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THE ORIGINS OF BACK-END SENTENCING IN CALIFORNIA: A DISPATCH FROM THE ARCHIVES

Sara Mayeux*

I. INTRODUCTION

In recent years, leading criminologists including Joan Petersilia and Jeremy Travis have identified parole policy as a significant yet hidden driver of mass incarceration.¹ By 2000, over a third of prison admissions nationwide were the result of parole revocations, not new criminal convictions.² In California, which has long kept a higher percentage of released prisoners under parole supervision than any other state, parole policy has played an especially important role in the growth of the prison system.³ Returning parolees have been the largest group of offenders entering California state prisons since 1987, and made up over sixty percent of prison admissions by 2005.⁴

To understand why so many California ex-offenders return to prison on

* JD/PhD candidate, Stanford University. Thanks to Joan Petersilia for her invaluable guidance; Robert Weisberg, Kara Dansky, Mona Lynch, and Cameron Blevins for reading earlier drafts; and James Campbell and the members of the 2010 American history research seminar at Stanford.

1. E.g., Jeffrey Lin, Ryken Grattet & Joan Petersilia, "*Back-End Sentencing*" and *Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions*, 48 CRIMINOLOGY 759 (2010); Jeremy Travis, *Back-End Sentencing: A Practice in Search of a Rationale*, 74 SOC. RES. 631 (2007). Currently the faculty co-director of the Stanford Criminal Justice Center, Joan Petersilia is a leading authority on parole and prisoner reentry, and has helped to implement prison and parole reform in California as a special advisor to Governor Arnold Schwarzenegger, chair of Governor Schwarzenegger's Rehabilitation Strike Team, and co-chair of California's expert panel on offender programs, among other roles. Jeremy Travis is the president of John Jay College of Criminal Justice and previously served as a Senior Fellow with the Justice Policy Center at the Urban Institute, where he launched a national research program on prisoner reentry. He also served under President Clinton as Director of the National Institute of Justice, the research arm of the Department of Justice.

2. Travis, *supra* note 1, at 631.

3. See JOAN PETERSILIA, CAL. POL'Y RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 64-65 (2006).

4. See Lin, Grattet & Petersilia, *supra* note 1, at 761.

parole violations, it is important to understand California's distinctive approach to parole.⁵ While the word "parole" is often used as shorthand for early release conditioned upon supervision by a parole officer, in California parole has long had a different meaning for most inmates. Because California switched from an indeterminate to a determinate sentencing scheme in the late 1970s, the vast majority of its inmates do not have the possibility of discretionary early release.⁶ Rather, they have been sentenced by a judge to a fixed term of years from a statutory menu, and must be released upon completion of that term (less any good-time credits). Around the same time that California switched to determinate sentencing, however, it also implemented legislation requiring every ex-prisoner, upon release, to submit to the supervision of a parole officer for up to three years. That legislation, the Public Protection Bill of 1978, is the subject of this Article, and will be discussed in more detail later. For now, however, it is only necessary to understand that California was unique among the states in combining determinate sentencing with mandatory post-release supervision. This unique choice explains why California has long had a much larger pool of "parolees" than other states.

In addition, California has also made it easier than other states for parole officers to return parolees to prison, even for minor violations such as missing a meeting or failing a drug test. During his parole term, a parolee must comply with a long list of conditions: He must tell his parole officer if he gets a new job or moves to a new house; he must secure his parole officer's approval to travel more than fifty miles away from home, or leave the county for more than two days; he can't be around a gun or a knife longer than two inches. He must sign an agreement consenting to be searched at any time, with or without cause. He must not only obey the law, but also "[his] parole agent's instructions."⁷

5. For a helpful brief summary, see Jonathan Simon, *A Primer on How Parole Works in California*, UC BERKELEY NEWSCENTER (May 6, 2009), http://berkeley.edu/news/media/releases/2009/05/06_crimestats.shtml.

6. Determinate sentencing was supported by a broad political coalition in the hopes of making prison sentences more uniform and fair, although there was much disagreement about whether it would have the overall effect of shortening or lengthening time served. See PAMALA GRISET, *DETERMINATE SENTENCING* 47-48 (1991); April Kestell Cassou & Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 30, 30 (1978) (noting that at the time it was impossible to predict what overall effect the switch would have on term lengths). Indeterminate sentencing was retained for the most serious crimes, such as murder. Therefore, a small percentage of California inmates are serving indeterminate life sentences, with early release by a parole board theoretically possible after a fixed term, e.g., fifteen or twenty-five years. They are not the focus of this Article, although it is worth noting that in practice, very few of these "lifers" are actually paroled.

