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**COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY  
UNITED STATES HOUSE OF REPRESENTATIVES**

**“CALIFORNIA CRIMINAL JUSTICE REFORM:  
POTENTIAL LESSONS FOR THE NATION”**

**JULY 13, 2019**

**Introduction**

Chairwoman Bass and other Committee Members, thank you for the opportunity to testify at this special hearing on criminal justice reform in California and potential lessons for the nation. My name is Michael Romano. I am the Director of the Three Strikes and Justice Advocacy Project at Stanford Law School. I am also the founding Director of the Criminal Defense Clinic at Stanford Law School, and I currently serve on several boards and advisory committees related to criminal justice policy. My primary research interests and teaching responsibilities involve criminal sentencing law, recidivism and prisoner reentry, post-conviction litigation strategies, and related policy development and implementation. As part of my work at Stanford, I supervise an experiential-learning program where students assist in the direct representation of prisoners across the country serving life sentences for nonviolent crimes.

On behalf of, and in partnership with, the NAACP Legal Defense and Educational Fund, I have also been directly involved with the drafting, enactment, and implementation of several criminal justice reform measures, including successful ballot statewide measures in California known as Proposition 36 (Three Strikes Reform Act of 2012) and Proposition 47 (The Safe Neighborhoods and Schools Act of 2014). In total, this work has effectively reduced sentences and provided an opportunity for early release for over 15,000 nonviolent, low-risk prisoners, including over 5,000 prisoners serving life sentences for nonviolent crimes under California’s “Three Strikes and You’re Out” law. I have also successfully litigated the reversal of mandatory minimum federal life sentences and partnered with the Obama Administration and United States Department of Justice regarding President Obama’s executive clemency program.

In this testimony, I seek to make five points. First, over the past decade, California has led the country in reducing its prison population while at the same time substantially reducing violent and property crime rates. Second, California has accomplished its prison downsizing under a variety of legislative and regulatory reforms on state and local levels, each with distinct political and policy strategies and objectives. Third, despite the state’s successful recent track record in criminal justice reform, legislative action in California has dragged behind public opinion, as multiple statewide surveys, including polls of crime survivors and likely voters, show continued public support for prison and jail downsizing. Fourth, although California has made

great strides, the state’s prisons and jails remain unconstitutionally overcrowded and for some critical subgroups, including prisoners suffering from mental illness, prison conditions may be worsening. Finally, new pilot programs and proposals in California deserve further development may present inspiration and opportunities for other jurisdictions throughout the country.

**I. California Has Dramatically Reduced Its State Prison Population and Reduced State Crime Rates at the Same Time**

Over the past decade, California has reduced its prison population by 26 percent.<sup>1</sup> During the past five years in particular, no other state has grappled as vigorously with its prison policies or enacted and implemented more reforms to reduce its prison and jail populations than California. In fact, to the extent that the total *national* prison population is on the decline, that decline is largely attributable to prison downsizing in California. Between 2006 and 2014, California reduced its prison population by more than 37,000 prisoners.<sup>2</sup> Over the same period of time, the combined population of all other state prisons and the federal system slightly *increased*.<sup>3</sup>

Because there is considerable public debate about the efficacy and impact of recent criminal justice reform measures in California, and particularly any corresponding impact on California’s crime rates, I will begin with several undisputed facts. I will then attempt to untangle issues leading to controversy among criminal justice officials, advocates, and academics.

First, it is undisputed that California has dramatically reduced the population of state prisoners from a peak of 170,794 inmates in 2006. Today, California’s total prison population is 125,472—reflecting a 26 percent decrease (over 45,000 prisoners).<sup>4</sup>

Second, it is also undisputed that during this period of prison downsizing crime rates in California have decreased substantially. Between 2006 and 2018, violent crime in California decreased by 17 percent and property crime decreased by 26 percent, according to the most recent data released by the California Department of Justice this month.<sup>5</sup> In fact, California has

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<sup>1</sup> Cal. Dept. of Corrections and Rehabilitation (“CDCR”), Office of Research, “Monthly Total Population Report Archive,” *available at* [www.cdcr.ca.gov/research/monthly-total-population-report-archive](http://www.cdcr.ca.gov/research/monthly-total-population-report-archive)

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

<sup>3</sup> See U.S. Bureau of Justice Statistics, “Total Correctional Population,” *available at* [www.bjs.gov](http://www.bjs.gov).

<sup>4</sup> CDCR, “Monthly Total Population Report Archive.”

