



Fall 11-1-2019

Misdemeanors for All Purposes? Interpreting Proposition 47's Ameliorative Scope in a New Era of Criminal Justice Reform

Kayla Burchuk

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Criminal Law Commons](#), [Law and Society Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Kayla Burchuk, Misdemeanors for All Purposes? Interpreting Proposition 47's Ameliorative Scope in a New Era of Criminal Justice Reform, 53 Loy. L.A. L. Rev. 179 (2019).

This *Developments in the Law* is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in *Loyola of Los Angeles Law Review* by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

MISDEMEANORS FOR ALL PURPOSES? INTERPRETING PROPOSITION 47'S AMELIORATIVE SCOPE IN A NEW ERA OF CRIMINAL JUSTICE REFORM

*Kayla Burchuk**

In 2014, Proposition 47 reclassified seven low-level felonies to misdemeanors, demonstrating voters' striking rejection of California's historically punitive sentencing policies. This Note examines the recent wave of California Supreme Court jurisprudence interpreting Proposition 47 by exploring the court's varied readings of the initiative's ballot materials and statutory text. While the court has liberally construed relief for affected property crimes, it has responded ambivalently in more controversial areas such as drug offenses, mandatory parole periods, and automatic resentencing. This variation reveals ideological tensions between the goal of expanding ameliorative benefits to low-level offenders and anxiety regarding public safety. This Note analyzes the court's opinions as expressions of Proposition 47's own hybrid and conflicting aims of reducing penalties for certain drug and property crimes, while continuing to harshly punish offenders perceived as violent and recidivist. As such, the court's recent opinions and Proposition 47 itself are products of California's complex sentencing history, which has vacillated between progressive and reactive policy extremes.

* J.D. Candidate, May 2020, Loyola Law School, Los Angeles. Thank you to student editors Katie Brosamle and Jane Kim, Professor Christopher Hawthorne, and the clients and my colleagues at Loyola's Juvenile Innocence and Fair Sentencing Clinic (JIFS). I would also like to thank Jeffrey Nord, MFT; Professor Aimee Dudovitz; Professor John Nockleby; my family; and my friends for their moral support.

TABLE OF CONTENTS

I. INTRODUCTION	181
II. BACKGROUND	184
A. Origins of a Crisis: From Early Statehood to Three Strikes	184
B. The Breaking Point: Federal Injunction and the Public Safety Realignment	189
C. Proposition 47: Reform Horizon.....	193
III. STATUTES AND BALLOT MATERIALS	195
A. Statutes Reducing Felonies to Misdemeanors	196
B. Resentencing Procedure.....	198
C. Ballot Materials.....	200
IV. CALIFORNIA SUPREME COURT INTERPRETATION.....	203
A. Expansive Approach to Property Crimes	205
B. Restrictive Approach to Perceived Public Safety Threats	209
C. Mixed Reading of Statutory Retroactivity.....	216
D. Showdown Over Voter Intent: <i>People v. Valencia</i>	222
V. CONCLUSION.....	230

I. INTRODUCTION

California's Proposition 47 is both common sense and quietly radical, feared as a door to lawlessness and praised as a daring experiment. On November 4, 2014, California's voters approved a measure that universally categorized six low-level property crimes and simple drug possession as misdemeanors,¹ created two new criminal statutes,² and laid out a detailed resentencing procedure for offenders "who would have been guilty of a misdemeanor . . . had this act been in effect at the time of the offense."³ These changes, a marked departure from California's harsh Three Strikes sentencing era, were motivated by the goal of "ensur[ing] that prison spending is focused on violent and serious offenses"—a proposition that would save taxpayer funds by reining in a sprawling state prison system populated by low-risk inmates and refocus those resources towards evidence-based rehabilitative programs aimed at reducing recidivism.⁴

Proposition 47 was neither enacted in a vacuum nor was it rooted in soul-searching regarding California's punitive values. As of now, it is the distillation of California's forced reassessment of its historically harsh sentencing policies, spurred by the United States Supreme Court's historic intervention in California's prison system via the *Brown v. Plata*⁵ decision. After an initial policy fix known as the California Public Safety Realignment ("Realignment"), Proposition 47 emerged to further reduce the prison population by releasing prisoners resentenced to misdemeanors and stemming future inflow of

1. See CAL. HEALTH & SAFETY CODE §§ 11350, 11357, 11377 (West Supp. 2019) (reclassifying simple drug possession as a misdemeanor); CAL. PENAL CODE §§ 459.5, 473, 476a, 490.2, 496, 666 (West Supp. 2019) (reclassifying the following property crimes as misdemeanors where amount is less than \$950: shoplifting, forgery, writing bad checks, petty theft, receiving stolen property, and petty theft with a prior theft conviction).

2. See CAL. PENAL CODE § 459.5 (adding new crime of shoplifting); *id.* § 490.2 (adding new crime of petty theft).

3. CAL. PENAL CODE § 1170.18(a) (West 2015).

4. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 2014, GENERAL ELECTION 70 (2014), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2328&context=ca_ballot_props [hereinafter VOTER INFORMATION GUIDE 2014]. Recidivism remains a major scourge of California justice reform, with roughly half of all inmates released being reconvicted within three years. See *2018 Recidivism Report: An Evaluation of Offenders Released in Fiscal Year 2013–14*, CAL. DEP'T OF CORR. & REHAB. 3 (Jan. 2019) (on file with author); see also MIA BIRD ET AL., PUB. POLICY INST. OF CAL., THE IMPACT OF PROPOSITION 47 ON CRIME AND RECIDIVISM 17–18 (2018), https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf (contrasting reduced inmate population and other gains with the stubbornness of the recidivism rate).

5. 563 U.S. 493 (2011).

felons for the newly downgraded crimes.⁶ In mere months after its implementation, Proposition 47 tipped the scales so that California finally complied with *Brown*.⁷ Furthermore, Proposition 47 has continued to drive down the prison population, to the point where California now accounts for a significant portion of the United States' overall reduction in prison numbers.⁸ While many scholars have acknowledged Proposition 47's policy role in California's new era of criminal justice reform, none have closely analyzed the text of the law itself, its corresponding ballot materials, and most significantly, its varied interpretation by the California Supreme Court. To date, the court has published eighteen opinions examining Proposition 47's scope, resentencing procedure, effect on collateral consequences, and other related issues.⁹

This Note explores Proposition 47's hybrid and conflicting aims of reducing penalties for low-level property and drug crimes, while continuing to harshly punish offenders perceived as violent and recidivist. The tension between the desire (and desperate need) to reduce the state prison population and the empathic exclusion of unpopular offender groups features prominently in Proposition 47's statutes and voter pamphlet. The California Supreme Court has, in turn, looked to these incongruent sources to discern the true voter intent behind Proposition 47 and, thus, determine the scope of its resentencing relief. While the court purports to honor the plain language of the statutes, supplemented by ballot materials when needed, it has interpreted the initiative selectively depending on

6. The California Public Safety Realignment was a series of policy changes that shifted responsibility for low level offenders from state prisons to county jails and other forms of local supervision. See CAL. PENAL CODE § 17.5(a)(5) (West 2014); CAL. PENAL CODE § 1170(h) (West 2015); CAL. PENAL CODE §§ 3451–58 (West Supp. 2019); *infra* Section II(B).

7. *People v. Valencia*, 397 P.3d 936, 979 (Cal. 2017).

8. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 14 (2017) (“Between 2010 and 2014, state prison populations dropped . . . from 1.41 million to 1.3 million. . . . So 62 percent of the net national decline, and 45 percent of the gross drop in prisoners, took place just in California.”).

9. See *People v. Liu*, 451 P.3d 1165 (Cal. 2019); *People v. Foster*, 447 P.3d 228 (Cal. 2019); *People v. Valenzuela*, 441 P.3d 896 (Cal. 2019); *People v. Lara*, 438 P.3d 251 (Cal. 2019); *People v. Colbert*, 433 P.3d 536 (Cal. 2019); *People v. Franco*, 430 P.3d 1233 (Cal. 2018); *People v. C.B. (In re C.B.)*, 425 P.3d 40 (Cal. 2018); *People v. Gonzales (Gonzales II)*, 424 P.3d 280 (Cal. 2018); *People v. Buycks*, 422 P.3d 531 (Cal. 2018); *People v. Adelman*, 416 P.3d 786 (Cal. 2018); *People v. Martinez*, 413 P.3d 1125 (Cal. 2018); *People v. Dehoyos*, 412 P.3d 368 (Cal. 2018); *People v. Page*, 406 P.3d 319 (Cal. 2017); *People v. Valencia*, 397 P.3d 936 (Cal. 2017); *People v. Romanowski*, 391 P.3d 633 (Cal. 2017); *People v. Gonzales (Gonzales I)*, 392 P.3d 437 (Cal. 2017); *Harris v. Superior Court*, 383 P.3d 648 (Cal. 2016); *People v. Morales*, 371 P.3d 592 (Cal. 2016).

whether the legal question concerns uncontroversial low-level property crimes or offenses perceived as a greater threat to public safety.¹⁰ In cases involving shoplifting, joyriding, and credit card theft, the court has read Proposition 47 permissively, emphasizing its ameliorative properties.¹¹ In cases dealing with mandatory parole, drug transportation, and automatic resentencing, the court has interpreted the measure restrictively, highlighting Proposition 47's exclusionary tone.¹² While voters likely approved Proposition 47 for many contradictory reasons, the court's recent opinions and Proposition 47 itself are products of California's sentencing history, characterized by clashing interests, constituencies, and institutional actors, all vacillating between progressive and reactive ideological extremes.

First, this Note places Proposition 47 in a wider historical and policy context. Part II will provide an overview of California's escalating sentencing laws and resulting prison expansion, culminating in the *Brown v. Plata* decision and subsequent Realignment policies. This Part will also discuss the origins of Proposition 47, including the unlikely political coalition that promoted the initiative and its immediate impact on California's prison population. Part III will examine the text of Proposition 47's ballot materials and the nine statutes it either created or amended, focusing on its competing goals of reducing punishment for certain crimes, channeling prison savings into rehabilitative programming, and ensuring "rapists, murderers, molesters and the most dangerous criminals cannot benefit."¹³ Part IV will analyze recent California Supreme Court jurisprudence interpreting the scope of Proposition 47 as intended and understood by voters in 2014, contrasting expansive interpretations related to low-level property crimes with restrictive interpretations of issues deemed a threat to public safety.

The Note will conclude in Part V, briefly touching on several recent threats to California's progressive sentencing reforms. As

10. *Gonzales I*, 392 P.3d at 441, 444 ("If the language is unambiguous, there is no need for further construction. If, however, the language is susceptible of more than one reasonable meaning, we may consider the ballot summaries and arguments to determine how the voters understood the ballot measure and what they intended in enacting it." (citation omitted)).

11. See *Page*, 406 P.3d 319 (vehicle theft); *Gonzales I*, 392 P.3d 437 (shoplifting); *Romanowski*, 391 P.3d 633 (credit card theft).

12. See discussion *infra* Section IV(B).

13. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 39.

overpopulated prisons continue to provide substandard inmate care and a new rival initiative threatens to undo Proposition 47's gains, a clear, generous judicial treatment of Proposition 47's ameliorative scope is more than a doctrinal question; it represents a wider struggle over a critical social problem.

II. BACKGROUND

A. *Origins of a Crisis: From Early Statehood to Three Strikes*

California has struggled to administer its correctional system since the earliest days of statehood.¹⁴ No state prisons existed at the time of the first constitutional convention in 1849, and the only criminal justice topics discussed were the death penalty and the governor's pardoning power.¹⁵ County jails were the only system of inmate detention, an arrangement that left counties financially strained and prisoners housed in escape-prone temporary buildings.¹⁶ In 1852, inmates living on the *Waban*, a prison ship docked in the San Francisco Bay, and a nearby jail began building San Quentin, California's first state prison.¹⁷ By 1858, San Quentin housed 539 prisoners in a facility with only sixty-two cells.¹⁸

California's first criminal code, An Act Concerning Crimes and Punishments, created a determinate sentencing system whereby a fixed range of minimum and maximum years of imprisonment corresponded with each offense enumerated by statute.¹⁹ Judges could select a term of punishment within a given offense's range, but the law did not guide their discretion, often resulting in excessive and widely varying sentences.²⁰ In 1917, to remedy the sentencing excesses of early statehood, California implemented a superficially progressive indeterminate sentencing system, which prevented trial courts from

14. Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 46 (2008).

15. *Id.* at 47.

16. W. David Ball, "A False Idea of Economy": Costs, Counties, and the Origins of the California Correctional System, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 27–28 (2016).

17. See Don Chaddock, *Unlocking History: Explore San Quentin, the State's Oldest Prison*, INSIDE CDCR (Dec. 4, 2014), <https://www.insidecdcr.ca.gov/2014/12/unlocking-history-explore-san-quentin-the-states-oldest-prison>; Dansky, *supra* note 14, at 53.

18. CAL. DEP'T OF CORR. & REHAB., PRISONERS RECEIVED EACH YEAR AND ANNUAL POPULATION OF INSTITUTIONS 1851–1945 (on file with author).

19. See, e.g., Act of Apr. 16, 1850, ch. 99, § 59, 1850 Cal. Stat. 329, 235 ("Every person guilty of robbery shall be punished by imprisonment in the State prison for a term not less than one year, nor more than ten years.").

20. Dansky, *supra* note 14, at 50.

attaching any sentence to a criminal conviction.²¹ Instead, the state prison warden would decide the sentence length when the convicted inmate arrived, although that decision was still constrained by the ranges preserved from the previous sentencing scheme.²² In addition, parole boards were granted tremendous authority to free or indefinitely detain individuals once they had served their minimum terms.²³

Although the word “rehabilitation” did not appear in the law, the change corresponded with California’s rise as a progressive penal system focused on a rehabilitative model of punishment.²⁴ The rehabilitative model, heavily influenced by the social sciences, emphasized the individualized assessment of prisoners’ social characteristics and the treatment of their psychological problems with the expert knowledge of corrections professionals.²⁵ The growing focus on rehabilitation in prisons paralleled the expansion of social welfare programs under post-World War II Governors Earl Warren and Pat Brown, which included public education, workers compensation, and state water works.²⁶ At the same time, parole boards’ newly expanded discretion to evaluate inmate rehabilitation was problematic. Many suspected that the boards disproportionately withheld parole from black and Latino prisoners if these inmates did not demonstrate an acceptance of the social order, or that they alternately released prisoners without proper evaluation as a means of easing overcrowding.²⁷

Ronald Reagan’s governorship from 1966 to 1975 marked a sharp turn away from the rehabilitative model and toward a view of crime as the product of moral depravity and a breakdown of the social order.²⁸

21. See Act of May 18, 1917, ch. 527, § 1, 1917 Cal. Stat. 665, 665 (codified as amended at CAL. PENAL CODE § 1168 (West 2015)).

22. *Id.* at 666.

23. *Id.*

24. JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 27, 37, 75 (2014).

25. *Id.*; VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 67 (2009); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA 89 (2007).

26. BARKER, *supra* note 25, at 59.

27. GILMORE, *supra* note 25, at 90; see also Dansky, *supra* note 14, at 64.

28. BARKER, *supra* note 25, at 65.

Against the backdrop of a crime wave,²⁹ the Watts uprising, and the turbulent student protests at the University of California, Berkeley,³⁰ these arguments were particularly compelling for white suburban voters, many of whom had migrated to California to work in the defense industry.³¹ This group of conservative homeowners, fearful of crime and concerned with property values, embraced a retributive sentencing model that tied punishment to a specific criminal act because it resonated with their individualistic worldview that rejected the idea of crime as the product of society.³² Governor Reagan's tenure saw the creation of mandatory prison penalties for some offenses such as those inflicting great bodily injury, and, in emphasizing victims' suffering, reintroduced vengeance as a compelling criminal punishment rationale.³³

Changing cultural attitudes about crime and punishment were solidified in the passage of California's Determinate Sentencing Law (DSL) in 1976.³⁴ Declaring that "the purpose of imprisonment for crime is punishment,"³⁵ the new law, signed by Governor Edmund G. "Jerry" Brown Jr. during his first term as governor,³⁶ returned sentencing power to judges and installed many of the structures that still dominate California's sentencing laws today.³⁷ These included sentencing triads where courts chose from lower, middle, and upper terms based on mitigating or aggravating factors and enhancements that added on to standard prison terms for various circumstances including, for example, the use of weapons in the commission of a crime and prior violent felony convictions, among many others.³⁸ The DSL contained multiple contradictions, including that indeterminate

29. See PFAFF, *supra* note 8, at 178 ("Between 1960 and 1991, official violent crime rates rose by almost 400 percent, and property crime rates by almost 200 percent.").

