

Staff Memorandum 2023-07
Prosecutorial Discretion, Plea Bargaining, and Related Matters

At its October 2023 meeting, the Committee on Revision of the Penal Code will consider prosecutorial discretion in charging and plea bargaining with the goal of proposing recommendations that improve public safety while reducing unnecessary incarceration and improving equity.

This memorandum gives general background and presents possible recommendations for the Committee’s consideration. A supplement to this memorandum, which will be released shortly, will present written submissions from invited panelists.

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Introduction

The tens of thousands of new criminal convictions every year in California represent a fraction of the arrests made and charges filed: though California law enforcement made more than 250,000 arrests for felony offenses and more than half a million arrests for misdemeanor offenses in 2022, there were only about 57,000 felony convictions and less than 100,000 misdemeanor convictions.¹

Prosecutorial decision-making explains why some arrests and charges end up as convictions and others do not. Two key aspects of this decision-making are the subject of this memorandum: charging discretion and plea bargain negotiation. The memorandum also discusses an effective policy tool with a long history in California's criminal legal system — financial incentives — to encourage this discretion to be used in ways that maximize public safety while also reducing unnecessary incarceration, improving equity, and saving money.

A. Prosecutorial discretion in charging decisions

The California Supreme Court has held that district attorneys are “given complete authority” to enforce the state criminal law in their counties,² which includes the broad discretion to decide what charges to bring, what punishment to seek, and numerous other key decisions during every criminal case.³ This discretion has little formal boundary in the law beyond a prosecutor's duty to “seek justice.”⁴ There is no statute that determines how prosecutors should charge, but ethical rules instruct prosecutors to only bring criminal charges if they are supported by probable cause.⁵

Prosecutors exercise their discretion to reject for prosecution a large number of arrests presented to them by law enforcement.⁶ According to data from the California Department of Justice, about 20% of felony arrests never become a criminal case because they are rejected by prosecutors and charges are never

¹ California Department of Justice, *Crime in California 2022*, Table 19; Judicial Council of California, *2023 Court Statistics Report*, Tables 8b & 9a. Note that misdemeanor convictions include only non-traffic offenses.

² *Pitts v. County of Kern*, 17 Cal.4th 340, 358 (1998).

³ A case pending review in the California Supreme Court raises a question about the scope of a prosecutor's power to decline to charge sentencing enhancements under California Three Strikes Law. See *Association of Deputy District Attorneys for Los Angeles County v. Gascon*, review granted Aug. 31, 2022, S275478.

⁴ ABA Standard 3-1.2: Functions and Duties of the Prosecutor; Cal. Rules of Professional Conduct, rule 5-110. See also Jeffrey Bellin, *Theories of Prosecution*, 108 California Law Review 1203, 1210-1217 (explaining that seeking justice “offers neither a meaningful standard to govern prosecutors, nor a useful guideline for generating specific rules.”).

⁵ Cal. Rules of Professional Conduct, rule 5-110.

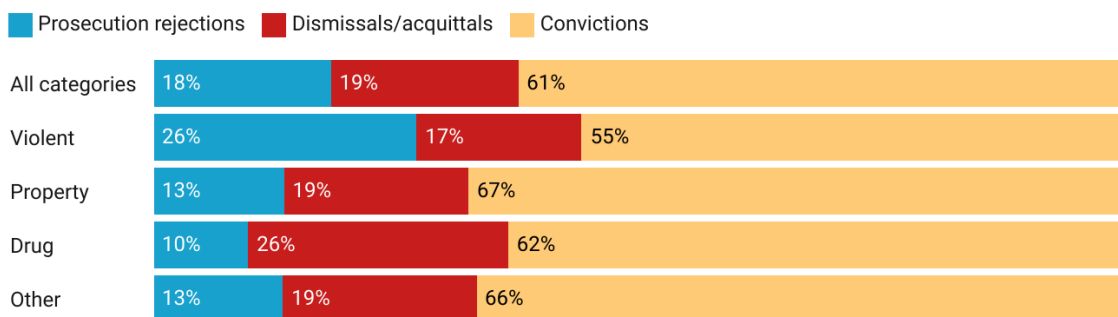
⁶ The Penal Code, however, does inform law enforcement that they may only make arrests when the officer has probable cause. See Penal Code § 836.

filed.⁷ About 60% of these prosecutorial rejections are because there is a lack of sufficient evidence to bring charges.⁸ In 2022, more than 40,000 felony arrests were rejected for further prosecution. However, as explained further below, exercising discretion to dismiss or not prosecute certain offenses can result in better public safety outcomes.

The chart below shows the overall rejection rate by offense category, as well as the dismissal and conviction rates for cases once they are filed in court. (Note that this information is limited only to felony arrests as similar data is not available for misdemeanor arrests.)

Dispositions of adult felony arrests by offense category (2022)

More than 250,000 people were arrested for felonies in 2022, but only around 60% of these arrests resulted in a conviction. The rest were rejected by prosecutors or dismissed after charges were filed.