<sup>5</sup> Becerra, et al., “Crime in California 2018,” California Dept. of Justice, California Justice Information Services Division (Jul. 2, 2019). In 2006, the rate of violent crimes in California was 535.6 per 100,000 residents. the rate of violent crimes in California in 2018 was 444.1 per 100,000 residents (17 percent decrease). In 2006, the rate of property crimes in California was 3,189.3 per 100,000 residents. In 2018, the rate of property crimes in California was 2,362.8 per

not seen similar levels of violent crime rates since the 1960s. Property crime rates have never been lower, according to the recorded history of the state Department of Justice.<sup>6</sup>

Third, although a variety of strategies, laws, and regulations drove the downsizing of California’s prison population, the individual beneficiaries of reforms enacted in California—those prisoners released earlier than expected due to changes in law—have dramatically outperformed expectations with recidivism rates well below state averages. Perhaps most impressive are those who have been released early under reforms to California’s Three Strikes law by Proposition 36 in 2016.<sup>7</sup> When the Three Strikes statute was originally enacted in 1994, proponents argued that the law would “keep career criminals who rape women, molest innocent children, and commit murder, behind bars where they belong . . . [and] California taxpayers will no longer have to pay the outrageous costs of running career criminals through the judicial system’s revolving door over and over again.”<sup>8</sup> When reforms to the Three Strikes law were proposed in 2012, opponents warned, “What do you think these newly released hardened criminals will do once they get out of prison? We already know the answer to that: They will commit more crimes, harm or kill more innocent victims, and ultimately end up right where they are today—back in prison.”<sup>9</sup>

In fact, people convicted of nonviolent crimes, sentenced to life under the Three Strikes law, and released early under Proposition 36 have far outperformed all other people released from state prison.<sup>10</sup> According to data recently provided by the California Department of Corrections, the recidivism rates of those released early under Proposition 36 is 40 percent better than the state’s average recidivism rate.<sup>11</sup>

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100,000 residents (26 percent decrease). *See also* Finch, “Crime continues to drop in California: Here are the Numbers for Your County,” SACRAMENTO BEE (Jul. 10, 2019) (“Most violent and property crimes fell last year, continuing an ongoing decline in California, according to statistics released this month by the state Attorney General.”)

<sup>6</sup> Becerra, et al., “Crime in California 2018,”

<sup>7</sup> *See* Cal. Penal Code § 1170.126 (establishing a mechanism for early release of most prisoners sentenced to life under California’s Three Strikes law for nonviolent and non-serious crimes).

<sup>8</sup> Reynolds, Scully & Huffington, “Argument in Favor of Proposition 184,” California Ballot Pamphlet, (Nov. 8, 1994).

<sup>9</sup> Royal, Adams & Salerno, “Argument Against Proposition 36,” California Official Voter Information Guide, (Nov. 6, 2012).

<sup>10</sup> *See* Eckholm, “Out of Prison, and Staying Out, After 3rd Strike in California,” NEW YORK TIMES, (Feb. 26, 2015); Morain, “Three-Strikes Changes Appear to Be Working,” SACRAMENTO BEE (Apr. 13, 2014).

<sup>11</sup> 27.6 percent of people released under Proposition 36 have been convicted of a new crime within three years of their release. That compares to 46.1 percent of all state prisoners in California have been convicted of a new crime within three years of their release. *See* Cal. Dept. of Corrections and Rehabilitation, “Outcome Evaluation Report,” (updated Jun. 2018). Prop. 36 data provided directly by the Dept. of Corrections.

Despite the apparent success of California’s prison downsizing efforts, and general trend of crime rates, of some have argued that the reforms have endangered public safety.<sup>12</sup> The controversy focuses around two central questions: (1) Over what period of time should we track crime rates? and (2) Can we attribute changes in crime rates to specific sentencing reforms?

First, there is no doubt that the rate of violent crime between 2014 and 2017 went up, approximately 12 percent, and opponents of reform point to this data to argue that prison downsizing reforms—particularly Proposition 47, which was enacted in November 2014—are endangering public safety.<sup>13</sup> Some attributed California’s recent criminal justice reforms to especially violent crimes, including the murder of a police officer in Whittier, California, in 2017, even though further investigation proved the reforms were completely unrelated.<sup>14</sup>

A closer, and I believe fairer, evaluation of the data undermines many of the concerns raised by reform opponents. First, the time period during which violent crime increased in California (2014 to 2017) turned out to be temporary and inconsistent with long term trends. As discussed above, over the past decade since California began reducing its prison population both violent and property crime rates are undeniably down. Second, even within the 2014 - 2017 time-period, nonviolent property crime rates decreased.<sup>15</sup> This is especially relevant because nearly all of the reforms enacted in California have reduced penalties for nonviolent crimes, leaving punishments for violent offenders largely intact. Third, according to the most recent crime reports released by the California Department of Justice this month, the statewide violent crime rate for 2018 was *down* compared to 2017.<sup>16</sup>

It is also difficult to attribute specific legislative changes to crime rate outcomes. For example, crime rates go up in some parts of the state when they are going down in other localities at the same time. As the noted by the *Los Angeles Times*, “What single factor can explain the fact that [in 2017] violent crime went up 6% in Los Angeles but fell 6% in Sacramento?”<sup>17</sup> Also, as noted, statewide violent crime went up slightly in 2017 but dropped in 2018 without any significant change to statewide laws, practices, or policies.<sup>18</sup>

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<sup>12</sup> See, e.g., VanSickle & Villa, “California transformed its justice system. But now crime is up, and critics want rollbacks,” LOS ANGELES TIMES (Dec. 20, 2018).

