutional rights have been disregarded in this movement.

Many previously robust drug courts and treatment programs are either struggling or are no longer in operation due to declines in demand for

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[167] *Offender Data Points for the 24-Month Period Ending in June 2018*, California Department of Corrections and Rehabilitation (January 2019), p. 3.

[168] *Three-Judge Court Quarterly Update*, California Department of Corrections and Rehabilitation (Sept. 15, 2023).

[169] *Id.*

[170] See, e.g., Sen. Holly J. Mitchell on why SB 180 would reduce sentence enhancements, YouTube (Jun 27, 2017); Lagos, *Jerry Brown Signs Criminal Justice Reforms, Eases Prison Terms*, KQED (Oct. 11, 2017); Lyons, *Criminal justice reform panel scores legislative wins* (Oct. 1, 2021); McGreevy, *Newsom signs bills restricting sentencing enhancements for many crimes*, Los Angeles Times (Oct. 8, 2021).

treatment.[171] With the rampant increase in crime and some of the real-life examples discussed in this article, one must seriously question the claim of increased rehabilitation.

The data also casts doubt on any claim that these reforms have removed or substantially lessened racial disparities. Minorities are still disproportionately incarcerated in state prison.[172] Similarly, homicide victimization rates continue to reflect a disproportionate impact on people of color.[173] One researcher, using crime data from Chicago, has made a strong case that decarceration policies disproportionately erode public safety in minority communities.[174]

Moreover, most of the new reforms discussed throughout this article received little public scrutiny as they moved through the legislative process or were concealed in ballot measures given catchy and misleading titles that suggested the measure would increase public safety and reduce costs.

Yet, today, the criminal justice system finds itself at a crossroads, where keeping up with the pace and scope of reforms is daunting for all those who seek justice in the best and most fair system ever created by human beings. While the new criminal justice reformers may truly believe in the merits of the changes they advocate, they should be mindful of the eloquent warning issued five decades ago to a different generation of reformers by California Court of Appeal Associate Justice Macklin Fleming:

> For when we aim at perfect procedure, we impair the capacity of the legal order to achieve the basic values for which it was created, that is, to settle disputes promptly and peaceably, to restrain the strong, to protect the weak, and to conform the conduct of all to settled rules of law. If criminal procedure is unable to promptly convict the guilty and promptly acquit the innocent of the specific accusations against them, and to do it in a manner that retains public confidence in the accuracy of its results, the deterrent effect of swift and certain punishment is lost, the feeling of just retribution disappears, and belief in the efficacy of the system of justice declines.[175]

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[171] Arnold, et al., *Drug Courts in the Age of Sentencing Reform*, Center for Court Innovation (2020), p. 2.

[172] The Prison Policy Initiative reported that in 2010, 27 percent of the prison population was black, yet blacks represented 6 percent of the state's population; 41 percent of the incarcerated population was Latino, and. Latinos represented 38 percent of the state's population. (*https://www.prisonpolicy.org/reports/rates.html* [as of Oct. 18, 2023].) 2020 U.S. Census data shows that 5.7 percent of the state's population is black, and 39.4 percent is Latino. The most recent CDCR data (September 2023) shows 27.7 percent of inmates are black and 45.9 percent are Latino.

[173] Steven Smith, *Paradise Lost: Crime in the Golden State 2011-2021*, Pacific Research Institute (February 2023), p. 36

[174] Rafael A. Mangual, *Criminal [In]justice): What the Push for Decarceration and Depolicing Gets Wrong and Who it Hurts Most (2022)*, p. 18.

[175] Macklin Fleming, *The Price of Perfect Justice 6* (1974).

Time and history will be the best judge of whether these reforms merit praise or condemnation. But as crime continues to increase at a frightening rate and powerful images of daily crime reports are ever present, the sleeping giant is starting to awaken to the new reality, and they are troubled. Nearly two in three Californians believe that street crime and violence in their local community is a problem,[176] and among racial and ethnic groups, black Californians expressed the highest level of concern about crime.[177] A poll conducted in July 2023, showed that 81 percent of California voters favor a revision of Proposition 47 to increase penalties for hard drugs and theft.[178] Increasingly, it appears that California is at a tipping point and the criminal justice pendulum may start swinging back. Perhaps it is time to put the Genie back in the bottle.

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Todd Spitzer

Greg Totten

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[176] *PPIC Statewide Survey: Californians and Their Government*, Public Policy Institute of California (September 2022).

[177] Walters, *Annual crime report shows Californians' fear of increasing crime is justified*, CalMatters (Jul. 9, 2023).

[178] Statewide survey of 900 California voters conducted by Probolsky Research from July 8–13, 2023. *https://www.action.goldenstatecommunities.com/pages/prop47* [as of Oct. 18, 2023].