

**Proposition 20:**  
**Reducing Crime and Keeping California Safe Act of**  
**2018**

Initiative Statute

By

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## I. EXECUTIVE SUMMARY

Proposition 20, known as the Reducing Crime and Keeping California Safe Act of 2018, would address several areas of criminal law, including provisions of the California Constitution, parole considerations, DNA collection for misdemeanor offenses, and criminal sentencing of theft crimes. The measure would specify 51 offenses that are ineligible for parole consideration under the framework added to the California Constitution by Proposition 57 (2016), would allow victims and witnesses of crime a greater role in the parole hearing process, and would place new requirements on what is to be considered by the parole board. Proposition 20 would also require DNA collection from those convicted of specified misdemeanor offenses and create two new theft crimes, allowing prosecutors to seek longer sentences even when the value of goods stolen is low. There is potential for confusion in some statutory provisions added by the measure, including the factors that must be considered to grant parole and the ability of probation officers to arrest parolees in violation of the terms of their release. Additionally, there are potential Constitutional issues in that the measure may address more than one subject and may amend the Constitution without complying with the procedural requirements to do so. Proponents favor Proposition 20 as reversing the negative impacts of Proposition 47 (2014) and Proposition 57 (2016), propositions that authorized lighter sentences and parole consideration for non-violent offenders. Opponents view these changes as unnecessary and bemoan the high costs of the changes, citing the Legislative Analyst's Office's estimate that the measure will lead to increased correctional costs in the tens of millions of dollars annually.

## II. THE LAW

### A. Background

In 2011, the United States Supreme Court ordered California to reduce its prison population.<sup>1</sup> In response, the California legislature gave the county government management and supervision of certain non-serious, non-violent, and non-sexual felons through Assembly Bill 109<sup>2</sup> (AB 109), known as the 2011 Criminal Realignment Legislation.<sup>3</sup> This allowed felons to serve their sentence in a county jail instead of a state prison.<sup>4</sup> Before AB 109, state law required felons to serve their sentences in state prison.<sup>5</sup>

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<sup>1</sup> Jason Pohl and Ryan Gabrielson, *California Tried to Fix Its Prisons. Now County Jails are More Deadly*, PRISON LEGAL NEWS, October 3, 2019 at 1, <https://www.prisonlegalnews.org/news/2019/oct/3/california-tried-fix-its-prisons-now-county-jails-are-more-deadly/>.

<sup>2</sup> AB 109 amended over 100 sections of the Penal Code and Welfare and Institutions Code. AB 109, 2011 Leg., Reg. Sess. 2011-12 (Cal. 2011).

<sup>3</sup> *California Proposition 20, Criminal Sentencing, parole, and DNA Collection Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_20,\\_Criminal\\_Sentencing,\\_Parole,\\_and\\_DNA\\_Collection\\_Initiative\\_\(2020\)#Assembly\\_Bill\\_109\\_.282011.29](https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020)#Assembly_Bill_109_.282011.29) (last visited September 19, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

In 2014, voters enacted Proposition 47,<sup>6</sup> which made certain offenses, known as wobblers, chargeable only as misdemeanors. Before this proposition, the “wobbler” crimes could be charged as either misdemeanors or felonies.<sup>7</sup> This included crimes such as petty theft, shoplifting, receiving stolen property worth less than \$250, writing bad checks, check forgery, and drug possession.<sup>8</sup> Before this change, when these crimes were charged as felonies, California law required the collection of DNA from the offender.<sup>9</sup>

In 2016, voters enacted Proposition 57<sup>10</sup>, known as “The Public Safety and Rehabilitation Act of 2016.”<sup>11</sup> This proposition passed with an overwhelming majority and was intended to stop the “revolving door of crime” by putting emphasis on rehabilitation.<sup>12</sup> Under Proposition 57, the number of inmates eligible for parole considerations was increased, and the California Department of Corrections and Rehabilitation (CDCR) was allowed to award sentencing credits to the inmates that would go toward their parole eligibility.<sup>13</sup> The aim was to award credits to the inmates to incentivize them to take responsibility for their rehabilitation and promote public safety through educational, vocational, and self-improvement activities.<sup>14</sup> Additionally, Proposition 57 aimed to reduce recidivism by “increasing the likelihood that inmates will successfully transition back into” communities.<sup>15</sup> Proposition 57 specifically granted rulemaking authority to CDCR to give effect to the measure. After Proposition 57 was enacted, the CDCR adopted rules in accordance with the proposition.<sup>16</sup>

Proposition 57 also changed the California Constitution to make individuals who are convicted of non-violent felonies eligible for parole consideration after serving the full prison term for their primary offense.<sup>17</sup> Under these new rules, the Board of Parole Hearing

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<sup>6</sup> Proposition 47 amended Sections 473, 476a, 490.2, 496, and 666 of the Penal Code, Sections 11350, 11357a, and 11377 of the Health and Safety Code, and added Sections 459.5 and 1170.18 to the Penal Code. Cal. Proposition 47, (2014).

