Staff Memorandum 2022-15
Draft of 2022 Annual Report

At its October 2022 meeting, the Committee on Revision of the Penal Code directed staff to prepare a draft 2022 Annual Report that included the recommendations that the Committee had discussed. The staff and Committee Chair have prepared the attached draft of the substance of that report for the Committee's review.

The draft report presents a description of each proposal the Committee discussed and an explanation of its purpose and rationale.

The data referenced throughout the draft report is not final and should not be relied upon for any reason.

The Committee now needs to decide whether to approve the attached draft, with or without changes. Upon approval of the Committee, the report will be finalized by Committee staff with assistance from a graphic designer. Any changes made at this stage will not affect the substance of the Committee's report or recommendations. Such changes may include adding citations, data, graphics and other non-substantive stylistic, editorial revisions.

Does the Committee approve the attached draft as its 2022 Annual Report, with or without changes, with the understanding that further revisions may be made by the staff, with approval of the Chair, before the report is formally submitted to the Governor and Legislature?

Respectfully submitted,

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Draft 2022 Annual Report
Committee on Revision of the Penal Code
November 2022

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Executive Summary

The Committee on Revision of the Penal Code was established by the Legislature and the Governor to study all aspects of criminal law and procedure and make recommendations that would simplify and rationalize the law. The Committee's goals remain finding ways to improve public safety, reduce unnecessary incarceration, improve equity, and address racial disparities in the criminal legal system.

This is the Committee's third Annual Report fulfilling its mandate. It contains 10 recommendations ranging from how technical traffic infractions are enforced to how people with serious mental health conditions are treated in California's competency to stand trial system. This Report also contains a lengthy list of offenses that have not resulted in a conviction in the last five years, which the Legislature can use to delete duplicative or unneeded sections from the Penal Code. The Committee also devoted special attention this year to studying California's bail and pretrial process and recommends significant reforms required by the California Supreme Court's *In re Humphrey* decision.

The Committee's recommendations are based on testimony from more than 50 witnesses, extensive public comment, thorough staff research, and deliberations of Committee members over the course of six public meetings. The recommendations are supported by legal analysis, empirical research, experience from other jurisdictions, and new data specially provided to the Committee by the California Department of Corrections and Rehabilitation and the California Department of Justice, among other entities.

As described in detail below, the recommendations are:

- Establish a State-Funded Restitution System for Crime Victims
- Create a Victim Right to Restorative Justice
- Expand Victim Right to Civil Compromise
- Prohibit Stops for Technical Traffic Infractions
- Limit Consent Searches During Traffic Stops
- Ensure Public Defense Counsel Before Arraignment
- Modernize the Competency to Stand Trial System
- Encourage Data Sharing to Address Frequent Utilizers
- Update Pretrial Procedures
- Codify *Humphrey*'s Elimination of Wealth-Based Detention

Introduction

When Governor Gavin Newsom addressed the Committee on Revision of the Penal Code at its inaugural meeting in January 2020, he urged the Committee to examine the "jaw-dropping" racial disparities and the "deep socioeconomic overlays that often determine the fate of so many in our [criminal legal] system."[1] The Governor's direction is consistent with Government Code Section 8290.5, which instructs this Committee to recommend legislative reforms that address sentence disparities, promote rehabilitation and alternatives to incarceration, reconsider sentence lengths, improve parole, and enhance public safety.

To date, twelve recommendations by the Committee have become law, including significant funding commitments for reentry programs, fundamental changes to how sentencing enhancements are applied, and prioritizing treatment over incarceration for people with serious mental health conditions.

The recommendations in this Report continue to follow the priorities set by the Governor and Legislature. The Committee's recommendations are driven by data, expert testimony, and lived experience. As with this Committee's prior recommendations, recommendations in this report aim to address over-incarceration and racial disparities while improving public safety at the same time.

Deep problems still remain. California's prison population has begun to grow, after reaching a thirty-year low during the early days of the COVID-19 pandemic, and now stands at more than 95,000 people.[2] Similarly, with the end of emergency bail orders across the state, county jail populations have begun to increase. In Los Angeles, the pretrial jail population is almost 7,000 people, up from 5,000 during the pandemic, and conditions at the jails continue to seriously deteriorate.[3] Furthermore, new studies continue to reveal racial disparities throughout California's criminal legal system.[4]

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[1] Committee on Revision of the Penal Code, Meeting on January 24, 2020, 0:01:12–0:02:00.

[2] On February 3, 2021, CDCR's population was 94,306, the lowest population since sometime in 1989, and 46% of the population at CDCR's peak of 173,643 on October 20, 2006. See CDCR, Weekly Report of Population, As of Midnight, February 3, 2021, and November 16, 2022; CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, Figure 1.2 (October 2020) (historical population data).

[3] Vera Institute, *Care First L.A. — Tracking Jail Decarceration* (historical LA jail population data); Gregory Yee, *Federal Judge Imposes Limits on L.A. County Jail After ACLU Sues Over 'Barbaric' Conditions,* Los Angeles Times, September 16, 2022.

[4] See Chauncee Smith et al., *Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing,* Catalyst California and ACLU SoCal. October 2022; Magnus Lofstrom et al., *Racial Disparities in Law Enforcement Stops,* Public Policy Institute of California, October 2021; Alyssa C. Mooney, Alissa Skog, and Amy E. Lerman, *Racial Equity in Eligibility for a Clean Slate Under Automatic Criminal Record Relief Laws,* Law and Society Review, Vol. 56, Issue 3, August 2022 (examining California record relief laws); Emily Widra and Felicia Gomez, *Where People in Prison Come*

At the same time, public safety and crime also remain an increasingly significant concern.[5] Although crime rates remain at or near historic lows, it is undeniable that certain crimes, most alarmingly homicides, increased during the pandemic.[6]

This year, the Committee approached California's criminal legal system at the "front end." Many criminal cases begin with a victim, and the Committee began its research with a thorough examination of victims' rights and what makes victims whole, from the role of restitution orders to having a larger voice in how criminal cases are resolved.

We also considered how the system should address people charged with crimes whose mental health conditions mean they are not competent to stand trial. California's current system for mental competency to stand trial relies on an antiquated process that does little to address people's long-term mental health needs and nothing to improve public safety.

We then moved to examine how traffic laws are enforced, the surprising public safety value in early appointment of public defenders, and how California must reform its bail practices to comply with precedent from our Supreme Court.

Leaders from across California and the country addressed the Committee to offer their solutions. Ralph Diaz, a former Secretary of the California Department of Corrections and Rehabilitation, spoke about the need to make crime victims' rights more meaningful, and Yolo County District Attorney Jeff Reisig proposed expanding restorative justice programs to do so.[7] District Attorney Reisig explained that his own office's program resulted in an impressive 90% victim satisfaction rate and a 37% reduction in recidivism.[8] Rachel Michelin, President of the California Retailers Association, advocated for both offering alternatives to incarceration to people who shoplift and dismantling organized retail crime rings.[9] Dr. Katherine Warburton, Statewide Medical Director of California's Department of State Hospitals, explained the state's complex and troubled competency-to-stand-trial system and Teresa Pasquini, whose adult son has experienced almost every aspect of California's mental health

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From: The Geography of Mass Incarceration in California, Prison Policy Initiative and Essie Justice Group, August 2022.

[5] Dean Bonner, *Solid Majorities of Californians View Crime as a Problem,* Public Policy Institute of California, September 27, 2002.

[6] Magnus Lofstrom and Brandon Martin, *Crime Trends in California,* Public Policy Institute of California, October 2022.

[7] Committee on Revision of the Penal Code, Meeting on Feb. 23, 2022, Part 1, 27:00–31:40 & Part 3, 30:30–32:30.

[8] *Id.* at Part 3, 31:30-32:00.

[9] *Id.* at Part 1, 16:34–22:15.

system, described it from a personal perspective.[10] Los Angeles Superior Court Judge James Bianco, who has handled over 10,000 competency cases since 2013, recommended community treatment for many with mental health conditions who are charged with serious felonies.[11]

Professor Erwin Chemerinsky, Dean of UC Berkeley Law School, emphasized the need to severely limit the ability to detain people pretrial and failures in implementing the California Supreme Court's decision in *In re Humphrey*.[12] Sonoma County Chief Probation Officer David Koch told the Committee that pretrial release programs are an integral component in effectively implementing *Humphrey* and that the experience of probation agencies throughout the pandemic indicated that more people could be released without increased rates of criminal activity or failure to appear.[13] And Stuart Rabner, Chief Justice of the New Jersey Supreme Court, discussed how New Jersey was able to achieve safe and meaningful bail reform.[14]

In all, the Committee heard from 56 witnesses during public hearings. Committee staff also consulted with dozens of other stakeholders, practitioners, and directly impacted people from across the state. Each of the recommendations in this report is informed by these conversations and also relies on recent data and empirical research on these topics. All of the recommendations in this report can be achieved with a majority vote in the Legislature. And while some require funding to be successful — particularly those to better address the needs of crime victims — others would result in long-term savings to the state and counties while improving public safety.

The Committee also continued its work with the California Policy Lab and produced a report on California's Three Strikes law, which last year the Committee recommended repealing. The report with the California Policy Lab gave an exhaustive analysis of how the law has been used and concluded that California's famous Three Strikes law did nothing to improve public safety in the state. Other work with the California Policy Lab also produced a list included with this Report of more than _____ offenses that have not resulted in a conviction in the last three years — a much-needed compilation that could be used to seriously reduce the length and complexity of the Penal Code. In addition, the Committee's research and analysis of California's criminal legal system has been relied on by courts throughout the state.[15]

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[10] Committee on Revision of the Penal Code, Meeting on May 17, 2022, Part 1, 4:00–42:20 & 1:09:10–1:14:22.
[11] *Id.* at Part 2, 0:50-1:45.
[12] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 35:05-41:36.
[13] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3, 28:10–20:50.
[14] *Id.* at 29:10–34:40.
[15] See, e.g., *People v. Hardin*, 2022 WL 10272623 (Second District 10/18/2022); *People v. Montano*, 80 Cal.App.5th 82 (Fifth District 06/22/2022); *People v. Perez*, 2022 WL 1537851 (Fifth District 05/16/2022); *People v. Ramos*, 77 Cal.App.5th 1116 (Fifth District 05/16/2022); *People v. Burgos*, 77 Cal.App.5th 550 (Sixth

The need for the Committee's work continues. California still incarcerates too many people for too long with no benefit to public safety and without sufficient consideration for the needs of crime victims. The recommendations in this report are necessary reforms to address these needs and to meet the Committee's goals to maximize public safety, ensure equal justice and racial equity, reduce needless and counter-productive incarceration, and improve public safety throughout the state.

District 04/15/2022) (dissenting opinion); *People v. Butler*, 2022 WL 892009 (Third District 03/25/2022); *People v. Moore,* 2022 WL 883811 (Third District 03/25/2022) (AB 333).

Prefatory Notes

Crime Rates

As it has in its previous Reports, the Committee presents the most recently available information about crime rates in California.

In 2021, the overall violent crime rate increased by 7% and the overall property crime rate increased by 3% compared to 2020.[16]

Despite increases in some categories of offenses — most notably homicide — crime rates across California continue to be at record lows. In 2021, California's violent crime rate was 58% below the peak violent crime rate recorded in 1992, and the property crime rate was 68% below the peak rate from 1980.[17]

And there is some potential good news on the horizon: data compiled by the Major Cities Chiefs Association from the eight largest cities in California show homicides trending downward by 11% for 2022 through September.[18] Only two of the cities — Sacramento and Long Beach — have more homicides than during the same time in 2021, while the others are flat or show decreases, including a 13% decline in Los Angeles and a 19% decline in Fresno. By contrast, homicides in the cities outside of California did not see the same decreases.

Finally, we note that while these statistics are important, they do not present a full picture of crime rates in the state. Nationwide, most crime is unreported.[19] The specific offenses that make up the violent and property crime rates reported by the Department of Justice leave a lot out, including simple assault crimes, most while collar offenses, drug crimes, and other economic crimes such as wage theft.[20] And in California, the clearance rates for many offenses — the rate at which law enforcement arrests a perpetrator — is between 40 and 45% for violent offenses and around 10% for property crimes.[21]

[16] California Department of Justice, *Crime in California 2021*, Table 1.
[17] *Id.*
[18] Major Cities Chiefs Association, *Violent Crime Survey — National Totals,* November 2, 2022.
[19] Rachel E. Morgan and Alexandra Thompson, *Criminal Victimization 2020,* U.S. Department of Justice, Bureau of Justice Statistics, Table 4, November 2021.
[20] See, e.g., Sandhya Dirks, Rising Crime Statistics Are Not All That They Seem, NPR, Nov. 3, 2022.
[21] California Department of Justice, *Crime in California 2021*, Table 15.

Legislative Update

In 2022, six new bills passed by the Legislature and signed by the Governor implemented recommendations originated or supported by the Committee in previous reports. The chart below provides information on the bills that passed.

Committee Recommendation	Bill
Strengthen the Mental Health Diversion Law	SB 1223 (Becker)
Encourage Alternatives to Incarceration	AB 2167 (Kalra)
Expand CDCR's Existing Reentry Programs	Led by Senator Skinner, $40 million for expansion in the 2022–23 Budget, AB 178, Sec. 166.
Create a Process to Remove the Permanently Incompetent from Death Row	AB 2657 (Stone)
Amend the Racial Justice Act of 2020 to Give it Retroactive Application	AB 256 (Kalra)
Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses	AB 2746 (Friedman)

Committee member Senator Skinner also led successful efforts to expand the scope of victims compensation though the budget process, consistent with the Committee's study of this topic.[22]

Finally, the Chair of the Committee was also designated as a member of the Prosecutorial Transparency Advisory Board, a new entity created by AB 2418 (Kalra), that will help guide the collection and analysis of prosecutorial data.

Update on SB 483

In its 2020 Annual Report, the Committee recommended retroactive application of SB 136 (Weiner) and SB 180 (Mitchell), which repealed certain one and three-year sentence enhancements.[23] At the time, more than 14,000 people had prison sentences lengthened by these enhancements.[24] The Committee noted the racially disproportionate application of the enhancements and suggested an administrative

[22] AB 160 (Committee on Budget)
[23] Committee on Revision of the Penal Code, *2020 Annual Report,* 48-51.
[24] Analysis of data provided by CDCR Office of Research.

resentencing process that would remove the enhancements from people's sentences quickly.[25]

The Legislature enacted SB 483 (Allen) to implement the Committee's recommendation by authorizing courts to retroactively remove the 1-year prison prior and 3-year drug prior enhancements from the sentences of people currently incarcerated in jail or prison. It required courts to resentence people who were only serving time on the enhancements by October 1, 2022, and all others by December 31, 2023.[26]

More than 2,000 people in prison immediately eligible for release if the enhancements were removed should have been resentenced by October 1.[27] But data from the California Department of Corrections and Rehabilitation indicates that almost 50% of the eligible people had not been resentenced by the deadline. The second list of people from CDCR — those who have the enhancements but are serving longer sentences — has more than 7,000 names on it. The number of people in each category who are serving their sentences in local jails is unknown, but is likely much smaller than the CDCR numbers.[28]

The Legislature should take steps to ensure that all people have access to the resentencing procedures mandated by SB 483. Among other reforms, this may include allowing eligible people to file a petition for resentencing directly with the court to kickstart the resentencing process.

Unused Offenses

California's laws contain more than 1,400 felony offenses — a significant increase from less than 400 enumerated crimes when the Uniform Determinate Sentencing Act was passed in 1976.[29] The Committee asked the California Policy Lab to research which non-wobbler felony offenses in the Penal Code have not resulted in either an arrest, conviction, or an arrest-but-no-conviction in the last 3, 5, and 10 years. The results of that research are included in an Appendix here and show that about __% of the relevant offenses have not resulted in a conviction in the last 5 years.

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[25] *Id.*
[26] Penal Code §§ 1172.7(c); 1172.75(c).
[27] This data from CDCR was provided to the Committee by the Ella Baker Center and the Office of the State Public Defender.
[28] The 1 year enhancement stopped being imposed in 2020 and the 3 year enhancement stopped being imposed in 2018. People serving sentences in jail tend to have much shorter sentences than those in prison, so many of the people who had sentences with the 1 and 3 year enhancement had probably been released before SB 483 would have provided any relief.
[29] See 1976 Cal. Stat. ch. 1139. The list of 1,400 felony offenses is taken from the California Center for Judicial Education and Research (CJER) Felony Sentencing Handbook, a resource prepared by the California court system and relied on by judges and practitioners throughout the state.

Given the large number of offenses that have been added to the law in the last 40 years, the Legislature should consider whether it may be appropriate to repeal any of the offenses listed here. Some of these offenses, such as _____,[30] may be appropriate to retain, but others, such as _____,[31] may be suitable for removal with little effect on the administration of justice and public safety.

This project will be ongoing and future analysis will focus on additional offenses, including wobblers, misdemeanors, and offenses not contained in the Penal Code (which contains only about half of all felony offenses in California law), as well as offenses that are used infrequently or only in certain jurisdictions.

Data Collection and Analysis

Since its inception, the Committee has prioritized the use of empirical research and data to inform its recommendations. The Legislature vested special authority in the Committee to gather the wide variety of criminal justice data collected by various state agencies.[32]

For the past three years, the Committee has been compiling one of the largest collections of criminal legal system administrative data in the country, and this Report relies on the latest data provided by the California Department of Corrections and Rehabilitation and the California Department of Justice, among others.

