

Staff Memorandum 2023-12
Draft of 2023 Annual Report

At its October 2023 meeting, the Committee on Revision of the Penal Code directed staff to prepare a draft 2023 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.

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

Joy F. Haviland
Senior Staff Counsel

Rick Owen
Senior Staff Counsel

Draft 2023 Annual Report
Committee on Revision of the Penal Code
November 2023

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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 fourth Annual Report fulfilling its mandate. The 10 recommendations in this Report are recommended by the Committee and include supporting police officers with funding and statutory guidance for Law Enforcement Assisted Diversion, creating more efficient resentencing procedures, and increasing data access to allow resolution of claims under California’s landmark Racial Justice Act.

This Report also updates an ongoing project from the Committee of cataloging offenses that have not resulted in a conviction in the last 3, 5, or 10 years, which the Legislature can use to delete obsolete or unneeded sections from California law.

The Committee’s recommendations are based on testimony from more than 40 witnesses, extensive public comment, thorough staff research, and deliberations of Committee members over the course of 4 public meetings. The recommendations are supported by legal analysis, empirical research, experience from other jurisdictions, and data specially provided to the Committee by the California Department of Corrections and Rehabilitation and the California Department of Justice, among other entities, and analyzed by the California Policy Lab.

As described in detail below, the recommendations are:

1. Support Law Enforcement Assisted Diversion (LEAD)
2. Improve Data Access for the Racial Justice Act
3. Create General Resentencing Procedures
4. Apply the “Nickel Prior” Reform Retroactively
5. Expand Second Look Resentencing
6. Clarify That SB 81’s Updates to Penal Code § 1385 Apply to Strikes
7. Focus Welfare Fraud Prosecutions on the Most Serious Cases
8. Reduce the Scope of Criminal Fines and Add-On Charges
9. Lessen Unfair Pressure to Plead Guilty
10. Use Financial Incentives to Reduce Short Prison Stays

Introduction

The Penal Code Committee was created to improve the criminal legal system by recommending reforms that simplify and rationalize substantive law and procedures, while improving equity and public safety. Numerous recommendations by the Committee have become law in 15 bills passed by the Legislature and signed by the Governor, including 4 bills this year.

This year, the Committee focused on the effects of many recent reforms, from resentencings, to reducing court-ordered debt, and to the initial implementation of the Racial Justice Act. The Committee also considered the role that prosecutorial discretion plays in the system, from the big picture reality that the vast majority of convictions are obtained through guilty pleas to how welfare fraud is treated very differently from county to county.

Over the course of three public meetings, the Committee heard from more than 40 witnesses about the current system in practice or presented the latest empirical research on how it is functioning. Chief Assistant District Attorney Michael Fermin of San Bernardino County explained to the Committee the importance of the Racial Justice Act because it helps ensure that justice is done for both defendants and victims but that fundamental questions about access to data for such claims remain unresolved.¹

Anita Lee, Principal Fiscal and Policy Analyst for the California Legislative Analyst's Office told the Committee that despite the great progress the state has made in eliminating criminal fines and fees over the last several years, the entire structure of the system still needs to be revised to better align with the state's criminal justice goals.² Francine Byrne, Director of Criminal Justice Services for the Judicial Council of California presented research showing that recent reforms that require judges to consider a person's ability-to-pay before imposing traffic fines increased equity and revenue.³

The Committee also heard testimony about promising new approaches being used across the country and in California that improve public safety while reducing incarceration and convictions. One program, Law Enforcement Assisted Diversion (LEAD), was praised by law enforcement officials to the Committee. Captain Geoffrey Deedrick of the Los Angeles County Sheriff's Department noted that this program — where police officers connect people to

¹ Committee on Revision of the Penal Code meeting on March 17, 2023, Part 1 of 3, 1:15:17–1:18:20.

² Committee on Revision of the Penal Code meeting on June 23, 2023, Part 3 of 4, 0:01:21–0:09:54.

³ *Id.* at 0:13:00–0:21:00.

high-quality services instead of bringing them to jail — had tremendous support amongst law enforcement in Los Angeles but needed further resources to expand.⁴ And Long Beach City Prosecutor Doug Haubert said that LEAD is an essential component in an ecosystem of diversion programs that reduce the impact of the criminal legal system.⁵ Dr. Jennifer Doleac, Executive Vice President of Criminal Justice of Arnold Ventures, also presented compelling research that not prosecuting lower-level offenses reduced future offending of those not prosecuted.⁶ Alex Chohlas-Wood, Executive Director of the Computational Policy Lab, shared research showing the inefficiency of current arrest and charging procedures that result in many people arrested in California spending between 1 and 3 days in jail only to never be charged with a crime.⁷

The Committee also considered the discrete crime of welfare fraud, an offense in which the majority of people prosecuted are women of color, almost all of whom are struggling financially. Andrea Brayboy, Chief of the California Department of Social Services CalFresh and Nutrition Branch, explained the extremely complex system for receiving benefits and noted that the current threshold for charging someone with felony welfare fraud can be just one month of benefits for some families.⁸

In addition to the witnesses that testified during the public meetings, Committee staff also consulted with dozens of other stakeholders, practitioners, and directly impacted people from across the state.

The Committee’s research and analysis of California’s criminal legal system continues to be relied on by courts⁹ and has been cited by other state bodies, including the Reparations Task Force — which recommended in its final report repealing the Three Strikes law and prohibiting pretextual traffic stops, both of which the Committee has also previously recommended.¹⁰ Committee staff also

⁴ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 1 of 4, 0:25:06–0:27:49.

⁵ *Id.* at 0:38:53–0:39:30.

⁶ Committee on Revision of the Penal Code meeting on October 2, 2023, Part 1 of 4, 0:32:20–0:37:21.

⁷ *Id.* at 0:26:13–0:32:00.

⁸ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 2 of 4, 0:07:01–0:11:40, 1:10:35–1:11:23.

⁹ See, e.g., *People v. Doron*, 95 Cal.App.5th 1, 8 (2023) (explaining that the amended mental health diversion law broadened eligibility criteria based on the Committee’s recommendation); *People v. Hardin*, 84 Cal.App.5th 273, 290 (2022) (discussing the Committee’s research on special circumstances); *People v. Butler*, 2022 WL 892009, (Cal. Ct. App. March 25, 2022) (discussing the Committee’s recommendation on recall and resentencing procedures).

¹⁰ California Task Force to Study and Develop Reparation Proposals for African Americans, *The California Reparations Report*, 752, 754 (June 2023).

testified regularly before the Legislature, providing technical expertise for bills based on Committee recommendations and for other issues, including the fentanyl crisis.

Though much has been accomplished in the Committee’s four years of existence, there is much more work to be done to make our criminal system more rational, safe, and effective for incarcerated people, crime victims, and the public. High incarceration rates and alarming racial disparities continue to plague our system.¹¹ While the state’s jail population has been trending downwards and dropped even further during the COVID-19 pandemic, the number of people with mental health needs has continued to increase, and now represents more than half of the total jail population.¹² In addition, the state continues to grapple with needed changes to its pretrial systems: three courts have found unconstitutional existing law that authorizes detention after arrest based on how much money someone has¹³ and Los Angeles County recently implemented a major change to its bail system with the goal of better protecting public safety.¹⁴

The Committee will continue its mission of thoroughly examining the Penal Code and other criminal laws and using data and direct experience from practitioners, impacted people, crime victims, and others to advance its goals of enhancing public safety while reducing unnecessary incarceration and improving racial equity. The recommendations in this report are important strides towards those objectives.

¹¹ See Mia Bird et al., *Sentence Enhancements in California*, California Policy Lab & Committee on Revision of the Penal Code, 31–37 (March 2023) (finding that Black and Hispanic people are have a higher likelihood of serving a sentencing enhancement); Daniel Trautfield et al., *Life Without Parole and Felony Murder Sentencing in California*, UCLA Center for the Study of Women, 8 (2023) (finding that while Black people account for 5% of California’s population, they account for 37% and 43% of people sentenced to life without parole and convicted of felony murder, respectively); Heather Harris and Thomas Sloan, *Pandemic Policymaking and Changed Outcomes in Criminal Courts*, Public Policy Institute of California, 14 (April 2023) (finding that racial inequity in conviction and sentencing outcomes predated the pandemic and persisted amid it).

¹² Magnus Lofstrom & Brandon Martin, *County Jails House Fewer Inmates, but Over Half Face Mental Health Issues*, Public Policy Institute of California, October 25, 2023.

¹³ See *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, *Urquidi v. City of Los Angeles*, Los Angeles Superior Court, Case No. 22STCP04044 (May 16, 2023 order).

¹⁴ Superior Court of California, County of Los Angeles, *2023 Felony Bail Schedule*, October 18, 2023.

Prefatory Notes

Crime Rates

As it has in its previous Reports, the Committee presents the most recently available information about crime rates in California. Statewide crime data is not made publicly available until the summer following the relevant year. Data from 2022 in California shows the following:

- The overall violent crime rate increased by 6.1% compared to 2021. Violent crime consists of homicide, aggravated assault, robbery, and rape.
- The overall property crime rate increased by 6.2% compared to 2021. Property crime consists of burglary, car theft, and all other thefts.
- The statewide homicide rate decreased by 5% after increasing significantly during the first two years of the COVID-19 pandemic.¹⁵

Despite recent increases in some categories of offenses, crime rates across California continue to be at record lows. In 2022, California’s violent crime rate was 123% less than the peak violent crime rate recorded in 1992, and the property crime rate was 197% less than the peak rate from 1980.¹⁶

While the overall crime rate rose in 2022 compared to 2021, available data for 2023 shows promising signs. In particular, according to data from the Major Cities Chiefs Association, violent crime appears to be trending downward, with data through September from eight of the largest jurisdictions in California showing an overall 3% decrease in violent crime — including a 16% decrease in homicides — compared to the same period in 2022.¹⁷

Finally, while these statistics are important, they do not present a full picture of crime rates in the state. Nationwide, most crime is unreported.¹⁸ And 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

¹⁵ California Department of Justice, *Crime in California 2022*, Table 1.

¹⁶ California Department of Justice, *Crime in California 2022*, Table 1.

¹⁷ Major Cities Chiefs Association, *Violent Crime Survey — National Totals, Midyear Comparison, January 1 to September 30, 2023, and 2022*, November 5, 2023. The California cities in the survey are Fresno, Long Beach, Los Angeles, Oakland, Sacramento, San Diego, San Francisco, and the cities and unincorporated areas patrolled by the Los Angeles Sheriff’s Department. San Jose is also included in the data reported by the Major Cities Chiefs Association, but only reported data through June 2023, so is excluded from the analysis presented here.

¹⁸ Alexandra Thompson & Susannah N. Tapp, *Criminal Victimization, 2022*, U.S. Department of Justice, Bureau of Justice Statistics, Table 4 (September 2023).

white-collar offenses, drug crimes, and other economic crimes such as wage theft.¹⁹

And in California, the clearance rate — the rate at which law enforcement arrests a perpetrator — was 41% for violent offenses and 7% for property crimes.²⁰

Incarceration Trends

California’s prison population is currently around 95,000 people, the lowest level since 1990.²¹ As the Committee explored in research with the California Policy Lab, the decrease in the prison population caused by the COVID-19 pandemic — which required the state prison to stop accepting new admissions for a period of time, among other policy responses — was greater than that caused by other significant reforms, including Public Safety Realignment in 2011, which specified county jail not state prison as the punishment for many lower-level felony offenses, and Proposition 47, which reclassified some common felony offenses as misdemeanors.²²

California’s jail population is also lower than it was before the COVID-19 pandemic. Though the population has increased since a dramatic decrease early in the pandemic, it is still 25% lower than it was before the pandemic and is around 54,000 people.²³

¹⁹ See, e.g., Sandhya Dirks, *Rising Crime Statistics Are Not All That They Seem*, National Public Radio, November 3, 2022.

²⁰ California Department of Justice, *Crime in California 2022*, Table 15.

²¹ Bureau of Justice Statistics, Corrections Statistical Analysis Tool (CSAT) - Prisoners (for 1978–2019); CDCR, Weekly Report of Population, As of Midnight, November 8, 2023.

²² Molly Pickard, Nefara Riesch, and Alissa Skog, *COVID-19 and Incarceration: A California Overview*, California Policy Lab (April 2023)

²³ Board of State and Community Correction, Jail Profile Surveys. California’s jails had average daily population in February 2020 of 72,387; in June 2023 it was 54,573.

Legislative Update

In 2023, 4 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.

Bill	Topic
AB 600 (Ting)	Judicial power to resentence if law has changed
AB 60 (Bryan)	Notice of restorative justice programs
Budget Act of 2023, SB 101, 5225-019-0001	Led by Senator Skinner, \$40 million for CDCR’s existing reentry “MCRP” programs
AB 1266 (Hart)	Judicial impoundment of licenses

Unused Offenses

Last year, 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, or 10 years. The results of that research showed that almost 30% of the relevant offenses — 88 of 299 — have not resulted in a conviction in the last 5 years.²⁴

This year, the research focused on felonies outside of the Penal Code that were not “wobblers.” In this group of non-Penal Code felonies, __% — ___ of 228 — have not resulted in a conviction in the 5 years between 2017 and 2021.

As the Committee recommended last year, the Legislature should consider whether it may be appropriate to repeal any of the offenses listed here because they are obsolete or rendered unnecessary by other statutes. Some of these offenses, such as _____, may be appropriate to retain, but others, such as _____, may be suitable for removal with little effect on the administration of justice and public safety.

²⁴ The analysis is limited to offenses that have a code assigned to them by the California Department of Justice for tracking arrests and convictions in the Automated Criminal History System (ACHS). Not every felony offense has such a code assigned, so the list of unused offenses presented here is likely underinclusive — for example, the catalog of non-Penal Code felony offenses in the California Center for Judicial Education and Research *Felony Sentencing Handbook* has more than double the offenses that have a code assigned by the Department of Justice.

This project will be ongoing and future analysis will focus on additional offenses, including wobblers and misdemeanors, as well as offenses that are used infrequently or only in certain counties.

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 data collected from state and local agencies.²⁵

For the past 4 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.

The analysis in this report of Automated Criminal History System (ACHS) data from the Department of Justice may differ from local records because it is based on what is reported to the California DOJ.

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.