30. BARKER, *supra* note 25, at 61 ("At the same time in the mid-1960s, a youth culture and free speech movement gained control over the Berkeley campus and racial unrest exploded in south central Los Angeles.").

31. *Id.* at 58–59.

32. *Id.* at 67.

33. *Id.* at 67–68, 75.

34. See Uniform Determinate Sentencing Act of 1976, ch. 1139, 1976 Cal. Stat. 5062.

35. *Id.* at 5140.

36. Jerry Brown served as California Governor twice, from 1975–1983, and later from 2011–2018. Governor Edmund G. Brown Jr., OFF. GOVERNOR EDMUND G. BROWN JR., <https://www.ca.gov/archive/gov39/about/index.html> (last visited Sept. 29, 2019).

37. See CAL. PENAL CODE § 1170 (West Supp. 2019).

38. See *id.* §§ 667.5, 1170(a)(3), 1170(b), 12022, 12022.5; Allen Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment*, 54 SANTA CLARA L. REV. 527, 542 (2014).

sentences (e.g., “25-to-life”) remained the format for the most serious crimes.³⁹

The implementation of the DSL set off an avalanche of harsh sentencing laws that continued for the next thirty years.⁴⁰ Politicians on both sides of the aisle aggressively introduced tough-on-crime legislation and engaged in “drive-by sentencing,” where new laws were passed in reaction to the latest highly publicized violent crime, resulting in an incoherent patchwork of sentencing rules.⁴¹ From 1984 to 1991, the California legislature approved over 1,000 crime bills, and sentencing under California Penal Code sections 1170 and 1202⁴² alone saw over eighty increases, including an explosion of enhancements from 1976 to 2006.⁴³ California’s voters also inserted themselves into the punitive sentencing landscape via California’s unique voter initiative system, passing numerous ballot measures that permanently altered the state’s constitution to raise criminal penalties and limit judges’ discretion.⁴⁴ For example, in 1982, Proposition 8, dubbed “The Victim’s Bill of Rights,” abolished the diminished capacity defense, restricted bail, loosened evidentiary standards, and permitted victim participation in sentencing, all within one single initiative.⁴⁵ Similarly, in 1990, Proposition 115 expanded the definition of murder, permitted juvenile life without parole sentences, and allowed hearsay evidence at preliminary hearings.⁴⁶

39. Dansky, *supra* note 14, at 83.

40. Barry Krisberg, *How Do You Eat an Elephant? Reducing Mass Incarceration in California One Small Bite at a Time*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 138 (2016).

41. *Id.*; Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California’s Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 920 (2004); Dansky, *supra* note 14, at 69; GILMORE, *supra* note 25, at 107–09.

42. All statutory references are to the California Penal Code unless otherwise specified.

43. Dansky, *supra* note 14, at 69 (citing LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT 68–76 (2007)); Vitiello & Kelso, *supra* note 41, at 921.

44. See Hopper et al., *supra* note 38, at 542 (“California voters have been equally aggressive in increasing criminal penalties. Between 1972 and 1994, voters enacted numerous state ballot initiatives ratcheting up sentencing laws, including Proposition 17 (1972, death penalty); Proposition 7 (1977, murder penalty); and Proposition 115 (1990 ‘Crime Victim Justice Reform Act’).”); see also Krisberg, *supra* note 40, at 137 (“The ability of California voters to change its criminal justice policies via voter initiative is not common across the nation, and no state has used the electoral route to alter sentencing rules more than California.”).

45. CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET FOR 1982, PRIMARY ELECTION 32–35, 54–56 (1982), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props [hereinafter PROPOSITION 8].

46. CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET FOR 1990, PRIMARY ELECTION 32–35, 65–69 (1990), <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2058&context>

California's infamous Three Strikes policy, implemented in 1994 via both ballot measure and legislation, rapidly accelerated the mass incarceration crisis that the DSL era had set in motion.⁴⁷ Under these new laws, if a defendant was found guilty of a serious or violent felony and had been previously convicted of a serious or violent felony, that person would serve a double sentence for the new offense.⁴⁸ If a defendant with two serious or violent prior felonies was later convicted of *any* felony, no matter how minor, that person would receive a minimum indefinite term of twenty-five years to life in prison.⁴⁹ Three Strikes also eliminated probation for repeat felons, created unlimited aggregate sentences whereby terms must be served consecutively in state prison only, and reduced the amount of time certain inmates could shorten their sentences with good time credits for education and job training.⁵⁰

The cumulative effect of Three Strikes, in addition to previous sentencing laws, was rapid swelling of California's prison population.⁵¹ Between 1994 and 2004, California incarcerated 80,000 second-strike felons and 4,500 third-strike felons in its state prisons.⁵² While some of these inmates completed their sentences, over 43,000 strikers remained incarcerated in 2004, forming 26 percent of the total inmate population.⁵³ From 1980 to 2006, the number of total state prisoners expanded seven-fold, peaking at over 170,000 inmates.⁵⁴ California's prisons, which had grown from eleven facilities to thirty-four, were so overcrowded that they operated at almost 200 percent of

=ca_ballot_props [hereinafter PROPOSITION 115].

47. See CAL. PENAL CODE § 667 (West Supp. 2019); CAL. PENAL CODE § 1170.12 (West 2015); CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 1994, GENERAL ELECTION 32–37 (1994), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2090&context=ca_ballot_props [hereinafter PROPOSITION 184].

48. CAL. PENAL CODE § 667(e)(1) (West Supp. 2019).

49. *Id.* § 667(e)(2)(A).

50. *Id.* § 667(e)(2)(B); PROPOSITION 184, *supra* note 47.

51. BARKER, *supra* note 25, at 78.

52. LEGISLATIVE ANALYST'S OFFICE, A PRIMER: THREE STRIKES—THE IMPACT AFTER MORE THAN A DECADE 45 (2005), https://lao.ca.gov/2005/3_Strikes/3_strikes_102005.pdf.

53. *Id.*

54. *Monthly Report of Population*, CAL. DEP'T OF CORR. & REHAB. (July 5, 2006) (stating a total population of 171,000 state inmates) (on file with author); Magnus Lofstrom et al., *California's Historic Corrections Reforms*, PUB. POLICY INST. OF CAL. (Sept. 2016), http://www.ppic.org/content/pubs/report/R_916MLR.pdf.

their design capacity.⁵⁵ Over time, the overcrowding crisis created prison living conditions that were so severely depleted they were eventually found to constitute cruel and unusual punishment.⁵⁶

B. The Breaking Point: Federal Injunction and the Public Safety Realignment

By the early 2000s, severe prison overcrowding had created a deadly and unconstitutional lack of mental health and medical care inside California's prisons, which eventually provoked the largest federal judicial intervention into a state's penal system in United States history.⁵⁷ Harsh sentencing laws had increased the lengths of inmates' stays in state prisons, creating an aging, chronically-ill population.⁵⁸ Meanwhile, these prisons were equipped to provide psychiatric and medical care at only 100 percent of design capacity.⁵⁹ Chronic overcrowding caused extremely inhumane conditions, with severely mentally ill inmates being caged in pools of their own urine while awaiting psychiatric care and others dying of treatable chronic illnesses while awaiting basic medical appointments, among other horrors.⁶⁰

As conditions worsened, a series of prisoner class action lawsuits wound their way through federal courts. In 1990, a group of prisoners with severe mental disorders filed a class action lawsuit in *Coleman v. Wilson*,⁶¹ alleging Eighth Amendment violations stemming from insufficient mental health screening, staffing, medication distribution,

55. OFFENDER INFO. SERVS. BRANCH, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS AND PAROLEES 2006 1 (2007), https://web.archive.org/web/20171219115659/http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf.

56. Hopper et al., *supra* note 38, at 529–30.

57. SIMON, *supra* note 24, at 3–15.

58. Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to Brown v. Plata*, 48 HARV. C.R.-C.L. L. REV. 217, 221 (2013) (“As a result of mass incarceration policies, prisons have accumulated and retain a population peculiarly vulnerable to the health problems of aging and chronic illness. Estimates suggest that as many as 40% of state prison inmates have chronic illnesses and given that prison populations are rapidly aging, it is likely that this ratio will rise steeply in coming decades.”).

59. *Brown v. Plata*, 563 U.S. 493, 504 (2011); Arnold Schwarzenegger, *Prison Overcrowding State of Emergency Proclamation*, OFFICE OF THE GOVERNOR OF CAL. (Oct. 4, 2006), <https://wayback.archive-it.org/5763/20101008194124/http://gov.ca.gov/proclamation/4278>; Heather Harris et al., *Just the Facts: California's Prison Population*, PUB. POLICY INST. OF CAL. (July 2019), <http://www.ppic.org/wp-content/uploads/jtf-prison-population-jtf.pdf>.

60. *Brown*, 563 U.S. at 502–06, 548–49.

61. 912 F. Supp. 1282 (E.D. Cal. 1995).

suicide prevention, recordkeeping, and speedy access to care.⁶² The *Coleman* court found that prison administrators displayed “deliberate indifference” to inmates’ suffering in violation of the Eighth Amendment and appointed a special master⁶³ to submit oversight reports regarding the prison mental health system’s compliance with the federal court’s remedial plans.⁶⁴ In 2001, a group of medically ill prisoners suffering from various chronic conditions filed a similar lawsuit against then-Governor Gray Davis, claiming Eighth Amendment violations rooted in deprivation of basic medical care in the case *Plata v. Davis*,⁶⁵ later renamed *Plata v. Schwarzenegger*.⁶⁶ In response, the district court granted injunctive relief in 2005, appointing a receiver who would not only monitor but also control, the day-to-day operations of medical care in all of California’s thirty-four prisons.⁶⁷

Finally, in 2009, the *Plata* and *Coleman* lawsuits were consolidated, and a three-judge panel was appointed.⁶⁸ The panel conducted a fourteen-day hearing and issued a 184-page order that expressly identified crowding as the primary cause of unconstitutionally inadequate mental health care in California prisons.⁶⁹ Holding that only a reduction in population could remedy California’s “longstanding and knowing failure to provide its prisoners with the minimal level of medical and mental health care required by the Constitution,” the panel commanded California to reduce its number of inmates to at least 137.5 percent of design capacity by removing 40,000 prisoners from the system in the next two years.⁷⁰

62. *Id.* at 1305–16.

63. *See* Lofstrom et al., *supra* note 54, at 28 n.2.

64. *Coleman v. Wilson*, 912 F. Supp. at 1319, 1323–24 (“[T]he evidence of defendants’ knowledge of the gross inadequacies in their system is overwhelming. The risk of harm from these deficiencies is obvious. The actual suffering experienced by mentally ill inmates is apparent. In the face of this reality, the court finds that defendants’ conduct constitutes deliberate indifference to the serious medical needs of the plaintiff class.”).

65. Complaint at 1–14, *Plata v. Davis*, No. 3:01-cv-01351-TEH (N.D. Cal. Apr. 5, 2001) (describing the plaintiffs’ untreated diseases and subsequent suffering).

66. No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

67. *See id.* at *30; *see also* Lofstrom et al., *supra* note 54, at 28 n.2.

68. Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1171 (2013).

69. *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 920–23 (E.D. Cal. 2009).

70. *Id.* at 962–63.

After the State appealed, the United States Supreme Court upheld the panel's order in its watershed 5-4 *Brown v. Plata* decision.⁷¹ Writing for the majority, Justice Anthony Kennedy graphically described the abysmal conditions of overcrowding and took the unusual step to include three photographs within the opinion itself.⁷² The majority strongly echoed the *Coleman-Plata* panel's injunction mandating a population reduction as the only acceptable solution to the population crisis.⁷³ Other fixes, such as expanding capacity, sending prisoners out of state, and additional hiring, would not suffice.⁷⁴ Finally, the court stated that California could reduce the prison population without significant threat to public safety and suggested reforms to release low-level offenders and parole violators.⁷⁵ *Brown* and its preceding litigation is significant in that it not only forced California to directly confront a humanitarian crisis it had shamefully ignored for decades, but the case also "put mass incarceration on trial" by questioning its legitimacy in the Court's acknowledgement that excessive sentencing practices had caused the crowding that, in turn, had created severe constitutional violations.⁷⁶

In the wake of *Brown v. Plata*, California had to reduce its state prison population by roughly 34,000 inmates in about two years.⁷⁷ In a difficult bind, returning Governor Jerry Brown quickly cobbled together a policy package later known as the California Public Safety Realignment, which shifted responsibility for low-level offenders away from the state and onto California's fifty-eight counties.⁷⁸ Taking effect in October 2011, Realignment required non-serious, non-violent, and non-sexual offenders with no serious prior convictions to serve their sentences in county jail under county-run post release community supervision (PRCS), or a combination of both.⁷⁹ For "non-non-non" offenders already serving state prison

71. *Brown v. Plata*, 563 U.S. 493, 502 (2011).

72. *See Brown*, 563 U.S. at 502–06, 510–11, 547–49 (2011) ("Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.").

73. *Id.* at 527–29.

74. *Id.*

75. *Id.* at 535, 538.

76. SIMON, *supra* note 24, at 14–15.

77. Lofstrom et al., *supra* note 54, at 6.

78. *Id.* at 5–6.

79. CAL. PENAL CODE § 1170(h)(3), (h)(5) (West Supp. 2019).

terms, these inmates would now participate in a PRCS program upon release instead of state parole, the revocation of which did not result in a return to state prison but, rather, a short stay in county jail, additional PRCS, or referral to another evidence-based program.⁸⁰

Realignment also overtly encouraged counties to develop their own community-based alternatives to incarceration in an effort to lower recidivism.⁸¹ Realignment was premised on the idea that local rehabilitation and supervision programs would better integrate healthcare and other social services, deliver programming more efficiently, and keep offenders rooted in their families and communities.⁸²

However, Realignment suffered from major flaws. In one striking example, the State allocated \$2.3 billion to help counties implement Realignment in its first three years, but distributed the funds based on counties' historic imprisonment rates and with no requirements for how counties would spend the money.⁸³ This was problematic because San Bernardino, a county that already sent a disproportionate number of its residents to prison, could now receive more funding which it could use to expand its jails, whereas counties like San Diego, which sent fewer people to prison because it had already implemented community-based programs, received fewer funds to continue those programs.⁸⁴

Realignment shrank the prison population but did not fully resolve the *Brown v. Plata* crisis. In its first year, Realignment reduced California's state inmates by 27,400, easing crowding to 150.5 percent of design capacity.⁸⁵ Three years into Realignment, the population had dropped to 140.9 percent of capacity, but the system still needed to move or release 2,850 inmates to reach the court mandate of 137.5 percent.⁸⁶

80. Hopper et al., *supra* note 38, at 556; see Lofstrom et al., *supra* note 54, at 5.

81. CAL. PENAL CODE § 17.5(a)(4)–(5) (West 2014) (“Realigning low-level felony offenders . . . to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society.”); Hopper et al., *supra* note 38, at 556.

82. Hopper et al., *supra* note 38, at 557–61.

83. Mia Bird & Joseph Hayes, *Funding Public Safety Realignment*, PUB. POLICY INST. OF CAL. (Nov. 2013), http://www.ppic.org/content/pubs/report/R_1113MBR.pdf; Hopper et al., *supra* note 38, at 561–75.

84. Hopper et al., *supra* note 38, at 569–70.

85. Lofstrom et al., *supra* note 54, at 7.

86. *Id.*

C. Proposition 47: Reform Horizon

On November 4, 2014, California voters decisively approved Proposition 47, The Safe Neighborhoods and Schools Act, ushering in the next major piece of sentencing reform post-Realignment.⁸⁷ The ballot initiative reclassified simple drug possession and five property crimes involving stolen property worth less than \$950⁸⁸ as misdemeanors, instead of felonies or wobblers, and allowed offenders previously convicted of those crimes to apply for resentencing.⁸⁹ In addition, Proposition 47's voter materials promised that the changes would reduce the state prison population by thousands of inmates and generate hundreds of millions of dollars of savings to be deposited in a Safe Neighborhood and Schools Fund for rehabilitation and education programs.⁹⁰

Proposition 47 enjoyed support from a surprisingly diverse political coalition. The initiative was written and promoted by Californians for Safety and Justice (CSJ), a non-profit that sourced its funding from a network of other center-left political foundations seeking to influence United States criminal justice policy and social attitudes, such as George Soros' Open Society Foundations and the American Civil Liberties Union.⁹¹ Crime Survivors for Safety and Justice, a victims group associated with CSJ's sister organization Alliance for Safety and Justice, also actively promoted Proposition

87. CAL. SEC'Y OF STATE, STATEMENT OF VOTE 91-93 (2014), <https://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf> (stating Proposition 47 passed by 59.6 percent of the vote).