Dismissals and acquittals are combined in the data, but the overwhelming majority are dismissals. Law enforcement releases account for around another 2% of dispositions. Around 11% of adult felony arrests are missing disposition data.
 Source: California Department of Justice, *Crime in California 2022*, Table 39. • Created with Datawrapper

Data from the Judicial Council also shows significant county variation in the seriousness of charges that are brought in court. Statewide about half of all criminal filings are misdemeanors, about 33% are felonies, and 16% are infractions.

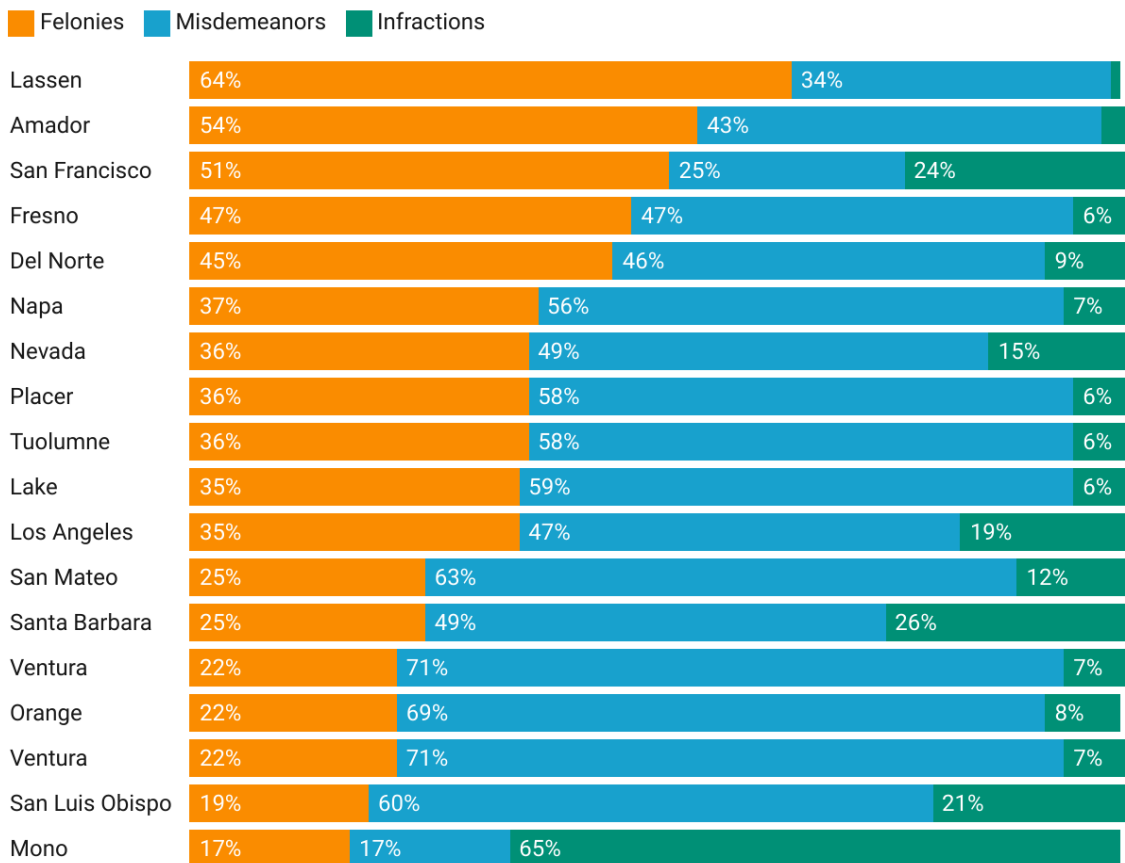
⁷ As with all of the information from the California Department of Justice and Judicial Council of California presented in this memorandum, the data should be interpreted with caution as it reflects only one year of arrests or case processing and may be impacted by responses taken to the COVID-19 pandemic. See, e.g., Heather Harris, *Pandemic Policymaking and Changed Outcomes in Criminal Courts*, Public Policy Institute of California, 9–10 (April 2023). In addition, both reports use the term “dismissal” but do not provide exact definitions and may be using the terms differently. Compare California Department of Justice, *Crime in California 2022*, Table 39 (“The ‘dismissed, acquitted’ category includes diversions that have been dismissed.”) with Judicial Council Table 8b (“The table does not specify the types or reasons for dismissal or acquittal, nor does it include other outcomes such as diversion programs, deferred entries of judgment, or dismissals resulting from pursuit of supervision revocations in lieu of formal convictions.”).

⁸ California Department of Justice, *Crime in California 2022*, Table 38A.

The following chart shows a sample of counties to demonstrate the differences among counties in what percentage of all criminal filings are felonies, misdemeanors, or infractions. Traffic offenses – which make up the overwhelming majority of criminal filings – are excluded to allow for easier comparison of similar offenses.⁹

Criminal filings by county (FY 2021–22)

Counties vary widely in what proportion of their criminal filings are felonies, misdemeanors, and infractions. Counties are ordered by the percentage of filings that are felonies.



Excludes traffic misdemeanors and traffic infractions.

