

On January 27, California Governor Jerry Brown [proposed a voter initiative](#) to reform sentencing in the state.

The [initiative](#) seeks to reintroduce parole hearings and early releases. If it passes, nonviolent felons will come up for parole once they complete the basic term for their original offense.

Brown's initiative is advertised as a cost-saving measure. As I argue in my book "[Cheap on Crime](#)," many recent criminal justice reform proposals use the language of cost to attract support. The governor also hopes to control prison overcrowding before federal court mandates force action. But more substantially, the initiative [proposes to](#) "stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles."

To understand the proposal, we must go back in time, to California sentencing before the 1970s.

### Out of the past: indeterminate sentencing

In 1974, Robert Martinson published an article titled ["What Works? Questions and Answers about Prison Reform."](#) It examined evaluative studies of approximately 600 prison rehabilitation programs nationwide. The article grimly concluded that these programs did not reduce recidivism.

The findings came as a shock to Californians, whose correctional system was based on rehabilitation. For decades, the state's voters had supported the use of prisons to teach inmates skills and reform them into productive, law-abiding citizens. This idea was reflected in California's [sentencing regime](#), known as "indeterminate sentencing."

At the time, California law did not list specific sentences for offenses. Judges would sentence defendants based on their characteristics and circumstances, and their actual release day would be determined by the parole board. For example, an inmate sentenced to three to 20

years' imprisonment would first come up for parole after three years. If not released, the prisoner would periodically reappear before the parole board until the members decided she had been rehabilitated.

### The move toward determinate sentencing

Martinson's research was published at a complicated time in California. A few years earlier, President Richard Nixon had been elected on a platform of crime control, capitalizing on media-fueled public fear of [rising crime rates](#) .

Highly publicized violent crimes, such as the Manson family's Tate-LaBianca murders, frightened Californians into considering alternatives. The resulting change in sentencing was the product of a narrow coalition. Conservatives [feared](#) that early releases coddled serious offenders and put the public at risk; progressives [claimed](#) that the unfettered discretion of parole boards led to inequalities, disfavoring poor inmates and inmates of color. You may recall the cynical portrayal of parole hearings in the movie "The Shawshank Redemption."

Jerry Brown, who was governor of California at the time, enthusiastically supported sentencing reform. California was the first state to implement the new sentencing regime, known as "determinate sentencing," that created inflexible sentences and required most inmates to serve their full sentences. This regime was then [adopted by other states and by the federal system](#) .

### The power of prosecutors

Determinate sentencing shifted power away from judges and parole boards toward legislators and prosecutors. In California, felony sentences were set by the legislature. In the following decades, various voter initiatives added "enhancements" – dramatic increases in sentencing due to factors such as use of [guns](#) , a [gang](#) context or a [prior felony record](#) . Parole boards lost the authority to offer early releases, except to inmates serving life sentences. The emphasis on rehabilitation declined, and gradually funds for rehabilitative programs were cut.

Determinate sentences flowed almost automatically from the charges. Therefore, the prosecutors' power to choose the charges became the most important factor in sentencing.

Fordham University professor [John Pfaff](#) argues that the massive growth in prison population was the result of the way prosecutors exercised their charging discretion.

[According to Pfaff's data](#)

, between 1994 and 2008, the probability that a district attorney would file a felony charge increased from one in three to two in three.

Many people [plead guilty](#) in order to avoid the draconian consequences of more serious charges. This aggressive turn in felony charging goes a long way in explaining why there are more people in prison. Increases in sentence length are a less significant factor.

### Should we return to indeterminate sentencing?

Is Brown's revival of parole boards a good thing? That largely depends on whether one trusts judges and parole boards over prosecutors.

Pfaff's data are hard to argue with. However, the original concerns that drove Californians away from indeterminate sentencing in the first place should still give us pause.

First, the proposition will increase the number of parole candidates. In 2014, [19.9 percent of California prison inmates were lifers](#)

, and not all of them were eligible for parole. This initiative would add to the parole board's caseload the additional

[29.3 percent](#)

serving time for nonviolent crimes.

Can the parole board handle this additional caseload? And if doing so requires hiring more parole personnel, how much money would we save?

It's important to keep in mind that [all parole commissioners](#) in California, who are appointed by the governor, come from law enforcement backgrounds.

As I have found out during my ongoing study of parole hearings for lifers, commissioners

currently receive some training on topics such as mental health and substance abuse. Once they are given the task of deciding more people's fate, would parole commissioners be educated as to implicit biases? If not, how would they avoid repeating the racially discriminatory outcomes that plagued parole releases in the 1970s?

Another source of concern is that parole hearings have adapted to the punitive mindset of the determinate sentencing era.

Before the California Supreme Court's decision in the case known as [Lawrence](#), parole boards regularly considered the severity of the inmate's offense as an indication of her dangerousness and risk. In Lawrence, the court forbade this practice and required the board to find evidence of dangerousness in the inmate's present conduct, not just in the original crime. But even after Lawrence, my qualitative study-in-progress of parole hearing transcripts reveal that parole boards tend to assume that inmates who committed serious crimes are more dangerous – even when several decades have passed since the crime was committed.

Finally, the initiative extends indeterminate sentencing to offenders convicted of nonviolent felonies, under the understandable [but misguided](#) assumption that they are less dangerous or less likely to reoffend. This has the potential to entrench our negative social attitudes toward people incarcerated for violent offenses – even if they are elderly, ill or have redeemed themselves over a long period of time.

Moreover, the initiative does not clearly explain what parole proceedings for low-level felons would look like. Would these cases receive the kind of attention awarded to lifers – or would they be abbreviated processes? Given the increased caseload, would the board rely more on the existing [software to predict risk](#) and less on their interviews with particular inmates? What would be the role of victims, who [currently have an extensive right to be heard](#) in lifer hearings? Can California afford to provide inmates with the rehabilitative programs they need to prepare them for a law-abiding life after release?

## Reasons for optimism

There are plenty of reasons to be optimistic about the governor's new initiative. In the decades since Martinson published his pessimistic study, [we have found new and convincing evidence](#) that, when conducted and evaluated properly, educational and vocational programs in prison

## New initiative from Governor Jerry Brown could reform sentencing in California, cut prison terms

Written by The Conversation USA

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can and do decrease reoffending. But we should not accept wholesale the premise that parole boards are categorically better than prosecutors at setting sentence length.

Governor Brown is now seeking enough signatures to place his initiative on the California ballot. Many Californians who are dismayed by the injustice and expense of mass incarceration are likely to support it. If it passes, this initiative would be the first step in undoing determinate sentencing across the country.

In the next few months, I hope that supporters of the initiative will carefully consider how to hold parole hearings, so that we may learn from the past, rather than repeat it.

*Hadar Aviram does not work for, consult, own shares in or receive funding from any company or organization that would benefit from this article, and has disclosed no relevant affiliations beyond the academic appointment above.*

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