88. *See supra* note 1 (summarizing amended statutes).

89. CAL. PENAL CODE § 1170.18(a) (West 2015).

90. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 37 ("In total, we estimate that the effects described above could eventually result in net state criminal justice system savings in the low hundreds of millions of dollars annually, primarily from an ongoing reduction in the prison population of several thousand inmates.").

91. *About Us*, CALIFORNIANS FOR SAFETY & JUSTICE, <https://safeandjust.org/about-us> (last visited Sept. 29, 2019) ("CSJ is the sister organization of Alliance for Safety and Justice, also a project of Tides Center and Alliance for Safety and Justice Action Fund, a 501(c)4 project of The Advocacy Fund. We are generously supported by a group of philanthropic foundations dedicated to replacing over-incarceration with new safety priorities, including Ford Foundation, Fund for Nonviolence, Open Society Foundations, Public Welfare Foundation, Rosenberg Foundation, The California Endowment, The California Wellness Foundation, The James Irvine Foundation, and The Butler Family Fund."); Jim Miller, *National ACLU Spends Big for California's Proposition 47*, SACRAMENTO BEE (Oct. 22, 2014), <https://www.sacbee.com/news/politics-government/capitol-alert/article3310071.html>; Paige St. John, *Prop. 47 Puts State at Center of a National Push for Sentencing Reform*, L.A. TIMES (Nov. 1, 2014), <http://www.latimes.com/local/politics/la-me-ff-pol-1101-proposition47-20141101-story.html>.

47.⁹² However, unlike victim-advocates of the past,⁹³ the CSJ's racially diverse representatives publicly rejected the excesses of mass incarceration as counterproductive to community healing and opposed retribution as an automatic response to personal tragedy.⁹⁴ On the other end of the spectrum, conservative billionaire B. Wayne Hughes, Jr. supported Proposition 47 from its early stages.⁹⁵ Right-wing figures Newt Gingrich and Senator Rand Paul later joined Hughes to publish editorials praising the measure as a solution to the expensive and ineffective imprisonment of low-level offenders.⁹⁶ While Attorney General Kamala Harris and Governor Jerry Brown remained neutral during the campaign, democratic Senator Diane Feinstein vehemently opposed the initiative.⁹⁷

In the four years since its passage, Proposition 47's effects on the prison population, crime rates, and the state's budget have begun to take shape. Within two months of the November 2014 election, the total prison population sank below the 137.5 percent mark mandated by the three-judge panel.⁹⁸ By December 2016, the state prison population had declined by over 15,000 inmates, helping return the incarceration rate in California to pre-Three Strikes levels and jail

92. See Jazmine Ulloa, *Survivors of Violent Crime Raise Their Voices in California to Call for a New Approach to Criminal Justice*, L.A. TIMES (Apr. 17, 2018), <http://www.latimes.com/politics/la-pol-ca-national-crime-victims-week-20180417-story.html>; Krisberg, *supra* note 40, at 148.

93. See BARKER, *supra* note 25, at 77 (describing the moral juxtaposition of the worthiness of crime victims against the unworthiness of criminals).

94. See ALL. FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>; Sarah Stillman, *Black Wounds Matter*, NEW YORKER (Oct. 15, 2015), <https://www.newyorker.com/news/daily-comment/black-wounds-matter>; Ulloa, *supra* note 92.

95. See Katia Savchuk, *Why a Conservative Billionaire Is Backing Criminal Justice Reform in California*, FORBES (Oct. 30, 2014), <https://www.forbes.com/sites/katiasavchuk/2014/10/30/why-a-conservative-billionaire-wants-to-reduce-sentences-for-drug-and-theft-crimes-in-california>.

96. Newt Gingrich & B. Wayne Hughes Jr., *What California Can Learn from the Red States on Crime and Punishment*, L.A. TIMES (Sept. 16, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-0917-gingrich-prop-47-criminal-justice-20140917-story.html>; Rand Paul & B. Wayne Hughes Jr., *Republicans Should Back Prop. 47*, ORANGE CTY. REG. (Oct. 29, 2014), <https://www.ocregister.com/2014/10/29/rand-paul-and-b-wayne-hughes-jr-republicans-should-back-prop-47>.

97. Dianne Feinstein, Opinion, *Prop. 47 Will Make Californians Less Safe*, L.A. DAILY NEWS (Oct. 15, 2014), <https://www.dailynews.com/2014/10/15/prop-47-will-make-californians-less-safe-dianne-feinstein> (“This would mean shorter prison sentences for serious crimes like stealing firearms, identity theft and possessing dangerous narcotics such as cocaine and date rape drugs The crimes that would be reclassified from a felony to a misdemeanor are not minor crimes.”).

98. Lofstrom et al., *supra* note 54, at 7.

population to near pre-Realignment levels.⁹⁹ Overall, crime in California remains comparable to the low crime rates of the early 1960s.¹⁰⁰ No evidence has emerged that Proposition 47 has affected violent crime rates, although there was a minor uptick in property crime after November 2014, specifically thefts out of cars and shoplifting.¹⁰¹

Proposition 47 has redistributed \$199 million in corrections savings to date.¹⁰² In June 2017, the Board of State and Community Corrections distributed a first round of \$103 million in community grants, followed by a second round of \$96 million in June 2019.¹⁰³ The funding went to local governments, health services agencies, and probation departments, among others, to provide substance abuse and mental health treatment, recidivism prevention, and housing services to Proposition 47 affected individuals.¹⁰⁴

III. STATUTES AND BALLOT MATERIALS

Proposition 47's nine amended criminal statutes and the Voter Guide pamphlet available on November 4, 2014 are the primary legal texts courts use to interpret voter intent regarding the initiative's ameliorative scope.¹⁰⁵ To explore later judicial interpretation, it is essential to first examine not only the statutory text, but also the various sections of the electoral materials as they communicated the effects of Proposition 47 to the electorate, theoretically shaping the electorate's legislative intent.

99. BIRD ET AL., *supra* note 4, at 5.

100. *Id.* at 8.

101. *Id.* at 7–14; PFAFF, *supra* note 8, at 152.

102. *Board Awards \$96m in Prop 47 Grants*, CAL. BD. OF STATE & CMTY. CORR. (June 13, 2019), <http://www.bscc.ca.gov/news/board-awards-96m-in-prop-47-grants>; *Board Awards \$103m in Prop 47 Funds to Innovative Rehabilitative Programs*, CAL. BD. OF STATE & CMTY. CORR. (June 8, 2017), <https://www.bscc.ca.gov/news/board-awards-103m-in-prop-47-funds-to-innovate-rehabilitative-programs>.

103. *Board Awards \$96m in Prop 47 Grants*, *supra* note 102; *Board Awards \$103m in Prop 47 Funds to Innovative Rehabilitative Programs*, *supra* note 102.

104. *Id.*; Jazmine Ulloa, *Prop. 47 Got Thousands out of Prison. Now, \$103 Million in Savings Will Go Towards Keeping Them Out*, L.A. TIMES (Mar. 29, 2017), <https://www.latimes.com/politics/la-pol-sac-prop-47-grant-awards-20170329-htmstory.html>; *Board Awards \$96m in Prop 47 Grants*, *supra* note 102; *Board Awards \$103m in Prop 47 Funds to Innovative Rehabilitative Programs*, *supra* note 102.

105. *E.g.*, *People v. Buycks*, 422 P.3d 531, 539 (Cal. 2018).

A. Statutes Reducing Felonies to Misdemeanors

Proposition 47 created three new criminal statutes and altered six others, which lowered penalties for low level drug and property offenses and created a specific misdemeanor resentencing procedure.¹⁰⁶ As with the ballot measure text of Proposition 47, these new and amended statutes reflect the tension between the goals of the limited reduction of criminal penalties for nonviolent crimes and the emphatic exclusion of a certain offender population convicted of offenses viewed as especially heinous.

Proposition 47 converted five property crimes involving amounts under \$950 and the crime of simple drug possession from felonies to misdemeanors.¹⁰⁷ Check forgery valued below \$950 became a misdemeanor, so long as the perpetrator was not part of the barred super-strike and sex offender population and, in addition, had not been convicted of both forgery and identity theft at the same time.¹⁰⁸ Writing a bad check for less than \$950, with intent to defraud and knowledge that funds were insufficient, was also reclassified as a misdemeanor, as well as receiving stolen property in the amount of less than \$950.¹⁰⁹

To further ameliorate punishment for low-level offenses, the measure created two new California Penal Code statutes.¹¹⁰ Newly minted section 459.5 formally recognized the new misdemeanor of “shoplifting” as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars.”¹¹¹ Similarly, section 490.2 distinguished the new misdemeanor of “petty theft” from felony grand theft if “the value of the money, labor, real

106. See CAL. HEALTH & SAFETY CODE §§ 11350, 11357, 11377 (West Supp. 2019); CAL. PENAL CODE §§ 459.5, 473, 476a, 490.2, 469, 666 (West Supp. 2019); CAL. PENAL CODE § 1170.18 (West 2015).

107. See VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70–74.

108. CAL. PENAL CODE § 473(b) (West Supp. 2019); see also *Gonzales II*, 424 P.3d 280, 286–88 (Cal. 2018) (holding that the forgery and identity theft offenses must have been made in connection with each other for felony sentencing to apply).

109. CAL. PENAL CODE §§ 476a, 496.

110. See *id.* §§ 459.5, 473, 476a, 490.2, 469, 666; CAL. PENAL CODE § 1170.18 (West 2015); CAL. HEALTH & SAFETY §§ 11350, 11357, 11377; VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70–74.

111. CAL. PENAL CODE § 459.5 (West Supp. 2019) (“Any other entry into a commercial establishment with intent to commit larceny is burglary.”).

or personal property taken does not exceed nine hundred fifty dollars.”¹¹² The statute that created misdemeanor petty theft also explicitly blocked misdemeanor status for the theft of a firearm, which some Proposition 47 opponents had falsely criticized in the ballot materials.¹¹³ In keeping with Proposition 47’s exclusion of serious super-strike and sex offender populations, if an individual from that group committed what the law would otherwise categorize as petty theft or shoplifting, the new laws would impose a felony punishment regardless.¹¹⁴

Outside of the property realm, Proposition 47 changed the simple possession of most drugs to a misdemeanor.¹¹⁵ Whereas previously the line between drug possession felonies, wobblers, and misdemeanors had depended on amount and type of drug, the newly amended statute made the illegal possession of most Schedule I, II, and III drugs always punishable only up to one year in jail.¹¹⁶ The substances covered included a wide array of opioids, hallucinogenic substances, stimulants, and various prescription drugs if taken illegally.¹¹⁷

Consistent with Proposition 47’s emphatic promise to “[e]nsure people convicted of murder, rape, and child molestation will not benefit,”¹¹⁸ every criminal statute created or modified by the ballot measure repeats the same string of statutory language used to deny benefits to specific individuals previously convicted of certain violent and sexual offenses known as “super strikes.”¹¹⁹ First, lower penalties are withheld from any person previously convicted of any crime listed in section 667(e)(2)(C)(iv), a subsection within California’s Three Strikes statute.¹²⁰ No individual with an underlying conviction for any

112. *Id.* § 490.2.

113. Compare *id.* § 490.2(c) (creating the crime of misdemeanor petty theft), with VOTER INFORMATION GUIDE 2014, *supra* note 4, at 39 (falsely claiming theft of a handgun would become a misdemeanor under Proposition 47).

114. CAL. PENAL CODE §§ 459.5, 490.2.

115. See CAL. HEALTH & SAFETY CODE § 11350.

116. See *id.*; VOTER INFORMATION GUIDE 2014, *supra* note 4, at 35.

117. See CAL. HEALTH & SAFETY CODE §§ 11054, 11055, 11056, 11350.

118. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70.

119. See CAL. PENAL CODE §§ 459.5, 473, 476a, 490.2, 469, 666; CAL. PENAL CODE § 1170.18 (West 2015); CAL. HEALTH & SAFETY CODE §§ 11350, 11357, 11377 (“[O]ne or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 . . .”).

120. CAL. PENAL CODE § 667(e)(2)(C)(iv) (West Supp. 2019); see also *Super Strikes*, SAN DIEGO OFFICE OF THE PUB. DEF., https://www.sandiegocounty.gov/content/sdc/public_defender/super_strikes.html (last visited Sept. 29, 2019).

homicide offense, various sex crimes involving children under fourteen, sexually violent offenses, or any “serious or violent felony offense punishable in California by life imprisonment or death,” among others, can ever benefit under Proposition 47.¹²¹

In addition, Proposition 47 excludes individuals required to register under California’s Sex Offender Registration Act based on convictions for various sex crimes.¹²² Every statute enacted by Proposition 47 explicitly prohibits both new misdemeanor sentences and resentencing of past offenses for this carve-out population of serious super-strike and sex offenders.¹²³

B. Resentencing Procedure

In addition to reclassifying certain felonies as misdemeanors for future prosecutions, Proposition 47 created a retroactive resentencing process for individuals convicted of felonies, “who would have been guilty of a misdemeanor . . . had [Proposition 47] been in effect” when the original crime was committed.¹²⁴ Newly added section 1170.18 allows individuals currently serving sentences for eligible crimes to go before the original sentencing court and request to have their sentences changed to misdemeanors “in accordance with” one of the listed criminal or drug statutes amended by Proposition 47.¹²⁵

If an offender otherwise qualifies, the trial court may still block resentencing if it determines the petitioner would present “an unreasonable risk of danger to public safety.”¹²⁶ The statute defined

121. CAL. PENAL CODE § 667(e)(2)(C)(iv) (naming assault with a machine gun on a police officer, possession of a weapon of mass destruction, and solicitation to commit murder as additional super-strikes); *see also supra* note 113.

122. *See* CAL. PENAL CODE §§ 459.5, 473, 476a, 490.2, 469, 666; CAL. PENAL CODE § 1170.18 (West 2015); CAL. HEALTH & SAFETY §§ 11350, 11357, 11377; *see also* CAL. PENAL CODE § 290 (West 2014) (“This paragraph does not apply to a person who is subject to registration pursuant to paragraph (2) or (3).”).

123. *See* CAL. PENAL CODE §§ 459.5, 473, 476a, 490.2, 469, 666; CAL. PENAL CODE § 1170.18 (West 2015); CAL. HEALTH & SAFETY §§ 11350, 11357, 11377.

124. CAL. PENAL CODE § 1170.18(a) (West 2015).

125. *Id.*; *see also* CAL. PENAL CODE § 1170.18(l) (“If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.”); *People v. Adelman*, 416 P.3d 786, 790–92 (Cal. 2018) (holding that the original sentencing court has jurisdiction over resentencing, not the jurisdiction where petitioner transferred probation, due to familiarity with case details); *People v. Page*, 406 P.3d 319, 323 (Cal. 2017) (clarifying that a petitioner does not need to be charged with a crime enumerated by Proposition 47 in order to be resentenced in “accordance with” one of the listed statutes); *infra* Section IV(A) (discussing *Page*).

