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# Bringing Humanism to California's Prisons

## I. Introduction

California's prisons have been in a state of nearly constant change and adjustment for several decades now. Many of the changes are in response to judgments entered in a number of class action lawsuits, both state and federal.<sup>1</sup> However, many of the changes reflect the Legislature's and public's reaction to the consequences of longer, determinate sentences that were part of a "tough on crime" set of policies enacted during the 1980s and 1990s. The consequences included a multi-billion-dollar prison construction program, dramatically increased annual expenditures on prisons, a dramatic spike in overcrowding that ultimately led to a Supreme Court decision affirming a trial court order to reduce overcrowding from 175% of design capacity to no more than 137.5% of design capacity,<sup>2</sup> and stubbornly high recidivism rates. In short, a prison system that failed to meet the goals set out for its performance notwithstanding over one hundred billion in expenditures over the decade.

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<sup>1</sup> See, e.g., *Coleman v. Wilson* (E.D. Cal. 1995) 912 F. Supp. 1282 (California's prison mental health system is unconstitutional); *Armstrong v. Davis* (9<sup>th</sup> Cir. 2001) 275 F.3d 849 (affirming claims under the Americans with Disabilities Act and Rehabilitation Act) *abrogated on other grounds*, *Johnson v. California* (2005) 543 U.S. 499; *Plata v. Schwarzenegger* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 68365 (medical health system is unconstitutional); *Perez v. Tilton* (N.D. Cal. 2006) 2006 Westlaw 2433240 (approving stipulated settlement in case involving unconstitutional dental care); *Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146 (Federal court appointed special master to oversee prison with a history of excessive violence, cruel and unusual punishment, and substandard medical care).

<sup>2</sup> *Brown v. Plata* (2011) 563 U.S. 493. See Margo Schlanger, "Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics" (2013) 48 *Harv. C.R.—C.L.L. Rev.* 165.

Until recently, most of these changes were essentially incremental. Not exactly moving around the deck chairs on the Titanic, but also nothing that fundamentally altered the overwhelming feeling when one enters a prison that its primary, unrelenting purpose is to punish. For example, reducing the population from 175% of design capacity to 137.5% of design capacity or less is undoubtedly a significant change, but it actually doesn't change the prison environment or its operations, and in that sense, it is an incremental change. The prison is still a prison.

This article will introduce the reader to recent developments in how California's prisons are operated, beginning with how healthcare is delivered, suggesting a more fundamental pivot away from the very long, unfortunate history of using prisons as places where pervasive, systematic dehumanization through continuous punishment and exploitation has been the operational reality, as well as the animating philosophy. California prisons can escape that history and adopt the morally and philosophically superior position, grounded in humanist principles and philosophies, that all people, even felons, are worthy of the respect that is owed to each of us simply by virtue of being human. The state can then focus its correctional philosophy much more on public safety and rehabilitation, and less on retribution and punishment. That will be good for everyone.

## **II. Correctional Practices and Philosophies in Western History**

The modern prison, its architecture and operational practices, is a recent phenomenon, historically speaking. We cannot truly understand just how historically recent without taking a journey through correctional practices and philosophies throughout western history. This means starting 2,600 years ago in ancient Greece, and surveying correctional history in ancient Rome, the Middle Ages, the Renaissance, the Protestant Reformation, the Enlightenment, England, and the American colonies. As we will see, certain aspects of our modern correctional perspectives are very deeply ingrained and explain many of our current practices, while some other features are of only historically recent vintage. The magnitude and importance of a pivot away from punishment to a more humanistic approach can be fully appreciated only with this brief historical survey.

### ***A. Correctional Practices in Ancient Greece***

So step back with me to antiquity in ancient Greece. The birthplace of democracy. Home to the Pythagoreans, Socrates, Plato and Aristotle, to name just a few of the leading thinkers of that age, thinkers whose philosophies are

directly traceable through Europe to modern times. The site of one of the great wonders of the ancient world, the Acropolis. Surely we can rely upon the ancient Greeks for some deep thinking about how to handle the problem of people who break the law and breach the peace.

Actually, not so much. Remember, after all, it was a Greek jury that sentenced the elderly Socrates to death on charges of failing to acknowledge the gods which had been recognized by the city and of corrupting the city's youth. It was a close vote—around 280 to convict and 220 to acquit—but close or not, he was convicted and sentenced to die by drinking the poison hemlock. Under the prevailing practices of the time, Socrates apparently could have purchased his freedom and left Athens forever, but his own principles kept him from taking the easy path.

To the great Greek thinkers listed above, we can add the name of “Draco” (sometimes Drako or Drakon), who history records as the first legislator of Athens. Prior to Draco's work, Athenian law had been for hundreds of years a system of only oral law which resulted frequently in private justice and family feuds. Around 621 or 622 B.C., Draco produced a written code of law for the city.

Draco's laws did not remain in effect for long. Twenty-five years later, Solon was chosen as chief magistrate. He repealed nearly all of Draco's code. According to Plutarch's version of history,

[Solon] repealed the laws of Draco, all except those concerning homicide, because they were too severe and their penalties too heavy. For one penalty was assigned to almost all transgressions, namely death, so that even those convicted of idleness were put to death, and those who stole salad or fruit received the same punishment as those who committed sacrilege or murder. . . . And Draco himself, they say, being asked why he made death the penalty for most offences, replied that in his opinion the lesser ones deserved it, and for the greater ones no heavier penalty could be found.<sup>3</sup>

If the name Draco sounds vaguely familiar in the context of punishment, it is because the harsh and severe penalties in his code are immortalized in the word, “draconian.”<sup>4</sup>

With death as the predominate penalty, there was no need to construct a building that could house large numbers of convicts for lengthy sentences.

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<sup>3</sup> Plutarch, *Complete Works of Plutarch*, “Life of Solon,” 17.1–2, Delphi Ancient Classics Book, 196.

<sup>4</sup> Richard Dargie, *Changing Times Ancient Greece: Crime and Punishment*, Compass Point Books, 2007, 7.

There was no need for what we today would call a prison.<sup>5</sup> There was no need to develop a theory for correctional or rehabilitative practices. Draco's policy was simply to permanently exclude criminals from being present in the city, and death was the surest way of accomplishing that goal.

The less draconian criminal penalties adopted by Solon and subsequent rulers still did not require construction and operation of a prison in the modern sense of that word.<sup>6</sup> Execution was still a prominent penalty even in the revised systems. But in addition to execution, the more moderate laws included banishment and exile from the city, corporal punishments such as public flogging, and imposition of fines. Banishment and exile were almost as bad as execution because the spaces between the Greek city states were a dangerous no-man's-land where people travelled without protection. A person exiled from one city was by no means guaranteed entry into any other city.