<sup>7</sup> Selena Farnesi & Emily Reynolds, *Proposition 47: The Safe Neighborhoods and School Act*, CAL. INIT. REV. (Fall 2014).

<sup>8</sup> *Id.*

<sup>9</sup> CAL. PENAL CODE § 296 (2020).

<sup>10</sup> Proposition 57 amended Sections 602 and 707 of the Welfare and Institutions Code. Cal. Proposition 57 (2016).

<sup>11</sup> *Id.*

<sup>12</sup> *Proposition 57, The Public Safety and Rehabilitation Act of 2016*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, <https://www.cdcr.ca.gov/proposition57/> (last visited September 20, 2020).

<sup>13</sup> *Proposition 57: Criminal Sentences. Juvenile Criminal Proceedings and Sentencing. Initiative Constitutional Amendment and Statute*, LEGISLATIVE ANALYST’S OFFICE, <https://lao.ca.gov/BallotAnalysis/Proposition?number=57&year=2016> (last visited September 20, 2020).

<sup>14</sup> *Proposition 57: Credit Earning for Inmates Frequently Asked Questions*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, <https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq/> (last visited September 20, 2020).

<sup>15</sup> *Id.*

<sup>16</sup> *Notice of Change to Regulations Sections: 3490, 3491, 3495-7, 2449.1, 2449.30-33*, DEPARTMENT OF CORRECTIONS AND REHABILITATION, April 19, 2019. <https://www.cdcr.ca.gov/wp-content/uploads/sites/171/2019/06/ncr19-02posting.pdf?label=Supplemental%20Reforms%20to%20Parole%20Consideration&from=https://www.cdcr.ca.gov/proposition57/>.

<sup>17</sup> *Id.*

would “decide whether to release these individuals before they have served any additional time related to other crimes or sentencing enhancements.”<sup>18</sup> CDCR, under its authority from Proposition 57, has since defined “violent felony offense” as any crime listed in subdivision 667.5 of the Penal Code for purposes of parole consideration.<sup>19</sup>

Since the implementation of Propositions 47 and 57, the prison population dropped by 20,000 inmates and there was no significant increase in crime rates.<sup>20</sup> A study from 2016 showed that there was “little or no deviation in the crime rate after the mass prison release” which California began enacting in 2011.<sup>21</sup>

## B. Path to the Ballot

Proposition 20 is titled “Reducing Crime and Keeping California Safe Act of 2018”, has an amended date of November 28, 2017, and is stamped as received on November 28, 2017 from the Initiative Coordinator at the Attorney General’s Office.<sup>22</sup> However, it was not on the 2018 initiative ballot because it did not meet the signature threshold at least 131 days before the election, as required by Section 9033(b)(1) of the Elections Code.<sup>23</sup> Therefore, it rolled over to the 2020 election.<sup>24</sup>

Even after the proposition received enough signatures, the proponents could remove it from consideration before it became certified 131 days before the November 2020 election.<sup>25</sup> If a legislative bill enacting the same statutory provision passed before that deadline, the proponents would not have to wait until the November election to enact this law and could remove the measure from the ballot. On February 22, 2019, Senator Bates introduced Senate Bill 710, which is identical to Proposition 20.<sup>26</sup> However, this bill failed passage in the Senate Public Safety Committee.<sup>27</sup> According to the Senate Public Safety Committee’s Bill Analysis, similar legislation has been attempted since 1998 to no avail.<sup>28</sup> The bill analysis also states that only the Riverside Sheriff’s Association supported the bill, while the American Civil Liberties Union of California, A New Way of Life Reentry Project,

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<sup>18</sup> CAL. CODE REGS. tit. 15 § 3490 (2020), subd. (c).

<sup>19</sup> *Notice of Change to Regulations Sections: 3490, 3491, 3495-7, 2449.1, 2449.30-33*, supra note 16, at 2.; Cal. Code of Reg. tit. 15 § 3490 (2020)

<sup>20</sup> Vansickle, Abbie and Manuel Villa, *California’s jails are so bad some inmates beg to go to prison*, LOS ANGELES TIMES, May 23, 2019 <https://www.latimes.com/local/lanow/la-me-california-jails-inmates-20190523-story.html>.

<sup>21</sup> Jackman, Tom, *Mass reduction of California prison population didn’t cause rise in crime, two studies find*, THE WASHINGTON POST, May 18, 2016 <https://www.washingtonpost.com/news/true-crime/wp/2016/05/18/mass-release-of-california-prisoners-didnt-cause-rise-in-crime-two-studies-find/>.