Source: Judicial Council of California, 2023 Court Statistics Report, Table 7a • Created with Datawrapper

⁹ The Judicial Council defines “filing” as follows: “Each filing in a criminal case is associated with a single defendant against whom criminal charges have been filed. Multiple criminal charges may occur in a case in which different charges have been brought against the same defendant, but only the single most severe charge against a defendant in a given case is counted as a new criminal filing. When multiple defendants are charged with a crime, multiple filings are reported.” Judicial Council of California, 2023 Court Statistics Report, xvii.

One explanation for the variation in felony and misdemeanor filings is how “wobblers” — offenses that may be charged as a felony or misdemeanor at a prosecutor’s discretion — are handled because they comprise a substantial number of filings. A recent series of reports from the ACLU, which relied on information obtained through public records act requests in four counties, present a small window into how prosecutors use their discretion on these charges, which is not reflected in the data from the Department of Justice. In Alameda and Sacramento Counties, some wobblers were almost always charged as felonies, including burglary, driving a stolen vehicle, and assault.¹⁰ This was also true in Merced County, although burglary was only charged as a felony half of the time.¹¹

A change in leadership in a prosecutor’s office may change how cases are charged. For example, according to the ACLU reports, in Merced County, in 2017–2018, wobbler offenses of domestic violence and possession of ammunition were almost always charged as felonies. But in 2019–2020, after the election of a new district attorney, the two offenses were more likely to be misdemeanors.¹²

And many felony charges resolve as misdemeanor convictions. In every county reporting data to the Judicial Council, a significant portion of cases are dismissed after filing, and in almost every county, another large portion resolve as misdemeanor convictions. Altogether, in the counties reporting data, more than 20,000 felony filings resulted in a dismissal and more than 18,000 resulted in a misdemeanor conviction.

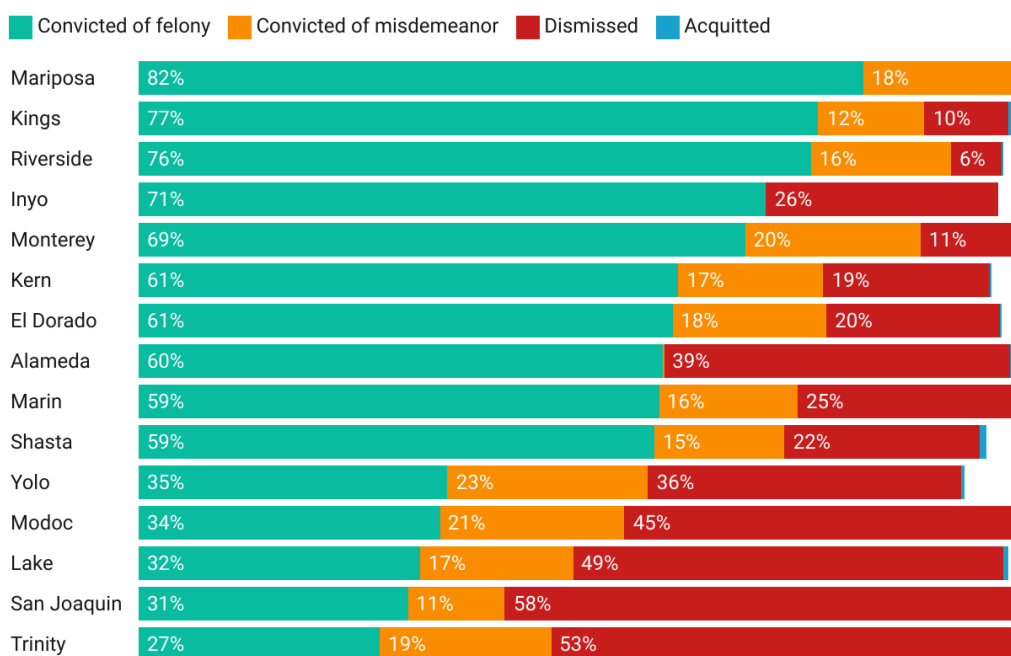
¹⁰ Max Hare et al, *In(Justice) in Alameda County*, ACLU Foundation of Northern California, 17 (2021); Fiona McBride, *In(Justice) in Sacramento*, ACLU Foundation of Northern California, 13 (2022).

¹¹ Shira Idris, *In(Justice) in Merced County*, ACLU Foundation of Northern California, 14 (2022).

¹² *Id.*

Dispositions of felony filings by outcome (FY 2021–22)

Counties are ordered by the percentage of dispositions that are felony convictions.



Dispositions that were transfers or felony petitions, such as petitions to seal & destroy arrest records, remove from gang injunctions, return firearms, are excluded from the data. Dismissals: Table 8a columns D & E (“Other,” which is dismissals and transfers) minus Table 8b column F (“Transfers”). Acquittals: The total number of convictions, which is the sum of Table 8b columns C+D (felony and misdemeanor convictions), minus the number of guilty pleas (Table 8a column C). This result is the number of guilty verdicts after trial. Subtract guilty verdicts after trial from total number of trials (Table 8a columns F+G).