Data collected by the Committee was analyzed with the help of the California Policy Lab, a policy-focused research lab at the University of California, Berkeley, and the University of California, Los Angeles.

This year, the Legislature also took two significant steps to assist in this effort. First, funding was allocated in the 2022–23 Budget to support continuing collaboration with the California Policy Lab over the next three years. Additionally, the Committee's data-gathering authority was extended to local government agencies, which will allow the Committee to fill gaps in statewide information with data gathered at the county level.[33]

Language and Terminology Used Throughout This Report

As in previous reports, this report avoids using the term "inmate," "prisoner," or "offender." Instead, the report uses "incarcerated person" and similar "person-first" language. Other official bodies have made similar choices about language,[34] and the

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32 Government Code § 8286.

33 Government Code § 8286.5.

34 Nancy G. LaVigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, Urban Institute (Apr. 4, 2016); John E. Wetzl, *Pennsylvania Dept. of Corrections to Discard Terms 'Offender,' 'Felon' in Describing Ex-prisoners*, Washington Post (May 26, 2016); Karol Mason, *Guest Post:*

Committee encourages stakeholders — including those drafting legislation — to consider doing the same.

Justice Dept. Agency to Alter Its Terminology for Released Convicts, to Ease Reentry, Washington Post (May 4, 2016); Morgan Godvin and Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That's Changing*, Poynter (Jan. 4, 2021).

Recommendations

1. Establish a State-Funded Restitution System for Crime Victims

Recommendation

Crime victims have a constitutional right to recover monetary restitution from the person convicted of the crime, but many restitution orders go unpaid in California's current system.

The Committee therefore recommends the following:

- Create a state-funded system for immediate payment of restitution orders.
- Specify that corporations, insurance companies, and government agencies that likely have other means to recover financial losses are excluded.

Relevant Statutes

Cal. Const. Art. I, § 28(a)(13)
Penal Code § 1202.4(f)

Background and Analysis

Victims of crime often suffer significant financial losses including lost wages, medical expenses, and damaged property.[35] In 1982, California established a "Victims' Bill of Rights" that, among other provisions, gave victims a constitutional right to recover the full amount of their losses from the person convicted of the crime.[36] Today, direct restitution — court orders requiring convicted persons to pay victims for their financial losses — are the primary approach used to make victims financially whole.[37]

California also uses a separate but related system of "victim compensation" to provide financial assistance to victims of violent crime through state-funded reimbursements

[35] See Douglas F. Zatzick et al., *Strengthening the Patient-Provider Relationship in the Aftermath of Physical Trauma Through Understanding of the Nature and Severity of Posttraumatic Concerns,* Psychiatry, 70:3, 260-273 (2007); See also Alicia Boccellari et al., Characteristics *and Psychosocial Needs of Victims of Violent Crime Identified at a Public-Sector Hospital: Data from a Large Clinical Trial,* General Hospital Psychiatry, 29, 236-234 (2007).
[36] *California Ballot Pamphlet, Primary Election, June 8, 1982;* See also Cal. Const. Art. 1 § 28(b); Restitution is only available to victims when someone is convicted of the crime committed against them and a judge enters an order for direct restitution. California's victim compensation system can provide financial assistance in cases where the perpetrator is not identified or prosecuted.
[37] Cal. Const. Art. I, Sec. 28(a)(13). See also Penal Code § 1202.4(f).

for specified expenses.[38] Courts are also required to impose a separate "restitution fine," which helps fund victims compensation.[39]

Unfortunately, crime victims in California often do not receive the financial compensation promised by these processes.

At the February 2022 Committee meeting, experts and practitioners in the field of victims' rights and services explained how California's array of restitution systems are failing to meet the needs of crime victims and urged the Committee to recommend reforms to ensure crime victims receive financial assistance sooner.

Former Secretary of CDCR and President of Stand up for Victims, Ralph Diaz explained that small restitution payments only serve as a reminder of prior victimization and do not provide victims any real financial assistance.[40] He suggested that California develop a system that allows the government to provide victims the financial assistance they need sooner.[41] Dr. Gena Castro Rodriguez, Director of Survivor Policy at the Prosecutors Alliance, and former Chief of San Francisco District Attorney's Office Victim Services Division, told the Committee that despite the millions of dollars ordered in restitution each year, crime victims rarely receive restitution payments, and what payments come are often in very low amounts.[42]

The Committee recommends that California follow the model for victim compensation pioneered by Vermont which almost twenty years ago created a restitution system which directed the state to pay restitution orders directly to victims.[43] Vermont continues efforts to collect payments from people convicted of crimes, but the slow and uncertain collection process no longer impacts victims.[44] California should adopt a similar model in order to ensure that victims receive financial assistance more quickly. Though victims in California would keep the right to recover restitution directly from the people convicted of the crime, they could waive that right in order to receive prompt payment directly from the state.[45]

Adopting a state-funded restitution model would allow the state to continue its efforts to reduce the impact of criminal fines and fees on convicted persons. In recent years, the Legislature and Governor have acknowledged the counter-productive financial

[38] See Govt. Code §§ 13955, 13957.
[39] Penal Code § 1202.4
[40] Committee on Revision of the Penal Code, Meeting on Feb. 23, 2022, Part 1, 0:27:04-0:28:43.
[41] *Id.*
[42] *Id.* at 0:26:05—0:26:21.
[43] The establishment of the new system was based on a 2001 Special Report to the Vermont Legislature that found that an average of $.13 cents of every dollar owed to victims had been collected and repaid in the preceding 10 years. See Judy Rex and Elaine Boyce, *The Vermont Model: A Victim-Centered Approach to Restitution,* Vermont Center for Crime Victim Services, 38 (2011).
[44] *Id.*
[45] Cal. Const. Art. I, Sec. 28(a)(13)(A).

hardships created by excessive criminal fines and fees and have begun to take steps to provide relief to those ordered to pay, including committing in the most recent budget to ending the imposition of restitution fines contingent on ongoing support from the General Fund.[46]

The recent reforms have yet to be extended to the direct restitution system, in which people convicted of crimes can be ordered to pay restitution in any amount, regardless of their ability to pay,[47] and collection practices include garnishing wages, tax refunds, and money deposited into the accounts of incarcerated people.[48]

California's restitution laws also apply in all types of cases, including in juvenile court, where victims of children have the right to restitution without consideration of the child's ability to pay.[49] Parents of children ordered to pay restitution are presumed to be jointly liable for making restitution payments.[50]

Under a state-paid restitution model, the state would have more flexibility to decide how or whether to pursue payments from people convicted of crimes including through methods not allowed under current law, such as considering a defendant's indigence and ability to pay restitution.[51] According to the authors of the Model Penal Code, public safety considerations support allowing judges to take the defendant's financial circumstances into account when deciding whether and in what amount to order restitution.[52] And several other states, including New York, Texas, and Washington, grant sentencing courts discretion whether and in what amount to order defendants to pay restitution.[53]

Under California's current restitution system, victims of crime do not have to be individual people to receive restitution — corporations and government agencies have the right to receive restitution when the entity is a direct victim of a crime.[54] But as explained to the Committee by Delany Green of the Berkeley Policy Advocacy Clinic, corporations, insurance companies, and government entities are compensated for

[46] See *California State Budget 2022-23*, 119; See also Penal Code § 1202.4(e).
[47] Penal Code § 1202.4(f)-(g).
[48] See Restitution Basics for Victims of Crimes by Adults, Judicial Council of California, Administrative Office of the Courts (2012).
[49] Welf. & Inst. Code § 730.6.
[50] Welf. & Inst. Code § 730.7(a).
[51] Penal Code § 1202.4(g).
[52] Model Penal Code: Sentencing (Am. Law Inst. Prepublication Draft, 2021), § 6.07 comment c.
[53] See New York Penal Law § 65.10(2), Tex. Crim. Proc. Code, Art. 42.037(a), and Wash. Code § 9.94A.750(5).
[54] See Penal Code § 1204(k).

losses through collection of premiums and tax dollars, and state resources should be directed towards people who do not receive these benefits.[55]

Victims of crime need financial assistance to recover from their victimization, but relying on indigent defendants to pay restitution has been ineffective. The state should take a greater role in supporting victims of crime by funding restitution payments.

Empirical Research

There is very limited data on the amount of victim restitution ordered and collected in the state each year.[56] But the data is clear that the majority of restitution is not paid to crime victims: a conservative estimate using available data indicates that at least $150 million is ordered in restitution each year[57] — with the actual number likely far higher — but that in Fiscal Year 2020–21 only $55 million was collected.[58]

Data from 6 counties about individual restitution orders shows that 75% of all victim restitution orders were less than $4,000, and 50% of all orders were less than $1,200. In other words, if the state were to establish a state-funded restitution model, even a $4,000 cap on payments to victims would allow 75% of all restitution orders to be paid in full.

Unpaid restitution is not just a problem in California — many states and the federal government collect much less restitution than ordered.[59] Researchers have explained that the low collection rate is due to the fact that restitution orders are overwhelmingly issued to a population uniquely unable to pay — indigent defendants, many of whom are unemployed, have unstable housing, mental health and substance abuse issues,

[55] See also, Lindsey E. Smith et al., R*eimagining Restitution: New Approaches to Support Youth and Communities,* Juvenile Law Center, 10 (2022)
[56] The Judicial Council collects data related to court-ordered debt from each county, but data specific to victim restitution does not answer basic questions like the number of cases in which victim restitution was ordered, the amount ordered, or the amount still owed. Report on Statewide Collection of Court-Ordered Debt for 2021-21, Judicial Council of California (Dec. 2021). This includes all types of court debt, including fines and fees.
[57] This data was obtained via Public Records Act requests by Delaney Green, a Clinical Teaching Fellow at the Berkeley Policy Advocacy Clinic, and included responses from 15 counties (accounting for a majority of the California population) covering 2010 to 2020. Using data from the 6 counties that provided the most comprehensive information, researchers at the California Policy Lab calculated the median amount of restitution ordered per person from 2018 to 2020. The median amount ordered was then multiplied by the number of people ordered to pay restitution statewide, as reflected in disposition data from the Department of Justice.
[58] Counties collected $35 million and the California Department of Corrections and Rehabilitation collected $22 million. Data provided by CDCR Office of Victims' Services and Judicial Council of California.
[59] Dana A. Waterman, *A Defendant's Ability to Pay: The Key to Unlocking the Door of Restitution Debt*, 106 Iowa L. Rev. 455, 470 (2020).

and are presently or recently incarcerated.[60] A report by the United States Government Accountability Office confirmed that the federal government's low (8%) restitution collection rate between 2014 and 2016 was due to defendants' inability to pay.[61]

Insights from Other Jurisdictions

Vermont pays crime victims restitution. Instead of the victim having to wait for the convicted person to pay restitution, a state Restitution Unit issues advance payment up to $5,000.[62] Businesses and corporate victims are ineligible.[63] After making advance payments to victims, the Restitution Unit serves as a centralized collection agency to collect restitution from those convicted of crimes.[64] Using this model, the majority of crime victims in Vermont receive all of the restitution ordered to them.[65]

[60] Alicia Bannon, Mitali Nagrecga, and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry,* Brennan Center for Justice at New York University School of Law, 4 (2010).
[61] United States Government Accountability Office, *Federal Criminal Restitution: Most Debt is Outstanding and Oversight of Collections Could Be Improved* (2018).
[62] 13 V.S.A. § 5353. See also Judy Rex and Elaine Boyce, *The Vermont Model: A Victim-Centered Approach to Restitution,* Vermont Center for Crime Victim Services (2011).
[63] Rex and Boyce, *The Vermont Model* at 37.
[64] *Id.*
[65] *Id.* at 43.

2. Create A Victim Right to Restorative Justice

Recommendation

Research shows that, in many cases, crime victims prefer an opportunity for restorative justice conferencing: mediations between crime victims and the person who caused them harm. Studies also show that these restorative justice interventions lower recidivism. Yet California law makes no provision for restorative justice processes in the adult criminal legal system.

The Committee therefore recommends the following:

Establish a victims' right to be informed of and participate in county-approved restorative justice programs. The programs should prioritize victim needs, be administered by independent community-based organizations, occur in confidential settings, apply to a wide variety of offenses, and offer the dismissal or non-filing of charges if successful to all parties.

Relevant Statutes

Cal. Const. Art. I, § 28(a)
Penal Code §§ 17.5(a)(8)(E), 1170(a)(1)

Background and Analysis

At the February 2022 Committee meeting, law enforcement officials described the benefits of restorative justice programs.

Thomas Morgan, a former sheriff's deputy who was nearly killed after being shot in the neck while on duty, described the healing he and his wife were able to achieve through participation in a post-conviction restorative justice program. For Mr. Morgan, speaking directly to the man that shot him helped him to recover from trauma that was unaddressed in the traditional court process.[66]

Yolo County District Attorney and Then-President of the California District Attorneys Association Jeff Reisig testified about the benefits of restorative justice programs that occur much earlier in the criminal legal process. District Attorney Reisig told the Committee about a restorative justice program for adults created by his office that has handled over 2,500 cases.[67] District Attorney Reisig highlighted data indicating lower recidivism rates for those who participated in the program and a 90% victim satisfaction rate.[68]

[66] Committee on Revision of the Penal Code, Meeting on February 23, Part 3, 46:34-56:33.
[67] *Id.*, Part 3, at 0:30:20—0:30:33.
[68] *Id.*

Professor Stephen Raphael of the UC Berkeley Goldman School of Public Policy presented promising data from a randomized controlled study of a restorative justice program for youth arrested for serious felonies in San Francisco.[69] Youth diverted into the program were required to conference with the victim of the offense in order to understand the impact of the crime, to take accountability for their actions, and to develop and complete a plan to restore the harm done. Professor Raphael explained that the youth who participated in the program had transformative experiences that led to a significant reduction in recidivism.[70]

There are a variety of approaches to restorative justice but elements common to all models include a trained facilitator who leads a conference between a victim and the person who caused harm that tries to produce a voluntary agreement designed to acknowledge and repair the harm.[71] In the criminal legal context, restorative justice typically results in the dismissal of charges.

California's Penal Code does not currently provide a clear path for using restorative justice to resolve adult criminal cases.[72] While most states have not established procedural laws related to restorative justice, Colorado requires victims to be informed of the availability of restorative justice programs.[73] When District Attorney Reisig appeared before the Committee, he urged it to recommend that restorative justice be established as a victims' right.[74]

California has been a leader in establishing rights for crime victims. In 1982, California became one of the first states to create a "Victims' Bill of Rights" through the passage of

[69] Committee on Revision of the Penal Code, Meeting on February 23, 2022, Par 3, 01:05-14:40; See also Yotam Shem-Tov, Steven Raphael, and Alissa Skog, *The Impacts of the Make-it-Right Program on Recidivism*, California Policy Lab (Jan. 2022).
[70] Committee on Revision of the Penal Code, Meeting on February 23, 2022, Part 3, 12:50-13:04.
[71] See, e.g., Reese Frederickson, Alissa Marque Heydari, Chloe Marmet, *Restorative Justice: A Best Practice Guide for Prosecutors in Smaller Jurisdictions*, Institute for Innovation in Prosecution, 3–6, January 2022; American Bar Association, Resolution 106A, adopted August 2020; Impact Justice, *Restorative Justice Project Diversion Toolkit for Communities*, 4, June 2019.
[72] For juvenile cases, Welfare and Institutions Code § 202(f) specifically authorizes restorative justice as an appropriate resolution of some cases. The Penal Code contains general acknowledgement and encouragement of restorative justice programs. Penal Code §§ 17.5(a)(8)(E), 3450 (b)(8)(E) (encouraging the use of "community-based punishment," including "[r]estorative justice programs such as mandatory victim restitution and victim-offender reconciliation"); Penal Code § 1170(a)(1) ("The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice.").
[73] See Thalia González, *The State of Restorative Justice in American Criminal Law*, Wisconsin Law Review, Issue 6, 1158 (2020) (Colorado has "the highest level of legalization of restorative justice across all jurisdictions"). See also Colorado Rev. Stat. 24-4.1.303(11)(g).
[74] Committee on Revision of the Penal Code, Meeting on February 23, Part 3, 32:00-32:26; See also Written Submission of Jeff Reisig to Committee on Revision of the Penal Code, February 23, 2022.

Proposition 8.[75] And in 2008, Californians reaffirmed the rights of victims with the passage of Proposition 9, also known as "Marsy's Law."[76] But the rights and protections extended to victims through these laws have primarily focused on granting victims greater access to the court process,[77] which for some victims is unsatisfying and retraumatizing.[78]

According to a recent national survey of crime victims conducted by the Alliance for Safety and Justice, 70% of crime victims report experiencing at least one symptom of trauma after their victimization, and nearly 75% did not receive counseling or mental health treatment to help them recover.[79] Restorative justice can meet the needs of victims that the traditional criminal legal system has not, such as the need for information from the responsible party, the need to feel heard by the person, and the need for more of a role in determining what the person must do to right the wrong.[80]

Practitioners of restorative justice stress the importance of the programs being developed and led by community-based organizations that are independent from law enforcement.[81] The Committee's recommendation adheres to the community-based model while allowing county supervisors, District Attorneys, and/or the Presiding Judge discretion to approve acceptable programs in their jurisdiction.