<sup>22</sup> Cal. Proposition 20 (2020).

<sup>23</sup> Email with Benjamin Glickman, Supervising Attorney General, California Department of Justice. (October 6, 2020)

<sup>24</sup> *Id.*

<sup>25</sup> CAL. ELECTIONS CODE § 9033, subd. (b), paragraphs (1) and (2).

<sup>26</sup> SB 710, 2020 Leg., 2019-20 Reg. Sess. (Cal. 2020).

<sup>27</sup> *Id.*

<sup>28</sup> SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 710, at 1 (January 6, 2020).

California Attorneys for Criminal Justice, California Public Defenders Association, California Safety and Justice, Inland Congregations United for Change, Los Angeles Dependency Lawyers, Inc., Social and Environmental Justice Committee of the Universalist Unitarian Church of Riverside, and Starting Over, Inc., all opposed the bill.<sup>29</sup>

### C. Proposed Changes

Proposition 20 proposes three major changes to the criminal justice system addressing parole considerations, DNA collection, and theft crimes.

#### 1. Parole Considerations

If passed, Proposition 20 would limit the number of inmates who could receive early parole by increasing the list of felonies defined as “violent.”<sup>30</sup> An entire new section defining “violent felony” would be added to the Penal Code.<sup>31</sup> This new list would determine if the inmate’s offense is considered violent and if they are eligible for parole. The first 24 offenses out of the 51 listed are identical to the offense listed in Section 667.5, which constitutes the current definition of violent felony.<sup>32</sup> While the proposed section does not conflict with the offenses listed in Section 667.5 in defining violent felony, the overlap and redundancy could cause confusion. Additionally, Proposition 20 adds a provision that would deem an inmate a violent offender, thereby removing access to parole consideration under the Proposition 57 framework, if that inmate is serving concurrent, consecutive, or stayed time for a violent felony, is sentenced to an indeterminate sentence, or has an enhancement making the offense violent.<sup>33</sup>

Proposition 20 also proposes a new standard for use at parole hearings. The current standard for parole weighs mitigating and aggravating factors and, based on the totality of the circumstances, determines “if the inmate poses a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity.”<sup>34</sup> The proposed standard of review is “whether the inmate will pose an unreasonable risk of creating victims as a result of felonious conduct if released from prison.”<sup>35</sup> The proposition first lays out factors the hearing officer must consider, such as the inmate’s criminal history, circumstances surrounding the current conviction, input from the victim, and any other information regarding the inmate’s suitability for release.<sup>36</sup> The proposition then lays out circumstances to be considered by the hearing officer to determine whether the inmate is unsuitable for release. They include looking at details of the offense the inmate is serving

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<sup>29</sup> *Id.*

<sup>30</sup> Cal. Proposition 20 (2020) § 4.

<sup>31</sup> Proposed CAL. PENAL CODE § 3040.1, Cal. Proposition 20 (2020).

<sup>32</sup> CAL. CODE REGS. tit. 15 § 3490 (2020), subd. (c).

<sup>33</sup> Proposed CAL. PENAL CODE § 3040.3, Cal. Proposition 20 (2020).

<sup>34</sup> CAL. CODE REGS. tit. 15 § 2449.5 (2020).

<sup>35</sup> Proposed CAL. PENAL CODE § 3040.2, Cal. Proposition 20 (2020).

<sup>36</sup> *Id.*, subd. (c).

time for, prior history of violence, and conduct while incarcerated.<sup>37</sup> Factors for the hearing officer to consider when determining if the inmate is suitable for release are also added. The factors include looking at the inmate's criminal history, the inmate's plans if released, and the inmate's activities while incarcerated that "demonstrate an enhanced ability to function within the law."<sup>38</sup>

Finally, Proposition 20 would give new rights to victims and prosecuting attorneys during parole hearings. The new law would require notice to the victims of the crime prior to an inmate being reviewed for early release and would give the victims a right to be heard at the parole hearing.<sup>39</sup> The prosecuting attorney would also have a right to review all of the information used at the hearing and would have a right to respond to the parole board in writing.<sup>40</sup> The inmate and the prosecuting attorney may ask for a review within 30 days of the notice of final decision.<sup>41</sup> The proposition also would allow the parole board to consider the entire criminal history, including juvenile history, of the inmate when making its determination for release.<sup>42</sup> Once released from prison, an inmate would not be allowed to live within 35 miles of a witness or victim of the crime.<sup>43</sup> If there is a period of flash incarceration<sup>44</sup>, the proposition would require the district attorney, public defender, and sheriff be notified.<sup>45</sup> Additionally, the proposition adds language allowing a probation officer to arrest a parolee if they believe the parolee has violated terms of the parole.<sup>46</sup>

## 2. DNA Collection

Proposition 20 proposes required DNA collection from offenders found guilty of misdemeanor burglary, forgery, larceny, possession of controlled substance, battery, domestic violence, and elder abuse.<sup>47</sup> These crimes were the same ones that changed from wobblers to mandatory misdemeanors under Proposition 47; prior to Proposition 47, DNA collection was not always required,<sup>48</sup> because there was discretion to charge the offense as a misdemeanor. Proposition 20, then, goes further than the law that existed prior to 2014, by making DNA collection for these crimes mandatory. Current law only allows DNA collection from any person, juvenile or adult, who is convicted or pleads no contest to

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<sup>37</sup> *Id.*, subd. (d).