Source: Judicial Council of California, 2023 Court Statistics Report, Tables 8a & 8b. • Created with Datawrapper

Some of the above variation in filings and dispositions may be caused by measurable differences between counties such as crime rates, but other factors that influence these differences are harder to measure. A recent study presented more than 500 prosecutors of varying experience with a fictional police report — describing a person brandishing a knife in a public place while experiencing apparent mental health issues — and surveyed their charging decisions.¹³ While the majority of prosecutors would not have sought the most severe charges or punishment, there was wide disparity in how they would have charged and resolved the exact same facts — prosecutors most commonly charged 3 crimes but some charged up to 11; while only 30% recommended jail time and 40% recommended a fine, those who did had sentences ranging from 5 years to 30 days and fines from \$5,000 to \$500.¹⁴ Some of the responding prosecutors also

¹³ Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 Southern California Law Review 1123, 1154 (Spring 2021).

¹⁴ The same study found that race and class did not have detectable prejudicial effects on prosecutorial decisions. Christopher Robinson, Shima Baradaran Baughman, and Megan S. Wright, *Race and Class: A Randomized Experiment with Prosecutors*, *Journal of Empirical Legal Studies*, 16(4) (Dec. 2019).

stated that they charged harshly, knowing that more serious charges can be used as leverage in plea bargaining.¹⁵

Despite the perceived benefits of prosecution, researchers have found that less prosecution of low-level cases can result in better public safety outcomes. In Suffolk County, Massachusetts, which includes Boston, adults who were not prosecuted for non-violent misdemeanor offenses were 53% less likely to face criminal charges in the next 2 years compared to people who were charged with a crime.¹⁶

And in Harris County, Texas, which includes Houston, deferred adjudications of guilt were found to permanently change the lifetime trajectory for people who were charged with but not convicted of their first felony offense. In these deferred adjudications, people admitted guilt without receiving a formal conviction and cases were dismissed after success on community supervision.¹⁷ Over a 10-year follow-up period, employment rates improved 49% and future convictions fell 75% compared to people who were convicted and sentenced to community supervision.¹⁸

These findings suggest that merely convicting people of low-level offenses — even without incarceration — harms public safety and other outcomes.

B. Plea bargaining

Trials in criminal cases are extremely rare in the United States.¹⁹ Plea bargaining — when a defendant and prosecutor negotiate a guilty plea to specific charges and sentence instead of having a trial²⁰ — accounts for almost all convictions. As the United States Supreme Court has observed, “criminal justice today is for the most part a system of pleas, not a system of trials.”²¹

In California, guilty pleas are the dominant process for resolving felony cases, though dismissals also play a significant role. In counties reporting data to the Judicial Council, 75% of dispositions of felony cases were guilty pleas, while around 20% were dismissals. Less than 3% were trials.

¹⁵ Baughman & Wright, 1183.

¹⁶ Amanda Agan, Jennifer L. Doleac, & Anna Harvey, *Misdemeanor Prosecution*, *The Quarterly Journal of Economics*, vol. 138(3), 1455 (January 2023).

¹⁷ Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System*, *The Review of Economic Studies*, vol. 88(2), 885–888 (March 2021).

¹⁸ *Id.*

¹⁹ See also John Gramlich, *Fewer Than 1% of Defendants in Federal Criminal Cases Were Acquitted in 2022*, Pew Research Center (June 14, 2023); John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Research Center (June 11, 2019).

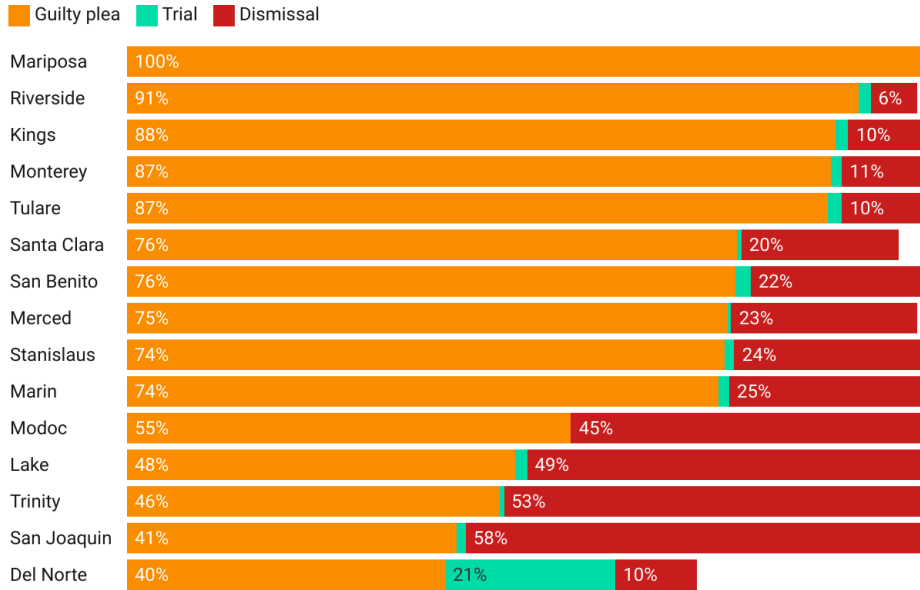
²⁰ See Penal Code § 1192.5.