Punishments for crime in Greece cannot be fully understood without an appreciation of the prevalence of slavery. Ancient civilizations generally viewed slavery as a completely natural and legitimate institution.<sup>7</sup> Slaves were property. Information about the number of slaves in ancient societies is lost to history, with estimates ranging from 10% of the population to as high as one-third of the population.<sup>8</sup> By comparison, the percentage of the U.S. population who were enslaved in 1860 was around 13%.<sup>9</sup> Slaves in ancient times came from the losing side in wars, or were bought at slave markets supplied by merchants or pirates, or were the offspring of female slaves, or were farmers in debt to landlords who defaulted on their debts, or, of greatest interest to us, had been convicted of crimes.<sup>10</sup>

The crimes leading to slavery were generally "private" crimes against individuals, such as theft. For these minor crimes, the convict might be sentenced to become a slave of the victim, or a fine might be imposed which, if not paid, would result in the debtor becoming a slave of the judgment creditor. A minor crime committed by a slave of one family against another family might result

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<sup>5</sup> There was clearly a need to build and operate what today we would call a jail to hold someone accused of crime and in the short period of time between conviction and implementation of sentence, and such facilities were built in Greek cities.

<sup>6</sup> Imprisonment as a punishment is described in Plato's *Laws*, but historical scholars have concluded that "[h]is prison system appears to be a theoretical construct for there is no evidence that anything like it ever existed in the Athens of his day or that his prison sentences had any counterparts in Athenian law." J. Thorsten Sellin, *Slavery and the Penal System*, Classics of Law & Society—Quid Pro Books, 2016, 15.

<sup>7</sup> *Id.* 1.

<sup>8</sup> *Id.* 2.

<sup>9</sup> Wikipedia, 1860 United States Census ([https://en.wikipedia.org/wiki/1860\\_United\\_States\\_census](https://en.wikipedia.org/wiki/1860_United_States_census) accessed on Sept. 4, 2024).

<sup>10</sup> Sellin, *Slavery and the Penal System*, 2.

in the transfer of the slave to the victim family. In this way, slavery became part of the criminal justice system in dealing with minor crimes.

### ***B. Correctional Practices in Rome***

Ancient Rome followed most of the practices adopted in Greece. Prisons in Rome were generally used only to hold a person awaiting trial or execution.<sup>11</sup> The concept of sentencing a criminal to a long term of years in a prison—where the state would become responsible for the care of the convict—did not exist. Most serious crimes were punishable by execution. A few, particularly members of the upper classes, could avoid execution by banishment. Those not exiled faced death by various means from simple execution to public crucifixion to being forced into the games at the Colosseum, along with slaves and gladiators.

Rome's primary innovation in punishing criminals was in the variety of ways someone could be put to death: simple decapitation, being beaten to death, thrown from the Tarpeian Rock, burning alive or being thrown to wild animals.<sup>12</sup> For the crime of patricide, the culprit was treated to the penalty of the sack: "He was sewn into a leather sack in company with a dog, a monkey, a snake and a rooster, and was thrown into the sea or a river."<sup>13</sup>

Slavery continued to play a large role in criminal punishments, just as it did in Greece. Rome's primary innovation was to establish hard labor colonies where slaves performed some of the hardest work in mines and quarries in support of public construction. Because of the greater demand for slave workers, slavery became a more regular alternative to death or exile. Slaves were not well treated, needless to say.

The overall philosophy for convicts, as in Greece, was to remove them from society by death or banishment or slavery. Public safety by exclusion was the policy. Recidivism was not an issue. Dead men don't recidivate.

Physically, Rome's prisons—used to hold the accused for trial or the convicted until implementation of sentence—were more like what we would today call a dungeon.<sup>14</sup> The prisons—such as the Mamertine in Rome<sup>15</sup>—were underground, dark, damp, had little to no air circulation, and no separate cells.

<sup>11</sup> Richard A. Bauman, *Crime & Punishment in Ancient Rome*, Routledge, 1996, 23.

<sup>12</sup> *Id.* 28.

<sup>13</sup> *Id.* 45.

<sup>14</sup> Wikipedia, "Prisons in Ancient Rome" (accessed at [https://en.wikipedia.org/wiki/Prisons\\_in\\_ancient\\_Rome](https://en.wikipedia.org/wiki/Prisons_in_ancient_Rome) on Sept. 7, 2024).

<sup>15</sup> Wikipedia, "Mamertine Prison" (accessed at [https://en.wikipedia.org/wiki/Mamertine\\_Prison](https://en.wikipedia.org/wiki/Mamertine_Prison) on Sept. 8, 2024).

They were filthy. Friends and family were expected to provide for the prisoners' needs. And they were, of course, overcrowded. Terrible living conditions and overcrowding are recurring themes throughout the history of jails and prisons, a powerful symbol of the anti-humanist sentiment that prisoners are not worthy of common human respect.

There was of course no real expectation that prisons in Rome would be anything other than horrific; after all, the likelihood of being found guilty at a trial was very high, and a guilty verdict resulted in death or banishment. So time spent in prison waiting trial was just a precursor to expelling that person from society. There was no need for treating that person as anything but an outcast and sub-human.

### ***C. Correctional Practices During the Middle Ages and Renaissance***

The collapse of the Roman Empire led to a long period of chaotic governance throughout Europe characterized by a significant decline in overall population, reduced trade between cities and a substantial increase in migration. During the Early Middle Ages (i.e., 5<sup>th</sup> to 10<sup>th</sup> centuries), there was also a conspicuous scarcity in written works or cultural development. The governance that existed tended to be localized within family and kinship groups loosely assembled into tribes. Conflicts between families and tribes were common.<sup>16</sup>

Within the family, the head of household had essentially unlimited disciplinary power.<sup>17</sup> Crimes within a family or kinship group were private matters and generally handled within the group. A violent crime by a member of one kinship group against another kinship group would often lead to a war between the groups. Crimes that threatened the tribe itself usually resulted in death. Property crimes committed by freemen could result in punishments short of death, such as a payment of indemnities.<sup>18</sup> There also appears to be an increased use of mutilating punishments such as amputation of a hand, castration, or blinding, along with the use of other methods of torture.<sup>19</sup>

Towards the end of the Middle Ages (i.e., 1300 to 1500), after a series of plagues and famines, including the Great Famine of 1315–17 and the Black Death (1346–1353), Europe found its overall population cut by over 50%, putting great stress upon society and triggering virtually non-stop warfare.<sup>20</sup>

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<sup>16</sup> Sellin, *supra* note 7, at 31.

<sup>17</sup> *Id.* 870.

<sup>18</sup> *Id.* 916.

<sup>19</sup> *Id.* 930.