Empirical Research

Restorative justice programs have been shown to result in a reduction of future criminal activity. In San Francisco, the Make It Right program provided restorative justice services for juveniles facing serious charges such as burglary and assault and

[75] Office for Victims of Crime, *Landmarks in Victims' Rights and Services,* United States Department of Justice (2021).
[76] The measure was passed after Marsalee (Marsy) Ann Nicholas was killed by an ex-boyfriend. Shortly after her killer was arrested, Marsy's mother ran into him at the grocery store because she hadn't been notified of his release on bail. See *California Official Voter Information Guide, General Election, November 4, 2008*, 129 (Proposition 9 § 2, ¶ 7).
[77] Victims' rights in California include the right to be notified of sentencing and parole hearings, and the right to give statements at those hearings. Penal Code §§ 1191.1, 3043. See also *California Ballot Pamphlet, Primary Election, June 8, 1982*, at 32–35, 54–56.
[78] See, e.g., Lara Bazelon and Bruce A. Green, *Victims' Rights from a Restorative Perspective*, Ohio St. J. Crim. L. 293, 308 (2020).
[79] Alliance for Safety and Justice, *Crime Survivors Speak 2022: National Survey of Victims' Views on Safety and Justice*, 13 (2022).
[80] Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 Denver Law Review Forum 1, 11-13 (August 11, 2021).
[81] See also Written Submission of Cymone Fuller to Committee on Revision of the Penal Code, February 23, 2022.

showed a 44% reduction in rearrests within 6 months compared against a control group.[82]

In Alameda County, Community Works West's Restorative Community Conferencing program, which also addressed juveniles facing serious charges, showed a 48% reduction in recidivism rates within 12 months where the original offense involved a crime against a person.[83]

And in Yolo County, people who completed the Neighborhood Courts Program, which focused on adults facing lower-level charges, were 37% less likely to recidivate than similarly-situated people whose cases were resolved through other means.[84]

Restorative justice programs also have high participant satisfaction across various jurisdictions and types of offenses.[85] In Alameda County's Community Works West's Restorative Community Conferencing program, more than 90% of victim-participants said they would participate in another conference or recommend the process to a friend.[86]

Insights from Other Jurisdictions

A number of states incorporate restorative justice into their laws.[87] Colorado has the highest level of legalization across all jurisdictions, and requires prosecutors to notify

[82] Yotam Shem-Tov, Steven Raphael, and Alissa Skog, *The Impacts of the Make-it-Right Program on Recidivism*, California Policy Lab, 18 (Jan. 2022).
[83] sujatha baliga, Sia Henry, and Georgia Valentin, *Restorative Justice Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County,* Impact Justice, 8, Summer 2017.
[84] Submission of Nicole Kirkaldy, Program Coordinator for the Yolo County District Attorney's Office's Neighborhood Courts Program, to Committee on Revision of the Penal Code, April 2020.
[85] See, e.g., Mark S. Umbreit, Robert B. Coates, and Betty Vos, *The Impact of Victim-Offender Mediation*: *Two Decades of Research*, 65 Federal Probation 29, 30, Dec. 2001; Mary P. Koss, *The Restore Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcome*, Journal of Interpersonal Violence, Vol. 29(0), 1647 (2013) (90% of participants were satisfied with restorative justice program in Arizona that handled sex crimes); American Bar Association, Resolution 106A, Adopted August 2020, Report at 2 (reporting data from a program in Washington DC); Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 Denver Law Review Forum 1, 15 (August 11, 2021) (collecting studies).
[86] sujatha baliga, Sia Henry, Georgia Valentin, *Restorative Justice Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County,* Impact Justice, 8, Summer 2017.
[87] For example, several states fund or direct agencies to direct restorative justice programs, and some states require victims to be informed of restorative justice programs when they are available. See, Shannon M. Silva and Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, Journal of Policy Practice, 14:77—95 (2015).

all crime victims of the "availability of restorative justice practices."[88] Colorado law also establishes a state restorative justice council to advance restorative justice principles and practices.[89] Vermont has a statute directing that "principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses"[90] and a series of "community justice centers" to administer restorative justice programs.[91] Minnesota authorizes the creation of community-based restorative justice programs.[92] In Massachusetts, many offenses are eligible for resolution with restorative justice, if both the victim and prosecutor consent.[93]

[88] Colorado Rev. Stat. 24-4.1.303(11)(g). See also Thalia González, *The State of Restorative Justice in American Criminal Law,* 2020 Wisc. Law Rev. 1147, 1175 fn. 185 (2020) (Colorado has "the highest level of legalization of restorative justice across all jurisdictions").
[89] See Colorado Rev. Stat. 19-2-213.
[90] 28 V.S.A. § 2a(a).
[91] 24 V.S.A. § 1961(3). See also Community Justice Network of Vermont, cjnvt.org.
[92] Minnesota Stat. § 611A.775.
[93] Mass. Gen. Laws Ch. 276B § 2. Sex offenses, certain domestic offenses, and any offense "resulting in serious bodily injury or death" are ineligible for restorative justice. Massachusetts Gen. Laws ch. 276B § 3.

3. Expand Victim Right to Civil Compromise

Recommendation

California law allows courts to dismiss cases if victims of certain misdemeanor offenses indicate that they have received "satisfaction" from the defendant. Expanding the type of offenses that are eligible for this "civil compromise" process and the scope of appropriate resolutions would empower victims, encourage alternatives to incarceration, and save court costs.

The Committee therefore recommends the following:

- Modernize the scope of civil compromises to apply to nonviolent, non-sex offense felony charges.
- Clarify the definition of "satisfaction" to include non-monetary resolutions, like cleanup and repair work, or community service.
- Require that victims of eligible offenses be notified of the availability of a civil compromise by the district attorney.

Relevant Statutes

Penal Code §§ 1377–1379

Background and Analysis

A concept related to restorative justice — civil compromise — has long existed in California's Penal Code. California's civil compromise statute dates back to 1872 and allows courts to dismiss most misdemeanor cases if a victim "acknowledges that they have received satisfaction."[94] Civil compromises typically involve payment to the crime victim from the defendant for damage to property. When a victim agrees to a civil compromise, the judge must decide whether the case is appropriate for dismissal.[95]

Civil compromises preserve the historical role of crime victims in the prosecution of criminal offenses. In the early years of the United States' court system, victims of crime would hire private prosecutors to bring charges against accused persons, often seeking money damages, and move to dismiss when those claims were satisfied.[96] While the private prosecution system had many flaws and was replaced by the state-led prosecution system we have today, courts have long recognized the public policy

[94] Penal Code §§ 1377–1379.
[95] Penal Code § 1378.
[96] See Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, Crime & Delinquency, Vol. 30, No. 4, 568-592 (1984).

benefits of checking, rather than encouraging, criminal prosecutions when an offense is between private individuals, and civil compromises are one way to do so.[97]

Expanding the reach of California's civil compromise laws has the potential to produce some of the same benefits as a traditional restorative justice process by placing a victim in control of tailoring a resolution. The streamlined process allowed by civil compromise may be more attractive to some victims who do not have the resources or interest in engaging in the more involved restorative justice process. In order for victims of crime to have access to this benefit, they must be informed of its availability early in the process.

California should expand the applicability of its civil compromise laws, while leaving in place current law that the final decision on whether to dismiss a case is made by a judge.

Empirical Research

According to data provided to the Committee from the California Department of Justice, the most common offenses that are resolved with civil compromise involve property damage: _____.[98]

While victims of non-serious felonies could benefit from participating in restorative justice programs, research has shown that restorative justice is more effective in repairing harm caused by crimes that are considered more severe.[99]

[97] See *People v. Moulton*, 131 Cal.App.3d Supp. 10, 17-21 (1982) (citing a 1849 treatise which explained New York's civil compromise laws.)
[98] Additionally, though not allowed by statute, data reveals that approximately __% of civil compromises have been in felony cases, most commonly in _____ offenses.
[99] Lindsey Pointer, *What is "Restorative Justice" and How Does it Impact Individuals Involved in Crime?,* Bureau of Justice Assistance, National Training and Assistance Center (2021).

4. Prohibit Stops for Technical Traffic Infractions

Recommendation

California law enforcement officers make more than 3 million traffic stops every year, with disturbing racial disparities in who is stopped. Law enforcement openly admit that many of these are "pretext stops" to investigate serious offenses — yet data show these traffic stops rarely result in the discovery of evidence of crime. Many traffic stops, including expired registration tags, do not relate to public safety, and prioritizing stops for offenses directly related to public safety may help reduce disparities and improve community trust in law enforcement. These types of technical infractions can continue to be enforced through other means, such as mailed citations or warnings.

The Committee therefore recommends the following:

Prohibit police officers from stopping people for technical, non-safety-related traffic offenses, including at a minimum offenses related to:

1. Vehicle or equipment registration;[100]
2. Positioning or number of license plates;[101]
3. Lighting equipment;[102]
4. Window tints or obstructions,[103] and;
5. Bicycle equipment and operation.[104]

Relevant Statutes

Penal Code § 13519.4

Background and Analysis

California police officers reported making nearly 3 million traffic stops in 2020.[105] California's extensive Vehicle Code covers all aspects of driving[106] and United States

[100] See e.g. Vehicle Code §§ 4000, 5350.
[101] See e.g. Vehicle Code §§ 5200, 5201, 5202, 5204.
[102] See e.g. Vehicle Code §§ 24252, 24400, 24600, 24601.
[103] See e.g. Vehicle Code §§ 26708, 26710.
[104] See e.g. Vehicle Code §§ 21201, 21212.
[105] Racial & Identity Profiling Advisory Board, Annual Report 2022, 27, 32–34. The number of annual stops are likely higher — 3 more agencies submitted data in 2020 than did in 2019, but the total number of stops reported decreased by 26%. The RIPA Board attributes the decline in reported stops to the COVID-19 pandemic. Id. at 27.
[106] See Vehicle Code §§ 22348-22366 (speeding); 22100-22113 (stopping, turning, signaling); 24250-24953 (lighting equipment); 26700-26712 (windshields and mirrors).

Supreme Court decisions allow police officers to stop almost anyone no matter how minor the violation,[107] such as excessive noise coming from a car's exhaust or wearing glasses with a wide temple.[108] Indeed, most people break at least some traffic laws while driving.[109]

The wide discretion granted to law enforcement in traffic stops has resulted in racial disparities in traffic enforcement. According to California's Racial and Identity Profiling Advisory (RIPA) Board, in 2020, Black and Hispanic people were stopped 112% and 9%, respectively, more frequently than expected based on their proportion of California's residential population, while white people were stopped 7% less frequently than expected.[110] People of color are also more likely to be handcuffed, searched, and have force used against them during traffic stops than white people.[111]

Traffic stops are not only inconvenient, but also frightening, humiliating, and even dangerous for both police officers and the person pulled over.[112] Recent high-profile killings of Black men during traffic stops further illustrate these concerns.[113] As Chauncee Smith, Senior Manager of Criminal Justice at Catalyst California, explained to the Committee, research indicates that while traffic stops do not reduce the number of motor vehicle fatalities, disproportionate traffic policing can lead to degraded health, trauma, and anxiety for stopped individuals.[114] As noted in a letter to the Committee from Prosecutors Alliance California, disproportionate traffic enforcement

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[107] *See, e.g., Whren v. United States*, 517 U.S. 806 (1996).
[108] See Vehicle Code §§ 21750, 23120, 27151.
[109] See, e.g., David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 555, 599 (1997) (noting that "with the traffic code in hand, any officer can stop any driver at any time).
[110] Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 51.
[111] California Racial & Identity Profiling Advisory Board, *Annual Report 2022 Appendices*, 14-15, 27, Tables A.7 & A.13. Officers can select up to 23 different actions and are supposed to indicate every action taken, not just the most intrusive.
[112] David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, Sup. Ct. Rev. 271, 272 (1997). See also Elizabeth Davis, Anthony Whyde, and Lynn Langton, *Contacts Between the Police and the Public, 2015,* U.S. Dept. of Just. Bureau of Just. Stat. at 16 (2018) (approximately 1 million of the nearly 53.5 million people who had contact with the police in the previous 12 months experienced nonfatal threats or use of force and only 1% of white civilians experienced the threats compared to 3% of Black and Hispanic civilians); Frank Edwards, Hedwig Lee and Micael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 Proceedings of the National Academy of Sciences 16793, 16795-96 (2019) (noting that police use of force is one of the leading causes of death for young men of color, especially Black men).
[113] David Kirkpatrick et. al., *Pulled Over: Why Many Police Traffic Stops Turn Deadly*, New York Times, (Oct 31, 2021) (finding that in the preceding 5 years, police officers killed at least more than 400 unarmed drivers and passengers who were not under pursuit for a violent crime, while about 60 officers were killed by motorists who had been pulled over).
[114] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 1, 52:59-54:22. See Justin Feldman, *Public Health and the Policing of Black Lives*, Harvard Public Health Review 7 (2015); RIPA Board Meeting Archives, *DRAFT 2023 RIPA Board Report*, 3 (July 28, 2022) (citing studies).

also impairs public safety because perceptions of unfair treatment and resulting distrust of law enforcement diminish a person's likelihood to comply with laws or cooperate with the police.[115]

While most traffic stops conducted in California are for offenses that can endanger public safety — moving violations like speeding, or failure to stop at a limit line — a significant number of traffic stops are for more technical violations, i.e. non-moving or equipment violations such as expired registration or failure to display license plates or tags, that do not directly endanger public safety.[116]

As reported to the Committee by RIPA Board Co-Chair Steven Raphael, local law enforcement agencies make stops for non-moving and equipment violations more frequently than the California Highway Patrol, and racial disparities are more pronounced in stops for these offenses than they are in stops for moving violations.[117]

Pretext stops — using a traffic stop as an excuse to conduct a more intrusive investigation than otherwise allowed — are a driver of racial disparities in stop rates in California. Pretext stops are permissible under the Fourth Amendment,[118] and police officers and agencies use them in an effort to deter crime, identify suspects, or seize contraband.[119] But pretext stops are ripe for racial profiling because stereotypes and implicit biases associating people of color, particularly Black people, with criminal behavior can influence who officers choose to target.[120]

A recent analysis by the *San Francisco Chronicle* of police stops in San Francisco over the past four years found that Black drivers were 4.4 times more likely to be stopped than white people for any traffic violation and 10.5 times more likely to be stopped for

[115] See Letter from Prosecutors Alliance California to Committee on Revision of the Penal Code (Jan. 6, 2022). See also Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 Yale L. J. 778, 797 (2021) (citing studies). See also Matthew Desmond, Andrew V. Papachristos, and David S, Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, Am. Soc. Rev., Vol. 81(5), 857-876, 867-68 (2016) (describing research conducted in Milwaukee that found that that a high-profile incident of police violence resulted in over 22,000 fewer calls for emergency services.)
[116] Racial & Identity Profiling Advisory Board, *Annual Report 2022 Appendices*, 47-50, Tables B 1.2, 1.3.
[117] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 1, 10:45-13:11. See also Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 133, fn 369.
[118] *Whren v. United States*, 517 U.S. 806, 813 (1996).
[119] See Policing Project at New York University School of Law, *An Assessment of Traffic Stops and Policing Strategies in Nashville*, 7.
[120] See Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass, 50 (2016). See also Amanda Charbonneau and Jack Glaser, *Suspicion and Discretion in Policing: How Laws and Policies Contribute to Inequity*, 11 U.C. Irvine L. Rev. 1327, 1336 (2021) (discussing studies).

common pretextual traffic codes such as improper display of license plates and expired registration.[121]

Lizabeth Rhodes, Director of the Los Angeles Police Department Office of Constitutional Policing, told the Committee that pretext stops are a useful policing tool.[122] Nonetheless, the LAPD recently implemented a pretext stop policy that requires officers to have a public safety justification for stopping a person. Data shared by Ms. Rhodes showed a reduced number of traffic stops and a greater proportion made for moving violations after the change in policy.[123] Other experts who appeared before the Committee, including Professor Maria Ponomarenko, Co-Founder of the New York University School of Law Policing Project, shared research indicating that pretext stops are inefficient in recovering illegal contraband and ineffective in reducing crime rates.[124]

San Leandro Police Chief Abdul Pridgen shared similar sentiments during a recent discussion facilitated by the Public Policy Institute of California.[125] Chief Pridgen, the immediate Past President of the California Police Chiefs Association, asserted that police agencies should already be transitioning away from pretextual stops to data-driven policing strategies.[126] According to Chief Pridgen, current traffic policing strategies have strained department resources, and reforms to traffic policing can lead to better cooperation between police agencies and the communities they serve, resulting in more crimes being solved.[127]

In a September 2022 report, the Center for Policing Equity — a non-profit whose founders and board members include police officers and that partners with police agencies around the country to develop data-driven policing strategies — recommended that states ban the use of pretextual stops and create robust safeguards against their use.[128]

The Committee's recommendation to limit the use of traffic stops for technical, non-safety-related offenses is in line with similar reforms being undertaken throughout the country, and can help to alleviate disparities, improve perceptions of the fairness of our criminal legal system, and encourage the development of more effective policing strategies.