<sup>38</sup> *Id.*, subd. (e).

<sup>39</sup> Proposed CAL. PENAL CODE § 3040.4, subd. (a), (c), Cal. Proposition 20 (2020).

<sup>40</sup> *Id.*, subd. (b), (d).

<sup>41</sup> *Id.*, subd. (g).

<sup>42</sup> Proposed CAL. PENAL CODE § 3041, subd. (b), Cal. Proposition 20 (2020).

<sup>43</sup> Proposed CAL. PENAL CODE § 3003, subd. (h), Cal. Proposition 20 (2020).

<sup>44</sup> Flash incarceration is a "period of detention in city or county jail due to a violation" of post release supervision and the length "can range between one and 10 consecutive days." CAL. PENAL CODE § 3454 (2020).

<sup>45</sup> Proposed CAL. PENAL CODE § 3454, subd. (d), Cal. Proposition 20 (2020).

<sup>46</sup> Proposed CAL. PENAL CODE § 3455, subd. (b), Cal. Proposition 20 (2020).

<sup>47</sup> Cal. Proposition 20 (2020) § 5.

<sup>48</sup> Cal. Proposition 47 (2014).

a felony, or any adult who is arrested for a felony offense.<sup>49</sup> This law has been in effect since November 2004.<sup>50</sup>

### 3. Theft Crimes

Proposition 20 proposes two new misdemeanors to the Penal Code: serial theft and organized retail theft.<sup>51</sup> Serial theft is defined as having two or more convictions of petty theft, shoplifting, grand theft, burglary, carjacking, robbery, crimes against an elder or dependent adult, forgery, unlawful taking or unauthorized use of a vehicle, identity theft, and unlawful use of an access card.<sup>52</sup> Organized retail theft is defined as a person who acts in concert with one or more people and commits two or more retail thefts within 180 days and the aggregate merchandise value is more than \$250.<sup>53</sup> A sentence of no longer than one year in county jail would be given to any person who violates the new law.<sup>54</sup>

This proposition would also change the definition of shoplifting to include intent to steal retail property, defining retail property as “any article, product, commodity, item or component intended to be sold”.<sup>55</sup>

### 4. Amendments

This proposition includes a clause that would not allow this act to be amended by the Legislature unless “by a statute that furthers the purposes, findings, and declarations of the Act” and is passed by a  $\frac{3}{4}$  vote in each house, or by a statute approved by voters.<sup>56</sup> This limits the ability of the legislature to change the list of violent felony offenses, the list of misdemeanor offenses subject to DNA collection, and the definition and penalty for certain theft crimes.

### 5. Severability Clause and Conflicting Provisions

Proposition 20 signals the intent of the people that any part that might be found unconstitutional or invalid is severable from the rest of the act.<sup>57</sup> A court that finds any provision to be invalid will still conduct an independent analysis, considering whether the provision is grammatically, functionally, and volitionally severable.<sup>58</sup> If the court does

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<sup>49</sup> CAL. PEN. CODE § 296 (2020).

<sup>50</sup> *Id.*

<sup>51</sup> Cal. Proposition 20 (2020) §§ 7, 8.

<sup>52</sup> Cal. Proposition 20 (2020) § 7.

<sup>53</sup> Cal. Proposition 20 (2020) § 8.

<sup>54</sup> *Id.*

<sup>55</sup> Cal. Proposition 20 (2020) § 6.

<sup>56</sup> Cal. Proposition 20 (2020) § 9.

<sup>57</sup> Cal. Proposition 20 (2020) § 10.

<sup>58</sup> *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 270 (2001).

conclude that the provision is severable—and it likely will—then, the remaining provisions that are unaffected by the invalid or unconstitutional provision will remain in full force.<sup>59</sup>

Additionally, Proposition 20 declares that in the event there is another measure or law that conflicts with the measure, this proposition “shall be self-executing and given full force and effect” and the other measures “shall be null and void.”<sup>60</sup>

### III. STATUTORY INTERPRETATION ISSUES

#### A. Proposed Addition of Section 3040.2 to the Penal Code

Subdivisions (c), (d), and (e) of proposed Section 3040.2 list factors that the hearing officer must consider when granting parole. Subdivision (c) lists seven factors to be considered generally, subdivision (d) lists 15 to consider whether the inmate is “unsuitable” for release, and subdivision (e) lists 11 factors to consider whether the inmate is “suitable” for release. There is potential for confusion regarding how these factors are to be applied and if they are to be considered differently. Many of the factors listed under the subdivisions are the same or similar. A challenge to the hearing officer’s decision may raise this issue.

