California could cut its prison population in half and free 50,000 people. Amid pandemic, will the state act?

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Emile DeWeaver has been counting his blessings during the pandemic. The 42-year-old has a good job with Pilot, a successful tech startup that helps companies handle bookkeeping and tax preparation. As a product specialist who deals with clients online and over the phone, he can work remotely, from a place in East Oakland he shares with four housemates. He pays his rent and owns some stock. He even has a handful of chickens in his backyard, in a small coop next to mature lemon and orange trees that pop with fruit.

“Very few people from Oakland can afford to live in Oakland. I live in Oakland,” DeWeaver told me on a recent evening, sitting in a chair in the backyard and drinking a mug of green-black tea. A wiry, bookish Black man, he wore glasses and a T-shirt that said Democracy Needs Everyone. “I’m very lucky, and that’s generally the tenor of my life since being out of prison.”

DeWeaver is one of only a few hundred Californians in the last decade who have had their criminal sentences commuted by the governor. When he was just 18, in a flash of violence in Oakland, he shot and killed a neighborhood rival at a dice game, resulting in a conviction for first-degree murder; he was also convicted of shooting and injuring a witness, and received a sentence of 67 years to life. Twenty years later, he was a published writer, the founder of his own justice-reform nonprofit and a leader of the first Society of Professional Journalists chapter at San Quentin State Prison. Everyone from Stanford professors to tech-industry professionals testified that he had transformed himself and was serving the community. In 2017, Gov. Jerry Brown agreed, commuting DeWeaver’s sentence to a lesser charge and allowing him to walk free a year later.

DeWeaver’s experience suggests that a violent act doesn’t freeze someone in amber, that an offender is more than just the offense, and he says he’s not an exception. There are tens of thousands of others in California’s 35

prisons who could be safely returned to their communities, he said, if the governor wanted to do it — and if the public supported him. Which, judging by opinion polls, it wouldn't, because many people have an idea of violent offenders that are "based on what media has built in our head, and based on our worst fears," DeWeaver said. "People are reasonably afraid of that image."

But it's not the image he has seen and lived: "This idea of 'violent offender' is way more complicated and counterintuitive than people understand."

Justice-reform groups have been shouting about the harms of mass incarceration for decades. But the need to rethink our idea of violent offenders has grown more urgent during the pandemic, when the virus has turned prisons into hot zones, killing incarcerated people and staff, straining hospital resources and putting entire communities at risk. COVID-19 has proved the point of the reformers — America's jam-packed prisons are threats to public safety — and at the same time, it has created a window for change. It won't stay open for long, though, and no one wants to waste the chance for change.

In June, after touring San Quentin and documenting a range of unsafe conditions that were allowing the virus to burn through the buildings, a team of University of California health experts said that the prison should be substantially emptied, its population reduced by 50%, amounting to about 1,700 men. The same logic, the experts said, would apply to other overcrowded state prisons.

The total number of people incarcerated in California prisons is about 100,000; getting to a 50% reduction would mean letting go of 50,000 humans.

Is this possible? The short answer is yes.

The state has the power. The main obstacle is political: Three-fourths of all prisoners have been convicted of violent acts. This means that decarcerating the state system by 50% would require the release of large numbers of people convicted of violent crimes. Is it possible to do that safely? A wealth of evidence suggests that the answer, again, is yes. All it would require is a fresh look at the data. And some political courage.

The first thing to understand is that prison systems have been emptied before, successfully, in foreign countries and the U.S. — including California.

Rewind to 2006, four years into Arnold Schwarzenegger's first term as governor. Decades of tough-on-crime policies had left California's 35 prisons dangerously overcrowded: Designed to hold 80,000 souls, they teemed with 170,000, making it impossible for prison health care workers to provide decent medical care. In October 2006, Gov. Schwarzenegger declared a state of emergency, saying people in prison were in "extreme peril," and a lawsuit filed by prisoners over the dangerous conditions, known as the Plata case, went all the way to the U.S. Supreme Court. The justices ruled in 2011 that "crowding creates unsafe and unsanitary conditions" and upheld an earlier court decision that required California to empty its prisons of almost 40,000 bodies within two years.

California pulled it off, making a series of policy changes. The corrections system redirected large numbers of people convicted of nonviolent crimes

to county jails, and most parole violators were also diverted to jails instead of being returned to prison. Then, in 2014, state voters passed Proposition 47, which turned some felony drug and theft crimes into misdemeanors. Together, these efforts slashed the state's prison population by a remarkable 45,000 souls by 2015.

Before the releases — a process now known as "Realignment" — California prison officials warned that the violent crime rate would surely rise. Instead, according to detailed studies by the nonpartisan Public Policy Institute of California and academic researchers, the state's violent crime continued to hover at about the same level it was in the 1960s — a historic low. "There were no impacts on violent crime," said Magnus Lofstrom, the institute's policy director of criminal justice. Another way of putting this: Today there is about the same amount of violent crime in California as when the state incarcerated five times fewer people. After Realignment, data did show a brief uptick in property crimes like car theft, but even that fluctuation soon disappeared, returning to a baseline that is also historically low, Lofstrom said.