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[121] Megan Cassidy, and Susan Neilson, *S.F. May Limit When Police Can Pull Over Drivers to Fight Racial Profiling. Will It Make the City Less Safe?,* San Francisco Chronicle (Oct. 7, 2022).
[122] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 1, 1:14:35-1:18:39.
[123] See Written Submission of Lizabeth Rhodes
[124] See NYU School of Law Policing Project, *An Assessment of Traffic Stops and Policing Strategies in Nashville* (2018).
[125] Public Policy Institute of California, Racial Disparities in Traffic Stops Virtual Event (Oct. 13, 2022).
[126] *Id.* at 0:30:58—0:31:31.
[127] *Id.* at 0:25:20—0:30:10.
[128] Hilary Rau et al., *Redesigning Public Safety: Traffic Safety*, Center for Policing Equity, 4 (Sep. 2022).

Empirical Research

A 2021 report by the National Institute of Health which analyzed traffic stop data and vehicle collision death rates in 33 states concluded that increased use of traffic stops did not decrease fatal car crashes.[129] While other research has found that increased traffic enforcement is associated with decreases in traffic crashes and injuries from accidents,[130] a recent study found that increasing traffic stops for violations that actually endangered public safety (as opposed to regulatory, equipment, or investigatory stops) resulted in better traffic safety outcomes.[131]

A study of traffic stops in Nashville, Tennessee, conducted by the New York University School of Law Policing Project which examined the effectiveness of using traffic enforcement as a crime fighting strategy concluded that traffic stops did not have a significant impact on short- or long-term crime trends.[132] As a result, the Nashville Police Department shifted its strategy to focus on unsafe driving and traffic stops fell by nearly 90% over the next 5 years.[133] While racial disparities persisted, with dramatically fewer stops, the overall impact on communities of color was significantly diminished.[134]

A recent report by Catalyst California (formerly the Advancement Project) concluded that counties dedicate billions of dollars per year towards traffic policing and that much of the time spent on traffic policing is for infractions unrelated to public safety.[135] The report additionally concluded that the Sacramento County Sheriff's Department devoted nearly two-thirds of the total amount of time it spent conducting traffic stops to stops for non-moving and equipment violations, and Sheriff's

[129] Anuja L. Sarode et al., *Traffic Stops Do Not Prevent Traffic Deaths,* J. Trauma Acute Care Surg. 141-47, Nat'l Inst. Health (Jul. 2021).
[130] Jordan B. Woods, *Traffic Without the Police,* 73 Stan. L. Rev. 1471, 1536 (2021) (citing studies).
[131] Mike Dolan Fliss et al., *Re-Prioritizing Traffic Stops to Reduce Motor Vehicle Crash Outcomes and Racial Disparities,* Injury Epidemiology 7:3 (2020) (finding that prioritization of safety-related stops resulted in a decrease in the number of total crashes (-13%), injurious crashes (-23%), and traffic fatalities (-28%).)
[132] NYU School of Law Policing Project, *An Assessment of Traffic Stops and Policing Strategies in Nashville,* 3 (2018). See also James Cullen, *Ending New York's Stop-And-Frisk Did Not Increase Crime,* Brennan Center for Justice (Apr. 11, 2016) (finding that ending the widespread "stop-question-frisk" practice in New York City did not lead to a rise in crime.)
[133] See Samantha Max, *Nashville Police Report Major Drop in Traffic Stops Following Accusations of Racial Bias,* WPLN News (March 25, 2021).
[134] *Id.*
[135] Chauncee Smith et al., Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing, Catalyst California and ACLU SoCal, 10-12, 18-20 (Oct. 2022). *Id.*

Departments in San Diego and Los Angeles spent 40% of traffic enforcement time on these types of violations.[136]

Insights from Other Jurisdictions

In 2020, the state of Virginia passed legislation limiting stops for low-level traffic violations.[137] In 2021, the Philadelphia, Pennsylvania City Council implemented a policy that bans traffic stops of low-level infractions related to vehicle registration and equipment violations.[138] In 2022, the Oregon legislature passed a bill that prohibits police officers from conducting traffic stops for vehicle lighting equipment violations.[139]

President Biden's May 2022 executive order on policing also called for "ending discriminatory pretextual stops."[140]

Law enforcement agencies in Los Angeles,[141] Oakland,[142] San Francisco,[143] and Berkeley[144] have recently developed (or are in the process of developing) policies that limit traffic enforcement for low-level offenses. Data from these efforts is not yet available or limited, but early results from Los Angeles show a reduced number of traffic stops and a greater proportion made for moving violations after the change in policy.[145]

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[136] Chauncee Smith et al., Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing — Appendix, Catalyst California and ACLU SoCal, 10-11 (Oct. 2022).
[137] Virginia SB 5029 (Lucas), 2020 Special Session I. Legislation reversing the law is currently moving forward in the legislature. Virginia HB 79 (Campbell), 2022 Session.
[138] City of Philadelphia Bill No. 210636-A
[139] Senate Bill 1510, 81st Oregon Legislative Assembly - 2022 Regular Session.
[140] Exec. Order No. 14074, 87 Federal Register 32945 (May 31, 2022).
[141] Los Angeles Police Department Manual Section 1/240.06, *Policy — Limitation on Use of Pretextual Stops.* The policy directs officers to make stops for minor equipment violations only when the violation interferes with public safety, to articulate the public safety reason for the stop on their body-worn video, to not conduct pretext stops unless they are acting on articulable information regarding a serious crime, and to limit all their actions during stops to the original basis of the stop in most circumstances.
[142] See Oakland Police Department, Office of the Chief of Police, *2016-18 Racial Impact Report* (2019) (finding that a directive that Oakland Police officers focus less on enforcement of vehicle code violations and more on conducting intelligence-led stops led to a 43% and 35% reduction in the number of Black and Hispanic people stopped respectively.)
[143] San Francisco Police Department, *Draft General Order 9.01*. The proposed order limits the use of pretext stops, stops for minor offenses, and searches and questioning after stops.
[144] Rigel Robinson and Ben Gerhardstein, *How Berkeley is De-Policing Traffic Enforcement*, Vision Zero Cities Journal (2021).
[145] See Written Submission of Lizabeth Rhodes to Committee on Revision of the Penal Code, September 2, 2022.

Additional Considerations

- Though not necessarily thought of as "traffic stops," stops of bicyclists for violations related to bicycle equipment or operation should also be limited. A *Los Angeles Times* analysis of more than 44,000 bike stops by Los Angeles County Sheriff's deputies found that 70% were of Latino cyclists.[146] The investigation found that deputies searched 85% of the people stopped, but that 92% of the searches found nothing illegal, less than 6% recovered illegal drugs, and less than 0.5% recovered weapons.[147]

[146] Alene Tchekmedyian, Ben Poston, and Julia Barajas, *L.A. Sheriff's Deputies Use Minor Stops to Search Bicyclists, With Latinos Hit Hardest*, Los Angeles Times (Nov. 4, 2021).
[147] *Id.* See also Nicole Santa Cruz and Alene Tchekmedyian, *Deputies Killed Dijon Kizzee After a Bike Stop. We Found 15 Similar Law Enforcement Shootings, Many Fatal*, Los Angeles Times (Oct. 16, 2020).

5. Limit Consent Searches During Traffic Stops

Recommendation

Searches of people and vehicles during traffic stops in which the only legal justification for the search is the person's consent have very low rates of discovering evidence of crime and are disproportionately directed at people of color.

The Committee therefore recommends the following:

Allow police officers to request permission to search during traffic stops only when the officer has reasonable suspicion to believe the search will uncover evidence of a crime.

Relevant Statutes

Penal Code § 13519.4

Background and Analysis

While traffic infractions are generally minor offenses that carry a maximum punishment of a fine, they can sometimes lead to more intrusive interactions with police, including searches of people or vehicles. The legal justifications for these searches can vary,[148] but in many instances — over 21,000 police searches in 2020 alone — the only legal basis for the search is the stopped person's consent.[149]

Police officers have wide discretion to ask people for consent to a search and are not required to identify any facts supporting a suspicion of wrongdoing.[150] But searches based only on a person's consent are inefficient. California law enforcement reported that only 12% of consent searches resulted in the discovery of anything illegal.[151] And police officers perform consent-only searches in stops of Black and Hispanic people at disproportionate rates than in stops of white people, despite it being less likely that they will find contraband or evidence.[152]

Data show that when consent-only searches are performed, the underlying reason for the initial police contact is more likely to be traffic enforcement for people of color than it is for white people.[153]

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[148] Officers reporting to RIPA can select from 13 different search criteria including, officer safety, search warrant, incident to arrest, and vehicle inventory. Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 133, fn 259.
[149] The RIPA Board reported 39,709 total consent-only searches in 2020, 53.4% of which occurred during traffic stops. *Id.* at 102, 105.
[150] See *Florida v. Royer*, 460 U.S. 491 (1983); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
[151] Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 103, 105.
[152] *Id.* at 55.
[153] *Id.* at 105-106.

Data also indicate that stops with consent-only searches often lead to officers releasing the person without issuing a citation or warning, suggesting that these stops are done for pretextual reasons and not to correct a traffic violation. In the vast majority of cases where people were stopped for traffic offenses, police issued a citation or a warning, and only 7% were released with no action. [154] But in stops in which officers conducted a consent-only search, people were released with no action taken in 39% of stops, and the rate varied by race — which suggests that many stops with consent-searches had no real underlying basis and were merely an excuse to initiate a search.[155]

California's largest law enforcement agency, the California Highway Patrol, issued a moratorium on consent searches from 2001 to 2006, upon the recommendation of a team of CHP managers and a pending federal lawsuit alleging racial discrimination.[156] Then CHP Commissioner D.O. Helmick said that asking people for permission to search their cars was "a lazy way of doing your work."[157] Analysis of 2019 RIPA data performed by the Public Policy Institute of California found that the likelihood of being searched, and the racial disparities in search rates are notably smaller in traffic stops made by CHP than in those made by local agencies, but that searches performed by CHP have higher hit rates.[158]

The Racial Identity and Profiling Advisory Board, concluded that policy-makers should move to ban consent searches altogether.[159] At least one state, Connecticut, has passed legislation that prohibits police officers from asking for consent to search a vehicle during a traffic stop.[160]

In California, unless police officers have consent to search, they need probable cause that a vehicle contains evidence of criminal activity or contraband in order to conduct a warrantless search of a vehicle.[161] Officers are also allowed to conduct a more limited search of a vehicle when they reasonably suspect that a person is armed and dangerous.[162] The reasonable suspicion threshold should be extended to consent

[154] *Id.* at 43.
[155] *Id.* at 106-107.
[156] *California Highway Patrol Bans Consent Searches Following Review of Data Collection Showing Discriminatory Pattern,* American Civil Liberties Union (Apr. 2001).
[157] Maura Dolan and John M. Glionna, *CHP Settles Lawsuit Over Claims of Racial Profiling,* Los Angeles Times (Feb. 23, 2003).
[158] Magnus Lofstrom et al., *Racial Disparities in Traffic Stops,* Public Policy Institute of California (Oct. 2022).
[159] Racial & Identity Profiling Advisory Board, Annual Report 2022, 113.
[160] See Connecticut House Bill No. 6004, July Special Session, Public Act No. 20-1.
[161] *United States v. Ross,* 456 U.S. 798, 799-800 (1982).
[162] *Michigan v. Long,* 463 U.S. 1032, 1049 (1983).

searches, so that consent-based searches are only undertaken when there is some articulable level of suspicion, as opposed to a potentially-biased hunch.

Limiting consent searches during traffic stops would reduce opportunities for bias while promoting more efficient policing strategies.

Empirical Research

Research by the Public Policy Institute of California concluded that while circumstances unrelated to racial bias — such as the age or gender of the stopped person, or the location where the stop occurred — explain some of the disparities, even after accounting for these factors Black people were still 1.5 times more likely to be searched during a stop than are white people.[163]

Insights from Other Jurisdictions

A few states, including Minnesota[164] and New Jersey[165] have required that police officers have reasonable suspicion to ask for consent searches. And recently passed legislation in the state of Connecticut limits the circumstances in which police can search motor vehicles that are stopped solely for motor vehicle violations.[166] Under the law, police officers may not ask for a driver's consent to conduct a search of a vehicle or its contents. Instead, any search must be (1) based on probable cause or (2) the driver's *unsolicited* consent, given in writing or recorded on body-worn equipment or dashboard camera.[167]

The Austin Police Department in Texas revised its consent search policy in 2012 to require that officers only request consent to search when they have an articulable reason to believe the search is necessary and likely to produce evidence related to an investigation.[168] The policy also requires officers to obtain supervisor approval and the signature of the person to be searched before the search is initiated.[169] In 2011, the year before the policy was implemented, officers conducted 694 consent searches, but by 2018 (the latest year for which data is available), the number of consent searches had fallen to 69 — a 90% reduction.[170]

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[163] Magnus Lofstrom et al., *Racial Disparities in Law Enforcement Stops,* Public Policy Institute of California, 12-13 (Oct. 2021).
[164] *Minnesota v. Fort,* 660 N.W.2d 415, 418-419 (2003).
[165] *New Jersey v. Carty,* 170 N.J. 632, 647 (2002).
[166] Connecticut House Bill No. 6004, July Special Session, Public Act No. 20-1.
[167] *Id.*
[168] City of Austin Police Department, *2012 Annual Racial Profiling Report,* 3 (Feb. 2013).
[169] *Id.*
[170] City of Austin Police Department, *Annual Racial Profiling Report: 2018,* 4 (Feb. 2019).

6. Ensure Public Defense Counsel Before Arraignment

Recommendation

Data show that effective legal representation at an arrested person's first court appearance reduces recidivism and saves money. Under current California law, only people who can pay for their own attorney are guaranteed legal representation prior to a court appearance. California does not currently provide appointment of public defenders for indigent people facing criminal charges until after someone's first appearance in court.

The Committee therefore recommends the following:

Require that people unable to afford hiring their own attorney have counsel appointed within 24 hours of booking, or sufficiently before arraignment to provide meaningful representation, whichever is earlier.

To facilitate this prompt assignment of counsel, the following should be included:

- Establish a presumption that a detained person is eligible for public defender services;
- Require public defenders to be notified of individuals who are being held in custody after an arrest;
- Require local jails and courts to ensure that defense counsel have access to detained individuals prior to formal appointment of counsel, without delaying the initial hearing; and
- Allow individuals to waive the right to counsel only after they have spoken to defense counsel.

Relevant Statutes

Penal Code §§ 810(b), 825, 849, 987, 988, 987.2(a), 987.5, 1269c
Government Code §§ 27700—27712

Background

Prompt assignment of counsel not only increases fairness and helps protect constitutional rights, but data show that it also has significant public safety and cost-saving benefits.

Professor Paul Heaton, Academic Director of the Quattrone Center for the Administration of Justice at the University of Pennsylvania Law School, presented the Committee with empirical evidence that "improving the quality of counsel at first

appearance can realize broadly shared goals of reducing bail violations, enhancing public safety, diminishing racial disparity, and reducing the system's imprint on people's lives."

In California, unlike many other states, recently arrested people who cannot afford to hire their own attorney are not guaranteed access to a lawyer until after their first court appearance, during which a judge inquires if the person can afford counsel, and appoints counsel when necessary.[171] This system recently earned California a failing grade on its first appearance procedures by researchers at the Dedman School of Law.[172] Judge Juliet McKenna of the Superior Court of the District of Columbia, told the Committee that she could not imagine a fair and efficient criminal justice system without the prompt appointment of defense counsel, as routinely occurs in her court.[173]

As explained to the Committee by Aditi Goel, Senior Program Manager at the Sixth Amendment Center, California is one of only eight states that does not have a state government entity overseeing any part of trial-level indigent defense services.[174] California is also one of only five states in the nation that does not provide regular funding for trial level public defender systems.[175] Galit Lipa, Executive Director of the Indigent Defense Improvement Division of the Office of the State Public Defender, told the Committee that access to counsel during the early stages of a case is inconsistent across the state and nonexistent in many counties. For example, in Butte County — which does not have an institutional public defender office — people can be arrested and spend up to 10 nights in jail before seeing a lawyer because the Penal Code does not specify when counsel must be appointed.[176]

While there is no statewide data on the number of guilty pleas entered into without the assistance of counsel, according to experts and practitioners consulted by Committee staff, the practice is common throughout the state.[177] For example, a review of Kern County data conducted by the ACLU found that more than 75% of people went before a

[171] See Penal Code § 987.
[172] Malia N. Brink, Jiacheng Yu, and Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center, 15 (Sept. 2022).
[173] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:36:00-0:39:06
[174] Written Submission of Aditi Goel to Committee on Revision of the Penal Code (Sept. 2, 2022). The other states are Arizona, Illinois, Mississippi, Nebraska, Pennsylvania, South Dakota, and Washington.
[175] Written Submission of Galit Lipa to Committee on Revision of the Penal Code, September 2, 2022.
[176] The Penal Code does contain some provisions allowing a lawyer to take action on a case before arraignment. See Penal Code §§ 825(b) (specifying that an attorney may visit a person after their arrest), and 1269c (allowing attorneys to request the magistrate set bail lower than schedule before the arraignment).
[177] See Letter from ACLU of Northern California and Southern California to the Committee on Revision of the Penal Code (Aug. 19, 2022).

judge without counsel at misdemeanor arraignment over a seven-year period.[178] At least 30% of these people (more than 67,000 cases) resulted in an unrepresented guilty or no contest plea.[179] According to information submitted to the Committee by the Immigrant Legal Resource Center, pleading guilty without counsel is especially treacherous for noncitizens — who account for approximately 12% of all defendants in the state — because they may face immigration consequences as a result of their conviction, but not be given sufficient information about them before entering a guilty plea.[180]

A few California public defender offices have developed early representation programs that allow attorneys to begin assisting people much earlier in the process and before they even appear before a judge.[181] At the September 2022 meeting, Carlie Ware, who supervises an early representation unit in Santa Clara County, outlined the building blocks of such a program, including information sharing between county agencies and access to the people held in custody.[182] Santa Clara County Assistant District Attorney David Angel endorsed the practice of early appointment of counsel in Santa Clara and emphasized that public defenders and district attorneys are often aligned on assigning counsel as early as possible because arrested people are released from custody sooner and with access to more services, improving public safety.[183] Whether counties rely on traditional public defender offices, or a panel of private attorneys to provide indigent defense, the building blocks outlined by Ms. Ware can be used to ensure effective representation at the earliest stages of a case.