7. *Parolee Conditions*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Parole/Parolee_Conditions/ (last visited Apr. 7, 2011). No other state keeps as high a percentage of released prisoners on parole and no other state sends them back to state prison for minor technical violations. R. GRATTET, J. PETERSILIA & J. LIN, NATIONAL INSTITUTE OF JUSTICE, *PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA* 5 (2008). With the 2010 reforms, the percentage of released prisoners kept on parole supervision will be about 85%, which is still higher than any other state. See *California Prison Reduction Policy Takes*

And if he is found to have violated any of these conditions, the state may send him back to prison, even without new criminal charges.⁸ As of 2009, the odds that a California parolee would be returned to prison at least once during a three-year parole term were 70%.⁹

California has an immediate impetus for reducing the number of parolees sent back to prison: its prison system is dramatically overcrowded and under a federal court order to reduce its inmate population.¹⁰ But even if California's prisons were not overcrowded, its parole policies might be troubling for deeper legal-philosophical reasons. Until recently, the parole revocation process, or "back-end sentencing,"¹¹ had not received the same intensive attention that politicians, voters, and scholars alike have focused upon the "front-end sentencing" that occurs in the criminal courts.¹² As Jeremy Travis has observed, the "truth-in-sentencing" reforms of the 1980s and 1990s made front-end sentencing decisions more public (often involving victim testimony), transparent, and legally constrained. In contrast, back-end sentencing through parole revocations retains all the much-maligned features of the pre-"truth-in-sentencing" regime: it occurs behind closed doors and free of many legal constraints.¹³ These findings would be troubling enough if they applied only to technical parole violations, like failing a drug test or missing an appointment. But a final key distinction to understand about California's parole system is that the line between technical parole violations and serious crimes has been blurred. For example, in 2000, Travis found that 78 cases were classified by the

Effect, S. CAL. PUB. RADIO (Jan. 25, 2010), <http://www.scpr.org/programs/airtalk/2010/01/25/california-begins-inmate-release/#>.

8. "Failure to follow any lawful verbal or written instructions will result in a violation of parole, and may result in a return to custody." *Parolee Conditions*, CAL. DEPARTMENT CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/Parole/Parole_Requirements/ParoleReqs_2.html (last visited Apr. 7, 2011).

9. See Simon, *supra* note 5.

10. Plata v. Schwarzenegger, No. C01-1351 THE, 2007 WL 2122657 (N.D. Cal. July 23, 2007), *aff'd sub nom.* Brown v. Plata, No. 09-1233, 2011 WL 1936074 (U.S. May 23, 2011), available at <http://www.prisonlaw.com/events.php>.

11. The term was coined by Jeremy Travis. He explains why the word "sentencing" should be used to describe both sanctions for original convictions and for parole violations as follows:

"In both systems, we use the enforcement agencies of the state (police or parole) to detect violations of rules (criminal laws or conditions of supervision), arrest and detain those suspected of those infractions (defendants or parole violators), bring cases and suspects before a neutral adjudicative entity (judge or hearing officer), provide an opportunity for determinations of fact through adversarial process (with some distinctions between the systems), determine guilt (with differing levels of proof) and impose sanctions for violations of those rules, up to and including the deprivation of liberty."

Travis, *supra* note 1, at 632.

12. *Id.* at 633-34.

13. *Id.* at 637-38. Additionally, since parole revocation is an administrative rather than criminal proceeding, the factual basis for a parole revocation need only be found by a preponderance of the evidence, and the parolee does not enjoy the full panoply of rights afforded to criminal defendants.

California Department of Corrections and Rehabilitation (CDCR) as “homicides,” but “handled through the revocation of parole, with a maximum prison sentence of a year, rather than through the traditional prosecution route.”¹⁴

For this mix of practical and legal-philosophical reasons, experts in recent years have identified back-end sentencing as a pressing reform priority for California,¹⁵ and lawmakers have begun, albeit haltingly, to respond. As a result of this recent scholarly focus, we now know far more than we did ten years ago about how California’s parole system works, how it differs from the systems of other states, and how it might be reorganized so as to reduce California’s prison population without undermining public safety. In late 2009, the California Legislature took its first steps towards implementing the experts’ recommendations with the passage of Senate Bill X3 18.¹⁶ Under this bill, the CDCR is required to assess the risk of each individual inmate upon release, with the lowest-risk parolees being assigned to a new system of “summary” or “non-revocable” parole. These parolees are still subject to search and seizure conditions ungoverned by the Fourth Amendment warrant requirement, but are not subject to traditional parole supervision, and thus cannot be returned to prison for minor violations.¹⁷ Even after these reforms, the percentage of released prisoners kept on full parole supervision in California is expected to be about 85%, which is still higher than any other state, making it likely that parole revocations will continue to be a major driver of prison admissions in California for years to come.¹⁸ But the passage of SB X3 18 at least indicates

14. JEREMY TRAVIS, URBAN INST., *PAROLE IN CALIFORNIA, 1980 - 2000: IMPLICATIONS FOR REFORM* 8 (2003), available at http://www.urban.org/UploadedPDF/900598_Parole_in_Calif.pdf.