One factor that must be considered is the offender’s entire criminal history, including their juvenile records, if any. This raises a question whether there must be specific authorization to access sealed juvenile records or whether a public record that considers details of a sealed record must also be sealed. The law states that a juvenile record that is sealed may be accessed in order to comply with data collection or reporting requirements in the law, but it must not be “further released, disseminated, or published by or through the researcher or research organization.”<sup>61</sup> This could cause conflict between the new probation standards (which would allow the victim to be heard, would allow the prosecuting attorney to be heard, and would allow the prosecuting attorney to petition for review after the final notice of decision) and ensuring the juvenile records remain private. California law that addresses the records of minor criminal defendants,<sup>62</sup> specifies the ways in which juvenile records can be sealed,<sup>63</sup> the time period before juvenile records will be destroyed once sealed,<sup>64</sup> and the specific instances in which juvenile records may be reviewed, including who has access, for what purpose, and in what scope.<sup>65</sup> The proposition does not include similar provisions addressing the issue of confidentiality and how juvenile records must be handled in the parole hearing process.

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<sup>59</sup> *Id.*

<sup>60</sup> Cal. Proposition 20 (2020) §11.

<sup>61</sup> CAL. WELF. & INST. § 787

<sup>62</sup> CAL. WELF. & INST. CODE § 775–787, incl.

<sup>63</sup> CAL. WELF. & INST. CODE § 781 and 786.

<sup>64</sup> CAL. WELF. & INST. CODE § 781, subd. (d).

<sup>65</sup> CAL. WELF. & INST. CODE § 775–787, incl.

## B. Amendment of Subdivision (b) of Proposed Section 3455 of the Penal Code

Proposition 20 explicitly adds “probation officer” to a list of individuals authorized to arrest a parolee for failure to comply with the terms of their probation. This change is likely unnecessary, because probation officers already have the powers of peace officers within the jurisdiction defined by Section 830.5 of the Penal Code<sup>66</sup> so adding “probation officer” explicitly may create confusion. While the creation of confusion is not enough to sever this portion of the proposition, it is possible that confusing text will create a need for time consuming and costly litigation to clear up the confusion.

## IV. CONSTITUTIONAL ISSUES

### A. Single-Subject Rule

The California Constitution prohibits an initiative measure from addressing more than one subject.<sup>67</sup> This means that if the provisions in the measure are not reasonably related to a common theme or purpose<sup>68</sup>, the measure cannot be placed on the ballot or take effect if passed by the voters.<sup>69</sup> Section 11 of Proposition 20 ostensibly acknowledges that the measure embraces multiple subjects. The section lists areas of potential conflict, including, “parole consideration pursuant to Section 32 of Article I of the Constitution, revocation of parole and post release community supervision, DNA collection, or theft offenses.”<sup>70</sup> However, this rule has typically been applied loosely, so that “even extensive reform in a particular area of public concern does not violate the single subject rule where a comprehensive package of provisions have a common sense relationship, and its various components are in furtherance of a common purpose.”<sup>71</sup> For example, a proposition that made sweeping changes to the criminal justice system in 2000 was challenged under this rule, but the court held that there was no violation because the proposition’s wide reaching goals all related to reducing crime and courts have repeatedly emphasized “liberal construction” of the single-subject rule.<sup>72</sup> This suggests that the common thread of criminal law reform is likely enough for Proposition 20 to escape violation of this rule.

However, despite the “liberal construction” that is often afforded initiative measures, there have been a few instances where propositions have been invalidated under this rule.<sup>73</sup> It seems that the court’s primary concern is when the provisions of the measure have the potential to create voter confusion or there is evidence that the proponents of the

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<sup>66</sup> CAL. WELF. & INST. CODE § 283.

<sup>67</sup> CAL. CONST. art. II, § 8, subd. (d).

<sup>68</sup> *Senate v. Jones*, 21 Cal. 4th 1142, 1158 (1999).

<sup>69</sup> CAL. CONST. art. II, § 8, subd. (d).

<sup>70</sup> Proposition 20 (2020) § 11.

<sup>71</sup> *Senate v. Jones*, 21 Cal. 4th 1142, 1158 (1999).

<sup>72</sup> *Manduley v. Superior Court*, 27 Cal. 4th 537, 575 (2002).