Realignment didn't touch the violent offender population. No one wanted to go there, California politicians least of all. For someone like Gov. Gavin Newsom, who grew up in the Willie Horton era, "The idea of having 20,000 potential Willie Hortons out there is scary," said Jonathan Simon, professor of criminal justice law at UC Berkeley.

But according to Simon and other researchers who have put the system under the microscope, the picture isn't so black-and-white, and the hard lines drawn by the state are made of myth, not science.

"The distinction we're always making between violent and nonviolent people? We have to let go of it, because it has no correlation with public safety," said Hadar Aviram, professor of law at UC Hastings in San Francisco.

Aviram has spent decades gathering data on violent offenders and their journeys through the system. Over and over again, across states and eras, she has found that there is no link between a person's crime and the risk they may pose to the public. People who commit more serious crimes may be less of a risk, depending on how long they have been in prison and how

old they are. Even those who committed murder can be safe to release: According to a study by the Stanford Criminal Justice Center, between 1995 and 2010, 48.7% of all paroled prisoners in California went on to commit new crimes, but among prisoners convicted of murder who were released, the rate was a minuscule 0.58%.

Some of the starkest evidence comes from Maryland. In 1996, a man serving a life sentence for murder, Merle Unger, claimed in a legal petition that his trial judge had given improper instructions to the jury. After years of court battles, the Maryland Court of Appeals finally agreed with Unger in 2012, opening a door for hundreds of other state prisoners — most convicted of murder — to challenge their own sentences on the same grounds. Since then, about 200 "Ungers" have won their freedom, and a study performed six years after the court decisionfound that less than 3% of those released had gone back to prison for a new crime or parole violation, well below the 40% recidivism rate for all Maryland offenders. The Ungers are just old men — the same kind of men who mentored a young Emile DeWeaver.

Landing in the corrections system as a teenager, waiting in a county jail to be transferred to a state prison, DeWeaver received some crucial guidance from an older man there, he recalled. The man was connected to a prison gang known as the Black Guerrilla Family; his fingertips, as DeWeaver later wrote, "were blunt and burned from hard labor and the hot glass of crack pipes." But instead of recruiting DeWeaver, the man gave him pointers on how to avoid joining a gang, and that advice allowed DeWeaver to stay independent and avoid physical altercations in dangerous prison yards for 21 years.

"He saved my life," DeWeaver said. "Everything I have ever learned, I learned from a violent offender."

Once you accept that some violent offenders can be safely returned to their communities, mass decarceration suddenly looks plausible, Aviram said, because now you can release broad categories of people. The state has already dipped its toe in this strategy during the pandemic, selecting a few limited groups — no violent offenders, no sex offenders and no one

convicted of domestic violence — and speeding their already-scheduled releases, to free up space for social distancing. A few thousand have gotten out through these programs.

“If you just zhush the categories a little bit,” Aviram said, “the few thousands turn into tens of thousands.”

For instance, she said, you could release 5,000 people in custody who are older than 65. A slew of studies shows that offenders “age out” of street crime in their mid- to late-twenties, growing less violent as they get older, like the Ungers. So you wouldn’t need to stop at 65. Prison life is brutal on bodies; the food is bad, the days are stressful. “When you’re 50 and you’ve spent 30 years in prison,” she said, “you’ve aged much faster than people on the outside.” About a quarter of all those incarcerated are over the age of 50.

Aviram was just warming up. She kept zhushing the categories, reeling off numbers.

Next she wanted to talk about people with medical conditions like cancer, diabetes, bad lungs, heart issues — sitting ducks for the virus. According to the state’s prison health care system, 50,000 incarcerated people have at least one “high risk” factor making them especially vulnerable to COVID-19.

And speaking of risk, she continued, what about the 60,000 prisoners considered “low risk to reoffend”?

The state gives incarcerated people a score from 1 to 5, with 1 being the lowest risk and 5 the highest. The score is supposed to measure the likelihood that a person will commit new crimes once released. Half of all people in the California system have the lowest score, 1.

Risk, of course, is a relative concept. According to the state, 48% of the lowest-risk offenders will be arrested on a new felony charge within three years of release; a score of 1 doesn’t mean they’re “safe.” Aviram’s response: So what? Lots of people in the outside world are committing crimes, too.

“I can do this all day,” she said.

Next she talked about ways to speed up the existing release process. People get out of prison every day under normal circumstances simply because their sentences end. Already this year, the California Department of Corrections and Rehabilitation has expedited the release of a few thousand people who were within 180 days of freedom. By the same logic, Aviram said, the state could stretch that window from 180 days to a full year. That’s 30,000 more people.

How about releasing 4,000 women?

THE PATH TO A 50% REDUCTION

A few categories of incarcerated people who could safely be released, according to the experts.