15. In 2007, Jeremy Travis observed: “For years, Joan Petersilia was perhaps the lone scholar conducting research on the topic. Now we can say that she has been joined by dozens of others, but we have a lot of lost ground to cover.” *Id.* at 634. Representative examples of recent scholarship that focuses on or devotes significant attention to California parole policy include Lin, Grattet & Petersilia, *supra* note 1; PETERSILIA, *supra* note 3; Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207 (2008).

16. S.B. X3 18, 2009-2010 Legis. Sess. (Cal. 2009), available at http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx3_18_bill_20091011_chaptered.html. For a summary of the changes, see *California Prison Reduction Policy Takes Effect*, *supra* note 7.

17. Press Release, Cal. Dep’t of Corr. & Rehab., CDCR Implements Public Safety Reforms to Parole Supervision, Expanded Incentive Credits for Inmates (Jan. 21, 2010), available at http://www.cdcr.ca.gov/News/2010_Press_Releases/Jan_21.html. Of course, such parolees may be returned to prison if they commit a new crime, but only if they are prosecuted and convicted through the regular criminal process as any other defendant would be.

18. *California Prison Reduction Policy Takes Effect*, *supra* note 7. For this reason, Joan Petersilia and her colleague Robert Weisberg of the Stanford Criminal Justice Center have described the final legislation as “very compromised.” Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, 139 DAEDALUS

some legislative recognition of the need for reform in this area.

There is one perspective, however, that has been missing from the reform-oriented policy discussion on California's parole system. While doing much to fill in our understanding of the system's current operations and ramifications, the discussion has devoted little attention to its origins. Since it dates to 1979, criminologists have assumed that California's policy of keeping nearly all released offenders under parole supervision for up to three years was an adjunct or afterthought to the Golden State's 1976 determinate sentencing reforms.¹⁹ For example, Grattet, Petersilia, and Lin have described California's current parole framework as having been implemented "simultaneously" with its determinate sentencing law.²⁰ At a higher level of generality, Jeremy Travis's call for a vigorous national discussion about the implications of back-end sentencing presupposes that "the practice of sending parolees back to prisons for new crimes" has not previously been the subject of extensive public debate, and that legislators may be unaware of the punishments that attend parole violations.²¹

In this Article, I draw on legislative archives to tell a different story about the origins of California's uniquely expansive parole system. California's parole framework was not an afterthought to the determinate sentencing law, it did not escape legislative debate, and its effect on the size of California's prison population was not accidental. To the contrary, the proponents of California's "unusual hybrid"²² of determinate sentencing with mandatory parole supervision intended and hoped for just the result that policy experts have observed and lamented: that the policy would make it easier to send more offenders back to prison. However, they may not have foreseen just how many more offenders that would be.

As I will show, back-end sentencing was understood from the beginning as a key feature of California's new parole policy, both by parole officers themselves and by lawmakers. In the late 1970s, the California parole officers' lobby explicitly promoted the use of parole revocation hearings as a substitute for criminal prosecution in cases where, for various reasons, district attorneys were unable or unwilling to press charges. They articulated a vision of a criminal justice system in which constitutional limitations on law enforcement

124, 130 (2010).

19. *E.g.*, PETERSILIA, *supra* note 3, at 64 ("The historic record of the passage of the determinate sentencing law in the California Legislature reveals virtually no serious discussion of parole supervision at all, and interviews with those central to the law's passage indicate that the subject of parole supervision did not arise in the debate over sentencing."); Jeremy Travis & Sarah Lawrence, *Experimenting with Parole*, 37 CAL. J. 18, 22 (2002) ("[W]hen the state abandoned indeterminate sentencing in 1977, it kept in place a system of parole supervision for everyone getting out of prison.")

20. GRATTET, PETERSILIA & LIN, *supra* note 7, at 44.

21. Travis, *supra* note 1, at 638.

22. PETERSILIA, *supra* note 3, at 64.

could be worked around through a second-best system of parole supervision. At a moment of great public concern about crime and safety, combined with tightening legal constraints on criminal investigation and prosecution, California's parole officers offered their services to help identify alternative routes for imprisoning dangerous individuals. And in nearly unanimously passing legislation to expand the use of post-release parole supervision, California legislators acquiesced in this vision, whether or not they agreed with it wholeheartedly.

II. SENATE BILL 1057: THE PUBLIC PROTECTION BILL

Though there have been several legislative modifications to California's parole law and policy over the years, most recently with SB X3 18 in 2009, the basic framework remains that established by Senate Bill 1057, or the Public Protection Bill, which was signed into law by Governor Jerry Brown in September 1978.²³ Sponsored by Senator Robert Presley of Riverside, a former homicide investigator in the Riverside County Sheriff's Department, the bill passed unanimously in the Senate and almost unanimously in the Assembly. It arrived on Governor Brown's desk along with memos from two state bureaucracies: the Department of Corrections, recommending that he sign it, and the Department of Finance, taking a neutral position. Also in the folder were a handful of letters from parole officers around the state, urging Governor Brown to sign the bill, and a clipping from the conservative *Sacramento Union*, describing a number of recently released offenders who had gone on to commit various crimes shortly after getting out of prison.²⁴

