Koret Scholars Research:
Reducing Unconstitutional or Unfair Prison Sentences

Presentation for SSU 2021 Virtual Research Gallery

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Project

- Type of Publication: Students drafted public comments to submit to the California Committee on the Revision of the Penal Code, the Office of Administrative Law, and CDCR during public comment periods.
- Subject Matter: The team examined June 2018 and January 2019 amendments to California Penal Code section 1170(d)(1), and how the California Department of Corrections and Rehabilitation (CDCR) recommended people for resentencing, and how courts have responded to these recommendations.
Objective of Project

- June 2018 and January 2019 amendments to California Penal Code section 1170(d)(1) are resulting in the California Department of Corrections and Rehabilitation (CDCR) recommending people for resentencing and courts resentencing them.
- For the first time in the United States, law enforcement agencies can request courts to resentence people based on sentence calculation errors, changes in law, exceptional conduct, or infirmity.
- However, CDCR hasn’t held the requisite public comment rulemaking. Thus, without public input or oversight, CDCR developed a more restrictive policy that reduces the number of eligible people.
- This project will evaluate the criteria and results of CDCR’s policy in advance of an anticipated public comment process, and in the new context of increasing efforts to release people from prison due to COVID-19.
- If 1170(d)(1) is implemented successfully, California will have created a new nationally replicable strategy to reduce prison populations and save billions of dollars.
Background On Project

- On January 1, 2020, the Committee on Revision of the Penal Code was formed. The Committee has seven members. Five are appointed by the Governor for four-year terms. One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules. The Governor selects the Committee’s chair.
- The principal duties of the Committee are to:
  - 1. Simplify and rationalize the substance of criminal law.
  - 2. Simplify and rationalize criminal procedures.
  - 3. Establish alternatives to incarceration that will aid in the rehabilitation of offenders.
  - 4. Improve the system of parole and probation.
- In 2020, it held eight meetings, five of which were two-day meetings.
Background On Project

- In California, regulations adopted pursuant to the Administrative Procedure Act (APA) are submitted to Office of Administrative Law as “regular” rulemakings.
- The regular rulemaking process includes public notice and comment requirements intended to further the goal of public participation in the rulemaking process and to create an adequate rulemaking record for review by OAL and the courts.
- On March 19, 2021 the Office of Administrative Law opened a public comment period on its proposed regulations “NCR 21-04 Penal Code Section 1170(d) Recall and Resentence Recommendation”
Project Significance

- California is suffering from a severe budget shortage due to COVID-19.
- California is also the nation’s epicenter of racialized mass incarceration.
- Before COVID-19 the U.S. Supreme Court admonished California prison administrators for causing at least one preventable death a week due to overcrowding.
- Due to COVID-19 overcrowding is contributing to more preventable deaths in California’s prison.
- This research can contribute to ensuring equitable policy promulgation and implementation in the administrative and judicial spheres.
- It can improve the CDCR’s rulemaking for the prison-based 1170(d)(1) court referral process.
- This project can help earn the re-sentencing and release of thousands of illegally or unfairly sentenced people by maximizing the reach and efficacy of 1170(d)(1), saving the state billions of dollars and preventing suffering and death.
- This legislation, which allows prosecutors or correctional officials to make resentencing recommendations directly to judges, is a nation-wide first.
- This research will be the first to use input from incarcerated people to show how this model can be improved and replicated in other jurisdictions.
Students will prepare reports evaluating the criteria and results of CDCR's pilot resentencing program that will be distributed to advocates and lawmakers before legal regulations are promulgated by CDCR, the judicial council, or legislators. The student reports will be based on more accurate qualitative and quantitative information than CDCR’s. Reports will be provided to lawmakers and advocates engaging in the rulemaking process to advocate for more fair and equitable policies. The four students will divide their work to produce papers on these topics:

1. **Number of people deemed eligible under the penal code criteria as compared to number of people deemed eligible under CDCR's more narrow criteria.** CDCR’s emergency regulations bar court access to tens of thousands of people because courts only hear cases referred under agency criteria. Potentially 150,000+ people (124,000 in CDCR and 27,000 in jails) are eligible but agency severe limiting of scope and failures in implementation are curtailing this law’s power.