In addition to the analysis presented in this report, the Committee and California Policy Lab produced the following stand-alone data reports:

- Three Strikes in California (March 2023)
- COVID-19 and Incarceration: A California Overview (April 2023)
- Racial and Gender Disparities in Police Stops: What Does the 2021 Racial Identity and Profiling Act Data Tell Us? (May 2023)
- Felony Offenses and Sentencing Triads in California (October 2023)

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,²⁶ and the Committee encourages stakeholders — including those drafting legislation — to consider doing the same.

²⁵ Government Code §§ 8286, 8286.5.

²⁶ See, e.g., Alexandra Cox, *The Language of Incarceration*, Incarceration, 1(1), 3–4 (July 2020); Nancy G. LaVigne, *People First: Changing the Way We Talk About Those Touched by the Criminal*

Recommendations

1. Support Law Enforcement Assisted Diversion (LEAD)

Recommendation

With LEAD, police officers take people directly to community-based service providers who deliver continuing care based on the person’s specific needs, rather than taking the person to jail. LEAD pilot projects in San Francisco and Los Angeles demonstrated that LEAD significantly reduces recidivism among participants. But state funding has expired and the COVID-19 pandemic may have also stalled momentum for the development of LEAD programs in additional cities.

The Committee therefore recommends the following:

1. Re-establish LEAD pilot programs with the following specifications:
 - Eligible offenses include those in the original LEAD pilot (drug possession, subsistence sales, and prostitution), *and* offenses related to theft, burglary, and trespassing.
 - Allow counties to further expand the list of eligible offenses.
2. Update Penal Code § 849 to allow police officers in all jurisdictions (even those without established LEAD programs) to release people to community-based supportive services in lieu of jail booking and referral to prosecution.

Relevant Statutes

Penal Code §§ 849, 1001.85—1001.88.

Background and Analysis

Low-level offenses dominate California’s criminal legal system — 88% of current arrests are for misdemeanors and nonviolent felonies.²⁷ Arrests for drug-related offenses continue to make up a large portion of all arrests even after Proposition

Justice System, Urban Institute, April 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: Justice Dept. Agency to Alter Its Terminology for Released Convicts, to Ease Reentry*, Washington Post, May 4, 2016; Morgan Godvin & Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That’s Changing*, Poynter, January 4, 2021.

²⁷ California Department of Justice, *Crime in California 2022*, Tables 30, 31.

47 reduced the penalty for drug possession.²⁸ Many arrests are of the same people who frequently come into contact with police for issues related to homelessness, mental illness, or substance abuse.

A special approach first developed in Seattle — Law Enforcement Assisted Diversion (LEAD) — has reduced recidivism among this group of people.

In 2016, California established the LEAD Pilot Program which allotted \$15 million in funding over 2.5 years.²⁹ San Francisco and Los Angeles received funding, and in both counties, the pilots proved successful in reducing future arrests of people who received LEAD intervention compared to similarly situated people who were arrested and brought to jail.³⁰

Dr. Aili Malm of California State University Long Beach helped evaluate the pilot projects for the Legislature and told the Committee that the LEAD pilot programs were extremely effective, but also faced significant barriers, including lack of police officer enthusiasm, and disruption from the COVID-19 pandemic.³¹

While momentum may have stalled LEAD in some places, Los Angeles County has expanded its program to serve more people. Los Angeles County Sheriff's Department Captain Geoffrey Deedrick, who supervised the implementation of LEAD in his Department, told the Committee that LEAD enhanced community safety by putting frequently arrested people on a path to success.³² Long Beach City Prosecutor Doug Haubert — who is responsible for prosecuting all misdemeanors in the city of Long Beach — told the Committee that his office is working on expanding the LEAD program by giving all patrol officers in the city the ability to refer a person to LEAD.³³

²⁸ California Department of Justice, *Crime in California 2016*, Tables 19 and 25; California Department of Justice, *Crime in California 2022*, Tables 19 and 25.

²⁹ Penal Code §§ 1001.85–1001.88.

³⁰ Aili Malm, Dina Perrone, and Erica Magaña, *Law Enforcement Assisted Diversion (LEAD) External Evaluation Report to the California State Legislature*, 14, 55 (2020). See also Aili Malm and Dina Perrone, *Law Enforcement Assisted Diversion (LEAD) External Evaluation Report to the California State Legislature — 2020 Addendum*, 13–14 (2021).

³¹ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 1 of 4, 0:04:35–0:11:38.

³² *Id.* at 0:25:06–0:26:11.

³³ *Id.* at 0:40:30–0:40:56. The initial LEAD pilot was limited to North Long Beach.

While the LEAD program in San Francisco was terminated after the completion of the pilot, San Francisco Chief of Police Bill Scott has recently said he wants to reintroduce the program to help address the city’s drug problem.³⁴

The original LEAD pilot was targeted at low-level offenses, particularly those related to drugs and prostitution, and the only felony eligible for LEAD was subsistence drug sales.³⁵ Other low-level felonies such as burglary and theft were not eligible, nor were many common misdemeanors like theft and trespassing.³⁶ Erica Shehane, Los Angeles County Office of Diversion and Reentry Director for LEAD, told the Committee at its June 2023 meeting that California should expand the list of eligible crimes and give counties the flexibility to decide to make additional offenses LEAD-eligible.³⁷

In addition to expanding LEAD-eligible offenses, the Penal Code should encourage law enforcement agencies that do not have official LEAD programs to develop similar pre-booking diversion practices. Current law, Penal Code section 849, allows officers to release an arrested person without further proceedings in some circumstances, including when a person is arrested for being under the influence of drugs but is delivered to a hospital for treatment.³⁸ This law should be expanded to allow police officers to refer someone to community-based supportive service programs like addiction or mental health counseling rather than taking them to jail. According to Los Angeles Sheriff’s Department Captain Geoffrey Deedrick, a Penal Code provision like this that allows officers to use pre-booking diversion (through LEAD or other similar programs) would empower law enforcement to use their discretion to divert appropriate cases.³⁹

Recognizing that LEAD has proven to be a more effective and efficient model for addressing minor offenses than arrest and prosecution, the state should increase the use of LEAD and similar programs throughout the state.

³⁴ David Sjostedt, *San Francisco Police Chief Pushes To Restart Program to Help Drug Users*, The San Francisco Standard (June 23, 2023).

³⁵ Penal Code § 1001.87(b).

³⁶ *Id.*

³⁷ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 1 of 4, 0:22:53–0:24:12.

³⁸ Penal Code § 849.

³⁹ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 1 of 4, 1:07:10–1:07:43. An example of this type of provision can be found in Washington state, which in addition to establishing grant funding for LEAD programs, directs police officers to offer any person arrested for possession of drugs a referral to supportive services, including but not limited to LEAD, in lieu of booking. RCWA §§ 10.31.115, 36.28A.450.

Empirical Research

An evaluation by researchers from California State University, Long Beach of the LEAD pilot project in San Francisco and Los Angeles showed the following results:

- In San Francisco, at the 12-month follow-up period, felony arrests for LEAD participants were 257% lower, and misdemeanor arrests were 623% lower compared to similarly-situated people who did not participate in LEAD.⁴⁰
- In Los Angeles, at the 12-month follow-up period, felony arrests for LEAD participants were 537% lower, and misdemeanor arrests were 153% lower.⁴¹
- The lower recidivism for LEAD clients translated into significant cost savings over system-as-usual individuals.⁴²

Insight from Other Jurisdictions

Former Albany, New York Police Chief and Director of Policing Strategies for the LEAD National Support Bureau, Brendan Cox, told the Committee that his organization assists many states and localities in the development and implementation of LEAD programs.⁴³ States including Colorado, Maryland, New Mexico, and Washington have established state-funded LEAD programs.⁴⁴ Other states, including New Jersey, have secured grant funding to establish LEAD programs.⁴⁵

Notably, in New Jersey, the list of LEAD-eligible offenses is more expansive than what was included in California's pilot program and includes theft, fraud, and trespass offenses.⁴⁶

The Narcotics Arrest Diversion Program in Chicago, Illinois is a program similar to LEAD that allows police officers to connect people arrested for drug

⁴⁰ Aili Malm, Dina Perrone, and Erica Magaña, *Law Enforcement Assisted Diversion (LEAD) External Evaluation Report to the California State Legislature*, 8 (2020).

⁴¹ Aili Malm and Dina Perrone, *Law Enforcement Assisted Diversion (LEAD) External Evaluation Report to the California State Legislature – 2020 Addendum*, 6 (2021).

⁴² *CSULB Report*, 8 ; *CSULB Addendum*, 6.

⁴³ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 1 of 4, 0:45:33–0:45:39.

⁴⁴ Colorado Senate Bill 17-207 (2017 Regular Session); Maryland House Bill 432 (2018 Regular Session); New Mexico House Bill 453 (First Session, 2019); Washington Substitute Senate Bill 5380 (2019 Regular Session).

⁴⁵ See State of New Jersey Department of Law & Public Safety, *Law Enforcement Assisted Diversion*.

⁴⁶ Committee staff received this information from the New Jersey Office of Attorney General.

possession with a substance use counselor in lieu of proceeding with the traditional criminal process.⁴⁷ Though unlike in LEAD, arrested people are taken to jail to be connected with a service provider stationed in the facility, once the person is connected to the program they face no threat of future prosecution related to the arrest. Researchers from the University of Chicago Crime Lab and Vanderbilt University found that over 79% of people who are diverted go on to start treatment, and that nearly half of those who start treatment remain engaged 60 days after.

⁴⁷ See Ashna Arora and Pankla Bencsik, *Policing Substance Use: Chicago's Treatment Program for Narcotics Arrests*, University of Chicago Crime Lab (November 6, 2021).

2. Improve Data Access for the Racial Justice Act

Recommendation

The Racial Justice Act allows a person to seek modification of their conviction or sentence if it was tainted by racial bias as shown by direct statements during the case or statistical evidence. But several current laws or policies prevent people from obtaining necessary data to even bring RJA claims.

The Committee therefore recommends expanding access for people bringing claims under the Racial Justice Act in the following ways:

1. Expand the detail and format of existing reports by the Judicial Council, CDCR, and DOJ.
2. Amend current law to increase access to probation and police reports if the request is related to a RJA claim.
3. Fund the Justice Data Accountability and Transparency Act to support the collection and publication of data from prosecutors.

Relevant Statutes

Penal Code §§ 745; 1170.45; 1203; 1203.5; 11370

Government Code § 6243(f)(1)

Background and Analysis

The Racial Justice Act, passed by the Legislature and signed by Governor Newsom in 2020, is a historic and important effort to address racial bias in the criminal legal system. It allows a conviction or sentence to be modified or even vacated if it was tainted by racial bias.⁴⁸ But the early days of the law have shown that practitioners have a significant difficulty obtaining data to even begin to bring claims.

The RJA allows two paths to relief: the first requires showing actual bias or use of “racially discriminatory language,” while the second relies on a statistical showing of disparate treatment and requires gathering information about other cases to show there is a discriminatory pattern. For claims that rely on statistics, the law requires the following:

- Defendants must prove they were charged, convicted, or sentenced more severely compared to “similarly situated” people of a different race, ethnicity, or nationality.⁴⁹

⁴⁸ Penal Code § 745(a); AB 2542 (Kalra 2020) § 2.

⁴⁹ Penal Code § 745(a)(3) & (4). Relief is also available if harsher sentences are based on the race of the victims.

- The differences between racial groups must exist in the same county where the defendant was sentenced. In other words statewide data is not sufficient.

But this data is difficult to obtain, so few — if any — statistics-based claims have been fully litigated. Data collection and sharing practices vary by county and agency⁵⁰ and have created unnecessary barriers to bringing statistics-based claims. While the RJA provides for discovery from law enforcement agencies after a showing of “good cause,”⁵¹ unnecessary restrictions in current law and practice prevent people from obtaining the data needed to even make the initial showing of good cause. In addition, some agencies may not collect the data requested or refuse to disclose it.⁵²

The Racial Justice Act will also soon begin to have retroactive application.⁵³ Beginning on January 1, 2023, the first group of applicants will be eligible to apply for relief, meaning a wave of claims will soon make their way to courts throughout California. To ensure claims are resolved efficiently and meaningfully, data access should be expanded in the following ways through any necessary statutory changes, which would benefit defendants, prosecutors, courts, and the public at large:

(1) Expand the scope of publicly available data.

Some agencies already publish data relevant to an RJA claim, but not in a format or at a level of detail that the RJA requires. For example, some reports only give statewide statistics or break down offenses into broad categories, such as violent or property offenses, which are not useful for RJA claims that require analysis at higher detail of “similar conduct” and “similarly situated” people. And this information may only be released in a summary form in a report, without the underlying data available for further analysis, which also prevents parties from using it in RJA cases.

⁵⁰ See Department of Justice Research Center, Presentation for the Task Force to Study Reparations Proposals for African Americans Public Hearing, March 3, 2023.

⁵¹ Penal Code § 745(d). See also *Young v. Superior Court of Solano County*, 79 Cal.App.5th 138, 144 (2022) (“good cause” is “a plausible case, based on specific facts, that any of the four enumerated violations of [the Racial Justice Act] could or might have occurred” and requires a court to balance additional factors).

⁵² The Orange County District Attorney recently refused such a request for felony diversion records and other data, asserting the information was exempt as attorney work product, but a court disagreed and ordered much of the data to be released. Noah Biesiada, *Orange County District Attorney Forced to Release Racial Data on Who Gets Prosecuted*, Voice of OC, August 31, 2023.

⁵³ See AB 256 (Kalra 2022).

Instead of these limited reports, information should be released similar to what is required by California’s Racial Identity and Profiling Act (RIPA), which requires data collection and reporting about traffic stops by law enforcement. Each year, the California Department of Justice releases RIPA data on individual stops, including demographic data, the reason and time for the stop, and what resulted. The most recent data covered more than 3 million stops and was released in a format that allowed researchers to perform additional analysis. A similar approach should be taken as specified below, which would assist both defense counsel and prosecutors in evaluating RJA claims. And while it is important to provide as much access as possible, any changes should also respect the privacy interests of individual people covered by the data.