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

<sup>14</sup> See Times Editorial Board, “County mistakes, not reform laws, allowed the alleged killer of a Whittier police officer to go free,” LOS ANGELES TIMES, (May 10, 2018).

<sup>15</sup> Becerra, “Crime in California 2018.”

<sup>16</sup> *Id.*

<sup>17</sup> VanSickle & Villa, “California transformed its justice system. But now crime is up, and critics want rollbacks,” LOS ANGELES TIMES, (Dec. 20, 2018).

<sup>18</sup> Finch, “Crime continues to drop in California: Here are the Numbers for Your County,” SACRAMENTO BEE, (Jul. 10, 2019) (“The trend toward a less violent society is not consistent

Factors contributing to crime rates are notoriously difficult to isolate, and I will not attempt to do so here.<sup>19</sup> However, there can be little legitimate dispute that the prevailing crime rate trend in California since the state began reducing its prison population is down, although that trendline is not perfectly flat and even. Changes in crime rates over short periods of time will inevitably reflect some volatility. Of course, we cannot say that downsizing California prisons is responsible for California's falling crime rates.<sup>20</sup> But we can say that the fear of reform critics who warned that reducing the state's prison population would gravely endanger public safety seems unfounded.

While California dramatically reduced its state prison population and crime rates at the same time, the state's criminal justice problems are far from over. The state remains under a federal court order to implement a long-term "durable" solution to prevent future crowding,<sup>21</sup> most of the state's county jail systems are also overburdened and under orders capping capacity,<sup>22</sup> the Los Angeles County Jail (the nation's largest) is under a federal consent decree due to longstanding mistreatment of mentally ill inmates,<sup>23</sup> the state spends over \$12 billion annually on its prison system (not including jails),<sup>24</sup> and far too many people remain behind bars without any public safety justification. California should continue to revisit its criminal justice laws and policies to maximize public safety and minimize unnecessary suffering in the state's prisons and jails.

## **II. California Downsized Prisons Under a Variety of Reforms with Different Political, Administrative, and Policy Strategies and Outcomes**

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across every region, but overall — and with a few exceptions — people are committing fewer crimes per capita today than a decade ago.”)

<sup>19</sup> For broader discussion *see* National Research Council of The National Academies, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES*, (2014); Zimring, *THE GREAT AMERICAN CRIME DECLINE*, Oxford Univ. Press, (2006).

<sup>20</sup> *Cf.* Holder, “Keynote for Shifting Law Enforcement Goals to Reduce Mass Incarceration,” Brennan Center for Justice, (Sept. 23, 2014) (“High incarceration rates and longer than necessary prison sentences have not played a significant role in materially improving public safety, reducing crime, or strengthening communities . . . In fact, the opposite is often true.”)

<sup>21</sup> *Coleman v. Brown*, 960 F. Supp. 2d 1057 (E.D. Cal. 2013).

<sup>22</sup> *See* St. John, “Gov. Jerry Brown’s Prison Reforms Haven’t Lived up to His Billing,” *LOS ANGELES TIMES* (Jun. 21, 2014) (describing crowded conditions in many county jails, including “scores of prisoners . . . stacked three high in steel bunk beds” in at least one county facility); Lawrence, Stanford Law School, “Stanford Law School Criminal Justice Center, Court-Ordered Population Caps in California County Jails,” (Dec. 2014).

<sup>23</sup> *See* Chang, “L.A. County Unable to Avert Federal Oversight of Jails,” *LOS ANGELES TIMES*, (Oct. 2, 2014).

<sup>24</sup> CDCR’s Budget for Fiscal Year 2018-19 *available at* [www.cdcr.ca.gov/budget](http://www.cdcr.ca.gov/budget).

In 2011, the United States Supreme Court issued its landmark decision in *Brown v. Plata*, ruling that California's prison population had reached unsustainable levels.<sup>25</sup> The Court noted that the state's prison system was designed to hold roughly 80,000 people but operated with twice that number of prisoners for over 11 years. Overcrowding led to neglect of prisoners in need of medical and psychiatric care, amounting to cruel and unusual punishment in violation of the Eight Amendment. Although *Plata* ushered in a wave of reforms to California's prison system and sentencing laws, the state's prison downsizing efforts began even before the Supreme Court decision in 2011.

**Limiting Parole and Probation Revocations.** Beginning in 2009, the state legislature recognized that a significant number of people in prison were incarcerated for violations of conditions of parole and probation, rather than for committing new crimes.<sup>26</sup> Furthermore, many of these violations were for minor so-called "technical violations," including missing appointments with parole or probation officers or failing to update authorities with proper contact information. Reducing the number of people incarcerated for minor parole or probation violations seemed like a good place to begin reducing the prison population. In 2009, the state legislature enacted two bills to accomplish this goal. First, Senate Bill ("SB") X3 18 launched a program known as Non-Revocable Parole ("NRP"), which targeted certain prisoners released on parole deemed low risk to reoffend. These people had committed nonviolent crimes, had no recent serious in-prison disciplinary violations, and had been evaluated by the Department of Corrections and deemed not a high risk for recidivism. Under NRP, these select released prisoners could only be returned to prison for committing a new crime, not for a technical parole violation.<sup>27</sup> The second measure was SB 678, which targeted probation violations administered by county probation offices. SB 678 did not change the rules for who could be sent to prison for violating probation rules but instead offered financial incentives to county probation offices if they reduced the number of people returned to state prison for probation violations that did not amount to new crimes.<sup>28</sup> These funds were used to increase reentry support services.<sup>29</sup> In total, it is estimated that these programs combined reduced California's prison population by approximately 6,000 people.<sup>30</sup>

**2011 - Public Safety Realignment (AB 109).** The largest drop in California's state prison system is attributable to a series of measures known as "Public Safety Realignment,"

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<sup>25</sup> *Brown v. Plata*, 563 U.S. 493 (2011).

