First Supplement to Memorandum 2023-07
Prosecutorial Discretion, Plea Bargaining, and Related Matters
Panelist Materials

Memorandum 2023-07 gave an overview of prosecutorial discretion, plea bargaining, and related matters. This supplement presents and summarizes written submissions from panelists scheduled to appear before the Committee on October 2, 2023.

Exhibit

Prosecutorial Discretion

Guilty Pleas

California's Use of Incentives in the Criminal Legal System

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

Joy F. Haviland
Senior Staff Counsel

Discussion Panel 1:
Prosecutorial Discretion

Jennifer Doleac, Executive Vice President of Criminal Justice, Arnold Ventures
Dr. Doleac's submission discusses recent research on how prosecutor's decisions affect recidivism and other public safety outcomes. In a study she conducted in Suffolk County (Boston), she found that defendants whose cases were dismissed were 53% less likely to have new charges. And when the district attorney adopted a policy of "presumption of nonprosecution" for nonviolent misdemeanors, recidivism fell and crime rates did not increase. Another study of prosecutorial decisions in Harris County (Houston), Texas, measured the effects of deferred adjudications for nonviolent felonies and found that they had significant benefits. Recidivism fell by 45% and employment increased by 49% compared to similarly-situated people who were convicted. Dr. Doleac explains that large reductions in recidivism are observed by simply giving more people an opportunity to avoid a criminal record and recommends that prosecutors be more lenient than they are today, especially with first-time defendants.

Alex Chohlas-Wood, Executive Director, Computational Policy Lab
Dr. Chohlas-Wood's submission describes a large-scale empirical analysis of charging decisions for 30,000 felony arrests in a California county between 2012 and 2017. Nearly half of people arrested during that time were never charged with a crime, but still spent at least 1 night in jail before being released. And 30% of people arrested whose cases were dismissed spent at least 3 days in jail, despite never facing criminal charges. Using the results of prior charging decisions, the researchers created a model that prioritized cases for early review if they had a high chance of being dismissed, using offense category, number of charges, the person's case history, and other factors. By carrying out early charging reviews for this group of people, the researchers estimate that prosecutors could reduce pre-arraignment detention for dismissed cases by 35–50%.

Discussion Panel 2:
Guilty Pleas

Professor Carissa Byrne Hessick, University of North Carolina School of Law
Professor Hessick, whose book on plea bargaining *Punishment Without Trial* was released in 2021, first describes the history of plea bargaining. Although it is now dominant, it was prohibited in the early days of this country and the United States Supreme Court once expressed hostility to the practice. By the 1970s, plea bargaining had become common and was expressly encouraged by the U.S. Supreme Court. Professor Hessick notes that plea bargaining allows the criminal

legal system to work faster and with more flexibility in the disposition of cases, but it also impedes criminal law reform, pushes innocent people to plead guilty, fails to resolve the truth of what happened, and results in sentences that are both too long and too short. Efforts to ban plea bargaining have failed and have only moved the practice into secrecy. Instead, policymakers should focus on reducing the leverage of prosecutors that pressure defendants into pleading guilty, including immediately releasing defendants who receive time-served offers.

Discussion Panel 3: California's Use of Incentives

Professor Mia Bird, UC Berkeley Goldman School of Public Policy & California Policy Lab

Professor Bird's submission first discusses the Community Corrections Performance Incentives Act (SB 678) of 2009, which financially rewarded county probation departments for reducing probation revocations to prison and for adopting evidence-based supervision practices. In the first year after implementation, probation revocations to prison declined by more than 23%, and by 30% the second year. Professor Bird also describes the impacts of 2011's Public Safety Realignment, which required counties to assume responsibility for incarceration and community supervision of many people convicted of lower-level felonies. In the first year after Realignment, the prison population dropped by about 25,000 people, while the jail population increased only by about 10,000 people. Both of these policies are successful examples of aligning county and state goals to reduce incarceration levels without harming public safety.

Professor W. David Ball, Santa Clara University School of Law

Professor Ball's submission argues that if the goal is to shrink the footprint of California's criminal legal system, policy must focus on systemic factors, not on individual cases or individual exercises of discretion. Among other recommendations, he suggests that the state stop subsidizing counties' use of prison and instead provide block grants to counties based on crime rates that counties can use for different approaches to public safety.

Exhibit A

Jennifer Doleac, Executive Vice President of Criminal Justice, Arnold Ventures

Written testimony for the California Penal Code committee

Jennifer Doleac, Arnold Ventures

September 19, 2023

Prosecutors have a great deal of influence over which cases move forward and the sentences that convicted offenders receive. It is important to consider whether the way they use this influence is aligned with society's goals.