- *California Department of Corrections and Rehabilitation.* CDCR has extensive data about people sent to state prison and regularly provides information to researchers and others who request it. Instead of requiring these individual requests, CDCR should provide more granular information about people who have been in their custody in a publicly-accessible format. While CDCR has taken important first steps by creating publicly-accessible data dashboards, the information available in these resources is often at too high a level to support analysis for an RJA case.⁵⁴

In addition, CDCR should report information about the statutory special circumstances that lead to the imposition of life without parole and death sentences.⁵⁵ CDCR does not currently do this, even though the information is typically included on the paperwork from the court. As the Committee has explored in past reports, existing data on the use of special circumstances shows troubling racial disparities: almost 80% of people currently serving a life without parole are non-white and research has shown racial disparities in the application of special circumstances involving gangs and felony murder.⁵⁶

- *Judicial Council.* By statute, the Judicial Council collects data on criminal case dispositions statewide according to the race and ethnicity of the defendant.⁵⁷ An annual report to the Legislature measures conviction rates, conviction offense level, prison sentencing rates, and prison

⁵⁴ Offender Data Points and CDCR Recidivism dashboards
<public.tableau.com/app/profile/cdcr.or>

⁵⁵ See Penal Code § 190.2(a).

⁵⁶ See 2021 Annual Report, 50–55. See also Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 UCLA Law Review 1394, 1426 (2019) (reviewing cases from 1978–2002).

⁵⁷ Penal Code § 1170.45.

sentence length.⁵⁸ While this data is a helpful starting point, the analysis only reports statewide information and is of limited use in assessing county-based disparities, which is necessary for an RJA claim. The reports also aggregate information on different offenses and does not disaggregate these categories by race or ethnicity, limiting its utility for RJA claims.

Since the Judicial Council already collects this information, they should be required to report county-level data and to disaggregate dispositions by offense type and to make raw data publicly-accessible.

- *California Department of Justice.* The Department of Justice publishes county-level data about arrests, including demographic information. But the data specifies only whether an offense is for a violent, property, drug or other offense, which is too general for the RJA. The arrest data also does not indicate the final court disposition, if any, which prevents analysis of what happens after an arrest. The Department of Justice already collects much of this information and should include it with the arrest information.

(2) Expand access to existing data for attorneys investigating an RJA claim.

In each of the categories of information described below — probation reports and police reports — existing law allows some access to the reports but only for a limited time. The information contained in these reports is often highly detailed and potentially of great relevance in RJA claims. But because these reports can also contain private information, broader access to them should be limited to attorneys investigating or litigating an RJA claim.

- *Probation reports.* These reports, which are required to be compiled before sentencing in felony cases,⁵⁹ contain detailed information about individual cases that is often exclusive to the report. Under existing law, the entire report is publicly available for 60 days after a case concludes.⁶⁰ After that, courts consider requests for access on a case-by-case basis. One appellate court has held that anyone seeking these reports must provide notice to the subject of each report,⁶¹ an impossible task for almost any criminal defendant or researcher seeking multiple reports to compare conviction or sentencing outcomes.

⁵⁸ See, e.g., Judicial Council of California, *Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant* (November 2021).

⁵⁹ Penal Code § 1203(b)(1).

⁶⁰ Penal Code § 1203.05(a).

⁶¹ *People v. Connor*, 115 Cal.App.4th 669 (2004).

The Penal Code could be amended to require the release of probation reports to attorneys investigating or litigating an RJA claim and with either a protective order or redactions as specified by a court.

- *Police reports.* Similar to probation reports, police reports and other law enforcement records contain detailed information about particular offenses that may be extremely relevant to RJA claims. The California Public Records Act covers law enforcement records,⁶² but appellate courts have held that only records about recent police activity are covered.⁶³ Recently, one appellate court upheld a county’s denial of a request to provide law enforcement records because the arrest information the petitioner sought was 11 months old at the time it was requested.⁶⁴

The law should be amended to access to non-contemporaneous information from law enforcement if it is sought by an attorney investigating or litigating an RJA claim.

(3) Fund the Justice Data Accountability and Transparency Act (AB 2418).

The Justice Data Accountability and Transparency Act (AB 2418 (Kalra 2022)) created new obligations for prosecutors to collect and disclose data to the Department of Justice, which would, among other responsibilities, publish reports using the data.⁶⁵ The law specifies more than 50 data elements, including demographic information about defendants and victims, charging information, plea offers, and case dispositions.⁶⁶

But the requirements of AB 2418 are not yet in effect and only become operational upon funding from the Legislature.⁶⁷ In addition, data collection would not begin until 2027.

The Justice Data Accountability and Transparency Act should be funded. The extensive data that would be collected would significantly enhance transparency and public access to data, thus supporting RJA claims.

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⁶² Government Code § 6243(f)(1).

⁶³ *Kinney v. Superior Court*, 77 Cal.App.5th 168 (2022) (holding that only “contemporaneous” records are available and records that were 11-12 months old were not contemporaneous); *County of Los Angeles v. Superior Court (Kusar)*, 18 Cal.App.4th 588 (1993).

⁶⁴ *Kinney v. Superior Court*, 77 Cal.App.5th 168 (2022).

⁶⁵ Penal Code §§ 11370(e); (b)(1)(E). The law also requires the creation of a Prosecutorial Transparency Advisory Board, which includes as a member the chair of the Committee on Revision of the Penal Code. Penal Code § 11370(b)(1)(F)(v).

⁶⁶ Penal Code § 11370(e).

⁶⁷ Penal Code § 11370(c)(1).

The RJA is an exceptionally important tool to address racial disparities in the criminal legal system and the state should ensure sufficient data access so that meritorious claims can be fully aired in court.

3. Create General Resentencing Procedures

Recommendation

For more than a decade, California has allowed thousands of incarcerated people to return to court to have their sentences reconsidered. However, there are no general procedures to follow for resentencings – and each new reform comes with its own distinct rules – resulting in wide variation and inefficiency across the state in how resentencings are handled.

The Committee therefore recommends the following:

Establish general procedures that apply to all resentencings and addresses each of the following components:

1. *Mandatory stakeholder meetings*: Require stakeholders to meet and collaborate in advance of any new resentencing law.
2. *Specialized courts*: Require the presiding judge to determine whether cases will be assigned to one judge or a designated set of judges.
3. *Counsel*: Require the appointment of counsel.
4. *Plea bargains*: Expressly allow resentencing in convictions by guilty pleas without prosecutorial consent.
5. *Assistance from CDCR*: Require that CDCR assist litigants with obtaining institutional records.
6. *Full resentencings*: Specify that at every resentencing hearing the full sentence may be considered by the court.
7. *Notice*: Require that a trial court provide notice to petitioners of any ruling.
8. *Abstracts of judgment*: Clarify that the resentencing paperwork be sent electronically to CDCR and specify quick timeframes for sending and acting on the paperwork when a person is close to their release date.

Relevant Statutes

Penal Code §§ 1172–1172.75; 1213

Background and Analysis

Beginning with Proposition 36 in 2012 and the resentencing of people serving a Three Strikes sentence for a non-violent felony, the state has continued to pass ameliorative sentencing legislation on an almost annual basis. Nonetheless, each time a new law passes practitioners and courts are left with little specific

guidance for how to put the laws into practice, leading to inefficient and slow outcomes at best, and expensive and unnecessary litigation at worst.

Most recently, the state authorized courts to retroactively reduce sentences for people serving a sentence with a one- or three-year enhancements for prior prison or felony jail terms or prior drug offenses, respectively, in SB 483 (2021 Allen). Despite the state’s history with resentencing, and SB 483’s attempts to address some recurring issues— for example, by clearly stating counsel is assigned — procedural issues arose that had to be resolved with costly appellate litigation.

For example, people seeking resentencing had to litigate whether courts should review their entire sentence or just the prior enhancements under SB 483.⁶⁸ An appellate court recently ruled that different pieces of the same sentence had different rules for when they could be changed following a plea bargain, a confusing result that will almost certainly result in more litigation.⁶⁹ And even in a case where the Attorney General agreed that a defendant was entitled to be resentenced, the California Supreme Court had to intervene to tell the lower court to reconsider the case.⁷⁰ Practitioners have also experienced lengthy delays in both getting records from CDCR and getting new court judgments to CDCR.⁷¹

Any new resentencing law could specifically choose a different procedure, but if it did not, the minimum procedures specified below should apply:

- *Mandatory stakeholder meetings.* Stakeholders — including the district attorney’s office, the public defender’s office, the clerk’s office, the presiding judge, the local jail, and a representative from CDCR — should be required to meet and decide on initial resentencing procedures and then hold regular meetings to address issues as they arise during implementation. Matthew Wechter explained that in San Diego County, the collaborative process resulted in less appearances, less litigation, and less use of court resources and time.⁷²

⁶⁸ *People v. Monroe*, 85 Cal.App.5th 393, 402 (2022).

⁶⁹ *People v. Coddington*, – Cal.Rptr.3d – , 2023 WL 6819182 (Cal. Ct. App., Oct. 17, 2023) (holding that while the Legislature intended that the striking of prior prison term would not provide a basis for rescinding a plea agreement, this rule does not apply to other possible sentence reductions that occur in the same resentencing).

⁷⁰ See *People v. Kimble*, 2023 WL 7031434 (Cal. Supreme Court, Oct. 25, 2023).

⁷¹ Submission of Matthew Wechter, Supervising Deputy Public Defender, San Diego County Department of the Public Defender, for March 17, 20203, Meeting of Committee on Revision of the Penal Code, 2-4.

⁷² *Id.* at 7.

- *Allow specialized courts.* In some counties the presiding judge assigned one judge to hear all requests for resentencing, allowing judges to develop expertise on the law and common factual issues and set clear case management policies, similar to other specialized courts like drug courts and behavioral health courts.⁷³ This process may not work for all counties so a resentencing law should require the presiding judge to decide whether to centralize all resentencings in the county to one judge or a designated set of judges, providing flexibility to counties while also promoting the efficient resolution of cases.
- *Appointment of counsel.* Counsel is critical to implementation – in addition to making legal arguments on novel issues of law, they are crucial to reviewing and obtaining mitigation materials. The most recently enacted resentencing laws have all required the appointment of counsel and every resentencing law should require the same.⁷⁴
- *Application to plea bargains.* Unless an exception is created by the Legislature, a sentence that was imposed following a plea bargain generally cannot be modified without the agreement of the prosecutor.⁷⁵ The SB 483 resentencings described above and law-enforcement initiated resentencings expressly allow resentencings in plea bargained cases without prosecutorial consent.⁷⁶ This should be the case in all resentencings since the reach of any resentencing law would be significantly curtailed if the law does not apply to plea bargains, given that the vast majority of felony convictions in California resolve with a plea bargain. It also ensures that a person’s sentence is consistent with current law. However, resentencings would not be automatic and prosecutors would still have the right to present arguments to the court.
- *Assistance from CDCR.* In resentencings where the incarcerated person is in prison, attorneys rely on CDCR to communicate with their clients and to provide records necessary for resentencing, including information about an incarcerated person’s behavior and progress while in prison. This process is slow and inefficient. In federal court, the First Step Act of 2018 contained language that required the Bureau of Prisons to assist

⁷³ Markus B. Zimmer, *Overview of Specialized Courts*, International Journal for Court Administration (August 2009), 1–3.

⁷⁴ See, e.g., Penal Code §§ 1172.7(d)(5); 1172.75(d)(5); 1172.1(b)(1); 1172.6(b)(3).

⁷⁵ See *People v. Stamps*, 9 Cal.5th 685, 706 (2020).

⁷⁶ Even still, one recent court held that this provision only applies to the prison prior and not the rest of the sentence. *People v. Coddington*, – Cal.Rptr.3d – , 2023 WL 6819182 (Cal. Ct. App., Oct. 17, 2023).

litigants in obtaining institutional records.⁷⁷ Similar language should be added for every resentencing.

- *Full resentencings.* The Penal Code should specify that at every resentencing the entire sentence can be reconsidered by the court, not just the individual component that may have triggered the resentencing. This is the general rule that has been applied by the California Supreme Court in resentencings and including it in the Penal Code would prevent future confusion.⁷⁸
- *Notice.* AB 1540 (2021 Ting), which made changes to Penal Code section 1172.1, required courts to provide notice to incarcerated people of any resentencing request initiated by law enforcement. As the Committee noted in its 2020 Annual Report, at the time, many trial courts provided virtually no process or notice when considering those resentencing requests.⁷⁹ The Penal Code should require courts to notify people seeking resentencing of any actions taken by the court, including rulings, which would protect due process and facilitate the right to appeal.
- *Abstracts of judgment.* The abstract of judgment, a written summary of the sentence, is created by court clerks and transmitted to CDCR, the sheriff, or probation so that they may administer the sentence. Current law provides that an abstract should be sent “forthwith,” with no specific timeframe.⁸⁰ CDCR regulations then provide another 5 days for CDCR to act on the abstract.⁸¹ CDCR cannot release someone until they receive the amended abstract, yet sometimes courts may take several weeks to send them⁸² – and may not be allowed to do so electronically⁸³ – resulting in people staying in custody longer than necessary. The Penal Code should specify that where the anticipated remaining time to serve is less than 30 days, the abstract must be submitted to CDCR electronically within 24 hours and CDCR must act on the abstract within a similar amount of time.

⁷⁷ 18 U.S.C. § 3582(d)(2)(A)(iii) (directing the federal Bureau of Prisons to “assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction”).

⁷⁸ *People v. Buycks*, 5 Cal.5th 857, 893–895 (2018).

⁷⁹ Committee on Revision of the Penal Code, 2020 Annual Report and Recommendations, 66.

⁸⁰ Penal Code § 1213.

⁸¹ 15 Cal. Code Regs. § 3371.1(e)(2).

⁸² See Letter from Office of the State Public Defender to Committee on Revision of the Penal Code, Oct. 21, 2022, 1 (presenting anecdotal information from public defenders throughout the state, including cases where abstracts had not been received weeks after resentencing).

⁸³ The relevant statute does not specify whether electronic service is acceptable.

Specifying general procedures for resentencings would help resolve cases efficiently and consistently across the state while avoiding inefficient and costly litigation.

Insights From Other Jurisdictions

Resentencings in federal court have operated more smoothly despite encountering similar challenges to courts in California.⁸⁴

- In 2014, the United States Sentencing Commission voted unanimously to reduce the presumptive sentence for drug trafficking offenses and to give the law retroactive effect.⁸⁵ By June 2015, less than one year after the effective date, courts had resolved more than 12,000 petitions, granting 79% of them.⁸⁶ By 2021, courts resolved more than 50,000 cases, granting more 31,000 of them (63%).⁸⁷
- The Fair Sentencing Act of 2018 expanded the use of “compassionate release” for reducing sentences.⁸⁸ Courts resolved more than 27,000 cases by September 2022 and granted 16% (4,502) of them.⁸⁹

Part of the success in federal court was due to the appointment of counsel, which ensured people in prison had adequate representation. While federal law did not require the appointment of counsel in these circumstances, many district courts, including the district courts in California, issued general orders appointing the federal defender to represent any person previously determined to have been entitled to appointment of counsel. The federal defender was responsible for determining whether persons qualified for relief and then presenting any petition on their behalf.⁹⁰

⁸⁴ Committee on Revision of the Penal Code, Staff Memorandum 2023-01, March 13, 2023, 17.