Some public defender offices have incorporated social workers to facilitate meaningful access to counsel.[184] These and other professionals may be better suited to the information-gathering and needs-assessments that occur during a first meeting with a client and similar models should continue to be explored in California. Development of these models can facilitate further expansion of holistic defense — a model in which public defenders work with interdisciplinary teams to address the underlying causes

[178] See Letter from ACLU of Northern California and Southern California to the Committee on Revision of the Penal Code (Aug. 19, 2022).
[179] *Id.*
[180] See Letter from the Immigrant Legal Resource Center to the Committee on Revision of the Penal Code (Aug. 19, 2022). Defense attorneys are required to provide accurate advice about the immigration consequences of a plea to their clients. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); Penal Code § 1016.3. When a person pleads guilty to an offense without counsel, courts are only required to give them a general advisement that the plea can carry negative immigration consequences. Penal Code § 1016.5.
[181] Public defender offices in Contra Costa, Sacramento, Santa Clara, and Santa Cruz have all developed unique early representation programs.
[182] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:39:14-0:45:35.
[183] *Id.* at 0:45:48-0:51:10.
[184] See e.g. *New Public Defender Program Wins Merit Award*, Sac County News (Nov. 12, 2020) (describing the Sacramento County Public Defender Office's Pretrial Support Project, which uses law students and social workers to conduct needs assessments of arrested individuals within 24 hours of booking, and provide linkage to services and case management.)

and collateral impacts of criminal legal involvement — which research has shown reduces incarceration rates, sentence lengths, and pretrial detention, without harming public safety.[185]

California recently passed legislation improving the appointment of counsel process in juvenile cases. Assembly Bill 2644 (Holden) requires public defenders to be notified of all juvenile bookings within two hours. Extending similar reforms to the adult system can improve public safety and generate cost-savings, while recognizing that people should be treated equally regardless of how much money they have.

Empirical Research

Providing legal assistance earlier in the criminal legal process can have important public safety benefits. Recent research by Professor Paul Heaton using data from nearly 100,000 cases in Philadelphia found that people who were provided assistance from the public defender's office before their bail hearings were 64% less likely to have a bail violation and 26% less likely to be arrested in the future.[186] Representation by a bail advocate was also associated with a decrease in the likelihood of a guilt determination, less harsh sentences, and a reduction in racial disparities in pretrial release rates.[187]

People represented by counsel at their first court appearance are more likely to be released pretrial[188] and this can result in significant cost savings. After the Alameda County Public Defender's Office began to represent people at their first court hearing, the pretrial release rate increased from 1% to 20%.[189] A study of early representation in Cook County, Illinois, found that providing counsel within 24 hours of arrest would save between $12 and $44 million per year.[190]

[185] See James M. Anderson, Maya Buenaventura, and Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, Harvard L. Rev. Vol. 132, No. 3 (Jan. 2019).
[186] Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities,* Indiana Law Journal, Vol. 96, Iss. 3, Article 2, 724-25 (2021).
[187] *Id.* at 725-28.
[188] See National Legal Aid and Defender Association, *Access to Counsel at First Appearance: A Key Component of Pretrial Justice*, 15-25 (2020).
[189] Danielle Soto and Mark Lipkin, *Representation at Arraignment: The Impact of "Smart Defense" on Due Process and Justice in Alameda County,* Impact Justice, 20 (2018).
[190] Bryan L. Sykes, Eliza Solowiej, and Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013,* 5 U.C. Irvine L. Rev. 813, 829 (2015).

Insight from Other Jurisdictions

Twenty-seven jurisdictions, including Illinois, Florida, and New York, require that the state provide counsel at a person's initial appearance.[191]

At the September 2022 Committee meeting, Aditi Goel described the appointment of counsel process in Massachusetts, which requires courts to determine whether people are eligible for appointed counsel prior to the first appearance, and to appoint attorneys for those who are eligible.[192] Judge Juliet J. Mckenna of Washington D.C. also explained her jurisdiction's rules, which require appointment of and an opportunity to consult with counsel prior to an accused person's initial appearance.[193]

[191] Deason Criminal Justice Reform Center, *Grading Injustice: Initial Appearance Report Cards*, 65 September 2022. Like many other states, California received an "F" grade on its policies around initial court appearances for arrested people. *Id*. at 15.
[192] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:32:22-0:33:19; M.G.L. c. 211D, § 5 (2022).
[193] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:33:38-0:39:06. See also D.C. Superior Court Criminal Rule 44(a); D.C. Superior Court Criminal Rule 5(c) ("The court must allow the defendant reasonable time and opportunity to consult counsel.").

7. Modernize the Competency to Stand Trial System

Recommendation

California's approach to competency to stand trial — the process for determining whether an accused person's mental health condition so impairs their understanding of the legal system that they cannot be prosecuted — results in long delays in providing treatment and does little to improve public safety or mental health outcomes.

The Committee therefore recommends the following:

1. Require judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted. A presumption against restoration would apply to: nonviolent felonies, wobblers, and assault and robbery offenses. If a judge concludes that restoration is not in the interest of justice, the court can then consider diversion, a conservatorship, or other existing treatment options.

2. Require court-appointed mental health experts to return competency evaluations within 30 days of the court order.

3. Require a judge to determine — and court-appointed mental health experts to opine — whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame. In addition, require the court-appointed mental health expert to evaluate their eligibility for mental health diversion.

Relevant Statutes

Penal Code §§ 1001.36, 1368, 1369, 1370

Background and Analysis

California's approach to competency to stand trial is broken.[194] This system — which considers whether an accused person's mental health condition prevents them from understanding the proceedings against them — is required by due process, but its core working principles have not been updated in decades. The current system does not provide long-term treatment or improve safety. People who are found incompetent and

[194] While the process for determining competency for a person with a developmental disability is largely the same as the process for a person with serious mental illness, the overall number of commitments is much smaller: between June 2021 and June 2022, the Department of Developmental Services received about 6 commitments a month while the Department of State Hospitals received an average of 400 referrals per month. The current average wait time to be placed at a DDS facility is 27 days. *Stiavetti v. Clendenin*, Alameda County Superior Court Case No. RG15-779731, Decl. of Sherrie Molina, July 14, 2022, ¶ 6.

then restored to competency often cycle back through the very same process — over a 10 year period, one-third of all people who were restored to competency and discharged from the Department of State Hospitals were later arrested and once again found incompetent to stand trial.[195] Many were readmitted to DSH multiple times.[196] The number of people found incompetent with more than 14 arrests has also steadily increased.[197] Once returned to court after being found competent at the state hospital, people are most likely sent back into the community — only 24% of people found incompetent to stand trial are sent to prison — and 70% of people restored to competency are rearrested within three years.[198]

The process to achieve these outcomes is barely functioning. In the last 10 years, the number of people found incompetent to stand trial in California has far outpaced the state's ability to provide timely services in response. The waitlist for placement at the state hospital — which only treats people with felony charges — has increased from 426 in 2014 to 1,737 in August 2022 and the average wait time for placement is 5 months.[199] The waitlist has grown even as the state made an additional 1,380 restoration beds available over the last decade[200] and spent $100 million to expand mental health diversion for people likely to become incompetent.[201] The delays have resulted in a court order requiring the state to reduce the time it takes to admit someone to the state hospital to restore them to competency.[202]

This experience shows that California is putting too many people through the competency restoration process for little to no long-term benefit for the people who cycle through the system or to public safety. Dr. Katherine Warburton, Statewide Medical Director at the California Department of State Hospitals, explained to the Committee that the competency restoration process does nothing to interrupt cycles of criminal legal involvement because the focus of competency restoration is only to achieve a basic understanding of the court process, not to provide continuing care.

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[195] Data provided to Committee staff by DSH.
[196] *Id.*
[197] Barbara E. McDermott, Katherine Warburton, and Chloe Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, CNS Spectrums, (25): 232 (2020).
[198] Incompetent to Stand Trial Solutions Workgroup, *Report of Recommended Solutions,* 11 (Nov. 2021).
[199] Data on file with Committee staff.
[200] IST Workgroup Report at 12.
[201] *Id.*
[202] *Stiavetti v. Clendenin,* 65 Cal.App.5th 691 (Ct. App. 2021). At least a dozen states, including California, have been sued for failing to conduct the competency restoration process within a "reasonable period of time" as required by the United States constitution. See Hallie Fader-Towe and Ethan Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial*, Council of State Governments Justice Center, 4, October 2020. Many still struggle to comply with court orders. For example, the state of Washington has paid more than $100 million in contempt fines. See *Trueblood et al v. Washington Department of Social and Health Services*, Case No. 2:14-cv-01178, Settlement Agreement, Aug. 16, 2018.

Despite the tremendous resources spent on restoring people to competency, people, as Dr. Warburton put "often end up worse off than when they started."[203]

A large cause of the problem is that once a judge determines that someone is incompetent in a felony case, the judge has no choice but to commit that person to the state hospital for restoration, even if other treatment options would be cheaper, more effective, and more protective of public safety. The competency system has become a catchall for a large number of people with mental health issues that come before the criminal court. As panelist Dr. Daniel Murrie, an expert on competency practices across the country, told the Committee, there are "far, far better approaches to linking people with the services they need."[204]

For example, Judge Steven Leifman explained that in Miami-Dade County, people charged with nonviolent felonies are put in a diversion program once stabilized, foregoing restoration and prosecution altogether, which has ultimately resulted in better outcomes.[205] Judge James Bianco noted that Los Angeles County has successfully released people charged with serious or violent cases to diversion, rather than sending them to the state hospital.[206] And though California recently changed the Penal Code to stop attempting to restore competency for people charged with misdemeanors,[207] Teresa Pasquini, a parent to a son with schizophrenia who cycled through the incompetency process, explained that "a felony charge is not the whole story and must not be the main driver of immediate solutions."[208]

To better address public safety and long-term mental health treatment for people found incompetent to stand trial, judges should be required to determine whether restoration to competency is in the interests of justice for almost all cases. A judge would not make this determination for offenses that are already excluded under the existing mental health diversion statute, which includes offenses such as murder and numerous sex offenses.[209] Presumptions against restoration should apply to Penal Code section 1170(h) offenses, wobbler offenses, and certain assault and robbery offenses. These latter offenses are some of the most common for which restoration to competency is undertaken, and as noted above, approximately 70% of people restored to competency receive short sentences or the dismissal of charges, suggesting that even people charged with these offenses are a low risk to public safety.

When weighing the interests of justice in these cases, the court should consider all aspects of the offense, the defendant's mental health condition and history of

[203] Committee on Revision of the Penal Code, Meeting on May 17, 2022, Part 1, 0:22:48-0:23:08.
[204] *Id.* at 0:59:59-1:00:07.
[205] *Id.* at 1:19-1:20.
[206] *Id.*, Part 2, at 00:01:26-00:01:48.
[207] See SB 317 (Stern 2021).
[208] *Id.*, Part 1, at 1:12:14-1:12:21.
[209] See Penal Code § 1001.36(b)(2).

treatment, whether the person is likely to face incarceration if convicted, the likely length of a term of incarceration, and other relevant circumstances. And if the court finds that restoration to competency is not in the interests of justice, the court would then consider whether existing mental health diversion[210] or other interventions, such as assisted outpatient treatment or a civil conservatorship, are appropriate. While barriers may exist to moving people into diversion quickly in some counties, stakeholders nonetheless agree that diversion should be expanded.[211] If someone was not successful in these programs, prosecution could resume.

In addition to rethinking the one-size-fits all approach to competency, other reforms can make the process more efficient and focused on better long-term outcomes. Unlike in many other states, judges in California cannot conclude that someone is unlikely to be restored to competency without first requiring some attempt at restoration.[212] About 10% of people sent to the state hospital for restoration are unable to be restored.[213] About 19% of people discharged as unrestorable had a neurocognitive diagnosis[214] and another 19% discharged as unrestorable had an intellectual disability diagnosis.[215]

There are also no significant deadlines for each step in the competency process. Once a doubt is raised, the court suspends the legal proceedings and the person's competency is evaluated by a court-appointed mental health expert, also called an "alienist," who submits a report to the court.[216] There is no timeline for the completion of a competency evaluation after it is ordered by the court. A recent survey of California counties by the Judicial Council found that this can range from 1 week to 3 months, with a 4 week average.[217] And if a defendant wants to be considered for mental health diversion after a finding of incompetency, then they must undergo and thus wait for, a separate evaluation on their suitability for diversion.[218] People may not be receiving

[210] Penal Code § 1001.36.
[211] Sheila Tillman, Katie Herman, & Hallie Fader-Towe, *Mental Health Diversion in California Survey Analysis*, Council of State Governments Justice Center, Jan. 2022, 7.
[212] In California, a judge may only consider a different outcome once a person has been committed to a treatment facility. Within 90 days after commitment to a treatment facility, the medical director makes a written report to the court concerning the defendant's progress toward recovery of mental competence. If there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future the person is returned to court. Pen. Code § 1370(b)(1).
[213] McDermott, Warburton, & Auletta-Young, *Incompetent to Stand Trial Admissions to a State Hospital*, 226.
[214] 98% of this group had that diagnosis as part of their primary or secondary diagnosis. Data provided to Committee staff from DSH.
[215] 83% of this group had that diagnosis as part of their primary or secondary diagnosis. Data provided to Committee staff from DSH.
[216] Penal Code § 1369(a)(1).
[217] Marshall Comia, *Incompetent to Stand Trial (IST) Evaluators: Recruitment, Hiring, and Compensation Practices in California's Trial Courts: A Qualitative Analysis of California Courts*, Judicial Council of California, 16 (July 2022).
[218] Penal Code § 1001.36.

necessary and appropriate mental health treatment during these long delays. Other states impose a reasonable deadline on the completion of this process.[219]

Giving judges the discretion to determine what is the most appropriate response to a finding of incompetency is a key step to improving public safety and improving long-term outcomes for people with serious mental health issues. Improving the efficiency and scope of the evaluation process will also bring predictability to a discrete part of the process and help connect people to appropriate treatment sooner.

Empirical Research

Between 2009 and 2016, assault, theft, and robbery were the three most commonly charged offenses for people sent to the state hospital for competency restoration, comprising almost 50% of the charged offenses.[220] People admitted with these charges were also more likely to have had extensive arrest histories, suggesting the current competency restoration process does not interrupt criminal legal involvement.[221]

Insights From Other Jurisdictions

A group of national experts, including psychiatrists, judges, and advocates, partnered with the Council of State Governments Justice Center, the American Psychological Foundation, and the National Center for State Courts, to put together several strategies for states to improve their competency process. Among other recommendations, the experts advised states to reserve restoration only for the most serious of cases.[222]

Unlike California, many states, for example Colorado and Missouri, set a specific time frame to complete the competency evaluation, with a national average of 31 days.[223] The American Bar Association recommends a deadline of 14 days[224] and the National Judicial College recommends anywhere between 15 and 30 days.[225] California's

[219] Neil Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, Psychology, Public Policy, and Law, 25(1), 7 (2019).
[220] McDermott, Warburton, & Chloe Auletta-Young, *Incompetent to Stand Trial Admissions to a State Hospital*, 232.
[221] *Id.*
[222] Hallie Fader-Towe and Ethan Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial*, Council of State Governments Justice Center (Oct. 2020), 17-18; see also Richard Schwermer, *Leading Reform: Competence to Stand Trial Systems — A Resource for State Courts*, Conference of Chief Justices and Conference of State Court Administrators (Aug. 2021), 3-4.
[223] Colo. Rev. Stat. Ann. § 16-8.5-103; Mo. Rev. Stat. Ann. § 552.020; Gowensmith, *Resolution or Resignation*, at 7.
[224] American Bar Association, *Criminal Justice Standards on Mental Health*, adopted Aug. 8, 2016, Standard 7-4.4(d).
[225] Gowensmith, *Resolution or Resignation*, at 7.