<sup>26</sup> See Grattet, Petersilia, et. al. "Parole Violations and Revocations in California: Analysis and Suggestions for Action." Federal Probation Reporter, Vol. 73, No. 1 (2008).

<sup>27</sup> See Cal. Penal Code § 3000.03 (2010); Cal. Dept. of Corrections and Rehabilitation, "Non-Revocable Parole" available at [www.cdcr.ca.gov/parole/parole/non-revocable-parole](http://www.cdcr.ca.gov/parole/parole/non-revocable-parole).

<sup>28</sup> See Cal. Penal Code §§ 1228 et. seq. (2009)

<sup>29</sup> *Id.*

<sup>30</sup> Judicial Council of California, "Program Findings, Community Corrections, (SB 678)" available at [www.courts.ca.gov/programs-communitycorrections.htm](http://www.courts.ca.gov/programs-communitycorrections.htm).

enacted in April 2011, one month prior to the Supreme Court’s decision in *Plata*. Like the reforms to parole and probation violations, Realignment targeted prisoners convicted of nonviolent offenses and aimed to reduce the state’s prison population without adjusting sentencing laws.<sup>31</sup> Rather than reducing sentences, Realignment required that most people convicted of non-serious and nonviolent crimes be incarcerated in county jails, rather than in state prison.<sup>32</sup> Realignment also shifted the responsibility of post-incarceration supervision of these inmates from state officials to county probation departments. In exchange for the new burden and responsibilities placed on county jail and probation systems, Realignment also provided a significant amount of state funding to county governments to invest in expanding jail capacity, alternatives to incarceration, or other almost any other program that the county chose.<sup>33</sup> In total, it is estimated that Realignment reduced California’s prison population by over 27,000 inmates.<sup>34</sup>

**2012 - Three Strikes Reform (Proposition 36).** Although California prison downsizing began in earnest with Realignment, the state had done nothing to revisit its sentencing laws, which were major drivers of the prison population boom in the first place. Most conspicuously, California had the county’s harshest and most frequently used (non-capital) sentencing scheme in its “Three Strikes” law, which imposed a life sentence for any felony if the defendant had two prior convictions for crimes defined as serious or violent by the state Penal Code.<sup>35</sup> By 2011, over 8,700 people had been sentenced to life under the Three Strikes law—most of whom were imprisoned for nonviolent third strike crimes, including crimes as minor as shoplifting and

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<sup>31</sup> See generally, Petersilia & Cullen, “Liberal but not Stupid: Meeting the Promise of Downsizing Prisons,” 2 *Stan. J. Crim. L. & Pol.* 1 (2015) (discussing Realignment as an “unprecedented experiment in downsizing prisons.”)

<sup>32</sup> It is often (misleadingly) stated that Realignment “moved” state prisoners to the county jail system. This is misleading because no individual state inmate was ever physically moved from prison to jail. Instead, Realignment merely directed new low-level offenders to county jails, thus reducing the number of new admissions in the state prison system.

<sup>33</sup> Despite these financial sweeteners, county jails were in no position to house the new wave of incoming inmates “realigned” from prison to jail. Many jail systems were themselves overcrowded and in 2014 alone county jails reported releasing 13,000 inmates early due to overcrowding. See Public Policy Institute of California, “Public Safety Realignment: Impacts So Far,” (Sept. 2015) available at: [www.ppic.org/publication/public-safety-realignment-impacts-so-far/](http://www.ppic.org/publication/public-safety-realignment-impacts-so-far/)

<sup>34</sup> See Quan, et. al., STANFORD CRIMINAL JUSTICE CENTER, REALLOCATION OF RESPONSIBILITY: CHANGES TO THE CORRECTIONAL SYSTEM IN CALIFORNIA POST-REALIGNMENT (Jan. 2014); Cate & Weisberg, STANFORD CRIMINAL JUSTICE CENTER, BEYOND LITIGATION: A PROMISING ALTERNATIVE TO RESOLVING DISPUTES OVER CONDITIONS OF CONFINEMENT IN AMERICAN PRISONS AND JAILS (Dec. 2014).