This fact—that the current parole framework was not part of the original 1976 determinate sentencing law (SB 42), but rather a separate piece of legislation amending that law—is key to understanding the origins of back-end sentencing in California. Joan Petersilia notes that neither the historic record nor interviews with those central to the passage of the 1976 law reveal any sustained discussion of parole supervision: “The assumption shared by all parties was that the previous post-prison parole system should and would simply remain intact.”²⁵ This may be true, but as soon as SB 42 had passed, there was a belated legislative discussion about the issue of parole supervision, and this discussion resulted not merely in preserving but in greatly expanding California's post-prison parole system. The legislative files on SB 1057 are admittedly not voluminous compared to other high-profile sentencing legislation at the time,²⁶ but they do contain enough analysis to undermine the

23. See GRISET, *supra* note 6, at 56.

24. BILL MEMORANDUM TO GOVERNOR, S.B. 1057 (Sept. 4, 1978) (on file with Governor's Chaptered Bill File, SB 1057 (Chapter 572, 1978), MF 3:3(51), California State Archives).

25. PETERSILIA, *supra* note 3, at 64.

26. Senator Robert Presley, who sponsored SB 1057, was at the same time sponsoring

assumption that back-end sentencing was implemented without any attention to its possible ramifications.

While SB 1057 was passed just two years after the determinate sentencing law, as part of the same flurry of late 1970s sentencing reform activity in Sacramento, SB 1057 should not be seen as an extension of the determinate sentencing project. To the contrary, after the passage of SB 42, many contemporary observers expected that parole supervision would eventually wither away in California: determinate sentencing, which was built around the idea that each offender's sentence would have a definite beginning and end, seemed fundamentally incompatible with post-release supervision, which reintroduced the indeterminate possibility of a subsequent return to prison.²⁷ For this reason, many parole officers thought their unit had been effectively gutted by SB 42, which did retain the possibility of post-release parole supervision for determinately sentenced offenders, but only for a maximum of one year, and with returns to prison capped at six months. Days before SB 42 went into effect, a set of emergency amendments were signed into law (AB 476 or the Boatwright Bill), extending the maximum length of parole supervision from one year to eighteen months, but many law enforcement leaders still felt the term of parole supervision should be longer.²⁸

Freezing California in 1976, then, one might have expected parole supervision to wither into a relatively small part of California's criminal justice system, if not eventually to be abolished altogether. Instead, within two years SB 1057 had not only reinstalled parole supervision as a cornerstone of the

a sentencing law, SB 709, which lengthened criminal sentences for a number of offenses. It would be signed into law along with SB 1057 on the same day in September 1978. In line with Jeremy Travis's general argument that front-end sentencing has received far more deliberation and attention than back-end sentencing, Presley's files on SB 709 in the California State Archives are much more extensive than his files on SB 1057. Nonetheless, his files on SB 1057—which form much of the source base for this Article—are not meager and do suggest at least some thought given to the issue of parole supervision by Sacramento lawmakers.

27. JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990*, 128-29 (1993). Indeed, California and Illinois are the only two states to have this particular hybrid system. Most states with determinate sentencing or nondiscretionary release do not also keep nearly all released offenders under parole supervision. PETERSILIA, *supra* note 3, at 64-65.

28. The 1977 California Conference on the Judiciary was a gathering of top law enforcement officials from around the state convened by a group called Citizens for Law Enforcement Needs. That conference's Probation and Parole Task Force Committee reported that the eighteen-month maximum parole term imposed by the determinate sentencing law (as amended by AB 476) was "of insufficient length to protect the public," and "should be extended to permit three years on parole and to permit returning a parolee to prison for a three-year maximum on the existing commitment." 1977 CAL. CONFERENCE ON THE JUDICIARY, *DELEGATE RECOMMENDATIONS FROM THE TASK FORCES ON APPELLATE PROCESS, FIXED-TERM SENTENCING, JUVENILE JUSTICE, MANDATORY SENTENCING AND PROBATION & PAROLE* (1977) (on file with Assembly Criminal Justice Committee Bill File, SB 709 (1978), California State Archives).

California criminal justice system, but also expanded it. SB 1057 increased the maximum length of supervision to three years for determinately sentenced offenders, and also, importantly, provided for the clock to stop during any returns to prison. With modifications, and allowing for the different system that governs indeterminately sentenced offenders, this framework remains the basic structure of California parole supervision to the present day. Since the clock is stopped during any prison stays, a released prisoner who racks up numerous parole violations can wind up cycling between prison and parole supervision for years—a situation that offenders refer to as “life on the installment plan.”²⁹

While it is beyond the scope of this Article to rehearse the many ways in which California’s nominally determinate sentencing scheme is actually infused with indeterminacy, it is worth noting that SB 1057 played a large part in reinjecting discretion and uncertainty into the question of how much time an offender would ultimately spend in prison.³⁰ Instead of a one-year transition period between prison and freedom, parole was now “a period of state supervision for as long as four years (three years plus the first twelve months of revocation), a period longer than most prison sentences, and a good deal of that time could be spent back in prison on revocations.”³¹ For most state prisoners, especially those convicted of relatively low-level crimes for which they would otherwise serve a short sentence, parole officials, not legislators or judges, would still “control a significant portion of their total time in incarceration.”³²

Why, just two years after establishing a determinate sentencing scheme with SB 42, did the California Legislature almost unanimously reintroduce indeterminacy through the back-door means of expanding parole supervision? How and why SB 1057 passed is the story to which I now turn.