What are those goals? There are several reasons that we punish people who commit crimes, including:

1. Retribution (you did a bad thing and so you deserve to suffer for it)
2. Incapacitation (putting you in jail or prison physically prevents you from committing crime outside that jail/prison)
3. Specific deterrence (the experience of punishment makes you change your behavior so that you don't have to experience it again)
4. General deterrence (other people observe your punishment and behave well so they don't suffer a similar fate)

The value of retribution to society is difficult to measure, and social scientists like myself have little to say about who 'deserves' punishment from this perspective. That is a political and moral choice. However, the other goals – incapacitation, specific deterrence, and general deterrence – are all measurable changes in public safety. These are outcomes we can observe in the real world, and researchers like me can tell you how much particular interventions or policies are affecting criminal activity.

This leads us to the empirical questions that I will discuss in my testimony: How do prosecutors' decisions affect recidivism and other public safety outcomes?

This question was difficult to answer for a long time because prosecutors' data has historically been badly maintained and inaccessible to researchers. But that is slowly changing. At least two recent, high-quality studies speak to the effects of prosecutorial discretion. The punchline of both studies is that erring toward leniency, especially for first-time offenders, yields big public safety benefits.

Nonprosecution of nonviolent misdemeanor offenses in Suffolk County, MA

The first study considers the effect of prosecuting defendants for nonviolent misdemeanor offenses, versus (essentially) dismissing the case at the initial hearing. Of course, the decision to prosecute a case or not is not random – on average, those who are prosecuted committed more serious crimes or have a longer criminal history, or the case is based on stronger evidence. It would not be surprising, then, if we see that those who are prosecuted have different outcomes than those whose cases are dropped; this average difference across groups would not tell us the *causal* effect of the prosecution decision itself. For that, we need something akin to an

experiment, where some defendants are prosecuted and others aren't, simply due to luck or chance.

In the real world, defendants are not randomly assigned to prosecution or punishment – that would be unethical. But they are randomly assigned to different prosecutors. And those prosecutors differ in their level of leniency. This means that two identical defendants who are assigned to different prosecutors may be treated differently. In such cases, a defendant would see their case prosecuted if they were unlucky and got assigned to a harsh prosecutor, but would see their case dropped if they were lucky and got assigned to a lenient prosecutor. This gives us a **natural experiment** similar to a lab experiment we might run to test the efficacy of a new drug. If the assignment of defendants to prosecutors is random, and different prosecutors make different decisions on similar cases (which they sometimes do, because they are human), then we can use that randomness to measure the effect of the prosecution decision itself.

I worked with my coauthors Amanda Agan and Anna Harvey to study just such a context, in Suffolk County, Massachusetts (where Boston is located). We found that the initial prosecution decision matters, a lot. Those defendants who got lucky – they were assigned to a lenient prosecutor and, as a result, their case was dismissed in the initial hearing – were 53% less likely to show up in court again with new charges in the future. On average, the number of new charges they had was 60% lower than their unlucky peers. The effects were largest for first-time defendants – those with no prior arrest or conviction record.

These are large effects, and they suggest that – if prosecutors' goal is to reduce future criminal activity – they should prosecute fewer of these low-level cases. Note that our research strategy only allows us to measure the impact of the prosecution decision on the *types of cases on which different prosecutors might disagree*. Some cases will always be prosecuted, regardless of which attorney is making the decision, and some cases will never be prosecuted. We can't say anything about changing the way those cases are handled. We are able to measure the effects of erring toward leniency in the cases that are in between – where some prosecutors currently prosecute, and others currently dismiss the case outright. Luckily, this is exactly the group that most policy changes would target.

What would happen if we implemented a policy that pushed prosecutors to be more lenient – to act more like our lenient prosecutors above? District Attorney Rachael Rollins (who shared her office's data with us for this study) did just this. Her office in Suffolk County implemented a "presumption of nonprosecution" for a list of nonviolent misdemeanor offenses. This didn't mean you definitely wouldn't be prosecuted, it simply changed the default action from "prosecute" to "don't prosecute." What happened to recidivism rates for the defendants affected by this change, and what happened to local crime rates?

Our results were consistent with the earlier part of our study: Recidivism fell, and crime rates did not increase. This provides reassurance that there wasn't a detrimental effect on general deterrence: if the general public knows that their likelihood of punishment is lower, they might all decide to commit more crime. That did not happen in Suffolk County.

