

A TALE OF TWO STATES WITHOUT A SENTENCING COMMISSION: HOW
DIVERGENT SENTENCING APPROACHES IN CALIFORNIA AND TEXAS
HAVE LEFT TEXAS IN A BETTER (AND MODEL) POSITION

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I. INTRODUCTION

This Comment examines and compares the divergent California determinate and Texas indeterminate systems for criminal sentencing in light of California's drastic correctional crisis and Texas' recent and apparently successful correctional reforms. Points of distinction between the California and Texas systems include the varied roles of key actors in the sentencing and corrections process, how constitutional concerns in sentencing have impacted each state's approach, and how the common concern for unwarranted disparity in punishment fits into the Texas and California approaches. California's current determinate sentencing structure is inadequate to address the needs of the state and has only fueled the correctional crisis. As California considers sentencing reform, in particular the implementation of a sentencing commission, it should first look toward Texas, with its non-commission-based system, as a model for important structural aspects of sentencing and for its recent successful correctional reforms.

California currently faces a prison overcrowding crisis of unprecedented proportions.¹ Since 2006, when the prison population reached an all-time high of more than 160,000 inmates, the "adult prison institutions have operated at almost double their intended capacity."² The California prison

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¹ See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *1 (E.D. Cal. Aug. 4, 2009) (tentative ruling), *appeal dismissed*, 130 S. Ct. 1140 (2010) and *appeal dismissed*, 130 S. Ct. 1142 (2010).

² *Id.*

population also appears to be more violent than those in other states.³ These conditions threaten the safety of inmates and corrections officers alike.⁴ While California is not alone in confronting such a correctional crisis and calls for prison reform, California's crisis has attracted considerable media attention.⁵ In October 2006, Governor Arnold Schwarzenegger declared a state of emergency for California's prisons, which remains in place today.⁶ Additionally, this crisis is set amid the state's rampant budgetary problems and ongoing tensions between the state's executive and legislative branches.⁷ Nonetheless, the most significant act pushing prison reform to the forefront was a ruling by a federal three-judge panel in *Coleman v. Schwarzenegger*, ordering the governor and legislature to create a plan to reduce the prison population in California by 40,000 prisoners in two years.⁸ The ruling lamented the dire conditions of the California prisons:

Thousands of prisoners are assigned to "bad beds," such as triple-bunked beds placed in gymnasiums or day rooms, and some institutions have populations approaching 300% of their intended capacity. In these overcrowded conditions, inmate-on-inmate violence is almost impossible to prevent, infectious diseases spread more easily, and lockdowns are sometimes the only means by which to maintain control. In short, California's prisons are bursting at the seams and are impossible to manage.⁹

³ See STANFORD CRIMINAL JUSTICE CTR., CALIFORNIA SENTENCING AND CORRECTIONS: SIGNIFICANT ISSUES 4 (2007), <http://www.pewcenteronthestates.org/uploadedFiles/CA%20Sentencing%20and%20Corrections.pdf> (prepared as part of an Executive Session with state prosecutors). "California prisons have nearly twice as many assaults as the Texas prison system and almost three times as many assaults as the federal prison system." *Id.*

⁴ See *Coleman*, 2009 WL 2430820, at *23.

⁵ See, e.g., Editorial, *Governor Holds the Keys: The Legislature's Abysmal Failure on Prison Reform Leaves the Job up to Schwarzenegger*, L.A. TIMES, Sept. 17, 2009, at A26.

⁶ See Proclamation, Governor Arnold Schwarzenegger, Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), available at <http://gov.ca.gov/proclamation/4278/>.

⁷ See Editorial, *supra* note 5.

⁸ See *Coleman*, 2009 WL 2430820 at *16; Bob Egelko & Wyatt Buchanan, *Judges Tell State to Free Thousands in Crowded Prisons*, S.F. CHRON., Feb. 10, 2009, at A1.

⁹ *Coleman*, 2009 WL 2430820 at *1. A great deal of the information used in the court's ruling drew from the January 2007 report by the Little Hoover Commission. See *id.* (citing the Little Hoover Commission's report). See generally LITTLE HOOVER COMM'N, SOLVING

Initial plans submitted under the *Coleman* panel's order were rejected.¹⁰ The final ruling, finding that California successfully complied with the order by creating a sufficient plan, is currently being appealed to the United States Supreme Court with arguments to be heard in fall of 2010.¹¹

It is clear from the condition of California's prisons that the state's correctional system has significant flaws. A major source of failure in the system derives from California's approach to sentencing criminals. California thus serves as an interesting candidate for a case study of state sentencing approaches.

Sentencing reform and a thorough examination of a state's sentencing system must accompany efforts to address correctional crises.¹² Sentencing, parole, and correctional systems have an important role in shaping the conditions and population rates of state prisons.¹³ It is not a coincidence that one of the most commonly called-for reforms in California is to institute a sentencing commission that can provide rationality and centralized governance for sentencing policies.¹⁴ Although a sentencing commission component was dropped from the most recent bill passed to address prison overcrowding, supporters' calls for this concept remain strong.¹⁵ Governor Schwarzenegger has emphasized the need for a sentencing commission in California, stating, "I think we want to move forward in a way like other states have shown us. . . . [T]here are many states that have sentencing commissions . . . and I think that we can learn

CALIFORNIA'S CORRECTIONS CRISIS: TIME IS RUNNING OUT (2007), <http://www.lhc.ca.gov/studies/185/Report185.pdf> (independent government commission report analyzing problems in the California correctional system).

¹⁰ See Michael Rothfeld, *Judges Reject State Bid to Cut Prison Crowding*, L.A. TIMES, Oct. 22, 2009, at A3.

¹¹ See *California Prison Ruling Stands, for Now*, DAILY REC. (Balt.), Jan. 19, 2010, <http://mddailyrecord.com/2010/01/19/california-prison-ruling-stands-for-now/>. No prisoners will be released early until the appeal is completed. See *id.*

¹² See LITTLE HOOVER COMM'N, *supra* note 9, at 33; KARA DANSKY, STANFORD CRIMINAL JUSTICE CTR., CONTEMPORARY SENTENCING REFORM IN CALIFORNIA: A REPORT TO THE LITTLE HOOVER COMMISSION 1 (2006).

¹³ See DEAN JOHN CHAMPION, SENTENCING 38–40 (2008); CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 73–75 (2d ed. 2009).

¹⁴ See, e.g., Kara Dansky, Editorial, *Yes: Dansky -- Other States Have Formed Successful Panels*, SACRAMENTO BEE, Sept. 27, 2009, at 2E, available at <http://www.sacbee.com/2009/09/27/2210462/yes-dansky-other-states-have-formed.html>.

¹⁵ See *id.*

from that.”¹⁶ With California looking to other states for guidance on reform, Texas emerges as a prime model that has successfully implemented reform without a commission.

A. Why Compare California and Texas Sentencing Approaches?

Texas and California present an interesting comparison because they have the two largest inmate populations in the United States, and both states operate without a sentencing commission.¹⁷ However, Texas’ indeterminate and California’s determinate approaches are in striking contrast. This Comment seeks to compare these two divergent state sentencing approaches in light of the apparent decline, if not complete failure, of the California sentencing approach.

State sentencing approaches have often been overshadowed by a focus on the federal sentencing system.¹⁸ The federal system utilizes sentencing guidelines set out by the United States Sentencing Commission.¹⁹ Several reasons underlie this federal sentencing concentration. First, academics focus on the federal system because it is nationwide, and their work will thus reach a broader audience.²⁰ Second, states diverge considerably in their approaches to sentencing, even within the three major approaches outlined below.²¹ Thus, comparisons between state sentencing systems are unlikely to be infused with any scientific, controlled factors.²² Finally, systematic review is hindered by the lack of comprehensive information on any given state’s approach, especially in states that do not have a centralized sentencing commission to compile and consolidate such information.²³ Despite these limitations on review, many states, including Texas, have taken innovative steps in sentencing that could provide insight

¹⁶ Governor Arnold Schwarzenegger, Remarks at Governor’s Press Conference to Unveil Comprehensive Prison Reform Proposal (Dec. 21, 2006), available at <http://gov.ca.gov/speech/7175/>.

¹⁷ See William J. Sabol et al., *Prisoners in 2008*, BUREAU OF JUST. STATS. BULL. (U.S. Dep’t of Justice, Washington, D.C.), Dec. 2009, at 17–18 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

¹⁸ See Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post-Blakely Era*, 4 OHIO ST. J. CRIM. L. 27, 28 (2006).

¹⁹ See 28 U.S.C. § 994 (2006).

²⁰ See Berman & Chanenson, *supra* note 18, at 28.

²¹ See *id.* at 28–29.

²² See *id.*

²³ See *id.*

for reform in other states.²⁴ State prison systems contain almost ninety percent of all United States prisoners, so examining two of the most populated state prison systems is valuable.²⁵ Given the complexity of state sentencing systems, this Comment will limit comparison of California and Texas to non-capital sentencing.²⁶

B. Overview of the Three Main State Sentencing Approaches

There are three predominant sentencing schemes used in most state jurisdictions: (1) indeterminate sentencing, (2) determinate sentencing, and (3) presumptive sentencing.²⁷ Mandatory sentencing is a fourth form that is incorporated within the aforementioned schemes to address certain crimes and offenders.²⁸ A brief overview of the basic premises of each system is helpful before specifically examining California's determinate and Texas' indeterminate systems. It is important to note that determining the specific number of states that employ each scheme is difficult because many combine features to create hybrid systems.²⁹

Indeterminate sentencing was the most prevalent scheme for many decades.³⁰ In states utilizing an indeterminate scheme "[T]he legislature specifies a minimum and a maximum sentence for a particular offense or category of offenses."³¹ In sentencing an offender, the judge determines the maximum sentence that the offender can serve from within this range.³² A distinguishing feature of an indeterminate system is that "the actual amount of time the offender will serve is determined by the parole board on the basis of its judgment as to whether the offender has been rehabilitated or

²⁴ See *id.* at 29.

²⁵ See Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 209 (2008).

²⁶ A review of capital sentencing is beyond the scope of this Comment as the sentencing procedures and systems that exist within a given state for capital sentencing are often unique even as compared to that state's standard approach to sentencing non-capital offenders. For example, many states allow juries to make the determinations required for capital punishment even where they provide no such option for non-capital crimes. See SPOHN, *supra* note 13, at 69.