²¹ *Lafler v. Cooper*, 566 U.S. 170 (2012).

These charts presents county-level disposition data from jurisdictions selected to show the range across the state for felony and misdemeanor filings:

Dispositions of felony filings by process (FY 2021–22)

Counties are ordered by the percentage of dispositions that are guilty pleas.

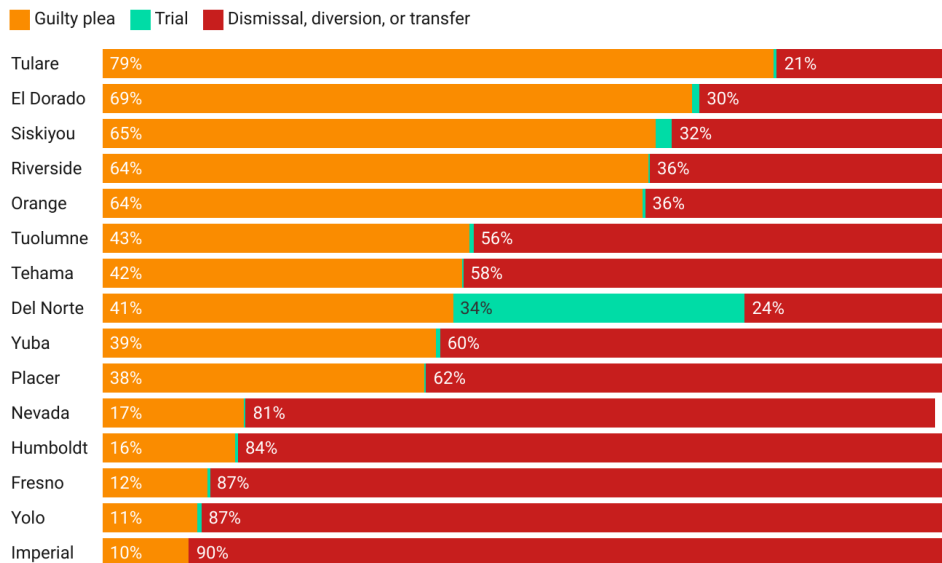


Court and jury trials are combined. Dispositions that are transfers and felony petitions are excluded. Contra Costa County is excluded because it had an atypically high number of trials in the year examined. Dismissals: Table 8a columns D & E ("Other," which is dismissals and transfers) minus Table 8b column F ("Transfers").

Source: Judicial Council of California, 2023 Court Statistics Report, Tables 8a & 8b. • Created with Datawrapper

Dispositions of misdemeanor filings by process (FY 2021–22)

Counties are ordered by the percentage of dispositions that are guilty pleas.



Court and jury trials are combined. Excludes traffic misdemeanors. Excludes bail forfeitures.

Source: Judicial Council of California, 2023 Court Statistics Report, Table 9a. • Created with Datawrapper

The above charts show guilty pleas in the context of all case resolutions, including dismissals which do not result in a conviction. If only convictions are examined, approximately 97% of convictions are a result of guilty pleas for felonies and 98% for misdemeanors in California.²²

Plea bargaining is generally accepted in the Penal Code,²³ which does not provide many guardrails to the practice except that a judge must find that there is a factual basis for the plea agreement and that the plea is freely and voluntarily made.²⁴ Additional safeguards are provided in some limited contexts: for example, pleas impacted by collateral immigration consequences²⁵ and forbidding waivers of future ameliorative law changes.²⁶

Proponents of plea bargaining argue that it is an essential mechanism to efficiently resolve cases given the volume of criminal filings and provides clear resolutions to defendants, victims, and the community.²⁷

But despite its ubiquity, plea bargaining has been criticized for decades because, as a recent report from the American Bar Association concluded, it prioritizes the efficient disposition of cases above fundamental constitutional rights and exacerbates racial disparities.²⁸ For example, two studies reviewing data from the New York County District Attorney's office found that after controlling for various demographic and case factors, Black people who enter into plea agreements were 2.1 times more likely than white people to receive jail offers and 1.7 times more likely to receive a plea-to-the-charge offer (i.e. no charge reduction) than white people.²⁹

²² Judicial Council of California, *2023 Court Statistics Report*, Tables 8a & 8b & 9b. The guilty plea percentage for felony convictions is calculated by taking the guilty plea number in Table 8a column C and dividing it by the sum of the convictions in Table 8b columns C + D. The guilty plea percentage for nontraffic misdemeanors is estimated by taking the guilty pleas in Table 9a column D and dividing it by the sum of guilty pleas and trials in columns F + G. Because there is no data given on total misdemeanor convictions, the guilty plea percentage is at least 98%, which assumes all trials end in convictions and adds another 1,369 convictions to the 75,596 convictions from pleas. If, as is likely, some misdemeanor trials end in acquittal, the guilty plea percentage is even higher.

²³ Penal Code § 1016(1).

²⁴ Penal Code § 1192.5.

²⁵ See e.g. Penal Code §§ 1016.2–1016.4.

