

POLICY BRIEF SERIES

RETHINKING POLICY ON GENDER, SEXUALITY, AND WOMEN'S ISSUES



2020 Confronting the Carceral State: Reimagining Justice



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(Front cover image: Drop LWOP rally. 2018. Source: Drop LWOP Coalition.)

CONFRONTING THE CARCERAL STATE: *Reimagining Justice*

This year's policy brief competition advances the intellectual and political priorities of CSW's Feminist Anti-Carceral Studies research stream, which centers prison abolition within feminist thought and practice.

This year, in addition to our usual process in which we select from among applications from graduate students in the University of California system, we invited system-impacted activists and organizers to contribute. We did so as to honor the bedrock prison abolitionist principle of prioritizing the analyses and perspectives of those most directly affected.

Doing so means that these policy briefs have been conceptualized and written in the service of important on-going campaigns. Jane Dorotik, a long-time organizer with the California Coalition for Women Prisoners (CCWP), has worked on issues related to elderly incarcerated people for years. Dorotik, who, until very recently, was incarcerated herself, details the violence, harassment, and medical neglect faced by elderly incarcerated people, and describes the structural barriers to being found suitable for parole that are specific to the elderly.

Two of the three system-impacted authors, Romarilyn Ralston and Joanne Scheer, as well as one of our graduate student authors, Rosie Stockton, are active members of the Drop LWOP coalition, and wrote their policy briefs to address some aspect of this state-wide campaign to eliminate the life without parole (LWOP) sentence. Like Dorotik, Ralston sheds light on the challenges facing those growing old behind bars, which has become an increasingly common condition as sentences like LWOP proliferate. Ralston's brief highlights an underappreciated aspect of aging behind bars: while work is mandatory for incarcerated people, and those serving long-term sentences like life and LWOP can spend decades working behind bars, they are not eligible for Social Security for those years of labor. Stockton's policy brief addresses an issue that became a priority for the Drop LWOP campaign at the insistence of incarcerated people and their families. Currently, those serving LWOP in California state prisons are not prioritized for self-help groups and educational programs. One of the only avenues to release for those serving LWOP is commutation by the Governor and subsequent review by the Board of Parole Hearings, both of which rely heavily on participation in such programs as a way to gauge someone's fitness for release. Access to these programs will give those currently serving LWOP a shot at one of the very few avenues to release. Scheer discusses California's felony murder rule, which provides prosecutors an avenue to seek death by execution for LWOP sentences, for those who participate in particular felonies during which a death results regardless of intention. All of these authors advocate for these policy changes as steps in the process toward eliminating the LWOP sentence altogether.

Our two other graduate student briefs likewise demonstrate how carcerality and the logics of punishment saturate all of our institutions. June Kuoch examines the intersection of criminalization and immigration policy in their focus on the deportation of Southeast Asian refugees who are convicted of crimes. Boké Saisi highlights the ways in which discourses of mental illness amongst incarcerated populations elide the effects of imprisonment on people's psyches and advocates for the decarceration of those in mental distress.

While these briefs represent a wide range in their focus, all of them represent abolitionist feminist politics both in that they advocate an end to our current institutions based on punishment and in that they envision and enact ways of centering, and caring for, those caught up in such institutions.



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RELEASE ELDERLY LIFERS TO REDUCE MASS INCARCERATION

BY JANE DOROTIK

While the overall prison population has decreased in recent years due to judicial and legislative interventions, the number of incarcerated individuals aged 50 and over has increased at an alarming rate.^{1,2} Between 1980 and 2010, the general population in the United States increased by 36 percent, whereas the overall population of incarcerated people increased by over 400 percent and the number of elderly incarcerated grew at an even faster rate.³

SOURCES PROJECT that if we continue down the same path, by 2030, the elderly population of incarcerated people (55 years and older) will be 4,400 percent greater than it was in 1981.⁴ Yet, this population re-offends at the lowest rate of any prison group.⁵ This growth in the elderly incarcerated population is largely due to the increase in long-term sentences. One in nine individuals in state and federal prisons in the United States are serving a life sentence; in California prisons, that number is about one in three or 34,000 people.⁶ California leads the nation in the size of its lifer population due to policies and practices in the last two decades that have increased the imposition of life sentences and delayed the granting of parole.⁷

Authors Mark Mauer and Ashley Nellis point out that long-term incarceration is counterproductive to public safety.⁸ People “age out” of crime, and any meaningful efforts to reduce incarceration should take this into account.⁹ Framed within a fundamental understanding of liberty and justice,



“California Institution for Women. State Department of Public Works, Division of Architecture, Sacramento.” 1930. Preliminary drawing of new women’s prison in Tehachapi. Design and drawing in pen and ink by Alfred Eichler. Source: Project for Department of Corrections.

Human Rights Watch further suggests that the continued incarceration of the aging and infirm constitutes disproportionately severe punishment and violates human rights.¹⁰ In order to reduce mass incarceration of the elderly, it is necessary to reduce lifers’ excessive prison terms in California. One of the most effective ways to do so is to change the existing elderly-parole policy and practice in order to release more elderly lifers.

As an elderly lifer who, until very recently, was incarcerated at the California Institution for Women (CIW) in Chino, California, I have experienced this situation firsthand. I am 73 years old and was behind bars for almost 20 years. I was also the chair of the Long Termer’s Organization (LTO), a group for people with long-term sentences,

and the chair of the Golden Girls, an organization for elderly incarcerated people, both at CIW. Because of my 25-years-to-life sentence, I had not yet been eligible to sit before the Board of Parole Hearings (BPH) for parole consideration. I am lucky to be relatively healthy, but I have watched many of my peers struggle to maintain dignity as they age behind bars. I have watched my peers go before the BPH, hoping against hope to be granted their freedom after years of incarceration. I see and feel all the fear, guilt, remorse, and tenuous hope each woman goes through when she sits before the BPH. This brief focuses on the experiences of incarcerated elderly women because that is the context with which I am most familiar, but my points are relevant for all elderly incarcerated people.

PROBLEM DESCRIPTION AND CRITIQUE

California's policies governing incarcerated elderly individuals are not cost-effective, nor do they advance public safety. In May 2019, CIW housed over 560 women aged 45 and up, close to 40 percent of the on-campus incarcerated population.¹¹ In California state prisons, the California Department of Corrections and Rehabilitation (CDCR) spends \$81,000 on average to keep an incarcerated person behind bars.¹² Research shows that elderly incarcerated individuals cost two to three times more to keep in prison than the average incarcerated person, resulting in an astronomical \$160,000 or more per person per year to keep these elderly people behind bars.¹³

California has had an elderly parole program in place since it was required by federal courts in February 2014.¹⁴ This federal court directive was eventually enacted into California law (with a few exclusions), and became effective in January of 2017.¹⁵ The elderly parole process then mandated that incarcerated people who are 60 years and older, and who have been incarcerated for 25 years, should be referred to the BPH for consideration for parole, regardless of their sentence. Very recently, AB 88 passed the California legislature and became effective on July 1, 2020. This bill modifies the elderly parole process by extending eligibility to those who are aged 50 and up, and have spent 20 years or more behind bars. This minor modification is still out of sync with the elderly parole policies of many other states, which require only 10 years of incarceration for individuals 50 and older.¹⁶ Prior to this modification, California's very conservative process for elderly release has not been effective in actually releasing a significant number of older incarcerated people, and there

is reason to believe that the provisions of AB 88 will do little to change this fact. According to the Prison Law Office, between 2014 and 2018, the parole suitability rate for those referred under the Elderly Parole Program was 26 percent.¹⁷ This is actually lower than the overall suitability rate, which is 34 percent.¹⁸ CDCR's own records show that between the years 2000-2011, more California lifers convicted of murder died in prison than were released on parole.¹⁹ Mortality rates for incarcerated people aged 55 and over are three times higher than for any other age group, and the vast majority of those deaths are due to age-related illnesses.²⁰ For many lifers, then, the likelihood of dying in prison is higher than the likelihood of being released on parole.²¹

The average time served for released lifers remained relatively stable from the 1970s to the 1990s, and then began a dramatic ascent in the 2000s. Time served for those paroled lifers averaged 12.3 years between 1984 and 2001, and then doubled to 24.3 years by 2013.²² In the vast majority of cases, this is not because elderly lifers are not worthy of parole or are any risk to public safety, but because of social and political factors. First, BPH commissioners require a performance of deference, humility, and remorse from the person coming before the board that punishes those who claim innocence and those who cannot provide such a performance (note that *performing* deference, humility, and remorse does not necessarily equate to *feeling* those sentiments). Second, victims' rights groups that agitate for strengthening punishments track BPH parole rates and put a great deal of pressure on the legislative committee that reviews BPH denials and on the Governor. Commissioners are appointed by the Governor and confirmed by the California Sen-

ate, and thus their ability to keep their positions are dependent on scrutiny by these bodies.

Most lifers at CIW are incarcerated for a single crime, committed many years ago, often under the duress of domestic violence; many have no other criminal history. Most of these women have spent their years in prison free of disciplinary infractions and working towards bettering themselves and their community. They pose little to no risk to public safety. Prison systems do not take these low-risk, high-needs incarcerated persons into consideration. Prisons are designed for younger incarcerated people, and security is the highest priority. The physical design of the facility, the staff training, and the rehabilitative emphasis on post-incarceration employment are all designed for younger incarcerated people. For instance, emergency horns (which at CIW happen up to five times daily) require that incarcerated people get down on the ground instantly, under penalty of disciplinary action. This is very challenging for the elderly.