<sup>20</sup> The late 1300s was the time of the Jacquerie peasant uprising in France, the Peasants' Revolt in England and the Hundred Years' War.

Around 1440, Johannes Gutenberg invented the movable-type printing press. This invention, which presaged the spread throughout Europe of literature, including most significantly the Bible and other religious texts, a mechanism for organized scientific discovery, and a growth in general knowledge, education and culture, was a major contributor to the start of the Renaissance, the rediscovery of the grandeur of Ancient Greece and Rome.

When it came to the topic of punishment for crime, there really wasn't much to rediscover, as shown by the history related above, but the Renaissance, with encouragement from the Protestant Reformation of the 1500s, did witness one important innovation that would ultimately lead to the modern prison system. That innovation was the workhouse prison, the best examples of which were the Rasphuis of Amsterdam (1596) and Bridewell Prison in England (1553).<sup>21</sup> Prior to the creation of these institutions, punishment for crime at this time was a continuation of everything described above. Frequent use of the death penalty, banishment, corporal punishment, branding, mutilating punishments and torture.<sup>22</sup> A recent addition to this list was sentencing the stronger convicts to serve as "galley slaves" in the growing fleets of ships dedicated to commerce and defense.<sup>23</sup> Convict slaves were also used to work on public works projects.<sup>24</sup>

There does not appear to be a single precipitating event or reason for the creation of workhouses or their use as prisons.<sup>25</sup> In part, they appear to be a reaction to an increase in poverty and vagrancy in urban centers, along with an increase in petty theft. In part, the Protestant Reformation encouraged the productive use of labor as well as a softening of the almost uniformly harsh penalties that had become standard practice in responding to crime. In part, the Renaissance encouraged renewed interest in Plato's works which, as noted above, included a detailed description of a prison system where imprisonment was to be employed as the punishment for certain crimes.<sup>26</sup> That Plato's description was theoretic and not actually used in Athens did not matter; it inspired new thinking during the Renaissance. And finally, sentencing a convict to work in the workhouse was not far removed from the well accepted practice

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<sup>21</sup> J. Thorsten Sellin, *Pioneering in Penology—The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries*, University of Pennsylvania Press, 1944. See also Wikipedia, "Bridewell Palace" ([https://en.wikipedia.org/wiki/Bridewell\\_Palace](https://en.wikipedia.org/wiki/Bridewell_Palace) accessed on Sept. 10, 2024).

<sup>22</sup> *Id.* 2–8.

<sup>23</sup> *Id.* 8. See also Sellin, *Slavery and the Penal System*, 43.

<sup>24</sup> Sellin, *Pioneering in Penology—The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries*, 8.

<sup>25</sup> *Id.* 12–17.

<sup>26</sup> See note 7, *supra*.

of sentencing a convict to slavery.<sup>27</sup>

### ***D. Correctional Practices During the Age of Enlightenment***

The workhouses in Amsterdam and London symbolized changing attitudes regarding punishment for crime.<sup>28</sup> During the Age of Enlightenment, those changes were given a broad, solid philosophical grounding with the 1764 publication of a set of essays by Cesare Beccaria, the father of modern criminal justice, titled “On Crimes and Punishments.”<sup>29</sup> Beccaria’s importance can most easily be seen in three principles that he emphasized throughout the essays:

- First, that it is only the law that should determine the punishment of crimes, and that, therefore, “[n]o magistrate then . . . can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws.”<sup>30</sup>
- Second, “that the intent of punishments is not to torment a sensible being, nor to undo a crime already committed. . . . The end of punishment, therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal.”<sup>31</sup>
- Third, there should be proportionality between the crime committed and the resulting punishment.<sup>32</sup> “That a punishment may produce the effect required, it is sufficient that the evil it occasions should exceed the good expected from the crime, including in the calculation the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore tyrannical.”<sup>33</sup>

Beccaria’s work was extraordinarily influential. The proportionality and moderation that he called for in punishments fit perfectly within the construct

<sup>27</sup> Ultimately, when slavery itself became disfavored and illegal, the practice of forcing prisoners to work would be continued by recharacterizing the practice as “involuntary servitude.” See United States Constitution, Thirteenth Amendment (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”) In California, the November 2024 ballot will include as Proposition 6 a measure to remove from the California Constitution the similar language permitting “involuntary servitude” in jails and prisons. See <https://voterguide.sos.ca.gov/propositions/6/index.htm>.

<sup>28</sup> Sillen, *Pioneering in Penology—The Amsterdam Houses of Correction in the Sixteenth and Seventeenth Centuries*, 1 (“They were concrete symbols of a gathering revolt against the sanguinary and dishonoring penalties of the past, and while from the point of view of modern penology they were modest and timid rebels against tradition, there was a magnificence about them which is often attached to the work of pioneers.”)

<sup>29</sup> Cesare Beccaria, *On Crimes and Punishments*, Seven Treasures Publications, 2009.

<sup>30</sup> *Id.* 13.

<sup>31</sup> *Id.* 34.

<sup>32</sup> *Id.* 20 (“There ought to be a fixed proportion between crimes and punishments.”)

<sup>33</sup> *Id.* 70–71.

of an institutionalized workhouse/prison environment. All of the ingredients for the development of modern prisons were now on the table.

### ***E. Correctional Practices in Our Colonies and the Early United States***

We can now turn to correctional practices in the United States and in the colonies before the United States came into being. If you travelled back in time to the 17<sup>th</sup> century, the early colonial years, you would discover that prisons did not exist. We really hadn't progressed very much from ancient Greece and Rome. Just as in Greece and Rome, prisons were not needed, and the reason was the same. It wasn't that there was no crime; it was because the penalty for crimes—execution, banishment, or brief, public, corporal punishment—did not create a demand for prisons. Corporal punishment (think of the stocks, where passers-by could humiliate criminals and entertain themselves by pelting convicts with food and feces, public floggings, brandings, and such) did not require long-term housing in a prison-like structure, and capital punishment was swift and sure in those days. Banishment removed convicts from society as surely as capital punishment.

Most serious crimes were punishable by death, and serious crimes even included offenses such as adultery or breaking the sabbath. The convict might not actually get the death penalty for a first offense, but repeat offenders faced death. The corrections philosophy was public safety by permanent exclusion with the addition of public, corporal punishment.

The early colonies did have buildings with cells where people were held for short periods of time. Usually, these cells were occupied by people who were waiting to be tried, and their stays could be days or weeks. With just a few exceptions, we would recognize those facilities as the modern equivalent of jails.