²⁶ Penal Code § 1016.8(b).

²⁷ American Bar Association: Criminal Justice Section, *2023 Plea Bargain Task Force Report*, 6; Fair and Just Prosecution, *Issues at a Glance: Plea Bargaining* (Feb. 2022), 2.

²⁸ *2023 Plea Bargain Task Force Report*, 6.

²⁹ Besiki Luka Kutateladze, *Opening Pandora's Box: How Does Defendant's Race Influence Plea Bargaining*, 33 *Justice Quarterly* (2016), 413-420; Ram Subramanian et al., *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Institute of Justice, 24-26 (September 2020).

In addition, when almost all cases are resolved by plea agreements, police and government misconduct may go unchallenged in open court and criminal charges are resolved without transparency to the public.³⁰

And though every guilty plea is supposed to be “knowing, intelligent, and voluntary” before it can be accepted by a court,³¹ the severity of the modern criminal legal system can often push people to plead guilty to avoid a lengthy prison sentence, not because it is a fair resolution. Faced with the possibility of an extreme sentence after trial, even innocent people plead guilty: of the more than 3,300 people exonerated since 1989, 25% had pleaded guilty.³²

People may also plead guilty because they fear a “trial penalty” — the difference between a plea bargain and the sentence a person faces or receives after trial.³³ A 2018 report by the National Association of Criminal Defense Lawyers on federal felony cases found an average 7 year difference between sentences after trial compared to those imposed after a guilty plea.³⁴

Pretrial incarceration also plays a significant role in plea bargaining. When people held in pretrial detention are presented with the choice to plead guilty to a time served or short sentence and go home, many do so.³⁵ One study, using data from hundreds of thousands of misdemeanor cases in Harris County, Texas, found that people detained pretrial were 25% more likely to plead guilty, 43% more likely to be sentenced to jail, and received jail sentences that were more than double — around 9 additional days — than those of people who were not detained.³⁶

³⁰ 2023 Plea Bargain Task Force Report, 6–7.

³¹ See e.g., *In re Tahl*, 1 Cal.3d 122 (1969).

³² The National Registry of Exonerations, 2022 Annual Report, (May 8, 2023), 11.

³³ National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), 20-21, 2023 Plea Bargain Task Force Report, 17.

³⁴ *Id.*

³⁵ Subramanian et al., 11–15; Human Rights Watch, *Not In It for Justice: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, 57 (April 11, 2017); Vanessa A. Edkins and Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences against Pretrial Detention in Decisions to Plead Guilty*, 24 *Psychology, Public Policy, & Law* 204 (2018) (the rate of innocent individuals who pleaded guilty in a psychological study tripled where defendants were held pretrial); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 *Journal of Law, Economics, & Organization*, 55-542 (2018).

³⁶ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stanford Law Review* 711, 747 (March 2017).

And, as the Committee explored last year, in some California counties, people plead guilty without ever speaking to an attorney and without a full appreciation of the consequences of the plea.³⁷

The rest of the world does not rely on plea bargaining to the extent the United States does, although it has been steadily increasing over the last two decades as international criminal legal systems have also become overburdened, suffering from delays and backlogs.³⁸ Prosecutors in other countries do not possess the same discretion as prosecutors in the United States — while they may be able to offer a reduced sentence, they are generally prevented by law from bargaining over reducing the charge itself and the amount of reduction is also dictated by law.³⁹ Prosecutors are also subject to tighter bureaucratic controls, including training, articulated standards and guidelines that dictate the sentencing discount, and robust internal review.⁴⁰

C. California's efforts at shaping discretion

As the above data and discussion show, prosecutorial discretion in charging and plea bargaining is at the core of how the criminal legal system currently functions. Previous efforts to influence discretion in the criminal legal system — either by sharply limiting it by statute or shaping it through financial incentives — have had different results and offer instructive insights for how the Committee might approach this area.

An attempt in 1982 to ban plea bargaining in many cases did not have the intended effect. Proposition 8, passed in 1982, included among its provisions a prohibition on plea bargaining in any case that charged a “serious” felony, or any offense of driving while intoxicated, with limited exceptions.⁴¹ While the language of the law seemingly acted as a significant obstacle to plea bargaining, it has not done so.⁴² Shortly after its passage, the California Department of Justice recognized that Proposition 8 only encouraged a shift of discretionary

³⁷ See Committee on Revision of the Penal Code, 2022 Annual Report, 44. A bill based on the Committee's recommendation to address this issue, AB 1209 (Jones-Sawyer), was unsuccessful this year.

³⁸ Fair Trials, *Efficiency Over Justice: Insights Into Trial Waiver Systems in Europe*, (Dec. 2021), 8.

³⁹ For example, France and Germany limit the potential discount in a plea bargain to approximately 30% of the expected sentence after trial. Rebecca Shaeffer, *The Trial Penalty: An International Perspective*, Federal Sentencing Reporter, 31(4-5) (2019), 321-330.

⁴⁰ Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 Crime & Justice 395, 402 (2017).

⁴¹ AB 566 (McClintock 1989) expanded the prohibition on plea bargaining to any offense where the defendant personally used a firearm.