<sup>35</sup> See Cal. Penal Code §§ 667, 1170.12.

simple drug possession.<sup>36</sup> In November 2012, California voters approved Proposition 36, a ballot measure that reformed California's Three Strikes law to eliminate life sentences for nonviolent crimes.<sup>37</sup> Proposition 36 passed with 69 percent support of state voters. Proposition 36 also included a retroactive provision, allowing prisoners currently serving life sentences for nonviolent crimes to apply for early release. These inmates received shorter sentences (often amounting to immediate release) unless the prosecutors proved in court that their release posed an "unreasonable risk of danger to public safety."<sup>38</sup> In total, over 2,200 people sentenced to life for non-serious, nonviolent crimes have been released under Proposition 36.<sup>39</sup> An unknown number of additional people have avoided life sentences for nonviolent crimes since the enactment of Proposition 36.

**2014 - Safe Neighborhoods and Schools Act (Proposition 47).** Following the success of Proposition 36, California voters in 2014 approved a second, further reaching sentence reduction measure, Proposition 47, which reduced punishments for six common nonviolent crimes, including shoplifting, petty theft, forgery, and simple drug possession. Proposition 47 passed with 60 percent support of state voters. Under Proposition 47, these crimes became mandatory misdemeanors and could not be prosecuted as felonies. Like Proposition 36, Proposition 47 also operated retroactively and allowed certain inmates to apply for early release if they were currently incarcerated for one of the enumerated offenses and could establish that their release would not endanger public safety.<sup>40</sup> Proposition 47 also created a state fund from savings realized by the state because it was incarcerating fewer people. This fund, which grew to \$78.4 million this year, distributes money to mental health services, juvenile delinquency programs and victim services. In total, 7,800 people incarcerated in state prison for non-serious, nonviolent crimes have been released under Proposition 47. In addition, it is estimated that 10,000 people incarcerated in county jails were released early under Proposition 47.<sup>41</sup> An unknown number of additional people have avoided longer sentences since the enactment of Proposition 47.

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<sup>36</sup> See Tiabbi, "Cruel and Unusual Punishment: The Shame of Three Strikes Laws," *ROLLING STONE* (Mar. 27, 2013).

<sup>37</sup> See generally Mills & Romano, "Passage and Implementation of the Three Strikes Reform Act of 2012: Proposition 36." *Fed. Sent. Reporter*, Vol. 25, No. 4 (Apr. 2013).

<sup>38</sup> See Cal. Penal Code § 1170.126; *People v. Superior Court (Kaulick)* 215 Cal. App. 4th 1279 (Ct. App. 2013).

<sup>39</sup> See Cal. Dept. of Corrections and Rehabilitation, "September 15, 2016 Update to the Three Judge Court," filed Sept. 15, 2016 in *Plata, et. al. v. Brown*, Case No. 3:01-cv-01351 (N.D. Cal.).

<sup>40</sup> See Cal. Penal Code § 1170.18. Because Proposition 47 was not limited to extreme Three Strikes cases, it applied to a much larger group of inmates than Proposition 36.

<sup>41</sup> See Stanford Law School Justice Advocacy Project, "Proposition 47 Progress Report," (Oct. 2015) available at [www-cdn.law.stanford.edu/wp-content/uploads/2015/10/Prop-47-report.pdf](http://www-cdn.law.stanford.edu/wp-content/uploads/2015/10/Prop-47-report.pdf).



**2016 - Public Safety and Rehabilitation Act (Proposition 57).** In 2016, then-Governor Jerry Brown led a third successful ballot measure campaign to address California’s ongoing prison crisis.<sup>42</sup> Proposition 57 passed with 64 percent support of state voters. Unlike earlier ballot measures, Proposition 57 did not directly amend statutes setting sentence lengths, but instead gave broad authority to prison administrators, including the Board of Parole Hearings, to increase the amount of time a person could earn off his or her sentence with positive in-custody behavior and offering an opportunity for early parole to certain prisoners convicted of nonviolent crimes.<sup>43</sup> Because the credit-earning portion of Proposition 57 was not restricted to people with nonviolent convictions, it authorized the Department of Corrections to expand sentence-reduction programs for all prisoners, including those convicted of violent crimes.<sup>44</sup> Proposition 57 also included a provision that reduced the power of prosecutors to charge young people in adult court, shifting that responsibility to trial court judges.<sup>45</sup> Because Proposition 57 and related regulations only recently went into effect, its impact on California’s prison population has not yet been substantial.<sup>46</sup>

### **III. Legislative Reforms Have Lagged Behind Public Opinion**

Since 2012, the most recent substantial reforms to California’s sentencing laws and prison policy have been enacted by voter initiatives rather than through the legislature.<sup>47</sup> These reforms required voter approval for two reasons. First, because many of California’s harsh sentencing laws were enacted by voters in the first place, thus practically speaking they can only

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<sup>42</sup> Proposition 57 declares the voters’ purposes in approving the measure were 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, especially for juveniles.” Ballot Pamp., Gen. Elec., (Nov. 8, 2016).

<sup>43</sup> See Cal. Const. art. I, § 32; Cal. Code of Reg. Tit. 15 § 3043, *et seq.* Although initially resisted by the administration, California courts eventually ruled that early parole opportunities established in Proposition 57 extended to approximately 4,000 people serving life sentences under the Three Strikes law for nonviolent offenses. See *In re Edwards*, 26 Cal. App. 5th 1181(Ct. App. 2018).