Of course, dropping more cases also meant that prosecutors saved time. This is time they could now spend on other, more serious cases. With no public safety costs – and potentially big public safety benefits (from the drop in recidivism) – this made this policy shift a win-win.

Deferred adjudications for nonviolent felony offenses in Harris County, TX

Another important study, using data from Harris County, Texas (where Houston is located), reached a similar conclusion. In that setting, prosecutors have the option of using a deferred adjudication in nonviolent felony cases. If they do this, the defendant essentially goes on probation. If they successfully complete this probationary period without any new arrests, the original charge is dropped. If they do commit a new offense during this probationary period, they receive the original conviction and punishment, plus any new conviction and punishment from the new offense. The deferred adjudication thus offers defendants a *second chance to avoid a criminal record*, if they demonstrate that they can clean up their act.

Again, simply comparing defendants who received a deferred adjudication with those who did not wouldn't tell us the *causal* effect of that prosecution decision. Prosecutors carefully decide whom to give this second chance to. We again need a natural experiment that sorts similar defendants into a treatment group (those who get a deferred adjudication) and a control group (those who are prosecuted and convicted as usual).

In Harris County, there were two big changes that led to a sudden drop or jump in prosecutors' use of deferred adjudications. One was related to a bureaucratic change that made this prosecution option more costly, and the other was due to an unexpected reduction in future prison capacity, which caused all judges to put pressure on their courts to be more lenient. The details of these changes matter less than the result: all of a sudden, from one day to the next, we see a big drop or jump in the share of defendants who received a deferred adjudication. This gives us the natural experiment we need (in this case, two separate natural experiments!): A defendant prosecuted one day had a very different chance of receiving a deferred adjudication than a similar defendant prosecuted the next day. The exact timing of those prosecution days sorted defendants into treatment and control groups.

The authors of this study, Michael Mueller-Smith and Kevin Schnepel, used these events to measure the effect of receiving a deferred adjudication for a nonviolent felony charge, on subsequent criminal convictions and employment. They found that being granted this second chance had big benefits: recidivism fell by 45%, and employment increased by 49%. As in Suffolk County, these benefits were much larger for first-time defendants – those who did not yet have a felony conviction on their record. This suggests that it wasn't the threat of a double punishment that deterred new criminal behavior during the probationary period (that affected those with a prior conviction as well as those without one) – it was the absence of a criminal record that enabled defendants to choose a better path.

Leniency doesn't mean no consequences

The results of these two studies are strikingly large, and strikingly consistent. Erring toward leniency in the prosecution decision, particularly for first-time defendants, reduced future criminal offending by nearly half, in both contexts. Most of my research is on how to help people reintegrate successfully back into society after a conviction or incarceration, and most policies and programs we try with that goal *do not work*. The fact that we see such large effects on recidivism by simply giving more people a second chance on the front end is powerful. And it doesn't require any additional spending!

A second chance to avoid a criminal record does not mean these defendants faced no consequences for their actions. They were arrested and had to appear in court, they faced the stress and shame of knowing they could face meaningful punishment, and they probably had to miss work and may have lost their job as a result. What these results show is that these consequences were enough – they served as a wake up call that pushed a large share of defendants to do better. Prosecutors did not need to put a permanent mark on their criminal record to achieve this effect – and in fact, avoiding that mark is likely what enabled these defendants to change course.

I cannot tell you exactly where prosecutors should draw the line – when to dismiss a case and when to push for a conviction. But these two studies show that prosecutors should be more lenient than they are today, especially with first-time defendants. Policies that encourage shifts in this direction (for instance, making deferred adjudications easy to grant, not bureaucratic hassles) would be beneficial. And academic researchers like myself will always be eager to help governments measure the effects of policy shifts, so that we can continue to learn together how to use prosecution in a way that maximizes public safety.

References

Amanda Agan, Jennifer Doleac, and Anna Harvey. 2023. "Misdemeanor Prosecution." Quarterly Journal of Economics, 138(3): 1453-1505.

Michael Mueller-Smith and Kevin Schnepel. 2021. "Diversion in the Criminal Justice System." The Review of Economic Studies, 88(2): 883-936.