III. HOW THE PAROLE LOBBY USED BACK-END SENTENCING TO SELL SB 1057

SB 1057 passed thanks to lobbying efforts by California parole officers, as represented by two professional organizations: the Parole Agents Association of California and the California Probation, Parole and Correctional Association. After the switch to determinate sentencing, parole officers confronted with a new sentencing and corrections framework in which parole seemed to play a minor part, and fearful that parole might one day be obsolete altogether, mobilized to seek legislative amendments to the determinate sentencing law that would re-establish parole supervision as a substantial component of the California criminal justice system.³³

29. GRATTET, PETERSILIA & LIN, *supra* note 7, at 10.

30. GRISET, *supra* note 6, at 56 (observing that the prospect of returning to prison on a parole violation was “a constant reminder” for offenders “that, in spite of the rhetoric, sentences remained uncertain under the new determinate structure”).

31. SIMON, *supra* note 27, at 128.

32. *Id.* at 129.

33. This analysis is based on a larger research project I have conducted reviewing the

The parole officers' lobby leveraged a number of rhetorical strategies in its successful campaign for the passage of SB 1057. But chief among them was the promotion of parole revocation as a substitute for constitutional criminal procedure.³⁴ At a time when police officers and prosecutors felt increasingly constrained by judicial decisions at both the federal and state level that expanded the rights of criminal defendants, California parole officers offered themselves as a workaround, a way of sending dangerous people to prison without having to go through the plea bargaining and trial process. Timothy Fitzharris, the executive director of the California Probation, Parole and Correctional Association (CPPCA), emphasized this point in a letter soliciting Attorney General Evelle Younger's endorsement of SB 1057:

Under the bill, some meaningful action is possible if, for a variety of reasons, the district attorney is unable to prosecute a new offense. . . . Parole agents, as you know, have unique powers relative to the search of a parolee, the burden of proof is lower, and agents have the ability to place parole "holds."³⁵

A flyer circulated in support of the bill also made this a key talking point:

In cases where there are search and seizure, credible witness or informant protection problems, to name a few, the DA cannot proceed even if there is no doubt of the parolee's guilt. (Further, the parole agent has a lower search and seizure standard—no warrant—and the parole violation is found at a lower standard than "beyond a reasonable doubt."³⁶

As these examples suggest, the parole lobby emphasized cases where parolees had gone on to commit new crimes that, for various reasons, could not be prosecuted as such. Charles Swim, the head of the Parole Agents' Association of California, submitted a list of examples for publication in the *Prosecutor's Brief*, the newsletter of the recently formed California District Attorneys Association, which ran under the headline, "Parole Officers Lodge Protest." The article began with a statement of concern that district attorneys had been publicly questioning the value of parole supervision. It provided examples describing a range of crimes committed by parolees, from "possession of a .38 caliber revolver and drugs" to "attempting to force a 14-year-old girl into prostitution."³⁷ In all seven cases, the local district attorney had declined to prosecute for one reason or another: "to protect the identity of an informant," "due to jurisdictional problems between two counties," "due to

legislative files for SB 1057.

34. By "constitutional criminal procedure," I mean proceedings subject to the full panoply of Fourth, Fifth, and Sixth Amendment protections that govern criminal prosecutions initiated by criminal complaint, information, or indictment.

35. Letter from Timothy L. Fitzharris, Exec. Dir., Cal. Prob., Parole & Corr. Ass'n, to Evelle J. Younger, Att'y Gen., Cal. (Jan. 23, 1978) (on file with the Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives).

36. WHAT SB 1057 DOES (on file with Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives).

37. Charles Swim, *Parole Officers Lodge Protest*, PROSECUTOR'S BRIEF, Apr. 1977 (published by the California District Attorneys Association, Sacramento, CA).

lack of witnesses of good reputation,” “due to lack of proof of intent,” “due to a defective search warrant,” or “because there was a ‘lack of suitable evidence’ for prosecution.” Though the *Prosecutor’s Brief* did not endorse Swim’s position, noting only that it had been submitted by Swim as an argument in favor of parole supervision, it did publish the article. Swim often attached a copy of this clipping when he wrote to legislators in support of SB 1057, so it made its way into several different committee files as the bill was being debated.³⁸