<sup>73</sup> *California Trial Lawyers Assn. v. Eu*, 200 Cal. App. 3d 351 (3rd Dist. 1988); *Chemical Specialties Manufacturers Assn., Inc. v. Dukmejian*, 227 Cal. App. 3d 663 (1st Dist. 1991); *Senate v. Jones*, 21 Cal. 4th 1142 (1999).

initiative are attempting to deceive voters to pass policies that would not receive majority support by including other, more popular policies in the same measure.<sup>74</sup> In this vein, there is some evidence of voter confusion or deception where the Proposition 20 proponents focus their rhetoric on “providing law enforcement agencies tools to fight violent crime”<sup>75</sup> or “rolling back ‘Brown-era leniency’ in criminal sentencing and parole,”<sup>76</sup> but fail to mention the mandate to collect DNA from certain misdemeanor offenders and the creation of new theft crimes. Additionally, advertisements produced by Keep California Safe include graphic images of crime victims and highlight the crimes that are not considered violent under current law.<sup>77</sup> While it is true that the ballot summary and arguments do mention the DNA collection and theft crime provisions of the proposition, only one sentence of those arguments addresses DNA collection.<sup>78</sup> Further, financial support from the Albertsons-Safeway, Ralphs Grocery Co., Costco Wholesale and other grocers<sup>79</sup> also suggest that proponents are seeking to build a wide coalition around issues that would not normally be tied together. Grocers and retailers may not be as supportive of the measure were it not for the creation of new retail crimes, even though those provisions are quite unrelated to the parole provisions that receive the majority of the proponents’ focus in advertising. While these facts do raise a concern that the proposition does not meet the demands of the single-subject rule, the history of courts applying the rule liberally suggests that Proposition 20 would survive a challenge on this claim.

## B. Signature Requirement

Proposition 20 is presented as a statutory initiative rather than a constitutional amendment. There are different requirements depending on whether an initiative amends statutes or the California Constitution. A statutory revision requires a lower number of signatures than a Constitutional amendment.<sup>80</sup> This means that if an initiative that purports to be a statutory revision actually amends the Constitution, the measure has not received enough signatures to be presented to the voters and those portions amending the Constitution cannot take effect. For Proposition 20, there is a question whether certain provisions actually amend the Constitution.

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<sup>74</sup> *Senate v. Jones*, 21 Cal. 4th 1142, 1168 (1999).

<sup>75</sup> *Yes on 20 Support Law Enforcement*, REFORM CALIFORNIA, <https://reformcalifornia.org/initiatives/yes-on-20/> (last visited Sept. 22, 2020).

<sup>76</sup> Ben Christopher, *Props to you, Californians: A preview of what's on your November ballot*, CALMATTERS, (June 29, 2020) <https://calmatters.org/explainers/california-november-2020-ballot-propositions-final-list/>.

<sup>77</sup> See videos titled “Date Rape,” “Pimp a Child,” “Beat Your Spouse,” and “Hate.” *Tool Kit*, KEEP CALIFORNIA SAFE, <https://keepcalsafe.org/tool-kit/> (last visited Sept. 22, 2020).

<sup>78</sup> CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 3, 2020, at 50, 51, available at <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>. [“NOVEMBER 2020 VOTER GUIDE”].

<sup>79</sup> *2017 through 2018: Campaign Finance: YES ON 20 - KEEP CALIFORNIA SAFE, A PROJECT OF THE CALIFORNIA PUBLIC SAFETY PARTNERSHIP ISSUES COMMITTEE*, CALACCESS, <http://calaccess.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1399447&view=received&session=2017> (last visited Sept. 22, 2020).

<sup>80</sup> CAL. CONST. art. II, § 8, subd. (b).

This issue exists because Proposition 20 attempts to change Proposition 57 (2016) which was a Constitutional amendment. Proposition 57 (2016) added Section 32 to Article I of the California Constitution; it allowed for a process of parole consideration for non-violent offenders and gave the California Department of Corrections and Rehabilitation (CDCR) the power to create regulations to give effect to the measure.<sup>81</sup> Since then, CDCR has used that authority to define “violent felony” as a “crime or enhancement as defined by subdivision (c) of Section 667.5 of the Penal Code. Proposition 20 would remove that power from CDCR by creating a statute that would define “violent offense” for purposes of the early release provision created by Proposition 57. As a result of the list being made in statute<sup>82</sup> and the Legislature’s power to amend that statute,<sup>83</sup> Proposition 20 would, in effect, strip the CDCR of its power, granted in the Constitution,<sup>84</sup> to define the terms of the early release provision of Proposition 57 without receiving the required number of signatures to amend the Constitution.