⁸⁵ United States Sentencing Commission, *2014 Drug Guidelines Amendment, Retroactivity Data Report*, 1-2, December 2015.

⁸⁶ *Id.* at Table 1.

⁸⁷ The early release did not increase recidivism. A United States Sentencing Commission study found no statistically significant difference between the recidivism rates for people convicted of drug trafficking who had served their full sentences and those who received a sentence reduction. United States Sentencing Commission, *Retroactivity and Recidivism*, 2-6, July 2020.

⁸⁸ 18 U.S.C. § 3582(c)(1)(A)(i)

⁸⁹ United States Sentencing Commission, *Compassionate Release Data Report*, Table 1, December 2022.

⁹⁰ See, e.g., *In the Matter of Appointment of Counsel in Criminal Cases Potentially Affected by Johnson v. United States*, 135 S. Ct. 2551 (2015), General Order No. 649, S. D. Cal., December 8, 2015; *In re: First Step Act of 2018* (Dec. 21, 2018), Application of Fair Sentencing Act of 2010, Misc. Order, N. D. Cal., January 25, 2019 (amended April 27, 2020)

Unsurprisingly, systemic appointment of counsel appears to have meaningfully increased relief. For example, the federal district court in Oregon assigned the federal defender in most cases, resulting in a 65% grant rate, while the Western District of Oklahoma, which did not appoint counsel, had a grant rate of less than 4%.⁹¹

⁹¹ Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN, September 30, 2021.

4. Apply the “Nickel Prior” Reform Retroactively

Recommendation

For more than three decades, judges lacked the power to dismiss a very common sentencing enhancement: the “nickel” prior that can add 5 years to a sentence. The Legislature recently restored discretion to judges to dismiss the enhancement but did not make the law retroactive.

The Committee recommends the following:

Allow people incarcerated or under supervision with a 5-year “nickel” prior as part of their sentence to petition a court for a reduced sentence if the sentence was imposed before 2019.

Relevant Statutes

Penal Code §§ 667(a)(1) & 1385.

Background and Analysis

In 2018, the Legislature gave judges power to dismiss one of the most common and harsh sentencing enhancements in the Penal Code: the 5 year “nickel prior.”⁹² This sentencing enhancement adds 5 years to the sentence of anyone convicted of a “serious” offense who had a prior conviction for a serious offense.⁹³ But the Legislature’s action in 2018 applied only prospectively and thousands of people remain in prison whose sentence may be more harsh than if they were sentenced today.⁹⁴

The Legislature’s restoration of judicial discretion to dismiss the nickel prior helped to correct some of the long-standing harshness the enhancement had caused. The nickel prior was created by a voter initiative in 1982, Proposition 8, that had the goal of dramatically increasing the prison population by enacting measures that would “take the handcuffs off the police and put[] them on the criminals, where they belong.”⁹⁵ In the first years of the nickel prior, trial courts had the power to dismiss this enhancement as they did any other. But the

⁹² SB 1393 (2018 Mitchell).

⁹³ Penal Code § 667(a)(1). The list of “serious” offenses is in Penal Code § 1192.7(c). The “violent” offenses from Penal Code § 667.5(c) are generally also “serious” ones.

⁹⁴ Some people may have been eligible for a reduction through SB 483, which removed the 1 and 3 year sentence enhancements, and allows for the consideration of the entire sentence, including whether other sentence enhancements should continue to be imposed. See, e.g., *People v. Monroe*, 85 Cal.App.5th 393, 402 (2022).

⁹⁵ Voter Information Guide for 1982, Primary Election, 34 (1982). See also *id.* at 35 (“THERE IS ABSOLUTELY NO QUESTION THAT THE PASSAGE OF THIS PROPOSITION WILL RESULT IN MORE CRIMINAL CONVICTIONS, MORE CRIMINALS BEING SENTENCED TO STATE PRISON, AND MORE PROTECTION FOR THE LAW-ABIDING CITIZENRY.” (capitals in original)).

Legislature took that power away in 1986.⁹⁶ When the Legislature took steps to give judges this power back in 2018, the *Los Angeles Times* editorial page praised the action, noting that it was an effective way to address “some of California’s tough-on-crime mistakes of the past.”⁹⁷

As Senior District Attorney Robert Mestman of Orange County explained to the Committee, nickel priors punish people for recidivism, even when the prior convictions are “very old.”⁹⁸ In addition, the same conviction that’s the basis for a nickel prior can also be used to impose even more time on a sentence under the Three Strikes law. The nickel prior is also a harsher version of another sentencing enhancement that adds 3 years to a sentence for a violent offense if the person was previously convicted of a violent offense within the last 10 years — a more balanced approach than the nickel prior.⁹⁹ In addition, empirical research has found no proof that the nickel prior enhancement helped deter crime.¹⁰⁰

As the Committee has noted before, California has a well-established history of offering retroactive application of significant reforms, including changes to the Three Strikes law in 2012 and reforms to the felony-murder rule in 2018. And in 2021, the Legislature — following a Committee recommendation — made retroactive the elimination of sentencing enhancements that added 1 or 3 years because of prior convictions.

The same principle of equity should be applied to the nickel prior — and doing so would not automatically result in short prison sentences. Instead, a judge would merely have the opportunity, considering public safety and all other circumstances, to decide whether the nickel prior was still appropriate in an individual case.

Empirical Research

The restoration of judicial discretion to dismiss the nickel prior appears to be associated with reduced use of the enhancement. From 2015 to 2018, approximately 4.5% of all admissions to prison had a nickel prior

⁹⁶ See California Statutes of 1986, Chapter 85 (amending Penal Code § 1385 and abrogating *People v. Fritz*, 40 Cal. 3d 227 (1985), which allowed dismissal of the enhancement under Penal Code § 1385).

⁹⁷ Los Angeles Times Editorial Board, *Editorial: Fixing some of California’s tough-on-crime mistakes of the past*, Los Angeles Times (May 25, 2018).

⁹⁸ Committee on Revision of the Penal Code, Meeting on March 17, 2023, Part 2, 0:19:33-0:20:00.

⁹⁹ Penal Code § 667.5(a).

¹⁰⁰ Steven Raphael, *The Deterrent Effect of California’s Proposition 8: Weighing the Evidence*, *Criminology & Public Policy*, Vol. 5, No. 3, 471–478, 476 (2006).

enhancement.¹⁰¹ After the restoration of judicial discretion to dismiss the enhancement began in 2019, the share of admissions dropped to 3.4% and continued dropping, with only 1.7% of admissions having a nickel prior in 2022.¹⁰² Though other factors may have caused this decline, this decrease in the use of the nickel prior suggests that judges are using their discretion to dismiss nickel priors in appropriate cases.

Similarly, the Secretary of CDCR has used its authority to initiate resentencing hearings for more than 700 people on the basis that they have a nickel prior imposed under the old law. More than 275 of these people have had their sentence reduced by a court, with some cases still pending.¹⁰³

The vast majority of people with a nickel prior are people of color – only around 20% are white, the same proportion as the current prison population as a whole.

Data from CDCR shows that people convicted of “serious” and “violent” offenses – which are the population of people who may have a nickel prior as part of their sentence – have lower recidivism rates than people convicted of non-serious and non-violent offenses.¹⁰⁴

¹⁰¹ See Committee on Revision of the Penal Code, Staff Memorandum 2023-01, March 13, 2023, 5.

¹⁰² California Policy Lab analysis of CDCR data.

¹⁰³ Data provided by CDCR as of October 26, 2023.

¹⁰⁴ CDCR Recidivism Data Dashboard. For people released in FY 2017–2018 (the most recently available data), the reconviction rates after 3 years by commitment offense are: violent offenses – 27.5%; serious offense – 47.4%; nonviolent/nonserious offense – 51.5%.

5. Expand Second-Look Resentencing

Recommendation

Research shows that long prison sentences do not improve public safety and produce significant racial disparities. CDCR, prosecutors, and other law enforcement personnel can now request resentencing in any case at any time, but incarcerated people cannot initiate these requests on their own.¹⁰⁵ An expansion of California’s current second-look resentencing laws to allow people who have served a significant period of time in prison to apply for resentencing directly to a court would create significant cost savings for the state while preserving public safety.

The Committee therefore recommends the following:

- Allow any person who has served more than 15 years to request reconsideration of a sentence directly from the court.

If this recommendation is too ambitious, the state can still expand second look resentencing to smaller populations in one or both of the following ways:

- Allow resentencing for people who have served more than 15 years in prison and:
 - (1) were under the age of 26 at the time of the offense or
 - (2) are at least 50 years old.

Relevant Statutes

Penal Code § 1172.1

Background and Analysis

In its 2020 Annual Report, the Committee recommended a broad second-look resentencing law that would allow any incarcerated person who had served 15 years to ask to be resentenced.¹⁰⁶ As Judge Daniel Lowenthal of Los Angeles County Superior Court explained to the Committee, “long sentences don’t age well [and] evolving norms generally will render a proportion of prison sentences of one time period disproportionate in the next.”¹⁰⁷ And research has consistently shown that long sentences have little or no public safety value.¹⁰⁸

¹⁰⁵ Penal Code § 1172.1

¹⁰⁶ Other aspects of the Committee’s recommendation around the current second-look sentence process were enacted as AB 1540 (2021 Ting).

¹⁰⁷ Committee on Revision of the Penal Code, Meeting on March 17, 2023, Part 1, 0:37:45–0:37:59.

¹⁰⁸ See, e.g., Daniel Nagin, *Incarceration & Public Safety*, Arnold Ventures (July 2022); Daniel M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, Crime and Justice, Vol. 50 (2021); Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 222 (2013);

The Legislature has repeatedly strengthened second-look resentencing laws, but the impact, while significant, has been limited, in large part because only certain law enforcement officials — including District Attorneys and CDCR — can request resentencing.¹⁰⁹

A recent evaluation by RAND of the first 18 months of a pilot program of prosecutor-initiated resentencings found slow progress — among cases awaiting a decision on whether to proceed by the prosecutor, 72% had been under review for more than 6 months.¹¹⁰ Of the 684 case reviews initiated, only 105 cases had been referred to the court for resentencing – 321 had been rejected and 258 were still being reviewed.¹¹¹ But once reviewed and referred to court, almost all were granted – 91 of the 94 cases that have been reviewed by a court were granted.¹¹²

CDCR recommendations have also slowed. Though CDCR made close to 900 referrals in 2018 alone, the pace has decreased significantly since then, with a little over 200 in 2022 and less than 50 so far this year.¹¹³

In total, only around 1,300 people have been resentenced statewide under California’s second-look law in the last 5 years, with more than 70% of those cases originating in referrals from CDCR.¹¹⁴ Some prosecutors do not even engage in the resentencing process and instead rely entirely on recommendations from CDCR, as Deputy District Attorney Robert Mestman of Orange County told the Committee.¹¹⁵

Judges also have the power to reconsider a sentence but in much more limited circumstances than prosecutors and CDCR. Historically, a judge’s power was limited to the 4 months following imposition of a sentence. But AB 600 (Ting) recently authorized judges beginning in 2024 to recall a sentence any time the applicable sentencing rules are amended by new law or cases.¹¹⁶ While an

National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 130–156, The National Academies Press (2014).

¹⁰⁹ Penal Code § 1172.1.

¹¹⁰ Lois M. Davis et al, *Evaluation of the California County Resentencing Pilot Program: Year 2 Findings*, The RAND Corporation, vi (September 27, 2023).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Data provided by CDCR as of October 26, 2023. See also 15 CCR § 3076.1–3076.5 (CDCR’s regulations for making sentencing referrals).

¹¹⁴ Data provided by CDCR shows 968 resentencings as of October 26 2023. According to For the People, an organization that works with prosecutors to remedy unjust sentences, approximately 350 people have been resentenced as a result of prosecutor referrals as of February 2023. See Committee on Revision of the Penal Code, Staff Memorandum 2023-01, March 13, 2023, 10.

¹¹⁵ Committee on Revision of the Penal Code, Meeting on March 17, 2023, Part 2, 0:43:14–0:43:46.

¹¹⁶ AB 600 (Ting).

important step forward, its eventual impact is unclear — the law does not require the judge to reconsider a sentence, only that the judge is allowed to do so and provides no process for incarcerated people to request resentencing.

Finally, even though the Legislature expanded parole eligibility to older and youthful offenders, release rates for these groups are not high. Between 2017–2022, the elderly parole grant rate was between 14–23% and for youthful offender parole it was 16–22%.¹¹⁷

Resentencing should be more widely available. Beginning with limited categories of eligibility — for example, people who have served at least 15 years and were either under age 26 at the time of offense (around 8,500 people) or are currently over the age of 50 (around 11,700) — would allow judges to focus on people who present the lowest risk to public safety. Courts, with input from prosecutors and victims, would still make the ultimate decision on whether a resentencing was justified and to what degree.

Allowing people to apply directly to courts for resentencing, without relying on or waiting for law enforcement to identify them, will speed up the process and increase access to resentencing without harming public safety.

Empirical Research

As the Committee has noted before, research shows that long prison sentences do not improve public safety while also having significant racial disparities.¹¹⁸ For example, Black people are heavily over-represented among people serving sentences with strike enhancements in California — while only 6% of the people in the state are Black, approximately 45% of the people serving a third-strike sentence (25-to-life) are Black and 33% of the people serving a sentence doubled by a second strike are Black.¹¹⁹

New analysis by the Committee and California Policy Lab shows those released under Proposition 36 have lower rates of new conviction than the broader population of CDCR releases. Proposition 36, a ballot initiative approved by the

¹¹⁷ California Board of Parole Hearings, *Reports of Significant Events*. The grant rates are based on the total number of hearings scheduled each year. Elderly parole is available, with some exceptions, for people who are age 50 or older and have served at least 20 years. Penal Code § 3055. Youthful offender parole is available, with some exceptions, to those who were under the age of 26 at the time of the offense and have served 15, 20, or 25 years, depending on the type of sentence they received. Penal Code § 3051(b)(1).

¹¹⁸ See, e.g., Committee on Revision of the Penal Code, 2020 Annual Report and Recommendations, 9–10, 67–68; 2021 Annual Report and Recommendations, 7–9. The Committee also devoted an entire meeting in June 2020 to the relationship between long prison sentences and public safety.