²⁷ See CHAMPION, *supra* note 13, at 6.

²⁸ See *id.*; SPOHN, *supra* note 13, at 38.

²⁹ See CHAMPION, *supra* note 13, at 6.

³⁰ See *id.* at 7.

³¹ SPOHN, *supra* note 13, at 38.

³² See *id.* See also CHAMPION, *supra* note 13, at 7.

has served enough time.”³³ Because of this role for parole decision makers, the judge’s sentence is not the final word on the length of a prisoner’s stay.³⁴

Determinate sentencing, in contrast, does not rely on the parole system to assess the early release of prisoners.³⁵ “Determinate sentencing denotes a fixed term of incarceration that must be served in full, less any ‘good time’ earned while in prison.”³⁶ In a determinate system, “The parole board may supervise offenders who have been released from prison, but it does not determine when offenders will be released.”³⁷ This system developed as a response to indeterminate sentencing’s perceived inadequacies, particularly judicial disparity.³⁸ It is intended to reduce judicial discretion and, in theory, reduce sentencing disparities by having the judge set a fixed term from within a more limited range of confinement for various offenses.³⁹

The federal system and approximately twenty states employ the third major sentencing model, presumptive or guidelines-based sentencing, the central feature of which is the sentencing commission.⁴⁰ “In jurisdictions

³³ SPOHN, *supra* note 13, at 39.

³⁴ *See id.*

³⁵ *See id.* The exact number of states employing determinate sentencing as their majority approach is not clear, but as of 2005, twenty-six states employed determinate sentencing for some crimes. *See* CHAMPION, *supra* note 13, at 7. There were thirty-five states using both indeterminate and determinate sentencing in this same year. *See id.*

³⁶ CHAMPION, *supra* note 13, at 7. “Good time” reduces the amount of time served when a defendant behaves well in prison. *Id.* Each state sets out a formula regarding how this reduction in time is handled for different categories of offenses. *See id.* at 7–8.

³⁷ SPOHN, *supra* note 13, at 39.

³⁸ *See* ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 289 (2008). In this context, the term “judicial disparity” refers to the inconsistencies in criminal sentences that arise based on which particular judge sentences the offender. *Id.* These disparities can emerge within and across jurisdictions and are often pinpointed by critics as a source of significant unfairness or injustice in the criminal system. *Id.* Much of this criticism derives from associating judicial disparities in decisions with race or other class discrimination. *See* SPOHN, *supra* note 13 at 129. However, judicial disparity can exist as a difference in treatment or outcome “that does not necessarily result from intentional bias or prejudice.” *Id.*

³⁹ *See* CHERMERINSKY & LEVENSON, *supra* note 38, at 289–90.

⁴⁰ *See* SPOHN, *supra* note 13, at 233; NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/NCSC_Sentencing_Guidelines_profiles_July_2008.pdf (profiling the guidelines-based, sentencing commission systems in twenty states and the District of Columbia. The states are Alabama, Alaska, Arkansas, Delaware, Kansas,

that use this model, a sentencing commission develops guidelines based on the seriousness of the offense and the offender's prior criminal record, which judges are required to use in determining the appropriate sentence."⁴¹ The presumptive guidelines system, in contrast to a voluntary or advisory guidelines scheme, requires judges to follow the guidelines or give a reason for not doing so.⁴² Departure from the guidelines to impose harsher or more lenient sentences is rooted in findings of specified aggravating or mitigating factors.⁴³ Because many of these states adopted a guidelines-based scheme to replace their previous indeterminate systems, sentencing commissions are often touted as a best practice in approaching reform.⁴⁴ This is the scheme which Governor Schwarzenegger referred to in his call to look to other states for California's sentencing and prison reform.⁴⁵

No state utilizes mandatory sentencing as its only, or even predominate, sentencing approach.⁴⁶ Thus, classifying this sentencing category as a "system" is somewhat of a misnomer.⁴⁷ Nonetheless, all jurisdictions, whether they utilize an indeterminate, determinate, or presumptive scheme, "now have laws that prescribe mandatory minimum terms of incarceration for selected crimes."⁴⁸ In these instances, a prison sentence is not left to the

Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, and Wisconsin).

⁴¹ SPOHN, *supra* note 13, at 39.

⁴² *See id.* at 236. Following Supreme Court decisions in the past decade concerning the Sixth Amendment constitutionality of guidelines sentencing, many of these systems are now technically advisory, although the guidelines still remain the predominant consideration in the sentences imposed. *See, e.g.,* *Cunningham v. California*, 549 U.S. 270, 274 (2007).

⁴³ *See* SPOHN, *supra* note 13, at 236.

⁴⁴ *See id.* at 233–34.

⁴⁵ *See* Governor Arnold Schwarzenegger, *supra* note 16; *supra* Part I.

⁴⁶ *See* CHAMPION, *supra* note 13, at 13, 32.

⁴⁷ *See id.*

⁴⁸ SPOHN, *supra* note 13, at 38. For example, "40 states have mandatory sentences for repeat or habitual offenders, 38 states and the District of Columbia have mandatory sentences for crimes committed using a deadly weapon, 36 states and the District of Columbia have mandatory penalties for drug possession or trafficking." *Id.* *See also, e.g.,* CAL. PENAL CODE § 190.05 (West 2008) (setting out mandatory minimum sentences for second-degree murderers who have served a prior sentence for murder); CAL. VEH. CODE § 23540 (West 2000 & Supp. 2010) (requiring minimum of ninety days in jail for a second-offense Driving While Under the Influence); TEX. PENAL CODE ANN. § 49.04 (West 2003 & Supp. 2009) (setting forth seventy-two-hour minimum term of confinement for Driving While Intoxicated and minimum of six days for open container); *Id.* § 12.31 (life imprisonment without parole is mandatory for conviction of a capital felony whether or not the state ultimately seeks the death penalty). These minimums also

judge's option; the sentence is required.⁴⁹ Only the prosecutor's discretion in choosing whether to charge an offense that will trigger the mandatory sentence affects a potential sentence.⁵⁰

C. Texas and California Provide Valuable Case Study Examples of Indeterminate and Determinate Approaches

Texas and California have extremely different approaches to sentencing. Texas utilizes an indeterminate system, while California predominantly employs determinate sentencing.⁵¹ Among the few aspects these states' systems share in common are claiming the highest prison populations in the country and not operating sentencing systems with guidelines-promulgating sentencing commissions. Examining Texas' and California's divergent approaches to sentencing is informative since each approach impacts the prison population in that state and reflects potential benefits and drawbacks of a non-commission approach. California's approach led it to a drastic corrections crisis that can only be remedied with systemic reform.⁵² Sentencing commissions can serve an important role in directing such reform.⁵³ Nonetheless, the failure of the determinate sentencing law in California does not signal the failure of a non-commission approach. California can draw important lessons from Texas sentencing. Texas has preserved an indeterminate system with unique features that have allowed it to remain flexible in its own recent reforms and to address prison overcrowding.⁵⁴ Because of the high number of prisoners incarcerated in California and Texas and the significant portion that these prisoners comprise of the national prison population, the sentencing structures upon which these populations are founded should not be ignored.

mirror the federal system, in which over 100 crimes are subject to between two and twenty-year mandatory minimum sentences. *See* SPOHN, *supra* note 13, at 38.

⁴⁹ *See* SPOHN, *supra* note 13, at 38.

⁵⁰ *See id.*

⁵¹ *See* CAL. PENAL CODE § 1170(a)(1) (West 2004 & Supp. 2010). *See, e.g.,* TEX. PENAL CODE ANN. § 12.32(a) (West 2003 & Supp. 2009).

⁵² *See* LITTLE HOOVER COMM'N *supra* note 9, at ii.

⁵³ *See id.* at iii.

⁵⁴ *See* COUNCIL OF STATE GOV'TS JUSTICE CTR., JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE 6 (2009) (highlighting successful prison population trends from reforms in a non-commission sentencing system).

II. CALIFORNIA AND TEXAS SENTENCING: BACKGROUND AND UNIQUE FEATURES

Before proceeding to comparing specific features of the California and Texas systems, it is necessary to provide an overview of the two sentencing approaches. Texas and California generally follow the indeterminate and determinate system definitions outlined *supra* Subpart I.B. Nonetheless, it is worth highlighting nuances of each system for their impact on the state correctional system.

A. *California's DSL: Restraining Judicial Discretion While Utilizing an Unusual Parole Release System*

Most California sentencing utilizes a determinate sentencing approach under the California Determinate Sentencing Law (DSL).⁵⁵ California created the DSL in 1976.⁵⁶ Prior to 1976, California used indeterminate sentencing with broad parole board discretion, and its early parole and correctional rehabilitation programs served as a model for many states.⁵⁷ In enacting the DSL, the California legislature shifted focus, declaring that the purpose of imprisonment for crime is punishment and not rehabilitation.⁵⁸

California's DSL utilizes a triad approach to sentencing.⁵⁹ The DSL does not apply to all crimes in California.⁶⁰ Inmates convicted of heinous crimes and those convicted for a third-strike offense receive indeterminate sentences, with the latter acting effectively as a mandatory sentence.⁶¹ Thus, as of 2005, approximately eighty-three percent of inmates in California were serving determinate sentences.⁶² In sentencing for incarceration under the DSL, the judge selects a determinate term from

⁵⁵ See Petersilia, *supra* note 25, at 253.

⁵⁶ See *id.*

⁵⁷ See *id.* at 254–55.

⁵⁸ See CAL. PENAL CODE § 1170(a)(1) (West 2004 & Supp. 2010) (“The Legislature finds and declares that the purpose of imprisonment for crime is punishment. . . . The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.”).

⁵⁹ See Petersilia, *supra* note 25, at 253.

⁶⁰ See *id.* at 254.