126. CAL. PENAL CODE § 1170.18(b); *see also* CAL. PENAL CODE § 667(e)(2)(C)(iv) (West Supp. 2019) (listing super-strike offenses).

the phrase as “an unreasonable risk that the petitioner will commit a new violent felony,” recycling the same super-strike standard used to bar certain current and future offenders from receiving any and all Proposition 47 benefits.¹²⁷ In evaluating the likelihood a petitioner will commit a new super-strike, a court considers the nature of the person’s criminal history, including “the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes,”¹²⁸ in addition to the petitioner’s prison records and any other relevant evidence.¹²⁹ As an extra safety precaution, even if a court approves recall of the sentence and resentencing to a misdemeanor, the petitioner must automatically serve a mandatory year of state parole upon release, unless the court specifically chooses to waive the requirement.¹³⁰ Section 1170.18 also permits the re-designation, as opposed to resentencing, of applicable felonies as misdemeanors for individuals who had already completed their sentences and, in those cases, does not require the public safety assessment and parole period.¹³¹

As with all other aspects of Proposition 47’s legal framework, any applicant with a previous super-strike conviction is never eligible for any form of post-conviction resentencing or re-designation of previous felonies.¹³² Finally, if a court permits resentencing or resignation of a previous felony to a misdemeanor, it “shall be considered a misdemeanor for all purposes,” except as it relates to firearm possession and ownership.¹³³ As we will see, the extent of “for all purposes” will greatly depend on the California Supreme Court’s detailed interpretation of the language of Proposition 47’s statutes and ballot pamphlet.¹³⁴

127. CAL. PENAL CODE § 1170.18(c) (West 2015); *see also* CAL. PENAL CODE §§ 459.5, 473, 476a, 490.2, 469, 666; CAL. PENAL CODE § 1170.18 (West 2015); CAL. HEALTH & SAFETY §§ 11350, 11357, 11377.

128. CAL. PENAL CODE § 1170.18(b)(1).

129. *Id.* § 1170.18(b)(2).

130. *Id.* § 1170.18(d); *see also* *People v. Morales*, 371 P.3d 592, 594 (Cal. 2016) (holding that credit for time served does not reduce the Prop 47’s one-year parole period because the voters were informed and intended that a person who benefitted from the new legislation would be placed on parole for one year subject to the court’s discretion).

131. CAL. PENAL CODE § 1170.18(f).

132. *Id.* § 1170.18(i).

133. *Id.* § 1170.18(k).

134. *See, e.g.,* *People v. Buycks*, 422 P.3d 531, 539 (Cal. 2018) (major judicial analysis of phrase “for all purposes”).

C. Ballot Materials

The Official Voter Information Guide of the November 4, 2014 General Election (“Voter Information Guide”) is the primary legal document outside of the statutes themselves that courts use to interpret Proposition 47.¹³⁵ Eleven of the informational pamphlets’ pages contained Proposition 47’s Official Title and Summary by the Attorney General, analysis by the non-partisan Legislative Analyst, emotionally charged Arguments pages, and finally a full legal text of the proposed Safe Neighborhoods and Schools Act.¹³⁶

The Attorney General’s “Official Title and Summary” opened the measure with a bulleted list that succinctly explained the core ideas of Proposition 47:

Criminal Sentences. Misdemeanor Penalties. Initiative Statute.

- Requires misdemeanor sentence instead of felony for certain drug possession offenses.
- Requires misdemeanor sentence instead of felony for the following crimes when amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks.
- Allows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation, or is registered sex offender.
- Requires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk.
- Applies savings to mental health and drug treatment programs, K–12 schools, and crime victims.¹³⁷

A detailed description by the Legislative Analyst followed, which explained Proposition 47’s proposed statutes reducing penalties in lay speak.¹³⁸ Next, the Legislative Analyst reviewed Proposition 47’s

135. See VOTER INFORMATION GUIDE 2014, *supra* note 4. Published by the California Secretary of State, the eighty-page ballot supplement contained descriptions of four other ballot initiatives, candidate statements, campaign finance reports, and political party statements of purpose, among other information. *Id.* at 3; *see, e.g., Buycks*, 422 P.3d at 539 (courts look to the Voter Information Guide to ascertain voters’ intent in passing Proposition 47).

136. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 34–39, 70–74.

137. *Id.* at 34.

138. *Id.*

resentencing policy, wherein individuals serving felony sentences for the property and drug crimes reclassified as misdemeanors would be able to “apply to have their felony sentences reduced to misdemeanor sentences” unless they had previously “committed a specified severe crime,” in which case the conviction would remain a felony.¹³⁹ Returning again to the contrast between low-level and serious offenders, the measure emphasized that a court is “not required” to resentence someone if the court determines that person will “commit a specified severe crime” in the future.¹⁴⁰ As a final safeguard, the Legislative Analyst mentioned that all imprisoned offenders a court deemed safe for resentencing and release would be required to spend one year on state parole (as opposed to county-run PRCS) unless a judge optionally waived the requirement.¹⁴¹

Last, under “Fiscal Effects,” the Legislative Analyst provided an extensive projection of the Proposition 47’s financial impact.¹⁴² This included the anticipation that Proposition 47 would generate savings “in the low hundreds of millions of dollars,” for the state criminal justice system.¹⁴³ First, the reclassification would “make fewer offenders eligible for state prison” so that in several years the prison population would begin to shrink by several thousand inmates annually on an ongoing basis.¹⁴⁴ Second, Proposition 47 would create an ongoing outflow of thousands of recently resentedenced prisoners for several years after the measure’s implementation.¹⁴⁵ On the county side, the Legislative Analyst projected a savings of “several hundred million dollars annually,” created by freeing up space in county jails, seeing as those sentenced to jail for misdemeanors versus felonies would spend less, if any, time in jail.¹⁴⁶ Finally, it was anticipated that the California justice system would save money in the long run if the mental health and substance abuse programs funded by Proposition 47 increased enrollment, therefore precluding commission of future crimes.¹⁴⁷

139. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 36.

140. *Id.*; see also *supra* Section III(B) (explaining how section 1170.18 imports the concept of super-strikes from the Three Strikes era).

141. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 36.

142. *See id.* at 36–37.

143. *Id.* at 37.

144. *Id.* at 36.

145. *Id.*

146. *Id.* at 34.

147. *Id.* at 37.

The back pages of the Voter Information Guide featured the complete proposed text of the Safe Neighborhoods and Schools Act, including the language of all proposed statutory amendments to California's penal, government, and health and safety codes.¹⁴⁸ The act also included an uncodified preamble and uncodified final clauses that spoke to Proposition 47's purpose.¹⁴⁹ Despite never becoming legal statutes themselves, the California Supreme Court cited these sections heavily in its later cases analyzing voter intent.¹⁵⁰ Under section 2 of the preamble, "Findings and Declarations," it stated:

The people enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment. This act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.¹⁵¹

The following section, section 3, "Purpose and Intent," listed six numbered items as "the purpose and intent of the people of the State of California" in enacting Proposition 47:

(1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act. (2) Create the Safe Neighborhoods and Schools Fund . . . (3) Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes. (4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors. (5) Require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure

148. *Id.* at 70–74 (utilizing italic text to indicate amended and strikethrough text to indicate deleted statutory language); *see supra* Section III(A) (explanation of the specific statutory changes enacted by Proposition 47).

149. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70, 74.

150. *See, e.g.,* *People v. Buycks*, 422 P.3d 531, 539 (Cal. 2018) ("Finally, uncodified sections of Proposition 47 informed voters that the act 'shall be broadly construed to accomplish its purposes,' and that its provisions 'shall be liberally construed to effectuate its purposes.'").

151. *See id.* at 70.

that they do not pose a risk to public safety. (6) This measure will save significant state corrections dollars on an annual basis¹⁵²

At the very end of the act, after the text of the proposed laws, section 15, “Amendment,” instructs, “This act shall be broadly construed to accomplish its purposes,” and further down, section 18 titled, “Liberal Construction,” similarly reads, “This act shall be liberally construed to effectuate its purposes.”¹⁵³

IV. CALIFORNIA SUPREME COURT INTERPRETATION

The court’s varied reading of Proposition 47’s purpose has noticeably reflected the multiple conflicting goals contained in the measure’s amended statutes and ballot materials. Since June 2016, the court has published eighteen opinions tackling various provisions of Proposition 47, addressing a broad range of substantive and procedural legal questions.¹⁵⁴ It is noteworthy that in all but three of the eighteen cases, all seven justices voted unanimously, with the occasional very short concurring opinion, often highlighting a peripheral issue.¹⁵⁵ In addition, the California Court of Appeal has published over two hundred opinions that reference Proposition 47, so it is likely this trend will continue.¹⁵⁶

In addition to a penchant for unanimity, the opinions apply the same core methods of statutory interpretation rooted in California precedent. The court reads statutes enacted by ballot initiatives as it does those enacted by the state legislature, “beginning with the text as the best guide to voter intent and turning to extrinsic sources such as ballot materials [when necessary] to resolve ambiguities.”¹⁵⁷ First, the court carefully examines the plain language of the statute itself,

152. *Id.*

153. *Id.* at 74.

154. *See supra* note 9.

155. *See, e.g., In re C.B.*, 425 P.3d 40, 51 (Cal. 2018) (Liu, J., concurring) (agreeing with majority but noting that defendants alternately could have raised a claim under the California right to privacy).

156. *See, e.g., People v. Baldwin*, 241 Cal. Rptr. 3d 786 (Ct. App. 2018) (recent California Court of Appeal case interpreting various aspects of Proposition 47); *People v. E.P. (In re E.P.)*, 240 Cal. Rptr. 3d 888 (Ct. App. 2018) (same); *People v. Acosta*, 239 Cal. Rptr. 3d 833 (Ct. App. 2018) (same).

157. *See, e.g., id.* at 44.

“affording the words their ordinary and usual meaning.”¹⁵⁸ The court also analyzes the language of an individual provision in the context of a statute as a whole and as part of a wider “statutory scheme,” such as all nine codified sections adapted or created by Proposition 47, as they interact with and modify each other.¹⁵⁹ If looking at plain meaning, statutory structure, and the statutory scheme as a whole all fail, the court will rely on extrinsic evidence such as ballot materials to gain insight into voters’ intended purpose.¹⁶⁰ Finally, the court repeatedly follows the presumption that voters were “aware of existing laws at the time the initiative was enacted” just as the legislature would have been.¹⁶¹

Despite their stated status as merely supplementing unclear statutory language,¹⁶² ballot materials feature consistently in the court’s reading of Proposition 47. The court frequently references the Voter Guide as secondary support in cases where a statute “means what it says,” and occasionally features it as a focal point in its analysis.¹⁶³ In at least two cases, electoral materials arguably supplant clear statutory text, sparking a rare debate among justices.¹⁶⁴

While the court claims to adhere to traditional interpretive principles, it applies those principles unevenly depending on the contested subject matter within Proposition 47’s scope, revealing ideological tensions between expanding ameliorative benefits to low-level offenders and anxieties regarding public safety. For cases involving minor property crimes, the justices have been incredibly creative in their ability to utilize the smallest turns of phrase to expand

158. *Gonzales II*, 424 P.3d 280, 284 (Cal. 2018) (quoting *Alcala v. Superior Court*, 185 P.3d 708, 717 (Cal. 2018)).

159. *People v. Adelman*, 416 P.3d 786, 787 (Cal. 2018); *Gonzales I*, 392 P.3d 437, 447 (Cal. 2017).

160. *See Gonzales II*, 424 P.3d at 286; *People v. Valencia*, 397 P.3d 936, 959 (Cal. 2017).

161. *People v. Buycks*, 422 P.3d 531, 541 (Cal. 2018) (quoting *Prof’l Eng’rs in Cal. Gov’t v. Kempton*, 155 P.3d 226, 246 (Cal. 2007)); *accord Adelman*, 416 P.3d at 791; *People v. Martinez*, 413 P.3d 1125, 1129 (Cal. 2018); *Valencia*, 397 P.3d at 952 (quoting *Prof’l Eng’rs in Cal. Gov’t*, 155 P.3d at 246); *People v. Romanowski*, 391 P.3d 633, 636 (Cal. 2017); *People v. Morales*, 371 P.3d 592, 595 (Cal. 2016).

162. *Gonzales I*, 392 P.3d at 444 (quoting *In re Tobacco II Cases*, 207 P.3d 20, 31 (Cal. 2009)) (“If the language is unambiguous, there is no need for further construction. If, however, the language is susceptible of more than one reasonable meaning, we may consider the ballot summaries and arguments to determine how the voters understood the ballot measure and what they intended in enacting it.”).

163. *People v. Page*, 406 P.3d 319, 324 (Cal. 2017).

164. *See Gonzales I*, 392 P.3d at 450–55 (Cal. 2017) (Chin, J., dissenting); *Valencia*, 397 P.3d at 964–77, 977–89 (Cal. 2017) (Liu, J., dissenting) (Cuellar, J., dissenting).

the number and type of offenses eligible for reduction to a misdemeanor. Conversely, when drug crimes or procedures for filtering out serious offenders are involved, the court often takes a negative stance, reading a restrictive voter intent from the ballot materials and denying defendants' claims based on varied applications of statutory retroactivity. Viewed in isolation, these opinions might appear as dry exercises in statutory interpretation or moot debates over niche legal questions regarding petty crimes, with little wider significance for California's criminal reform debate. Taken as a whole, however, many fascinating contradictions emerge.

A. *Expansive Approach to Property Crimes*

The court has taken a creative and generous approach to its interpretation of Proposition 47 regarding property crimes, extending misdemeanor status to varied forms of criminal conduct outside of the offenses expressly named in the ballot initiative.¹⁶⁵ To accomplish this, the court has expansively interpreted the new shoplifting and petty theft statutes created by Proposition 47. As support, the court has construed the ballot materials to prioritize voters' desire to reduce punishment for non-violent crimes, with an emphasis on the value of property taken versus the type of property or method of taking.

The court's sensible flexibility is typically illustrated in *People v. Romanowski*,¹⁶⁶ an earlier case that explored whether theft of access card information (data from a debit or credit card) under \$950 is eligible for reduction to a misdemeanor.¹⁶⁷ The petitioner had been convicted for theft of access card information under section 484e(d), a statute and offense not explicitly mentioned in the text of Proposition 47, and the trial court had therefore denied his petition for resentencing.¹⁶⁸ However, the court found that Romanowski's conviction could be reduced to a misdemeanor based on a reading of the recently enacted petty theft statute.¹⁶⁹ Section 490.2 had created a new misdemeanor for "obtaining any property by theft" worth less than \$950 "[n]otwithstanding . . . any other provision of law defining

165. See CAL. PENAL CODE §§ 459.5, 473, 476a, 490.2, 496, 666 (West Supp. 2019); CAL. HEALTH & SAFETY CODE §§ 11350, 11357, 11377 (West Supp. 2019).

166. 391 P.3d 633 (Cal. 2017).

167. *Id.* at 634–35.

168. *Id.* at 635.

169. *Id.*

grand theft,” which the court interpreted to encompass the theft of access code information under section 484e(d).¹⁷⁰

The court bolstered its statutory interpretation with excerpts from the ballot materials stating that Proposition 47’s purpose was to “be liberally construed,” “[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes.”¹⁷¹ Thus, the court would no longer label theft of property worth less than \$950 grand theft “solely because of the property involved.”¹⁷² Taken together with the statute’s plain language, the ballot materials established that the reasonable voter would intend and expect theft of access card information under the threshold amount to receive downgraded punishment under Proposition 47.¹⁷³

An earlier case, *People v. Gonzales*,¹⁷⁴ represents one of the court’s first major departures from the application of everyday meaning to the language of Proposition 47. The case examined whether a defendant’s entry into a bank to cash a forged check worth less than \$950 could be resentenced as a misdemeanor under the new crime of shoplifting.¹⁷⁵ Newly created section 459.5 defined shoplifting as “entering a commercial establishment with intent to commit larceny,” whereas cashing forged checks is considered a distinct offense of theft by false pretenses.¹⁷⁶

Rather than interpret shoplifting as the taking of tangible merchandise from a store, which directly comported with the physical taking associated with larceny, the court opted to take an obscure historical route.¹⁷⁷ The opinion explained that in 1927, two criminal statutes had consolidated the three historical concepts of stealing: larceny, theft by false pretenses, and embezzlement, and had reorganized them under the label “theft.”¹⁷⁸ At the same time, an additional statute had retroactively substituted the broadened

170. *Id.*; CAL. PENAL CODE § 490.2 (“Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor.”).

171. *Romanowski*, 391 P.3d at 637.

172. *Id.* (quoting VOTER INFORMATION GUIDE 2014, *supra* note 4, at 35, 70, 74).

173. *Id.* at 637.

174. *Gonzales I*, 392 P.3d 437 (Cal. 2017).

175. *Id.* at 440.

176. *Id.*

177. *Id.* at 452.