2. **Impropriety of exclusions:** The law only excludes death sentences. Students will analyze why it was improper that CDCR additionally excluded life without parole, 3-strikes, sex-offenses, people serving under 10 years or 50% of sentence, with scheduled parole hearings, with rules violations, and with solitary terms.

3. **Fiscal Impact.** Students will update and analyze data last calculated on 5/5/20. At that time CDCR reviewed 2,184 cases for resentencing referral. On average, resentencing reduced incarceration by 4.48 years per person, or a total of 1,963.12 years. CDCR listed the annual cost savings per person as $8,259.00 and reports a savings of over 16 million dollars ($16,213,667.13) in less than two years. However, CDCR’s estimate fails to account for 89% of the cost savings when adjusted for the actual cost of incarceration. **First**, CDCR’s $8,259.00 figure is a gross underestimation of the actual annual cost of housing a person in CDCR, which averages $75,560.00. At a rate of an average reduction of 4.48 years per person, the true figure represents an average savings of $338,508.80 per person. Thus, the total cost reduction **already achieved** by sentence reductions is actually over $148,333,347.20. **Low**, given that this legislation targets elderly and infirm people, those who are more costly to house due to medical needs. CDCR’s Proposed Rule’s Economic and Fiscal Impact Statement reported potential “Institution Savings” at only $3,554,812 across five years. These projected savings fail to match CDCR’s own logged savings of $8,259.00 per person per year during its pilot stage.

4. **Discriminatory implementation:** CDCR added program and work requirements. Students will analyze how this is discriminatory because CDCR denies program and work access to many marginalized people, including people it categorizes as LGBTQ, medically infirm, disabled, at risk of victimization, or at a high security level. CDCR requires petitioners to secure a referral letter from staff. Staff members’ exercise of discretion already evidences individual and systemic bias stemming from discriminatory and retributive norms that reflect racist, sexist, ableist, heterosexist, classist, transphobic, and xenophobic driven presumptions of who “deserves” incarceration. This further impedes the release of people often excluded from reforms for being members of vulnerable groups such as: people of color; trans and gender non-conforming; medically infirm; disabled; neuro-diverse; or sentenced for gang affiliation, violence, sex offenses, or to life without the possibility of parole.
Paloma Chavez

Link to full comments
**Paloma’s Research Questions**

- What are the challenges that incarcerated people are facing when it comes to finding information about 1170(d)1?
- What has their experience been in following CDCR’s regulations that predicate resentencing referrals on Involvement counselors and/or the Warden?
- What are the discrepancies in each prison, or yard staff reacting to requests for 1170(d)1 resentencing?
- How many people that appear eligible under the Penal Code, does CDCR seem to deem ineligible based on its regulations, or without a reason?
Paloma’s Hypothesis

- CDCR created regulations and implemented them in a manner that makes it difficult for people who may qualify under the Penal Code’s criteria for 1170(d)(1) resentencing to qualify under CDCR’s criteria, thus restricting people who may be eligible according to the Penal Code’s language from judicial review.
Results

Pie Chart Summarizing Testimony From Incarcerated People

Map of Specific Prisons Where Incarcerated People Sent Their Testimony From

1170(d)(1) Hearing Testimony Gathering Form Responses

- No response/ did not fill it... 16.0%
- Facility staff sent a referral 8.8%
- The staff member declined... 15.2%
- I was told CDCR policy did... 16.9%
- Other response? 15.3%
- I was told my facility/yard i... 8.3%
  a. LWOP sentence 13.6%
  b. Hadn’t served enough b... 5.1%
  c. Disciplinary Actions / SHU 5.1%
  e. Something else? 1.7%