This issue has been raised in the courts, and the Superior Court of Sacramento held that because the other provisions do not amend the Constitution and the provisions at issue could be severed from the measure if it passes, the court will wait to decide the issue.<sup>85</sup> “There is a strong presumption against preelection resolution of substantive challenges to initiatives, i.e., challenges aimed at the measures’ substantive provisions.”<sup>86</sup> The challenge is substantive because it asks the court to review the substantive provisions of Proposition 20 to determine whether they conflict with provisions in Article I, Section 32 or any regulations promulgated by CDCR under the authority of Section 32.<sup>87</sup> In order to protect the integrity of the initiative process, a court will allow measures with potentially invalid provisions to be placed on the ballot, unless a significant part of the measure is invalid.<sup>88</sup> The court found that, “it is not clear that all or even most of the Initiative’s provisions are invalid,”<sup>89</sup> because the provisions relating to DNA collection and theft crimes are not challenged.<sup>90</sup> Further, the court found that the challenged portions could be severed if found invalid after the measure passes because the challenged parole provisions, the DNA collection provisions, and the theft crime provisions “do not appear to be interdependent in the sense that the validity of any depends on the validity of all the others. By all appearances, the DNA-collection and anti-theft provisions could be given effect regardless of whether the early-parole provisions were invalidated in a postelection challenge.”<sup>91</sup>

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<sup>81</sup> CAL. CONST. art. II, § 32, subd. (b).

<sup>82</sup> Proposition 20 (2020) would add Section 3040.1 to the Penal Code to define violent felony offense “[f]or purposes of early release or parole consideration under the authority of Section 32 of Article I of the Constitution.”

<sup>83</sup> Proposition 20 (2020) § 9 allows the Legislature to revise the measure with a  $\frac{3}{4}$  vote so long as it furthers the purpose of the measure.

<sup>84</sup> CAL. CONST. art. II, § 32, subd. (b).

<sup>85</sup> *Newsom v. Padilla*, 2019 Cal. Super. LEXIS 3237, Jun. 13, 2019.

<sup>86</sup> *Newsom v. Padilla*, 2019 Cal. Super. LEXIS 3237, \*12, Jun. 13, 2019.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*20.

<sup>89</sup> *Id.* at \*31

<sup>90</sup> *Id.* at \*31–32.

<sup>91</sup> *Id.* at \*32.

## V. PUBLIC POLICY CONSIDERATIONS

### A. Proponent Arguments

Proponents take particular concern with the effects of Proposition 47 (2014) and Proposition 57 (2016), arguing that those measures were detrimental to public safety and that Proposition 20 will remedy the issues they created. The first of the issues proponents raise is the change in Proposition 47 requiring certain “wobbler” offenses to be classified as misdemeanors. The proponents argue that those crimes were serious and now are not given proper attention by law enforcement because they were downgraded by Proposition 47.<sup>92</sup> Proposition 20 does not, however, undo the reclassification of offenses under Proposition 47.<sup>93</sup> The second issue raised by proponents is that changes made by Proposition 57 allow “dangerous offenders” early release. The proponents argue that too many “violent inmates” and “sexual predators” are eligible for early release under the changes made to the California Constitution by Proposition 57.<sup>94</sup> Proposition 20 attempts to address this issue by creating a list, in statute, of offenses that are ineligible for early release,<sup>95</sup> circumventing the list created by CDCR under its Constitutional authority. The third issue is that Proposition 47 led to “an explosion of serial theft.”<sup>96</sup> Proposition 20 addresses this issue by creating two new theft offenses and redefining a third.<sup>97</sup> Proponents argue that many theft offenders are drug addicts that will benefit from being made criminals because the new laws will get them “off the streets and into the substance abuse and mental health programs they desperately need.”<sup>98</sup> Proponents do not address the fact that “strengthening sanctions against theft”<sup>99</sup> will get drug addicts incarcerated, not into rehabilitation programs.

Proponents also suggest that stronger criminal law provisions will protect victims of crime.<sup>100</sup> Proposition 20 contains provisions which require that victims are notified of an offender’s release,<sup>101</sup> and that they are able to submit a confidential statement to the parole hearing board.<sup>102</sup> Proponents also argue that the increase in DNA collection of misdemeanor offenders will aid in cold case investigations, referencing a slight decrease in

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<sup>92</sup> *Yes on 20 Support Law Enforcement*, *supra* note 71, at 8.

<sup>93</sup> Proposition 20 (2020).

<sup>94</sup> NOVEMBER 2020 VOTER GUIDE at 51.

<sup>95</sup> Proposed CAL. PENAL CODE § 3040.1. Proposition 20 (2020) §4.

<sup>96</sup> *About: Initiative Overview*, KEEP CALIFORNIA SAFE, <https://keepcalsafe.org/about/> (last visited Sept. 22, 2020).