- 5,000 older than 65. Studies show that offenders tend to “age out” of violence.
- 50,000 considered “high risk” for COVID-19, many with existing medical problems such as cancer, diabetes, bad lungs, heart issues.
- 30,000 eligible for release within a year if the state corrections department — already releasing those within 180 days of freedom — broadened its window.
- 4,000 women, who are often the accomplices of men or victims of abuse, and whom corrections department data show have lower recidivism rates than men

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Red light: While the logic behind releasing 50,000 inmates from state prisons is reasonable, the political hurdles are too great for this to happen.

105.9k: Total number incarcerated in California prisons

54.7k: Total number out on parole

46.9%: 2019 recidivism rate for offenders released from state prison in the 2014-2015 fiscal year

Today, the state locks up enough women to fill two entire prisons. But typically, when women are convicted of felonies, they're the accomplices of men or they're victims of abuse themselves, said Simon, the Berkeley professor. Recidivism rates for women are lower than for men, CDCR data show. Simon argued that most every woman now in a state prison could safely be sent home.

Altogether, by pulling people from some or all of these categories, the California prison system could identify the 50,000 people necessary to achieve a 50% cut in population. In May, Californians United for a Responsible Budget, a prison-reform coalition, urged the governor to conduct the releases in multiple "waves," recommending that a minimum of 50,000 people be included in the first wave.

Amber-Rose Howard, the group's executive director, said that the virus has shown the prison system to be overstuffed, brittle and deadly. "Now is the time that we fix things."

If the governor wanted to decarcerate at scale, he could. There are a few levers to pull. One is to declare an emergency, like Schwarzenegger did in 2006 to alleviate overcrowding; multiple groups have asked Newsom to do the same in the COVID-19 crisis.

Reformers say that large releases could also be achieved through the existing clemency process — a kind of sword in the stone of the state Constitution, an awesome power there for Newsom's taking. Article 5 allows the governor to substitute less severe punishments for existing ones, giving him wide latitude to alter people's fates by commuting their sentences. Legal experts say the power could be wielded to release entire categories of incarcerated people; in a 2016 paper, Simon pointed out that European countries have done this successfully to relieve prison overcrowding.

“The legal scaffolding is there,” said the Bay Area’s Kate Chatfield, senior adviser with the Justice Collaborative, a national group that advocates decarceration. “Somebody just needs to utilize it.”

Unfortunately for those in prison, governors in California and other states tend to use their clemency powers sparingly, commuting the sentences of a few dozen handpicked individuals per year. Gov. Jerry Brown granted 283 commutations during eight years, more than his predecessors; so far, Newsom has issued 65 commutations in almost two years. The process is not based on science but on outmoded narratives of redemption; the application for a commuted sentence is submitted by the prisoner himself, and the core of it is a series of personal essays, which helps explain how Emile DeWeaver was able to win back his life.

Soon after landing in prison, he decided to become a professional writer. He had to do it mostly alone — “I was, for the most part, an island,” he recalled — because until he got to San Quentin, he didn’t have access to writing groups or classes in other prisons. He learned sentence structure and comma placement from “The Elements of Style,” the famous writing guide by William Strunk and E.B. White. DeWeaver borrowed a copy of the book from another incarcerated man and stayed up all night writing down every word in longhand, creating a version for his own cell’s library.

Over the years, through writing, he agonized over the crime for which he was deeply sorry, processing the mistakes he had made and the traumas of his youth: “It was my therapy.”

And as he found healing, his literary skills improved. After about five years, he sent his first short stories to contests and literary journals. After nine years, he received his first kind, handwritten rejection letter from an editor. Then, three years later, he published his first piece of fiction, in the Lascaux Review: “I had never felt better in my life.”

Transferred to San Quentin in 2011, DeWeaver helped launch a nonprofit group called Prison Renaissance there that supports rehabilitation programs led by incarcerated people, and along the way, he built

relationships with media and tech professionals who would boost his clemency application and help him land on his feet after his 2018 release.

This is another way that DeWeaver was lucky: Thanks to the strength of the network he created while locked up, he didn't struggle to find housing or a job when he got out. As many as 30% of those released under normal circumstances don't have a place to go, according to the state, and those returning to their communities from prison often need assistance with everything from finding an apartment to applying for a government I.D. and medical benefits.

A common argument against decarceration is that these reentry services cost a lot of money, and they do. But right now, the state invests almost nothing in reentry programs — a few million here or there — and because state taxpayers spend an average of $81,000 per year just to keep a single relatively healthy person locked up, decarceration would save money, too.

"Think about how expensive it is now," Aviram said. "It's always more expensive to keep people behind bars."

In the last two months, DeWeaver has been thinking and worrying about friends who are still inside. Everyone he knows at San Quentin has been infected.

He says he wishes people could see what he saw during his 21 years. Inside prison, he said, "there is genius and there's compassion and there's creativity. There are models for compassionate living in prison that we could give to society. There are fathers we could give to their families. There are mothers we could give to their families." There are teachers, there are mentors, and the difference between him and them is that "I spent a lot of time learning to write," DeWeaver said in his yard as the sun faded beyond the fence. "And that's it." He paused. "And that is a tragedy."

Editor's note: This story has been updated by removing the suggestion that Jonathan Simon is in favor of ex-prisoners wearing ankle bracelets.

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