Exhibit B

Alex Chohlas-Wood, Executive Director, Computational Policy Lab

Reducing pre-arraignment incarceration with early reviews

Written submission to the Committee on Revision of the Penal Code
By Alex Chohlas-Wood, Executive Director, Computational Policy Lab
achohlaswood@hks.harvard.edu
September 19, 2023

Across California, people who were recently arrested can be held in jail for up to two business days while prosecutors decide whether to file charges on their case. This detention period can stretch to more than four days if weekends or holidays occur immediately after an arrest. While this period provides time for prosecutors to review the available evidence, it also exacts high costs, especially for people whose cases are dismissed. Even brief incarceration may lead to job loss and social stigma. These detentions may also undermine trust in law enforcement for those who are arrested but never charged.

In one of the first large-scale empirical analyses of pre-arraignment detention, **I worked with colleagues at the Computational Policy Lab to examine charging decisions for 30,000 felony arrests in a major California county between 2012 and 2017**. We found that nearly half of arrestees were never charged for any crime, but still typically spent one or more nights in jail before being released. In fact, we estimated that **30% of eventually dismissed arrestees spent at least three days in jail**, despite never facing criminal charges.

This delay is largely driven by reviewing attorneys waiting until local police departments file their final summary packet, which typically occurs just a few hours before the charging deadline. The final packet can in theory provide new evidence, but in practice its primary function is to summarize previously filed reports. For 90% of cases, all other case materials are received within eight hours of booking.

To reduce pre-arraignment incarceration, **we analyzed what would happen if prosecutors conducted early reviews the day after a person is booked**, releasing people if their cases are likely to be dismissed. In our partner jurisdiction, attorneys currently review about 20 referrals per day. Our partners estimated that they could conduct about 5–10 additional reviews per day, taking advantage of extra capacity typically reserved for days with a heavy caseload. To optimize early reviews, we trained a statistical model on the alleged charges, the number of charges, the arrestee's case history, and other case information. This model would be used to prioritize cases for early review if they had a high chance of being dismissed. **By carrying out early reviews and releases for 5–10 of these cases per day, we estimated that prosecutors could reduce pre-arraignment incarceration for dismissed cases by 35–50%.** We also estimate that these early reviews and releases would not have an impact on recidivism rates.[1]

[1] For more information, see our peer-reviewed study: Zhiyuan Jerry Lin, Alex Chohlas-Wood, and Sharad Goel. "Guiding prosecutorial decisions with an interpretable statistical model." In *Proceedings of the 2019 AAAI/ACM Conference on AI, Ethics, and Society*, pp. 469-476. 2019.

Prosecutors in California should consider implementing a similar policy of early review and release in their own offices. As with all policy interventions, one must carefully consider the impacts of deploying a system for early review and release of arrestees. For example, reviewing attorneys may not be able to make early release decisions reliably. However, we find that most information about an incident is almost always available within eight hours of booking. The information available eight hours after booking also allows us to predict the final charging decision with reasonably high accuracy, suggesting that much of the relevant information is available early on. Policymakers would also have to consider the extra costs of releasing some individuals who are later charged, including costs for local law enforcement to execute arrest warrants. Nevertheless, our proposal — to review cases as soon as possible, and dismiss those that seem likely to be declined — would help jurisdictions more closely adhere to the principle of presumed innocence, reducing incarceration for arrestees who are never charged with a crime.

Exhibit C

Professor Carissa Byrne Hessick, University of North Carolina School of Law

Comments on Plea Bargaining
for
The California Committee on Revision of the Penal Code

October 2, 2023

Carissa Byrne Hessick
Ransdell Distinguished Professor of Law
University of North Carolina School of Law
Author, *Punishment Without Trial: Why Plea Bargaining is a Bad Deal* (Abrams Press 2021)

The Rise of Plea Bargaining

- At present, fewer than 3% of criminal convictions in the U.S. occur after a trial. The rest are the result of guilty pleas, many of which are obtained as a plea bargain with prosecutors.
    - Precise numbers about plea bargain (as compared to guilty pleas that were not negotiated with prosecutors) are difficult to obtain because many jurisdictions do not report plea bargaining rates and because not all plea bargains are publicly disclosed.
- Although plea bargaining is now dominant, it was prohibited in the early days of the Republic. In the decades following the Civil War, many state courts refused to uphold guilty pleas when the defendants had pleaded guilty because of pressure from the prosecutor or the trial judge. Even the U.S. Supreme Court expressed hostility to plea bargaining, though it did not rule directly on whether the practice was permissible.
    - Albert W. Alschuler, *Plea Bargaining and Its History*, 13 Law & Soc'y Rev. 211, 223 (1979)
    - The Whiskey Cases, 99 U.S. 594 (1878)
- Despite being prohibited, plea bargaining occurred in secret, at least in some urban courts. The practice was "discovered" by the crime commission movement of the 1920s and 1930s. The commissions were quick to condemn plea bargaining as corrupt and as allowing defendants to escape the punishment that they deserved.
    - William Ortman, *When Plea Bargaining Became Normal*, 100 Boston U. L. Rev 1435 (2020)
- After the commissions exposed plea bargaining, it became more common. Eventually the U.S. Supreme Court not only said that plea bargaining was constitutional, but also that it was a "highly desirable" practice which should be encouraged.
    - Santobello v. New York, 404 U.S. 257 (1971)