Locations of Individuals that Returned Testimony Gathering Forms

Pelican Bay State Prison (PBSP) 3.4%
California State Prison, Solano (SOL) 1.7%
Mule Creek State Prison (MCSP) 1.7%
California Medical Facility (CMF) 3.4%
California Institute for Women (WIC) 36.2%
Central California Women’s Facility (CCWF) 46.6%
California State Prison, Los Angeles
Chuckawalla Valley State Prison (CVSP) 1.7%
Paloma’s Recommendations

● Create a Detailed and Specific Referral Process
● Better Communication from CDCR to the Courts and Vice Versa
● Court Appearances Should Not Be Required and Should Be Up to the Individual
● Eliminate Unnecessary CDCR Requirements
Paloma’s Methods

This analysis is based on 59 surveys and 16 letters a sample of 75 people incarcerated in CDCR’s women's prisons sent to the California Coalition of Women Prisoners.
Research Questions

● What is it that PC 1170(d)(1) does that can help reduce prison populations?
● What kind of programming is being offered in CDCR?
● What is the quality and quantity of programming?
● How can it be improved?
● Do these flaws make CDCR’s regulations that mandate a show of programming to qualify for resentencing arbitrary and capricious?
Hypothesis

- Did CDCR’s implementation of 1170(d)(1) narrow down the amount of people who would be able to qualify for a recall of sentence? Does the requirement of participation in rehabilitative programs impact case outcomes?
Mass incarceration is a growing issue and through a proper implementation of PC 1170(d)(1) we can help target and fix this problem.

https://www.ppic.org/publication/californias-prison-population/

https://www.prisonpolicy.org/profiles/CA.html
Danielle’s Recommendations

- Legislation should make it explicit within the text of PC 1170(d)(1) that there is no need to have a requirement of programming. CDCR does not provide the resources that they are requiring in their implementation of 1170(d)(1) narrowing the number of eligible individuals. PC 1170(d)(1) was created in order to lower the populations of prisons and give the possibility to reduce unconstitutional or unfair sentences and CDCR has gone against these goals.
- Programming should be seen as a benefit to what the incarcerated person has participated in but should not be a requirement to be resentenced. This is mainly due to the fact that CDCR does not have properly implemented programming and they have limited programming.
- Having programing be a requirement for resentencing reduces the incentive for rehabilitation; therefore, does not reduce recidivism. Making it a positive aspect to rehabilitation but not a requirement makes it more purposeful.
Methods

- This is a mixed method qualitative and quantitative study asking “Does the CDCR regulation requiring people seeking release under CDCR’s P.C. 1170(d)(1)’s exceptional conduct category to participate in rehabilitative programs impact case outcomes”
- A literature review was conducted.
- Materials published by CDCR, the Legislative Analyst’s Office, the Office of the Inspector General, the Legislative Public Safety Committees, the Committee on the Revision of the Penal Code and the UC Irvine Center for Evidence Based Research were viewed, read, and analyzed.
Hypothesis

- The amount of money that CDCR states it will save per incarcerated person by releasing people through 1170 (d)(1) is understated.
Research Questions

- Is CDCR’s 1170(d)(1) cost tracking log accurate?
- Does CDCR use the same cost variable as the California State budget, or is CDCR understating the potential cost savings?
Background on CDCR Budget

- As CDCR’s population becomes older and more infirm, and CDCR continues its attempts to remedy its horrific and unconstitutional conditions and comply with court orders, healthcare costs, especially the costs for health care staffing, have nearly doubled over the past decade and are becoming significantly more costly than CDCR is prepared or able to address.
- The Legislative Analyst’s office reports that the cost of CDCR operations has increased $3 billion since 2010.
- This is roughly the equivalent of the annual cost of operations for an entire prison holding up to thousands of people.
- It is clear that while a few releases will eliminate “marginal” costs such as food and clothing, to end mass incarceration CDCR needs to eliminate “fixed” costs such as staffing.
- This requires a dedicated effort by all stakeholders in the criminal justice system to reduce the financial burden of mass incarceration.
- AB 1812 and AB 2492 were passed as a key part of this effort.
March 1, 2021 Recent Cost Saving Data