⁶¹ See *id.*

⁶² See *id.*

three possible prison terms (upper, lower, or middle term) authorized by statute for a given crime.⁶³ Under this triad system, “[T]he lower term [is] reserved for cases with mitigating circumstances and the higher term for cases where there [a]re aggravating circumstances. If neither mitigating nor aggravating factors exist, the middle term is presumptively appropriate.”⁶⁴ Judges thus retain control over the critical probation or prison decision, but their overall discretion is reduced within California’s triad approach, even as compared to other determinate sentencing states.⁶⁵

Judicial discretion in California recently expanded when the triad system became advisory in reaction to the Supreme Court’s decision in *Cunningham v. California*,⁶⁶ finding that the DSL was unconstitutional.⁶⁷ *Cunningham* is discussed in greater detail in Subpart III.B, but a brief overview of this case is essential to understanding the current state of California sentencing.⁶⁸ In *Cunningham*, the Supreme Court examined the constitutionality of the DSL based on the conviction of a sexual offender to the highest of the three terms available.⁶⁹ The trial court judge alone had found aggravating circumstances to impose this upper term.⁷⁰ The Court utilized the Sixth Amendment jury fact-finding analysis developed through *Apprendi v. New Jersey* and associated cases.⁷¹ Under this analysis, the Sixth Amendment requires a jury to find facts that would expose a defendant to an elevated upper term sentence above the statutory maximum.⁷² The Court found the DSL unconstitutional because it gave only a sentencing judge the authority to find aggravating facts to impose the highest term of the triad, where the Court regarded the otherwise presumptively required middle term as the statutory maximum.⁷³ To

⁶³ CAL. R. CT. 4.420 (a).

⁶⁴ Petersilia, *supra* note 25, at 253–54.

⁶⁵ See SPOHN, *supra* note 13, at 233.

⁶⁶ See 549 U.S. 270, 274–75 (2007).

⁶⁷ See *People v. Sandoval*, 161 P.3d 1146, 1158–59 (Cal. 2007) (where the California Supreme Court modified California sentencing laws to conform to the constitutional requirements set forth in *Cunningham*).

⁶⁸ See *Cunningham*, 549 U.S. at 274–75 (2007).

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.* at 282. See also *United States v. Booker*, 543 U.S. 220, 232 (2005); *Blakely v. Washington*, 542 U.S. 296, 301–05 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

⁷² See *Cunningham*, 549 U.S. at 274–75.

⁷³ See *id.* at 292–93.

remedy this unconstitutionality, a California judge now has discretion to choose between the three terms in the triad.⁷⁴ Despite this increased flexibility to choose between three sentencing options, the California system remains determinate.

California's pairing of determinate sentences with required and automatic, rather than discretionary, parole release also contributes to its imperiled correctional system.⁷⁵ "California prisoners serve a statutorily specified portion of the term the judge ordered and are automatically released when that period elapses."⁷⁶ This creates the California system's "determinacy" because the time served by the offender, prior to his automatic parole release, is determined primarily by the sentence length imposed by the judge rather than by a parole board's discretionary review.⁷⁷ The DSL "makes it extremely difficult for corrections officials to keep inmates in prison, regardless of their future dangerousness."⁷⁸ When California adopted the DSL with automatic parole release, it left its parole supervision system intact.⁷⁹ This combination contributes to the state having the highest recidivism rate in the country.⁸⁰ As discussed further *infra* Subpart III.A.3, this sentencing structure choice left California with a dysfunctional hybrid system where automatic parole release reduces incentives for rehabilitation while heavy parole supervision increases the likelihood of finding parole violations.⁸¹

B. Texas' Indeterminate, Decentralized System: A Unique Bifurcated Trial System with Non-Capital Jury Sentencing

In the Texas system, the judge or jury imposes a term to be served from within a broad available range set by offense categories.⁸² The range from which the set term of years is selected provides far more judicial discretion than would be available in California's triad system. For example, the

⁷⁴ See *People v. Sandoval*, 161 P.3d 1146, 1158–59 (Cal. 2007).

⁷⁵ See Petersilia, *supra* note 25, at 255.

⁷⁶ *Id.* at 254.

⁷⁷ *Id.*

⁷⁸ *Id.* at 253.

⁷⁹ *Id.* at 256.

⁸⁰ See *id.* at 253, 256; Ryan G. Fischer, *Are California's Recidivism Rates Really the Highest in the Nation? It Depends on What Measure of Recidivism You Use*, UC IRVINE CTR. FOR EVIDENCE-BASED CORR. BULL., Sept. 2005, at 1.

⁸¹ See Petersilia, *supra* note 25, at 255–56.

⁸² See, e.g., TEX. PENAL CODE ANN. §§ 12.01, 12.04, 12.32 (West 2003 & Supp. 2009).

sentence for a first-degree felony can be anywhere within the range of “for life or for any term of not more than 99 years or less than 5 years.”⁸³ The system is indeterminate because the actual time served will depend on the discretion of a parole board in assessing early release and the accumulation of good-time credit rather than on the judge’s or jury’s initial determination.⁸⁴

Texas has several unique sentencing system features. First, Texas allows a defendant to opt for sentencing by a jury, rather than by a judge.⁸⁵ Texas is one of only six states that routinely provide jury sentencing for non-capital offenses.⁸⁶ Second, Texas utilizes a bifurcated trial system composed of a guilt/innocence phase and a sentencing phase.⁸⁷ This procedure is not commonly used in non-capital sentencing by other states.⁸⁸ Under this two-phase system, the sentencing occurs as a later component of a single trial, in which the standard rules of evidence and beyond-a-reasonable-doubt burden of proof continue to apply.⁸⁹

Texas utilizes a determinate sentencing scheme for one category of offense—state jail felonies.⁹⁰ This fourth degree of felony in Texas situates lesser property and drug felony offenders outside the misdemeanor system with time served in distinct state jails.⁹¹ The state jail system is notable for its lack of parole and good-time credit, contrasting the rest of the Texas indeterminate sentencing and parole scheme.⁹² This lack of parole and good-time credit significantly impacts the conditions in state jail facilities as inmates have little incentive to rehabilitate, as discussed *infra* Subpart III.A.3.

⁸³ *Id.* § 12.32.

⁸⁴ See TEX. GOV’T CODE ANN. §§ 508.0441(a), 508.145(f) (West 2004).

⁸⁵ See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (West 2006 & Supp. 2009).

⁸⁶ SPOHN, *supra* note 13, at 69. The other five states are Arkansas, Kentucky, Missouri, Oklahoma, and Virginia. *Id.*

⁸⁷ See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(a) (West 2006 & Supp. 2009).

⁸⁸ See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 1005 (2003).

⁸⁹ See TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (West 2006 & Supp. 2009).

⁹⁰ See TEX. PENAL CODE ANN. § 12.35(a) (West 2003 & Supp. 2009).

⁹¹ Carl Reynolds, *Sentencing and Corrections: From Crowding to Equilibrium (and Back Again?)*, 69 TEX. B. J. 232, 234 (2006); KEN ANDERSON & JOHN BRADLEY, TEXAS SENTENCING 6-1 (5th ed. 2007).

⁹² See ANDERSON & BRADLEY, *supra* note 91, at 6-1; TEX. DEP’T OF CRIM. JUST., OFFENDER ORIENTATION HANDBOOK 7 (2004), available at <http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf>.

III. COMPARING FEATURES OF THE CALIFORNIA AND TEXAS SENTENCING SYSTEMS

A. *Examining the Key Players in the Sentencing and Corrections Processes*

Texas and California diverge significantly in the role that certain key players involved in sentencing and corrections have within each system. This has contributed to some of California's problems, particularly its high recidivism rate and the debasement of the system from constitutional challenges. The actors that diverge critically between the Texas and California approaches include the sentencing judge, the sentencing (or non-sentencing) jury, the parole system actors, and the legislature. Each of these will be considered for their effects on keeping the Texas system durable and efficient while contributing to California's imperiled system.

1. The Judge – The Restricted Final Word Versus a Discretionary Checkpoint

First, the judge obviously plays a critical role in both systems in imposing the sentence on a defendant. However, the nature of his discretion and the influence of his decision on the actual time served vary considerably between California and Texas. The judge's position is central to defining the type of sentencing system in each state.⁹³ California and Texas exemplify diverging philosophies for how much power should be left in judicial hands when determining the fate of a convicted individual.

California's determinate system, which abolished discretionary parole for most cases, makes the judge's sentence the final say as to the time to be served, but he retains little discretion in the term he selects.⁹⁴ In enacting the DSL, the California legislature explicitly stated that, moving forward, the California sentencing system would be designed to effect one goal: punishment.⁹⁵ This was a response to a system viewed as allowing too much disparity in sentencing.⁹⁶ Thus, the desire to obtain uniformity is engrained in this punishment goal.⁹⁷ In an effort to decrease judicial

⁹³ See SPOHN, *supra* note 13, at 38.

⁹⁴ See *id.* at 231–32.

⁹⁵ See CAL. PENAL CODE ANN. § 1170(a)(1) (West 2004 & Supp. 2010).

⁹⁶ See *id.*; see also Petersilia, *supra* note 25, at 210.

⁹⁷ See SPOHN, *supra* note 13, at 231.

disparity, California's triad system rigidly restricts judicial discretion.⁹⁸ Originally, under the DSL and prior to *Cunningham*, the California sentencing judge had nominal discretion and was usually obligated to impose the middle term of the triad.⁹⁹ This uniformity-seeking, punishment-based approach exemplified a shift occurring in the mid-1970s that viewed sentencing as an ineffective rehabilitative measure.¹⁰⁰ The determinate sentencing movement lost steam in the late 1970s.¹⁰¹ Many states subsequently adopted presumptive guidelines systems after research showed that the determinate approach did not adequately address concerns about sentencing discretion and disparity.¹⁰²

The Texas sentencing judge wields much greater discretion in his decisions than his California counterpart. In Texas' indeterminate system, the judge has broad discretion to select the term to be served from an often expansive range of years.¹⁰³ The role of the Texas Board of Pardons and Paroles counters this discretion because the judge's decision is not the final say.¹⁰⁴ Discretionary parole allows for adjustments to the judge's sentence if this sentence has proven overly harsh for a particular offender.¹⁰⁵ The Texas system recognizes that an individual offender's situation may evolve over time and that it may not be in the best interest of the offender (or the state housing him) to require that he stay in jail based on the term of years determined at the outset of his time served.¹⁰⁶

The Texas judge is also well equipped with a range of options to tailor the sentence to the individual needs of the offender. Texas, like California and other states, has a formal probation system to address post-conviction probation, or "community supervision" as it is formally known in Texas.¹⁰⁷ Texas allows probation for a more expansive range of crimes than most

⁹⁸ *Id.* at 231–32.

