



Jerry Brown in 1978.

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Sentencing reform ballot measure will discard progress

By Mitchell Keiter

Supporters promise The "Public Safety and Rehabilitation Act" (Proposition 57) will keep violent offenders locked up. It will actually demolish a generation's worth of sentencing reforms that explain why California's violent crime rate is barely one-third of what it was a generation ago. And it will undermine fundamental notions of democracy and justice. People will no longer be punished for what juries find they did, but, as in the Tom Cruise film "Minority Report," for what "experts" predict they will do in the future.

Prop. 57 will undo the sentencing reforms that produced the crime drop. After Gov. Jerry Brown signed the 1977 Determinate Sentencing Law, punishment was so minimal that the term for second-degree murder

was five to seven years. Inmates could cut that in half through good behavior, and thus possibly go free after trial — even if convicted. But over time, several reforms emerged to protect public safety.

"Truth in sentencing" laws guaranteed that violent felons would serve at least 85 percent of their sentence, and murderers would serve 100 percent. Pen. Code Sections 2933.1, 2933.2.

"Consecutive sentencing" expanded, so a defendant who committed two crimes could receive full punishment for each.

"Enhancements" increased sentences where defendants committed felonies with aggravating factors like using a deadly weapon or inflicting serious injury.

These reforms worked. From 1992 through 2014, the violent crime rate fell from 1,104 to 396 per 100,000 people.

Prop. 57 began as a proposal to modify a statute concerning juvenile justice. Derived from the plausible objection that adult prisons were hardening rather than reforming juvenile delinquents, it would have barred 15-year-olds from being tried as adults, and allowed those already convicted to seek a juvenile sentence. Although one might question its shielding all youthful offenders (including murderers) from adult consequences, it carefully addressed a legitimate issue. But the measure then transformed from a scalpel into a sledgehammer: a constitutional amendment designed so hastily that its Section 32(a)(1) has a subdivision (A) but not (B).

Criminals of any age, including murderers, now may benefit from Prop. 57. Subdivision (a)(1) concerns "Parole Consideration" and affects only "nonviolent fel-

ony offenses"; subdivision (a)(2) concerns "Credit Earning" without such limit. In their ballot pamphlet statement, supporters cite the Supreme Court to prove the measure will apply only to the nonviolent. *Brown v. Superior Court*, 63 Cal. 4th 335 (2016). But not only did the court deny it was addressing how the law would be interpreted, but the quoted reference concerned only parole consideration, not credit earning.

So (a)(2), which overrides "any other provision of law," imposes no limits on sentence reductions, and offers no guidelines for how to grant them, leaving everything in the hands of the Department of Corrections and Rehabilitation to develop regulations. This discretion overrides the current law requiring a rapist who receives a six-year sentence to serve more than five of them. Without any public debate or accountability, the Department could return to the former rule where murderers and rapists serve just half their sentence. That's not to say it will, but Prop. 57 empowers this reduction, away from public scrutiny.

The parole consideration provisions concern only violent offenses, but the "violent crime" list is very narrow. Pen. Code Section 667.5(c). Crimes considered "nonviolent" include rape by intoxication, sex trafficking of a minor, hostage taking, and an attempt to commit any offense other than murder. It also excludes enhancements.

Therefore, so long as the "base" crime concerns such a "nonviolent" or attempted crime, extra terms for weapon use or serious injury may be erased. The same holds for consecutive sentencing: If you serve your term for one of two attempted rapes, you may be excused from serving the other. This will have implications for public safety — and our understanding of justice.

The current system of enhancements and consecutive sentencing imposes punishment based on objective factors. Assuming the same underlying crime, criminals who use a weapon and hurt their victim during the crime receive a longer sentence than those who don't, and those who commit crimes against two victims get a longer term than those

victimizing just one. The punishment fits the crime.

But Prop. 57 authorizes sentences based not on what the offender did but what an expert panel predicts he will do in the future. Contrary to the governor's promises, no one has such prescience. Voters in 2014 were promised Prop. 47 would make us safer but homicides and rapes jumped 10 percent in the following year.

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It will harm not only public safety but justice, as an inmate who committed a lesser crime may be held in prison longer than a more serious offender, due to projections of future criminality. Yet Prop. 57 is entirely silent on how these projections will be made.

This emphasis recalls the now-discredited "scientific" school of criminology, which held sway for the first three-quarters of the last century. See Mitchell Keiter, "How Evolving Social Values Have Shaped (And Reshaped) California Criminal Law," 4 Cal. Legal Hist. 393 (2009). Its premise that curing criminality, like illness, was a process whose duration could not be known in advance generated "indeterminate sentencing," which offered sentences like "three years to life" and left the release date to unelected corrections officials. This process "remove[d] sentences from the hands of [legislators and] jurists whom the public conscience is entitled to criticize and place[d] them in the hands of technical experts whose social

sciences do not even employ such categories as rights and justice." C.S. Lewis, "The Humanitarian Theory of Punishment," 6 Res Judicatae 224 (1953).

As observed by Mimi Ajzenstadt and Brain Burtch, the scientific school denied average citizens were responsible enough to enact and apply laws, or even follow them. It "challenged the assumptions which saw individuals as responsible for their own behavior. The sources of criminal activity were now traced to physical and biological factors, or social conditions beyond the control of each individual. The epistemological approach to 'social problems' had the effect of undermining the responsibility of individuals, while simultaneously allowing the State to assume even greater powers in 'correcting' problems now deemed beyond the individual's power to alter." It was this combination that led California to punish possessing certain drugs more severely than killing under their intoxicating influence. It is the same thinking that explains why our ballot includes Proposition 63, which will prohibit the purchase of ammunition without a license, and Prop. 57, which will ease punishment for firing it to commit a crime.

Alexis de Tocqueville observed "He who punishes the criminal is therefore the real master of society." Since the Rose Bird era, Californians as voters enacted laws to protect themselves by punishing criminals based on objective criteria, and as jurors applied them to those deserving extra punishment. Violent crime fell by more than 60 percent. Prop. 57 will discard this progress, and diminish both public safety and democratic self-government.

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