<sup>44</sup> Inmates on death row or serving life without parole were excluded.

<sup>45</sup> See California Legislative Analyst’s Office, “Implementation of Proposition 57” (Apr. 24, 2017) (summarizing all the reforms in Proposition 57).

<sup>46</sup> See Cal. Dept. of Corrections and Rehabilitation, “June 17 Update to the Three Judge Court,” filed Jul. 8, 2019 in *Plata, et. al. v. Newsom*, Case No. 3:01-cv-01351 (N.D. Cal.).

<sup>47</sup> To be sure, some reforms have been enacted by the California legislature over the decade. See, e.g., SB 260 (establishing youth offender parole hearings) (2013); SB 261 (expanding youth offender parole hearings) (2015); SB 10 (bail reform) (2018); SB 1437 (amending felony murder rule) (2018). Other reforms have been imposed by court order. See Cal. Dept. of Corrections and Rehabilitation, “September 15, 2016 Update to the Three Judge Court,” filed Sept. 15, 2016 in *Plata, et. al. v. Brown*, Case No. 3:01-cv-01351 (N.D. Cal.).

be amended by subsequent voter approval.<sup>48</sup> Second, legislators (in California, at least) seem to lag behind voters who continue to support criminal justice reforms that reduce prison sentences.

As discussed above, voters convincingly passed three separate ballot measures in 2012 (Proposition 36), 2014 (Proposition 47), and 2016 (Proposition 57), reducing punishments for almost all prisoners in California, including those sentenced to life under the Three Strikes law and prisoners convicted of violent offenses. The least popular of these measures (Proposition 47) was still supported by two-thirds of California voters. Despite strong majorities of voters supporting these reforms, none would have gathered sufficient support to pass through the state legislature.<sup>49</sup>

Recent public opinion surveys show that California voters and even crime victims continue to support criminal reform and would likely approve further reductions to the state's sentencing laws. According to a recent poll of likely 2020 California voters, by a 2-to-1 margin, respondents believed that recent criminal justice reforms in the state had "not gone far enough" over those who said reforms had gone "too far."<sup>50</sup> Even crime victims appear support further criminal justice reforms in California. For example, according to a recent survey, 75 percent of crime survivors in California favor reducing sentence lengths by 20 percent for prisoners assessed to be a low risk to public safety, and directing the savings to fund more crime prevention and rehabilitation.<sup>51</sup>

Despite the apparent continuing public support for sentence reductions and prison downsizing, at least two initiatives have qualified for the November 2020 ballot in California that aim to roll-back recent reforms. The first would increase sentences for shoplifting (which were reduced by Proposition 47) and limit the power of parole authorities to release nonviolent offenders (enacted as part of Proposition 57). This measure is known as the "Reducing Crime and Keeping California Safe Act," and is supported by several law enforcement advocacy groups, including financing from California's prison guard union.<sup>52</sup> The second measure would

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<sup>48</sup> See Romano, "A Different Kind of Sentencing Commission: A 'Smart' Solution for California and Model for Prison Downsizing Across the Country," 2 STAN. J. CRIM. LAW & POL. 44 (2015).

<sup>49</sup> In California, legislators can vote to put issues on the ballot for voter approval, but even this intermediate approach was politically untenable.

<sup>50</sup> Voter survey of 800 likely California voters conducted May 30, 2019 through June 2, 2019, by David Binder Research. Results were made available to me by the group that commissioned the survey.

<sup>51</sup> Californians for Safety and Justice, "California Crime Survivors Speak: A Statewide Survey of California Victims' Views on Safety and Justice," (Apr. 2019) *available at* [allianceforsafetyandjustice.org/wp-content/uploads/2019/04/201904-CSJ-CA-Crime-Survivors-Speak.pdf](http://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/201904-CSJ-CA-Crime-Survivors-Speak.pdf)

<sup>52</sup> See Ronayne, "Bid to Toughen California Crime Laws Set for 2020 Ballot," U.S. NEWS AND WORLD REPORT, (Jul. 9, 2018).

repeal recent reforms to California’s cash bail system and is supported by the bail bond industry.<sup>53</sup>

I suspect that voters will reject both of these measures this November, and I hope that will give legislators further evidence and encouragement to pursue new sensible criminal justice reforms that further reduce unnecessary prison sentences in California.

#### **IV. California’s Prison Population Remains Unconstitutionally Overcrowded and Prisoners with Mentally Illness Appear Left Behind by Recent Reforms**

Although California has made great strides, the state prison system remains dramatically overcrowded. California’s state prison system is designed to hold between 80,000 and 90,000 prisoners. Today, over 125,000 prisoners are in state custody.<sup>54</sup> The current annual budget for California’s prison system is over \$12 billion.<sup>55</sup> Furthermore, California remains under federal court order to develop and implement a “durable solution” to the prison overcrowding problem, including improvements to prisoner medical and mental health care.<sup>56</sup>

It is especially troubling that prisoners suffering from mental illness seem to have been left behind by recent reforms. It appears that the number of California prisoners with mental illness and the severity of their symptoms are rising at the same time that criminal justice reforms have been enacted and implemented.<sup>57</sup> While the overall state prison population has decreased dramatically, the number of prisoners with mental illness continues to climb and is expected to grow in the years ahead. Over the past decade, the percentage of state prisoners with mental illness has increased by 77 percent.<sup>58</sup> It also appears that the severity of mental illness among prisoners is also on the rise. Over 30 percent of California prisoners currently receive treatment

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<sup>53</sup> McGough, “The fate of California’s cash bail industry will now be decided on the 2020 ballot,” SACRAMENTO BEE, (Jan. 17, 2019).