⁹⁹ See *Cunningham v. California*, 549 U.S. 270, 274–75 (2007).

¹⁰⁰ See SPOHN, *supra* note 13, at 231–32.

¹⁰¹ See *id.* at 233.

¹⁰² See *id.*

¹⁰³ See, e.g., TEX. PENAL CODE ANN. § 12.32(a) (West 2003 & Supp. 2006).

¹⁰⁴ See ANDERSON & BRADLEY, *supra* note 91, at § 8.1.

¹⁰⁵ See TEX. BD. OF PARDONS AND PAROLES, PAROLE IN TEXAS 49–50 (2008), available at http://www.tdcj.state.tx.us/bpp/publications/PIT_english.indd%2008-2-2008.pdf.

¹⁰⁶ See CHERMERINSKY & LEVENSON, *supra* note 38, at 289; ARTHUR W. CAMPBELL, LAW OF SENTENCING 105 (3d ed. 2004).

¹⁰⁷ See TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 2, 3 (West 2006 & Supp. 2009).

states offer.¹⁰⁸ Texas also has a formalized, statutory deferred adjudication option that allows certain offenders to serve a probationary period that, if successfully completed, prevents an adjudication of guilt from appearing on employer records.¹⁰⁹ These incarceration alternatives are combined with a wide range of sentencing conditions and community programs that give the judge an early opportunity to keep people out of jail or prison who do not need to be there. These options play a critical role in avoiding unnecessary increases in the incarcerated population.

2. The Non-Capital Sentencing Jury – Texas Shows It Is Possible

A jury can impose a criminal sentence as an alternative to sentencing by a judge; however, a majority of states do not provide jury sentencing in non-capital crimes.¹¹⁰ California follows the majority.¹¹¹ This lack of jury sentencing created problems for many state sentencing systems, including California's DSL, when challenged as violating the Sixth Amendment right to a jury trial.¹¹² In contrast, Texas' unique jury sentencing option has benefited Texas in three substantial ways, contributing to the durability and stability of its system.

First, Texas' jury sentencing insulated it from the Sixth Amendment constitutional challenges raised in other states and the federal system. In the last decade, rulings of unconstitutionality based on a judge's fact finding to prescribe sentences above the statutory maximum proved detrimental to certain systems.¹¹³ These Sixth Amendment cases are discussed in greater detail *infra* Subpart III.B regarding *Cunningham*. The basic concept is that "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant."¹¹⁴ The facts found by a

¹⁰⁸ See *id.* §§ 3(e), 3(g).

¹⁰⁹ See *id.* § 5(a).

¹¹⁰ See SPOHN, *supra* note 13, at 69.

¹¹¹ See *id.*

¹¹² See *Cunningham v. California*, 549 U.S. 270, 274 (2007). See also *United States v. Booker*, 543 U.S. 220, 243–44 (2005); *Blakely v. Washington*, 542 U.S. 296, 308 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490–91 (2000).

¹¹³ See *Booker*, 543 U.S. at 232; *Blakely*, 542 U.S. at 301–05; *Apprendi*, 530 U.S. at 490.

¹¹⁴ *Cunningham*, 549 U.S. at 274–75.

judge to expose a defendant to an elevated sentence need to be inherent in the jury's verdict or defendant's plea and established beyond a reasonable doubt.¹¹⁵ The systems found unconstitutional under this Sixth Amendment concept did not offer jury sentencing.¹¹⁶ Texas has not suffered these concerns because the defendant can opt for jury sentencing, even following a plea of guilty.¹¹⁷ Furthermore, sentencing in Texas continues as a second phase of trial where the beyond-a-reasonable-doubt standard applies in full force.¹¹⁸ A finding of unconstitutionality is detrimental for any government system, and some states and the federal system have been required to implement significant reforms and alter the way they consider sentencing in order to comply with court findings of unconstitutionality.¹¹⁹ Texas' jury sentencing inoculated its indeterminate system from the constitutional challenges associated with judicial fact finding, allowing the system to remain intact¹²⁰. Not only has jury sentencing allowed the Texas system to avoid the stigma of unconstitutionality, but Texas also serves as a model for how other states can address unconstitutionality.

Second, as discussed regarding jurisdictional disparities *infra* Subpart III.C, jury sentencing offsets some of the common criticisms of jurisdictional disparities among judges. Indeterminate systems like Texas' are often criticized for allowing for too much jurisdictional disparity between judges' sentences.¹²¹ This jurisdictional disparity is viewed as an element of unfairness and injustice in the treatment of criminal defendants because the outcome of one's sentence can depend heavily on the judge that happens to sentence them.¹²² However, jury sentencing counters these concerns.¹²³ Defendants can opt for jury sentencing where a particular judge may be viewed as imposing particularly strict sentences.¹²⁴

¹¹⁵ See *id.* at 281.

¹¹⁶ See *id.*

¹¹⁷ See TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2(b) (West 2006 & Supp. 2009).

¹¹⁸ See *id.* § 3(a)(1).

¹¹⁹ See, e.g., *United States v. Booker*, 543 U.S. 220, 265–66 (2005) (remedial opinion required the federal guidelines system to be treated as advisory unless Congress opted for other reforms to bring the system within constitutional bounds).

¹²⁰ See *Cunningham*, 549 U.S. 270, 274–75; *Booker*, 543 U.S. at 232; *Blakely v. Washington*, 542 U.S. 296, 301–05 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

¹²¹ See SPOHN, *supra* note 13, at 131.

¹²² See *id.* at 232.

¹²³ See Petersilia, *supra* note 25, at 269.

¹²⁴ TEX. CODE CRIM. PROC. ANN. art. 37.07 §§ 1–2 (West 2006 & Supp. 2009).

Additionally, where sentencing disparities arise from jury decision-making, it is easy to view that disparity as a warranted reflection of local values regarding that type of crime.¹²⁵

Finally, Texas jury sentencing serves as an example for other states, and even for the federal system, that non-capital jury sentencing is possible and can be run relatively effectively in a highly-populated state.¹²⁶ Many state systems and the federal sentencing system have refrained from moving toward a jury sentencing system following pronouncements of unconstitutionality.¹²⁷ There is a common misconception that creating a jury sentencing system is inordinately expensive and logistically insurmountable. The *Booker* remedial decision highlighted some of these concerns for the federal system.¹²⁸ Instead of adopting the obvious cure to a Sixth Amendment right-to-jury-trial violation by importing some form of jury sentencing, the Supreme Court's remedial solution was to make the guidelines advisory for sentencing judges.¹²⁹ This is a solution that California and other states have also adopted as they redressed unconstitutionality.¹³⁰ The Texas system refutes assumptions about the infeasibility of a jury sentencing system. Texas allows for jury sentencing in the second phase of its bifurcated trial setup.¹³¹ Juries in Texas have demonstrated that they are able to consider complex sentencing facts in assessing the punishment of an offender within the statutory range available. The jury system in Texas has worked for a long time and it exemplifies that some assumed concerns with jury sentencing might be significantly misplaced.

3. The Parole System – California's Failing Solution

The parole board has significantly broader discretion in Texas' indeterminate system than in California's determinate system because the latter uses automatic-release parole with a non-discretionary review process

¹²⁵ See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 354–65 (2003).

¹²⁶ See Mark Osler, *Texas Juries, Buyer's Remorse, and Booker's Fatal Flaw*, 22 FED. SENT'G REP. 100, 100–03 (2009).

¹²⁷ See *United States v. Booker*, 543 U.S. 220, 246 (2005).

¹²⁸ See *id.* at 254–55 (Breyer, J., remedial opinion).

¹²⁹ See *id.* at 246; See also *Cunningham v. California*, 549 U.S. 270, 293–94 (2007).

¹³⁰ See *People v. Sandoval*, 161 P.3d 1146, 1164 (Cal. 2007).

¹³¹ TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2 (West 2006 & Supp. 2009).

for a majority of inmates.¹³² Parole systems are intricately linked to the population residing in state prisons.¹³³ There are two critical points where parole decision makers impact prison overcrowding.¹³⁴ First, parole decision makers have varying roles in determinate and indeterminate systems regarding the initial decision to release a prisoner on parole, which reduces the prison population.¹³⁵ Second, the decision to revoke parole brings parole violators back into the corrections system.¹³⁶ This parole revocation process is not inherently dictated by the sentencing system employed.¹³⁷ Nonetheless, California exemplifies how imparting less discretion in the first decision (a result of the determinate system) while requiring ongoing parole supervision can increase the number of parole violators that must be brought back into prison.¹³⁸

Since adopting the DSL, California has faced great difficulty in creating an effective parole review and revocation system.¹³⁹ “All prison inmates in California who are not serving life sentences (known as Determinate Sentences) are released on parole after serving the sentence imposed by the court and are supervised by the Dept. of Corrections and Rehabilitation.”¹⁴⁰ Inmates with determinate sentences are thus subject to parole supervision at the expiration of their originally imposed incarceration.¹⁴¹ This structure significantly resembles the federal system’s supervised release procedure.¹⁴² Inmates serving life sentences with the possibility of parole face an indeterminate process with the Board of Parole Hearings assessing suitability for release.¹⁴³ Thus, for a vast majority of California prisoners:

¹³² See Petersilia, *supra* note 25, at 254–55.

¹³³ See CHAMPION, *supra* note 13, at 36.

¹³⁴ See SPOHN, *supra* note 13, at 74–75.

¹³⁵ See *id.* at 74.

¹³⁶ See *id.* at 75.

¹³⁷ See *id.*

¹³⁸ See Petersilia, *supra* note 25, at 257–59.

¹³⁹ See *id.*; STANFORD CRIMINAL JUSTICE CTR., *supra* note 3, at 4–5.

¹⁴⁰ *Lifer Parole Process*, CAL. DEP’T OF CORR. AND REHAB., available at http://www.cdcr.ca.gov/Parole/Life_Parole_Process/Index.html (last visited May 3, 2010).

¹⁴¹ See Petersilia, *supra* note 25, at 256–57.