Other challenges include transportation off prison grounds which requires shackling, per CDCR policy. Feet are shackled together and hands are shackled to a waist chain, resulting in skin bruising and, worse, the risk of an unprotected fall while attempting to walk. For the elderly, falls can result in broken hips, fractured facial bones, and other serious internal injuries. While elderly people require medical care more frequently, the fear of being injured while shackled is the main reason they refuse medical transport. Claiming that shackling is a necessary precaution against escape, CDCR refuses to modify this policy or allow discretion in consideration of the elderly. Yet, I conducted an informal review over a recent period of three years and

found there were 13 falls to zero escape attempts.

Retirement is also not an option in prison, as everyone is required to work regardless of their age. All elderly incarcerated people struggle to find a work assignment they can physically manage. They are often ridiculed or derided by other incarcerated persons and staff. They are more likely to lose track of time, and their hearing can be compromised due to age, causing difficulty with following and understanding directions and orders. Elderly incarcerated people often isolate because of the stress of prison life and to protect themselves from younger, more aggressive, incarcerated people or from guards. This isolation can exacerbate loneliness and dementia.

I have watched so many of my peers struggle to maintain some kind of dignity as they age behind bars. The following three glimpses exemplify the challenges of aging in prison:

GG #1 is a 73-year-old who has been behind bars for 38 years, has no prior criminal history, has completed approximately 30 self-help programs while incarcerated, has been disciplinary-free for 36 years, and currently has a job assignment in the prison kitchen which requires lifting industrial-size pots and pans. She recently fell on a medical visit due to shackling and is now, a month later, in a wheelchair, awaiting a comprehensive diagnostic to assess her injuries.

GG #2 is a 72-year-old who has been behind bars for 33 years on a 25-to-life sentence. She also has no prior criminal history, no disciplinary infractions in 26 years, and has completed multiple self-help programs. She gets around with the help of a walker and still manages to work in the sewing

factory despite her physical limitations and serious medical problems, including undergoing open-heart surgery three years ago. She works because retirement is not permitted, and being unassigned for medical reasons means placing herself at risk for transfer up north to the other California state prison for women, California Correctional Women's Facility (CCWF), in Chowchilla. This is because policy states that everyone incarcerated at CIW must do some sort of "programming," either work or school.

GG #3, age 65, has been incarcerated for 31 years. She also had no prior criminal history, has had no serious rule infractions ever, and has completed about 30 self-help educational and vocational programs. GG #3 has been in front of the parole board five times, and has always maintained her innocence. BPH commissioners acknowledge her "low risk" psychological evaluation and applaud her rehabilitation efforts and lack of disciplinary violations. In her most recent hearing, after being told she was denied parole again, she said, "I don't know what you want me to do or say, I truly don't." The commissioners had written in her denial recommendation, "Stay write-up free; participate in self-help." These are the same boiler-plate recommendations they make in many denials, recommendations GG #3 has followed for years to no avail. In five years (her next opportunity for parole consideration), she will be 70 years old. I can guarantee she will by then have at least 35 self-help educational/vocational completions in her file. I am confident that she will continue to have no disciplinary infractions. I do not know if she will finally measure up in their eyes, since they maintain she has no insight and shows no remorse because she claims innocence. I wonder if she will be yet another statistic, dying in prison

before she is found suitable for parole.

RECOMMENDATIONS

The incarcerated elderly population is cast aside, discounted, and damaged by the prison system, despite having as low as a 3 percent recidivism rate when provided appropriate reentry support.²³ Multiple studies of aging in prison have made similar recommendations: find ways to release the elderly. In order to do so, we must:

- 1) change the existing elderly parole policy so that all those 50 and over who have served 10 years or more are automatically allowed parole consideration review.
- 2) mandate that the BPH prioritize risk to public safety over ambiguous and subjective factors like "insight" as criteria for release, and continue to track the parole suitability rate for this population until it reflects what all research shows—that this is the safest population to release.
- 3) diversify BPH commissioners, as the regulations require, so that they are not all people with law enforcement backgrounds.

Only with these changes will elderly incarcerated people have any fair chance for release.



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She had been incarcerated for almost 20 years on a wrongful conviction that she relentlessly works to overturn. She was recently released pending COVID-19 concerns and is fighting her case from the outside. She is a member of the California Coalition for Women Prisoners (CCWP), a current mem-

ber of the Board of Directors of Californians United for a Responsible Budget (CURB), and a former board member of Justice Now. She also founded Compassionate Companions, an organization within the California Institution for Women (CIW) that provides care and companionship for terminally ill incarcerated people, and founded and published the CIW newsletter Strive High for eight years. She advocates for prison abolition as well as dignity and compassion for her fellow prisoners, especially those who are terminally ill.

NOTES

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2. Because of the added health burdens that come with being imprisoned, many experts agree that incarcerated people age at a rate approximately 10-12 years ahead of their non-incarcerated peers. The designation of 50 and up as "elderly" is used by the majority of studies on this population and is recommended by a 2015 Columbia University study on aging in prison.

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5. Hunt, Steven Kim, and Billy Easley II, *The Effects of Aging on Recidivism Among Federal Offenders*, United States Sentencing Commission, December 2017, <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/>

[research-publications/2017/20171207_Recidivism-Age.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/2017/20171207_Recidivism-Age.pdf).

6. Mauer, Mark, and Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (New York: The New Press, 2019).

7. Ghandnoosh, Nazgol, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences*, The Sentencing Project, January 31, 2017, 14, <https://www.sentencingproject.org/publications/delaying-second-chance-declining-prospects-parole-life-sentences/>.

8. Mauer, Mark, and Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (New York: The New Press, 2019).

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10. *Old Behind Bars: The Aging Prison Population in the United States*, Human Rights Watch, January 2012, 10, https://www.hrw.org/sites/default/files/reports/usprisons0112webcover_0.pdf.

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12. "How much does it cost to incarcerate an inmate? California's Annual Cost to Incarcerate an Inmate in Prison 2018-10," Legislative Analyst's Office, accessed May 19, 2020, https://lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost.

13. *Elderly Inmates in California Prisons*, Legislative Analyst's Office, May 11, 2010, https://lao.ca.gov/handouts/crimjust/2010/Elderly_Inmates_05_11_10.pdf.

14. "Elderly Parole Hearings," California Department of Corrections and Rehabilitation, accessed April 2, 2020, <https://www.cdcr.ca.gov/bph/elderly-parole-hearings-overview/>.

15. AB-1448 Elderly Parole Program (2017-2018), California Legislative Information,

October 12, 2017, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20170180AB1448.

16. *Information about Elder Parole*, Prison Law Office, April 2018, <https://prisonlaw.com/wp-content/uploads/2018/04/Elder-Parole-April-2018.pdf>.

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18. Life Support Alliance, personal email correspondence with the author, May 4, 2020. While CDCR claims that the overall suitability rate is only 18 percent, according to the Life Support Alliance, that rate is the percentage of grants for hearings that are scheduled. Because about half of all scheduled hearings are not held due to postponements, waivers, and other issues, the grant rate for hearings that were actually held was 34 percent.

Suitability Hearing Summary CY 1978-2019, California Department of Corrections and Rehabilitation, <https://www.cdcr.ca.gov/bph/2020/01/09/suitability-hearing-summary-cy-1978-through-cy-2018/>.

19. Ghandnoosh, Nazgol, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences*, The Sentencing Project, January 31, 2017, 10, <https://www.sentencingproject.org/publications/delaying-second-chance-declining-prospects-parole-life-sentences/>.

20. Between 2006-2016, 52 percent of deaths in state prisons were among those aged 55 and older. Carson, E. Ann, and Mary P. Cowhig, "Mortality in State and Federal Prisons, 2001-2016 – Statistical Tables," US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, February 2020, <https://www.bjs.gov/content/pub/pdf/msfp0116st.pdf>.

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23. TRC Staff, "Paroling Grandpa: Study Finds 3% Recidivism Rate Among Elderly Ex-Inmates," *The Crime Report*, November 19, 2018, <https://thecrimereport.org/2018/11/19/paroling-grandpa-study-finds-3-recidivism-rate-among-elderly-ex-inmates/>.

LONG-TERM INCARCERATED PEOPLE NEED RETIREMENT BENEFITS

BY ROMARILYN RALSTON with GINNY OSHIRO and FIDELIA SANTOS-AMINY



Drop LWOP rally. 2018. Photograph. Source: Drop LWOP Coalition.

Most people who work for 20 or more years look forward to retirement. In fact, they have earned it! Unfortunately, this is not the case for incarcerated and formerly incarcerated workers. As the number of long-term sentences increase in California, more and more people work for decades behind bars, only to find themselves released later in life with no Social Security benefits to show for it. A 2017 report by Ashley Nellis of the Sentencing Project notes that California has approximately 40,691 people serving life, life without the possibility of parole, or “virtual life” sentences—more than any other state.¹ Lifers and people serving long-term sentences are eligible for parole and/or may apply to have their sentences commuted by the Governor. Even those sentenced to death—either death by execution or death by incarceration (i.e., life without the possibility

of parole)—are technically eligible for release via gubernatorial clemency powers. During Governor Jerry Brown’s 2011-2018 term, there were 152 commutations and 6,412 parole grants.² When people with indeterminate or long-term sentences are released, they may have worked for decades and be close to or above the average retirement age, but would not be eligible for Social Security benefits.