The primary difference between colonial jails and modern jails is that occupants in colonial jails were required to work during their stay, based on the model of similar facilities in Amsterdam and London. In other words, jails were essentially workhouses where occupants worked to earn money for the owners to maintain the jail. Perhaps a more accurate description is that workhouses were used in part as jails. And, of course, the business model for a successful workhouse necessarily included essentially involuntary labor at significantly reduced or no wages. Prisoners, then, were economically handy to a workhouse, whose other residents would have included poor and homeless, orphans and abandoned children, disabled persons, and persons suffering from mental illness. All of these could be and were taken advantage of in a workhouse.

### ***F. Correctional Practices in the Early 1800s and the Birth of Modern Prisons***

By the late 1700s and early 1800s in the United States, there arose significant resistance to the use of capital punishment for so many crimes, resistance based in part on the new humanistic philosophies that were part of the Protestant Reformation and Age of Enlightenment and in part on the long-standing opposition of Quakers in Pennsylvania to capital punishment. Criminal laws were changed to reserve capital punishment for only the most serious crimes. For less serious crimes, a term of incarceration was the alternative, and these three-, four-, and five-year terms created the need for a place to house the prisoners for lengthy stays. This, finally, was the birth of the modern prison.

In 1816, the Auburn State Prison opened in Auburn, New York. Auburn became a model for state prisons around the country. It was essentially a successor to workhouses, and it operated on principles of silence, corporal punishment for violation of silence or other rules, and congregate labor. The prison earned profits from prisoner labor.

An alternative model was established in Pennsylvania at the Walnut Street Prison and subsequently at the Eastern State Penitentiary where prisoners were generally isolated from each other and required to perform prison labor in their own, individual cells. Jobs included nail making, shoe making, stone sawing, weaving and picking and carding wool. General isolation from other prisoners lasted for only a decade or so because the prison quickly became overcrowded, although the concept of solitary confinement lived on for many purposes.

Aside from the overt commercialization of forced prison labor, proponents of these prison models argued that the system would teach good work habits which would ostensibly promote rehabilitation of the prisoners. So now we can add to punishment and exclusion from society, a theory of rehabilitation to justify the terrible living conditions and forced labor.

### ***G. Correctional Practices in Early California***

That brings us to the birth of California and San Quentin, our first state prison.<sup>34</sup> The gold rush resulted in a dramatic increase in population in Northern California and, in particular, in San Francisco. Many of the gold rushers were ultimately disappointed that they didn't immediately strike it rich, and some of those turned to crime. Others no doubt were criminals before coming to California and perhaps saw the chaos in San Francisco as a good opportunity.

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<sup>34</sup> This section is drawn largely from my article, J. Clark Kelso, "San Quentin Prison's Birth Story," (Fall/Winter 2024) *CSCHS Review*, 2.

At the beginning, in the 1840s, there was no state prison, and criminals were detained in jails, although these jails were mostly made of adobe and did not do a very good job of actually holding prisoners.<sup>35</sup> Escapes were common.

In 1849, one solution was proposed by a city councilman, Sam Brannan, who had purchased and then retrofit a ship in the harbor to serve as a jail. He was of course hoping to make a profit from charging for housing prisoners. A more permanent solution was for the county to build a proper county jail. But at least in San Francisco initially, the county jail project ran out of money.

The state legislature realized there was a problem in having no state prison, but its initial solution was to simply declare that all county jails were also state prisons, a very early form of re-alignment. Leave it to the counties. This wasn't just a cram down on the counties, however, because by virtue of being a state prison, the county jails could then lawfully force prisoners to work on public works projects. That was the deal. So counties now could pursue profitable public works projects using forced labor. This type of tradeoff between the state legislature and local governments is of course a common feature of California governance even today.

In 1851, the Legislature was approached by James M. Estill and General Mariano Guadalupe Vallejo with the idea of the State leasing to Estill and Vallejo state prison grounds and requiring counties to deliver to Estill and Vallejo all state prisoners. The deal was for Vallejo and Estill to give the state \$137,000 and they would agree to build a state prison in Solano County, staff it, clothe and feed all of the prisoners in exchange for the Legislature moving the state capitol from San Jose to a city yet to be built in Solano County that would be named Vallejo, and authorizing Vallejo and Estill to use all convict labor for their personal profit. The Legislature approved the deal.

Things did not turn out well for Vallejo, either the city or the General. The Legislature quickly decided the City of Vallejo was not suitable for its needs, and it moved to nearby Benicia for a year and then to Sacramento. General Vallejo lost interest in the prison project, but his partner, James Estill, pushed on.

Estill now had state prisoners, but no prison had yet been built. In the meantime, he kept prisoners in a dungeon on a ship anchored near Angel Island, and prisoners were put to work quarrying stone in a quarry leased by Estill. The stone from this work would be used to build the first cellblock.

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<sup>35</sup> As noted in Hon. Barry Goode and John S. Caragozian, "California Without Law: 1846 Through 1850" (2023) 18 *California Legal History* 167, between 1846 and 1850, people living in California faced the uncertainty of the transition in governance from Mexico to California, a period of time they fairly described as a "legal void." *Id.* 167.

Ultimately, in 1852, the state paid \$10,000 to buy 20 empty acres on the southern shore of a place called Punta de Quentin. It was renamed San Quentin. Construction began.

Estill's economic interest was in building as cheaply as possible consistent with reducing the number of escapes and maximizing the number of inmates whose forced labor was the basis for any profits to him. So prison conditions were predictably terrible and the prison was almost immediately overcrowded.

Conditions at the prison deteriorated so much that in 1858, the Legislature authorized the Governor to take immediate control of the prison, and the lease agreement was declared illegal. The Governor personally entered San Quentin and with the assistance of his armed guards secured the keys to the prison and evicted Estill's successor in interest, John McCauley. From that time onward, state prisons became the direct responsibility of the state.

State management did not mean much of a change in conditions. An 1875 report by the Directors of the State Prison paints a dismal picture of San Quentin:

The Surgeon's report draws a sad picture of the crowded prison, the insufficient ventilation, and the practice of huddling together the prisoners without any regard to health or comfort.... [W]e have four rooms with forty-five men in each, with all the others equally crowded, and one-half, if not more of them, afflicted with maladies, and locked up for thirteen or fourteen hours out of the twenty-four, sleeping and existing in a fetid and poorly ventilated atmosphere, made absolutely poisonous by the exhalations from diseased lungs, and to a great extent unwashed surfaces, and the effluvia arising from the accumulation of excrementious matter deposited in a common receptacle during all these hours.<sup>36</sup>

This report helped drive the Legislature to construct a second state prison, this one located in Folsom, near Sacramento. Another prison would not be built in California for the next 60 years.