¹⁴² See CAL. PENAL CODE § 3000(b)(1) (West 2000 & Supp. 2010); CAMPBELL, *supra* note 106, at 111 n.9. Almost all California prisoners serve a parole term after their prison term. Petersilia, *supra* note 25, at 256. The Board of Parole Hearings can technically waive parole but this is a rare practice. *Id.*

¹⁴³ See Petersilia, *supra* note 25, at 254.

The only way for them to get out of prison is to serve the statutorily mandated percentage of the sentence a judge gave them, with some reductions allowed for good-time and earned-time credits. Once that time is up, however, they are automatically released, whether they are rehabilitated or incorrigible, and no matter how likely they may [sic] be to reoffend.¹⁴⁴

The decision to send a parole violator back to prison for an additional sentence is made by a correctional official, such as a parole agent, parole supervisor, or a deputy commissioner at the Board of Parole Hearings, instead of by a judge.¹⁴⁵ Because of this non-judicial decision-making, California's DSL requires a lower standard of evidence to return people to prison.¹⁴⁶ California established an "unusual hybrid system" by removing discretionary parole release while maintaining parole supervision for all offenders.¹⁴⁷ Parole in California operates less as a reward for good behavior and more as an extended period of surveillance.¹⁴⁸ Because both serious and non-serious offenders will be out on parole, "California parole officers often claim that their high revocation rates are a by-product of release of parolees who were almost certain to reoffend and should not have been released in the first place."¹⁴⁹

This parole structure amplifies two negative features of the California corrections system: (1) California's claim to the highest rate of recidivist offenders in the country, and (2) the impact on prison conditions arising from a lack of incentives to promote good conduct or rehabilitation.¹⁵⁰ For many years, California has had the highest rate of recidivists reentering the prison population.¹⁵¹ Two-thirds of all prisoners are returned to prison within three years, nearly twice the average national rate.¹⁵² Even more notably, many of these recidivist offenders return for technical parole

¹⁴⁴ *Id.*

¹⁴⁵ See STANFORD CRIMINAL JUSTICE CTR., *supra* note 3, at 5.

¹⁴⁶ See *id.*

¹⁴⁷ See Petersilia, *supra* note 25, at 256.

¹⁴⁸ *Id.* at 256–57.

¹⁴⁹ *Id.* at 257–59.

¹⁵⁰ See *id.* at 255, 259, 262.

¹⁵¹ See *id.* at 262–64.

¹⁵² See *id.* at 211; Fischer, *supra* note 80, at 1–2.

violations, as opposed to committing new crimes.¹⁵³ This seems to indicate that there is ample opportunity for California to reexamine its parole review and revocation system to ensure that parole violators are not needlessly sent back to prison, while ensuring that the most dangerous offenders stay locked up.¹⁵⁴

The California system clearly suffers from overcrowding but when inmates know they will receive automatic parole release, it also impacts their behavior while incarcerated.¹⁵⁵ “The elimination of discretionary parole release undercut[s] incentives for inmates to rehabilitate themselves while incarcerated. . . . Inmates . . . who know they will be released whether or not they participate in programs are effectively discouraged from participation.”¹⁵⁶ There is also less incentive for good behavior in California prisons.¹⁵⁷ Texas has faced similar difficulties in its state jail system.¹⁵⁸ Since 1994, offenders convicted of state jail felonies serve their time in state jail facilities, which represent the one instance of determinate sentencing in Texas.¹⁵⁹ These facilities offer no parole and no good-time credit.¹⁶⁰ With the lack of prospects of early release and no good-time credit available, there is nothing to encourage inmates in these state jails to behave well or invest their time in rehabilitation and other programs offered.¹⁶¹ The discretionary parole system thus serves a critical role in incentivizing good prisoner conduct and rehabilitation in prisons already suffering from overcrowding.¹⁶² Restructuring the parole release and revocation system is a measure that California needs to incorporate into any

¹⁵³ See Fischer, *supra* note 80, at 1–2.

¹⁵⁴ See Petersilia, *supra* note 25, at 211.

¹⁵⁵ See Katharine Bradley & R.B. Michael Oliver, *The Role of Parole* (Cmty. Res. for Justice, Policy Brief, July 2001), available at <http://www.crjustice.org/rolparol.htm>; Petersilia, *supra* note 25, at 211.

¹⁵⁶ Petersilia, *supra* note 25, at 255.

¹⁵⁷ See *id.*

¹⁵⁸ See Carlos Guerra, *How Texas' State Jails Are Keeping the Wrong Prisoners in Longer*, SAN ANTONIO EXPRESS-NEWS, June 18, 2007, http://www.mysanantonio.com/news/MYSA061907_01B_guerra_345cdad_html14648.html?showFullArticle=y.

¹⁵⁹ See ANDERSON & BRADLEY, *supra* note 91, § 6.1.

¹⁶⁰ See TEX. BD. OF PARDONS AND PAROLES, *supra* note 105, at 40; Guerra, *supra* note 158.

¹⁶¹ Guerra, *supra* note 158.

¹⁶² See BRADLEY & OLIVER, *supra* note 155; Ilyana Kuziemko, *Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 22–31 (Nat'l Bureau of Econ. Research, Working Paper No. 13380, 2007).

reformed system with or without a sentencing commission.¹⁶³

Texas, in contrast to California, has maintained the discretionary parole review system characteristic of indeterminate sentencing.¹⁶⁴ The Texas Board of Pardons and Paroles effectively determines how long an inmate will serve, thus curtailing the influence of the judge's initially imposed sentence.¹⁶⁵ Once a prisoner becomes eligible for parole after serving a designated percentage of his sentence, the Board assesses suitability for release using parole guidelines, which create a score based upon a risk assessment instrument and offense severity class.¹⁶⁶ In 1983, Senate Bill 396 designated the Board as a statutory agency with exclusive authority to approve paroles, increased Board membership to six members to be appointed by the governor, and gave the Board authority to revoke paroles and issue warrants for the arrest of administrative release violators.¹⁶⁷ There has been criticism of discretionary parole review in indeterminate systems because it creates the potential for unwarranted disparities between times served.¹⁶⁸ However, it can also allow for more careful consideration of a prisoner's potential danger to society upon release, thus keeping only those prisoners who truly need to be incapacitated in prison.¹⁶⁹

The Texas prison system also assesses individual offender's early release; therefore reducing prison crowding through good conduct or "good time" credit.¹⁷⁰ Good-conduct time is an important feature in both Texas jails and prisons.¹⁷¹ The Texas Department of Criminal Justice and sheriff determine good-conduct credit in prisons or jail facilities, respectively.¹⁷² An award of good-conduct credit accelerates the inmate's eligibility for parole in prison and allows county jail inmates to be released earlier than

¹⁶³ See Petersilia, *supra* note 25, at 211.

¹⁶⁴ ANDERSON & BRADLEY, *supra* note 91, § 8.1[c]

¹⁶⁵ See *id.*; SPOHN, *supra* note 13, at 74.

¹⁶⁶ See TEX. BD. OF PARDONS & PAROLES, PAROLE GUIDELINES ANNUAL REPORT FY 2009, 7–8 (Dec. 2009).

¹⁶⁷ See *id.* at 4; Act of May 18, 1983, 68th Leg., R.S., ch. 232, 1983 Tex. Gen. Laws 974, 974–979.

¹⁶⁸ See CHEMERINKSY & LEVENSON, *supra* note 38, at 289.

¹⁶⁹ See *id.*

¹⁷⁰ See ANDERSON & BRADLEY, *supra* note 91, §§ 8.1[b], 8.3[b].

¹⁷¹ See *id.* § 8.1[b]; TEX. GOV'T CODE ANN. § 498.003 (West 2004 & Supp. 2009).

¹⁷² See TEX. GOV'T CODE ANN. § 498.002–.003 (West 2004) (setting forth how the good-time credit classification and award system operates in Texas); TEX. CODE CRIM. PROC. ANN. art. 42.032 § 2 (West 2006 & Supp. 2009) (good-conduct time in county jail).

their judicially imposed sentence.¹⁷³ The parole board does not operate this feature of the Texas system, but it has a similar effect as parole in reducing the time served based on one's progress and behavior during incarceration.¹⁷⁴ Good-time credit is also an aspect of sentencing reduction that many determinate sentencing systems have maintained.¹⁷⁵

The Texas parole system has also recently increased its efficiency through the Texas Justice Reinvestment Initiative implemented in 2007.¹⁷⁶ The Texas Justice Reinvestment Initiative is discussed further *infra* Subpart IV.B, but the general concept behind the initiative was to address the overcrowding crisis in Texas prisons by investing in state policies and programs rather than using the money to build more prison facilities.¹⁷⁷ Under this initiative, the Board has moved closer to reaching a goal of thirty-one percent parole approval rates and has notably reduced its parole revocations by twenty-five percent between 2006 and 2008.¹⁷⁸ "The increased availability of treatment and intermediate sanction facilities—made possible through the Justice Reinvestment Initiative—has facilitated the reduction in revocations and the enhanced use of parole."¹⁷⁹ Some of these reform measures would be helpful for California to look to as it approaches overhauling its own parole system.

4. The Legislature – An Actor that California Needs to Curtail

The final key player in the sentencing and corrections process that must be examined is the state legislature. Because of California's lack of discretionary parole release, the legislature has more significant influence in determining the prison stay of a Californian inmate than it does in Texas.¹⁸⁰

¹⁷³ See ANDERSON & BRADLEY, *supra* note 91, §§ 8.1[b], 8.3[b].

¹⁷⁴ See *id.*; TEX. BD. OF PARDONS AND PAROLES, *supra* note 105, at 9.

¹⁷⁵ See SPOHN, *supra* note 13, at 74.

¹⁷⁶ See COUNCIL OF STATE GOV'TS JUSTICE CTR., JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE 2–6 (Apr. 2009).

¹⁷⁷ See *id.* at 1–2.

¹⁷⁸ See *id.* at 2.

¹⁷⁹ *Id.* Intermediate Sanction Facilities (ISFs) are "secure facilities that serve as detention centers for offenders violating the conditions of their supervision ('technical violations'). These facilities are used to sanction offenders in lieu of a revocation to prison. The average length of stay is 60 days." *Id.* at 4.

¹⁸⁰ See Petersilia, *supra* note 25, at 255.