BACKGROUND AND PROBLEM DESCRIPTION

INDIVIDUALS SENTENCED to prison do not earn Social Security retirement benefits, even though they are required to work while incarcerated unless they have a medical condition that exempts them. California Penal Code Section 2700 states, “The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours

of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.”³ This requirement also applies to those sentenced to death, with a few exceptions.⁴

Incarcerated people must work; it is not optional. For those serving life sentences, life without the possibility for parole, and virtual life sentences, working in prison may give meaning and purpose to their lives. It also puts a small amount of money in their pockets to purchase much needed personal care items and food, or help to support their families. In fact, lifers and long-termers are one of the most cooperative groups in prison. They often provide mentorship and structure to other incarcerated people, and provide a constant supply of highly skilled labor. It is unfortunate that the skilled labor and loyalty of long-termers is so unvalued by the carceral state. Prison wages are a reminder that once a per-

son enters the corrections system, they are in essence a state-sanctioned slave.

When someone sentenced to life is granted parole, or has their prison sentence commuted and is released from prison, they often face close to insurmountable barriers to finding employment, housing, medical care, education, and other social services, which makes reentry difficult. Without proper financial stability, these returning community members may encounter challenges with rebuilding their lives or successfully completing parole.

The Social Security Administration (SSA) offers some benefits to formerly incarcerated people after release. Much of what is available supports individuals with disabilities, and is designed to help with reentry services and applying for resources such as cash benefits, health care, food, and housing.⁵ The SSA also states, “An individual released from incarceration may be eligible for Social Security retirement, survivors, or disability benefits *if they have worked or paid into Social Security enough years*. An individual released from incarceration may be eligible for Supplemental Security Income benefits *if they are 65 or older, are blind, or have a disability and have little or no income and resources*” (emphasis added)⁶. SSA’s guide, *What Prisoners Need to Know*, explains that Social Security pays retirement benefits to people age 62 or older who have worked and paid Social Security taxes for 10 years.⁷ Unfortunately, in my experience, many long-term incarcerated people are sentenced as juveniles or young adults, and have not paid Social Security taxes for 10 years prior to their incarceration. Many have never held legitimate employment outside of the work they have done for the California Department of Corrections and Rehabilitation (CDCR). Prison labor may be the only work experience many incarcerat-

CDCR Pay Rate	Hourly, Min/Max	Monthly, Min/Max
Level 1, DOT 9 Lead Person	\$0.32 - \$0.37	\$48 - \$56
Level 2, DOT 7-8 Special Skill	\$0.19 - \$0.32	\$29 - \$48
Level 3, DOT 5-6 Technician	\$0.15 - \$0.24	\$23 - \$36
Level 4, DOT 3-4 Semi-Skilled	\$0.11 - \$0.18	\$17 - \$27
Level 5, DOT 1-2 Laborer	\$0.08 - \$0.13	\$12 - \$20

Table 1. Inmate Pay Rates, Schedule, and Exceptions. (Source: Barclays Official California Code of Regulations)¹⁰

ed people have, and prison wages their only earned income.

While the meagerness of the wages and forced compliance distinguish working behind bars from working outside prison walls, certain similarities exist. Since the CDCR requires all able-bodied incarcerated people to labor, they have established a compensation plan that includes a pay scale, timekeeping procedure, hourly and monthly pay schedule, and accounting procedure. Similar to hiring practices elsewhere, incarcerated people must undergo the equivalent of a job interview. They must appear before a “classification committee” at their institution of hire. They must meet a skills requirement; demonstrate a good record of behavior and attitude; have a history of good work habits; and be able to read, write, and speak effectively. The CDCR requires that “institutions/facilities shall establish an application/resume process for selection of skilled workers.”⁸ CDCR’s classification and hiring processes for incarcerated people thus mirrors human resources practices and procedures elsewhere.

CDCR regulations and statutory limitations on pay for incarcerated individuals limit pay to no higher than half of the minimum wage.⁹ Under such authority, “pay schedules” are set by institutions/facilities, as shown above in Table 1.

In addition to the unconscionably low wages paid to incarcerated people, the prison labor system is all the more exploitative because this work is not eligible for Social Security benefits.

The only exception to this extremely low pay scale is the CalPIA “Joint Venture Program” (JVP), established by Proposition 139 in 1991.¹¹ A select group of incarcerated individuals at a limited number of prisons are eligible to earn minimum wage through the JVP. Among programs offered by the CDCR, the JVP comes closest to allowing incarcerated individuals to earn tax credits and to pay state and federal taxes.¹² The JVP private industry partnership hires incarcerated people at minimum wage in state or county facilities to produce goods and services that may be sold to the public. Accord-

Year	Number of Hearings Scheduled	Number of Parole Grants
1978	1	1
1988	1, 017	28
1998	2, 172	27
2008	6, 883	293
2018	5, 226	1, 136

Table 2. CDCR Board of Parole Hearings Statistical Data. (Source: California Department of Corrections and Rehabilitation)¹⁴

ing to their website, “The Joint Venture Program (JVP) provides vocational training opportunities to inmates within California’s correctional settings and it offers businesses attractive benefits for employing them.”¹³ However, incarcerated people sentenced to life and to life without the possibility of parole, and those sentenced to long terms, are excluded from participation in JVP. Thus, people with long-term sentences cannot participate in the sole CDCR program that pays minimum wage and contributes to Social Security.

The issue of Social Security eligibility for formerly incarcerated people has become particularly important as long-term sentencing and, subsequently, the number of parole hearings and grants have increased over the past 40 years in California. The CDCR’s Statistical Data (Table 2) shows a remarkable increase since 1978. In 1978, there was one parole hearing scheduled and one parole granted. In each decade that followed, parole suitability hearings increased by 1000 percent. For decades, the gubernatorial and legislative mission of the state focused on “tough-on-crime” policies, mandatory minimum sentences, and three strikes law, which greatly increased the number of long-term and indeterminate sentences. In recent years, a shift from “no parole”

policies towards rehabilitation and decarceration has triggered the release of more individuals with long-term sentences.

RECOMMENDATIONS

Allowing individuals who are serving long-term sentences the opportunity to earn retirement credits by applying a Social Security retirement tax to prison wages and other sources of income would give them a pathway toward securing adequate Social Security retirement benefits in their senior years.

CDCR should increase prison wages to the state minimum wage, and allow long-term incarcerated individuals the right to claim their prison wages and other income sources (e.g. handicraft sales) as income that pays into Social Security. An existing model is provided by CalPIA’s JVP, which uses IRS “Form 1099-NEC Nonemployee Compensation” to determine the taxable amount, verify earned income, and contribute to Social Security.



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help them thrive as scholars. She is also an organizer with the California Coalition for Women Prisoners and an alumna of California’s Women’s Policy Institute. Ralston holds a BA with honors in Gender and Feminist Studies from Pitzer College and an MA in Liberal Arts from Washington University.

GINNY OSHIRO is currently completing a BA in Criminal Justice (minor in Ethnic Studies) at CSUF. She currently serves as the Chief of Staff for Project Rebound and is a Women’s Policy Institute Fellow on the Criminal Justice Reform Team.

FIDELIA “LIA” SANTOS-AMINY has served as the Government Relations Intern for Project Rebound at CSUF. In an effort to further understand incarceration and Social Security retirement benefits, she was asked to assist in the initial research. Santos-Aminy is a substitute teacher at an elementary school in Orange County and applying to graduate schools.

NOTES

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UNEQUAL PUNISHMENT: REPEALING FELONY MURDER SPECIAL CIRCUMSTANCES

BY JOANNE SCHEER



Author Joanne Scheer at a Drop LWOP rally, 2018. Photograph. Source: Drop LWOP Coalition.

The California penal code governing “special circumstances” pertaining to first-degree murder demands that mandatory capital punishment—that is, the death penalty or a death-in-custody sentence of life in prison without the possibility of parole (LWOP)—be imposed upon a person when a death occurs during the commission of another underlying felony, such as robbery.¹ In order to convict someone of “felony murder special circumstances,” and sentence them to one of these two forms of death penalty, a prosecutor does not have to prove that someone killed intentionally. Furthermore, those convicted do not need to be the actual perpetrators of the killing. As long as a prosecutor can prove they were a major participant in committing one of the 13 underlying offenses, and that they acted with “reckless indifference,” they can be convicted.

WHILE FELONY MURDER does not require a prosecutor to prove that a defendant killed anyone, intentionally or not, it can be punished more severely than first-degree murder, which requires a prosecutor to prove a defendant intentionally, willfully, and maliciously perpetrated a killing. The minimum sentence for an intentional first-degree murder is 25 years to life, while the minimum sentence for felony murder special circumstances is either the death penalty or LWOP.²

This particularity of California criminal law thus relegates people convicted of felony murder to staggeringly disproportionate sentences. It also has particularly detrimental effects on women and on transgender and gender non-conforming people. Many of the over 200 women and transgender people in California women’s prisons serving LWOP were sentenced as aiders and abettors with special circumstan-

es, including under the felony murder rule. The majority of incarcerated women and transgender people were themselves survivors of abuse, such as intimate partner violence, child abuse, sexual violence, and trafficking.^{3,4}

The passage of California Senate Bill 1437 in 2018 has limited the conditions under which defendants can be convicted and subsequently sentenced as aiders and abettors in certain felony murder cases.⁵ However, further reform is urgently needed to fully abolish felony murder special circumstances and thereby ensure consistency in California sentencing law.

PROBLEM DESCRIPTION

The particularities of California’s penal code have created a situation in which those convicted of committing felony murder, whether or not the death was intentional, could suffer harsher punishments than those convicted of intentional first-degree murder. The minimum penalty for first-degree murder in California is 25 years to life. However, the California Penal Code contains provisions that enumerate 22 special circumstances under which those who have been convicted of first-degree murder *must* serve a minimum sentence of LWOP or the death penalty.⁶ All but one of these 22 provisions requires that the killing be intentional. The exception allows for defendants who are convicted of felony murder with special circumstances, regardless of whether they were the actual killer or whether the killing happened intentionally, to be sentenced to LWOP or the death penalty. Thus, those convict-

ed of intentional first-degree murder without a special circumstance can be sentenced to 25 years to life, but those convicted of felony murder with special circumstances, whether or not they intended for the death to happen, *must* be sentenced to LWOP or the death penalty.