### ***H. Recap on the History of Correctional Practices and Philosophies***

Now is a good time for a short recapitulation. From ancient times until the late 1700s, the primary philosophy for dealing with persons convicted of any serious crime was permanent exclusion from society usually by death and sometimes by banishment. Exclusion promoted public safety, and of course a secondary goal was deterrence, the hope that people in society would be deterred from crime given the consequences of being caught. By the 1600s

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<sup>36</sup> Biennial Report of the Directors of the State Prison, p. 151 (1875).

and 1700s, all other criminals were sentenced to some form of public, corporal punishment, or sentenced to slavery. Executions and corporal punishments were often occasions for public entertainment.

Public attitudes started changing in the late 1700s. As a result of growing criticisms that capital punishment was excessive for many crimes to which it applied, sentencing laws and practices changed, and many felons began to be sentenced to confinement. Sentencing to a prison increasingly became the punishment of first choice. This change created a need for prisons where these felons could be confined for years or decades. And with prisons now starting to be built, the need for public, corporal punishment vanished. As Michel Foucault carefully and persuasively documented, punishment for crime increasingly vanished from a public spectacle to an institutional practice behind high walls and tall fences.<sup>37</sup>

Because no one actually wanted to pay for the earliest prisons, the model adopted for early prisons was the workhouse where construction and operational costs could be defrayed by using convict labor to produce goods for sale. An overall profit was also anticipated by investors. I do not believe there was really any correctional philosophy behind this development of the prison as a workhouse. It was just the economic and political reality of the time. But human beings are very good at rationalizing behavior and coming up with justifications—reason in service of reality or desired reality. So a justification for this approach to prisons based on the idea of rehabilitation was quickly adopted. Convicts would be rehabilitated for reentry by making them work hard while in prison; it just so happened that the prisons might pay for themselves and make a profit.

California's first prison was what today we would call a private prison, and it was definitely built and run on the workhouse model to generate profits. However, profits never materialized, and prison conditions were horrific. Within ten years, the State took over the prison. To alleviate serious overcrowding at San Quentin, the Legislature authorized construction of Folsom State Prison. Punishment and forced labor as a form of rehabilitation were the twin goals for California's prison system, except in cases of capital punishment, where exclusion was the guiding principle. And all of these sanctions were supported by the theory of deterrence.

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<sup>37</sup> Michel Foucault, *Discipline and Punish*, Vintage Books, 1995, 104.

### III. The Change to Determinate Sentencing and the Resulting Explosion in Prison Population

Corrections in California was essentially stable for the next 60 years after Folsom was built in 1880. During that period, the incarceration rate dropped from its high in 1878 of 0.18% of the state's population to about 0.07% in the mid-1970s. However, the population in California exploded beginning in 1941, so even though the incarceration rate was still going down, the total number of prisoners started going up. To alleviate the inevitable overcrowding, the state built 8 prisons between 1941 and 1965. And then there was again a pause and more stability until 1976.

Everything changed in 1976 when the State rejected its long-standing indeterminate sentencing system in favor of determinate sentencing.<sup>38</sup> In an indeterminate sentencing system, most felons were sentenced to prison for an indeterminate term with time of release determined by the parole board or Governor based on an evaluation of an individual inmate's readiness for release and risk to public safety. One consequence of this system was that the Administration essentially had control over how many inmates were held at any one time in the state's prisons. In order to hold the prison population at a reasonable level and to avoid overcrowding, prison officials and the Administration would usually release hundreds of prisoners between Christmas and New Year's. That is how the incarceration rate was kept at a pretty stable 0.1% of the population from 1940 through 1970.

Under determinate sentencing, by contrast, a felon was sentenced to a term of years, and a complex sentencing scheme was born with the length of a sentence determined by a set of factors resulting in possible low, medium and high terms that could be lengthened by special sentencing factors, like whether the crime was committed with a gun.

One of many problems with determinate sentencing is that there really isn't any basis for determining what constitutes a proportionate sentence. How long should someone serve in prison for burglary? For robbery? And so on. There is no objective measure for how long is long enough, particularly since there are competing justifications for incarceration, some of which point to longer sentences and some of which point towards shorter sentences.

Second problem, if the 2,500 years of history described above teaches us anything, is that the public enjoys watching and knowing that other people, not "us" or our family or friends of course, but other people, are getting punished

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<sup>38</sup> Kara Dansky's *Understanding California Sentencing* (2008) 43 U.S.F. L. Rev. 45, is one of the best recent historical reviews of California's sentencing policies.

and hurt in some way. It is the criminal sentencing equivalent of that old joke about taxes: Don't tax you, don't tax me, tax the guy behind the tree. As a species, we seem to tend towards violence and retribution against "others." Perhaps these characteristics gave us an evolutionary advantage prior to the creation of modern society and government, and we simply have difficulty now moving beyond those deeply held feelings.

The third problem is that determinate sentencing puts control over the length of sentences in the hands of the people and the people's representatives. If the people or the Legislature think a sentence is not long enough, they can change the law and make any sentence longer, and with retribution on their minds, that is exactly what they did. Courts and corrections lost control.

Now, when you combine the lack of a metric for determining proportionality with a system that gives control over the length of sentences to the People with what appears to be an inherent human tendency of the People to desire more and more retribution, you have a recipe for spiraling incarceration rates.

That is why the sentencing laws in California were amended over 1,000 times during the 1980s and 1990s, and every one of those amendments lengthened sentences. That is why we went from an incarceration rate of 0.07% in 1976 to a rate of 0.47% in 2008, a 670% increase in the rate of incarceration over 30 years. That is why the State built 21 new prisons over that time period. That is why the prison population exploded from around 25,000 to over 170,000. The war on drugs and passage of Three Strikes clearly were big contributors to the prison population.

The change to determinate sentencing and the explosion in incarceration cannot be seen as anything other than a sharp turn towards harsher punishment, retribution and exclusion from society as the predominate corrections philosophy. It is a philosophy that inevitably results in dehumanization of both inmates and staff who work in the prisons.

#### **IV. Humanism in California's Prisons**

We are finally ready to consider the progressive changes that have occurred during the last 20 years where humanization of various aspects of prison life have occurred. Some of those changes have been driven by the courts; the most recent innovation is being led by the Newsom Administration.

##### ***A. Court-Led Change in the Practice and Philosophy of Prison Healthcare***

The court-led changes began with several class action lawsuits challenging the constitutionality of mental health, dental and medical care within

California’s prisons. That there would be these lawsuits, and that they would be successful in finding liability should be no surprise to anyone. The purpose of prison had been punishment, retribution and exclusion. The housing was terrible, the food was awful, inmates were essentially in charge of the level of violence and drugs in prisons, and there were insufficient resources for pretty much everything. Healthcare was not given serious consideration in this environment.