This has contributed to some significant drawbacks for the California system.¹⁸¹

California's DSL, by removing judicial discretion and discretionary parole, effectively put the determination of how long an inmate would serve in prison in the hands of the legislature.¹⁸² This increased legislative role "turned sentencing into one more way for elected representatives to score points with their constituents."¹⁸³ Two serious consequences of this heightened involvement of the state legislature have bolstered calls for a sentencing commission as an element of the corrections reform movement.¹⁸⁴ First, because the legislature tends to amend sentencing statutes by imposing higher imprisonment terms and harsher punishments in response to the concerns of constituents, the prison population has increased.¹⁸⁵ Second, the legislature often enacts criminal punishment statutes as a "knee jerk" reaction to public concern, which increases the complexity of the sentencing system and the statutes that undergird it.¹⁸⁶ The hastily acting legislature often doesn't consider the broader structure and need for consistency in sentencing statutes.¹⁸⁷ Given the legislative role, it becomes clearer why many argue that a sentencing commission would help California.¹⁸⁸ One of the key benefits associated with a sentencing commission is to take power away from the legislature and put sentencing oversight in the hands of an insulated, non-politicized agency that will increase system consistency.¹⁸⁹

The legislature in Texas, unlike California, sets out the range to be imposed for a given category of offense and sets forth rules concerning sentencing elements like enhancements and incarceration alternatives.¹⁹⁰ However, the judge must decide on a term within that range, and ultimately the parole board determines the portion of the term served.¹⁹¹ While the

¹⁸¹ *See id.*

¹⁸² *See id.* at 254–55.

¹⁸³ *Id.* at 255.

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* at 255, 269.

¹⁸⁷ *See id.* at 268–69; Dansky, *supra* note 14, at 1–2.

¹⁸⁸ *See* Dansky, *supra* note 14, at 1–2.

¹⁸⁹ *See id.* at 1–2.

¹⁹⁰ *See, e.g.,* TEX. PENAL CODE ANN. §§ 12.32, 12.42 (West 2003 & Supp. 2010).

¹⁹¹ *See id.* § 12.32; TEX. BD. OF PARDONS AND PAROLES, *supra* note 105, at 7; ANDERSON & BRADLEY, *supra* note 91, § 8.1[c].

Texas legislature must also be responsive to constituent's criminal justice needs and concerns, the level of disconnect with the judge and parole board's discretion allows the state to avoid some of the knee-jerk reactions that California confronts.¹⁹² Texas, thus, generally faces fewer calls for a sentencing commission. Despite the lack of a permanent centralized commission, Texas' basic offense category system established by Penal Code enactments provides a relatively simple and easy-to-apply format based on felony and misdemeanor designations.¹⁹³

B. The Effect of Constitutional Challenges to the Sentencing Process

A major setback for California's determinate sentencing approach, adding to the ripeness for pervasive reform, was the relatively recent ruling in *Cunningham v. California*, which held that California's DSL was unconstitutional under the Sixth Amendment.¹⁹⁴ Starting with its decision in *Apprendi v. New Jersey* in 2000, the United States Supreme Court has found several sentencing systems in violation of the Sixth Amendment's right to a jury trial.¹⁹⁵ The Supreme Court held that "the Federal Constitution's jury-trial guarantees proscribe a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant."¹⁹⁶

In *Cunningham*, the Supreme Court assessed California's DSL in light of these previous cases and found it to be unconstitutional.¹⁹⁷ *Cunningham* was charged with continuous sexual abuse of a child under the age of

¹⁹² See *State Sentencing Policy*, COURTEX: TEXAS JUDICIAL BRANCH NEWS (Off. of Ct. Admin. Dir., Austin, Tex.), Jan. 2007, at 2, available at <http://www.courts.state.tx.us/pubs/courtex/jan07.pdf>.

¹⁹³ See, e.g., TEX. PENAL CODE ANN. §§ 12.01, 12.32 (West 2003 & Supp. 2009).

¹⁹⁴ See 549 U.S. 270, 274, 292–293 (2007).

¹⁹⁵ See *United States v. Booker*, 543 U.S. 220, 226–27, 245 (2005) (finding the federal mandatory sentencing guidelines system unconstitutional as a violation of the Sixth amendment and instructing in a separate remedial opinion with a five-vote majority that the solution to unconstitutionality was to make the guidelines advisory); See also *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004) (holding that Washington's guidelines system was unconstitutional because it allowed a judge to find aggravating facts by a preponderance of the evidence to sentence beyond the range for which a jury could find factual support); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (determining that New Jersey's hate crime enhancement process was unconstitutional).

¹⁹⁶ *Cunningham*, 549 U.S. at 274–75.

¹⁹⁷ See *id.* at 274.

fourteen, an offense that carried a potential lower term sentence of six years, a middle of twelve years, and an upper of sixteen years under the DSL's triad system.¹⁹⁸ The trial judge found additional facts in aggravation, particularly the vulnerability of the victim and Cunningham's violent conduct, and imposed the upper term of sixteen years.¹⁹⁹ To impose this upper term, the judge was required to find these additional "circumstances in aggravation," which the Supreme Court regarded as "factual" findings.²⁰⁰

The Supreme Court found that the California DSL most closely resembled the pre-*Booker* federal and pre-*Blakely* Washington systems.²⁰¹ In all three systems, it was mandatory for the judge to impose the middle term or the range determined by the jury's facts, unless he established a reason to depart based on his own factual findings by a preponderance of the evidence.²⁰² In finding the DSL unconstitutional and overruling the California Supreme Court's holding in *People v. Black*, the U.S. Supreme Court hinged its decision on the concept of a statutory maximum term.²⁰³ In *Blakely*, the Court found that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."²⁰⁴ For California's DSL, contrary to the finding in *Black*, the Court determined that the statutory maximum was the middle term in a DSL triad.²⁰⁵ The DSL was unconstitutional because it required a judge to find facts by only a preponderance of the evidence before the judge could exceed the statutory maximum and impose the upper term.²⁰⁶ Such an increase instead required a jury to find the aggravating facts beyond a reasonable doubt.²⁰⁷ The *Cunningham* Court ultimately left the remedial ball in California's court, as it did with the federal system in *Booker*.²⁰⁸ The Court nonetheless highlighted that potential solutions included incorporating a jury sentencing component into the system, like Texas

¹⁹⁸ See *id.* at 275; see also CAL. PENAL CODE. § 288.5(a).

¹⁹⁹ See *Cunningham*, 549 U.S. at 275–76.

²⁰⁰ See *id.* at 279–80.

²⁰¹ *Id.* at 284–85.

²⁰² See *id.* at 288.

²⁰³ See *id.* at 288–89.

²⁰⁴ *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

²⁰⁵ *Cunningham*, 549 U.S. at 288.

²⁰⁶ See *id.* at 288–89.

²⁰⁷ See *id.*

²⁰⁸ See *id.* at 293–94.

already provides, or giving the judge broader discretion to choose among the triad of terms.²⁰⁹ So far, California has opted for the latter advisory path and judges currently have greater discretion to choose among the three possible terms, rather than the middle term serving as a mandatory baseline.²¹⁰ Nevertheless, this recent *Cunningham* ruling has apparently added a “nail in the coffin” for California’s current sentencing system and bolstered calls for extensive reform in light of the correctional crisis.²¹¹ Again, Texas offers some prospects for reform.

Texas has avoided the setbacks and debasement from such an unconstitutional finding by offering defendants the option of jury sentencing and incorporating sentencing as a phase of trial where the beyond a reasonable doubt burden of proof applies.²¹² Many critics lament jury sentencing as an unworkable option.²¹³ This perceived impracticality led some systems that were found unconstitutional to rectify themselves by making their guidelines or triad advisory rather than adopting any jury-sentencing component.²¹⁴ However, Texas and its bifurcated jury system have shown that jury sentencing is not as unworkable as many critics would suggest. If a state as large as Texas and one viewed as traditionally tough on criminals can effectively operate a jury sentencing system, then other states should not automatically disregard it as too unwieldy.

C. Jurisdictional Disparity in Punishment

One of the most common concerns in developing an effective sentencing approach is to avoid unwarranted inter-jurisdictional and intra-jurisdictional disparity in punishments imposed for the same crime.²¹⁵ Inter-jurisdictional disparity “occur[s] when the sentencing patterns of judges in different jurisdictions vary.”²¹⁶ Intra-jurisdictional disparity refers to variances in sentences imposed by judges within the same jurisdiction

²⁰⁹ See *id.* at 294.

²¹⁰ See *People v. Sandoval*, 161 P.3d 1146, 1158–59 (Cal. 2007).

²¹¹ See, e.g., Dansky, *supra* note 14, at 1.

²¹² TEX. CODE CRIM. PROC. ANN. art. 37.07 §§ 1–3 (West 2006 & Supp. 2009).

²¹³ See Iontcheva, *supra* note 125, at 354–365 (2003).

²¹⁴ See, e.g., *Sandoval*, 161 P.3d at 1158 (upholding the constitutionality of California’s move to make the triad system discretionary for the sentencing judge); *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (Breyer, J., remedial opinion) (discussing the remedial option for advisory guidelines that the federal system adopted).

²¹⁵ SPOHN, *supra* note 13, at 131. See Iontcheva, *supra* note 125, at 356–360.

²¹⁶ SPOHN, *supra* note 13, at 131.

and often reflects “differing perceptions of crime seriousness or [judges giving] greater or lesser weight to legally relevant factors.”²¹⁷ Even where a uniform set of statutes guides how crimes are defined and punished, judicial discretion is never completely eliminated in any sentencing system.²¹⁸ Thus, some disparity in sentences will arise across and within state jurisdictions.²¹⁹ A sentencing commission and the guidelines it promulgates are often advocated as ways to increase uniformity and fairness.²²⁰ Both California and Texas face concerns with jurisdictional disparities since both states lack the uniformity that a centralized commission could potentially instill.²²¹ Generally, indeterminate systems are also particularly accused of failing to adequately prevent sentencing disparities.²²²

One of the perceived benefits of enacting California’s DSL in the 1970s was promoting sentencing uniformity by combating jurisdictional disparity.²²³ California’s more rigid DSL may help prevent both inter-jurisdictional and intra-jurisdictional disparities for the same crime because of the limitations on judicial discretion.²²⁴ Nonetheless, California is not free from disparities in sentencing.²²⁵ The heightened role of the legislature in creating complex sentencing statutes has resulted in inconsistent punishments across certain types of crimes instead of across the judges imposing the sentence.²²⁶ For example, in California a life sentence is imposed for kidnapping for purposes of robbery, but not for purposes of rape.²²⁷ Also, given adjustments to the California system after *Cunningham*, the DSL’s original rigid mechanism for curtailing judicial discretion has proven constitutionally unsound, but it is currently unclear how an advisory system might impact disparity.²²⁸

²¹⁷ *Id.* at 132.