The Benefits of Plea Bargaining

- Plea bargaining allows the criminal justice system to work more efficiently. Trials are costly and time-consuming. Plea bargaining, on the other hand, can be accomplished

relatively quickly; it requires only a negotiation between prosecutors and defense counsel, the defendant's acceptance of the agreement that the lawyers reach, and a short court appearance in which the judge confirms that the defendant's decision to plead guilty is knowing, voluntary, and intelligent.

- Plea bargaining can allow more flexibility in the disposition of cases. For example, it allows the parties to bargain around mandatory minimum sentences or collateral consequences (such as deportation) when they seem unwarranted by the particular facts of the case.
- Plea bargaining avoids the uncertainty of trial. Juries can be unpredictable, and witnesses can fail to attend. Plea bargaining allows the parties to "hedge their bets" against those possible outcomes by negotiating a plea to a lesser charge or with a favorable sentencing recommendation.
- Plea bargaining can spare victims the trauma of testifying; they can also spare defendants the embarrassment of a trial.

The Drawbacks of Plea Bargaining

- Plea bargaining can impede criminal code reform. For example, in opposing a reduction in mandatory minimum sentences for drug offenders, Senator Chuck Grassley said that sentences needed to be high in order "to put pressure on defendants to cooperate in exchange for a lower sentence." He also noted that "the average sentence" for drug mules was actually significantly below the mandatory minimum sentence, adding "that seems to be an appropriate level." In other words, the Senator believed that the actual sentence for drug offenders should be lower, but refused to reduce the penalty because it would remove prosecutors' leverage in plea bargaining.
    - 161 Cong. Rec. S955-02, S963 (daily ed. Feb. 12, 2015) (statement of Sen. Grassley)
- Plea bargaining can result in innocent defendants pleading guilty. The National Registry of Exonerations reported that, as of 2015, 15% of known exonerees plead guilty. The number of innocent people who pleaded guilty is likely much higher because those who plead guilty face greater obstacles in obtaining exoneration than those who are convicted at trial.
    - Some defendants plead guilty in order to avoid very lengthy post-trial sentences.
    - Some defendants plead guilty because they are facing little punishment and the pre-trial process is as onerous or more onerous than the punishment avoided through a guilty plea.
- Plea bargaining can result in defendants who committed serious crimes serving sentences that are far too short. This appears to be a common outcome in sexual assault cases. Jeffrey Epstein provides one example; a plea bargain allowed him to serve only 13 months in jail despite having molested dozens of underaged girls.
- A negotiated plea—especially a plea to lesser charges—can fail to resolve the truth of what happened. For example, imagine a defendant is accused of a violent robbery, and he

raises the defense of mistaken identity. Rather than proceed to trial, the lawyers agree that the defendant will plead guilty to theft. That outcome does not resolve whether the defendant committed a violent crime; it only establishes that he took property that belonged to another person. Neither party believes that the defendant committed a non-violent theft; one believes he committed a violent robbery, and the other that he committed no crime at all.

Recommendations for Reform

Prohibiting plea bargaining is unlikely to be effective. Efforts to ban the practice have failed in the past, as the parties continue to plea bargain in secret. Consequently, plea bargaining reform should concentrate on making the process more fair and more accurate.

- Reduce the leverage of prosecutors to pressure defendants into pleading guilty by:
    - Abolishing mandatory minimum sentences;
    - Eliminating pretrial detention for defendants who have been offered (or who are likely to be offered) a plea of time served; and
    - Immediately releasing any defendant whose conviction has been overturned on appeal and who has been offered a plea of time served or a similarly generous plea.
- Require the prosecutor to disclose discovery before permitting a judge to accept a guilty plea.
- Adopt a rule stating that judges should not consider a defendant's decision to go to trial or to plead guilty as a sentencing factor.
- Let defendants who have been released pretrial waive their appearance at pretrial conferences.

