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Remarks prepared for “Sentencing in California: Moving Toward a Smarter, More Cost-Effective Approach,” a workshop at the California Budget & Policy Center’s annual conference, *Policy Insights 2016*, on March 9 in Sacramento.

Having invested more than 50 years in the administration of justice as a public prosecutor, criminal justice administrator, criminal defense attorney and judge, I am honored to have the opportunity to participate in this workshop on criminal sentencing reform.

During this morning’s plenary session, State Senator Kevin de León, President *pro tem* of the Senate, cited the need for “bold and innovative” actions, and I urge you to maintain focus on that phrase because all criminal justice reform measures will require boldness and innovation.

There is a national bipartisan movement for sentencing reform, motivated, in part, by fiscal conservatives recognizing that the “get tough on crime” effort of the 1970s and 1980s has failed to achieve its purpose at considerable expense.

Consideration of meaningful sentencing reform should start with a clean slate and a thoughtful assessment of the criminal justice system’s objectives.

A criminal justice system reinforces the goal of cultivating respect for a “Rule of Law” that provides a measure of safety and protection from physical, emotional and financial harm in a democratic society that values freedom.

Statutes that prescribe punitive consequences for behavior that violates these safeguards are intended to reinforce the lesson of the Golden Rule (“Do unto others as you would have them do unto you”) and serve as a deterrent to misconduct. Does the prospect of punishment accomplish that goal?

In fact, the overwhelming majority of people respect themselves, each other and the rule of law without being influenced by the negative incentive of punishment.

We must re-assess the objectives of criminal justice and how best to achieve them.

Sentencing reform should start with policy questions, such as:

- “What consequences should be imposed for those who engage in conduct that violates the law?”

- “What conduct requires the punitive sanction of incarceration?”
- “What are the alternatives to incarceration?” and,
- “What are the most cost-effective options to achieve our goals?”

We have nurtured a culture of punishment to serve as a deterrent. We start with the notion, “There ought to be a law!” and for some, the answer is “Lock them up and throw away the key!” We have applied that response to both violent and non-violent conduct, to misdemeanors and felonies.

Of course, there are violent crimes and some criminals for whom lengthy terms of incarceration may be the only reasonable answer. After all, incarceration provides a measure of public safety through incapacitation, and it also serves to satisfy a basic desire for retribution, a primary motivation of the victims’ rights movement that inspired the adoption of harsh and inflexible sentencing laws in the 1970s and 1980s.

However, sentencing reform should not be limited to tinkering with prescriptions for the severity of the punishment, the length of confinement, and who should make those determinations. Instead, we should look to alternatives that will enhance the prospect of reducing recidivism.

For example, I encourage us to ask whether conduct that is merely annoying, intrusive or offensive, especially conduct that is a by-product of addiction and mental illness, should be subject to incarceration, which necessarily implicates the enormous machinery of the criminal justice system and the commitment of financial resources associated with police, custodial officials, prosecutors, defense attorneys, court personnel, jurors and their employers.

Even after implementation of the revolutionary Proposition 47 last year, some trial courts are still drowning in cases where juries of 12 citizens are removed from their regular employment and asked to decide whether an addict was under the influence of narcotics. The expense associated with presentation of evidence over a four-day period is enormous, and this approach has proved to be a dismal failure if its primary purpose is to reduce drug addiction.

We have been resistant and reluctant to address the root causes of criminal conduct. We would be far better served if we were to subject such conduct to the immediate scrutiny of mental health and public health experts.

We will benefit from expansion of restorative court concepts, the San Diego experience with community courts, the comprehensive Los Angeles City Attorney Community Justice Initiative, the San Francisco Sentencing Commission that we will learn more about this morning from Tara Regan Anderson, and other

methods of diverting people from criminal justice into treatment, education, development of occupational skills, employment and housing.

We have neglected the concept of “re-entry,” which recognizes that the overwhelming majority of inmates will be released from custody tomorrow, next week, next month, next year or in three, five or seven years. Instead, we adopted an arbitrary schedule of terms and enhancements that has produced an enormous and expensive prison population without reducing recidivism.