²¹⁸ *See id.* at 131.

²¹⁹ *See id.*

²²⁰ *See, e.g.,* Dansky, *supra* note 14, at 1.

²²¹ *See* Dansky, *supra* note 12, at 9.

²²² *See* CHEMERINSKY & LEVENSON, *supra* note 38, at 289.

²²³ *See* SPOHN, *supra* note 13, at 231; Petersilia, *supra* note 25, at 256.

²²⁴ *See* SPOHN, *supra* note 13, at 231.

²²⁵ *See* Petersilia, *supra* note 25, at 269.

²²⁶ *See id.*

²²⁷ *See id.*

²²⁸ *See* *Cunningham v. California*, 549 U.S. 270, 274 (2007).

Jurisdictional disparity is one of the supposed drawbacks of the indeterminate approach used in Texas.²²⁹ Broader term ranges combined with judicial discretion, discretionary parole review, and the availability of jury sentencing, result in more opportunities at different stages of the Texas sentencing process for jurisdictional disparities to emerge.²³⁰ However, differences within and between jurisdictions should not be automatically discounted as unwarranted.²³¹ Inter-jurisdictional disparities, in particular, can reflect important societal concerns that differ across various regions in the state.²³² In many instances, it may be unhealthy in a state of Texas' size to assume that sentencing should not reflect some locally held beliefs.²³³ The theory underlying indeterminate sentencing is that there should be some individualized consideration of the offender in determining his initial sentence as well as in assessing his progress and eligibility for early release.²³⁴ As an important feature of this system, tailoring the sentence to the offender may in many cases outweigh the cost of disparity that could peripherally arise.²³⁵ As long as disparities are tied to legitimate local values associated with how a certain offense or type of offender is viewed within a particular community, and are not based on discriminatory factors such as race, some disparity can, and even should, legitimately exist in the system.²³⁶ When sentences reflect local values, people in the community are more likely to have faith in the legitimacy of the criminal system, which is vital to the continued functioning of criminal justice policies.²³⁷ The push towards uniformity in sentencing and the resistance against individualized sentences is not always the best solution for the individual offender or the sentencing scheme at large.²³⁸ Jury sentencing also buffers the Texas system from some of the negative connotations of jurisdictional disparity because, when cross-sections of various communities reach different

²²⁹ See CHEMERINSKY & LEVENSON, *supra* note 38, at 289.

²³⁰ See TEX. CODE. CRIM. PROC. ANN. art. 37.07 (West 2006 & Supp. 2009); TEX. BD. OF PARDONS AND PAROLES, *supra* note 105, at 7. See, e.g., TEX. PENAL CODE ANN. § 12.32(a) (West 2003 & Supp 2009).

²³¹ See SPOHN, *supra* note 13, at 140.

²³² See *id.* at 141.

²³³ See SPOHN, *supra* note 13, at 140–41.

²³⁴ See CHEMERINSKY & LEVENSON, *supra* note 38, at 289.

²³⁵ See *id.*

²³⁶ See Iontcheva, *supra* note 125, at 356.

²³⁷ See SPOHN, *supra* note 13, at 141.

²³⁸ See *id.* at 140–41.

results, it seems less offensive than when individual judges impose variant sentences.²³⁹ There is a greater tolerance for disparity that can be more clearly linked to community norms instead of just appearing to be based on the whims of an individual judge.²⁴⁰ Furthermore, the determinate sentencing system, like in California, has proven an imperfect solution for addressing judicial disparity.²⁴¹

IV. PROSPECTS FOR CALIFORNIA REFORM

A. *Repeated Calls for a Sentencing Commission: A Helpful, Yet Incomplete, First Step*

It is apparent from California's overcrowded prison population and its sentencing system that major reform is needed. Several reform measures are set to become effective with the most recent set of state congressional approvals, but absent among these measures is the approval of a proposed permanent sentencing commission.²⁴² One of the most common and persistent calls for reform in California has been to create a permanent sentencing commission.²⁴³ With the level of crisis that California faces, at least a temporary sentencing commission is necessary to bring guidance to the implementation of reforms, but it should not be viewed as a fix-all solution.²⁴⁴

There are several potential benefits of creating a sentencing commission in California.²⁴⁵ A sentencing commission is usually comprised of ten to thirty people, who are all experts in the criminal justice system.²⁴⁶ They constitute an independent, nonpartisan agency that focuses specifically on developing sentencing policy.²⁴⁷ As the Stanford Criminal Justice Center's Report to the Little Hoover Commission describes in advocating for a commission:

²³⁹ See *id.*

²⁴⁰ See *id.* at 140.

²⁴¹ See *id.* at 231–33.

²⁴² See Dansky, *supra* note 14 at 1–2.

²⁴³ See, e.g., Petersilia, *supra* note 25, at 269.

²⁴⁴ See Dansky, *supra* note 14 at 1–2.

²⁴⁵ See Dansky, *supra* note 12, at 1; Dansky, *supra* note 14, at 1–2.

²⁴⁶ See Dansky, *supra* note 14, at 2.

²⁴⁷ See Dansky, *supra* note 12, at 1.

It is sound policy to create an independent agency, drawing on professional policy expertise as well as the perspectives of representatives from various parts of state government, whose mandate is to collect and analyze sentencing and corrections data, to develop statewide sentencing and corrections policies, and to distribute sentencing discretion appropriately and evenly throughout the criminal justice system.²⁴⁸

Creating a sentencing commission could also lend rationality to California's currently tangled and overly complex sentencing statutes and could help tie punishment to the severity of each crime.²⁴⁹ As mentioned *supra* Subpart III.A.4, one difficulty that California has faced is the knee-jerk reaction, and often over-reaction, by legislators who approve sentencing bills with an eye toward pleasing constituents with a tough-on-crime outlook.²⁵⁰ A sentencing commission is likely the most effective way to address this dilemma because a commission provides political cover to elected officials.²⁵¹ Given California's current budget crisis, a permanent sentencing commission also offers a potentially effective solution to reduce needless resource allocation by linking sentencing policies to correctional resources based on empirical and evidentiary findings rather than passing legislation "on the fly."²⁵²

However, while California's current correctional crisis may require the centralized direction of a sentencing commission to institute needed pervasive reforms, a sentencing commission should not be viewed as a fix-all solution. If a sentencing commission is instituted in California, it should serve as a means to an end in enacting critical sentencing reform, not as the end in itself. Budgetary constraints in California would likely impede a sentencing commission if implemented.²⁵³ Even though a sentencing commission would logically reduce needless allocations of limited resources long-term, it requires initial resources to invest in critical research

²⁴⁸ *Id.*

²⁴⁹ See Dansky, *supra* note 14, at 1.

²⁵⁰ See Petersilia, *supra* note 25, at 269; Dansky, *supra* note 14, at 1–2.

²⁵¹ See Petersilia, *supra* note 25, at 269; Dansky, *supra* note 14, at 1.

²⁵² See Dansky, *supra* note 14, at 1.

²⁵³ Evan Halper & Shane Goldmacher, *Governor Again Seeks Steep Budget Cuts*, L.A. TIMES, Jan 9, 2010, at A1.

and policy analysis.²⁵⁴ California currently does not have these resources.²⁵⁵ California's current fiscal crisis has gained worldwide attention.²⁵⁶ In 2009, California underwent roughly \$60 billion dollars in program cuts along with increases in taxes and federal stimulus money.²⁵⁷ The governor's 2010-2011 budget plan calls for even more cuts for the education system and transportation and social services programs, including specific cuts for the prison healthcare system.²⁵⁸ Given the tumultuous state of the California economy, plans for any sentencing commission need to emphasize how a commission could save California money and resources.²⁵⁹ A temporary commission leaves open the possibility for making that commission permanent in future years, hopefully after promising results in reform cause opponents to recognize a commission's benefits in allocating resources and rationalizing sentencing policies.²⁶⁰ Even more importantly, and where the Texas system comes into play, is that a sentencing commission in California, whether permanent or temporary, should not necessarily be tied to a presumptive guidelines system as it has been in many states.²⁶¹

There are several exceptions to the general pattern among states to implement sentencing commissions when shifting from indeterminate to presumptive guidelines-based sentencing.²⁶² California would be such an exception if it chose to implement a commission because it would be doing so to reform its rigid and complex determinate system.²⁶³ New Jersey and Missouri have implemented sentencing commissions but have retained, upon recommendation of the commission, largely indeterminate sentencing systems.²⁶⁴ These "hybrid" commission-based, indeterminate systems recognize that commissions epitomize the need to base sentencing policy on empirical data and budgetary realities, which are concerns faced by any

²⁵⁴ See Dansky, *supra* note 14, at 2.

²⁵⁵ See Halper & Goldmacher, *supra* note 253, at A1.

²⁵⁶ See Dansky, *supra* note 14, at 2.

²⁵⁷ See *id.*

²⁵⁸ See *id.* at 1, 3.

²⁵⁹ See Halper & Goldmacher, *supra* note 253, at A1.

²⁶⁰ See Dansky, *supra* note 14, at 1-2.

²⁶¹ See SPOHN, *supra* note 13, at 232.

²⁶² See Dansky, *supra* note 12 at 3.

²⁶³ See *id.* at 3, 9.