While the legal theory of felony murder has existed for many years, originating in eighteenth-century England, ballot initiatives passed in California in the last four decades have expanded the number of special-circumstance crimes for felony murder, and first weakened and then removed the necessity of proving intent, thus precipitously expanding the number of people convicted under felony murder.

The 1977 death penalty law made it clear that no one could be sentenced to LWOP or death for first-degree murder unless that person intended to kill the victim.⁷ While one who only aided another in committing a felony could be convicted of first-degree murder, the 1977 law required that person be physically present and intend the death before special circumstances could be found.⁸ In 1978, voters passed Proposition 7, which replaced that more specific language with the much broader and more ambiguous “intent to kill.”⁹ In addition, in the case of felony murder, Proposition 7 contained two contradictory clauses that introduced ambiguity around the necessity of proving intent. One clause listed the underlying crimes that would trigger the felony-murder rule, but did not specify that intent was necessary,¹⁰ while another clause mandated that prosecutors prove intent-to-kill in felony murder cases in order to convict for first-degree murder.¹¹ This ambiguity seems to have resulted in an increased number of false convictions.¹²

Proposition 115, The Crime Victims Justice Reform Act (passed in 1990), removed that ambiguity once and for all by making it possible to convict without proof of intent. Proposition 115 mandated that those aiders/abettors who acted with “reckless indifference to human life and as a major participant” could also be convicted of first-degree felony murder, removing the requirement of intent.¹³

Recent legislation has limited, but not eliminated, the basis for felony-murder convictions. SB 1437 (2018) allows a person previously convicted of second-degree felony murder (for being an accomplice under the felony-murder rule), or through the “natural and probable consequences” theory of law, to petition their original court of conviction for a resentencing to the underlying felony only.¹⁴ It also allows those currently undergoing trial a similar basis for challenging the charge of felony murder. Natural and probable consequences is a legal theory that asserts culpability if it can be proven that an aider/abettor could have reasonably foreseen that a death could occur as a direct result of the underlying crime. Though district attorneys across California have challenged the constitutionality of SB 1437 in the courts, such cases have slowed, but not prevented, the application of the new statute. A number of petitioners have been released under the new statute, most notably Adnan Khan, the first person released under the new law and the co-founder of Re:Store Justice, the criminal justice reform organization that spearheaded SB 1437.¹⁵

As encouraging as these instances are, there is still much work to be done to eliminate the felony-murder category altogether. SB 1437 does not apply to everyone convicted of felony murder special circumstances, only those who

were prosecuted and convicted of second-degree felony murder as an aider/abettor or under the natural and probable consequences doctrine. Those who were convicted of felony murder with a special circumstance as a major participant, or as acting with reckless indifference to human life; as the actual perpetrator of the killing; as an aider/abettor with the intent to kill; or if the person killed was a police officer in the performance of his or her duties, are not eligible for resentencing under SB 1437.

CRITIQUE

These felony-murder provisions lend themselves to capricious and unjust sentencing. While malice for burglary and other offenses clearly does not equal malice for murder, people are being punished as if it does. In addition, the decision to charge someone with special circumstances for felony murder (rather than simply for the underlying felony or for felony murder without special circumstances) is at the sole discretion of the District Attorney, resulting in inconsistent, unequal, and potentially biased application of this lethal law.

Felony murder violates key tenets of the state’s own definition of appropriate punishment. In the *People v Dillon* (1983) decision, the California Supreme Court states that “the state must exercise its power to prescribe penalties within the limits of civilized standards and must treat its members with respect for their intrinsic worth as human beings.” It further states, “punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated.” They conclude that a punishment may violate the California constitutional prohibition “if, although not cruel or unusual in its method, it is so disproportionate

to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.”

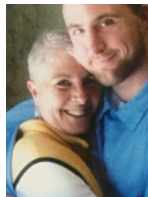
The United States is one of the few countries in the world to use the felony-murder rule.¹⁶ Acknowledging the capriciousness and unfairness of this rule, England, its country of origin, abolished the felony-murder rule in 1957.¹⁷ Various states in the United States have also abolished the felony-murder rule, including Hawaii, Kentucky, Michigan, Ohio, and New Hampshire.¹⁸

RECOMMENDATIONS

We recommend that the California Penal Code be amended to abolish special circumstances penalties for felony murder, so that the criteria of proving intent-to-kill is consistent with all other determinations of the charge of murder, regardless of whether or not the deaths happened during the commission of an underlying felony. This would require abolishing those sections of the California Penal Code that punish people convicted of felony murder regardless of intent, that is, Penal Code sections 190.2(b), 190.2(c), and 190.2(d).¹⁹

These changes to the Penal Code could only be implemented via a ballot initiative or a two-thirds majority vote in the state legislature. Proposition 7 and Proposition 115, which established the current statutes governing felony murder special circumstances, were ballot initiatives. Changes to Proposition 7 that abolish felony murder special circumstances altogether would require another ballot initiative. Abolishing the sections of the Penal Code that punish those convicted of felony murder special circumstances without intent-to-kill means changing

certain portions of Proposition 115. Proposition 115 was written so that it could be changed by either a ballot initiative or a two-thirds majority vote in the legislature. Anticipating the difficulty of garnering enough support to win a two-thirds majority vote or to win a ballot initiative, the authors of SB 1437 only changed language not directly specified in either proposition. As such, the main provisions defining felony murder special circumstances—that is, intent-to-kill or “acting with reckless indifference and as a major participant”—remain unchanged by SB 1437. We therefore recommend introducing legislation, passed by a two-thirds majority, to abolish sections of the California Penal Code that punish people convicted of felony murder special circumstances regardless of intent to kill.



JOANNE SCHEER is the founder of the Felony Murder Elimination Project, a growing group of concerned citizens whose goal is the elimination of the felony murder rule from California law. When her only child (Tony Vigeant, featured in the picture with his mother) was convicted under the felony murder rule and sentenced to the death sentence of life in prison without the possibility of parole, she began the work of bringing an end to one of the most heinous of California’s laws. Striving not only to eliminate the felony murder rule, the Felony Murder Elimination Project endeavors to bring relief to those who are serving harsh and disproportionate sentences imposed by the rule’s application.

With nothing but the resolve to eliminate a law that so easily and unjustly sentences youth to death, she sponsored Assembly Bill 2195 in 2016, co-sponsored Senate Concurrent Resolution 48 in 2017, and co-sponsored Senate Bill 1437 in 2018, which virtually eliminated second-degree felony murder and the natural and probable consequences doc-

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ENSURING ACCESS TO REHABILITATIVE PROGRAMS AND ENDING DISCRIMINATION AGAINST PEOPLE SERVING LIFE WITHOUT PAROLE

BY ROSIE STOCKTON

There are currently 5,100 people serving Life Without Parole (LWOP) sentences in California,¹ a number that has quadrupled in the past 20 years, despite declining violent-crime rates statewide.² Studies have shown that LWOP, also known as “death by incarceration,” disproportionately impacts women and people of color.³ Of the 200 women serving LWOP, the overwhelming majority are survivors of abuse, intimate partner violence, and sexual violence.⁴ It is well documented that in both California men’s and women’s prisons, people serving LWOP are relied upon to provide leadership, mentorship, and peacekeeping within the prison population.⁵ They do this as leaders of self-help groups and classes, in the familial roles they play to younger incarcerated people, and through their institutional knowledge of prison policies. Despite this, they face heightened institutional discrimination and are deprioritized and excluded from the majority of self-help groups and educational classes,⁶ because these rehabilitative opportunities require parole eligibility to enroll. Such discrimination leaves people serving LWOP in a contradictory position. The nature of this sentence renders them a necessary population the prison depends on, while it simultaneously



Posters from the a Drop LWOP rally. 2018. Photograph. Source: Drop LWOP Coalition.

excludes them from any semblance of rehabilitation.

IN THE PAST TWO YEARS, due to shifts in legislation such as California Senate Bill 1437, “Accomplice Liability for Felony Murder,” and the growing understanding of the injustice of the LWOP sentence, former California Governor Jerry Brown and current Governor Gavin Newsom have granted commutation to 154 people serving LWOP,⁷ which makes them eligible to appear before the parole board. Given this trend of commutations, it is essential that people serving LWOP have access to rehabilitative programs to prepare them for their parole hearings and reentry, as programming is one of the primary factors used to assess parole readiness. Moreover, having access to programming can support the mental health and overall well-being of people serving LWOP, many of whom suffer

from complex and ongoing trauma. Denying programming and access to skills development, community engagement, and educational opportunities is essentially a statement that this community of people serving LWOP, including women who have suffered sexual assault and intimate partner abuse, is expendable. While many with LWOP convictions will not receive commutations, and therefore also not be eligible for parole hearings, that determination is currently a matter of executive discretion. The California Department of Corrections and Rehabilitation (CDCR) must not abuse that discretion through discriminatory penal policies and practices, which deny many incarcerated people with LWOP sentences the possibility to rehabilitate.