<sup>54</sup> Approximately 117,000 of these people are incarcerated in state prisons with the remainder largely housed in private or other “contract” facilities. *See* Cal. Dept. of Corrections and Rehabilitation, Office of Research, “Monthly Total Population Report Archive,” *available at* [www.cdcr.ca.gov/research/monthly-total-population-report-archive](http://www.cdcr.ca.gov/research/monthly-total-population-report-archive).

<sup>55</sup> CDCR’s Budget for Fiscal Year 2018-19 *available at* [www.cdcr.ca.gov/budget](http://www.cdcr.ca.gov/budget).

<sup>56</sup> *See generally* Plata, *et. al. v. Newsom*, Case No. 3:01-cv-01351 (N.D. Cal.).

<sup>57</sup> *See* Stanford Justice Advocacy Project, “Confronting California’s Continuing Prison Crisis: The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise,” (2017).

<sup>58</sup> Bien, “New Challenges Raised by Decarceration,” at Western Society of Criminology, (Feb. 2017).

for a “serious mental disorder.”<sup>59</sup> Since 2012, the number of prisoners requiring enhanced mental health services has increased by over 60 percent.<sup>60</sup>

It is especially troubling that the problem of mental illness in California’s prisons may be deteriorating. Not only are criminal offenders suffering from mental illness generally considered less culpable for their crimes and more deserving of treatment and leniency, but the legal efforts at the forefront California’s prison downsizing movement were first lodged on behalf of prisoners with mental illness. As the Supreme Court noted in *Plata*, litigation over prison overcrowding in California began with a class action lawsuit filed in 1990 on behalf of prisoners with mental illness receiving inadequate psychiatric care. That case brought the first federal finding that California’s prisons were unconstitutionally overcrowded.<sup>61</sup>

It is arguable that recent reforms in California disadvantage prisoners with mental illness by awarding sentence reductions to inmates deemed low risk for recidivism. The reforms enacted in Propositions 36, 47 and 57 all provide early release for prisoners who are able to demonstrate that they are no longer a danger to public safety.<sup>62</sup> Inmates and criminal defendants with mental illness are frequently unable to meet this burden due to difficulty articulating their case and coordinating with counsel, bias against people with mental illness, and lack of adequate community psychiatric care resources to support successful reentry.<sup>63</sup> Future reforms should take special care to address the over-incarceration of prisoners with mental illness.

#### **V. New Programs in California Show Promise and May Present Inspiration for Other Jurisdictions Throughout the Country.**

California was once the national vanguard of tough-on-crime politics; today it is one of the states leading the trend in the opposite direction. The reversal has been extraordinary, and I hope instructive. As noted, however, more work remains and continued reform efforts are underway. At least three new programs and proposals deserve special mention.

**Sentence Reconsideration.** Last year, California enacted and implemented new program to review sentences of prisoners with records of exceptionally meritorious rehabilitative

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<sup>59</sup> See Cal. Dept. of Corrections and Rehabilitation & Cal. Correctional Health Care Services, “Mental Health Bed Need Study,” (Jan. 8, 2016). There is also evidence that the state’s projections underestimate the current number of prisoners with mental illness by undercounting Latino prisoners. See also Stanton, “Prison officials did not intentionally mislead judge on inmate psychiatric care, report says,” SACRAMENTO BEE, (May 3, 2019);

<sup>60</sup> Cal. Dept. of Corrections and Rehabilitation & Cal. Correctional Health Care Services, “Mental Health Bed Need Study,” (Jan. 8, 2016).

<sup>61</sup> *Plata*, 563 U.S. at 506.

<sup>62</sup> See Cal. Const. art. I, § 32; Cal. Code of Reg. Tit. 15 § 3043, *et seq.*; Cal. Penal Code §§ 1170.126(f), 1170.18(b).

<sup>63</sup> See Stanford Justice Advocacy Project, “Confronting California’s Continuing Prison Crisis: The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise.” (2017).

conduct.<sup>64</sup> The new law and regulations direct prison administrators to identify prisoners who are deemed fully rehabilitated. It is a high bar. In order for an inmate to qualify for relief under this program, the Secretary of the Department of Corrections must personally certify that the prisoner's rehabilitation is "so extraordinary beyond simply complying with all regulations and procedures" that he or she has "changed as a person and would be a positive asset to the community" if released.<sup>65</sup> Selected prisoners are then referred back to a sentencing court, which can choose to reduce the prisoner's sentence. The judge can also reject the recommendation of prison officials and keep the prisoner's original sentence intact.<sup>66</sup> Since the program's inception in March 2018, the Department of Corrections has recommended new sentences for over 75 prisoners, the majority of whom have received some sentence reduction from the court.