In 2005, Judge Thelton Henderson placed the prison medical system under receivership. The Author was appointed as the second receiver in 2008 with the task of improving the medical care delivery system within the California Department of Corrections and Rehabilitation so that medical care would satisfy the minimum requirements imposed by the Eighth Amendment. Humanization of the healthcare system was a key strategy to meeting those requirements.

### *1. The Eighth Amendment’s “Deliberate Indifference” Standard*

A prison official violates the Eighth Amendment when he or she acts with “deliberate indifference” to the serious medical needs of an inmate.<sup>39</sup> There are two components to this standard. First, the deliberate indifference must be with respect to the serious medical needs of one or more inmates. Second, liability attaches only if a prison official has been deliberately indifferent to those serious medical needs.

#### (a) “Serious Medical Needs”

A “serious medical need” exists when the failure to treat an inmate’s physical condition may result in further significant injury or the unnecessary and wanton infliction of pain.<sup>40</sup> “The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a ‘serious’ need for medical treatment.”<sup>41</sup>

#### (b) “Deliberate Indifference”

“Deliberate indifference” is shown by an act or failure to act done with the purpose of denying an inmate medical care that would address an inmate’s serious

<sup>39</sup> *Farmer v. Brennan* (1994) 511 U.S. 825, 828. See *Estelle v. Gamble* (1976) 429 U.S. 97.

<sup>40</sup> *Jett v. Penner* (9<sup>th</sup> Cir. 2006) 439 F.3d 1091, 1096.

<sup>41</sup> *McGuckin v. Smith* (9<sup>th</sup> Cir. 1992) 974 F.2d 1050, 1059–60, *overruled on other grounds by WMX Techs., Inc. v. Miller* (9<sup>th</sup> Cir. 1997) 104 F.3d 1133.

medical needs,<sup>42</sup> or where the actor “knows of and disregards an excessive risk to inmate health and safety.”<sup>43</sup> In other words, to show deliberate indifference, an inmate must show that the course of action chosen was “medically unacceptable under the circumstances” and that the prison official “chose this course in conscious disregard of an excessive risk to plaintiff’s health.”<sup>44</sup>

Liability under the constitutional deliberate indifference standard is limited when compared with civil liability in an ordinary tort action for medical malpractice. In particular, “an inadvertent failure to provide adequate medical care does not, by itself, state a deliberate indifference claim for § 1983 purposes.”<sup>45</sup> Because of this limitation, “a plaintiff’s showing of nothing more than a difference of medical opinion as to the need to pursue one course of treatment over another [is] insufficient, as a matter of law, to establish deliberate indifference.”<sup>46</sup>

If this below-negligence standard applied to my work, I could essentially create a system that regularly produced really poor results—results that would constitute malpractice in a free-world context. In this way, the duty owed to prisoners would be significantly less than the duty owing to free-world human beings. Prisoners would be treated as less than fully human. That is not how I interpreted the applicable law.

## 2. *Individual versus Systemic Claims*

So how did I avoid being in charge of a system that regularly produces sub-standard results?

First, I recognized that there are two very different types of cases alleging deliberate indifference with respect to inmate medical care. The first type of case—an individual case—is typically brought by a single inmate alleging that the medical care given to that inmate violates the Eighth Amendment deliberate indifference standard. The second type of case—a systemic case—alleges that one or more elements of the system of inmate medical care is so deficient that it deprives a class of inmates (often defined as inmates with serious medical needs) of constitutionally adequate care.

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<sup>42</sup> *Id.*, 974 F.2d at 1096.

<sup>43</sup> *Estelle*, 429 U.S. at 106.

<sup>44</sup> *Jackson v. McIntosh* (9th Cir. 1996) 90 F.3d 330, 332.

<sup>45</sup> *Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122. *See also Estelle v. Gamble* (1976) 429 U.S. 97, 106 (“[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”).

<sup>46</sup> *Id.*

There are also significant differences between cases seeking damages for harm that has already occurred and cases involving prospective injunctive relief.

(a) Individual Claims

In individual cases, the complaint will often allege specific decisions or actions to deny, delay or intentionally interfere with the delivery of medically necessary care. For example, a complaint might allege that a specific type of surgery or treatment is medically necessary for that inmate and that the prison has refused to authorize that surgery or treatment. Or, a complaint might allege that a prison has failed to make medically necessary drugs available to the plaintiff to treat a particular condition.

The application of the Eighth Amendment's standards to these types of individual complaints is relatively straightforward. For purposes of a complaint seeking damages, the plaintiff must establish both the medical necessity of the surgery or other treatment that was denied as well as a sufficiently culpable state of mind which entails more than mere negligence (at a minimum, the plaintiff must show that the prison officials had actual knowledge of an excessive risk to inmate health or safety and disregarded that risk). For purposes of a complaint seeking prospective injunctive relief, the plaintiff must show that the requested surgery or treatment is medically necessary and that failure to provide the surgery or treatment would create an excessive risk to the inmate's health. If those showings are made, the defendant's further refusal to provide the requested surgery or treatment would necessarily satisfy the heightened culpability required for deliberate indifference.

Other complaints by individual plaintiffs may involve allegations that medical care was delivered to the plaintiff, but that the care delivered was constitutionally deficient, perhaps because of one or more errors committed by the treating physician(s). These cases require the court to distinguish merely bad care from care that is so bad that it violates the Eighth Amendment. The distinction is important because, as noted above, mere negligence or medical malpractice, without more, generally does not violate the Eighth Amendment.<sup>47</sup> In such cases, even if a prison doctor's performance falls below a community or national standard of care, that will ordinarily not be enough to constitute an Eighth Amendment violation. Put another way, isolated instances of medical malpractice do not, by themselves, violate the Eighth Amendment.

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<sup>47</sup> *Snow v. McDaniel* (9<sup>th</sup> Cir. 2012) 681 F.3d 978, 987, *overruled, in part, on other grounds by Peralta v. Dillard* (9<sup>th</sup> Cir. Mar. 6, 2014) 2014 U.S. App. LEXIS 4226.

### (b) Systemic Claims

The analysis is fundamentally different and more complex when a case involves broad claims that an entire prison system of medical care violates the Eighth Amendment. The constitutional challenge in these cases is to the system of care itself, not to the care delivered to any particular plaintiff. Of course, there clearly is a relationship between the system of care and the care delivered to individual patients. In particular, if one or more elements of the system of care are absent or significantly deficient, it is highly likely that care is not appropriately being delivered to a significant number, or perhaps even all, patients, thereby creating a risk of serious harm to patients.