This policy brief recommends that legislators take steps to challenge discrimination against people serving LWOP

by requiring that they have access to all programming within the CDCR. Such a bill should bar the CDCR from preventing or deprioritizing individuals designated as LWOPs, or lifers, from participating in programming based on their classification. It should ensure that more Community-Based Organizations (CBOs) and nonprofits could sponsor and facilitate programs within California prisons through a reallocation of funds currently funneled towards the CDCR. Finally, it is well documented that LWOP is part of a culture of perpetual punishment in the United States that disproportionately targets marginalized communities, especially black and brown people, and allows them to disappear into the criminal justice system. Following the path set by Governors Brown and Newsom, California should therefore have a moratorium on LWOP sentencing and commute the sentences of *all* those already serving LWOP, allowing them to go before a parole board.

PROBLEM DESCRIPTION AND CRITIQUE

Over 40,000 people in California—more than 30 percent of people incarcerated in the state—are serving a life sentence, and over 5,100 of these people are serving LWOP.⁸ LWOP sentences are a result of nationwide “tough-on-crime” policies, mandatory minimum sentencing, three-strike laws, and sentence enhancements. Nationwide, 50 percent of people serving LWOP sentences are sentenced for nonviolent crimes under the three-strikes law, a policy known to criminalize poor people of color.⁹ This trend has particularly harsh repercussions for women in California, where 90 percent of people serving LWOP in women’s prisons were sentenced under the felony murder aider and abettor sentence enhancement, indicating

they were not the main perpetrators of the crime.¹⁰ The majority of women serving LWOP for violent crimes were first-time offenders and survivors of abuse, including domestic violence, childhood abuse, sexual violence, and trafficking. Troubling the “good victim” / “bad criminal” binary, organizations like Survived & Punished make clear that survivors of violence are prosecuted using racist, sexist, anti-trans/queer and classist logics, through policies that target poor communities of color.¹¹

Discriminatory practices against people serving LWOP take place in prisons, both officially and unofficially. Some rehabilitative programs, such as the Long Term Offender Program (LTOP), explicitly exclude people serving LWOP. This is stated in Title 15 of the California Code of Regulations,¹² which offers programs such as “Cognitive Behavioral Treatment and other rehabilitative programs” that are crucial for facilitating the well-being and rehabilitation of people serving long-term sentences.¹³ Other programs, like the “Educational Programs,” “Inmate Activity Groups (Arts in Corrections and Innovative Programming Grants),” and “Treatment Programs,” exclude people serving LWOP for three main reasons: (1) limited enrollment capacity, (2) an explicit parole eligibility requirement, and (3) the security status of people serving LWOP prohibiting them from entering “unsecured areas” where programs are held. As noted previously, this exclusion is a result of both formal and informal practices that render people serving LWOP unable to access programs for the majority of their lives. Meanwhile, people serving LWOP provide mentorship by facilitating many of the peer-led support groups. This leaves them barred from accessing any semblance of “rehabilitation,” and at the same time, re-

sponsible for foundational aspects of social stability within the prison.

Within the limited programming currently available to lifers, people in women’s prisons have even less access to reentry-preparation classes (e.g., vocational training and degree programs), than people in men’s prisons.¹⁴ This is due, in part, to the startling fact that since 1980, women are being incarcerated at a rate 50 percent higher than men nationwide.¹⁵ This leaves women’s prisons ill-equipped not only to house incarcerated people, but also to provide adequate programming. This affects women serving LWOP and long-term sentences particularly harshly. Because the overwhelming majority are survivors of domestic violence and sexual assault, they are unable to access support groups for domestic-violence survivors, as well as educational and job-skills programs. Additionally, transgender women held in men’s prisons are often housed in solitary confinement “for their own protection,” and therefore have more restricted access to programming than their male-identified counterparts. According to a 2019 statewide audit of CDCR programs,¹⁶ the rehabilitation programs that women-identified prisoners *are* offered are understaffed, mismanaged, and ineffective. They also show little recognition for complex trauma histories, hindering participants’ ability to prepare for parole and reentry, should they be eligible for that opportunity.¹⁷ Finally, due to their “high security status,” people serving LWOP also face discrimination when it comes to work assignments, and are only eligible for jobs that pay the lowest hourly amount (currently \$0.08/hour).¹⁸ They are also excluded from Prison Industry Authority jobs or Joint Venture jobs,¹⁹ while being expected to pay a high victim restitution. The financial burden of providing for their

basic needs (e.g. hygiene products, food, and personal items) often falls on family members of incarcerated people serving LWOP. In effect, these discriminatory policies and practices “outsource” the CDCR’s responsibility to meet basic survival needs, and provide rehabilitation services, to the family members of incarcerated people and to other volunteer labor.

RECOMMENDATIONS

LWOP sentences are inhumane and excessive. As such, all efforts should be made to end LWOP in California. Given that prison-reform advocates nationwide look to California as a leader in progressive policy change, it must be a priority for California lawmakers to ensure that people serving LWOP have access to rehabilitative programming for the extent of their sentences. Furthermore, lawmakers must ensure that women, particularly women of color, housed at both men’s and women’s prisons in California, remain the central focus of any policy concerned with combatting discrimination against people serving LWOP due to their particularly precarious positions within the prison system.

In 2016, California passed Proposition 57, which “incentivizes people in prison to take responsibility for their own rehabilitation with credit-earning opportunities for sustained good behavior, as well as in-prison program and activities participation.”²⁰ While these measures are indicative of progress, a 2019 audit reported that CDCR has been ineffective in delivering these programs.²¹ Thus, legislators should move to redistribute Proposition 57 funding for CDCR to CBOs, which have proven more effective than the CDCR at providing quality, trauma-informed programs that prepare incarcerated individuals to safely return

to their families and communities.²² Lawmakers should look to the Transformative In-Prison Workgroup, a coalition of 32 CBOs that administer effective rehabilitative programming in California’s 36 state prisons, as a successful example.

Legislators should also look for opportunities to prioritize people serving LWOP as a target population for Innovative Programming Grants (IPG) and Parole Prep. The 2019-2020 California state budget includes \$1,000,000 per year in ongoing CDCR funding intended to support eligible nonprofit organizations in providing programs for incarcerated people that focus on personal responsibility and restorative justice principles. The 2020 grant cycle should include language that prioritizes people serving LWOP and Life Sentences, in order to ensure that they are not pushed out of rehabilitative programs due to space limitations.

Finally, legislators should move to amend language in Title 15 of the California Code of Regulations that currently allows for the discrimination or deprioritization of people serving LWOP. Particular attention should be paid to language that excludes people with sentences that make them ineligible for parole from the Long-Term Offender Program (LTOP). Language should also be added to Title 15 to emphasize the importance of rehabilitative programming for *all* individuals in CDCR facilities, including those currently ineligible for parole.

Recommendations in brief:

- Ensure that people serving LWOP have access to rehabilitative programming for the extent of their sentences.
- Ensure that women, particularly women of color, housed at both

men’s and women’s prisons in California, remain the central focus of any policy concerned with combatting discrimination against people serving LWOP due to their particularly precarious positions within the prison system.

- Move to redistribute Proposition 57 funding for CDCR to CBOs.
- Prioritize people serving LWOP as a target population for Innovative Programming Grants (IPG) and Parole Prep.
- Amend language in Title 15 of the California Code of Regulations that currently allows for the discrimination or deprioritization of people serving LWOP.



ROSIE STOCKTON is a first-year graduate student in the Gender Studies Department at UCLA. Their research focuses on the role of cultural and educational programming in anti-carceral movement building. They are a member of California Coalition of Women Prisoners (CCWP) and are currently working on the Drop LWOP Campaign. Before moving to Los Angeles, they facilitated the Writers’ Bloc poetry workshop at the Women’s Huron Correctional Facility in Michigan. This brief was written in conversation with the Women’s Policy Institute and the Drop LWOP Campaign, who are developing legislation and messaging to advocate for programming for individuals serving LWOP, with the ultimate goal of ending long-term sentencing all together.

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STOP “CRIMMIGRATION!” STOP SOUTHEAST ASIAN REFUGEE DEPORTATIONS!

BY JUNE KUOCH

The Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 in effect criminalize populations of immigrant and refugee status. As a result of these legislative acts, committing a minor criminal offense could affect a person’s immigration or refugee status long after they have served time in prison for the offense. For non-citizen immigrants and refugees, the impact of a criminal sentence might not be isolated to the punishment issued by the state, but could also result in having to live in exile or, for refugees, in “double exile.” This intersecting of criminal law and immigration law is sometimes referred to as the “cimmigration” system. As the largest resettled community in the United States, Southeast Asian immigrants and refugees are strongly impacted by “cimmigration” practices. There is arguably a case of cruel and unusual punishment, where they are first punished for what they did, and then for who they are. In a sense, it is also a form of double jeopardy in that they are punished twice for one crime, first, by being incarcerated and, second, by being deported.

IN ORDER TO BREAK this inhumane link between the criminal justice system and the immigration system, legislators should revise current policies and remove discrepancies in how pertinent criminal categories are defined, end agreements with foreign



“Bring my Dad Home.” Illustration for the Release the Minnesota 8 campaign by Tori Hong. Source: www.ToriHong.com.

governments that allow the United States to deport refugees to the country they sought refuge from, and create systems of support for victims of “cimmigration” in their efforts not to be punished twice by being deported.