Senator John Nejedly, the architect of SB 42 and a former district attorney, took strong exception to the view of parole as a workaround for avoiding constitutional limitations. In correspondence with advocates of expanding parole supervision, Nejedly emphasized that he had specifically included the six-month limit on parole violations in SB 42 to *reduce* reliance on parole revocations: “If a parolee is only guilty of violating administrative rules or conditions, 6 months imprisonment seems appropriate. If a crime is committed, he should be prosecuted and returned to prison WNT. What you are suggesting is that administrative standards be substituted for constitutional standards for purposes of incarceration.”³⁹

That was precisely what the parole officers’ lobby was suggesting, but Nejedly may have overestimated the extent to which his fellow legislators would find this proposal troubling. Rather, fellow legislators may have agreed more with Swim, who wrote an angry letter to John Nejedly shortly after the determinate sentencing law went into effect and enclosed a reprint of his *Prosecutor’s Brief* article listing examples of parolees who had committed new crimes and were not prosecuted. In these cases, Swim wrote, “should those offenders have been permitted to remain free to again prey upon the public?” Swim then described at length the case of a parolee who had gone on a crime spree, purchasing drugs for “other parolees” and robbing a store at gunpoint. He noted that it remained unclear whether he would be prosecuted for those crimes: “The Parole Agent tried to protect society. The burden of that protection now belongs to the District Attorney. Which procedure of the criminal justice system would have provided more speedy and economical safety to the public—technical return [on a parole violation] or new commitment [on a criminal conviction]?”⁴⁰

38. Letter from Charles Swim, President, Parole Agents Ass’n of Cal., to Daniel Boatwright, Assembly Member, Cal. Leg. (Aug. 14, 1978) (on file with the Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives); Letter from Charles Swim, President, Parole Agents Ass’n of Cal., to John A. Nejedly, Senator, Cal. Leg. (July 11, 1977) (on file with the Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives).

39. Letter from John A. Nejedly, Senator, Cal. Leg., to Mr. R. Neil Zinn, Staff Member, Cal. Bd. of Corr. (Feb. 22, 1977) (on file with the Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives).

40. Letter from Charles Swim, *supra* note 38.

The due process concerns raised by SB 1057 did not go entirely unnoticed during legislative deliberations. The bill analysis prepared for the Assembly Ways and Means Committee raised several questions about the systemic consequences of extending the incarceration period for parole revocations: “Would this bill encourage the CRB [Community Release Board] to revoke parole instead of bringing the parolees to trial for a new offense? Since illegally obtained evidence may be considered at a parole revocation hearing, would this bill encourage peace officers to violate the rights of parolees in searching for evidence?”⁴¹ However, these concerns were apparently neither widespread nor salient enough to block passage of the bill.

The only two letters of opposition across all of the committee files on SB 1057 were both from the trial bar: one from the California Trial Lawyers Association, and one from the California Attorneys for Criminal Justice, an organization of defense attorneys. The two organizations shared the same lobbyist, and in both letters he gave fairly succinct reasons for the groups’ “vigorous” opposition: expanding parole supervision would disturb the careful balance established by the determinate sentencing law, and “in the absence of a showing that longer parole periods reduce recidivism, tax monies could be better utilized in other areas of the criminal justice system.”⁴² But these letters did not mention the due process issues raised by what we now call back-end sentencing—perhaps because the lobbyist was unaware that the parole officers’ lobby had made back-end sentencing such a central plank in their case.

While of great import to parole officers, SB 1057 received very little public attention. When Governor Brown signed it into law, his office issued a three-page press release on that day’s criminal justice legislation. Of those three pages, almost two were devoted to SB 709, which extended prison terms for a laundry list of crimes. SB 1057, the parole bill, was covered in a single sentence: “For most crimes the bill triples the maximum period a person released from state prison can be placed on parole and subjected to conditions of parole and supervision by a parole officer.”⁴³ The *Los Angeles Times* devoted to SB 1057 no article of its own—just a sentence, towards the end of

41. ASSEMBLY OFFICE OF RESEARCH, SB 1057 ASSEMBLY THIRD READING DIGEST (1978) (on file with Assembly Criminal Justice Committee Bill File, SB 1057 (1978), California State Archives).

42. Letter from Donald C. Green, Cal. Trial Lawyers Ass’n, to Hon. Robert Presley, Senator, Cal. Leg. (May 16, 1977) (on file with Senate Judiciary Committee Bill File, SB 1057 (1978), MF 1:5(10), California State Archives); Letter from Donald C. Green, Cal. Trial Lawyers Ass’n, to Hon. Robert B. Presley, Senator, Cal. Leg. (Feb. 23, 1978) (on file with Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives); Letter from Donald C. Green, Cal. Trial Lawyers Ass’n, to Hon. Robert B. Presley, Senator, Cal. Leg. (Feb. 24, 1978) (on file with Assembly Criminal Justice Committee Bill File, SB 1057 (1978), California State Archives).