178. *Id.* at 442; *see* CAL. PENAL CODE § 484 (West Supp. 2019) (consolidating the three concepts of larceny, false pretenses, and embezzlement under the single label “theft”).

definition throughout the entirety of the California Penal Code.¹⁷⁹ Therefore, intent to commit “larceny” as used in section 459.5 truly meant “theft,” which in turn could include entering a commercial business during open hours with intent to commit other forms of non-larcenous theft, such as cashing forged checks.¹⁸⁰ The court justified its interpretation with the tenet that voters are assumed to be aware of all existing laws when they pass an initiative, including special judicial constructions.¹⁸¹ Therefore “shoplifting” under Proposition 47, the opinion argued, is intended as “a term of art, which must be understood as it is defined, not in its colloquial sense.”¹⁸² The court sourced additional support from Proposition 47’s ballot materials, namely that voters intended the initiative to reduce punishment and require misdemeanors for non-serious offenses, which indicated that voters did not view the three underlying forms of theft differently.¹⁸³

The *Gonzales* court’s refashioning of a commonly used term did not sit well with Justices Chin and Liu, who dissented in one of only three split California Supreme Court opinions on Proposition 47 to date.¹⁸⁴ Reinforcing the link between common understanding and voter intent, Justice Chin’s dissenting opinion decried that the concept of shoplifting had been “expand[ed] . . . beyond all recognition” when voters clearly understood it to mean the stealing of tangible merchandise from a store.¹⁸⁵ Additionally, “autocorrecting” the narrower concept of “larceny” to signify the broader term of consolidated “theft” would change the substantive nature of the crimes themselves, creating potentially absurd results.¹⁸⁶ For example, was an employee sitting in a business minutes before closing with intent to commit embezzlement now a shoplifter?¹⁸⁷ Although mild by most standards, the existence of any overt conflict in Proposition 47

179. See CAL. PENAL CODE §§ 484, 490a (“Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word ‘theft’ were substituted therefor.”).

180. *Gonzales I*, 392 P.3d at 440.

181. *Id.* at 445.

182. *Id.* at 446.

183. *Id.* at 445–46.

184. See *id.* at 450–55 (Chin, J., dissenting); see also *People v. Valenzuela*, 441 P.3d 896 (Cal. 2019); *People v. Valencia*, 397 P.3d 936 (Cal. 2017).

185. *Gonzales I*, 392 P.3d at 452–53 (“The ballot materials, a useful source of ascertaining voter intent . . . demonstrate the voters’ understanding that shoplifting was limited to its common understanding.”).

186. *Id.* at 451, 455.

187. *Id.* at 455.

jurisprudence is notable, especially in an opinion regarding low-level property crimes, and speaks to the unorthodox nature of the majority's interpretation.¹⁸⁸

While the court used a flexible interpretive approach in *Romanowski* and *Gonzales* to allow new types of grand theft-related conduct to fall under Proposition 47's resentencing umbrella, it pushed the envelope even further in *People v. Page*.¹⁸⁹ Previously, only offenders convicted of the specific enumerated statutes listed in section 1170.18(a) could apply for resentencing.¹⁹⁰ In *Page*, the court unanimously decided to liberate future petitioners from that list, so that offenders charged under other statutes, even within the California Vehicle Code, could theoretically seek resentencing as a misdemeanor "in accordance with" one of the enumerated statutes.¹⁹¹

Page involved a petitioner who had applied to resentence a felony conviction for "joyriding" under California Vehicle Code section 10851 as a misdemeanor because the vehicle was worth less than \$950.¹⁹² However, *Page*'s petition was denied because joyriding did not appear in the list of enumerated statutes expressly eligible for resentencing under section 1170.18(a).¹⁹³ Despite this, the court decided to allow resentencing because joyriding under California Vehicle Code section 10851 can involve the subtle distinction of taking of a vehicle with the intent to steal, versus merely driving a vehicle post-theft.¹⁹⁴ The court reasoned that if the defendant's conviction records showed his joyriding crime rested on what was essentially vehicle theft, he could seek resentencing under section 490.2 for petty theft "regardless of the statutory section under which the theft was charged."¹⁹⁵

188. The court's broadening of the concept of "shoplifting" was not infinite, however. In January 2019, the court held that "entering [a store's] . . . interior room that is objectively identifiable as off-limits to the public with intent to steal therefrom is not shoplifting, but instead remains punishable as burglary." *People v. Colbert*, 433 P.3d 536, 537 (Cal. 2019).

189. 406 P.3d 319 (Cal. 2017).

190. See CAL. PENAL CODE § 1170.18(a) (West 2015) (permitting a petitioner to "request resentencing . . . in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act").

191. *Page*, 406 P.3d at 323–25.

192. *Id.* at 320–21.

193. *Id.* Ironically, had the defendant committed grand theft auto for under \$950, he would have been able to seek relief under Proposition 47 without issue under section 490.2, petty theft.

194. *Id.* at 326.

195. *Id.* at 325.

The court justified this vast expansion of offenses eligible for resentencing with concrete interpretations of specific statutory language in addition to highlighting the same permissive portions of the ballot materials as it did in *Romanowski* and *Gonzales*. A straightforward reading of section 490.2's wording "obtaining *any* property by theft" established that joyriding with intent to permanently steal a car within the \$950 value limit easily fit the basic statutory meaning.¹⁹⁶ Furthermore, the court highlighted section 1170.18(a)'s phrase that a petitioner may request sentencing "in accordance with" one of the listed statutes to mean that it is not a list of offenses the petitioner must be charged under but, rather, should be "[u]nderstood as a list of sections under which defendants are to be resentenced."¹⁹⁷ The fact that Proposition 47 added two previously non-existent statutes for petty theft and shoplifting, which also appear in the enumerated list of statutes to be resentenced "in accordance with," further reinforced this reading because it would have been impossible for a petitioner to have been originally charged under one of those laws prior to the enactment of the initiative.¹⁹⁸

The court reinforced its statutory construction with the ballot materials' statements that Proposition 47 should be construed "broadly" and "liberally" to accomplish its goals, and the Legislative Analyst's references to "theft of certain property (such as cars)" that would no longer be charged as felonies "solely because of the property involved."¹⁹⁹ The court reasoned that "these indicia of the voters' intent support[ed] an inclusive interpretation"—one that would extend not only to perpetrators of joyriding but, theoretically, to an entirely new range of criminal conduct and its corresponding charging statutes not originally contemplated by Proposition 47.²⁰⁰

B. Restrictive Approach to Perceived Public Safety Threats

In light of the court's decisions greatly expanding Proposition 47's scope for property crimes, one might expect that the same interpretive flexibility would translate to the court's interpretation of other issues such as drug possession, resentencing procedures, and

196. *Id.* at 324–25.

197. *Id.* at 323.

198. *Id.* at 323–24.

199. *Id.* at 324–25.

200. *Id.* at 325.

other key aspects of the measure. Especially in a post-*Page* environment where the court had unshackled Proposition 47's resentencing procedure from its enumerated statutes, it seems reasonable that other aspects of Proposition 47 would also be "liberally construed."²⁰¹

Yet the opposite trend has emerged when the recent California Supreme Court decisions are viewed as a whole. On questions apart from low-level property crimes, the court has often restrictively interpreted voter intent as it relates to the scope of resentencing procedures, retroactive application of resentencing benefits, and other issues that affect recidivist or more serious criminals. This is not shocking. After all, Proposition 47's uncodified preamble clearly lists "[ensuring] that people convicted of murder, rape, and child molestation will not benefit from this act" as the first of its six stated purposes.²⁰² Furthermore, the exclusion of offenders who have committed super-strikes is explicitly codified in every statute Proposition 47 enacted.²⁰³

In *People v. Morales*,²⁰⁴ the court's very first case analyzing Proposition 47, the court restricted a benefit to resentenced criminals, rooted in a straightforward reading of statutory and ballot language. The petitioner was convicted of felony heroin possession prior to the enactment of Proposition 47.²⁰⁵ However, Morales was set to serve three years of PRCS²⁰⁶ instead of his formal sentence of sixteen months in prison due to 220 days of good conduct credits he had already accumulated while in custody awaiting adjudication.²⁰⁷ Yet when Morales successfully petitioned for resentencing under Proposition 47, section 1170.18(d) nonetheless required him to serve one year of more-stringent state parole, even though the credits would have normally applied towards his parole under the preexisting California Penal Code statute.²⁰⁸

201. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 74.

202. *Id.* at 70.

203. CAL. PENAL CODE § 490.2(a) (West Supp. 2019); CAL. PENAL CODE § 1170.18(i) (West 2015).

204. 371 P.3d 592 (Cal. 2016).

205. *Id.* at 593.

206. *See also supra* notes 76–78 (distinguishing Post Release Community Supervision and its role in Realignment policy from state parole).

207. *Morales*, 371 P.3d at 594.

208. *Id.* at 595; *see* CAL. PENAL CODE § 1170.18(d); *see also* CAL. PENAL CODE § 2900.5(c) (West 2011) (stating that good time credits apply to "any period of imprisonment and parole").

The court upheld the banned use of good time credits, citing section 1170.18(d)'s language, "shall be given credit for time served *and* shall be subject to parole for one year," as indication that credits could apply to reduce a resentenced petitioner's new misdemeanor sentence but not the mandatory one year parole period.²⁰⁹ Moreover, the decision quoted the ballot materials' statement that "[o]ffenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement" as evidence that voters anxious about the release of former felons were reassured by mandatory parole period and would not want to curtail a resentencing court's discretion.²¹⁰ Rebutting Morales's argument that mandating parole would cost the state more, the court agreed that although placing fewer resentenced individuals on parole would save money, "the purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings."²¹¹

The *Morales* court's analysis, despite turning on a single preposition, straightforwardly adheres to the statutory and ballot text and therefore appears fairly self-evident, especially given the anxiety about early release of prisoners that pervaded the Voter Guide.²¹² However, contradictions emerge when one examines the *Morales* facts more carefully. Primarily, Morales himself was already released into larger society by virtue of his original PRCS sentence.²¹³ He was both already under a form of government surveillance and physically free to harm the public.²¹⁴ If the court based its reasoning on the projected fears of "[s]ome voters who were concerned about simply releasing persons," placing the petitioner under state parole versus community supervision would have had minimal, if any, effect.²¹⁵ Moreover, Morales was set to serve three years of PRCS, whereas now

209. *Morales*, 371 P.3d at 594–595 (emphasis added).

210. *Id.* at 596 ("Some voters who were concerned about simply releasing persons who had committed what had been felonies might have been reassured by this promise, a reassurance that might have persuaded them to vote for the proposition. We have no reason to believe any voter intended to curtail or eliminate the court's discretion to impose parole whenever excess credits exist, and much reason to believe the opposite.")

211. *Id.* at 597 (responding to amici briefs).

212. VOTER INFORMATION GUIDE 2014, *supra* note 4, at 39 ("Prop. 47 will require the release of thousands of dangerous inmates These early releases will be virtually mandated by Prop 47.")

213. *Morales*, 371 P.3d at 594.

214. *Id.*

215. *Id.* at 596.

he would only serve one year of state parole, gaining two completely unsupervised years.²¹⁶ While it is understandable that the court may not have wanted to set a precedent for other petitioners who, unlike Morales, were currently behind bars while applying for a change of sentence, the rationale of voter anxiety over the release of dangerous inmates falters under the specific case facts.

In addition, the *Morales* decision overlooks the very real differences between PRCS and state parole, and the way in which state parole violations vastly expanded California's prison population.²¹⁷ State parole missteps carry more severe penalties than PRCS, which was created as part of the Realignment policy package specifically designed to keep offenders from returning to state prison.²¹⁸ While the court may reasonably argue that cost of placing resentenced offenders on state parole for one year is worth the expense given voter expectations, the impact of low-level offenders committing what are often the most basic technical violations and returning to state prison in larger numbers would increase the state prison population, thwarting the goal of "ensur[ing] that prison spending is focused on violent and serious offenses."²¹⁹ Here, the court does not justify its prioritizing of inferred voter anxiety regarding prisoner release over Proposition 47's equally compelling goal of keeping non-violent criminals out of state prison, the same rationale the court used to expand the scope of relief for property crimes.²²⁰

In *People v. Martinez*,²²¹ the court applied a similarly selective interpretive logic to the resentencing of drug crimes. Martinez was convicted of drug transportation without intent to sell after police

216. *See id.* at 594.

217. *See* Jeffrey Lin et al., *Back-end Sentencing and Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions*, 48 CRIMINOLOGY 759, 761 (2010), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259341/doc/slspublic/j.1745-9125.2010.00201.x.pdf> ("By 2005, more than 60 percent of California prison admissions were individuals returning from parole. . . . Mass incarceration thus seems to be increasingly a result of the largely hidden dynamic of returning parolees to prison rather than court-ordered imprisonments for new felony offenses alone.").

218. *Compare Parole Conditions*, CAL. DEP'T CORR. & REHAB., <https://www.cdcr.ca.gov/parole/parole/parole-conditions> (last visited Sept. 29, 2019) (list of technical violations resulting in a return to state prison), *with* CAL. PENAL CODE § 3455 (West Supp. 2019) (PRCS revocation resulting in return to jail or other non-prison sanctions).

219. *Morales*, 371 P.3d at 597; VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70.

220. *See Gonzales I*, 392 P.3d 437, 445 (Cal. 2017) ("One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative.").

221. 413 P.3d 1125 (Cal. 2018).

discovered him with a plastic bag containing methamphetamine during a 2007 traffic stop.²²² At the time of Martinez's final conviction in 2010, only one general felony drug transportation statute existed under California Health and Safety Code section 11379.²²³ The general statute did not distinguish between transportation for personal use and transportation for distribution and sale.²²⁴ However, in 2013, the California legislature amended the statutory scheme to recategorize drug transportation without intent to sell as simple drug possession under California Health and Safety Code section 11377, a section later expressly reduced to a misdemeanor under Proposition 47 in 2014.²²⁵ Therefore, the government would almost surely have charged Martinez's criminal act of non-sale drug transportation as a misdemeanor had it occurred in 2018 when the California Supreme Court considered the case.²²⁶

Like the joyriding petitioner in *Page*, Martinez sought resentencing in "accordance with" the simple drug possession, now a misdemeanor under California Health and Safety Code section 11377, despite having been originally charged under a non-enumerated statute.²²⁷ Nevertheless, the court denied Martinez's petition for resentencing, citing limited retroactivity and normative social arguments about the nature of drug trafficking crimes.²²⁸ To qualify the denial, the court first addressed its recent decisions in *Romanowski* and *Page*, which expanded resentencing benefits for minor property crimes.²²⁹ The opinion explained that the mere fact that section 11379 is not one of the code sections enumerated in section 1170.18(a) was "not fatal to Martinez's petition for resentencing."²³⁰

Still, the court distinguished *Page* using a limited retroactivity argument. It observed that Martinez's particular drug transportation

222. *Id.* at 1127.

223. *Id.*

224. *Id.* ("The transportation element of the offense was satisfied so long as the defendant knowingly moved the substance a minimal distance.")

225. *Id.* ("In 2013, the Legislature narrowed the transportation statute by specifying that '[f]or purposes of this section, "transports" means to transport for sale.' In light of this amendment to section 11379, the possession and movement of methamphetamine for personal use, without intent to sell, can be charged only as a possession offense under section 11377.")

226. See CAL. HEALTH & SAFETY CODE § 11377 (West Supp. 2019).

227. *Martinez*, 413 P.3d at 1128–29.

228. *Id.* at 1129; see *People v. Page*, 406 P.3d 319, 323 (Cal. 2017) (citing CAL. PENAL CODE § 1170.18(a) (West 2015)).

229. *Martinez*, 413 P.3d at 1128, 1130.

230. *Id.* at 1128.

conviction, although the underlying conduct was likely identical to what is now considered drug possession, was ineligible for resentencing because Proposition 47's retroactive resentencing benefits hinge on the phrase "who would have been guilty of a misdemeanor under [the act] . . . had [Proposition 47] been in effect at the time of the offense."²³¹ Had Proposition 47 been enacted in 2007 when Martinez was arrested with drugs or in 2010 when his conviction became final, the initiative would have been unable to downgrade what was then still a blanket drug transportation felony under California Health and Safety Code section 11379.²³² Therefore, the court reasoned, for the purposes of the statutory analysis, it must only consider voter intent regarding Proposition 47's effect on drug *transportation* offenses.²³³

Once the court reframed the issue as Proposition 47's intended effect on the separate crime of drug transportation, it handily discarded Martinez's claim on several grounds. First, the court observed that the ballot materials, including the uncodified preamble and Legislative Analyst's assessment, "extensively discuss[ed] Proposition 47's impact on drug *possession* offenses" but did not mention drug transportation at all.²³⁴ Therefore, voters must have clearly understood that drug possession and drug transportation crimes "are distinct and merit different treatment under the proposition."²³⁵ Second, the court cited various policy rationales from unrelated precedent to demonstrate that the movement of drugs from place to place, even without the intent to sell, posed a greater danger to public safety and therefore merited greater punishment.²³⁶

231. *Id.*

232. *Id.* at 1129 ("[H]ad Proposition 47 been in effect at the time of Martinez's offense, his criminal conduct still would have amounted to felony drug transportation because none of the statutes amended or enacted by Proposition 47 altered the offense set forth in section 11379. Proposition 47's amendments to sections 11350, 11357, and 11377, all of which concern illegal possession of various controlled substances including methamphetamine, do not redefine or refer to unlawful transportation of controlled substances.").