¹¹⁹ Mia Bird et al, *Three Strikes in California*, California Policy Lab, August 2022, 27.

voters in 2012, allowed people serving a life sentence that had been imposed under the Three Strikes law for a nonviolent offense to be resentenced if a court concluded they did not present a risk to public safety.¹²⁰ Overall, about 46% of all people released from prison had a new conviction within 3 years, but only __% of people who were released early under Proposition 36 did — a __% difference. And only a very small percentage of those released early under Proposition 36 — less than __% — had a new conviction for a violent offense within 3 years of release.

Most (__%) of the people released under Proposition 36 were at least fifty years old, but still had a lower reconviction rate than people the same age released from CDCR: 31% for all releases but only __% for Proposition 36, a __% difference.¹²¹ That result is consistent with research establishing that the older someone is, the less likely they are to commit offenses, as shown by recidivism data from people released from prison in California.¹²²

A report from Human Rights Watch of 125 people released from CDCR between 2011 and 2019 who had originally been sentenced to life without parole but had their sentences commuted found a very low recidivism rate. Only 4 people were subsequently convicted of a crime – 1 felony and 3 misdemeanors – during the 3 years following their release.¹²³

Insights From Other Jurisdictions

Though no jurisdiction currently has a universal second-look law, Washington, D.C., allows people who have been incarcerated for more than 15 years and who were under the age of 25 at the offense to ask for resentencing.¹²⁴ In 2021, Maryland passed a law allowing people who were under 18 at the offense and

¹²⁰ Proposition 36 reformed the Three Strikes law to generally require a conviction for a violent or serious felony — instead of just any felony — before a life sentence could be imposed. It also allowed people with a life sentence from the older version of the Three Strikes law to apply for resentencing if they could not have received a life sentence under the amended law. Penal Code § 1172.6. To be resentenced, a court had to determine the person did not “pose an unreasonable risk of danger to public safety.” Penal Code § 1172.6(f).

¹²¹ This analysis uses releases from CDCR for Fiscal Years 2013–2014 and 2014–2015, as _____ people resentenced under Proposition 36 were released during this time. CDCR data is from the CDCR Recidivism Data Dashboard. CDCR does not indicate the proportion of reconditions that are violent felonies, nonviolent felonies, or misdemeanors.

¹²² See 2020 Annual Report and Recommendations, 9; Robert Weisberg, Debbie Mukamal, and Jordan Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, Stanford Law School Criminal Justice Center, 17 (2011).

¹²³ Human Rights Watch, “I Just Want to Give Back”: *The Reintegration of People Sentenced to Life Without Parole*, June 2023, 14 (the 125 people examined represented 87% of the commutations made).

¹²⁴ See D.C. Council Passes Second Look Amendment Act of 2019, District of Columbia Corrections Information Council, (May 19, 2019).

who have served 20 years to ask for resentencing.¹²⁵ The American Bar Association adopted Resolution 502 in 2022, which urges governments to enact legislation that would allow courts to revisit any sentence when an individual has been incarcerated for 10 years.¹²⁶ The Model Penal Code suggests that states enact “second look” sentencing that allows someone to ask a judge for resentencing after serving 15 years of imprisonment.¹²⁷

Federal courts may grant resentencing if “extraordinary and compelling reasons” warrant a reduction.¹²⁸ The United States Sentencing Commission recently expanded the list of reasons that can warrant resentencing¹²⁹ and created a new category for unusually long sentences. This new category allows courts to apply changes in the law that were not made retroactive when the defendant is serving an “unusually long sentence,” has served at least 10 years of the sentence, and an intervening change in the law has produced a great disparity in the sentence being served and the sentence likely to be imposed today.¹³⁰

¹²⁵ Maryland Code of Criminal Procedure § 8-110.

¹²⁶ American Bar Association Resolution 502 (August 2022).

¹²⁷ Model Penal Code: Sentencing § 305.6, Comment (a) (“[This] provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.”).

¹²⁸ 18 U.S.C. § 3582(c)(1)(A).

¹²⁹ United States Sentencing Commission, *Amendments to the Sentencing Guidelines*, (April 27, 2023) 3–5 (for example, public health emergencies, when specialized medical care is not being provided, a broader list of family circumstances for care of dependents, and when a defendant has suffered abuse while in custody).

¹³⁰ *Id.* at 5-6 (changes to the guidelines manual that the Commission has not made retroactive are excluded).

6. Clarify That SB 81’s Updates to Penal Code § 1385 Apply to Strikes

Recommendation

Judges have long possessed the discretion to dismiss sentence enhancements in the interest of justice. SB 81 (2021 Skinner), implementing a Penal Code Committee recommendation, specified a list of mitigating circumstances to guide judges when exercising this discretion. But – contrary to the Committee’s original recommendation – courts have held that the changes made by SB 81 do not apply to people sentenced under the Three Strikes law, which excludes a significant group of people facing long sentences that may not improve public safety.

The Committee therefore recommends the following:

Clarify that the guidance created in SB 81 applies to a court’s dismissal of a prior strike at sentencing.

Relevant Statutes

Penal Code § 1385

Background and Analysis

In its 2020 Annual Report, the Committee recommended that the Penal Code should provide guidance to judges on how to exercise their long-standing authority to dismiss sentencing enhancements. But even though that recommendation became law in 2022, courts have decided it does not apply to the most common sentencing enhancement – prior strike convictions.

The Committee's recommendation became law via SB 81, a bill authored by Committee member Senator Nancy Skinner that updated Penal Code § 1385.¹³¹ Following SB 81, judges now had statutory guidance for how to exercise this discretion in the form of nine mitigating circumstances, including that the current offense is connected to mental illness or that the current offense is not a violent felony.¹³² The presence of any of these circumstances “weighs greatly in favor of dismissing the enhancement” unless the court finds that “dismissal of the enhancement would endanger public safety.”¹³³

¹³¹ Penal Code § 1385(c)(1); see generally *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996).

¹³² Penal Code § 1385(c)(2)(D) & (F).

¹³³ Penal Code § 1385(c)(2). The law further specifies that “‘Endanger public safety’ means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.” Penal Code § 1385(c)(2).

Practitioners reported to the Committee that SB 81 and other recent sentencing reform have resulted in an increase in judges using their discretion to dismiss enhancements.¹³⁴ But appellate courts have decided that SB 81 does not apply to prior strike convictions, which can double sentences for new convictions and, in some circumstances, result in a life sentence. Courts have excluded strikes from SB 81’s coverage on technical grounds by concluding that strikes are an “alternative sentencing scheme and not a sentencing enhancement.”¹³⁵

The Committee now recommends that strike enhancements be treated like all other enhancements for purposes of SB 81’s changes. There is no rational reason to treat prior strikes differently from other sentencing enhancements and the Committee’s 2020 report did not make such a distinction.¹³⁶ Strikes are the most common sentencing enhancement in California and people sentenced under the Three Strikes Law are also more likely to be people of color and more likely to suffer from a mental illness.¹³⁷

By excluding prior strike enhancements from the reforms of SB 81, the state curtails judicial discretion for a large demographic of people serving lengthy and disparate sentences, and for a large group of people for whom the mitigating circumstances likely apply. As SB 81 currently provides, judges would retain the discretion to determine whether those mitigating circumstances apply and could still impose strike enhancements if justified by public safety.

Empirical Research

In September 2023, approximately 28% of people in prison were serving a sentence enhanced by the Three Strikes Law with 23% (around 21,600 individuals) serving a term enhanced by a second strike and 5% (around 5,200 individuals) serving a term enhanced by a third strike.¹³⁸ And from 2015 to 2021, nearly 65% of people admitted to prison to serve a term enhanced by a second strike had been convicted of a non-violent, non-serious offense.¹³⁹ People of

¹³⁴ Committee on Revision of the Penal Code, Meeting on March 17, 2023, Part 2, 0:08:24–0:09:50.

¹³⁵ *People v. Burke*, 89 Cal.App.5th 237, 244 (Third Appellate District 2023); *People v. Hempstead*, 2023 WL 3141009, *5 (Third Appellate District April 8, 2023); *People v. Oliveros*, 2023 WL 3108542, *9 (Fourth Appellate District, April 27, 2023); *People v. Pimentel*, 2023 WL 3220922, *3–*5 (Sixth Appellate District May 3, 2023); *People v. Poliquin*, 2023 WL 3367690, *3 (Third Appellate District May 11, 2023); *People v. Gomez*, 2023 WL 3402597, *3–*5 (Sixth Appellate District May 12, 2023); *People v. Gray*, 2023 WL 3593929, *2 (Third Appellate District May 23, 2023); *People v. Scott*, 2023 WL 3833259, *1–*3 (Fourth Appellate District June 6, 2023).

¹³⁶ See Committee on Revision of the Penal Code, 2020 Annual Report and Recommendations, 37–42; see also *Burke*, 89 Cal.App.5th at 243, n. 3 (noting that the 2020 Report “did not distinguish strikes from enhancements and did not exclude them from its recommendation”).

¹³⁷ Mia Bird et al, *Three Strikes in California*, California Policy Lab, August 2022, 27.

¹³⁸ *Id.* at 13.

¹³⁹ *Id.* at 14.

color, particularly Black people, are overrepresented among people serving these sentences.¹⁴⁰

As the Committee has repeatedly noted, there is a broad consensus among academic studies of decades of nationwide crime and incarceration data concluding that long sentences have little or no public safety value.¹⁴¹

¹⁴⁰ *Id.* at 27.

¹⁴¹ See, e.g., Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 222 (2013). See also National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press, 134-140 (2014).

7. Focus Welfare Fraud Prosecutions on the Most Serious Cases

Recommendation

Welfare fraud prosecutions in the criminal legal system have concerning race and gender disparities, with women of color making up more than 50% of convictions over a 10-year span. Criminal prosecution in these cases is often not needed as there is already an administrative process that can require the return of funds and even lifetime bans on receiving future benefits.

The Committee therefore recommends the following:

1. Without changing current law in the following cases, continue to allow criminal prosecutions for welfare fraud regardless of the monetary amount:
 - *Multiple counties*: intentionally and unlawfully receiving benefits in more than one county;
 - *Stolen or fake identities*: intentionally receiving benefits using a fictitious identity;
 - *Trafficking*: using, selling, or transferring benefits unlawfully;
2. In cases involving a person's misrepresentation of income that results in an overpayment, require at least \$25,000 in excess benefits before criminal prosecution is permissible. Current law allows misdemeanor prosecutions at any dollar amount and allows felony prosecutions at \$950 in excess benefits.

Relevant Statutes

Welfare and Institutions Code § 10980
7 Code of Federal Regulations § 273.16(a)

Background and Analysis

California's public assistance programs, including CalWorks and CalFresh, serve millions of people every year and are important tools in fighting poverty.¹⁴² About 5 million Californians live in poverty and that number is on the rise since pandemic era relief programs have ended.¹⁴³ In 2023, more than 3 million more

¹⁴² California counties are also required to operate a program of General Assistance or General Relief for indigent people residing in the county who are not eligible for other programs. See Welfare and Institutions Code § 17000 et seq.

¹⁴³ Caroline Danielson et al., *Poverty in California*, Public Policy Institute of California (October 2023).

people would have been in poverty without California’s safety net programs.¹⁴⁴ Given the importance of these programs to so many Californians, fraud — when a person makes false statements or fails to report important information in order to receive benefits to which they are not entitled to¹⁴⁵ — is unacceptable.

Fraud by a recipient of benefits occurs in an exceedingly small number of cases.¹⁴⁶ As explained by Kimberly Brauer, Section Chief for the California Department of Social Services Data Stewardship and Integrity Bureau, people having their benefits stolen from them is more common.¹⁴⁷

Although prosecutions for welfare fraud make up a relatively small part of California’s criminal justice system, they have significant consequences for the thousands of people who enter the system because of an accusation that they committed fraud.¹⁴⁸

Over a 10-year span from 2012–2021, there were approximately 24,000 arrests and 11,000 convictions for welfare fraud in California. In recent years, most convictions are for misdemeanors, but felony convictions are available if the amount of excess benefits received is at least \$950.¹⁴⁹ The vast majority (80%) of people convicted for welfare fraud do not have any prior convictions during this time period.¹⁵⁰ Importantly, welfare fraud is prosecuted under different statutes than unemployment fraud,¹⁵¹ which surged during the COVID-19 pandemic.¹⁵²

¹⁴⁴ *Id.*

¹⁴⁵ Welfare and Institutions Code § 10980.

¹⁴⁶ Between October and December 2019, there were less than 75,000 fraud investigations pending or concluded out of over 4 million people receiving CalFresh benefits, and less than 700 of those investigations led to a referral to an administrative disqualification hearing or criminal prosecution. Department of Social Services, *Public Assistance Facts and Figures Report*. See also Department of Social Services, *Fraud Investigation Activity Report, Federal Fiscal Year 2019–20*.

¹⁴⁷ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 2 of 4, 0:13:32–0:16:54.

¹⁴⁸ “Welfare” is a blanket term for a variety of government-funded programs that provide financial and other types of aid to individuals and families but the term is increasingly outdated due to the negative implications it has developed, as discussed below. See Language, Please, *Welfare*; Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *Journal of Criminal Law and Criminology* 643, 644 (2009).

¹⁴⁹ California Policy Lab analysis of the California Department of Justice Automated Criminal History System (ACHS) data. See also Welfare and Institutions Code § 10980(c)(2).