Exhibit D

Professor Mia Bird, UC Berkeley Goldman School of Public Policy & California Policy Lab

Aligning County Incentives with State Goals
SB678 and Public Safety Realignment

California reached its peak prison population of about 173,000 people in 2006 following two decades of growth during which the prison population tripled in size. The state faced a myriad of problems related to mass incarceration, including prison overcrowding, high correctional costs, and high rates of returns to prison.

In response to these conditions, the state enacted the Community Corrections Performance Incentives Act (SB 678) in 2009. SB 678 transformed California's probation system and set the stage for the decade of reforms that would follow. The legislation aligned county incentives with the state goals of reducing prison incarceration, reducing correctional costs, and maintaining public safety. Relative to the baseline rate, prison revocations declined by more than 23 percent in the first year following implementation, resulting in state savings of $179 million. By year two, the legislation had achieved more than a 30 percent reduction in revocations (JCC, 2019). The law incentivized probation departments to reduce revocations to prison by sharing a portion of state savings back to counties to support the use of evidence-based practices and programs. Evidence from surveys of county probation departments suggests the use of these practices and programs, such as risk and needs assessments and substance use programs, increased under SB 678 (Bird and Grattet, 2020). In the two years following implementation, crime rates declined in California (CA DOJ, 2021).

The widespread political support and early success of SB 678 opened a door for the state to craft more substantial changes to the structure of the criminal legal system through California's 2011 Public Safety Realignment. Like SB 678, Realignment aligned the incentives counties face with state goals of reducing prison incarceration, reducing correctional costs, and maintaining public safety. Under Realignment, county jail and probation systems take on responsibility for managing people convicted of lower-level felony offenses and for most people who experienced a parole or probation revocation. In exchange, counties receive grants from the state to fund these responsibilities, as well as efforts to increase collaboration across county departments and the use of evidence-based practices and programs.

In the first year following Realignment, the prison population dropped by about 25,000 people. Jail populations increased during this first year by about 10,000 people, but the net impact of Realignment was to dramatically reduce the number of people incarcerated in California (Lofstrom, Bird, and Martin, 2016). Importantly, evaluations of Realignment have not shown substantial increases in crime or recidivism resulting from these reductions in incarceration (Raphael and Lofstrom, 2016; Bird, Grattet, and Nguyen, 2022). These findings suggest counties were able to reduce incarceration and invest those resources in practices and programs designed to improve public safety.

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Exhibit E

Professor W. David Ball, Santa Clara University School of Law

Comments on Prosecutorial Incentives, Systemic Changes
for
The California Commission on Revision of the Penal Code

October 2, 2023

W. David Ball
Professor of Law
Santa Clara University School of Law

I want to start with three initial observations.

First, the United States incarcerates more people than any other society at any point in human history. Some of what I'm going to propose might seem radical when compared to what the U.S. is doing now, but what the U.S. is doing now is extremely radical compared to all other human societies, past or present. If we are the only people ever to have figured out that the solution to dealing with crime and other public safety problems is mass incarceration, we should have evidence for our policy's clear superiority. We don't. So, while I have some evidence but no guarantees that what I'm proposing will work, our system doesn't, either, and it is the system only we—among all human societies--have arrived at. In other words, we should not treat new ideas with greater skepticism than existing ones. Just because this is what we do doesn't mean it works. And, it should be noted, there is plenty of evidence that it doesn't work, or, barring that, doesn't work as efficiently and effectively as other alternatives.

Second, I'm operating on the assumption that what we want to do is shrink the footprint of California's criminal legal system (as happened, for example, to the prison population from 1968-1972 under then-Governor Ronald Reagan). That requires us to focus not just on how people are treated within the system, but how to ensure that people can avoid the system altogether. We talk a lot about re-entry, which is important, and about decisions made within the system, but I think our focus should be on non-entry. Every system interaction from arrest to release is the equivalent of the Emergency Room: it's expensive--in human and financial terms--and less likely to be effective, since the situation has already reached a breaking point. It is far better to invest in the equivalent of health--the safety part of public safety—than in waiting until something is broken to fix it.

Third, within the criminal legal system, we focus on individual cases. But we should, instead, focus on the system, as I have done in much of my academic writing for the past 10 years. The reason is that case-level factors are so numerous and discretionary judgments are so intrinsic to the system that it is extremely difficult to constrain discretion at the level of the individual case. We want tailoring when justice requires it, but we don't want favoritism. The problem is that it is impossible ex ante to distinguish between "good" and "bad" discretion. The best operating definition is that good discretion is discretion you agree with and bad is discretion you disagree with. Discretion is, irreducibly, a matter of judgment.