For example, if the system of care is so grossly understaffed that it cannot see patients in a timely manner as required by their medical needs, then there would be a significant risk that the understaffing would result in serious risks of harm to inmates, significantly increasing the risk of morbidity and mortality. Well-functioning systems are what help ensure that adequate care is actually being delivered. For purposes of prospective injunctive relief, once prison officials are aware that understaffing is creating these risks, the constitutional violation has been established. As the Ninth Circuit noted in *Parsons v. Ryan*,<sup>48</sup> “we have repeatedly recognized that prison officials are constitutionally prohibited from being deliberately indifferent to policies and practices that expose inmates to a substantial risk of serious harm.”<sup>49</sup>

Although there is a relationship between the system of care and the care actually delivered to individual patients, it is important to remember that the primary remedial focus in a case alleging systemic violations is on the critical elements of the health care system, not on individual-level care. Stated another way, the remedial goal is to improve the critical systems that support appropriate medical care delivery, and when those systems have been improved to a level of adequacy and are actually being implemented routinely and reliably, that should be sufficient to satisfy the Eighth Amendment’s requirements in a case challenging the system of care.

### 3. *Constitutionality in a Systemic Claims Case*

The legal discussion above frames the practical question of how to go about determining whether California’s prison medical system has reached the level of constitutional adequacy. The overarching factual issues in a systemic claims case are: (1) whether, as a matter of pattern or regular practice, inadequacies

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<sup>48</sup> (2014) 754 F.3d 657.

<sup>49</sup> *Id.* 677.

in the medical system expose inmates to a serious risk of harm, and (2) to the extent it does, whether the state or responsible state officials are deliberately indifferent to any such system deficiencies. Once an Eighth Amendment violation has been found (i.e., once there have been findings under both (1) and (2)), the remedial focus shifts to the first element of the test since, at that point, any deficiencies that are allowed to persist will readily support a finding of deliberate indifference in fixing those deficiencies.

In determining whether there are systemic deficiencies that expose inmates to a serious risk of harm, we take into account the standard of care and performance set by free-world medical systems. In other words, we provide access to a medical system based on the quality of free-world health care systems with only those adjustments necessary to operate in a prison. Our doctors treat our patients in the same way as doctors treat patients who are not incarcerated—a humanistic approach to prison healthcare.

Putting the law aside for now, the transformation in prison health care in California’s prisons has been nothing short of remarkable. When San Quentin first opened in 1851, there was no health care at all. A few years in, one Napa Valley doctor was put on contract. There were no facilities to provide medical care, and the one doctor was insufficient for the hundreds of patients.

One hundred and fifty years later, things weren’t much better. In its October 3, 2005, opinion appointing a receiver, the district court in *Plata* chronicled serious deficiencies throughout the system of medical care encompassing the following elements:

- Lack of Medical Leadership
- Lack of Qualified Medical Staff
- Lack of Medical Supervision
- Failure to Engage in Meaningful Peer Review
- Intake Screening and Treatment
- Patients’ Access to Medical Care
- Medical Records
- Medical Facilities
- Interference by Custodial Staff with Medical Care
- Medication Administration
- Chronic Care
- Specialty Services
- Medical Investigations

There were two major reasons why the medical system was so bad. First, there is the problem of resources. Almost every system at a prison is under-resourced because there really isn't a strong interest within the Legislature to spend money on prisons and felons. From the very beginning of San Quentin, the Legislature didn't want to spend money on prisons. That is consistent with our 2,500-year review above.

Second, the overriding philosophy and culture in prison was punishment. The idea that prisoners were people who should receive medical care like people in the free world just wasn't given serious consideration. As the Supreme Court expressed it in *Youngberg v. Romero*, the "conditions of confinement [in prison] are designed to punish."<sup>50</sup>

Within the first 90 days of my appointment, I produced a draft Turnaround Plan of Action to remedy the constitutional deficiencies. The Court approved the plan on June 16, 2008.

The Turnaround Plan of Action set forth 6 goals:

- Ensure Timely Access to Health Care Services
- Establish a Prison Medical Program Addressing the Continuum of Health Care Services
- Recruit, Train and Retain a Professional Quality Medical Workforce
- Implement a Quality Assurance and Continuous Improvement Program
- Establish Medical Support Infrastructure
- Provide for Necessary Clinical, Administrative and Housing Facilities

In effect, we have been transforming that portion of California's prisons that deals with medical care into a system not based on conditions of punishment, retribution and dehumanization, but based on how we treat ordinary people in a free world medical system. We try to treat our patients humanely and without considerations of punishment. That is the very core of the humanistic tradition. It is also supported by an enlightened interpretation of the Eighth Amendment.<sup>51</sup>

### ***B. Other Efforts to Redirect the Focus to Rehabilitation***

So what about the rest of the prison's systems? Do they operate without punishment and with humanity? Not exactly, but over the last twenty years,

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<sup>50</sup> (1982) 457 U.S. 307, 321–22 (“Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”)

<sup>51</sup> *Brown v. Plata* (2011) 563 U.S. 493, 510 (“As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”). See also J. Clark Kelso, “Corrections and Sentencing Reform: The Obstacle Posed by Dehumanization,” (2014) 46 *McGeorge L. Rev.* 897.

there have been serious efforts underway to move away from punishment as the daily fare in California's prisons, although it has clearly been an incremental, incomplete, start-and-stop process.

First, we have clearly seen a renewed emphasis on rehabilitation programs. Symbolic of that emphasis, in 2004, the department's name was formally changed from the California Department of Corrections to the California Department of Corrections and Rehabilitation.

Second, the federal courts established a limit on the degree of overcrowding that could exist within California's prisons. The population reduction was initially accomplished simply by offloading non-violent, non-serious, non-sex felons to the jails. The population came down from over 170,000 to around 125,000, a dramatic improvement which meant that CDCR no longer had to triple bunk inmates in gymnasiums like cords of wood.

Jails mostly went along with this change in return for promises of state money for local jails and because most big jails in California already had established court-ordered procedures for early release of prisoners to avoid overcrowding. So it was easier for the jails to accomplish jail de-population than it would have been for CDCR to accomplish prison de-population.

Third, in 2016, *Proposition 47* recategorized certain nonviolent offenses as misdemeanors, rather than felonies, which diverted defendants to the jails and away from the prisons. The crimes affected were:

- Shoplifting, where the value of property stolen does not exceed \$950;
- Grand theft, where the value of the stolen property does not exceed \$950;
- Receiving stolen property, where the value of the property does not exceed \$950;
- Forgery, where the value of forged check, bond or bill does not exceed \$950;
- Fraud, where the value of the fraudulent check, draft or order does not exceed \$950;
- Writing a bad check, where the value of the check does not exceed \$950;
- Personal use of most illegal drugs (Below a certain threshold of weight).

Fourth, in 2016, Assemblymember Weber's bill, AB 2590, amended Penal Code Section 1170, which is the heart of the determinate sentencing scheme. Before the amendment, Section 1170(a)(1) provided that "the purpose of imprisonment for crime is punishment." That language was replaced with the following: "The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for

uniformity in the sentences of offenders committing the same offense under similar circumstances.” Cesare Beccaria would be smiling.