Incompetent to Stand Trial Workgroup recently also recommended creation of a mandatory time frame for both the appointment of evaluators and receipt of reports.[226]

At least five states, including Kentucky, Michigan, and Ohio, require courts to find at the time of the competency hearing whether it is reasonably foreseeable the defendant will become competent within the maximum specified timeframe. Some of these states also require the competency evaluator to opine on the likelihood of restorability. In general in these states, if the court determines at the competency hearing that there is no substantial probability of attaining competency, the case is dismissed and/or the defendant is referred for a civil conservatorship.[227] The American Bar Association's Criminal Justice Standards on Mental Health also recommends that if the evaluator determines the defendant is incompetent to stand trial, the evaluator should address the likelihood of the person attaining competence during the treatment period.[228]

[226] IST Workgroup at 38. For example, Connecticut sets two timelines: the examination must be completed within 15 business days from the day the court orders it and the examiner must submit a written report to the court within 21 days of the order. Conn. Gen. Stat. Ann. § 54-56d(d).
[227] See e.g. Ken. Rev. Stat. Ann. § 504.110; Mich. Comp. Laws Ann. § 330.2031; Neb. Rev. Stat. Ann. § 29-1823(4); Nev. Rev. Stat. Ann. § 178.460(4)(d); Oh. Rev. Code Ann. § 2945.38(2).
[228] American Bar Association, *Criminal Justice Standards on Mental Health,* adopted Aug. 8, 2016, Standard 7-4.6(b)(iv) & (c)(iii).

8. Encourage Data Sharing to Address Frequent Utilizers

Recommendation

A small group of people cycle repeatedly through multiple county systems, receiving fragmented care, yet counties do not collect or utilize data that could improve care and outcomes for this group of people.

The Committee therefore recommends the following:

Counties and other stakeholders should collaborate across multiple systems — such as jails, behavioral health, and emergency healthcare — to identify and improve outcomes for frequent utilizers of these systems.

Background and Analysis

A small number of highly-vulnerable people cycle repeatedly through multiple systems, including jails, emergency rooms, shelters, and other public systems due to underlying behavioral health, housing, and other needs.[229] The result for these people, often referred to as high or frequent utilizers, is inefficient and fragmented care that does not lead to stabilization, improved outcomes, or benefits to public safety.[230]

Care coordination across systems is often limited, in part, because data systems are not linked. Local data on how people cycle through various systems is either not collected or collected incompletely. Though there have been efforts to encourage data sharing and collaboration for years,[231] communities are still in the process of collecting data and reporting outcomes.[232] The biggest effort underway in California is the Innovation Incubator at the Mental Health Services Oversight & Accountability Commission

[229] Arnold Ventures, *Early Lessons from Data-Driven Justice Pilot Sites*, 1 (June 2021). Some California specific studies: Elsa Augustine and Evan White, *High Utilizers of Multiple Systems in Sonoma County*, California Policy Lab, 3, 7 (July 2020); Long Beach Justice Lab, *The Justice Lab 2019 Year End Report*, 2 (2019); Sonya Shadravan, Dustin Stephens, Oona Appel, and Kristen Ochoa, *Cross-Sectional Study of Homeless High Service Utilizers in Los Angeles County Jails: Race, Marginalization and Opportunities for Diversion*, Ethnicity & Disease 30:3, 505 (Summer 2020)

[230] There is no standardized definition as to what constitutes a high or frequent utilizer. Each locality or study has defined it differently, depending on the data set and population. See e.g. *Data Driven Justice: A Playbook*, at 11-12.

[231] In 2016, a federal initiative started under the Obama Administration — Data-Driven Justice — encouraged city, county, and state governments to collect data on people with mental illness, substance use disorders, and chronic health problems in their local criminal justice and health care systems. Arnold Ventures and the National Association of Counties recently relaunched the program as the Familiar Faces Initiative. See National Association of Counties, Familiar Faces Initiative. A similar effort called Stepping Up is supported by the Council of State Governments Justice Center. See The Stepping Up Initiative, Stepping Up Innovator Counties: Leading the Way in Justice System Responses to People with Behavioral Health Needs, 1 (Aug. 2021).

[232] Arnold Ventures, *Early Lessons from Data-Driven Justice Pilot Sites*, at 1.

(MHSOAC), which is providing technical assistance to 10 counties in California to build their capacities to link criminal justice, behavioral health, and social services data.[233]

Once equipped with data about their frequent utilizers, communities can take direct and coordinated actions that identify gaps in service and more effectively match frequent utilizers with appropriate services and support. Strategies have ranged anywhere from targeted outreach, linkage to services, and care coordination to the development of crisis stabilization centers.[234]

The research and results from across the country explored below show that every locality in California could potentially benefit from increased data sharing, collaboration, and targeted interventions for people who frequently come into contact with justice, health, and behavioral health systems.

Empirical Research

At the May 2022 meeting, Judge Steven Leifman explained that 97 people in Miami-Dade County were arrested 2,200 times and spent a combined 39,000 days in jail, emergency rooms, state hospitals, and psychiatric facilities over a period of five years, costing the county $17 million.[235] The county created a cross-system collaboration that resulted in the creation of several programs, such as a Crisis Intervention Team, post-booking diversion, and a state funded pilot project that places people found incompetent to stand trial in community-based treatment. As a result of the county's reform efforts, the county jail population dropped significantly, allowing the county to close a jail facility and save over $39 million per year.[236]

Some counties have worked with non-government organizations to collect and study data. Studies in California have analyzed data from a wide range of sources, such as emergency rooms, shelters, jails, and 911 calls. For example, an analysis of 911 calls to the Oakland Police Department showed that one police district accounted for almost a quarter of calls and workload.[237]

Sonoma County worked with the California Policy Lab to identify its highest utilizers of multiple systems, finding that despite making up only 1% of the population, each year

[233] Findings are not yet publicly available. The first cohort comprises Sacramento, San Bernardino, Nevada, Plumas, and Yolo counties. The second cohort includes Calaveras, El Dorado, Lassen, Marin, and Modoc counties.
[234] See generally Arnold Ventures, *Responding Better: A Collaborative Approach to Helping Those in Crisis: Key Insights and Recommendations from the Data-Driven Justice Pilot Initiative* (Nov 2020).
[235] Report of Criminal Mental Health Project, Eleventh Judicial Circuit, Miami-Dade County, Florida (Dec. 2021).
[236] *Id.*
[237] *Police Data Analysis Report: Oakland, California*, Center for Public Safety Management, Dec. 2020, 19.

they accounted for an average of 28% of behavioral health costs, 52% of nights in housing or shelters for the homeless, and 26% of jail time in Sonoma County.[238]

The Benioff Homelessness and Housing Initiative at UCSF also worked with the California Policy Lab to study the small number of San Francisco residents cycling in and out of the county's health and criminal legal systems. By linking together ten years of data from physical health, behavioral health, housing, and criminal legal sectors, they found that 24% of the high utilizer cohort in 2011 continued to be high utilizers the following year.[239] The 2011 cohort had a startling death rate — by the end of the ten-year period, 26% were deceased.[240]

Targeted use of such data can have dramatic results. In 2011, the City of San Diego launched a program that identified the 25 most frequent users of public services, who cost taxpayers $3.5 million in hospital and criminal justice costs, and enrolled them in a Housing First program. Three years later the rate of arrests and emergency room visits dropped by nearly 80%.[241] The program was discontinued after the three-year pilot period because it lacked sustainable funding.[242] In Pinellas County, Florida, the county identified the top 30 users of crisis stabilization and jail services, developed and implemented an intensive level of treatment and services, and cut jail and hospital days and costs in half.[243]

[238] Elsa Augustine & Evan White, *High Utilizers of Multiple Systems in Sonoma County*, California Policy Lab, July 2020, 3.
[239] Caroline Cawley et al, *Signals of Distress: High Utilization of Criminal Legal and Urgent and Emergency Health Services in San Francisco,* California Policy Lab, Sept. 2022, 8-9.
[240] *Id.* at 8.
[241] Fermanian Business & Economic Institute at Point Loma Nazarene University, *Project 25: Housing the Most Frequent Users of Public Services Among the Homeless*, 12 (April 2015).
[242] Kelly Davis, *Despite Early Success, San Diego Homeless Program Struggles to Expand*, USC Annenberg Center for Health Journalism (Mar. 6, 2017).
[243] *Case Study: Pinellas County, Fla.* Familiar Faces Initiative, National Association of Counties.

9. Update Pretrial Procedures

Recommendation

Under current law, people can be held in jail for days without seeing a lawyer because the Penal Code does not require an arraignment on Sundays or holidays. California has also failed to incorporate into its Penal Code the requirement that a judge promptly review warrantless arrests for probable cause.

The Committee therefore recommends the following:

- Ensure that all arrested people have their first appearance in court no more than 48 hours after arrest, without exception.
- Codify the requirement of a prompt judicial review of probable cause for warrantless arrests of adults and juveniles and require courts to make a record of the determination.

Relevant Statutes

Penal Code §§ 825, 849
Welfare & Institutions Code §§ 631, 632

Background

Unlike many other states, California's pretrial timeline is missing important procedural protections of when the first court appearance must occur and a judge's duty to review whether a warrantless arrest is supported by probable cause.

Arraignment Timeline
Judge J. Richard Couzens told the Committee that judges recognize that the first 48 hours after a person's arrest is a critical time period.[244] While many arrested people are not charged — in 2021, more than 20,000 felony arrests were rejected by prosecutors for lack of sufficient evidence — under current law these people can nonetheless be detained and not brought to court to learn the status of their case for more than two days.[245] Though arraignments (what California and many states call the first court appearance) must occur "without unnecessary delay" after arrest and the Penal Code sets a general 48 hour timeframe, Sundays and holidays are excepted.[246] This elongated

[244] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 2, 01:24:30-01:24:41.
[245] California Department of Justice, *Crime in California 2021*, Table 38A.
[246] Penal Code § 825(a).

timeline helped earn California a failing grade on its pretrial procedures in a recent report from the Dedman School of Law.[247]

The exceptions for Sundays and holidays should be removed, as they are in many other states, including Texas, Florida, and Alabama.[248] While holding arraignment every day of the week will impose new costs, this recommendation does not require an entire court building and all its staff to be open a full day — instead, courts can prioritize efficient arraignment proceedings with minimal court staff at set times on days when the court would otherwise be closed. Current law already provides that at least one judge must be on call whenever court is not in session to resolve issues about release from custody.[249]

Judicial Review of Warrantless Arrests

Despite a United States Supreme Court case arising from Riverside County more than 30 years ago, California has not codified a core requirement of the federal Fourth Amendment: that every arrest must be promptly reviewed by a neutral judge.[250]

Sue Burrell, Policy Director Emeritus, Pacific Juvenile Defender Center, informed the Committee that this requirement might be honored in most jurisdictions, but there is often no record made of it and there is no mention of it in the Penal Code.[251]

This rule — required by the 1991 case *County of Riverside v. McLaughlin* — specifies that probable cause determinations made within 48 hours of arrest will generally meet the Fourth Amendment's promptness requirement, but that no additional time for weekends or holidays is allowed.[252] While probable cause determinations do not need to be ruled upon in open court and typically rely on short written statements from the arresting officer, prompt judicial reviews of warrantless arrests is an essential safeguard against blatantly illegal arrests or mistakes by law enforcement.[253]

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[247] Malia N. Brink, Jiacheng Yu, Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center, October 2022.
[248] *Id.*; Ala. R. Crim. Proc. 4.3; Fla. R. Crim. Proc. 3.130(a); Tex. Code Crim. Proc. Ann. art. 15.17.
[249] Penal Code § 810.
[250] See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).
[251] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3, 01:08-04:14; See also Written Submission of Sue Burrell to Committee on Revision of the Penal Code (Sept. 21, 2022).
[252] *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Justice Antonin Scalia dissented in the case, arguing that 48 hours was too much and that such reviews should be conducted within 24 hours, a shorter time limit than the 36 hours suggested by the liberal justices who were also in dissent. *Id.* at 70 (Scalia, J. dissenting).
[253] Sue Burrell, The 48-Hour Rule and Overdetention in California Juvenile Proceedings, UC Davis Journal of Juvenile Law & Policy, Vol. 20:1, 8 (2016).

Some courts in California review warrantless arrests for probable cause during the arraignment. But this means that the requirements of *McLaughlin* are routinely violated if the arraignment is held after 48 hours due to a weekend or holiday, which is another reason to require all arraignments to be completed no later than 48 hours from arrest. The potential problems are even worse in juvenile cases, where current law allows 3 to 7 days to pass before a judicial review of the arrest.[254]

California should both update its arraignment timeline to align with other states and amend its adult and juvenile statutes to ensure court procedures throughout the state are in compliance with constitutional standards. Doing so would decrease wrongful detention, reduce unnecessary incarceration, and allow the vindication of other important constitutional rights.

Empirical Research

As explored elsewhere in this report, almost any period of pretrial detention is harmful to the incarcerated person and community.[255]

Research on statewide juvenile court procedures conducted in 2015 found that while some counties reviewed warrantless arrests of juveniles within 48 hours or arrest, the majority of counties did not.[256] A 2022 survey of adult court public defenders about probable cause reviews in their county indicated significant variation in county practices, with many responses indicating that the 48-hour rule was not adhered to or that courts did not make a record of the determinations.[257]

Insight from Other Jurisdictions

At least 13 states require a first appearance to be held within 48 hours (or less) of arrest, including Texas, Florida, Alabama, Georgia, Mississippi, and New York.[258]

As explained to the Committee by Judge Juliet McKenna of the Superior Court of the District of Columbia, the rules from *McLaughlin* are strictly adhered to in other jurisdictions and judges in her court are "petrified" of violating the rule.[259] Many other states, such as Florida, Louisiana, and Arizona, expressly incorporate *McLaughlin*'s requirements of a prompt review of probable cause into their criminal codes.[260]

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[254] Welf. & Inst. Code §§ 631, 632, 635.
[255] Sandra Susan Smith, *Pretrial Detention, Pretrial Release, & Public Safety*, Arnold Ventures, July 2022.
[256] Sue Burrell, *The 48-Hour Rule and Overdetention in California Juvenile Proceedings*, UC Davis Journal of Juvenile Law & Policy, Vol. 20:1, 16-17 (2016).
[257] See Written Submission of Sue Burrell to Committee on Revision of the Penal Code (Sept. 21, 2022).
[258] Malia N. Brink, Jiacheng Yu, Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center, October 2022.
[259] Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 1:04:31-1:05:29.
[260] Fla. R. Crim. P. 3.133; La. C. Cr. P. 230.2; Ariz. R. Crim. P. 4.2, 4.1. See also Alaska Stat. § 12.25.150; Del. Code Ann. Tit. 11, § 1909; MD Rules, rule 4–212(f); Minn. R. Crim. P. 4.02(5); Mo. Rev. Stat. § 544.170; N.H. Rev. Stat. Ann. § 594:20–a.

10. Codify *Humphrey*'s Elimination of Wealth-Based Detention

Recommendation

Lower courts are not following the California Supreme Court's *Humphrey* decision that people should not be kept in jail because they cannot afford to pay cash bail.

The Committee therefore recommends the following:

- Codify and clarify elements of the California Supreme Court *Humphrey* decision, including a presumption of release, when conditions of release should be imposed, and how courts should determine affordable cash bail amounts.
- Allow courts to accept a refundable percentage of cash bail amounts.

Relevant Statutes

Penal Code §§ 1268–1320.5.

Background and Analysis

More than 40,000 people are currently held in California's jails awaiting trial.[261] Many are held because they cannot pay cash bail — an amount set by a county schedule or court that specifies how much money they can pay to leave custody.[262] California's cash bail amounts are notoriously high and the most recent data from 2009 shows that the median bail amount in California is five times the amount imposed in the rest of the country.[263]

In March 2021, in a unanimous decision in *In re Humphrey*, the California Supreme Court disapproved California's system of "wealth based detention" and held that people should not be held in jail solely because they could not afford to pay cash bail.[264]

But more than a year and a half after the decision, testimony and data presented to the Committee shows that *Humphrey* is not being followed. A recent report from the Berkeley Policy Advocacy Clinic and the UCLA School of Law Bail Practicum presented to the Committee by Professor Stephanie Campos-Bui showed that pretrial detention has not decreased, cash bail amounts remain unattainably high, and many judges

[261] California Board of State and Community Corrections, *Jail Population Trends,* Table 1, Sept. 15, 2022 (reflecting June 2022 data).
[262] See, e.g., Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice,* 25, October 2017.
[263] Sonya Tafoya, Public Policy Institute of California, *Pretrial Detention and Jail Capacity in California*, July 2015, 4 (analyzing data ending in 2009).
[264] *In re Humphrey*, 11 Cal. 5th 135, 151 (2021).

throughout the state have concluded that *Humphrey* increased their power to hold people in custody.[265]

This state of affairs — which allows those who can afford high cash bail amounts to buy their release while confining people who cannot — has resulted in widespread pretrial detention that is unfair, racially-biased, and harmful to individual people and their families and loved ones. Communities also suffer because pretrial detention increases long-term recidivism and reduces employment prospects.[266]

In 2017, a workgroup created by Chief Justice Tani Cantil-Sakauye recommended that cash bail be eliminated and replaced with risk-based release decisions.[267] Those recommendations were embedded in SB 10, a comprehensive reform bill that passed the Legislature and received Governor Brown's signature in 2018. In 2020, that law was subject to a referendum and — despite Governor Newsom's support[268] — was repealed before it went into effect.[269]

Six months later the California Supreme Court acknowledged in *Humphrey* that cash bail is too often set at an amount that judges know the arrested person cannot pay and used to detain people in jail indefinitely without following due process.[270] This system undermines respect for the rule of law where, according to the United States Supreme Court and the California Supreme Court, "liberty is the norm and detention prior to trial or without trial is the carefully limited exception."[271]

A panel of California judges shared similar concerns with the Committee. Judge Lisa Rodriguez of San Diego Superior Court and Vice Chair of the Judicial Council's Criminal Law Advisory Committee, told the Committee that many judges are still constructively detaining people by setting high cash bail amounts despite *Humphrey's*

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[265] Alicia Virani, Stephanie Campos-Bui, Rachel Wallance, Cassidy Bennett, & Akruti Chandrayya, *Coming Up Short: The Unrealized Promise of In re Humphrey*, UCLA School of Law Bail Practicum & Berkeley Law Policy Advocacy Clinic, 3, 21, October 2022. See also Johanna Lacoe, Alissa Skog, & Mia Bird, *Bail Reform in San Francisco: Pretrial Release and Intensive Supervision Increased After* Humphrey, California Policy Lab, May 25, 2021, 1 (in San Francisco, which began adhering to Humphrey in January 2018 after the initial appellate decision, the overall likelihood of detention declined from 25% to 22% and the total jail population remained relatively stable).