A case-centered focus makes us tend to treat every case as exceptional—when, logically, most cases are normal cases. I've written about this most recently in the NYU Law Review, applying

psychological insights to bail release decisions.[1] Humans have a tendency to overweight bad outcomes. We ask "what if" and overweight the possibility of, say, someone committing a crime on release. This means we are willing to detain a hundred people on the chance that 3 to 5 of them might commit another crime. Willie Horton was one of the very few people who committed crimes under the Massachusetts prison furlough program that probably cost Mike Dukakis the 1988 election. But if Willie Horton is just the name we give to a common occurrence, wouldn't we have replaced his name with someone else's 35 years later?

So my comments here, while not ignoring the importance of incentives on individual actors and individual exercises of discretion, will instead focus on systemic factors. Part of this is because of my agnosticism about when discretion is valid (an agnosticism which is not just about my personal opinion, but about what I think is knowable by anyone). I can trust that there are justifiable deviations from the norm without knowing what they are in advance. At the same time, however, we should not treat every case as a potential disaster if, on the whole, that's not true.

We can get a truer measure of priorities by introducing constraints. For example, if you ask someone what their priorities are for public safety on a scale from one to ten, you are much more likely to find yourself getting a list where everything is a ten. Everything is tied for most important because there is no cost to doing so. If you tell someone to rank their priorities, however, you will get a clearer sense of what is really important. You only get one top priority, so you are more likely to use it wisely.

In the real world, of course, there are tremendous human and financial costs to the criminal legal system. We don't have unlimited resources. The money and time we spend on addressing criminal behavior after the fact is money and time we don't spend on other things. When we throw the book at someone "just in case" they might reoffend, two harms arise. First, we can't spend those resources on housing, income supplements, better schools, and treatment for those suffering from Adverse Childhood Experiences (ACEs), all of which could help reduce future crime. But, more importantly—and shockingly unknown within the system and society at large—is that throwing the book at a low-risk offender makes them more likely to commit crimes. This is known as the risk-needs-responsiveness principle. For some offenders, the best thing you can do solely on crime reduction grounds is nothing. To return to the ER analogy, treating a hangnail with chemotherapy "just in case" is more likely to harm than help. Prison, like chemotherapy, is sometimes required, but given its costs (human and financial), it should be used only when necessary.

My proposals generally try to ensure that the normal case is, in fact, treated in a normal way, and that if there is something extraordinary, it should be proven. I also focus on shrinking the size of the criminal legal system. By saying this, I am not denying the existence of very real and sometimes deadly problems--interpersonal violence, for example, or driving under the influence of alcohol and other drugs—but even if we agree that these are problems, that does not lead to the conclusion that the criminal legal system is the solution. If we wait until after the harm has been done to intervene, it might seem like punishment is our only resource. But if we take that approach, we are conceding that we will let the harms happen before we invest in solutions.

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[1] W. David Ball, *The Peter Parker Problem*, 95 N.Y.U. L. Rev. 879 (2020).

We should ask what kind of society we want and then figure out how we can get there. Public safety isn't a synonym for street crime, nor is it a synonym for the absence of safety. Public safety includes housing insecurity, food insecurity, freedom from environmental contaminants, road safety, and also assets that contribute to resisting crime. Kids who grow up in an environment where they aren't sure of their next meal, don't have a consistent place to live, are exposed to lead contamination, have poor educational attainment, have untreated (or even undiagnosed) trauma or other mental health issues, are not, themselves, safe. They are also more likely to become involved in the criminal legal system.

I would also ensure more flexibility on how counties choose to respond to crime. In a series of papers, I demonstrated that violent crime rates only explain 3 percent of the variance in the use of prison, and I argued that counties should get block grant subsidies on the basis of their crime problem, not on the particular policy options they chose to deal with that problem.[2] Currently, the state subsidizes state prison commitments, but it doesn't subsidize county expenditures on mental health beds or substance treatment beds. We don't have good evidence that prison is more effective than these treatments, or even that is more efficient (in terms of how much cost generates how much benefit). There is a growing body of evidence suggesting that prison is criminogenic. Given this lack of evidence in favor of prisons, the state should stop subsidizing it. Counties should be free to choose to respond to crime in other ways. Details are outlined in my paper Defunding State Prisons.[3]

We can also ration access to the state prison system and to the criminal legal system more generally. We have done this before with realignment (AB 109) and with access to the state juvenile prison (SB 81). The limitations of these approaches are twofold, however. First, they limit the use of state detention resources without encouraging or subsidizing alternatives to detention, and, second, the policies only kick in once someone is involved in the system. Evaluations of the Justice Reinvestment Initiative (JRI) show the limitations of approaches that start and end with the criminal legal system. JRI was supposed to divert people (and resources) from the system and reinvest savings in crime prevention. The problem is that system actors controlled the money and, generally, the implementation of JRI. The system perhaps got fairer and more efficient, but it did not get smaller. This, again, is why non-entry—not re-entry or quick release—needs to be a policy goal.