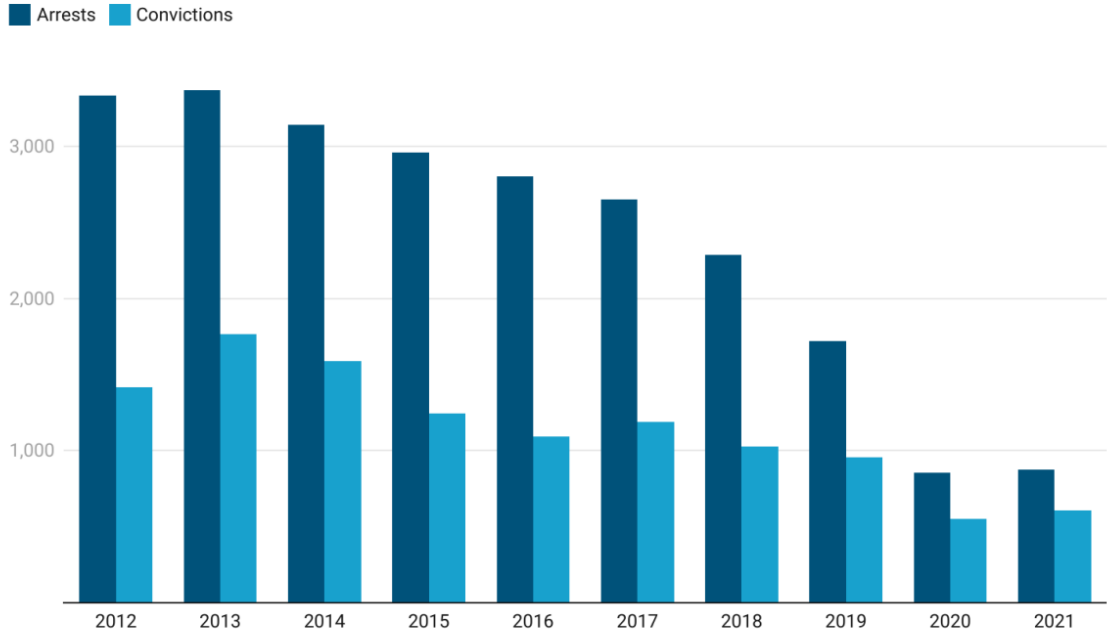
¹⁵⁰ California Policy Lab analysis of the California Department of Justice Automated Criminal History System (ACHS) data. Analysis of criminal history includes any conviction in California between January 1, 2012 and the date of the conviction in the welfare fraud case.

¹⁵¹ Unemployment Insurance Code § 2101.

¹⁵² See Eric Westervelt, *Pandemic-Related Fraud Totaled Billions. California is Trying to Get Some of it Back*, National Public Radio (October 18, 2022).

Annual welfare fraud arrests and convictions, 2012–2021

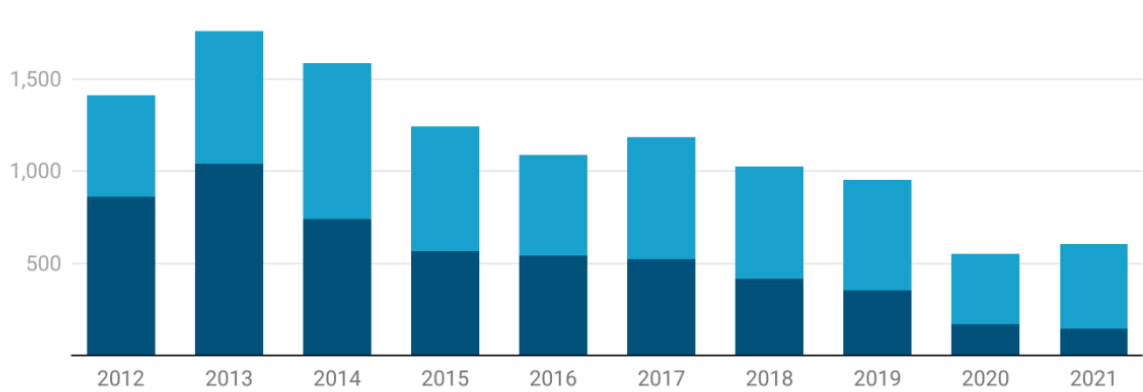
Misdemeanors and felonies combined.



Source: DOJ ACHS • Created with Datawrapper

Annual welfare fraud convictions, 2012–2021

Felonies Misdemeanors

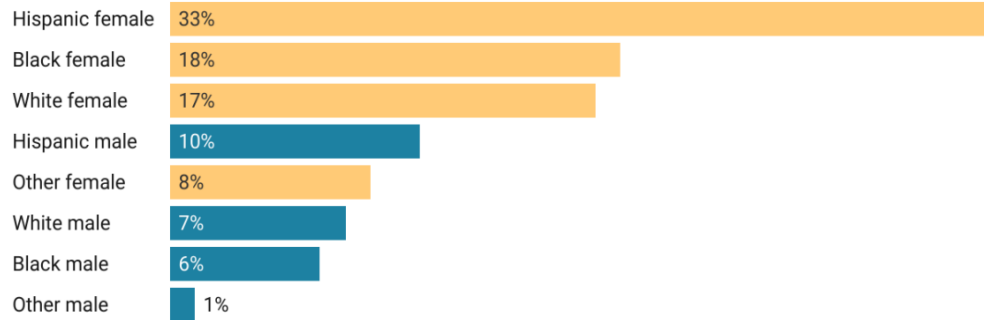


Source: DOJ ACHS • Created with Datawrapper

Like many other aspects of the criminal legal system, prosecutions for welfare fraud have a sordid racial history that includes the widespread stereotype that

low-income women of color take advantage of the public benefits system.¹⁵³ The most recent data shows alarming race and gender disparities: women comprise 75% of arrests and convictions, and Black and Hispanic women account for over 50% of all arrests and convictions combined.

Demographics of welfare fraud convictions, 2012–2021



Includes both misdemeanor and felony convictions.

Source: DOJ ACHS • Created with Datawrapper

While the total number of arrests and convictions for welfare fraud have been declining for several years, racial disparities have persisted in many counties.¹⁵⁴

¹⁵³ The “welfare queen” caricature — one promoted by former California Governor (and later President) Ronald Reagan was politicized to promote ideas about government waste and crime control. Over time, these racialized concerns led to more stringent income verification requirements, heightened scrutiny of administrative records, and increased administrative and criminal penalties. See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *Journal of Criminal Law and Criminology* 643, 648–64 (2009).

¹⁵⁴ *Id.*

Welfare fraud convictions by demographic, 2012–2016 vs. 2017–2021

County	2012-2016 Convictions	2012-2016 Of convictions, % nonwhite	2017-2021 Convictions	2017-2021 Of convictions, % nonwhite
El Dorado	143	21%	53	25%
Fresno	377	81%	148	86%
Kern	514	76%	145	82%
Los Angeles	1397	92%	187	92%
Placer	217	31%	39	33%
Riverside	982	80%	224	79%
San Bernardino	500	81%	560	82%
San Joaquin	86	66%	224	79%
Santa Barbara	167	74%	68	78%
Sonoma	50	42%	57	51%
Tulare	432	77%	56	79%

Note: These 11 counties are the only ones that had sufficient convictions in both time periods to allow comparison.

California’s welfare fraud statute, Welfare and Institutions Code section 10980, covers a wide range of fraudulent conduct, including committing fraud by making multiple applications or using a false identity.¹⁵⁵ But the vast majority of arrests (89%) and convictions (92%) for welfare fraud stem from allegations that a person made false statements or failed to disclose an important fact.¹⁵⁶

Still, California takes great steps to prevent and detect recipient fraud in its public benefit programs. Under the oversight of the California Department of Social Services, each county maintains a fraud investigation unit staffed with law enforcement officers.¹⁵⁷ State and local hotlines specifically dedicated to welfare fraud allow anyone to report suspected fraud to law enforcement. The state and counties also implement the federally-mandated Income and Eligibility Verification System — a data exchange system that uses various databases to track earnings and benefits.¹⁵⁸

¹⁵⁵ Welfare and Institutions Code § 10980.

¹⁵⁶ California Policy Lab analysis of ACHS data.

¹⁵⁷ California Department of Social Services Manual of Policies and Procedures § 20-005.21.

¹⁵⁸ 7 Code of Federal Regulations § 273.2(f)(9).

While federal law requires that states take steps to prevent fraud and address it when it is discovered, states are given the discretion to decide whether to handle cases of suspected fraud through either a criminal or administrative process.¹⁵⁹ The administrative process carries significant consequences: findings of fraud can result in orders to repay excess benefits, the suspension of benefits, or lifetime bans from receiving assistance.¹⁶⁰

The consequences of the criminal process are more severe because, in addition to repaying or being suspended from receiving benefits, convictions can result in incarceration, loss of employment and housing, severe immigration consequences, and court-ordered debt.¹⁶¹

At the Committee’s June 2023 meeting, Antionette Dozier, Senior Attorney at the Western Center on Law and Poverty, explained that the current criminal scheme unnecessarily criminalizes people who are unable to meet the demands of the cumbersome and rigorous reporting process within the public benefits system.¹⁶² In many cases, hardships related to the recipient’s poverty, disability, or language access can be reasons for noncompliance.¹⁶³

California state regulations direct county welfare departments to refer cases to the District Attorney when there is clear and convincing evidence that fraud occurred,¹⁶⁴ but there is a great deal of variation in whether criminal charges are brought because each District Attorney has a different monetary threshold for prosecuting fraud.¹⁶⁵ While some counties frequently prosecute these offenses, others almost never do. As shown in the table below, over a 5-year span between

¹⁵⁹ 7 Code of Federal Regulations § 273.16(a).

¹⁶⁰ See California Department of Social Services Manual of Policies and Procedures §§ 20-300.3, 20-353.

¹⁶¹ Council of Economic Advisors, *Economic Perspectives on Incarceration and the Criminal Justice System*, Executive Office of the President of the United States (April 2016).

¹⁶² Committee on Revision of the Penal Code meeting on June 23, 2023, Part 2 of 4, 0:32:24–0:38:12. See also Lisa Newstrom and Ann Block, *No Crime to be Poor: Defending Welfare Fraud Allegations in Criminal, Administrative, and Immigration Proceedings*, Immigrant Legal Resource Center (October 2023).

¹⁶³ *Id.*

¹⁶⁴ California Department of Social Services Manual of Policies and Procedures § 20-300.21.

¹⁶⁵ See California State Auditor, *Department of Social Services: For the CalWorks and Food Stamp Programs, It Lacks Assessments of Cost-Effectiveness and Misses Opportunities to Improve Counties Antifraud Efforts* (November 2009) (finding that that counties had inconsistent prosecution thresholds and recommending that DSS work with counties to implement more consistent prosecution methods); California State Auditor, *Follow-Up — California Department of Social Services: It Has Not Corrected Previously Recognized Deficiencies in Its Oversight of Counties’ Antifraud Efforts for the CalWorks and CalFresh Programs* (June 2015) (finding that DSS had not taken action to implement previous recommendations). See also California Department of Social Services All County Letter 17-118.

2017–2021, several counties did not convict a single person for a welfare fraud offense.

Welfare fraud convictions by type, 2017–2021

County	No felony convictions	No misdemeanor convictions
Alpine	X	X
Calaveras	X	X
Del Norte		X
Inyo		X
Mariposa	X	
Modoc	X	X
Napa	X	X
Plumas	X	X
Sierra	X	X
Siskiyou	X	X
Trinity	X	X
Yuba		X
Total number of counties	9	11

There is also county variation in the number of people arrested. For example, while there were over 1,800 arrests for welfare fraud offenses in San Bernardino County between 2017–2021, there were 25 or less arrests per county in nearly half (28) of all counties during the same time period.¹⁶⁶

As explained to the Committee by Kamaria Henry, Managing Deputy District Attorney at the Riverside District Attorney’s Office, many prosecutors focus their attention on fraud that occurs over a long period of time and results in high monetary losses.¹⁶⁷ However, there is no statutory requirement for them to do so,¹⁶⁸ and according to John Martire, President of the California Welfare Fraud

¹⁶⁶ The 28 counties are: Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, Glenn, Inyo, Lake, Lassen, Madera, Marin, Mariposa, Mendocino, Merced, Modoc, Mono, Napa, Nevada, Plumas, San Benito, San Francisco, San Luis Obispo, Sierra, Siskiyou, Sutter, Trinity, Tuolumne.

¹⁶⁷ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 2 of 4, 0:28:45–0:30:23.

¹⁶⁸ See Welfare and Institutions Code § 10980.

Investigators Association, in some counties, the prosecutor-established threshold is as high as \$15,000, while in others it is \$3,000.¹⁶⁹

At the June 2023 Committee meeting, Andrea Brayboy, California Department of Social Services CalFresh and Nutrition Branch Chief, explained that \$950, the threshold for a felony prosecution, is just one month of benefits for some families.¹⁷⁰ In contrast to the low threshold for felony welfare fraud, a number of felony tax fraud crimes in California require losses amounting to \$25,000 or more to charge a felony.¹⁷¹ Adopting the same loss threshold for welfare fraud prosecutions would provide a more equitable approach to the criminal legal system and ensure consistency in the treatment of fraud offenses across different areas of the law.

The state should continue its efforts to prevent fraud, but the administrative process already in place is sufficient to handle almost all cases. Focusing welfare fraud prosecutions on the most serious cases, as specified above, can free up scarce criminal justice resources and improve confidence in our legal system.

Empirical Research

A recent report by the Public Policy Institute of California found that nearly 4 million more Californians would have been in poverty without safety net programs like CalFresh and CalWORKS.¹⁷² Other research suggests that providing people with public benefits may reduce criminal activity.¹⁷³ Despite these benefits, California's safety net programs are underutilized — only approximately 4.8 million of the 6.5 million people eligible for CalFresh

¹⁶⁹ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 2 of 4, 0:41:45—0:42:42.

¹⁷⁰ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 2 of 4, 1:10:35—1:11:23. See also Department of Social Services, *All County Information Notice No. 1-78-21* (indicating a maximum CalFresh benefit of \$992 per month for a family of 5). Fraudulently receiving over \$950 in benefits can be prosecuted as a misdemeanor or a felony but knowingly making more than one application for aid, or making an application for aid for a fictitious or nonexistent person is a felony regardless of the amount of loss. Welfare and Institutions Code § 10980.

¹⁷¹ See Revenue and Taxation Code §§ 7153.5, 9354.5, 30480, 40187, 41143.4, 60707.

¹⁷² Caroline Danielson, Patricia Malagon, and Sarah Bohn, *Poverty in California*, Public Policy Institute of California (October 2022).

¹⁷³ See Manasi Deshpande and Michael G. Mueller-Smith, *Does Welfare Prevent Crime? The Criminal Justice Outcomes of Youth Removed from SSI*, Working Paper 29800, National Bureau of Economic Research (February 2022) (finding that removing youth from the Supplemental Security Income (SSI) program at age 18 increased the number of criminal charges by 20% over 20 years, and the likelihood of incarceration by 60%.)

participate in the program each month, and only about 60% of families eligible for CalWORKS were enrolled in the program.¹⁷⁴

Other research from the Public Policy Institute of California shows that complicated and confusing reporting requirements cause more than a third of CalFresh recipients to drop out of the program after six months, when many people are still eligible for benefits.¹⁷⁵ Researchers suggest that efforts to automate income reporting would help reduce this drop-off, and such efforts could also reduce the need for criminal prosecutions.