43. Press Release, Office of the Governor, Following Are the Criminal Justice Bills Signed by Gov. Edmund G. Brown Jr. on September 5 (Sept. 5, 1978) (on file with the California Government Documents Collection, Green Library, Stanford University).

an article about Jerry Brown's gubernatorial campaign against Attorney General Evelle Younger.⁴⁴

But at least one constituent enthusiastically supported the back-end sentencing rationale for expanding parole supervision. In May 1977, one Jean York of Humboldt County took a few moments to type a brief letter to Senator Robert Presley, the sponsor of SB 1057, to express her support. "Parole agents, with their authority for warrantless searches, surveillance and anti-narcotic testing programs are often able to intervene in criminal cases where other law enforcement agencies are unable to act, thus providing a very real public protection," she wrote. "I have personal knowledge of cases where parolees, addicted to heroin and involved in burglaries, shoplifting and drug sales, were taken off the streets and returned to prison as parole violators when police were unable to take action."⁴⁵

York's concerns would have been salient to many Californians in the late 1970s, and California lawmakers would have been receiving similar messages from their constituents throughout that decade, even if not targeted specifically to SB 1057.⁴⁶ Fueled both by concerns about observed crime rates as well as deeper currents in American cultural life, a grassroots conservative movement was gaining strength in the Golden State, which would soon help to send popular former governor Ronald Reagan to the White House.⁴⁷ Built around concerns over "a perceived decline in religiosity, morality, individual responsibility, and family authority" in postwar America, this movement sought to limit state intrusion in economic matters but "supported the use of the state to uphold law and order."⁴⁸

Lending additional urgency to the "law and order" political turn, California had been uniquely traumatized by high-profile and gruesome tragedies such as the string of Manson Family murders in the late 1960s. It is perhaps telling, then, that buried among Presley's file on SB 1057 was a clipping on Charles Manson. Someone had taken a yellow highlighter to the following phrase: "Manson . . . becomes eligible for parole this year."⁴⁹ Manson, of course, had been convicted under the old indeterminate sentencing system. Moreover, the determinate sentencing law did not cover murder; even under the new system,

44. Bill Billiter, *Law-Order Issue: Brown, Younger Focus on Crime*, L.A. TIMES, Sept. 6, 1978, at B3.

45. Letter from Ms. Jean York to Sen. Robert Presley (May 10, 1977) (on file with the Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives).

46. On the fear of crime as a major factor in 1960s and 1970s California politics, see, for example, LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 188, 204-05 (2001).

47. *Id.*

48. *Id.* at 10-11.

49. *Manson's Girls: Fromme and Good Continue Their 'Crusade' from Prison*, SACRAMENTO UNION, Mar. 12, 1978, at A8 (on file with the Sen. Robert Presley Bill File, SB 1057 (1978), California State Archives).

someone convicted of Manson's crimes (multiple murders via a conspiracy theory) could still, and likely would, be kept in prison for life.⁵⁰ And finally, parole *release* (what was at issue with Manson) is not the same thing as post-release parole *supervision* (what was at issue with SB 1057), though both are colloquially known as "parole." Nevertheless, the traumatic memory of Manson, who along with some of his followers was back in the news for various reasons throughout the 1970s, surely contributed to a general climate in which legislators felt it was best to err on the side of caution in criminal justice matters.⁵¹

The parole officers' lobby astutely appealed to this constellation of constituent and lawmaker concerns by emphasizing cases in which released prisoners had gone on to commit new crimes. It may be that, as Joan Petersilia has suggested, the California legislators who crossed determinate sentencing with near-universal post-release parole supervision did not fully appreciate the long-term policy ramifications of this "hybrid system" and especially the role it would play in driving California's high recidivism rate.⁵² But it is not hard to understand why, when presented with the parole officers' arguments in favor of SB 1057, they almost all voted for it. Under the new determinate sentencing scheme, the prisons would no longer have control over the release date of most offenders, even those believed to pose a danger to the community. While not a perfect solution to that problem, SB 1057 at least offered a way of quickly returning offenders to prison as soon as they reoffended without having to go through an entirely new criminal prosecution.

Additionally, although it is beyond the scope of this Article to consider the fiscal implications of SB 1057, it is worth noting that SB 1057 promised to return these recidivist offenders to state prison—not to county jail, which is where they would have been kept if they were awaiting criminal trial. That would only have added to the bill's appeal, since Proposition 13 was on the ballot that same year (and would indeed pass that November), threatening to drain county coffers.⁵³ The culmination of several years of uproar over property taxes in California, Proposition 13 cut the property tax rate and established a set of freezes and caps on property market values for tax purposes, deflating local property tax revenues.⁵⁴ As the proposition was being debated across the state

50. Indeed, Manson remains incarcerated in the California state prison system to this day.

51. See, e.g., William Farr, *\$200,000 Bail Set for Manson Girl in New Trial*, L.A. TIMES, Dec. 28, 1976, at D1. Additionally, the assassinations of San Francisco Mayor George Moscone and County Supervisor Harvey Milk occurred in November 1978—after SB 1057 had already been signed into law, but before it went into effect in January 1979—and further cemented support for the general idea of incapacitation. If lawmakers had any uncertainty about voting for SB 1057, subsequent events like the Moscone-Milk murders may have disinclined them to revisit the issue.