● Cost Savings According to CDCR’s Log
  ○ $19,371,863.50
    ■ (based on CDCR’s tracking log, which uses $8,259.00 as annual cost of incarceration)

● Actual Saving According to State Budget
  ○ $213,600,567.63
    ■ (based on Actual cost to incarcerate from 2021 CDCR Budget $91,067)
First Source of Inaccurate Data: CDCR’s Emergency Rule’s Economic and Fiscal Impact Statement Underestimates Saving in 2019


- These projections underestimate savings as compared to CDCR’s tracking log, and as compared to the state budget calculations of the actual average cost of incarcerating a person in CDCR.

- The Statement reports potential “Institution Savings” at only three and a half million dollars ($3,554,812) across five years.

- It is unclear why the projected savings fail to match CDCR’s own logged savings of $8,259.00 per person per year during its pilot stage.
First Source of Inaccurate Data:

CDCR’s October 2019 Emergency Rule’s Economic and Fiscal Impact Statement Underestimates Saving

- According to the May 2020-2-21 State Budget, even using the inaccurately low figures presented by CDCR, the resentencing of only 477 people as of December 15, 2020 has already saved $18,060,577.55, thus shaving .001% annually off of CDCR’s colossal fifteen billion dollar ($13,856,860,000) post-COVID-19 Revised Annual Budget.

- The savings reported also far offset and outweigh the estimated petition and parole costs related to resentencing, which equal 9.7 million dollars over six years ($9,721,063 from 2018-2023), or an average of 1.6 million dollars annually ($1,620,177 per year).

- These figures in the May 2020-2021 revision to the Governor's budget are set against the reality that, despite a declining population in CDCR, the costs of incarceration are steadily rising.
Second Source of Inaccurate Data: CDCR’s 12/15/2020 1170 (d) Main Tracking Log Underestimates the Annual Cost of Incarceration

- CDCR reviewed 2446 cases for resentencing.
- CDCR tracked a total of 477 sentence reductions (375 sentence reductions and 102 releases).
- CDCR listed the annual cost savings per person as $8,259.00.
- Thus, the log reports a savings of over 18 million dollars in less than two years.
- However, CDCR’s estimate fails to account for a large percent of the cost savings when adjusted for the actual cost of incarceration.
  - First, CDCR’s $8,259.00 figure is a gross underestimation of the actual annual cost of housing a person in CDCR, which averages $91,067. Furthermore, the actual figure of $91,067.00 is likely low, given that this legislation targets elderly and infirm people who are more costly to house due to medical needs.
  - Thus, the total cost reduction already achieved by sentence reductions between June 2018 and December 2020 is actually over 199 million dollars ($199,141,810.40).
  - According to the May Revision of the Governor’s 2020-2021 Budget, even using the inaccurately low figures presented by CDCR, the resentencing of only 505 people (385 reduced, 120 released) people as of December 15, 2020 (Exhibit C) has already saved many millions more in two years than was anticipated for six years.
Third Source of Inaccurate Data: CDCR’s 03/01/2020 1170 (d) Main Tracking Log Underestimates the Annual Cost of Incarceration

- Using the state budget annual incarceration cost of $91,067.00 it saved $213,600,567.63.
- Using the CDCR underestimate value of $8,259.00 the savings would amount to $19,371,863.50.
- CDCR’s Emergency Regulations Statement reported potential “Institution Savings” at only three and a half million dollars ($3,554,812) across five years. This has already been surpassed greatly.
Dede’s Recommendations