[266] See, e.g., Will Dobbie, Crystal Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Economic Activity, 2 March 25, 2021 (finding that just three days of pretrial incarceration reduces earnings by an average of $29,000 over the detained person's life).

[267] Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, October 2017.

[268] Patrick McGreevy, *California Voters to Decide Whether to End Cash Bail System with Proposition 25*, Los Angeles Times, October 7, 2020.

[269] Patrick McGreevy, *Prop. 25, Which Would Have Abolished California's Cash Bail System, Is Rejected by Voters*, Los Angeles Times, November 3, 2020.

[270] *Humphrey*, 11 Cal. 5th at 143.

[271] *Humphrey*, 11 Cal. 5th at 156; *United States v. Salerno*, 481 U.S. 739, 755 (1987).

ruling to the contrary.[272] Judge George C. Eskin also urged the Committee to codify *Humphrey*'s requirements, particularly by providing guidance on how judges should evaluate a defendant's ability to afford cash bail.[273] Judge Brett Alldredge of Tulare County frankly acknowledged that many judges find it easier to allow people to be detained by high cash bail amounts because they fear negative headlines if a released person commits a high-profile offense.[274] Judge J. Richard Couzens explained that there is a conflict between the individualized determinations required by *Humphrey* and what current law requires, particularly around the use of bail schedules by judges.[275]

Ryan Couzens, Assistant Chief Deputy District Attorney in Yolo County, also expressed support for codifying certain aspects of *Humphrey*, including a presumption of release in most cases. He explained that his office has already adopted a policy directing prosecutors not to seek cash bail in most cases, even for serious crimes.[276]

Judges undoubtedly have, as *Humphrey* held, the "narrow" ability to order pretrial detention to protect public safety,[277] but the contours of that power in California are currently being resolved by the courts, with the California Supreme Court likely to review the issue soon.[278] But there is no indication that the other issues arising every day in bail settings will be settled by the courts anytime soon.

For these reasons, the Committee concludes it is critical for the Legislature to adopt rules to implement *Humphrey* consistently throughout the state and ensure judges have fair guidelines for determining a defendant's ability to afford bail.

There are three steps that should be taken immediately:

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[272] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 01:33:38-01:34:11.
[273] *Id.* at 01:31:24–01:32:13.
[274] *Id.* at 01:37:24-01:38:44.
[275] *Id.* at 1:45:27–1:45:56.
[276] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3, 16:40–18:18. See also Yolo County District Attorney Policies, Bail and Pretrial Release.
[277] *Humphrey*, 11 Cal.5th at 143.
[278] The legal issue is how to resolve a potential conflict between different sections of the California constitution, Article 1, § 12 and Article 1, § 28(f)(3). Section 12 specifies that people "shall be released on bail by sufficient sureties" and then defines a narrow group of people who may be detained after a court makes certain findings. Section 28(f)(3) says people "may be released," which the California Supreme Court has indicated would allow for much more detention. See *People v. Standish*, 38 Cal.4th 858, 877 (2006). Though both sections were added to the constitution by voter initiatives in 1982, Section 12 controlled because it received more votes. Id. at 874–78. But a voter initiative in 2008 amended portions of Section 28, and the effect of those amendments — if any — has not yet been definitively resolved and was explicitly left as an open question by Humphrey. *Humphrey*, 11 Cal. 5th at 155, n.7. The California Supreme Court recently ordered a lower court to directly address this issue, which suggests that the Court will in turn grant review. See *In re Kowalczyk* (California Supreme Court Case No. S274181) (on June 22, 2022, the California Supreme Court ordered the First Appellate District to consider this issue; that court held oral argument on October 31, 2022).

Presumption of release: Codify that every arrested person has a presumption of release and that the prosecution bears the burden of showing why this presumption should be overcome. As Erwin Chemerinksy, Dean of the UC Berkeley School of Law, told the Committee, the fundamental "right[] to pretrial liberty"[279] was a key part of *Humphrey*'s reasoning and should be made an explicit part of the Penal Code.[280]

Least restrictive conditions: Codify *Humphrey*'s rule that if release without conditions is not appropriate to protect public safety or ensure appearance in court, a court must impose the least restrictive non-financial conditions possible.[281]

Such conditions — which are typically informed by an assessment completed by a pretrial services entity — can include checking in with a probation officer, attending treatment programs, complying with stay away or other protective orders, or wearing an electronic monitoring device. The Penal Code should also specify that electronic monitoring is among the most restrictive conditions that can be imposed, a determination that the Legislature already made when providing funding for pretrial services.[282]

Ability to pay cash bail: If after considering all other non-financial conditions, the court concludes that cash bail is required to ensure the person's appearance in court, the court must conduct an ability to pay determination and, as *Humphrey* held, "set bail at a level the arrestee can reasonably afford."[283]

Humphrey did not specify how this determination should proceed, so the Legislature should create rules that ensure a fair and efficient process. The ability to pay determination should rely on the arrested person's sworn statements, as is current practice in similar situations, such as when courts consider whether to lower or waive fines for traffic violations.[284]

The amount the person can reasonably afford should be set at a large percentage — such as 50% — of the person's disposable income, which is calculated after subtracting monthly expenses from monthly income and assets. The court should make findings on the record about how it calculated the amount that can be paid under these standards and presumptively impose no

[279] *Humphrey*, 11 Cal. 5th at 151.
[280] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 37:19–37:38, 45:46–46:02.
[281] *Humphrey*, 11 Cal. 5th at 156.
[282] SB 129 (Skinner 2021), Sec. 4, Item 11.
[283] *Humphrey*, 11 Cal. 5th at 154.
[284] See Judicial Branch of California, Self-Help Guide, *If You Can't Pay Your Traffic Ticket Fine* (directing people to form TR-320/CR-320 — Can't Afford to Pay: Traffic and Other Infractions).

more than that amount unless there are compelling reasons supported by clear and convincing evidence to impose a higher amount that must also be stated on the record.

Courts making bail determinations at or after arraignment should be prevented from relying on the bail schedule, a preset list of cash amounts set by each county, in setting cash bail amounts because doing so is incompatible with *Humphrey*'s command that the court's determination be a "careful consideration of the individuals arrestee's circumstances."[285] Judges should also be specifically prohibited from setting cash bail at a level that it intends the arrested person not be able to pay to circumvent the process required to impose a detention order.

In addition to codifying *Humphrey*, courts should have more flexibility to accept cash bail than they do under current law, which limits them to accepting the full amount of cash bail.[286] Currently, the vast majority of people who are able to pay cash bail do so by using a commercial bond company, which typically charges a non-refundable 10% fee.[287] In San Francisco, over 99% of people who post cash bail use a commercial bond agency and bail agencies collected as much as $10–15 million in nonrefundable fees in 2017.[288] In Los Angeles, between 2012 and 2016, bail bond agencies collected an estimated $193 million in nonrefundable premiums from people who paid bail before arraignment.[289] As emphasized to the Committee by Gina Clayton-Johnson, Executive Director of Essie Justice Group, these fees are primarily paid by low-income communities and people of color, especially women,[290] who cut back on food, rent, or other bills, or work more hours to pay for their loved one's release.[291]

In many other jurisdictions, courts can accept a percentage of the total bail amount — or no payment at all and simply a promise to pay — and, if the arrested person fails to

[285] *Humphrey*, 11 Cal. 5th at 156.
[286] Penal Code § 1295.
[287] Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 30, October 2017.
[288] Financial Justice Project, San Francisco Office of the Treasurer, *Do the Math: Money Bail Doesn't Add Up for San Francisco*, June 2017, 4, 6.
[289] Isaac Bryan, Terry Allen, Kelly Lytle Hernandez, & Margaret Dooley-Sammuli, *The Price for Freedom: Bail in the City of L.A.*, UCLA Ralph J. Bunche Center for African American Studies, Dec. 5, 2017, 1.
[290] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3, 43:15–44:15; Saneta deVuono-powell, Chris Schweidler, Alicia Walters, & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, 2015, 9.
[291] *Id.*; Gina Clayton-Johnson, Endria Richardson, Lily Mandlin, & Brittany Farr, *Because She's Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, Essie Justice Group, May 2018, 13; Joshua Page, Victoria Piehowski, & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Pedation*, The Russell Sage Foundation Journal of the Social Sciences 5(1): 150–172, 2019.

comply with their obligations, recover the full amount from them.[292] And if the arrested person does show up to court as required, the amount they paid is refunded to them.

Even if all of the above reforms are enacted, many issues will remain with California's pretrial system. But these changes would be significant progress to ensuring due process and equal justice in California by ensuring that current law and practice complies with *Humphrey*'s constitutional commands.

Empirical Research

Cash bail has repeatedly been shown to offer no improvement to people's return to court or their law abiding behavior.[293] A study evaluating data before and after the Philadelphia District Attorney's Office implemented a new bail policy found no evidence that financial incentives increased compliance.[294]

Most people are detained pretrial because they are too poor to pay their bail.[295] A Pretrial Detention Workgroup convened by Chief Justice Tani Cantil-Sakauye determined, based on data from three counties in 2015 and 2016, that a large percentage of people in jail are there solely because they cannot pay cash bail.[296] This is consistent with research showing that most Americans would be unable to pay a surprise $1,000 bill without borrowing money, and a third would be unable to pay an unexpected $400 bill.[297]

While a possible benefit of pretrial detention is the prevention of someone being rearrested while their case is pending, studies show that any gains are offset by the fact that people detained pretrial are more likely to be rearrested after their case resolves.[298] Data also show that pretrial detention increases the likelihood of a conviction and the severity of a sentence while reducing future employment and

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[292] New York, Kentucky, North Dakota, South Carolina, Ohio, Indiana, and Alaska all allow for release through partially secured or percent bonds, which are payable to the court and are refundable minus a small court fee. Alaska Stat. § 12.30.020; Ky. Rev. Stat. Ann. §§ 431.520, 431.530; N.D.R. Crim. P. 46(a)(2)(K); N.Y. Crim. Proc. Law § 500.10(18)-(19); S.C. Code Ann. § 17-15-15(A).

[293] See e.g., Aurelie Ouss & Megan T. Stevenson, *Does Cash Bail Deter Misconduct?*, Jan. 2022; Michael Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, Pretrial Justice Institute (2013); Tracey Meares & Arthur Rizer, *The "Radical" Notion of the Presumption of Innocence*, The Square One Project, May 2020, 26–28.

[294] Ouss & Stevenson, *Does Cash Bail Deter Misconduct?* at 3.

[295] Sandra Susan Smith, *Pretrial Detention, Pretrial Release, & Public Safety*, Arnold Ventures, July 2022, 4.

[296] This estimate is based on data from three counties: Fresno (15%), San Francisco (53%), and San Mateo (59%). Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 25, n. 71, October 2017.

[297] Karen Bennett, *Survey: Less than Half of Americans Have Savings to Cover a $1,000 Surprise Expense*, Bankrate, Jan. 19, 2022; *Economic Well-Being of U.S. Households in 2021*, Board of Governors of the Federal Reserve System, May 2022.

[298] Sandra Susan Smith, *Pretrial Detention,* at 4–5; Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited*, Core Correctional Solutions, March 2022.

access to social safety nets.[299] As Dr. Sandra Susan Smith of the Harvard Kennedy School told the Committee, the harms caused by pretrial detention occur extremely quickly and even a few hours in pretrial detention can have negative impacts.[300]

Insights from Other Jurisdictions

Comprehensive statewide reform: New Jersey and New York have both recently implemented substantial changes to their pretrial system. New Jersey Supreme Court Chief Justice Stuart Rabner explained to the Committee that the state's old system resulted in low-risk defendants being held in custody because they were too poor to make bail.[301] When the state shifted to a risk-based system and away from cash bail, New Jersey's pretrial jail population reduced by 40% and the state's rearrest rates remained stable.[302] In the two years after these changes, crime dropped in every category, including a 32% drop in homicides, a 30% drop in burglaries, and a 37% drop in robberies.[303] In 2019, the court appearance rate passed 90% for the first time.[304]

In New York, following sweeping reforms to state bail laws, the failure to appear rate and pretrial re-arrest rates have largely remained stable.[305]

Similar results were found after Harris County, Texas, reformed the misdemeanor bail system.[306]

Presumption of release: More than half of states ensure that "liberty is the norm"[307] by codifying a presumption of release, either on recognizance or non-monetary conditions.

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[299] Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. Rev. 369 (2020); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, Journal of Law & Economics, 60(3), 2017, 550 (probability of being rearrested within 2 years after detention increased by 8% and 12% for the felony sample and misdemeanor sample, respectively); Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, Journal of Legal Studies, 45(2), June 2016 (setting cash bail causes a 12% rise in the likelihood of conviction and a 6–9% rise in being charged with another crime in the future.).
[300] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 1:01:17-1:01:43.
[301] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 0:34:04-0:34:38.
[302] New Jersey Courts, *Criminal Justice Reform Annual Report 2020*, 18, 8–9.
[303] Rebecca Ibarra, *Crime Rates Plunge in New Jersey, And Bail Reform Advocates are Gloating*, WNYC News, Nov. 28, 2018.
[304] *Id.* at 10.
[305] New York City Comptroller, *NYC Bail Trends Since 2019*, Mar. 2022, 2; New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Data Summary Analysis: 2019–2021*, Sept. 21, 2022, slides 23-27.
[306] Monitoring Pretrial Reform in Harris County, *Fourth Report of the Court-Appointed Monitor*, Mar. 3, 2022; Matt Keyser, *Misdemeanor Cases Steadily Declining Following Bail Reform in Harris County*, National Partnership for Pretrial Justice, Mar. 21, 2022.
[307] *Salerno*, 481 U.S. at 755.

Least restrictive conditions: Nearly half the states and Washington, D.C. have laws that require courts to impose the least restrictive conditions necessary to ensure a person's return to court and/or public safety.[308]

Ability to pay: At least 13 states have enacted laws that require courts to consider a person's financial circumstances or ability to pay when setting financial conditions of release.[309] For example, Georgia requires a court to consider a defendant's financial resources and obligations (including to dependents) when setting bail on misdemeanors, although many courts are not complying with the law.[310] And in Massachusetts bail should be set in an amount no higher than what would reasonably assure the appearance of the person in court after taking into account their financial resources.[311] A recent court settlement in Shelby County, Tennessee (which includes Memphis) specifies that cash bail amounts should only be imposed at a level determined by a bail calculator provided by the Vera Institute.[312]

Court acceptance of a percentage of the cash bail amount: As Insha Rahman of the Vera Institute explained to the Committee, some states provide greater flexibility in the use of money to secure release.[313] Four states have prohibited the for-profit bail industry — Illinois, Kentucky, Wisconsin, and Oregon — and instead rely on systems that allow people to pay deposits to the courts directly when cash bail is set.[314] (And starting next year, Illinois will be the first state to entirely eliminate cash bail.)[315] Other states use this system alongside commercial bail and some states simply allow a promise to pay.[316] Research has shown that this type of system is no less effective than the commercial bail bond industry in ensuring appearance in court and is less destructive to people's personal finances because the money is returned at the conclusion of a

[308] National Conference of State Legislatures, *Legal Presumptions to Guide Courts Making Pretrial Determinations,* 2020.
[309] National Conference of State Legislatures, *Pretrial Release: Financial Conditions of Release,* Feb. 22, 2021.
[310] Andrea Woods et al., *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia,* 54. Georgia Law Rev. 1236 (2020).
[311] Mass. Ch. 276 § 57.
[312] Shelby County Criminal Court, Standing Bail Order, I.2 (page 2–3), I.4 (page 4), August 15, 2022. See also Sandra van den Heuvel, Anton Robinson, and Insha Rahman, *A Means to an End: Assessing the Ability to Pay Bail,* Vera Institute, 4–6, December 2019 (describing bail calculator).
[313] Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 4, 42:37-46:28.
[314] Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *The History of Bail and Pretrial Release,* Pretrial Justice Institute, Sept. 23, 2010, 19.
[315] See Michael Friedrich, *Illinois Prepares for Historic Abolition of Cash Bail,* Arnold Ventures, October 3, 2022.
[316] At least New York, Kentucky, North Dakota, South Carolina, Ohio, Indiana, and Alaska all allow for release through partially secured or percent bonds, which are payable to the court and are refundable minus a small court fee. Alaska Stat. § 12.30.020; Ky. Rev. Stat. Ann. §§ 431.520, 431.530; N.D.R. Crim. P. 46(a)(2)(K); N.Y. Crim. Proc. Law § 500.10(18)-(19); S.C. Code Ann. § 17-15-15(A).

case, unlike with commercial bail bonds where the premium paid to the company is non-refundable.[317]

Additional Considerations

- The Committee notes that many arrested people are released from custody before seeing a judge in court, with some people securing release through cash bail set by a county bail schedule. Bail schedules, which are set by local judges, have been held unconstitutional by federal courts in San Francisco and Sacramento when used to determine who can be released from custody before seeing a judge.[318] A third lawsuit in state court challenging the practice was recently filed in Los Angeles County.[319] While bail schedules are relied on throughout the state, their constitutionality is increasingly in doubt — particularly because they conflict with *Humphrey*'s holding that release determinations must be individualized — and courts and the Legislature should consider how to end reliance on the schedules in the pre-arraignment context.