PROBLEM DESCRIPTION

Many Southeast Asians entered the United States while fleeing the aftermath of the American War in Viet

Nam, Laos, and Cambodia. In light of this legacy, deportations of Southeast Asian immigrants and refugees, in particular, reveal the socio-political complexities of “cimmigration.” Legal scholar Julia Stumpf states that the concept of “cimmigration” “illuminate[s] how and why these two areas of law [i.e., criminal law and immigration law] have converged, and why that convergence may be troubling.”¹ She also says, “[‘Cimmigration’] operates

in this new area [of theory and law] to define an ever-expanding group of immigrants and ex-offenders who are denied badges of membership in society.”² The passing of the AEDPA and the IIRIRA streamlined a process of deportation of permanent residents in the United States, and expanded the intersections of the criminal legal system and the immigration system. Through these laws, offenses categorized as misdemeanors in criminal law, are viewed as felonies for immigration purposes.³ Specifically, re-categorizing misdemeanors as “aggravated felonies” under immigration law, opened the door for mandatory detentions, deportations, and limiting immigration judges’ individual discretion in adjudicating.

The AEDPA and IIRIRA also allow for the retroactive detention and deportation of non-citizens convicted of a crime. These laws retroactively re-classify Southeast Asian refugees and other immigrant groups as aggravated felons. Non-citizens who served time for lesser offenses before 1996, then, can lose their refugee or immigrant status overnight. As a result, there are currently over 17,000 Southeast Asian refugees with final orders of removal in the United States.⁴

Among the impacted communities, Cambodian refugees are the longest-standing refugee population facing deportation from the United States. The deportation of Cambodians with minor criminal records was streamlined in 2002 when the Bush Administration convinced the nation of Cambodia to sign a Memorandum of Understanding (MoU), by which Cambodia agreed to accept deportees from the United States. Prior to 2002, Cambodian non-citizens were subjected to indefinite detention until paperwork with Cambodia could be final-

ized, as seen in *Kim Ho Ma v. Ashcroft*. Kim Ho Ma was released from federal prison on good behavior on April 1, 1997, after serving a 26-month prison sentence. Upon his release, Ma was detained by the Immigration and Naturalization Service (INS) in order to begin deportation proceedings to Cambodia. In Ma’s case file, his lawyers write:

...the INS has been unable to remove him, and hundreds of others like him, because Cambodia does not have a repatriation agreement with the United States and therefore will not permit Ma’s return. The question before us is whether, in light of the absence of such an agreement, the Attorney General has the legal authority to hold Ma, who is now 22, in detention indefinitely, perhaps for the remainder of his life. [*Kim Ho Ma v. Ashcroft*]

Ma’s ninth circuit legal case challenged INS practices of indefinite detention all the way to the Supreme Court. At the same time, a similar battle was fought in a fifth circuit court case, *Zadvydas v. Davis*. As a result of this case, the INS practice of indefinite detention was deemed in violation of the 14th Amendment. Since then, immigrant officials must provide documentation within the first 90 days of detainment to show that an individual’s deportation is possible. Unfortunately for Ma, after his release in 2001, the MoU between the United States and Cambodia was signed, giving the United States grounds to remove him. He was deported soon thereafter.

The Obama Administration expanded the “crimmigration” practices set up by the Bush Administration. While President Barack Obama signed a repatriation agreement with Viet Nam in 2008, preventing the deportation of

pre-1995 refugees, an unprecedented 3.2 million people were deported under his “felons, not families” deportation policies.⁵ Since the election of President Donald Trump in 2016, there have been fewer deportations overall, but a drastic increase of deportations of Cambodians to approximately 200 per year (an increase of 279 percent).⁶ The MoU with Viet Nam has also been reinterpreted to include detention and deportation of pre-1995 refugees, a group the agreement originally sought to protect.⁷ Thus far, Laos is the only nation among those affected by the American War in Southeast Asia that does not have a formal agreement with regard to deportation. However, as of 2020, the Trump administration is attempting to streamline a deportation process with Laos. Absent an MoU, a “gentlemen’s agreement” between Laos and the United States has allowed up to 40 deportations per year (a 300 percent increase).⁸ In total, 2,149 Southeast Asians have been deported from the United States since 1998 (1,033 to Cambodia, 879 to Viet Nam, and 219 to Laos).⁹ Although the absolute numbers are relatively small, the economic and psychological impact of these deportations is strongly felt within the larger Southeast Asian-American community.

“Crimmigration” practices also have a gendered component in that Southeast Asian women who are at risk of deportation often face compounding forms of violence. Campaigns by advocacy groups Asian Americans Advancing Justice and Survived & Punished to free Cambodian refugee Ny Nourn (#FreeNy!) illustrate this dynamic:

[When] Ny turned 18, her boyfriend killed the boss at her after-school job in a fit of jealousy. The murder went unsolved for three years until Ny went

to the police. After providing a confession, Ny was arrested and charged with aiding and abetting murder. A judge sentenced Ny to life without the possibility of parole.¹⁰

Nourn survived a long-term relationship with an abusive partner. The court, however, refused to see her as either a victim or survivor, judging her instead as a criminal, an “aggravated felon.”¹¹ Nourn was fortunate to have the support of a community of organizers who fought alongside her for her freedom. On November 9, 2017, after serving 16 years in prison and 10 months in Immigration and Customs Enforcement (ICE) detention, Nourn was released on bond. For the past three years, Nourn has been a major advocate for survivors, formerly incarcerated people, and people impacted by deportation. She was awarded the 2018 Yuri Kochiyama Fellowship at the Asian Law Caucus, and continues to work as an anti-deportation advocate with the Caucus. Nourn’s case highlights how different forms of violence are compounded through “crimmigration” practices. Not only did she endure the physical violence of her abuser, she was made responsible for his violence, sentenced to jail for it, served time, and was then threatened with deportation. Each step added additional trauma to that of being subjected to the original violence of her abuser.

CRITIQUE

The deportation of refugees is a fundamental violation of human rights and constitutional law. International refugee law premises that refugees cannot be forcibly sent back to the country they are fleeing; this is known as “non-refoulement.”¹² In addition, many of these deportees were born

stateless. They were born in refugee camps, not the nation-states they are “returned” to. As political scientist Khatharya Um writes, “While the idea of ‘repatriation’ is rooted in the dual concepts of ‘return to’ one’s ‘natal source,’ these embedded notions are problematized by the fact that most of the young deportees were born in cross-border refugee camps...‘return’ is, in fact, exile.”¹³ Their lives are rooted in a refugee identity and legal status, not one of national belonging.

Specifically, the disjunctures within the “crimmigration” system, especially surrounding the term “aggravated felony,” highlight the unconstitutionality of the 1996 immigration laws. Many deportees are transferred immediately from prison to ICE detention centers. The aforementioned case of Nourn serves as an example. She was paroled by former California Governor Jerry Brown. As far as the criminal legal system was concerned, then, she had served her time. Yet, instead of being allowed to reenter civil society, she was detained by immigration officials. As a result of the initial crime, the state had the right to revoke Ny’s status as Long-term Permanent Resident (LPR), and to label her a criminal alien. Under AEDPA and IIRIRA, serving a criminal sentence constitutes a basis for deportability. Thus, the deportation places the individual in “double jeopardy.” The Fifth Amendment of the US Constitution prohibits an individual from being punished for the same crime twice. Arguably, Nourn and other Southeast Asian refugees are punished, first, by incarceration, and then by deportation. Deportation is undeniably a form of punishment in this context.¹⁴ For refugees, who are already in exile from their birth country, deportation becomes an instance of double exile, increasing the cruelty of the punishment.

RECOMMENDATIONS

In order to end “crimmigration,” the United States needs to stop detaining and deporting refugees. In addition, the state needs to address the larger sociopolitical issues that underlie the “crimmigration” system by adopting abolitionist policies that dismantle ICE and the prison system. To abolish ICE without abolishing prisons ignores the broader dynamics of “crimmigration.” The prison-industrial-complex is inherently anti-Black, as evidenced by the disproportionate incarceration and harsher sentencing of Black people compared to other racial groups. Calls to abolish ICE without also abolishing the prison industry, then, are inherently anti-Black. Ignoring these connections obfuscates how conceptualizations of illegality are predicated on ideologies of Black criminality. Prison abolition is not just about eliminating prisons, but involves building a world in which life is valued. Funds currently used to control and incarcerate need to be redirected to provide direct support to immigrant and refugee communities, in order to change the material conditions of their lives. Policies that support access to healthcare, housing, and food are critical both for the re-entry of formerly incarcerated people, as well as for newly resettled refugees. For refugees, it is also critical to provide culturally competent programs and professionals to support these initiatives. We must move away from the current “prison nation”—that is, from structures of control that criminalize, dehumanize, and punish—towards structures of care.¹⁵

Grassroots community organizers have already led the charge to **end the expansion of immigration detention centers and to close existing prisons and detention facilities.** This

entails closing both private and public detention centers. Within all levels of government (federal, state, and local), policy makers have the opportunity to stop investing in the carceral system. In 2020, after an intensive grassroots campaign, Washington, Maryland, and California have all passed statewide legislation to curtail the federal expansion of immigrant detention centers. State lawmakers play a critical role in challenging the expansion of the prison system. Practical steps for state policymakers to take include:

End the collaboration between the Department of Corrections (DOC) and ICE in order to fracture the prison-deportation pipeline. The DOC has no legal obligation to report incarcerated individuals to immigration officials. Collaborating with ICE and allowing ICE to enter corrections facilities to interview and detain people is a choice. Direct transfers of incarcerated people from the DOC to ICE can be stopped by insisting that the DOC refuse to collaborate. In California, community organizers have pressured Governor Gavin Newsom to get #ICEout-of-CaliforniaPrisons. Although Governor Newsom has been praised for sanctuary-esque policies, they fail to give reprieve to incarcerated immigrants. The Governor, however, has the power to order ICE and the DOC to stop working together.