233. *Id.*

234. *Id.* at 1129 (emphasis added).

235. *Id.*

236. *Id.* ("[T]he act of transportation substantially increases the risks to the public. Thus, a prohibition on the simple transportation of drugs affects the transporter's ability to make sales or purchases of contraband; it reduces the risks of traffic accidents due to drivers under the influence; and it arguably even reduces the frequency of personal drug use by discouraging users from carrying supplies in vehicles. The Legislature continues to punish transportation of contraband for sale more severely than possession of contraband for sale." (citations omitted)).

Last, the court returned to the core presumption that voters understood existing laws when they enacted Proposition 47.²³⁷ Therefore, if voters had intended resentencing to extend to that specific pocket of pre-2013, non-sale drug transportation felons including Martinez, the initiative would have expressly covered that offender group.²³⁸ The court used these combined rationales, based mostly on the initiative's silence on the subject of drug transportation crimes, to block resentencing for offenders convicted of criminal conduct that would have undoubtedly been charged as simple drug possession had it occurred after 2013.²³⁹

Although the court voted unanimously, Justice Liu authored a thoughtful concurring opinion, questioning whether it was “an oversight” to exclude non-violent, non-serious offenders such as Martinez from Proposition 47's ameliorative reach.²⁴⁰ The concurrence reasoned that Proposition 47's scope may have failed to retroactively include petitioners in Martinez's specific chronological sentencing window because in 2014 it was assumed that transportation without intent to sell would always be charged as drug possession going forward.²⁴¹ More significantly, the concurrence argued that allowing resentencing benefits to a petitioner like Martinez honored Proposition 47's core value to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like . . . drug possession.”²⁴² That clear goal, combined with an explicitly retroactive sentencing procedure laid out in section 1170.18(a) and the seemingly inadvertent exclusion of a non-serious, non-violent offender group of drug possessors, indicated that “it is not clear . . . that the initiative's proponents or the electorate really anticipated” that Proposition 47 would deny offenders like Martinez resentencing.²⁴³ While the concurrence ultimately stood by the court's textual interpretation, Justice Liu's suggestion that the legislature might want

237. *Id.*

238. *Id.* (“Proposition 47 could have been written to reduce to a misdemeanor any drug offense without intent to sell. But Proposition 47 was not written that way. The electorate reduced felony drug possession convictions under only three possession statutes, even though it presumably understood that before 2014, some possessory conduct resulted in felony convictions for unlawful transportation under former section 11379.” (citations omitted)).

239. *Id.* at 1128–30.

240. *Id.* at 1131 (Liu, J., concurring).

241. *Id.*

242. *Id.* (citing VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70).

243. *Id.*

to revise this potential neglect in Proposition 47's drafting represents an important, albeit brief, acknowledgement that a seemingly direct statutory interpretation could contradict, rather than illuminate, voter intent.²⁴⁴

C. Mixed Reading of Statutory Retroactivity

In subsequent Proposition 47 decisions, the court continued to navigate the interpretive tension between reducing punishment for non-serious and non-violent crimes and an aversion to extending any benefit to serious or recidivist offenders. Apart from the generally narrower interpretive strategies discussed in the previous subsection, the court also utilized the concept of Proposition 47's retroactive effect to create a distinction between cases where it granted versus withheld resentencing benefits to certain offender groups. This, in turn, has entailed a varied interpretation of *In re Estrada*,²⁴⁵ the California precedent that continues to control the retroactive application of ameliorative criminal statutes.²⁴⁶

Estrada addressed the scenario where a person has committed a criminal act, but between the act itself and adjudication of the case, an amended statute lessening punishment comes into force.²⁴⁷ The court held that “[t]he key date is the date of final judgment.”²⁴⁸ Therefore, a court should sentence a defendant under the amended statute mitigating punishment if the statute was enacted prior to his or her sentence becoming final, meaning all direct appeals were exhausted.²⁴⁹ This conclusion contradicted the California Penal Code's general rule that statutes were presumed to operate

244. *Id.* (“Although our holding today follows from the text of Proposition 47 . . .”).

245. 408 P.2d 948 (Cal. 1965).

246. *Id.* at 950 (“A criminal statute is amended after the prohibited act is committed but before final judgment by mitigating the punishment. What statute prevails as to the punishment the one in effect when the act was committed or the amendatory act?”).

247. The *Estrada* defendant had peacefully escaped confinement at a drug rehabilitation center. After the criminal escape act, but before the defendant went to trial, the statute governing such escapes was amended to distinguish between escapes with and without force. The amendment actively shortened both the term of imprisonment and mandatory prison time before parole eligibility kicked in for non-force escapees like the defendant. *Id.* at 950–51.

248. *Id.* at 952.

249. *Id.* at 951 (“If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.”).

prospectively and not retrospectively if there were no signs of another intent.²⁵⁰

Similar to recent Proposition 47 cases, legislative intent was central to the *Estrada* court's reasoning.²⁵¹ If the legislature did not expressly state whether an old or new statute should apply, "the amendatory statute should prevail" because

[w]hen the Legislature amends a statute . . . it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper . . . It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty . . . should apply to every case to which it constitutionally could apply.²⁵²

To continue to use the harsher earlier punishment for a non-final judgement would mean that "a desire for vengeance" had motivated the legislature, as opposed to the legitimate criminal punishment theories of deterrence, incapacitation, or rehabilitation.²⁵³ Because "[t]here is no place in the scheme for punishment for its own sake," the court concluded that, when "it is impossible to ascertain the legislative intent," an ameliorative statute is presumed to affect all non-final judgements.²⁵⁴

In *People v. Dehoyos*,²⁵⁵ the court overrode the *Estrada* presumption to deny automatic resentencing to petitioners whose sentences were not yet finalized, requiring them to instead follow Proposition 47's standard resentencing procedure.²⁵⁶ The case considered whether individuals sentenced prior to November 5, 2014, but with cases still on appeal, could benefit from an automatic reduction in sentence versus undergoing the formal process mandated in section 1170.18(b), including the trial court's "unreasonable risk of danger to public safety" assessment.²⁵⁷ Dehoyos had been sentenced in April 2014 to three years of probation for felony drug possession

250. *Id.* at 952; *see also* CAL. PENAL CODE § 3 (West 2014) ("No part of it is retroactive, unless expressly so declared.")

251. *In re Estrada*, P.2d at 951.

252. *Id.*

253. *Id.* at 951–52.

254. *Id.* at 952.

255. 412 P.3d 368 (Cal. 2018).

256. *Id.* at 369.

257. *Id.* at 370.

under California Health and Safety Code section 11377(a), an offense Proposition 47 reduced to a misdemeanor only months later.²⁵⁸ Dehoyos rooted her argument for automatic resentencing in a direct reading of *Estrada*.²⁵⁹ Accordingly, she requested that the court automatically convert her sentence to a misdemeanor, bypassing the formal process, because her sentence was on appeal and she had no disqualifying super-strike convictions.²⁶⁰ The court rejected her request.²⁶¹

In reaching its conclusion, the court utilized a mix of statutory text and ballot materials to circumvent *Estrada*.²⁶² First, the *Dehoyos* court noted that despite the absence of an express savings clause, section 1170.18 was “not silent on the question of retroactivity” because its various provisions describe its retroactive effect on future sentences, sentences being served, and sentences already completed “in conspicuous detail.”²⁶³ Second, section 1170.18(a)’s resentencing benefits to offenders “serving a sentence” did not distinguish between final and non-final sentences.²⁶⁴ Therefore, the ordinary meaning of “serving” refers to any period after a sentence has been imposed, regardless of its finality.²⁶⁵ Had Proposition 47’s creators intended to designate the resentencing procedures for final sentences only, the opinion argued, the statute and ballot materials could have stated so clearly.²⁶⁶ Third, Proposition 47’s uncodified preamble’s statement to “[r]equire a thorough review of criminal history and risk assessment of *any individuals* before resentencing” demonstrated that the court’s

258. *Id.* at 370–71.

259. *Id.* at 371.

260. *Id.*

261. *Id.* at 369.

262. *Id.* at 372–74.

263. *Id.* at 372–73 (“Separate provisions articulate the conditions under which the new misdemeanor penalty provisions apply to completed sentences (§ 1170.18, subs. (f)–(j)), sentences still being served (*id.*, subs. (a)–(e)), and sentences yet to be imposed (Pen. Code, §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subd. (a), 496, subd. (a), 666, subd. (a); Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a)).”).

264. *Id.* at 373–74.

265. *Id.* It should also be noted that the court has not utilized its interpretation of “serving a sentence” solely to limit ameliorative relief. In 2019, the court held unanimously in *People v. Lara* that petitioners who had committed a crime before Proposition 47’s effective date but had not been sentenced yet were entitled to automatic resentencing. 438 P.3d 251, 255 (Cal. 2019). In contrast to *Dehoyos*, the court observed that the text of the initiative was in fact “silent” with regards to that specific class of post-conduct but pre-sentencing offenders. *Id.*

266. *Dehoyos*, 412 P.3d at 374 (“But it does not follow that we can read ‘serving a sentence’ as though it instead read ‘serving a final sentence,’ as defendant argues—a conclusion that would require us to insert language that Proposition 47’s drafters did not see fit to include.”).

discretionary public safety determination applied broadly to any persons seeking a reduced sentence.²⁶⁷ These “indicia of legislative intent,” taken together, convinced the court that the voters did not intend the *Estrada* rule to permit automatic resentencing for non-final judgements.²⁶⁸ In this sense, Proposition 47’s subtle language “expressly contained its own retroactivity provision” with regard to the public safety, which, in turn, overruled the normal application of *Estrada* precedent.²⁶⁹

In contrast, the court has also used the *Estrada* rule to vastly expand relief available to petitioners seeking resentencing.²⁷⁰ For example, its expansive *People v. Buycys*²⁷¹ decision reembraced *Estrada* when it held that Proposition 47 could ameliorate previously imposed sentencing enhancements if the underlying felony had been reduced to a misdemeanor and the sentence was under appeal on the date Proposition 47 was enacted.²⁷² *Buycys* consolidated three different matters in order to address a variety of collateral felony sentencing enhancements.²⁷³ These enhancements included the increased penalties for a new felony committed while released on bail for a previous felony, for having served a prior felony prison term, and for the failure to appear for a felony charge.²⁷⁴ The extension of Proposition 47 benefits to collateral enhancements is especially significant given their role in the extreme ratcheting up of sentencing laws since the 1970s and resulting prison growth.²⁷⁵

The *Buycys* court focused its analysis on section 1170.18(k)’s all-encompassing language that, once reclassified, a former felony “shall

267. *Id.* at 373 (quoting VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70).

268. *Id.*

269. *People v. Buycys*, 422 P.3d 531, 542 (Cal. 2018).

270. *See id.* at 541–46.

271. 422 P.3d 531, 542 (Cal. 2018).

272. *Id.* at 535–36 (“[R]elief is limited to judgments that were not final at the time the initiative took effect on November 5, 2014.”).

273. *Id.* at 535.

274. *Id.*; *see also* CAL. PENAL CODE § 12022.1(b) (West Supp. 2019) (felony while released on bail); CAL. PENAL CODE § 667.5(b) (prior prison term); CAL. PENAL CODE § 1320.5 (failure to appear for a felony charge). It should be noted that, in the end, the court held that Proposition 47 could not reduce an enhancement for failure to appear under section 1320.5 “because a section 1320.5 offense is not premised on the conviction status of the felony for which the defendant failed to appear [A]t the time of his failure to appear, [the petitioner] was charged with a felony, notwithstanding the fact that the felony was ultimately reduced to a misdemeanor” *Buycys*, 422 P.3d at 538–39.

275. *See supra* Section II(A).

be considered a misdemeanor *for all purposes*.²⁷⁶ Observing that Proposition 47 does not directly address enhancements, the court substituted section 1170.18(k)'s wording as a guide.²⁷⁷ Furthermore, while section 1170.18(k) clearly indicates that newly reduced misdemeanors will no longer generate future felony enhancements, it does not mention enhancements imposed prior to the reduction of a felony to a misdemeanor.²⁷⁸

To bridge this gap, the court read section 1170.18(k) in relation to the statutory scheme as broad enough to retroactively mitigate an enhancement imposed before a felony was reduced to a misdemeanor.²⁷⁹ Yet the court limited this ameliorative provision to affect only non-final judgements under *Estrada*.²⁸⁰ In reading section 1170.18(k) retroactively, the court observed that the section was closely linked to sections 1170.18(a) and (f) that explicitly featured backward-looking provisions so that section 1170.18(k), too, “was undeniably intended to have a retroactive effect.”²⁸¹ Moreover, because Proposition 47 was “designed to have an ameliorative effect on punishment of offenses no longer deemed egregious enough to be handled as felonies,” section 1170.18(k)'s “for all purposes” language should apply “as broadly as possible,” except as constrained by *Estrada*.²⁸² Although not as radical as the mitigation of all felony-

276. CAL. PENAL CODE § 1170.18(k) (West 2015); *Buycks*, 422 P.3d at 539 (emphasis added).

277. *Buycks*, 422 P.3d at 539. This approach contrasts with other Proposition 47 opinions where the court interpreted silence on a specific issue as a signal that voters did not intend Proposition 47 to function a certain way. *Compare id.* (“Although no provision enacted by Proposition 47 expressly addresses whether the measure has any mitigating effect on felony-based enhancements[,] . . . section 1170.18, subdivision (k), which was enacted by that initiative, is relevant to the issue.”), with *People v. Martinez*, 413 P.3d 1125, 1129 (Cal. 2018) (“Neither mentions drug transportation offenses. We infer that the electorate reasonably could have understood that drug possession and drug transportation crimes are distinct.”), *People v. C.B. (In re C.B.)*, 425 P.3d 40, 44 (Cal. 2018) (“Nothing in the text of section 1170.18 explicitly applies to juveniles.”), *People v. Adelman*, 416 P.3d 786, 790 (Cal. 2018) (“Nothing in the language of Proposition 47, or any of the statutes it amended, mention the probationary transfer scheme . . .”), and *People v. Morales*, 371 P.3d 592, 596 (Cal. 2016) (“It says nothing about credit for time served.”).

278. *Buycks*, 422 P.3d at 540.

279. *Id.* at 541–42.

280. *Id.*

281. *Id.* at 542; see also CAL. PENAL CODE § 1170.18(a) (“[W]ho would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense . . .”); CAL. PENAL CODE § 1170.18(f) (“[W]ho would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense . . .”).

282. *Buycks*, 422 P.3d at 542, 545 (quoting *People v. Conley*, 373 P.3d 435, 440 (Cal. 2016)). The court also carefully distinguishes the inapplicability of the *Estrada* rule in *Dehoyos* from *Buycks* because in *Dehoyos* section 1170.18(b)'s “serving a sentence” and the ballot materials’ “any

sentencing enhancements since the beginning of time, the court's widening of Proposition 47's scope to aid recidivist offenders in any form marked a significant departure from California's extremely punitive sentencing practices.²⁸³

Aside from "logically" extending resentencing relief to enhancements, the *Buycks* court made several sweeping statements about Proposition 47's scope.²⁸⁴ It declared that Proposition 47 represented a "universal reclassification of certain felonies to misdemeanors."²⁸⁵ Moreover, it stated that "Proposition 47 as a whole . . . is intended to ameliorate criminal punishment" and "intended to reform the needs of the criminal law."²⁸⁶ The court even touched on the fiscal purpose of Proposition 47, linking the reduction of the prison population to cost savings and rehabilitative programming.²⁸⁷

Yet it is interesting to observe that a championing of ameliorative values did not entirely eclipse public safety concerns. The court pointedly distinguished its reasoning *Dehoyos* and justified its expanded reading of "for all purposes" in *Buycks* by clarifying that the initiative could mitigate an enhancement only after the court had performed the risk of danger to public safety assessment contained in the formal resentencing process.²⁸⁸ Because section 1170.18(k) follows the successful completion of the statutory resentencing procedure laid out in subsections 1170.18(a) and (b), it would not interfere with this essential safeguard promised to voters.²⁸⁹ In this sense, the generous interpretation in *Buycks* still delicately rested upon the more cautious reading of Proposition 47 exhibited in previous decisions.²⁹⁰

individuals" language creates "its own retroactivity provision" to supplant *Estrada* in order to impose the formal resentencing procedure on non-final sentences. *People v. Dehoyos*, 412 P.3d 368, 374 (Cal. 2018) (quoting VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70); *see Buycks*, 422 P.3d at 542.