Assemblymember Weber explained the intent of the change as follows: “AB 2590 (Weber), the Restorative Justice Act, is a modest but important step to move California’s criminal laws away from a system that relies solely upon incarceration and punishment. While current law assumes that punishment (i.e., prison) is the only legitimate response to crime, AB 2590 recognizes that alternatives to incarceration, including restorative justice solutions, may sometimes be appropriate.”<sup>52</sup>

And fifth, in November 2016, the voters approved Proposition 57 which, among other things, expanded consideration for parole to certain felons convicted of non-violent crimes and authorized more sentence credits for rehabilitation, good behavior and education.

### ***C. Public Safety and Rehabilitation Instead of Retribution and Punishment***

These have all been good steps forward, in my judgment, but they still don’t really get at the core problem which is that, on a daily basis, life in prison—for both staff who work there and inmates who live there—punishes the heart, soul and spirit. It is a place built to punish people every day of their sentence, and the environment essentially encourages staff to treat inmates as less than human which inversely dehumanizes the staff. There is very little reason to expect that rehabilitation programs can be effective in that overall environment of punishment. And, thus, we will still end up releasing thousands of inmates every year who will, more likely than not, reoffend. The incremental steps to achieve rehabilitation aren’t enough when the overwhelming culture is one of dehumanization and violence.

It’s time to try something completely different. Governor Newsom is trying something completely different. In March 2023, the Governor announced a program called “The California Model” to transform how California’s prisons operate. Based on a corrections model developed first in Norway,<sup>53</sup> the California Model endeavors to promote public safety by changing prison operations so that prisoners learn how to live in free world environments instead of learning how to live in a prison. The California Model will implement

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<sup>52</sup> Assembly Committee on Public Safety, Hearing on AB 2590 (Weber), April 19, 2016.

<sup>53</sup> See Jerome F. Buting, “Correctional Reform: The Norwegian Model” (2023) 47—Jul Champion 36. The leading champion of the Norway Model in the United States is Dr. Brie Williams at the University of California San Francisco. Dr. Williams is the Founder and Director of AMEND, which promotes a public health approach to addressing prison harms. See <https://amend.us/> (accessed on Sept. 9, 2024).

system changes that create an environment rich in rehabilitation, a safer and more professionally satisfying workplace for all staff, and improves outcomes and opportunities for success through robust re-entry efforts.

Instead of prison being simply a place for punishment, the California model “draws on national and international best practices to change culture within our prisons and improve our correctional environment through staff training, tools, and resources that promote the health and well-being of those who work and live in them.”<sup>54</sup> One of the model’s distinguishing features is the focus on the harm that current prison practices inflicts upon the staff who work in the prisons:

Providing a safer environment where staff want to go to work and add value will reduce the trauma and toxic stress experienced daily. The CA Model also aims to help incarcerated individuals prepare to become better neighbors when they return to our communities. This is how we can best promote public safety. It’s a vitally important statewide effort that is expanding to every aspect of [the prison]. The CA Model is not going to stop all our bad days, but it will reduce the number of bad days our staff have now.<sup>55</sup>

The following pillars form the foundation of the California Model:<sup>56</sup>

1. **Dynamic Security:** an approach that promotes positive relationships between staff and incarcerated people through purposeful activities and professional, positive, and respectful communication.
2. **Normalization:** aims to bring life in prison as close as possible to life outside of prison. The more life in prison resembles life in the community, the easier it will be for people to transition and adjust to life in the community upon release.
3. **Peer Support:** seeks to train incarcerated individuals to use their lived experiences to provide recovery and rehabilitative support to their peers.
4. **Becoming a Trauma Informed Organization** by changing the practices, policies, and culture of the entire Department, educating staff at all levels to recognize the impacts of trauma and ensure the physical and emotional safety of all staff and incarcerated individuals.

Now it is clear that the department will need to decide which inmates can benefit from this type of approach, and which inmates will still need to be isolated. There are probably thousands of inmates who would not be able to

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<sup>54</sup> California Department of Corrections and Rehabilitation, “The California Model Magazine,” p. 2 (Summer 2024).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* 3.

adjust their behavior to live in a more normalized environment. But it is just as clear there are tens of thousands more for whom this new approach will increase the likelihood of a successful reintegration into our communities.

The department has developed a “California Model Measurement Plan” to assess both the department’s progress in implementing the plan and whether the California Model actually produces the hoped for impacts, changes and results. For the purposes of this article, the results measures are of greater importance. Using a combination of staff and incarcerated person surveys and process and outcome measures extracted from the department’s data warehouses, the department intends to measure at least the following:

- Job satisfaction and wellness ratings;
- Indications of staff trauma / burnout, such as worker’s compensation claims, levels of unplanned leave, long-term leave, and staff turnover;
- Indications of violence or threat of harm in the workplace, including serious rule violation reports, use of force and other incident reporting;
- Program feedback and recommendations for future improvements;
- Program participation and completion rates, including attendance at education, vocational training, work assignments, rehabilitation groups and health care appointments;
- Health outcomes for the incarcerated population, such as suicide and self-harm, hospitalizations and overdoses; and,
- Post-release outcomes, including re-arrest and recidivism.

Implementation of the model has been underway at eight institutions, with eight more soon to follow, and implementation at all institutions is anticipated by June 2026.

#### **IV. Conclusion**

In closing, it is worth reminding ourselves about the long trajectory of prison practices and philosophies. For most of western history, the philosophy was simply to exclude those convicted of crimes by capital punishment or banishment. Public corporal punishment was added to the mix for lesser offenses. With prisons came involuntary labor and the reality of punishing prisoners on a daily basis.

Throughout this history, prisoners have been seen as unworthy of the basic respect that we accord to all other people. Prisoners are sub-human, and the lack of humanity is reinforced in pretty much everything that happens in prison. Even with the moderation and proportionality introduced after the Age of Enlightenment, prisoners were still slaves in cages.

We have been working to reform healthcare in California's prisons as much as we can to restore humanity to the equation. But healthcare is only one part of the correctional environment and system.

Rehabilitation has been promised for two hundred years. But trying to rehabilitate someone who, at the very same time, is routinely subject to dehumanizing punishment has never worked and never will work. We end up producing people who know how to survive in prison, but not how to thrive in the free world.

We need to do better. The current approach still dehumanizes inmates while simultaneously debasing staff who work in corrections. We need to embrace more fully the principles of humanism embodied in Age of Enlightenment philosophies. The California Model recognizes the work that needs to be done and represents a strong pivot away from the dehumanization that too often characterizes the modern prison environment and operations.

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