¹⁷⁴ Caroline Danielson, Tess Thorman, and Patricia Malagon, *The Role of CalFresh in Stabilizing Family Incomes*, Public Policy Institute of California, 3 (September 2022). See also California Legislative Analyst's Office, *Estimating the CalWORKS Take-Up Rate* (February 2, 2021).

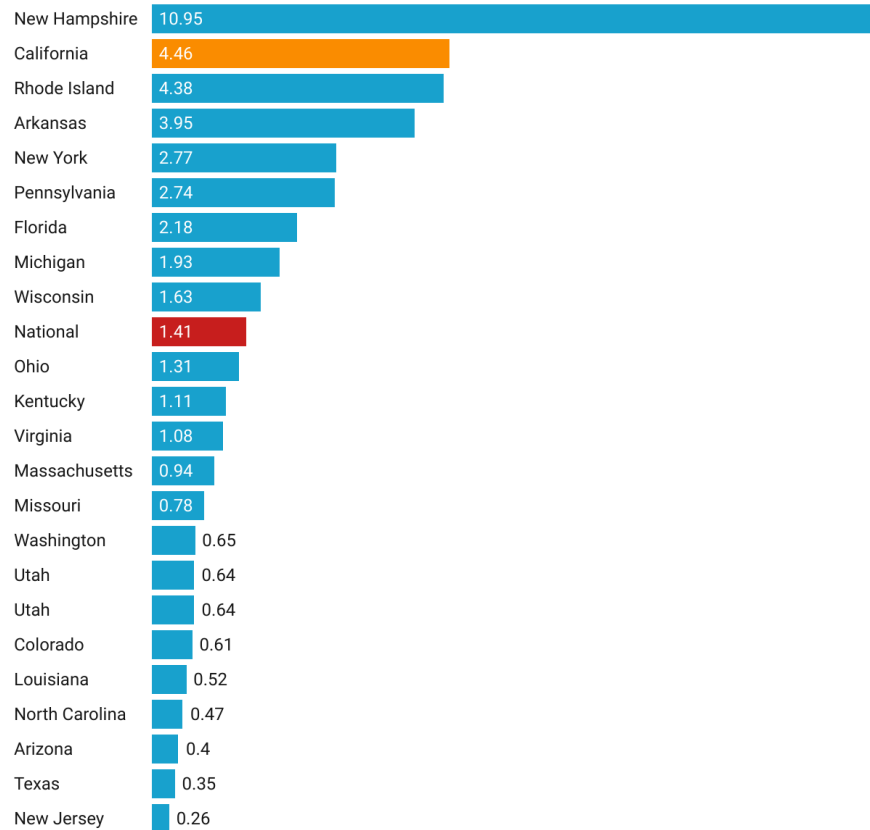
¹⁷⁵ Tess Thorman, Caroline Danielson, and Patricia Malagon, *Employment Patterns for CalFresh Adults*, Public Policy Institute of California (July 2022). See also Caroline Danielson, Tess Thorman, and Patricia Malagon, *The Role of CalFresh in Stabilizing Family Incomes*, Public Policy Institute of California, 3 (September 2022).

Insight from Other Jurisdictions

Data on state activity in the Supplemental Nutrition Assistance Program (called CalFresh in California) collected by the U.S. Department of Agriculture shows that California is an outlier among other states, even accounting for its large population, in the number of prosecutions it brings for welfare fraud, with a prosecution rate more than three times the national rate.¹⁷⁶

SNAP fraud prosecution rate (FY 2020)

Rate is per 100,000 population.



Prosecutions are convictions, signed disqualification consent agreements, and acquittals. States with less than 20 prosecutions excluded.

Source: Supplemental Nutrition Assistance Program State Activity Report, Fiscal Year 2020, Table 16; Census. • Created with Datawrapper

¹⁷⁶ Supplemental Nutrition Assistance Program State Activity Report, Fiscal Year 2020, 24, Table 16: SNAP Recipient Fraud Prosecution Activity – FY 2020 (March 2022).

8. Reduce the Scope of Criminal Fines and Fees

Recommendation

Criminal fines and related add-on fees have become part of every misdemeanor and felony conviction in the state but ordering people to pay amounts they cannot afford does not improve public safety.

The Committee therefore recommends the following:

1. Prohibit courts from imposing fines when a person is:
 - Convicted of a misdemeanor or felony; and
 - Indigent as indicated by their receipt of public benefits, earning 125% or less of the federal poverty standard, or representation by a public defender;
2. In the remaining cases, require courts to conduct ability-to-pay determinations before imposing fines and to use their discretion to set fines in amounts compatible with a person's financial ability; and
3. Eliminate all add-on fees so that any fine ordered by a court reflects the full cost of what a person owes.

Relevant Statutes

Penal Code §§ 19, 672, 1202.4, 1464, 1465.7, 1465.8

Government Code §§ 70372, 76000, 76000.5, 76104.6, 76104.7

Background and Analysis

People convicted of criminal offenses are routinely required to pay fines and a dizzying variety of add-on charges (called fees, penalties, assessments, restitution orders, interest, and surcharges). However, many people ordered to pay are unable to, and California's fine and fee system has resulted in billions of dollars of unpaid debt which the state and counties struggle to collect.¹⁷⁷

Additionally, research has shown that the imposition of fines and fees amplifies race and wealth disparities in the criminal legal system while making no improvement to public safety.¹⁷⁸

In 2019, the Legislature took a major step towards rethinking the state's fines and fees system by passing a bill that would have required courts to determine

¹⁷⁷ *Report on Statewide Collection of Court-Ordered Debt for 2021–22*, Judicial Council of California, 5-13 (December 2022).

¹⁷⁸ Brittany Friedman et al., *What is Wrong With Monetary Sanctions? Directions for Policy, Practice, and Research*, *The Russell Sage Foundation Journal of the Social Sciences*, Vol. 8, Iss. 1 (January 1, 2022).

whether someone had the ability to pay a fine, fee, or assessment before they could be imposed.¹⁷⁹ But Governor Newsom vetoed the bill explaining that while California “must tackle the issue of burdensome fines, fees and assessments that disproportionately drag low-income individuals deeper into debt and away from full participation in their communities,” such reforms should be handled in the budget process.¹⁸⁰

In 2020 and 2021, the Legislature used the budget process to eliminate over 40 different add-on charges, resulting in nearly \$3 billion in dismissed or vacated criminal administrative fees.¹⁸¹ Despite these efforts, criminal fines and add-on charges remain a common feature of criminal sentencing, and people convicted of crimes are often ordered to pay amounts they cannot afford.

This court-ordered debt is used both to punish people convicted of crimes and to generate revenue for state and local public safety programs.¹⁸² Like many states, California requires courts to impose various add-on charges in addition to any fine that is imposed, significantly increasing the total amount of court-ordered debt.¹⁸³ For example, under current law, when a court orders a person to pay a base fine of \$500, the person will also be required to pay add-on fees including a \$500 state penalty assessment, a \$350 county penalty assessment, and a \$100 state surcharge, among others.¹⁸⁴ While many other states impose add-on fees, a 50-state survey of administrative fees conducted by the Fines and Fees Justice Center in 2022 found that California has among the highest fees in the country.¹⁸⁵

Unlike fines, which judges use their discretion to set within a range authorized by statute, judges do not have discretion to determine the amount of add-on

¹⁷⁹ AB 927 (2019 Jones-Sawyer).

¹⁸⁰ Governor Newsom veto message on AB 927 (October 9, 2019).

¹⁸¹ AB 1869 (2020 Committee on Budget); AB 177 (2021 Committee on Budget). See also *Report on Statewide Collection of Court-Ordered Debt for 2021–22*, Judicial Council of California, 10 (December 2022).

¹⁸² See Anjuli Verma and Bryan L. Sykes, *Beyond the Penal Code: The Legal Capacity of Monetary Sanctions in the Corpus of California Law*, *The Russell Sage Foundation Journal of the Social Sciences*, Vol. 8, Iss. 1, 36–62 (January 2022).

¹⁸³ Legislative Analyst’s Office, *Overview of State Criminal Fines and Fees and Probation Fees*, 3 (February 5, 2019) (finding that the total penalty for a stop sign violation had increased by 54% since 2005).

¹⁸⁴ See Penal Code §§ 1464, 1465.7; Government Code § 76000. The add-on charges listed here are the most widely applicable but there are also several offense-specific charges including an alcohol testing fee for DUI cases, and a seizure and disposition fee for drug manufacturing cases. See Penal Code § 1463.14(b) and Health and Safety Code § 11470.1. While many add-on charges are mandatory, some require the County Board of Supervisors approval to impose. See Gov’t Code § 76000.5.

¹⁸⁵ *Assessments & Surcharges: A 50-State Survey of Supplemental Fees*, Fines and Fees Justice Center (December 2022).

charges. At the Committee's June 2023 meeting, Lisa Foster, a former California Superior Court Judge and current Co-Executive Director of the Fines and Fees Justice Center explained that California's current system of add-on charges creates a tax system that only applies to the most marginalized groups in society.¹⁸⁶

Research has shown that Black and Latinx people are more likely to be arrested and incarcerated than white people¹⁸⁷ — making it more likely that they will be subject to court-ordered debt. And while wealthier people are able to quickly pay their debts and fulfill their sentences, low-income people, who are disproportionately people of color and immigrants, are subjected to continued legal involvement and additional sanctions for failure to pay.¹⁸⁸

California has taken several significant steps to address this disproportionate impact, including mandating ability-to-pay determinations in infraction cases, the lowest level of criminal offense and largely consisting of traffic tickets.¹⁸⁹ Courts are advised to consider factors such as whether a person receives public benefits, whether their income is 125% or less of federal poverty guidelines, and to use their discretion to issue fines in amounts that are reasonable and compatible with the person's financial ability.¹⁹⁰ Early results presented to the Committee at its June 2023 meeting by the Judicial Council demonstrated that setting fines and fees at amounts people can afford resulted in increased repayment rates and revenue.¹⁹¹

¹⁸⁶ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 3 of 4, 0:50:38—0:54:09. See also Written Submission of Lisa Foster to Committee on Revision of the Penal Code, June 23, 2023.

¹⁸⁷ See Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, *Nature and Human Behavior*, Vol. 4 (2020) (finding that Black and Latinx drivers were more likely to be arrested during traffic stops — the most common point of contact between civilians and police). See also, Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons* (October 13, 2021) (finding that California is one of 9 states that maintain a Black/white disparity in incarceration rates larger than 9 to 1).

¹⁸⁸ See Lindsay Bing, Becky Pettit, Ilya Slavinski, *Incomparable Punishments: How Economic Inequality Contributes to the Disparate Impact of Legal Fines and Fees*, *The Russell Sage Foundation Journal of the Social Sciences*, Vol. 8, Iss. 1 (January 1, 2022). See also Amairini Sanchez et al., *Punishing Immigrants: The Consequences of Monetary Sanctions in the Cimmigration System*, *The Russell Sage Foundation Journal of the Social Sciences*, Vol. 8, Iss. 1 (January 1, 2022).

¹⁸⁹ California Rules of Court Rule 4.335. Infractions are offenses for which the only authorized punishment is a fine. Penal Code § 19.6.

¹⁹⁰ California Rules of Court Rule 4.335 Advisory Committee Comment.

¹⁹¹ See *Report to the Legislature: Online Infraction Adjudication and Ability-to-Pay Determinations*, Judicial Council of California, 9 (February 2023).

In addition to the infraction fine reforms, in the 2022–23 budget, the restitution fund fine (which ranges from \$150 to \$10,000) was earmarked for elimination in 2024, subject to future budget appropriations.¹⁹²

Despite these reforms, current law — which is in flux as appellate courts have reached conflicting results on whether judges must consider someone’s ability-to-pay before imposing certain add-on charges¹⁹³ — still allows courts to sentence people convicted of misdemeanors and felonies to pay fines and fees without considering their ability to pay.¹⁹⁴ Judges can sentence people to pay fines and add-on fees even when their likelihood of paying the debt is unrealistic because criminal convictions reduce employment and earnings,¹⁹⁵ and often also include incarceration.

At the June 2023 meeting, Anita Lee, Senior Fiscal Policy Analyst at the California Legislative Analyst’s Office, emphasized the need for the Legislature to continue to improve the criminal fines and fee system.¹⁹⁶ Among other recommendations, the Legislative Analyst’s Office recommends that the Legislature reevaluate the goals of the system and consider whether and how ability-to-pay should be incorporated into it.¹⁹⁷ Notably, the LAO also recommends that the state consolidate most fines and add-on charges into a single statewide charge while taking steps to address the fiscal impact that eliminating fees could have on local governments.¹⁹⁸

The Committee concurs with the recommendations of the Legislative Analyst’s Office. Expanding ability-to-pay reforms to misdemeanor and felony cases and eliminating add-on fees would make California’s system more equitable and efficient.

Empirical Research

Requiring people convicted of crimes to pay money has little on recidivism or may increase it. A recent multi-state analysis found no evidence that imposing

¹⁹² SB 189 (Committee on Budget and Fiscal Review), Section 77. Though prioritized for funding in 2024-25, the elimination of the restitution fund fine is not automatic and requires additional legislation to be implemented.

¹⁹³ *People v. Dueñas*, 30 Cal.App.5th 1157. See also *People v. Hicks*, 40 Cal.App.5th 320 (2019) (review granted); *People v. Kopp*, 38 Cal.App.5th 47 (2019) (review granted).

¹⁹⁴ Penal Code §§ 19, 672, 1202.4, 1464, 1465.7, 1465.8. See also Gov’t Code §§ 70372, 76000, 76000.5, 76104.6, 76104.7.

¹⁹⁵ See Michael D. Tanner, *Poverty and Criminal Justice Reform*, Cato Institute, 2 (October 2021).

¹⁹⁶ Committee on Revision of the Penal Code meeting on June 23, 2023, Part 3 of 4, 0:01:14–0:09:54.

¹⁹⁷ See Submission of Anita Lee to Committee on Revision of the Penal Code for Meeting on June 23, 2023.