⁴² The statute created by Proposition 8, Penal Code §1192.7, restricts plea bargaining only after there has been a preliminary hearing in a case. In addition, there are three other exceptions that allow plea bargaining: if there is insufficient evidence to prove the prosecution's case, the testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence. Penal Code § 1192.7(a)(2).

practices to different points in the system because “it is impossible to sharply limit the discretion available to legal actors.”⁴³ Practitioners throughout the state consulted by Committee staff report that Proposition 8’s restrictions on plea bargaining have minimal effect on daily practice and serious felonies are consistently resolved through plea bargaining.

On the other hand, several policies in California have reshaped the exercise of discretion by using financial incentives.⁴⁴ In all these contexts — which range from juvenile and adult incarceration to probation revocations to commitments to the state hospital — the policies turned on a recognition that county decision-makers may have been using state resources without a full appreciation of their costs and the effectiveness of other solutions. The history below shows that this dynamic — referred to as the “correctional free lunch” because the state pays the entire cost of prison incarceration⁴⁵ — can be disrupted by making costs explicit and rewarding evidence-based practices that improve public safety:

- In 1996, SB 681 (Hurt) shifted a larger share of the cost of incarcerating juveniles onto counties. After the law was passed, the number of juveniles sent to state facilities dropped between 40% and 60%, with the decrease mostly driven by the number of cases that were dismissed, rather than a substitution with other means of confinement.⁴⁶ Juvenile crime continued to drop after the policy change.⁴⁷
- In 2009, SB 678 (Leno) created incentive-based funding for county probation departments to invest in evidence-based supervision and reduce probation revocations to prison. After implementation, SB 678 reduced revocations by more than 30% after the first two years, reduced the prison population by more than 6,000 after the first year, and reduced

⁴³ Candace McCoy & Robert Tillman, *Controlling Felony Plea Bargaining in California: The Impact of the “Victims’ Bill of Rights”*, California Department of Justice, 12 (August 1986).

⁴⁴ The federal government has also used incentives to shape state criminal justice policy. For example, the Violent Crime Control and Law Enforcement Act of 1994 gave money to states if they set credit-earning rates at no more than 15% for violent offenses, though many states already had such a rule. See Council on Criminal Justice, *The 1994 Crime Bill: Legal and Lessons*, (Sept. 2019).

⁴⁵ See, e.g., Franklin E. Zimring and Gordon Hawkins, *Prison Population and Criminal Justice Policy in California*, California Policy Seminar, 7 (August 1992); Steven Raphael and Michael Stoll, *A New Approach to Reducing Incarceration While Retaining Low Rates of Crime*, The Hamilton Project, 19–22 (May 2014).

⁴⁶ Aurélie Ouss, *Misaligned Incentives and the Scale of Incarceration in the United States*, 191 *Journal of Public Economics*, 2 (2020).

⁴⁷ *Id.*

state prison spending by over \$1 billion since implementation, all without increases in crime rates.⁴⁸

- In 2011, Public Safety Realignment specified that sentences for certain low-level offenses would be served in county jail and post-release supervision for these offenses would be overseen by county probation departments.⁴⁹ This shift in responsibility from the state to counties was accompanied by funding, including financial incentives to reduce the number of people sent to prison.⁵⁰ Realignment resulted in a significant reduction in the prison population without the same increase in the jail population and without substantial impacts to public safety.⁵¹
- The 2022–23 budget established a cap for all counties for people committed to the state hospital for competency restoration treatment. Beginning this year, if a county’s total number of annual felony competency commitments exceeds the county’s baseline, the county will be subject to a penalty payment.⁵²

⁴⁸ Mia Bird & Ryken Grattet, *SB 678: Incentive-Based Funding and Evidence-Based Practices Enacted by California Probation Are Associated with Lower Recidivism Rates and Improved Public Safety*, California Probation Resource Institute (March 2020).

⁴⁹ See Magnus Lofstrom and Brandon Martin, *Public Safety Realignment: Impacts So Far*, Public Policy Institute of California, 2 (September 2015).

⁵⁰ See Final Recommendation of Realignment Allocation Committee (October 2014) (among other funding measures, providing \$27,309 to a county for each less person sent to prison with a second-strike designation).

⁵¹ Magnus Lofstrom, Mia Bird, & Brandon Martin, *California’s Historic Corrections Reform*, Public Policy Institute of California, 6, 10–12 (September 2016); Steven Raphael & Magnus Lofstrom, *Incarceration and Crime: Evidence from California’s Public Safety Realignment Reform*, *The Annals of the American Academy of Political and Social Science*, Vol. 664 (March 2016).

⁵² Welfare & Institutions Code § 4336.

Areas for Further Exploration

The Committee may wish to consider the following staff proposals to address the issues raised in this memorandum. The proposals are organized into two broad categories: (1) financial incentives to better align some prosecutorial policies with evidence-based practices and (2) discrete changes to the Penal Code that address some of the unfair aspects of the plea bargaining process. These recommendations do not address all of the issues raised in this memorandum, but are a starting place for improving the current system with the goals of increasing public safety and equity while reducing unnecessary incarceration.