The point, ultimately, is to introduce constraints and to expand potential avenues to address the social problems we presently treat with incarceration and other criminal sanctions. Agreeing that, say, interpersonal violence is a problem does not mean we should treat that after the fact with prison and jail time. We need to know if that is as effective or as efficient as other strategies. I have written about how we might implement such an approach in Pay for Performance in Prison.[4]

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[2] See e.g. W. David Ball, *Defunding State Prisons*, 50 Crim. L. Bull. 1060 (2014).
[3] *Id.*
[4] W. David Ball, *Pay-for-Performance in Prison: Using Healthcare Economics to Improve Criminal Justice*, 94(3) Den. U. L. Rev. (2017).

My former (and dearly departed) professor Joan Petersilia, a world-renowned criminologist and advisor to elected officials throughout this state, first taught me this saying about prison construction: “If you build it, they will fill it.” We put people in jail because we have room in jail. But what would jail populations look like if jail weren't the only option? What if we had more mental health treatment beds than jail beds, or more substance use disorder treatment beds than jail beds, or more beds for the unhoused than jail beds? It’s currently the opposite on the ground. We have far more jail capacity. We should limit jail bed capacity to the smallest of mental health treatment, beds for the unhoused, and treatment beds for alcohol and other drugs. If jail capacity were limited to the smallest of those three categories, we would ensure that we're not putting people in jail because we can, but because we need to. And if their problems are poverty, or mental illness, or addiction, we can treat those. Jail doesn’t and can’t fix those problems.

We can also consider resetting defaults to be in line with the normal case. The default should be release. Most people should be released pretrial, because they won't commit crimes. If they pose a risk, we can detain them—but we should have to prove that. There are a huge number of arrests every month, tens of thousands of which result in no charges. The normal case is not a murderer, or Al Capone (who “really” was a gangster but was charged with tax fraud). Al Capone died almost a century ago, yet he is still our main example of how the charged offense is not necessarily what someone is “really” guilty of, suggesting that Al Capone is not a normal case, but a once-in-a-century case. If most arrestees are not, in fact, secret mob bosses, the default should be that we don’t treat them like one. This means that if there is a genuine, provable issue of public safety, the prosecution should prove it, and if it’s a genuine issue—not just speculation—that should pose no problem. If they can’t prove it, then they don’t “really” know that someone is a secret mob boss—it’s just speculation. In our current system, we make the public defender do something to get someone out. This suggests that we don't really value the liberty of the accused (despite state and federal courts saying the opposite), or that we expect everyone to be so dangerous that they cannot be released, and there is no evidence of that.

A related idea, and one that is also part of the above solution, is to make sure that decisions that result in system use are not easier to make that ones that don’t. I think of this as a kind of regulatory tax. Nobody likes paperwork--so make sure that system actors have to do a writeup to keep someone in jail, or to search them (as is now the case in New York following a consent decree over the NYPD’s stop-and-frisk policy). It shouldn't be that the hard thing is to have non-criminal-legal system involvement. If the path of least resistance/least amount of work is detention, we'll get more of that. If the hard thing to do is detention, we'll get less of that. But making detention harder and rarer is not bad. It is a measure of sincerity. If this person is truly dangerous, do some paperwork. If they're not worth your doing paperwork, then they really weren't that dangerous, were they?

Again, some of this is radical. But it is only radical given our current position as the most carceral society that has ever existed. If we are happy spending billions on the system, and if we don't need proof that we could do something better, then ignore these ideas. If we need to keep some people out of society, we should be able to do that--but if that is true, we should be able to prove it. But, above all, we should have a clear idea of what we are trying to accomplish with our current system. What do we think the system is doing, would we agree with those implicit goals

if we made them explicit, and what evidence do we have that we are achieving those goals at all, or, if so, that our system achieves those goals in the most effective and efficient way possible? Those are questions you should ask not just of new ideas, but our current system.

Thank you for the opportunity to discuss these ideas further.