52. PETERSILIA, *supra* note 3, at 64.

53. I am grateful to Joan Petersilia for suggesting this connection to me.

54. A brief summary of Proposition 13 is provided in LAURA KALMAN, RIGHT STAR

in 1978, Governor Brown threatened that local governments could not expect a “sugar daddy in Sacramento who will bail you out if Proposition 13 passes.”⁵⁵

IV. CONCLUSION

In recent years, policy analysts have generated a small body of literature about the practice of “back-end sentencing,” observing that California uses parole revocation in lieu of criminal prosecution for a surprisingly high number of cases, including many that would otherwise be considered serious crimes. Some of these offenders may be getting away with far shorter sentences than if their conduct were prosecuted criminally. Surely others are being railroaded into serving time for charges of which they could never be convicted beyond a reasonable doubt. And many are being cycled in and out of prison on fairly minor violations for which a state prison stay, even a short one, may be overkill.

In confronting the myriad injustices of back-end sentencing, it is important to understand that these injustices have not been an unforeseen consequence of California’s parole system. When the California Legislature instituted the current parole system with SB 1057 in 1978, they did so in spite of—or maybe because of—arguments by parole officers that specifically pointed to back-end sentencing as one of their *raisons d’être*. In other words, while Jeremy Travis and others are right to call for the same scrutiny of back-end sentencing practices that scholars, lawmakers, and voters have applied to front-end sentencing, it is also important to prepare for the likelihood that back-end sentencing could well survive such scrutiny. Already the limited parole reform of 2009 has generated intense controversy, as law enforcement officials and California residents alike have expressed concern about the prospect of releasing prisoners without any supervision.⁵⁶

The eminent French historian Marc Bloch once faulted historians for their “obsession with origins”: “The explanation of the very recent in terms of the remotest past . . . has sometimes dominated our studies to the point of a hypnosis.”⁵⁷ In this Article, I have not gone anywhere near “the remotest past,” nor even traveled so far back as the early-twentieth-century cultural origins of parole that have been traced by David Rothman and Jonathan Simon.⁵⁸ Still, there is a danger to assigning too much present-day policy significance to the

RISE: A NEW POLITICS, 1974-1980, AT 233-35 (2010).

55. *Id.* at 234. As it turned out, the California legislature did end up directing surplus funds to help bail out municipalities after Proposition 13 passed. *Id.* at 235.

56. *California Early-Release Program Stirs Controversy*, S. CAL. PUB. RADIO (Feb. 10, 2010), <http://www.scpr.org/news/2010/02/10/calif-prison-early-release-program-stirs-controversy/>.

57. MARC BLOCH, *THE HISTORIAN’S CRAFT* 24 (1964).

58. DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (2002); SIMON, *supra* note 27.

rhetorical tropes that were used to move a bill through the political process years before. In their empirical work on how SB 1057 and its subsequent modifications have actually been implemented, Grattet, Lin, and Petersilia have cautioned against “assum[ing] a close coupling between policy and practice, between discourse and action,” while ignoring “the everyday practices of situated actors within the criminal justice system.”⁵⁹ Similarly, Weisberg and Petersilia have encouraged academics to “pay their dues on the less magisterial, more mundane side of the issues,” attending to “ground-level, state-by-state studies” of how policies and programs are actually implemented.⁶⁰ Ultimately, reforms aimed at dismantling mass incarceration in California and elsewhere will depend upon information gained through careful empirical studies, not an “obsession with origins” for their own sake.

It can be useful, however, to know at least something about the origins of whatever system one is hoping to reorganize. By excavating a structure’s foundation, we can identify where that structure has strong and deep support, and where it is weaker and will take less effort to dismantle. If California’s uniquely expansive back-end sentencing scheme had been an entirely unforeseen and unintended consequence of other policy projects, then drawing attention to its unfortunate effects on California’s prison rolls or offenders’ due process rights might suffice to generate enthusiasm for reforming it. But if—as I argue in this Article—California’s “unique hybrid” parole system was explicitly framed from the beginning as a desirable alternative means of imprisoning offenders without going through a criminal prosecution, then the hill to reform takes on a steeper grade. Today’s local law enforcement officials, parole officers, and lawmakers may well have trained under or worked alongside the players who guided SB 1057 through Sacramento just over 30 years ago. Making visible the consequences of back-end sentencing may win over many Californians. But lawmakers and especially local law enforcement officials—who have been among the parole system’s staunchest supporters—may require different and deeper strategies of persuasion.

59. Lin, Grattet & Petersilia, *supra* note 1, at 761.

60. Weisberg & Petersilia, *supra* note 18 at 132.