283. *Supra* Section II(A).

284. *Buycks*, 422 P.3d at 546.

285. *Id.* at 545.

286. *Id.* at 542, 545.

287. *Id.* at 546 ("Permitting defendants to ameliorate, under *Estrada*, their nonfinal judgments involving felony-based enhancements and felony-based offenses grounded on those reduced offenses would generate cost savings by reducing the incarceration terms for those offenders.").

288. *Id.* at 543.

289. *See id.*

290. *See, e.g., supra* text accompanying note 244.

In a recent progressive turn, the court expanded its *Buycks* “misdemeanors for all purposes” framework beyond enhancements to invalidate a petitioner’s separate but associated “street terrorism” conviction.²⁹¹ In *People v. Valenzuela*,²⁹² a five-to-two majority held that downgrading Valenzuela’s theft of a \$200 bicycle also dismissed his associated section 186.22(a) “street terrorism” conviction, an offense which contained the essential element of “willful promotion, furtherance, or assistance in any *felonious* criminal conduct by members of [a] gang.”²⁹³ With the original theft conduct no longer felonious, the court found that the street terrorism conviction could not stand because Proposition 47 had negated an essential element of the crime.²⁹⁴ Therefore, Valenzuela was entitled to a “full resentencing” under Proposition 47 that included ameliorative relief for the distinct yet dependent gang offense.²⁹⁵ The *Valenzuela* decision is significant not only because some of California’s harshest sentencing reforms have targeted street gangs but also because gangs have remained a socially taboo subject.²⁹⁶ The court’s characterization of the *Buycks* holding as a “full resentencing” rule, coupled with its emphasis on downgrading underlying criminal conduct, seems to foreshadow promising future expansions of the *Buycks* “for all purposes” concept.²⁹⁷

D. Showdown Over Voter Intent: *People v. Valencia*

While the California Supreme Court’s Proposition 47 jurisprudence clearly exhibits ideological tensions between amelioration of punishment and public safety in a rapidly changing

291. *People v. Valenzuela*, 441 P.3d 896, 898, 903 (Cal. 2019).

292. 441 P.3d 896 (Cal. 2019).

293. *Id.* at 898–900 (emphasis added) (citing CAL. PENAL CODE § 186.22(a) (West 2014)).

294. *Id.* at 904–05.

295. *Id.*

296. In 1988, the legislature added section 186.22(a) as part of the Street Terrorism and Enforcement (STEP) Act, which created various new gang-related offenses and enhancements. *See id.* at 900. Enacted to “seek the eradication of criminal activity by street gangs,” the STEP Act has been criticized for being unconstitutionally vague and disproportionately applied to minority groups. *Id.* (quoting CAL. PENAL CODE § 186.21); *see also* Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 106–07 (2006) (contending that the STEP Act is unconstitutionally vague); Sara Lynn Van Hofwegen, Note, *Unjust and Ineffective: A Critical Look at California’s STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 681–86 (2009) (discussing the STEP Act’s disproportionate application to minority groups).

297. *Valenzuela*, 441 P.3d at 899–900, 902–03 (quoting CAL. PENAL CODE § 1170.18(k) (West 2015)).

justice reform landscape, it never explicitly addressed these conflicts but for one exceptional case, *People v. Valencia*.²⁹⁸ At over seventy pages, the opinion featured a concurrence and two lengthy dissenting opinions.²⁹⁹ *Valencia* remarkably laid bare contentious debates regarding the overall direction of California's sentencing reforms.³⁰⁰ The decision also deeply questioned the underlying concept of judicial interpretation of voter intent from ballot materials and, in turn, the essential role of ballot initiatives in California's democracy.³⁰¹

In *Valencia*, the court examined the seemingly obscure legal question of whether Proposition 47's narrower definition of "danger to public safety" could apply to petitioners seeking resentencing under Proposition 36, the Three Strikes Reform Act.³⁰² Sandwiched between Realignment and Proposition 47, Proposition 36 was overwhelmingly approved by voters on November 6, 2012.³⁰³ Like its successor, the measure emerged in a rare moment of political compromise and amidst an election discourse centered on cost savings and refocusing resources on punishment for the most serious offenders.³⁰⁴ Proposition 36 barred the imposition of a life sentence when a third-strike offense was non-serious and non-violent so that now courts would sentence the low-level third offense as a second strike, imposing only double the base term.³⁰⁵ Proposition 36 also created a retroactive resentencing procedure similar to Proposition 47's, allowing non-serious third-

298. 397 P.3d 936 (Cal. 2017).

299. *Id.*

300. *Id.* at 979 (Cuéllar, J., dissenting).

301. *Id.* at 987 ("Lawmaking by ballot initiative is so fundamental to California's democracy that . . . [v]oter enactments are to be afforded legitimacy commensurate to that which is furnished to enactments by our Legislature, and our respect for the doctrine of separation of powers should not wane when we encounter a voter-enacted statute.").

302. *Id.* at 940 (majority opinion). The question of cross-applicability was particularly obscure because Proposition 36's two-year resentencing window only overlapped for two days after Proposition 47 came into effect, although the deadline could be extended for "showing of good cause." *Id.* at 951; see CAL. PENAL CODE § 1170.126.

303. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 2012, GENERAL ELECTION 48–53, 105–10 (2012), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2319&context=ca_ballot_props [hereinafter VOTER INFORMATION GUIDE 2012]; see also CAL. SEC'Y OF STATE, STATEMENT OF VOTE 67–69 (2012), <https://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf> (stating that Proposition 36 passed by 69.3 percent of the vote and a majority in each of California's 58 counties, a larger majority than Proposition 47).

304. HADAR AVIRAM, CHEAP ON CRIME: RECESSION ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 138–44 (2015).

305. VOTER INFORMATION GUIDE 2012, *supra* note 303, at 8, 48 ("Revises [Three Strikes] law to impose life sentence only when a new felony conviction is serious or violent."); see CAL. PENAL CODE § 667(e)(2) (West Supp. 2019); CAL. PENAL CODE § 1170.12(c) (West 2015).

strike offenders to petition for resentencing within two years of the law's enactment.³⁰⁶ Like Proposition 47, a judge could block resentencing if a petitioner was found to be an "unreasonable risk of danger to public safety," although Proposition 36's resentencing statute, section 1170.126, left the concept undefined.³⁰⁷

As with many cases interpreting Proposition 47, the analysis in *Valencia* hinged on a single turn of phrase. At issue was "[a]s used throughout this code," the introductory clause to section 1170.18(c)'s narrower construction of "unreasonable risk of danger to public safety."³⁰⁸ Unlike Proposition 36, section 1170.18 defined the term more narrowly to mean the direct risk that a resentenced individual would commit a future super-strike felony.³⁰⁹ The majority held that the narrower definition of a public safety risk did not apply throughout the entire California Penal Code, including to Proposition 36 offenders, as its ordinary meaning would suggest.³¹⁰ Instead, "[a]s throughout this code" was rendered "ambiguous" when the court considered Proposition 47 as a whole, including contradictory messages in the ballot materials excluding serious offenders.³¹¹

For the majority, section 1170.18(c)'s ambiguity stemmed from various statutory nuances.³¹² These included the use of the term "*the* petitioner" versus "a petitioner" within the statute, in addition to section 1170.18(c)'s placement behind subsections 1170.18(a) and (b), which formally laid out Proposition 47's resentencing procedure.³¹³ Furthermore, Proposition 47 had promised in its uncodified preamble to "[r]equire misdemeanors . . . for nonserious and nonviolent crimes" and to ensure sentences for those previously convicted of "dangerous crimes," such as "rape, murder, and child

306. CAL. PENAL CODE § 1170.126.

307. *Id.* § 1170.126(f), (g). Although a judge would still assess risk based on a petitioner's conviction history, prison disciplinary record, and other factors it sees fit, just like Proposition 47. *See id.* § 1170.18.

308. *People v. Valencia*, 397 P.3d 936, 953 (Cal. 2017); *see also* CAL. PENAL CODE § 1170.18(c) ("As used throughout this code, 'unreasonable risk of danger to public safety' means an unreasonable risk that *the* petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (emphasis added)).

309. *Valencia*, 397 P.3d at 960.

310. *Id.* at 944.

311. *Id.* at 943–44.

312. *Id.* at 946–47.

313. *Id.*; CAL. PENAL CODE § 1170.18(c).

molestation are not changed.”³¹⁴ For the court, that language clearly indicated that section 1170.18(c)'s tailored definition was intended to affect only Proposition 47 petitioners, and no other group.³¹⁵ The court argued that voters clearly did not expect “felons with recidivist convictions for serious or violent felonies” to benefit from any provision of Proposition 47, as evidenced by the wording “serious crimes” and “dangerous crimes” in the ballot materials.³¹⁶ The majority thus drew a sharp distinction between Proposition 36 and Proposition 47 offender groups, framing the former as particularly threatening despite Proposition 36's similar focus on non-serious and non-violent third-strike offenses.³¹⁷

After diagnosing the ambiguity of the statutory text to negate a plain reading, the court returned again to the extrinsic ballot materials to discern Proposition 47 voters' expectations regarding three-strikes offenders.³¹⁸ The majority pointed out that the Attorney General and Legislative Analyst did not “make any reference to the Three Strikes Law, the Three Strikes Reform Act, three strike inmates, or life sentences,” nor did they detail a resentencing procedure for the Proposition 36 group or its projected fiscal impact.³¹⁹ The ballot materials' silence clearly indicated that the expert Legislative Analyst, Attorney General, and, most certainly, the voters, were unaware of, and did not intend, a potential benefit, including release, for serious and violent third-strike offenders.³²⁰ Therefore, it reasoned, the narrower definition of “danger to public safety” did not apply to

314. *Valencia*, 397 P.3d at 947–48; see VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70.

315. *Valencia*, 397 P.3d at 947–48.

316. *Id.* at 948 (“Thus, contrary to Proposition 47's Purpose and Intent, three strike inmates previously convicted of nonforcible rape or molestation of a child over the age of 14 would stand to benefit under Proposition 47's definition of “an unreasonable risk of danger to public safety.”).

317. *Id.* (“By design, those convicted under either the former Three Strikes law or the amended version enacted by Proposition 36 are persons convicted of dangerous crimes and have prior convictions for various violent or serious crimes. These uncodified introductory provisions, therefore, are inconsistent with any intention to make the resentencing provisions of the Three Strikes Reform Act more favorable to the resentencing and release of three strike inmates, who are felons with recidivist convictions for serious or violent felonies.”).

318. *Id.* at 956.

319. *Id.* at 949–50. It is interesting that the opinion frames the Proposition 36 petitioner population as tainted by the three-strikes sentencing scheme, versus less culpable in light of a non-serious final strike.

320. *Id.* at 952.

Proposition 36.³²¹ The broader resentencing benefit rightfully applied only to the Proposition 47 offender group.³²²

The majority's analysis then took a sharp turn in a subsection entitled, "The Presumptions Concerning an Initiative Adopted by Voters."³²³ It attacked two core interpretive tenets: that voters carefully consider the text of ballot initiatives and vote intelligently, and that they understand preexisting laws when they enact an initiative.³²⁴ As for voting intelligently, the court called the presumption that voters study the detailed text of initiatives a "fiction."³²⁵ Instead, it observed that voters depend on the professional summaries of the Attorney General and Legislative Analyst to prevent "voter confusion and manipulation."³²⁶ Therefore, if those legal specialists had overlooked the connection between different uses of "unreasonable risk of danger to public safety," a phrase that appears in Propositions 36 and 47 and nowhere else in the Penal Code, the average voter was certainly clueless.³²⁷ Regarding knowledge of existing laws, the court similarly found that voters lack the adequate time and knowledge necessary to recognize patterns in previously enacted statutes without help from the Voter Information Guide.³²⁸ Framing the ballot materials as the true source of voter awareness versus merely an indication of it, the *Valencia* court concluded that it could not infer voter intent "where there was nothing to enlighten it in the first instance."³²⁹

Justices Liu and Cuéllar authored separate but similar dissents that vehemently protested not only the majority's textual analysis but its fundamental assumptions about the purpose of Proposition 47, the role of ballot initiatives, and California's sentencing history

321. *Id.* at 951.

322. *Id.*

323. *Id.* at 952–55.

324. *Id.*

325. *Id.* at 954 ("Defendants and our dissenting colleagues find these circumstances unremarkable and engage in the fiction that we should still apply the presumption that the voters thoroughly study and understand the content of complex initiative measures, even though the implications for three strikes resentencing were apparently opaque to the Attorney General and the Legislative Analyst. They were almost certainly opaque to the average voter as well.").

326. *Id.*

327. *Id.* ("[U]nless [they] had exhaustively sifted through the voluminous Penal Code in order to find the single other reference to the phrase [located in section 1170.126].").

328. *Id.* at 955.

329. *Id.* at 956.

generally.³³⁰ First and foremost, the dissents criticized the majority's decision to ignore the plain language of section 1170.18(c) and instead delve into reading ballot materials as a way to resolve the statute's purported ambiguity.³³¹ Both dissents forcefully argued that the phrase "as used throughout this code" was not ambiguous within the language of the statute or incompatible with the underlying purpose of Proposition 47.³³² Both also emphasized Proposition 47's crucial goals of "concentrating state corrections spending on the most dangerous offenders" and "increasing investment in crime prevention, victim services, and mental health and drug treatment to reduce recidivism."³³³ The majority gave short shrift to these central purposes to instead prioritize barring relief to sex offenders, rapists, and other feared criminals, which was only one of Proposition 47's six official purposes.³³⁴

Regarding serious offenders, both dissents characterized the target populations of Propositions 36 and 47 as "not wholly distinct."³³⁵ The dissent written by Justice Liu pointed out that like Proposition 36 offenders, Proposition 47 petitioners could have past convictions that were violent or serious, so long as they were not super-strikes.³³⁶ The dissent by Justice Cuéllar also observed that, if an inmate's non-serious third strike offense that was also an enumerated misdemeanor covered by Proposition 47, that individual

330. *Id.* at 964–89 (Liu, J., dissenting) (Cuéllar, J., dissenting).

331. *Id.* at 967 (Liu, J., dissenting) ("The analytical framework for making that choice consists of the rules governing when to follow and when to depart from plain meaning, not the rules for resolving statutory ambiguity."); *id.* at 989 (Cuéllar, J., dissenting) ("It is a well-settled principle of statutory interpretation that, where both text and purpose are clear, courts shall not endeavor to rewrite language of a ballot measure.").

332. *Id.* at 967 (Liu, J., dissenting); *id.* at 984 (Cuéllar, J., dissenting) ("[T]he phrase 'the petitioner' plainly has relevance elsewhere in the Penal Code, specifically in the Three Strikes Reform Act. Those words, '[a]s used throughout this Code,' would serve an unintelligible function if section 1170.18, subdivision (c)'s definition were to pertain only to the Proposition 47 petitioner.").

333. *Id.* at 969 (Liu, J., dissenting); *id.* at 977 (Cuéllar, J., dissenting).

334. *Id.* at 968–69 (Liu, J., dissenting) ("[O]ne reason courts do not assign much weight to preamble language relative to operative provisions is that such language . . . typically includes multiple purposes that point in different directions.").

335. *Id.* at 969–70; *id.* at 981 (Cuéllar, J., dissenting).