²⁶⁴ See *id.* at 4-5.

type of system whether determinate, presumptive, or indeterminate.²⁶⁵ A shift to a system as indeterminate as Texas' is likely not realistic for California. Given the past statements of Governor Schwarzenegger and the movement advocating for a sentencing commission, it seems more likely that California will lean toward adopting a guidelines-based system.²⁶⁶ However, there are key aspects of Texas sentencing and its own recent successful reforms that policymakers in California, including those serving on a sentencing commission if created, could benefit from if they were adopted or tweaked to comport with the needs of a reformed California sentencing structure.²⁶⁷

B. Utilizing Texas System Features and Recent Reforms as Inspiration

Texas and California, as shown above, are polar opposites in many aspects of their sentencing systems.²⁶⁸ Thus, adopting effective components of the Texas system may seem drastic.²⁶⁹ Nonetheless, California is in need of substantial, if not drastic, reform.²⁷⁰ Despite the contrast in the sentencing systems themselves, California and Texas share the two largest inmate populations in the country and both have faced overcrowding crises.²⁷¹ Yet Texas has been able to more effectively stabilize its prison population through recent reforms.²⁷² While there are a number of outside factors that contribute to the ability of Texas to more effectively reform its system, this should not deter California's policymakers from thoroughly examining the beneficial aspects of the Texas system for insight in considering future reform.

1. Exemplary Aspects of the Texas Indeterminate System Structure

Some of the positive aspects of Texas sentencing derive from the

²⁶⁵ See *id.* at 5.

²⁶⁶ See Dansky, *supra* note 12, at 3; Halper & Goldmacher, *supra* note 253, at A1.

²⁶⁷ See COUNCIL OF STATE GOV'TS, *supra* note 176, at 1–2.

²⁶⁸ See CAL. PENAL CODE § 1170(a)(1) (West 2004 & Supp. 2010); TEX. PENAL CODE ANN. § 12.32 (a) (West 2003 & Supp. 2009).

²⁶⁹ See *id.*

²⁷⁰ See Sabol, *supra* note 17, at 17–18; *supra* Part I.

²⁷¹ See *id.*

²⁷² See COUNCIL OF STATE GOV'TS, *supra* note 176, at 2.

indeterminate structure of the system itself, but it would be worthwhile to consider weaving these into a reformed California system.

a. Range of Sentencing Options Available to Judge

The Texas system is marked by judicial flexibility and discretion in sentencing.²⁷³ However, instead of being the unfettered discretion that determinate sentencing proponents highlight, this judicial discretion is paired with substantial options to avoid adding to the prison population.²⁷⁴ These notably include statutory, formalized deferred adjudication and the availability of probation (labeled post-conviction community supervision in Texas) for a broad range of crimes.²⁷⁵ There are also alternatives and adjustments to incarceration that allow the judge to effectively tailor the sentence to the needs of the individual offender, including work release programs, county work programs, community corrections facilities, and drug treatment programs.²⁷⁶

b. The Unique Feature of Jury Sentencing

Second, the unique availability of jury sentencing in Texas has not only insulated the system from constitutionality concerns, but in conjunction with its bifurcated trial process, has also demonstrated that jury sentencing in a large, heavily-populated sentencing system can be effectively implemented.²⁷⁷

²⁷³ See TEX. CODE. CRIM. PROC. ANN. art. 37.07 (West 2006 & Supp. 2009); TEX. BD. OF PARDONS AND PAROLES, *supra* note 105, at 7. See, e.g., TEX. PENAL CODE ANN. § 12.32(a) (West 2003 & Supp 2009).

²⁷⁴ See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5 (West 2006 & Supp. 2009); TEX. CODE. CRIM. PROC. ANN. art. 42.12, §§ 3–4.

²⁷⁵ See TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5 (West 2006 & Supp. 2009) (setting forth the availability and requirements of deferred adjudication); *id.* §§ 3–4 (setting forth the availability of and limitations on post-conviction community supervision, both when imposed by the judge or the jury).

²⁷⁶ See TEX. CODE CRIM. PROC. ANN. art 42.031 (work release programs); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 14, (felony drug abuse program as a condition of probation); *id.* § 18 (community corrections facilities as a condition of probation). See generally TEX. CODE CRIM. PROC. ANN. art. 42.01–.23 (“Judgment and Sentence” chapter of the Texas Code of Criminal Procedure that sets forth the multiplicity of options available for sentencing in Texas).

²⁷⁷ See TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2006 & Supp. 2009).

c. Parole Board's Discretionary Review

Parole board discretionary review, while potentially increasing disparity in how much of a sentence is served, helps keep only the most violent and dangerous offenders in overcrowded prisons.²⁷⁸ Parole is an area that California needs to confront with considerable reform, with or without a sentencing commission.²⁷⁹ A sentencing commission or similarly situated policy makers could look for ways to curtail parole board discretion rather than assuming that no discretion is the best option.²⁸⁰ The state of California's current system suggests that non discretion was not a perfect solution by any means.²⁸¹

d. Simplified Classification of Offenses

Finally, Texas bases punishment ranges, albeit very broad ranges, on categories or types of offenses.²⁸² Thus, one looks to the Texas Penal Code to find a specific offense listed as one of three misdemeanor classes or one of five felony degrees, including capital and state jail felonies.²⁸³ Each of the eight classifications is then matched to a specific punishment range for that type of offense.²⁸⁴ This limits some of the complexity in sentencing and avoids the maze of statutory punishments that resulted from "knee-jerk" legislation in California.²⁸⁵ While the more embedded features of the Texas system may be drastic for California to implement in reformation, recent Texas reforms under the 2007 Justice Reinvestment Initiative have

²⁷⁸ See CHAMPION, *supra* note 13, at 36.

²⁷⁹ See Petersilia, *supra* note 25, at 256.

²⁸⁰ See *id.* at 269.

²⁸¹ See *id.* at 256.

²⁸² See TEX. PENAL CODE ANN. § 12.03 (West 2003); *id.* § 12.04; ANDERSON & BRADLEY, *supra* note 91, § 1.1.

²⁸³ See TEX. PENAL CODE ANN. § 12.03 (West 2003) (setting forth the three types of misdemeanors); *id.* § 12.04 (setting forth the five types of felonies); ANDERSON & BRADLEY, *supra* note 91, § 1.1.

²⁸⁴ See TEX. PENAL CODE ANN. § 12.21 (West 2003) (Class A misdemeanor); *id.* § 12.22 (Class B misdemeanor); *id.* § 12.23 (Class C misdemeanor); *id.* § 12.31 (West 2003 & Supp. 2009) (punishment range and options for capital felony); *id.* § 12.32 (range for first degree felony); *id.* § 12.33 (range for second degree felony); *id.* § 12.34 (range for third degree felony); *id.* § 12.35 (state jail felony); ANDERSON & BRADLEY, *supra* note 91, § 1.1.

²⁸⁵ See Petersilia, *supra* note 25, at 269.

initially appeared successful and could provide a model for California reform.²⁸⁶

2. Commendable Recent Reforms as a Model for California and Other Large Inmate Population States

In 2007, Texas was faced with its own crisis: housing 17,000 new inmates by 2012.²⁸⁷ Texas managed to revamp its system without building new prisons through bipartisan efforts and a series of reforms that considerably reduced parole revocations and lowered recidivism rates.²⁸⁸ Another state with a high inmate population, Florida, has already recognized the impressive reforms in Texas and is looking to Texas initiatives for ideas in implementing changes to its own system.²⁸⁹

The Texas Justice Reinvestment Initiative approached reform by focusing on inadequate state policies and programs, instead of opting to use allocated budget money to build an expensive new prison to house the influx of inmates.²⁹⁰ Importantly, this was a bipartisan effort that assessed program needs based on extensive analysis of the state's prison population.²⁹¹ The project used the money earmarked for new prison construction to "add substance abuse and mental health treatment beds; add short-term residential and outpatient treatment programs; add programs that would reduce probation violations and combat recidivism; and parole more eligible prisoners."²⁹² The reinvestment initiative has seen some significant successes in the short time since its implementation, although some programs and intermediate sanction facilities are not yet operational due to local community resistance to their placement.²⁹³ In developing their reform strategy, the bipartisan legislative leaders and the Justice Center focused on three factors contributing to the buildup of the prison population: (1) increased probation revocations; (2) reduced capacity of residential treatment programs for those serving on probation and parole;

²⁸⁶ See COUNCIL OF STATE GOV'TS, *supra* note 176, at 1–2.

²⁸⁷ See *id.* at 2.

²⁸⁸ See *id.*; Jamal Thalji, *Legislators Look West for Prison Solution*, ST. PETERSBURG TIMES, Nov. 18, 2009 at 1B.

²⁸⁹ Thalji, *supra* note 288, at 1B.

²⁹⁰ See COUNCIL OF STATE GOV'TS, *supra* note 176, at 3.

²⁹¹ *Id.* at 3.

²⁹² Thalji, *supra* note 288, at 1B; see also COUNCIL OF STATE GOV'TS, *supra* note 176, at 2.

²⁹³ See COUNCIL OF STATE GOV'TS, *supra* note 176, at 2.

and (3) fewer approvals for parole.²⁹⁴ California, like Florida, should look to these recent strides taken in Texas.²⁹⁵ While each state suffers from a unique set of problems, some of the solutions that have been implemented to address the recidivism and parole revocations could be particularly pertinent to California's reforms.²⁹⁶ Texas also serves as a model for carefully allocating resources and targeting the true systemic sources of the prison crisis rather than just adding more beds for prisoners.²⁹⁷

V. CONCLUSION – THE NEED TO ACT NOW WHILE LOOKING EAST TO TEXAS

No matter what direction California takes in its future reforms, it is clear that the California DSL has failed to address the needs of the state and must be dramatically restructured as soon as possible. California needs to act now while the dire state of California prisons is on the minds of voters and policymakers. This critical timing will make mobilizing reform efforts, and hopefully bipartisan efforts, more effective. A California sentencing commission could provide needed centralized guidance to launch and oversee reforms, but California should consider Texas' recent reforms and elements of its system for specific possibilities of how a commission could approach such reform. California and Texas, representing the two largest inmate populations in our nation, have polar sentencing systems that have contributed to divergent results in handling correctional crises. In crafting its future reforms, California, literally, cannot afford to ignore the positive features of Texas' state sentencing system.

²⁹⁴ See *id.* at 3.

²⁹⁵ See Thalji, *supra* note 288, at 1B.

²⁹⁶ See COUNCIL OF STATE GOV'TS, *supra* note 176, at 3.

²⁹⁷ See *id.* at 1.