Charging decisions

- **Establish financial incentives that encourage evidence-based charging decisions that improve public safety.**

The state could build on its previous experiences with incentives by taking two steps: (1) requiring counties to pay to use prison in some circumstances so it is more likely to be used only when necessary and (2) financially rewarding counties and prosecutors for implementing evidence-based policies that improve public safety, including increased use of diversion and deferred prosecution and more efficient charging practices. Incentives could also be given to implement more equitable plea bargaining practices.

- **Create a formal mechanism to allow deferral and automatic dismissal of prosecutions.**

In New York, a prosecutor may offer a defendant an “adjournment in contemplation of dismissal,” where the case is deferred for six months (or one year if the case is a marijuana offense or a family violence offense).⁵³ If the person is not rearrested, the case is automatically dismissed and sealed without requiring further court appearances. California’s Penal Code does not have a similar tool, which would allow prosecutors greater flexibility in making charging decisions and allow dismissals to be based on public safety. Use of this tool could be one of the evidence-based practices that is rewarded by financial incentives.

Plea bargaining

- **Allow courts to revisit pretrial detention whenever a plea offer is made.** Current law allows bail to be revisited for “good cause”.⁵⁴ This law could be amended to specify that good cause to reduce bail includes the

⁵³ New York Criminal Procedure Law § 170.55.

⁵⁴ Penal Code § 1289. See also *In re Alberto*, 102 Cal.App.4th 421, 430 (2002) (Second Appellate District) (“good cause must be founded on changed circumstances relating to the defendant or the proceedings”).

following circumstances: (1) whenever a plea offer is made by a prosecutor, particularly if the offer is to time served or its equivalent or (2) the defendant has been incarcerated for the maximum amount of time, including credits, that they could serve if convicted. The law should also provide that a motion on these grounds can be made immediately without notice.

- **Add a presumption of a probation sentence to the default triad.**

A default sentencing triad of 16, 24, or 36 months applies to more than 70% of felony offenses defined in California law.⁵⁵ While probation is often a permissible sentence for these offenses, the Penal Code could specify that it be the presumptive sentence, unless the interests of justice require a sentence of incarceration. By limiting some of the uncertainty of what sentence a court may impose after trial, this change to the default triad would remove a portion of the undue pressure to plead guilty in some cases.

- **Prohibit the firearm “use” enhancement from applying to assault with a firearm.**

A common sentencing enhancement — personally using a firearm during a felony — which can add 3, 4, or 10 years to a sentence generally does *not* apply to offenses that necessarily require the use of a gun as an element of the underlying offense.⁵⁶ Despite this, the enhancement is permissible when someone is charged with assault with a firearm⁵⁷ — even though the firearm is already an element of the offense.⁵⁸ This assault offense is a wobbler with a maximum punishment of 4 years in prison, which means the firearm enhancement can easily double the potential sentence. Analysis from the California Policy Lab shows that more than two-thirds of people serving a prison sentence for assault with a firearm had a sentence lengthened by this firearm enhancement.⁵⁹ Closing this loophole would remove unfair prosecutorial leverage in a frequently-charged offense while still allowing sufficient punishment.

⁵⁵ See Penal Code § 18(a). A forthcoming publication from the Committee and California Policy Lab will examine the use of the default triad and other structural aspects of California’s determinate sentencing scheme.

⁵⁶ Penal Code § 12022.5

⁵⁷ Penal Code § 245(a)(2).

⁵⁸ Penal Code § 12022.5(d). The firearm enhancement can also be applied to “murder if the killing is perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death.” *Id.*

⁵⁹ Mia Bird et al., *Sentence Enhancements in California*, California Policy, Table 12 (March 2023).

- **Allow juries to consider lesser-related offenses for specified charges.** Under current law, jurors have the choice to acquit a defendant or find them guilty of the charged offense or a “lesser-included offense,” such as second-degree burglary instead of first-degree burglary.⁶⁰ But proof at trial often shows a different offense that is not technically a lesser-included one, such as trespassing instead of burglary. A jury’s inability to consider these lesser-related offenses may drive people to plead guilty because they fear conviction of the more serious offense. The Penal Code could allow defendants to request that a jury be instructed on lesser-related offenses when warranted by the evidence.⁶¹ These lesser-related offenses should be limited to specific charges: for example, that brandishing a weapon is a lesser-related of assault with a deadly weapon and that trespassing is a lesser-related of burglary.

Conclusion

Prosecutorial discretion in charging and plea bargaining are key elements of California’s criminal legal system. The Committee should consider recommendations that address these decision-making processes and improve public safety while also reducing unnecessary incarceration, improving equity, and saving money.

Respectfully submitted,

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⁶⁰ Penal Code § 1159. A bill last year, AB 2435 (Lee), would have restored the ability for defense counsel to ask for lesser-related offenses but it failed passage on the Assembly Floor.

⁶¹ A version of this policy was in effect from 1984 to 1998, when the California Supreme Court reversed an earlier decision allowing it. See *People v. Birks*, 19 Cal.4th 108 (1998).