On the federal level, the following recommendations would seek to amend the 1996 immigration laws:

1) **Abolish the term “aggravated felon” from immigration law.** By abolishing the legal terms “aggravated felon” and “aggra-

vated felon” on a federal level, non-citizens who have served a sentence would not automatically be considered for deportation by immigration officials.

2) **End practices of mandatory detention as required in the AEDPA.**

3) **Give immigration judges the right to make deportation decisions at their discretion.** This could decrease the number of deportations, because judges would have the authority to make individual rulings based on context.

On December 10, 2019, Congress introduced the New Way Forward Act (H.R.5383). The bill would “remove mandatory detention requirements for certain aliens, such as asylum seekers with a credible fear of persecution,” which would directly impact the Southeast Asian community. The bill seeks to amend the 1996 immigrant laws, end private detention centers, and sever ICE’s relationship with local law enforcement. This is a positive step towards preventing “crimmigration” practices and should be supported. Additional policy changes that could provide more focused relief to the Southeast Asian community include:

1) **Renegotiating MoUs:** The State Department must rewrite the MoUs between Cambodia and the United States, and Viet Nam and the United States. Rewriting the MoUs could provide a legal route to halt deportations. In addition, policymakers in Congress and the Department of State must prevent the United States from signing other one-sided MoUs that would formalize deportation proceedings

with other nations like Laos.

2) **Passing policies that relieve the burden of legal expenses post-conviction:** Many refugees in the “crimmigrant” system take plea deals because they lack funds to pay for criminal defense attorneys, and because they hope to exit the criminal legal system as quickly as possible (i.e., pressured into plea deals to avoid longer sentences). Legislators should pass policies that would provide funds and legal support for immigrants to relitigate their original convictions, as many are typically not informed of how their original criminal conviction will affect their immigrant status (*Padilla v. Kentucky*). In addition, prosecutors must factor in the damage of sentencing on immigration status and help stop ICE from flagging immigrants.¹⁶

3) **Creating “Right to Return” and “Right to Reunite” programs:** Deportees are barred from legally entering the United States, and as a result, friends and families are separated. Ultimately, deportees should have a means to reunite and return to their communities in the United States.

If you are a directly impacted Southeast Asian immigrant or refugee in need of assistance, please visit: searaid.org.



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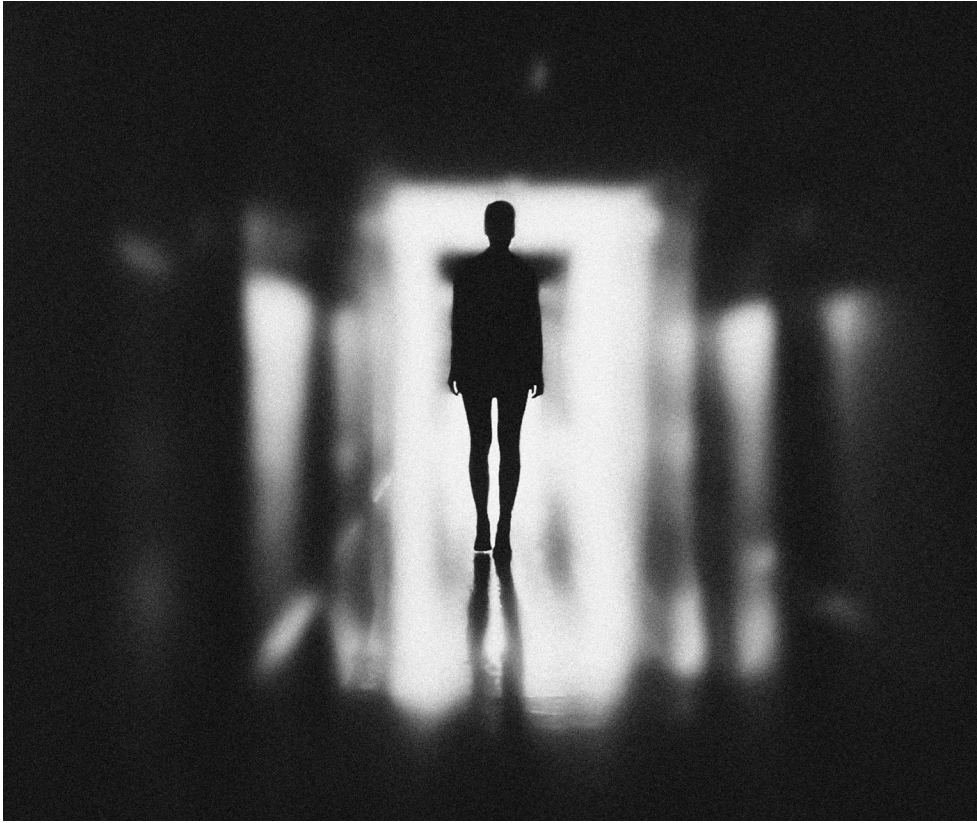
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INCARCERATION AND MENTAL WELLNESS ARE INCOMMENSURABLE - A CALL TO DECARCERATE

BY BOKÉ SAISI



Photograph by Elina Krime. Source: www.Pexels.com.

Legal and academic discourses about incarceration and mental unwellness, particularly in women's prisons, often highlight the high rates of people that experience mental distress—medicalized as mental “illness”—in both prisons and jails.¹ Social scientific findings show that upwards of 70 percent of all incarcerated people, and 73 percent of incarcerated women, have a “mental illness.”² These discourses and research findings fail to take into account two interrelated factors. Firstly, the findings are premised on the taken-for-granted idea of “mental illness” as an inherent individual biological and

neurological pathology that can only be treated through pharmaceutical intervention—forced or otherwise. Secondly, the research findings presume that incarceration itself does not contribute to mental unwellness, again implying a biologically unhealthy mind as the sole source of unwellness.

CURRENT APPROACHES to mental unwellness fail to mark incarceration as a contributing factor of distress. Without such recognition, incarcerated people will continue to stay and get increasingly unwell. I recommend decarcerating incarcerated people experiencing mental distress,

that is, using legislative means to reduce prison populations. This can be accomplished by extending the definition and practice of “compassionate release” to include mental unwellness, allocating funding for community-based mental-health care *outside* of carceral settings (i.e., jails, prisons, and state psychiatric hospitals), averting new admissions, decreasing recidivism, and providing social support systems upon release. These recommendations need to be actualized in collaboration with formerly incarcerated people at every step.

PROBLEM DESCRIPTION

Incarceration is a detriment to mental health. The idea that normative practices in prisons and jails have little bearing on incarcerated people's mental health is false. For instance, both current and previous research illustrate the direct correlation between solitary confinement and experiences of distress (e.g., auditory or visual hallucinations).³ Solitary confinement is used both as punishment for the subjective violation of institutional rules and as a means of “protection from self,” despite evidence that shows this practice is injurious to mental health.⁴ Moreover, social isolation from community (e.g., incarceration and psychiatric commitment), and from other individuals (e.g., solitary confinement—both punitive and “protective”), are detrimental to mental health—the latter producing conditions ripe for suicidal ideation and completion.⁵ The imperative to confine those experiencing

mental health distress, then, can be lethal.

Social movements to end the involuntary confinement of people in state psychiatric hospitals in the mid-twentieth century illustrate why the contemporary practice of incarcerating people experiencing mental distress is severely misguided. Deinstitutionalization in the 1950s and 1960s—the closure of many state psychiatric hospitals and subsequent implementation of the Community Health Act of 1963—illustrates why psychiatric confinement is detrimental to adequate mental healthcare.⁶ The subsequent disinvestment in community care and other social welfare policies, for example, resulted in houselessness and a lack of healthcare for many ex-patients, which culminated in the mass criminalization and incarceration of people experiencing mental distress as seen in the present. The current overrepresentation of mentally unwell people in prisons and jails is a consequence of policy failures, as well as ethical and fiscal failures to invest in community care, following mid-twentieth century deinstitutionalization. Funding allocated primarily to community mental health care will prevent this documented cycle from repeating itself.

The incongruence of adequate mental healthcare with incarceration cannot be divorced from institutional structures of discrimination inherent to the criminal justice system. The past and current overrepresentation of Black, Indigenous, and other people of color; queer identified, low or no-income, and mentally unwell people in prisons and jails, is a direct result of histories of criminalization and pathologization of these marginalized groups.⁷ For example, prior to the 1865 Emancipation Proclamation, Black people were seen to be psychologically unfit for freedom,

which led to the creation of the diagnosis of ‘drapetomania’ (desiring freedom from enslavement), which was criminalized and violently punished. Contemporary practices of overdiagnosing and/or wrongfully diagnosing Black people with more severe psychiatric labels—resulting in penal and psychiatric incarceration, and often forced medication—replicate such racialized pathological diagnoses.⁸ Similarly, much of the volumes of the Diagnostic and Statistical Manual (DSM) labelled same-gender relationships, non-normative gender expressions, and the “hypersexuality” of women as mental disorders—all practices which carried corresponding *de jure* and *de facto* punishments throughout the legal system. These fallacious pathologies have been, and continue to be, criminalized and punished both within and outside of prisons and jails.

While the aforementioned DSM labels have been rescinded from recent volumes, the criminalization of non-normative gender and sexual expressions, as well as the criminalization of mental distress, still occur through the policing of these expressions by arrest, incarceration, and punishable “infractions” within prisons.⁹ The use of solitary confinement as punishment for not adhering to gender-based rules, such as “compliant” physical attire and appearance, speech patterns, or self-assertion, illustrates that the system is structured to violently regulate normative gender categories.¹⁰

The criminalization of mental distress can be seen through the disproportionate lethal police violence towards Black and Indigenous people and other people of color experiencing mental distress, whereby up to 50 percent of police killings involve a victim in a mental health crisis.¹¹ Health concerns are also made punishable in prisons

where people experiencing mental distress, such as engaging in self-injury, are criminalized as “committing” internal “infractions” and punished by solitary confinement.¹² Current policies that uphold and encourage these practices illustrate the inherent contradiction between incarceration and effective mental health care given the context of pathologization and criminalization of marginalized groups of people. Policy changes, then, must: (a) pinpoint factors that produce and exacerbate mental unwellness within prisons, jails, and psychiatric hospitals; (b) recognize how structural racism, sexism, homophobia, and transphobia are replicated by current incarceration practices and psychiatric labelling; and (c) allocate funding to community care initiatives independent of state institutions.