336. *Id.* at 969 (Liu, J., dissenting) ("It is true that inmates eligible for resentencing under Proposition 36 have been convicted of violent or serious felonies. But that is also true of many inmates eligible for resentencing under Proposition 47, which excludes only persons who have been convicted of a 'super strike' or a registrable sex offense.").

could request a reduction of sentence under either or both initiatives.³³⁷

The dissents emphasized that both Propositions 36 and 47 shared the same broad remedial purpose as part of a wider justice reform project aimed at low-level offenders.³³⁸ Most notably, these opinion passages are the court's only Proposition 47 jurisprudence in which it directly acknowledged California's past sentencing excesses. For example, Justice Cuéllar's dissent spent almost an entire page detailing the history of Three Strikes, prison overcrowding, *Brown v. Plata*, and Realignment.³³⁹ Describing a turning point when "California voters then began using the initiative process to reform some of the most punitive features of the criminal justice system," Justice Cuéllar underscored the common goals shared by Propositions 36 and 47.³⁴⁰

The dissent penned by Justice Liu also highlighted a new era of reform, arguing that both Californians and the wider United States electorate "have had second thoughts about our past criminal justice policies."³⁴¹ Justice Liu's dissent also noted a troubling double standard. For decades, the court had faithfully interpreted Three Strikes laws according to their plain statutory meaning without referencing outside ballot materials.³⁴² Therefore, Justice Liu argued the court must "apply the same interpretive approach to this ameliorative statute that we applied to the punitive statutes of an earlier era."³⁴³

Justice Cuéllar not only condemned the majority's "implausibly cramped reading of Proposition 47's purposes" but also connected its

337. *Id.* at 981 (Cuéllar, J., dissenting).

338. *Id.* at 977, 981, 985 ("These declared purposes of reallocating prison spending to the most dangerous criminals and allowing others to pursue resentencing would be advanced by permitting Three Strikes Reform Act petitioners to demonstrate that—under the same forward-looking risk assessment employed under Proposition 47—they do not pose an unreasonable risk of danger to public safety.").

339. *Id.* at 979.

340. *Id.*; *see also id.* at 977 (Liu, J., dissenting) ("Many voters may have reasonably believed that inmates whose third strike was neither serious nor violent should not have received 25-years-to-life sentences . . .").

341. *Id.* at 976 ("Fiscal, moral, religious, and public safety considerations have motivated an unusually wide spectrum of leaders to reexamine penal laws and sentencing practices.").

342. *Id.* at 964 ("For over two decades, we have applied the Three Strikes law in accordance with its plain meaning, and we have done so regardless of whether the text, history, or ballot materials addressed the particular application of the statute at issue.").

343. *Id.* at 977.

analysis to a dangerous disregard for the ballot initiative's role in California government.³⁴⁴ The dissents argued that the majority's side-stepping of the plain meaning of "as throughout this code" to imply that voters were caught off-guard by the Voter Information Guide's silence regarding three-strikes inmates was misguided for two reasons.³⁴⁵ First, ballot materials, like the uncodified preamble and explanations by the Attorney General and Legislative Analyst are "indisputably incomplete summaries."³⁴⁶ Due to space, time, and word constraints, these materials supply "informational triage" aimed at fostering only adequate voter understanding.³⁴⁷ Both dissents emphasized that, because ballot materials are so limited, and the laws in our democracy so complex, precise knowledge of the voters' subjective understanding of a measure is likely impossible.³⁴⁸ However, whether voters literally study and understand initiatives or not, courts do not have the authority to interpret initiatives with any less deference than a legislative statute, especially if they ignore a statute's plain meaning.³⁴⁹

Second, the dissents criticized the court's reinterpretation of section 1170.18(c) as a severe judicial overreach.³⁵⁰ Justice Cuéllar's dissent forcefully stated that the majority "unjustifiably augments the judicial power" to modify a duly enacted statute based on a court's own preferences.³⁵¹ Justice Liu's dissent used similar phrasing, forewarning that "[i]f we can rewrite statutes on the ground that the voters were not aware of what they were enacting, there will be no end to the mischief that courts . . . can inflict on the initiative process."³⁵² Thus, because voters assume the role of a legislature, an override of

344. *Id.* at 978 (Cuéllar, J., dissenting).

345. *Id.* at 976 (Liu, J., dissenting) ("The court today concludes that the drafters of Proposition 47 pulled a fast one on an uninformed public."); *id.* at 985–96 (Cuéllar, J., dissenting).

346. *Id.* at 976 (Liu, J., dissenting); *id.* at 986 (Cuéllar, J., dissenting); *see also id.* at 985 (Cuéllar, J., dissenting) ("Official ballot materials are not detailed legal memoranda, nor can we command they discuss every nuance or legal issue an initiative may touch.").

347. *Id.* at 974 (Liu, J., dissenting).

348. *E.g., id.* at 988 (Cuéllar, J., dissenting) ("[T]he subjective, exact thoughts of the voters casting ballots for the initiative . . ."); *id.* at 989 ("It is one of democracy's recurring challenges that the rules and standards governing society—whether enacted by legislation or initiative—are often enormously complicated in both their content and effect.").

349. *Id.* at 988 ("When we analyze a statute, a particularly compelling mix of humility and analytical clarity should prevent us from implying that we are articulating legislators' or voters' subjective states of mind.").

350. *E.g., id.* at 967 (Liu, J., dissenting); *id.* at 978 (Cuéllar, J., dissenting).

351. *Id.* at 982 (Cuéllar, J., dissenting).

352. *Id.* at 971 (Liu, J., dissenting).

duly enacted initiative text violates the doctrine of separation of powers, threatening the balance of power in California's democracy.³⁵³

In 2017, *Valencia* was only the fifth California Supreme Court opinion interpreting Proposition 47, and its influence on the court's subsequent jurisprudence on the initiative's scope remains unclear. Mixed holdings predated *Valencia*, including the expansive property readings in *Gonzales* (non-larcenous shoplifting) and *Romanowski* (access card data), and the restrictive holding in *Morales* (parole requirement).³⁵⁴ Yet apart from *Valencia*, the court only issued two other split decisions on the subject of Proposition 47.³⁵⁵ The court also never again openly questioned voter intelligence, but neither did it follow up on the dissents' characterization of ballot materials as inherently flawed interpretive aids, and it continued to consistently employ them throughout future decisions.³⁵⁶

Instead, the court continued on a similarly contradictory path, issuing restrictive decisions in *Dehoyos* (automatic resentencing) and *Martinez* (drug possession), and liberal decisions in *Page* (non-enumerated statutes), *Buycks* (enhancements), and *Valenzuela* (street terrorism).³⁵⁷ As discussed earlier, the contradictory interpretive rationales that the court used to block benefits to feared offender populations, as well as the varied readings of the same ballot materials used to support an "inclusive interpretation" with regard to property crimes, demonstrate a significant pattern.³⁵⁸ These mixed judicial interpretations reveal that when the court is faced with Proposition 47's contradictory goals of lowering penalties for minor crimes, saving funds by reducing the inmate population, and blocking resentencing for more serious offenders, public safety fears often predominate.

V. CONCLUSION

The court's often narrow interpretation of Proposition 47 to the exclusion of other low-level offender populations is problematic for several reasons. Primarily, it continually holds the desire to block any

353. *Id.* at 987 (Cuéllar, J., dissenting).

354. *Supra* Section IV(A)–(B).

355. *People v. Valenzuela*, 441 P.3d 896 (Cal. 2019).

356. *Id.* at 896, 901.

357. *Supra* Section IV(A)–(C).

358. *People v. Page*, 406 P.3d 319, 325 (Cal. 2017).

mitigation of punishment for “people convicted of dangerous crimes like rape, murder, and child molestation” over the equally worthy goal to “maximize alternatives for nonserious, nonviolent crime and to invest the savings generated from this act into prevention and support programs.”³⁵⁹ While Proposition 47 clearly presents many conflicting aims, the court has not yet offered a coherent textual or legal justification for why anxiety about serious crime should prevail against the more urgent goals of ameliorating needlessly harsh punishment for low level crimes and reducing the inmate population. In its insistence on executing a straight statutory analysis informed by ballot materials, the court often ignores the reform movement that gave rise to Proposition 47. If California voters’ primary goal was to continue punishing serious offenders, why amend the last forty years’ sentencing laws at all?

California’s new era of justice reform continues to face grave challenges. State prisons currently operate collectively at 131 percent of design capacity, just below the *Brown v. Plata* threshold of 137 percent.³⁶⁰ Yet, of the thirty-five total prison facilities, sixteen currently operate at populations over the threshold, with eight as crowded as 150 percent of capacity or higher.³⁶¹

As a result of overcrowding and other systemic failures, mental health care inside of California prisons remains abysmal. The 1990 *Coleman*³⁶² litigation by mentally ill inmates and the reporting relationship with the special master it created were finally winding down in 2018 when Dr. Michael Golding, the chief psychiatrist of the entire California prison system, filed a major whistleblower report in October 2018.³⁶³ The 161-page document laid out in careful detail the methods the California Department of Corrections and Rehabilitation (CDCR) had used to game the self-reporting system to make it appear

359. *People v. Dehoyos*, 412 P.3d 368, 373 (Cal. 2018); see VOTER INFORMATION GUIDE 2014, *supra* note 4, at 70.

360. *Brown v. Plata*, 563 U.S. 493, 501 (2011); *Weekly Report of Population*, CAL. DEP’T CORR. & REHAB. (Feb. 12, 2020), <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/02/Tpop1d200212.pdf>

361. *Weekly Report of Population*, *supra* note 360 (only three prison facilities operate at under 100 percent capacity).

362. See *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995); see also *Coleman v. Brown*, No. 2:90-cv-0520 KMJ DB P, 2018 WL 5828696 (E.D. Cal. Nov. 7, 2018).

363. Declaration of Michael Golding, M.D., *Coleman v. Brown*, No. 2:90-cv-0520-KMJ-DB (E.D. Cal. Oct. 31, 2018), ECF No. 5988; CDCR Mental Health Sys. Report, *Coleman v. Brown*, No. 2:90-CV-00520 KMJ-DB (E.D. Cal. Oct. 31, 2018), ECF No. 5988-1 [hereinafter Golding Report].

that inmates received adequate and timely psychiatric care when this was far from true.³⁶⁴ The report documented a reality where only 30 percent of psychiatry patients were seen confidentially or on time, but the percentage appeared much higher because CDCR staff failed to record appointments that inmates declined or did not show up for, in addition to other timeline manipulations.³⁶⁵ The report also described terrible conditions where psychiatrists evaluated severely mentally disabled patients through slatted cell doors or on public prison yards, with one report of a psychiatrist in an administrative segregation unit visiting seven towel-clad patients in fifteen minutes.³⁶⁶ In one gruesome event, understaffing of psychiatrists left a severely psychotic inmate alone and unmedicated, and she tore out and consumed her own eyeball.³⁶⁷

In response, federal district court Judge Kimberley Mueller, who was supervising the final phases of the *Coleman* litigation, appointed a neutral expert to investigate the accusations against CDCR.³⁶⁸ On April 22, 2019, the law firm Gibson Dunn released the Neutral Expert Report.³⁶⁹ The report recorded problematic practices in multiple areas of patient treatment and reporting but did not find intentional deception on the part of CDCR.³⁷⁰ Nonetheless, Judge Mueller ordered an evidentiary hearing to investigate whether misleading information was presented to the court, which was set to take place in September 2019.³⁷¹

More optimistically, in the years since Proposition 47's passage, California's voters and legislature have continued to move forward with new justice reform initiatives aimed at reducing the prison population. In 2016, the voters passed Proposition 57 by a 64.5 percent majority.³⁷² That initiative expanded parole eligibility for non-violent

364. Golding Report, *supra* note 363, at 1–14.

365. *Id.* at 1–14, 62–63.

366. *Id.* at 80–81.

367. *Id.* at 83–85.

368. Amended Order for Neutral Expert at 1, *Coleman v. Brown*, No. 2:90-cv-00520-KMJ-DB (E.D. Cal. Jan. 8, 2019).

369. Neutral Expert Report, *Coleman v. Newsom*, No. 2:90-cv-00520-KMJ-DB (E.D. Cal. May 3, 2019).

370. *Id.* at 2.

371. Order at 2, *Coleman v. Newsom*, No. 2:90-cv-00520-KMJ-DB (E.D. Cal. June 14, 2019).

372. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 2016, GENERAL ELECTION 54–57, 141–46 (2016), <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>; *see also* CAL. SEC'Y OF STATE, STATEMENT OF VOTE 68–70 (2016),

offenders, permitted the expansion of credits for good behavior and education in prison, and blocked the automatic transfer of fourteen-year-olds to be tried in adult court.³⁷³ The California legislature has also passed numerous new laws reducing punishment and giving certain offenders the opportunity for early release.³⁷⁴

However, a new initiative has gained sufficient signatures to appear on the November 3, 2020 General Election ballot that would reverse key provision of Propositions 47.³⁷⁵ The proposed Reducing Crime and Keeping California Safe Act seeks to “[r]eform theft laws to . . . restore accountability for serial thieves and organized theft rings.”³⁷⁶ If approved, the measure would amend section 459.5’s definition of “shoplifting” to mean “steal retail property or merchandise,” and specifically exclude forgery, access card information theft, and joyriding, in an effort to counteract the court’s expansive treatment of property crimes under Proposition 47.³⁷⁷ The measure also proposes new sections: section 490.3, a wobbler for “serial theft” based on two or more thefts over \$250, and section 490.4, a wobbler for “organized retail theft” for individuals working in concert to steal merchandise worth over \$250.³⁷⁸ The opposition that has built against the least controversial property crime aspects of Proposition 47 is sobering.

<https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf> (stating Proposition 57 prevailed by 64.5 percent majority).

373. CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 2016, GENERAL ELECTION 11 (2016), <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>.

374. See, e.g., CAL. PENAL CODE § 189(e) (West 2014) (new felony murder rule); CAL. PENAL CODE § 1170 (West 2015) (retroactive resentencing); CAL. PENAL CODE § 3550 (West Supp. 2019) (medical parole); CAL. PENAL CODE § 3051 (youth offender parole hearings for offenders who were twenty-five years old or younger during commission of a crime).

375. LEGISLATIVE ANALYST’S OFFICE, FISCAL IMPACT ESTIMATE REPORT OF INITIATIVE NO. 17-0044, AMENDMENT NO. 1, at 3 (2017), https://www.oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report%2817-0044%29_0.pdf (“This measure amends state law to (1) increase penalties for certain theft-related crimes, (2) change the existing nonviolent offender release consideration process, (3) change community supervision practices, and (4) require DNA collection from adults convicted of certain misdemeanors.”); *Eligible Statewide Initiative Measures*, CAL. SEC’Y OF STATE, <https://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/eligible-statewide-initiative-measures> (last visited Sept. 29, 2019) (“Authorizes felony charges for specified theft crimes currently chargeable only as misdemeanors, including some theft crimes where the value is between \$250 and \$950.”).

376. ATTORNEY GEN. OF CAL., INITIATIVE NO. 17-0044, REDUCING CRIME AND KEEPING CALIFORNIA SAFE ACT OF 2018 (2017), <https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0044%20%28Reducing%20Crime%29.pdf>.

377. *Id.* at 15.

378. *Id.* at 16–17.

These attacks on Proposition 47 are even more alarming because sentencing reforms aimed at nonviolent offenders are often considered the achievable “low hanging fruit” of criminal justice reform.³⁷⁹ While incremental reforms show promise, especially considering California’s extremely punitive history, violent offenders continue to take up the majority of all prison beds.³⁸⁰ Thus, to ever truly reduce mass incarceration in a lasting way, political actors and the electorate will eventually need to confront lessening punishment for violent offenders, an impossible task if a popular and largely successful low-level reform like Proposition 47 is dismantled.³⁸¹

While the California Supreme Court certainly should not judicially override the text of Proposition 47 or other statutes, neither should the court lose sight of the current progressive climate or what is at stake in preserving California’s recently hopeful, yet vulnerable sentencing reforms. Historically, California’s voters, legislators, executive branch, and other political actors have created an incoherent overlap of extremely punitive sentencing laws.³⁸² If courts, ideally somewhat outside the fray, can bring some clarity and balance to their interpretation of Proposition 47 and other initiatives (although strapped with the epistemological challenge of uncovering voter intent), it would represent a step in the right direction. California has no choice but to move tentatively forward into this new era of justice reform.

379. PFAFF, *supra* note 8, at 186.

380. *Id.* at 188.

381. *Id.*; *see supra* Section II(C).

382. *Supra* Part II.