**Enhanced Reentry.** The California Department of Corrections' new enhanced community reentry program appears to be successfully reducing the amount of time selected prisoners spend behind bars, accelerate reentry prospects, and reduce recidivism.<sup>67</sup> Program participants are prisoners in the final year or two of their sentences who agree to leave their traditional prison facility and enter a community-based facility. Participants wear electronic ankle bracelets, participate in rehabilitation programs, work off site, and are permitted family visits and other benefits of slowly integrating to the community. The programs are staffed primarily by nonprofit service providers with on-site security and supervision by Department of Correction staff. Participants remain prisoners under Department of Corrections authority and are returned to prison for any violation of program rules. The program is designed to last one year, after which participants transition to long-term housing and continue with parole or probation supervision. According to the Department of Corrections, the program improves recidivism rates.<sup>68</sup> Today, approximately 1,000 inmates are participating in this program in eight sites throughout the state. The program services a small fraction of over 30,000 prisoners released from California state prison every year and should be expanded.

**Behavioral Health Facility.** Two-thirds of jail inmates across the country (64 percent) suffer from mental illness, according to the United States Department of Justice, and county jails have become the nation's largest mental health providers.<sup>69</sup> A proposal by the San Francisco

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<sup>64</sup> See Cal. Penal Code § 1170(d)(1).

<sup>65</sup> Cal. Code Regs. tit. 15, § 3076.1(a)(1).

<sup>66</sup> See *Dix v. Superior Court*, 53 Cal. 3d. 442 (1991).

<sup>67</sup> The men's program is the Male Community Reentry Program (MCRP); the women's program is the Custody to Community Transitional Reentry Program (CCTRP). The program was originally established under Penal Code §§ 6250(a), 6258.

<sup>68</sup> Recidivism data provided directly to me by program administrators. Cf. Petersilia & Cullen, "Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons," 2 STAN. J. CRIM. L. & POL. 18, 22 (2015) ("We also must recognize that the number of proven programs, especially for a reentry programs, is in short supply.")

<sup>69</sup> See James & Glaze, "Bureau of Justice Statistics Special Report: Mental Health Problems of Prison and Jail Inmates," U.S. Dept. of Justice (rev. Dec. 14, 2006); Hare, "Population 17,049: Welcome to America's Largest Jail," CNN, (Sept. 26, 2017); see also Ho, "Police slow in

District Attorney to develop a new facility to safely house and treat jail inmates with mental illness may provide a promising solution to this critical problem and deserves further study and consideration.<sup>70</sup> The proposed “Behavioral Health Justice Center,” would be neither a jail nor a hospital, but a highbred facility specifically designed to house, treat, and rehabilitate jail inmates with mental illness. Studies show that incarceration frequently exacerbates mental illness and undermine a person’s ability to function in society.<sup>71</sup> As currently constructed, county jails are generally ill equipped to properly treat mental illness. Likewise, county hospitals are unable to safely house or restrain people accused of crimes. Incarceration in county jails are frequently counterproductive to a defendant’s psychiatric stability and public safety. The problem of mental illness and public safety is perhaps the largest and most difficult issues in criminal justice today. San Francisco’s proposed Behavioral Health Justice Center and other efforts like it may be a significant step in the right direction.<sup>72</sup>

### **Conclusion**

Thank you for the opportunity to testify before this Committee. California has made great strides in reforming its criminal justice system while simultaneously improving public safety and reducing crime rates. The reforms have not only proven successful as a matter of policy, they remain politically popular, and California voters support further efforts to downsize the state’s prison and jail populations. While work remains to be done—too many people remain unnecessarily behind bars in California—I hope California’s experience can be an inspiration and model for the rest of the country.

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making progress in confronting mentally ill,” SAN FRANCISCO CHRONICLE, (Dec. 19, 2015) (reporting that up to 80% of calls to San Francisco police involve people with mental illness).

<sup>70</sup> See Barbra, “Gascon, supes introduce mental health alternative to new jail,” SAN FRANCISCO EXAMINER, (Jan. 5, 2016); Haney, et. al., “Justice That Heals: Promoting Behavioral Health, Safeguarding the Public, and Ending Our Overreliance on Jails,” *available at* [sfdistrictattorney.org/sites/default/files/Document/BHJC%20Concept%20Paper\\_Final\\_0.pdf](http://sfdistrictattorney.org/sites/default/files/Document/BHJC%20Concept%20Paper_Final_0.pdf).

<sup>71</sup> See Bewley & Morgan, “A national survey of mental illness services available to offenders with mental illness: Who is doing what?” 35 LAW AND HUMAN BEHAVIOR, 351-363 (2011); *see also* Haney, “Reforming Punishment: Psychological Limits to the Pains of Imprisonment,” (2006).

<sup>72</sup> See “Justice That Heals,” at p. 12-13 (describing similar efforts in Miami, Florida; Bexar County Texas; and Memphis, Tennessee).