CRITIQUE

Adequate mental health care within prisons, jails, and other carceral settings, such as state forensic hospitals, is impossible to deliver. The purpose and effect of incarceration is always punitive. While there are rights implemented by the Constitution’s Eighth Amendment to avoid cruel and unusual punishment (often applied as the right of incarcerated people to receive adequate physical and mental health care), reported conditions in prisons and jails illustrate that these rights are far from upheld.¹³ A 2018 federally ordered independent investigation of the California Department of Corrections and Rehabilitation’s (CDCR) lack of compliance with psychiatric care legislation, highlighted that the CDCR had falsified information in a federal court to produce the illusion that facilities complied with mental health care regulations.¹⁴ One example was the irregular monitoring of people placed in solitary confinement under “suicide

watch”—referred to as protective isolation—and resultant attempted and completed suicides at multiple facilities.¹⁵ Since solitary confinement and isolation are proven to produce mental distress, both the regulations and the lack of adherence to them create the conditions for attempted and completed suicide. Given such recent state falsifications, testimonies from currently and formerly incarcerated people about their experiences are essential to any comprehensive recommendations about policy change. Such accounts reveal just some of the ways practices of incarceration are harmful, and at times lethal, with regard to people's mental health.¹⁶

Recommendations that attempt to make current structures more gender, culturally, or medically sensitive or inclusive do not work. Much legal and academic discourse about incarceration and mental health provides analytically flattened accounts of incarcerated peoples needs, thus not attending to issues of racism, sexism, homophobia, gender-based discrimination, ableism, and sanism—the social stigma and oppression against mental unwellness—in prisons and jails. Any policy devoid of such an analysis is inherently faulty. For example, psychiatric discourses about women's sexuality, same-gender relationships, non-normative gender expression, and the autonomy of racialized groups, have produced pathological and criminalized diagnoses since the inception of psychiatry as a medical field.¹⁷ Prison officials' insistence on regulating normative gender roles, gender expression, and sexuality, results in punishment for those who deviate from those norms in ways that bolster their pathologization through psychiatric means.¹⁸ Likewise, people of color, primarily Black and Indigenous peoples, who experience mental distress are met with disproportionate

amounts of violence—largely lethal—in prisons and jails, and by law enforcement outside.¹⁹ Experiences of physical and sexual violence from prison employees and other incarcerated people, the involuntary consumption of psychiatric medication, and social isolation from family and community, also produce deleterious effects on mental health.^{20,21,22} Additionally, incarcerated people of color experience a racialized and discriminatory criminalization of mental distress, mental distress as a result of institutional oppression, and medical racism, when seeking mental health care. All three of these non-biological elements contribute to mental unwellness among incarcerated people.

Accessing mental health care, particularly in women's facilities, comes with many barriers. Many people incarcerated in women's prisons are survivors of gender-based sexual violence.²³ Incarceration itself often reproduces the traumas of sexual violation. The prevalence of male guards in women's facilities creates an atmosphere of risk of sexual violence from guards in positions of power, as do the mandated cavity searches at intake, which include “gender searches” to identify genitalia, and moves between facilities (including, and especially so, moves to mental health facilities).²⁴ In this way, these commonplace practices for the incarcerated produce and exacerbate mental unwellness, and function as a barrier to receiving even *inadequate* mental health care. This is done by reproducing experiences of sexual violence and abuse in ways that deter incarcerated people from seeking care. State psychiatric forensic hospitals replicate these gendered and violent practices. In California, its five forensic hospitals house only those classified as men. While some feminist legal and policy scholars have suggested the creation of psychiatric prisons for women to fill such an

institutional void, death rates in the five men's institutions are notoriously high and thus show that the construction of penal hospitals for incarcerated women is clearly not the solution.²⁵ This point is also evident in the successful public pressure to stop the construction of a men's mental health treatment prison in Los Angeles County.²⁶

Mental health care, both inside and outside of prisons and jails, does not operate in a societal vacuum. Current manifestations of institutional and structural racism, sexism, and gender and sexuality-based discrimination, inform mental health care. Just as the legalized criminalization and pathologization of marginalized groups inform who is incarcerated, so does the construction and application of psychiatric labelling. For example, as shown in an ever-growing scholarship about medical and clinical racism, traditional mental health care is an illustration of structural racism itself.²⁷ Likewise, the growing body of research that shows how structural racism produces mental distress indicates the need for alternative modes of mental health care. Clinical practitioners often lean towards ideas of cultural competency training for mental health care workers as a remedy.²⁸ However, cultural competency training—the practice of studying cross-cultural interactions in occupational settings—reinscribes notions that racism is simply individual prejudice and not structured into the medical system itself. Structural medical racism can determine who receives consistent care (i.e., how pain and discomfort are measured and perceived); which diagnostic labels are ascribed and, thus, which medications are prescribed (i.e., the overdiagnosis of schizophrenia and prescription of atypical antipsychotics for Black men); and which behaviors by which people are read as criminal versus clinical (i.e.,

how behaviors are unequally interpreted based on the presumed race of a patient).²⁹ Such problems are magnified during incarceration. The overrepresentation of Black, Indigenous, and people of color in prisons and jails, and the evident need for mental health care, implicates prisons and jails as inherently unable to provide adequate mental health care.

Concerns about the release of incarcerated people with mental-health struggles often focus on the potential acts of violence that may be perpetrated by those released. However, the presumption that mental unwellness inherently equates to violence is a well-documented myth and part of the stigma produced by mental health “diagnoses.”³⁰ For example, the rampant mass shootings perpetrated by white men in the US are fallaciously construed as a result of a pathology, rather than the legacy of racialized and gendered violence that has been upheld by the courts for the majority of this country’s existence. People experiencing mental distress are actually more likely to be *victims* of violence, whether by vigilantes or by police, than perpetrators.³¹ This victimization is largely due to the lack of social support systems, which creates the conditions for vulnerability to violence, such as homelessness and a lack of mental health care. Given that incarceration produces even more violence for these vulnerable populations, decarceration through compassionate release is an apt response to the crisis of incarcerating people experiencing mental distress.

RECOMMENDATIONS

Policy recommendations that aim to provide mental health care must focus on decarceration and center the experiences of formerly incarcerated people.

First, this means ending solitary confinement as a practice, whether punitive or “protective,” indefinitely. Solitary confinement constitutes cruel and unusual punishment and has been ruled so in California. The ruling resulted in the limited use of solitary confinement on incarcerated minors and those with pre-existing mental health diagnosis.^{32,33} The emphasis on a pre-existing diagnosis as a determination of which incarcerated person is exempt from or receives limited solitary confinement fails to account for and address how incarceration and solitary confinement produce distress. Legislators need to extend the limited use of solitary confinement to *all* incarcerated people to address this conceptual failure. For example, if an incarcerated person requires self-protection, such as in the context of suicide, they should be released from prison.

Decarceration can be accomplished through the extension of compassionate release. Compassionate release is granted for severe medical or humanitarian reasons, both of which apply to those in “protective” isolation.³⁴ Organizations that work with incarcerated and formerly incarcerated people need to be consistently consulted by legislators. Many organizations already participate in policy initiatives that recognize the harm of incarceration itself, including the California Coalition for Women Prisoners and Survived & Punished.^{35,36}

Future mental health care for incarcerated people should center community-based mental health care, as opposed to state psychiatric holding, which is both isolating and often punitive.³⁷ Again, isolation as it pertains to mental health care is inherently counterproductive. Since Black, Indigenous, and other people of color are overrepresented in prisons and jails, any mental

health care needs to address the structure of racism in the medical system and acknowledge the detrimental effect that racism and other interrelated structures of discrimination have on mental health. This means that funding needs to be allocated *away* from the criminal system (such as the California Department of Corrections and Rehabilitation and law enforcement bodies), *to* independent community care initiatives.

Community mental health care initiatives have been successfully implemented in other states and geographical contexts. For instance, the White Bird Clinic in Eugene, Oregon is a 24/7 community-run mental health facility that prioritizes care for low- or no-income and houseless people experiencing mental distress.³⁸ Instead of focusing primarily on psychiatric medication and clinical institutionalization, the organization provides outpatient treatment; resources for housing, legal representation, and counseling; and broader healthcare. These interventions address many of the causes for the incarceration of people experiencing mental distress in the first place. Additionally, the clinic has a mobile crisis-intervention team that functions as an alternative to police intervention—an often fatal interaction for Black people and other people of color in distress. This preventative initiative can function as a model for alternative community-centered modes of mental health care that legislators will allocate funds to construct and support. This will require consultation with organizations and critical mental health care providers that center the experiences of incarcerated and formerly incarcerated people working through a racial, gender, and queer justice framework, to effectively address and counter medical racism and institutional discrimination in mental health care.



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UCLA CENTER FOR THE STUDY OF WOMEN

Through our foundational research on women and gender equality, the UCLA Center for the Study of Women (CSW) works toward a world in which education and scholarship are tools for social justice feminism, improving the lives of people of all genders.

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