- The penal code should make CDCR report actual cost savings which should correlate with the number submitted to the legislature for the budget.
- The penal code should be explicit in holding CDCR responsible for reporting actual cost savings correlated with the number submitted to the legislature for the budget.
- There needs to be a streamlined process with checks and balances to ensure the correct incarcerated people are being referred for resentencing evaluation and thus ensuring the actual savings to the state.
Methods

- This is a quantitative study using Google Sheets and AirTable to take data in CDCR’s the 1170(d)(1) log (obtained by Public Records Act request) to identify CDCR’s cost variable, and change variable to the current California budget line item “Annual Costs to Incarcerate an Inmate” to create graphs and calculations to compare CDCR’s underestimated cost calculations to the more accurate cost calculations from the current state budget.
- Use Airtable program to analyze and create visuals.
Research Questions

- Why does CDCR not allow incarcerated people or defense attorneys to make referrals for resentencing?
- How do some of the “Exceptional Conduct” category criteria discriminate against minority groups in prison (LGBTQ+, people of color, people with disabilities, neuro-diverse people, etc.)?
- How many incarcerated people have been denied resentencing due to the lack of information or CDCR creating eligibility guidelines that are more restrictive than the penal code?
- Does 1170(d)(1), as implemented by CDCR, lower the prison population?
- What are CDCR’s goals to improve its implementation of 1170(d)(1) over time?
Hypothesis

- The implementation of CDCR’s Penal Code 1170(d)(1) criteria undermines the agency’s stated goal “To facilitate the successful reintegration of the individuals in our care back to their communities.”
The Problem with PC 1170(d)(1) currently as Implemented by CDCR:

- The Penal Code defers to CDCR to develop regulations to implement 1170(d)(1). CDCR’s qualifications for release do not accurately reflect the legislative intent of 1170(d)(1) to decrease prison population, but rather CDCR’s interests to make it difficult for people to be released, and allow CDCR to continue determining, as with indeterminate sentences, who CDCR deems “rehabilitated” or “safe” for release as opposed to judges.
- CDCR’s lack of follow through in giving access to the programs it deems necessary for rehabilitation, disproportionally makes people of color, transgender, and non-binary people ineligible for 1170 soley due to them being part of “vulnerable groups.” This goes against the legislature’s efforts to reduce prison populations and prison reform.
The Problem with PC 1170(d)(1) currently as Implemented by the Courts

- The courts require the same judge to resentence the petitioner that is considered to resentence, however this can further delay the resentencing process.
- The requirement for the same judge that sentenced the person to be the primary judge to resentence them could possibly be a conflict of interest.
- It does not take into consideration the impact of COVID-19. This only lengthens the process while also glossing over the issues with prison systems regarding discrimination towards minority groups.
Problems With 1170 (d)(1)

- Inevitably allows CDCR to create so many loopholes that undermine the legislature
- Lack in regulation makes the application for resentencing difficult due to its discrimination and disregard for circumstances such as COVID-19.
Kristine’s Recommendations

- the committee to advocate for amendments to the PC § 1170(d)(1) law, including: stricter regulations on CDCR, more efficient processing by the DA and courts, revising the “Three Strikes Rule”, and more access to programs that are required to qualify for resentencing.
- Enable more efficient processing by the DA and courts to adequately assess people’s cases
- Legislators revising the “Three Strikes Rule” that gives defendants 25 years to life when convicted of three serious or violent felonies regardless of the duration between the committed felonies.
- Provide better access to programs required to qualify for resentencing through the implementation of Proposition 57 where legislation can adjust the terms to hold CDCR accountable.
Methods

- Conduct a review of public comments and testimony submitted to the California Committee on the Revision of the Penal Code. Review the letters and surveys incarcerated people sent to the California Coalition of Women prisoners about their requests for resentencing. Assess reasons as to why individuals are denied resentencing and cross check with criteria from both CDCR and PC 1170(d)(1).