We must reject the illusory expectation and hope that those incarcerated for criminal conduct will have “learned their lesson” and will not re-offend following their release from custody, and we must recognize that imposing harsher sentences on those who re-offend is based not only on their failure but on the failure of our “corrections” system to prepare them (and us) for their re-entry.

One way to address the failure of our prisons to rehabilitate offenders is to scale back the number of people we send to prison in the first place. More than 40 years ago, the Legislature recognized the value of Court-ordered drug treatment “diversion” programs for some minor offenses, and during the past four decades “diversion” has been expanded, but there has been resistance to the option of diverting other offenders from jail and the court system into therapeutic programs.

Some law enforcement agencies in the United States have followed the lead of Portugal, which faced an overwhelming heroin epidemic 15 years ago, decriminalized drug possession and had its law enforcement officers take addicts to treatment programs instead of jail. As a result of the current election campaign, we have become aware of the overwhelming heroin epidemic in New Hampshire and other states that has invited early public health intervention.

We have made some progress toward fixing the unfortunate consequences of the incredibly complicated determinate sentencing law (DSL) adopted in 1977, the most visible of which was overcrowded prisons, in part, because sentencing discretion was taken away from judges and prison commitments could not be modified to recognize a prisoner’s progress in custody and failed to provide meaningful parole upon release from custody.

In 2011, the Legislature adopted Assembly Bill 109, and Public Safety Realignment brought us a significant measure of sentencing reform by shifting supervision for many felony offenses to local corrections and probation authorities. In November 2014, the voters’ voice was loud and clear when Prop. 47 was passed and made a profound impact on police and prosecution practices as well as providing relief for thousands of people who had been arrested and convicted for “felonies” that prevented them from obtaining employment.

And now, Governor Brown has proposed an initiative, “The Public Safety and Rehabilitation Act of 2016”, that will enable those who have been convicted of non-violent offenses to avoid the consequences of sentence enhancements by demonstrating to parole authorities that they have earned an “early release” after they have served the maximum term for the primary offense. The Governor has tuned into “re-entry.”

When the Governor vetoed a package of crime bills last year, he expressed a hope for a broader, more systemic discussion of criminal justice reform. His message included the comment, “Before we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective.” He has expressed regret that the “tough on crime” legislation he promoted in the past has had unfortunate “unintended consequences.”

The initiative will not change sentencing policy, but it enables corrections officials to award credits toward early release based upon good behavior and participation in prison education programs. “By allowing parole consideration if they do good things,” the Governor said, inmates “...will then have an incentive ... to show whether or not they're ready to go back into society.”

Some prosecutors have expressed opposition because the proposal also restores the authority of judges to decide whether felony offenses committed by children as young as 14 years old should be tried in adult court, repealing the system adopted by the voters in 2000 with Prop. 21. Some victims’ rights advocates have also expressed opposition based upon concerns that their demand for retribution will not be satisfied.

Our challenge today is to change the way we have been programmed to respond to human behavior that violates society’s expectations for order, and not merely tinker with existing systems to increase efficiency and reduce expenses.

The majority of county jail inmates are unable to post cash bail. Approximately 90 percent of all defendants charged with criminal offenses are convicted by their pleas of guilty or “no contest” in exchange for custody credits for time served.

I advocate consideration of the following proposals:

- Reform our bail system to address the reality that many inmates of county jails are serving their sentences before they are convicted because they are unable to post cash bail following their arrest. Expanded use of electronic monitoring will reduce the jail population and enable defendants

to obtain therapeutic treatment, maintain employment and make restitution.

- Expand the scope of infractions and prescribe consequences other than incarceration, such as community service, direct work, restitution, therapeutic treatment and job training.
- Re-define misdemeanors, expand diversion programs, limit jail terms and expand the use of electronic monitoring as a method of incarceration in addition to community service, direct work, restitution, therapeutic treatment and job training.
- Limit felonies and state prison incarceration to crimes of physical, financial and psychological violence.
- Provide discretion to judges and flexibility to correctional officials and parole boards regarding the length of prison sentences and how they are served.

I commend to you the paper titled [*Sentencing in California*](#) and published by the California Budget & Policy Center in December 2015.

Hopefully, this workshop will produce some creative and visionary policy approaches to the community and budget problems associated with “criminal” behavior. Thank you.