- The Legislature should also consider expanding California's existing administrative release laws which could safely reduce the number of people booked into jail and subject to pretrial detention. These laws currently apply to most misdemeanors — except domestic violence, stalking, and similar offenses — and allow police officers to give people citations and a notice to appear in court without booking them into jail.[320] The law also contains exceptions that allow police officers to book people into jail for a number of reasons, including if the arrested person presents an immediate public safety risk or there is reason to believe the person will fail to appear in court.[321]

  The majority of arrests in California (about 70%) are for misdemeanors, with nonviolent felonies accounting for approximately 20% of arrests and violent felonies only 10%.[322] The law could be expanded to nonviolent felony offenses, with appropriate exclusions, such as for assault crimes and sex offenses. Many

[317] Jones, *Unsecured Bonds* at 3; Insha Rahman, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts,* Vera Institute of Justice, Sept. 2017; Claire M.B. Brooker, Michael R. Jones, Timothy R. Schnacke, Pretrial Justice Institute, *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds,* June 2014.
[318] *Buffin v. City and County of San Francisco,* Northern District of California, Case No. 15-cv-04959; *Welchen v. Bonta,* Eastern District of California, Case No. 16-cv-00185. The federal Ninth Circuit Court of Appeals has yet to consider the merits of the issue.
[319] *Urquidi v. City of Los Angeles,* Los Angeles County Superior Court, Case No. 22STCP04044 (complaint filed November 14, 2022). See also Sam Levin, *"'If I could buy freedom, I would': LA residents who can't afford bail sue to change system,"* The Guardian, November 14, 2022.
[320] Penal Code § 853.6.
[321] Penal Code § 853.6(i)(1)–(12).
[322] California Department of Justice, *Crime in California 2021,* Tables 28 & 31.

states allow such policies for some felony offenses.[323] In New Jersey, 68% of all arrests are handled with a similar practice.[324]

- Court reminders via text message or phone call are a proven way to increase appearance in court.[325] California has used text messages to provide other public services, such as reminders to use less electricity during heat waves,[326] and should use the same technology to help people get to court. Doing so would improve appearance rates and reduce costs by resolving cases more quickly.[327] Many jurisdictions around the country have used reminders to increase appearances rate in court and they are required by law in New York.[328]

[323] *Citation In Lieu of Arrest,* National Conference of State Legislatures, Oct. 2018.
[324] New Jersey Courts, *Annual Report*, at 14 (statistics on use of "complaint-summons").
[325] See, e.g., Advancing Pretrial Policy & Research, *Pretrial Assessment Tools,* April 2021; Alissa Fishbane, Aurelie Ouss, Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, Science, 379:682, November 2020; Russell Ferri, *Desk Appearance Tickets and Appearance Rate — The Benefits of Court Date Reminders*, New York City Criminal Justice Agency, July 2019; Joanna Thomas & Abdaziz Ahmed, New York City Criminal Justice Agency, *Court Date Notifications: A Summary of the Research and Best Practices for Building Effective Reminder Systems*, March 2021, 29–30.
[326] Grace Toohey, Alexandra E. Petri, *A Text Asked Millions of Californians To Save Energy,* Los Angeles Times, September 7, 2022.
[327] Thomas & Ahmed, *Court Date Notifications,* at 30 (equivalent of 1,000 annual jail beds saved by use of reminders by a county in Arizona).
[328] N.Y. Crim. Proc. Law § 1580.80(2); Thomas & Ahmed, *Court Date Notifications*, 28–29 (describing programs in Louisville, KY, King County, WA, Multnomah County, OR, Hennepin County, MN, and Jefferson County, CO).

Administrative Report

2022 Administrative Report

The following report summarizes its activities during the past year from an administrative standpoint and briefly describes the Committee's future plans.

Creation of the Committee

On January 1, 2020, the Committee on Revision of the Penal Code was formed.[329]

For administrative and budgetary purposes, the Committee was located within the California Law Revision Commission. There is no substantive overlap in the work of the two bodies. By law, no person can serve on both the Commission and the Committee simultaneously.[330] Neither body has any authority over the substantive work of the other.[331] The two bodies have different statutory duties.[332]

The Committee has seven members. Five are appointed by the Governor for four-year terms.[333] One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules.[334] The Governor selects the Committee's chair.[335]

Function and Procedure of the Committee

The principal duties of the Committee are to:

1. Simplify and rationalize the substance of criminal law.
2. Simplify and rationalize criminal procedures.
3. Establish alternatives to incarceration that will aid in the rehabilitation of offenders.
4. Improve the system of parole and probation.[336]

[329] Government Code § 8280(b).
[330] See Government Code § 8281.5(d).
[331] Government Code § 8290(c). The Commission and Committee submit their reports and recommendations directly to the Governor and Legislature, not to each other. Government Code § 8291.
[332] Compare Government Code §§ 8289, 8290 (duties of Commission) with Government Code § 8290.5 (duties of Committee).
[333] Government Code § 8281.5(a), (c).
[334] Government Code § 8281.5(a).
[335] Government Code § 8283.
[336] Government Code § 8290.5(a).

The Committee is required to prepare an annual report for submission to the Governor and the Legislature.[337]

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.[338] In 2022, it held six meetings, two of which were two-day meetings. Due to the COVID-19 pandemic, meetings were conducted entirely by teleconference, except for the May meeting, which was conducted in person at the State Library.[339]

Personnel of the Committee

At the time of this report in 2022, the following persons were members of the Committee:

CHAIR
Michael Romano

LEGISLATIVE MEMBERS
Senator Nancy Skinner
Assemblymember Isaac Bryan

GUBERNATORIAL APPOINTEES
Hon. Peter Espinoza
Hon. Thelton E. Henderson
Hon. Carlos Moreno

The following persons are on the Committee's legal staff:

Thomas M. Nosewicz
Legal Director

Rick Owen
Senior Staff Counsel

Joy F. Haviland
Senior Staff Counsel

The following persons provide substantial support for the Committee's legal work:

[337] Government Code § 8293(b).
[338] Government Code §§ 11120–11132.
[339] This was made possible by Executive Orders N-1-22 and Government Code § 11133 (added by 2022 Cal. Stat. ch. 48 (SB 189), § 20, on June 30, 2022).

Lara Hoffman
Natasha Minsker
Lizzie Buchen

The following people from the California Policy Lab provide data analysis and research support to the Committee:

Mia Bird
Omair Gill
Johanna Lacoe
Nefara Riesch
Molly Pickard
Steven Raphael
Alissa Skog

The following persons are staff of the California Law Revision Commission who also provide managerial and administrative support for the Committee:

Brian Hebert
Executive Director

Debora Larrabee
Chief of Administrative Services

Megan Hayenga
Office Assistant

This report was designed by Taylor Le.

Committee Budget

<<To be provided.>>

Planned Activities for 2023

In 2023, the Committee expects to follow the same general deliberative process that it used in past years. It will hold frequent public meetings with speakers representing all groups that have an interest in reform of the criminal justice system. At those meetings, the Committee will identify, debate, and develop recommendations that improve public safety, reduce unnecessary, improve equity, and address racial disparities.

The Committee will also continue its work to establish a secure compendium of empirical data from various law enforcement and correctional sources in California.

That data will be used by the Committee as a tool in evaluating the effect of possible reforms.

Acknowledgements

Many individuals and organizations participated in Committee meetings in 2022 or otherwise contributed towards this report. The Committee is deeply grateful for their assistance.

The keynote speakers and panelists are listed below. Inclusion of an individual or organization in this list in no way indicates that person's view on the Committee's recommendations.

Many other persons testified during the public comment portion of Committee meetings, submitted written comments, or otherwise assisted in the work of the Committee. It is not possible to list everyone here, but the Committee thanks all of them for their efforts and encourages them to continue to participate in the Committee's work going forward.

Panelists
(in alphabetical order)

Judge Brett Alldredge
Tulare County Superior Court

Matt Alsdorf
Associate Director, Center for Effective Public Policy

Judge Thomas M. Anderson
Nevada County Superior Court

David Angel
Assistant District Attorney, Santa Clara County

Bill Armstrong
President, California Bail Agents Association

Judge James N. Bianco
Los Angeles County Superior Court

Sue Burrell
Policy Director Emeritus, Pacific Juvenile Defender Center

Stephanie Campos-Bui
Deputy Director, Policy Advocacy Clinic, Berkeley Law School

Dr. Gena Castro Rodriguez
Assistant Professor, University of San Francisco & Director, Survivor Policy, Prosecutors Alliance

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law, Berkeley Law School

Jeff Clayton
Executive Director, American Bail Coalition

Gina Clayton-Johnson
Executive Director, Essie Justice Group

Judge J. Richard Couzens (Ret.)
Placer County Superior Court

Ryan Couzens
Assistant Chief Deputy District Attorney, Yolo County

Ralph Diaz
President & CEO, Stand Up for Victims

Mariam El-Menshawi
Director, California Victims Legal Resource Center

Cymone Fuller
Co-Director, Impact Justice Restorative Justice Project

Judge George Eskin (Ret.)
Santa Barbara County Superior Court

Lynda Gledhill
Executive Officer, California Victim Compensation Board

Aditi Goel
Senior Program Manager, Sixth Amendment Center

Professor Neil Gowensmith
University of Denver's Forensic Institute for Research, Service, and Training

Matthew Greco
Deputy District Attorney, San Diego County

Delaney Green
Clinical Teaching Fellow, UC Berkeley Policy Advocacy Clinic

Andrew Gulcher
Regional Supervising Investigator, California Department of Insurance

Paul Heaton
Professor of Law and Academic Director, Quattrone Center for the Fair Administration of Justice

Chief Probation Officer David Koch
Sonoma County

Judge Steven Leifman
Associate Administrative Judge, Miami-Dade County Court

Galit Lipa
Executive Director, Indigent Defense Improvement Division, Office of the State Public Defender

Judge Juliet J. McKenna
Associate Judge, Superior Court of the District of Columbia

Rachel Michelin
President & CEO, California Retailers Association

Thomas Morgan
CDCR Victim-Offender Dialogue Participant

Professor Daniel Murrie
University of Virginia's Institute of Law, Psychiatry, and Public Policy

Michelle Parris
Program Director, Vera Institute of Justice

Theresa Pasquini
Co-author of Housing That Heals

Kim Pederson
Senior Attorney, Disability Rights California

Maria Ponomarenko
Co-Founder and Counsel, NYU Policing Project

Chief Justice Stuart Rabner
New Jersey Supreme Court

Insha Rahman
Vice President, Advocacy and Partnerships, Vera Institute of Justice

Steven Raphael
Professor of Public Policy, UC Berkeley & Co-Chair California Racial Identity and Profiling Advisory (RIPA) Board

Stephanie Regular
Chair of California Public Defender Association's Mental Health and Civil Commitment Committee

Jeff Reisig
District Attorney, Yolo County & Past-President, California District Attorneys Association

Lizabeth Rhodes
Director, LAPD Office of Constitutional Policing

Judge Lisa Rodriguez
San Diego County Superior Court

Alison Shames
Director, Center for Effective Public Policy

Chauncee Smith
Senior Manager of Criminal Justice, Catalyst California

Sandra Susan Smith
Daniel & Florence Guggenheim Professor of Criminal Justice, Harvard Kennedy School and Director, Malcolm Wiener Center for Social Policy

Tiffanie Synnott
Supervising Public Defender, Sacramento County

Aswad Thomas
National Director, Crime Survivors for Safety and Justice

Irene Vidyanti
Principal Analyst, Los Angeles County Office of the CIO

Carlie Ware
PARR Team Supervisor, Santa Clara County Public Defender

Dr. Katherine Warburton
Statewide Medical Director, California Department of State Hospitals

Kate Weisburd
Associate Professor of Law, The George Washington University Law School

Jordan Woods
Professor of Law, University of Arizona — James E. Rogers College of Law

Mike Young
Assistant Chief, CDCR Office of Victim and Survivor Rights & Services

Kendra Zoller
Deputy Legislative Director, California Department of Insurance

Philanthropic and Other Support

The Committee is grateful to Arnold Ventures for providing generous support relating to the Committee's research and data analysis. The Committee also extends special thanks to the personnel at the California Department of Corrections and Rehabilitation Department of Research, the California Department of Justice Research Department, and the Department of States Hospitals who assisted the Committee's data-gathering efforts. The Committee also received generous support from staff and faculty at Stanford Law School in developing our recommendations and drafting this report.

Appendix A: Biographies of 2022 Committee Members

Michael Romano, of San Francisco, serves as chair of the Committee on Revision of the Penal Code. Romano teaches criminal justice policy and practice at Stanford Law School and has been director of the Stanford Justice Advocacy Project since 2007. Romano has collaborated with numerous local, state, and federal agencies, including the United States Department of Justice and Office of White House Counsel under President Obama. He has also served as counsel for the NAACP Legal Defense and Educational Fund and other civil rights organizations. Romano was a law clerk for the Honorable Richard Tallman at the United States Court of Appeals for the Ninth Circuit from 2003 to 2004 and a legal researcher for the Innocence Project from 2000 to 2001. He earned a juris doctor degree with honors from Stanford Law School and a master of laws degree from Yale Law School.

Assemblymember Isaac Bryan, of Los Angeles, has been a member of the Assembly since 2021 and represents the 54th Assembly District, which includes, among other neighborhoods, Baldwin Hills, Crenshaw, Century City, Culver City, and Westwood. Prior to his election, Assemblymember Bryan served as the founding Director of the UCLA Black Policy Project, a think tank dedicated to advancing racial equity through policy analysis, served as the first Director of Public Policy at the UCLA Ralph J. Bunche Center, and Director of Organizing for the Million Dollar Hoods project. Assemblymember Bryan has authored several influential policy reports and led several campaigns at the intersection of racial, economic, and social justice. He earned a Master of Public Policy from UCLA.

Peter Espinoza, of Los Angeles, has served as director of the Office of Diversion and Reentry at the Los Angeles County Department of Health Services since 2016. He served as a commissioner and judge at the Los Angeles County Superior Court from 1990 to 2016. Espinoza was an attorney at Peter Espinoza Attorney at Law from 1984 to 1990. Espinoza was a deputy public defender at the Orange County Public Defender's Office from 1981 to 1983. He earned a juris doctor degree from the University of California, Los Angeles, School of Law.

Thelton E. Henderson, of Berkeley, has been Distinguished Visiting Professor of Law at the University of California, Berkeley since 2017. Henderson served as a U.S. District Court Judge at the U.S. District Court for the Northern District of California from 1980 to 2017. He was Assistant Dean at Stanford Law School from 1968 to 1976 and a Professor at Golden Gate Law School from 1977 to 1980. Henderson was Director of the East Bayshore Neighborhood Legal Center from 1966 to 1968. Henderson was a Corporal in the U.S. Army, serving as a Clinical Psychology Technician from 1956 to 1958. He earned a Juris Doctor degree from the University of California, Berkeley School of Law.

Carlos Moreno, of Los Angeles, has been a self-employed JAMS arbitrator since 2017. Moreno was United States Ambassador to Belize from 2014 to 2017. He was of counsel at Irell & Manella LLP from 2011 to 2013. Moreno was an associate justice of the California Supreme Court from 2001 to 2011 and served as a judge at the United States District Court, Central District of California, from 1998 to 2001. Moreno was a judge at the Los Angeles County Superior Court from 1993 to 1998 and at the Compton Municipal Court from 1986 to 1993. Moreno was senior associate at Kelley, Drye & Warren from 1979 to 1986. He was a deputy city attorney at the Los Angeles City Attorney's Office from 1975 to 1979. Moreno earned a juris doctor degree from Stanford Law School.

Senator Nancy Skinner, of Berkeley, has been a member of the Senate since 2016. She was a member of the Assembly from 2006 to 2014. Senator Skinner represents California's 9th Senate District, which includes Oakland, Berkeley, and Richmond, and chairs the Senate Budget Committee. Senator Skinner is a longtime justice reform advocate and the author of two landmark California laws: SB 1421, which made police misconduct records available to the public for the first time in 40 years, and SB 1437, which reformed the state's felony murder rule so that people who do not commit murder can't be convicted of that crime. She also authored bills to reduce gun violence and allow people with prior felony convictions to serve on juries. Her legislative efforts have resulted in cuts to the number of juveniles incarcerated in state facilities by half; established a new, dedicated fund to reduce prison recidivism; reduced parole terms; and banned the box for higher education. She earned a master's degree in education from the University of California, Berkeley.