<sup>97</sup> Proposed CAL. PENAL CODE § 459.5. Proposition 20 (2020), § 6. Proposed CAL. PENAL CODE § 490.2. Proposition 20 (2020), § 7. Proposed CAL. PENAL CODE § 490.4. Proposition 20 (2020), § 8.

<sup>98</sup> NOVEMBER 2020 VOTER GUIDE at 50.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Subd. (a), proposed CAL. PENAL CODE § 3040.4. Proposition 20 (2020), § 4.

<sup>102</sup> Subd. (c), proposed CAL. PENAL CODE § 3040.4. Proposition 20 (2020), § 4.

cold case “hits” since Proposition 47, less than a quarter of which are “connected to violent crime.”<sup>103</sup>

## B. Opponent Arguments

Opponents argue that Proposition 20 is an “extreme”<sup>104</sup> response to criminal justice reform that was “overwhelmingly” supported by Californians.<sup>105</sup> Opponents highlight that Proposition 47 did not lead to an increase in violent crime,<sup>106</sup> though it may have led to a moderate increase in petty theft.<sup>107</sup> Opponents also point out that the measure will have a disproportionate impact on youth, people of color, and low-income communities because they could be “locked up for years for low-level, non-violent crimes.”<sup>108</sup> The Legislative Analyst’s Office has estimated that the initiative will cost tens of millions of dollars annually.<sup>109</sup> There would be an increase in correctional costs because of an increased county jail population and county supervision, state costs because of the reduction in the number of inmates that are eligible for parole, court costs because of the new theft-related crimes, and enforcement costs because of the number of people required to give DNA samples.<sup>110</sup> Opponents argue that the increase in spending on correctional facilities will draw resources away from victims and survivors of crime and away from needed social programs that tackle the root causes of crime in California.<sup>111</sup> For example, savings of \$350 million since the passage of Proposition 57 have been reinvested in community programs.<sup>112</sup> Without this spending, opponents argue, California will be less safe, not more.<sup>113</sup>

## C. Other Considerations

The current COVID-19 pandemic would complicate the efforts of Proposition 20. The pandemic has required the CDCR to enact new rules to ensure inmate safety, including rules for “an expedited transition to parole” for inmates that have 60 days or less to serve.<sup>114</sup> However, Proposition 20 would make it harder for inmates to get parole and would consequently require more inmates to stay in prison. It is unclear how the CDCR would maintain proper social distancing protocol if they are required to keep more inmates

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<sup>103</sup> *About: Initiative Overview*, *supra* note 84, at 9.

<sup>104</sup> NOVEMBER 2020 VOTER GUIDE at 51.

<sup>105</sup> *Id.* at 50.

<sup>106</sup> *NO on Prop 20: it will draw resources away from survivors of crime and our communities*, RUBY’S PLACE <https://www.rubysplace.org/no-on-prop20> (last visited Sept. 22, 2020).

<sup>107</sup> Mia Bird, Magnus Lofstrom, et al. *The Impact of Proposition 47 on Crime and Recidivism*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (June 2018) [https://www.ppicy.org/wp-content/uploads/r\\_0618mbr.pdf](https://www.ppicy.org/wp-content/uploads/r_0618mbr.pdf). (finding 9% increase in larceny offenses since Proposition 47 took effect).

<sup>108</sup> NOVEMBER 2020 VOTER GUIDE at 50.

<sup>109</sup> *Id.* at 48.

<sup>110</sup> *Id.* at 48-49.

<sup>111</sup> NOVEMBER 2020 VOTER GUIDE at 51.

<sup>112</sup> *NO on Prop 20: it will draw resources away from survivors of crime and our communities*, *supra* note 94.

<sup>113</sup> NOVEMBER 2020 VOTER GUIDE at 51.

<sup>114</sup> *COVID-19 Information: Updates*, CALIFORNIA DEPARTMENT OF CORRECTION AND REHABILITATION, March 31, 2020, <https://www.cdcr.ca.gov/covid19/updates/>.

incarcerated during the pandemic. Also, while Proposition 20 has a clause that says it supersedes conflicting provisions, it is unclear if it would supersede provisions enacted because of the pandemic.

## VI. CONCLUSION

Proposition 20 would change the definition of violent felony offense for purposes of parole consideration under Article 32 of the California Constitution and would create new standards for early release and parole hearings. Proposition 20 would also require DNA collection from numerous additional misdemeanors, redefine shoplifting in the penal code, and add serial theft and organized retail theft as new misdemeanors to the penal code. Proponents argue that this proposition will protect victims and increase public safety. Opponents argue that this is an extreme proposition that will have disproportionate impacts on youth, people of color, and low-income families. Proposition 20 may run into problems with statutory interpretation, encompassing multiple subjects in violation of the single-subject rule, and, without the required number of signatures for a constitutional amendment, creating statutes that would amount to a constitutional amendment.