¹⁹⁸ *Id.*

finances and fees deterred crime but that fines and fees were concentrated on those less likely to pay, placing them at higher risk of other negative outcomes such as arrest warrants and additional fines.¹⁹⁹ Studies conducted in Florida, Oklahoma, and Pennsylvania have reached similar conclusions.²⁰⁰

Data from the Judicial Council of California shows that 33% of fines and fees, which includes those issued in infraction cases, are in default and counties spend a substantial sum — up to 40% of the money they eventually recover — on debt collection.²⁰¹ Counties also designate hundreds of millions of dollars in debt as uncollectable each year, which means they've given up on trying to recover it.²⁰²

In contrast, California's experience with ability-to-pay determinations in traffic cases has shown that ordering people to pay less can be a more effective and efficient means of collecting revenue. Analysis performed by the Judicial Council found that cases granted a reduction in the amount ordered to pay had a 61% success rate for full repayment while cases denied relief had a 29% success rate.²⁰³ Data also indicated that repayment success increases when litigants are ordered to pay less.²⁰⁴

Insight from Other Jurisdictions

In April 2023, the United States Department of Justice issued guidance to state and local courts cautioning that the imposition of fines and fees on individuals who cannot afford to pay them can erode trust in government, increase recidivism, undermine rehabilitation and reentry, and generate little or no net revenue.²⁰⁵

¹⁹⁹ Keith Finlay et al., *The Impact of Criminal Financial Sanctions: A Multi-State Analysis of Survey and Administrative Data*, NBER Working Paper No. w31581 (August 2023).

²⁰⁰ See Devah Pager et al., *Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment*, *American Sociological Review*, 87(3)(2022). See also Alex R. Piquero, Michael T. Baglivio, and Kevin T. Wolff, *A Statewide Analysis of the Impact of Restitution and Fees on Juvenile Recidivism in Florida Across Race & Ethnicity*, *Youth Violence and Juvenile Justice* 0(0) (2023); Alex Piquero and Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, *Youth Violence and Juvenile Justice*, 15(3), 235–340 (2017).

²⁰¹ Report on Statewide Collection of Court-Ordered Debt for 2021–22, Judicial Council of California, 9, 14, Chart 7 (December 2022).

²⁰² *Id.* at 11–12, Chart 9. In 2021–22, court and county collections programs discharged over \$230 million in uncollectable debt.

²⁰³ *Report to the Legislature: Online Infraction Adjudication and Ability-to-Pay Determinations*, Judicial Council of California 4–5, Table 1 and Table 2.

²⁰⁴ *Id.* at 6, Figure 2.

²⁰⁵ U.S. Department of Justice, *Dear Colleague Letter* (April 2023).

Several state legislatures have made ability-to-pay considerations an explicit part of their fine and fee systems and taken steps to limit the application of add-on fees:

- 12 states require courts to conduct an ability to pay determination whenever they impose fines, fees, costs, surcharges or assessments.²⁰⁶
- 8 states have codified standards that trigger a presumption that a person is indigent and unable to pay fines, fees, costs, surcharges or assessments, in cases involving a violation of law.²⁰⁷ For example, Washington law specifies that people who receive public benefits, earn 125% or less of the federal poverty standard, or are represented by a public defender are presumed to be unable to pay discretionary fines.²⁰⁸
- 18 states ensure that all judges have discretion to waive or modify all fines, fees, costs, surcharges or assessments based on ability to pay, at imposition or at any point afterwards.²⁰⁹
- Other states have taken steps to limit the application of add-on fees. Recently passed legislation in Washington eliminated add-on charges that were previously required to be issued upon conviction.²¹⁰ Similarly, New Mexico recently abolished most criminal legal fees imposed as administrative costs to fund government programs.²¹¹ Many other states including Arizona, Illinois, Indiana, Montana, and Texas have passed laws eliminating court fees in juvenile cases.²¹²

²⁰⁶ The states are Arizona, Indiana Montana, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, Texas, Utah, and Washington. See National Center for Access to Justice, *Fines and Fees Data Set, Benchmark 5: Ability to Pay*.

²⁰⁷ The states are Connecticut, Florida, Georgia, Illinois, Kentucky, Mississippi, Rhode Island, and Washington. See National Center for Access to Justice, *Fines and Fees Data Set, Benchmark 8: Presumption of Indigence*.

²⁰⁸ See *State v. Blazina*, 182 Wash.2d 827 (holding that sentencing courts must make individualized inquiries into a person’s current and future ability to pay before imposing discretionary fines); RCW 10.101.160(3) (specifying that courts shall not order a person to pay costs if they are indigent); RCW 10.101.010(3) (defining indigency).

²⁰⁹ The states are Connecticut, Georgia, Hawaii, Illinois, Kentucky, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, West Virginia, and Wyoming. See National Center for Access to Justice, *Fines and Fees Data Set, Benchmark 9: Judicial Discretion to Waive or Modify Fines and Fees*.

²¹⁰ HB 1169 (Simmons 2023-2024 Regular Session).

²¹¹ HB 139 (Cadena 2023 Regular Session).

²¹² See Michael Friedrich, *States Across the Political Spectrum are Reforming Juvenile Court Fees*, Arnold Ventures (September 13, 2023).

9. Lessen Unfair Pressure to Plead Guilty

Recommendation

An overwhelming majority of criminal cases are resolved by plea bargaining. The severity of punishment in 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. Discrete changes to the Penal Code can address some of the more unfair aspects of the plea bargaining system.

The Committee therefore recommends the following:

- Allow courts to revisit pretrial detention whenever a prosecutor makes a plea offer.
- Add a presumption for probation to the default sentencing triad.
- Allow juries to consider lesser-related offenses for specified charges.
- Prohibit the use of the same fact for conviction of the offense and enhancement.

Relevant Statutes

Penal Code §§ 18(a); 245(a)(2); 1159; 1289; 12022.5

Background and Analysis

Trials in criminal cases are extremely rare in the United States.²¹³ Plea bargaining — when a defendant and prosecutor negotiate a guilty plea to specific charges and sentence instead of having a trial²¹⁴ — accounts for almost all convictions.

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 for Fiscal Year 2021–2022, 75% of dispositions of felony cases were guilty pleas, while around 20% were dismissals. Less than 3% were trials. But this system is one where prosecutors sometimes have an unfair advantage, with no benefit to public safety.

Defendants who plea bargain typically receive shorter sentences than people convicted at trial.²¹⁵ Several factors, including harsh sentencing laws and pretrial

²¹³ 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).

²¹⁴ See Penal Code § 1192.5.

²¹⁵ Shawn D. Bushway, Allison D. Redlich, & Robert J. Norris, *An Explicit Test of Plea Bargaining in the “Shadow of the Trial,”* *Criminology*, 52(4): 723-754 (2014).

incarceration, can make the risks of going to trial intolerable, giving the prosecutor significant power in plea bargaining.²¹⁶

As Professor Carissa Byrne Hessick told the Committee, “[P]retrial detention can ... exert a lot of pressure for people to plead guilty, especially if a guilty plea is going to get them out of detention.”²¹⁷ Professor Amy Lerman further explained that the emotional and financial hardships a person faces while incarcerated influences their decision making because people will do anything to avoid staying in jail.²¹⁸ And as the Committee explored last year, almost any period of pretrial detention is harmful to the incarcerated person and community.²¹⁹ Pretrial detention is often the single best predictor of case outcomes: it increases the likelihood of a conviction, the severity of conviction, and the length of a sentence. At the time, pretrial detention reduces future employment and access to social safety nets.²²⁰

The Committee recognizes, as this data and experience show, that guilty pleas are foundational to the functioning of the criminal legal system but present serious equity issues. Past efforts to ban the practice in California — specifically, a prohibition from 1982’s Proposition 8 on plea bargaining in cases where a serious felony was charged — have failed.²²¹ The goal of the recommendations that follow is to lessen some of the undue pressure to plead guilty in some cases,

²¹⁶ 2023 Plea Bargain Task Force Report, 16.

²¹⁷ Committee on Revision of the Penal Code, Meeting on October 2, 2023, Part 2 of 4, 0:07:15–0:07:27. See also 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).

²¹⁸ Committee Meeting on October 2, 2023, Part 2 of 4, 0:13:32–0:14:20.

²¹⁹ Committee on Revision of the Penal Code, 2022 Annual Report and Recommendations, 62.

²²⁰ Will Dobbie, Jacob Goldin, and Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, *American Economic Review* (2018), 108(2), 203–205.

²²¹ Shortly after the passage of Proposition 8 in 1982, which included among its provisions a prohibition on plea bargaining in certain cases, Penal Code § 1192.7(a), the California Department of Justice recognized that it only encouraged a shift of discretionary practices to different points in the system because “it is impossible to sharply limit the discretion available to legal actors.” 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). See also ABA 2023 Plea Bargain Task Force Report, 12.

including by limiting some of the uncertainty of what sentence a court may impose after trial:

- *Pretrial detention.* California law allows bail to be revisited — to both increase or reduce the amount — for “good cause,” which is not otherwise defined.²²² This law should be amended to specify that a presumption of good cause exists in the 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.
- *Presumptive probation.* A default sentencing triad of 16, 24, or 36 months applies to more than 70% of felony offenses defined in California law.²²³ While probation is often a permissible sentence for these offenses, the default triad should be updated so that probation is the presumptive sentence, unless the interests of justice require a sentence of incarceration. This would align the Penal Code with the reality that the most common disposition for felony offenses – even for violent crimes — is probation. A period of incarceration in a county jail would still remain as a possible condition of any probation term.²²⁴
- *Double-counting firearm use.* A common sentencing enhancement, personally using a firearm during a felony, can add 3, 4, or 10 years to a sentence. While it generally does *not* apply to offenses that necessarily require the use of a gun as an element of the underlying offense,²²⁵ it is permissible when someone is charged with assault with a firearm²²⁶ — even though the firearm is already an element of the offense.²²⁷ The 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

²²² Penal Code § 1289.

²²³ See Thomas M. Nosewicz and Molly Pickard, *Felony Offenses and Sentencing Triads in California*, California Policy Lab (October 2023).

²²⁴ Penal Code § 1203.1(a).

²²⁵ Penal Code § 12022.5.

²²⁶ Penal Code § 245(a)(2).

²²⁷ 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.*

a firearm had a sentence lengthened by this firearm enhancement.²²⁸ The state should repeal the exception that allows for this enhancement to be used in cases of assault with a firearm or, in the alternative, create guidance in Penal Code section 1385 for judges to dismiss enhancements in circumstances like these, where the same conduct is punished twice.

- *Lesser-related offenses.* 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.²²⁹ 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 even though the evidence shows a less serious offense. The Penal Code could allow defendants to request that a jury be instructed on lesser-related offenses when warranted by the evidence.²³⁰ 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.

The Committee’s recommendations are a starting place for improving the current system without attempting to uproot plea bargaining’s position in the core of the criminal legal system.

Empirical Research

Plea bargaining exacerbates racial disparities.²³¹ 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.²³²

People held in pretrial detention are more likely to plead guilty, to do so earlier in their case, and to receive longer sentences than those who were released. One study, using data from hundreds of thousands of misdemeanor cases in Harris

²²⁸ Mia Bird et al., *Sentence Enhancements in California*, California Policy, Table 12 (March 2023).

²²⁹ 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.

²³⁰ 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).

²³¹ 2023 ABA Plea Bargain Task Force Report, 6.

²³² 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).

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.²³³

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.²³⁴ 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.²³⁵ 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.²³⁶

Insights from Other Jurisdictions

Many countries, including Germany, Italy, and Spain, do not rely on plea bargaining to the extent the United States does.²³⁷ In these jurisdictions, prosecutors are subject to tighter bureaucratic controls, including training, articulated standards and guidelines that dictate the sentencing discount, and robust internal review.²³⁸ Criminal law in other countries also provides for less severe penalties than the United States, confining prosecutors within narrower bounds of potential sentences in plea bargaining.²³⁹

While in most states defendants are entitled to jury instructions only on lesser-included offenses,²⁴⁰ in at least 4 states – Colorado, Hawaii, Michigan, and Montana – instructions on lesser-related offenses or their equivalent may be required in some circumstances.²⁴¹ In these states, courts generally require that the evidence at trial establish the elements of the lesser-related offense.²⁴² And

²³³ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stanford Law Review* 711, 747 (March 2017).

²³⁴ The National Registry of Exonerations, *2022 Annual Report*, (May 8, 2023), 11.

²³⁵ 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.

²³⁶ *Id.*

²³⁷ Fair Trials, *Efficiency Over Justice: Insights Into Trial Waiver Systems in Europe*, (Dec. 2021), 8.

²³⁸ Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 *Crime & Justice* 395, 402 (2017).

²³⁹ *Id.*

²⁴⁰ See 50 A.L.R. 4th 1081.

²⁴¹ *People v. Rivera*, 186 Colo.24, 28 (1974); *State v. Kupau*, 63 Haw. 1 (1980). See also HRS s 701-109(4); *People v. Richardson*, 409 Mich. 126, 135–38 (1980); *State v. Gopher*, 194 Mont.227, 230–31 (1981).

²⁴² *Id.*

in at least one state, Colorado, jury instructions for a lesser-related offense may be requested by the defendant.²⁴³

Other states, such as Kansas, Kentucky, New Jersey, and North Dakota, provide that the presumptive sentence for certain low-level felonies is probation.²⁴⁴ Some states allow courts to impose a sentence of incarceration if specific aggravating factors are present to justify departing from probation.²⁴⁵

²⁴³ *People v. Rivera*, 186 Colo.24, 28 (1974).

²⁴⁴ See e.g. K.S.A. 21-6604(a)(3) (Kansas); K.R.S. 218A.135 (Kentucky); N.J.S.A. 2C:44-1e (New Jersey); N.D., Cent. Code § 12.1-32-07.4 (North Dakota).

²⁴⁵ See e.g., N.D. Cent. Code § 12.1-32-07.4.

10. Use Financial Incentives to Safely Reduce Short Prison Stays

Recommendation

California has a long history of successfully using financial incentives to shape decisions by local officials and has used these policies to safely reduce admissions to prison.

The Committee therefore recommends the following:

Use financial incentives to reward counties that reduce the number of people they send to prison that stay for less than 1 year.

Relevant Statutes

Penal Code §§ 1228–1233.12; Welfare & Institutions Code § 4336

Background and Analysis

For many years, California has used financial incentives to encourage county decision-makers to safely reduce how many people are sent to state prison. These policies are all based on the recognition that county decision-makers may have been using state resources without a full appreciation of their costs and that other solutions can be more effective at improving public safety.

This policy approach can be applied to an area of recurring interest to the Committee – the large number of people sentenced to prison who only serve a short period of time there. Each year, around 14,000 people are sent to CDCR and released after less than a year, once time served in county jail and good conduct credits are accounted for. These short stays are costly, in part because intake procedures to assign a classification score and assess medical and mental health needs must be performed on each new admission. But there is often little opportunity for rehabilitative programming to be completed because of the short length of stay. And research on California’s system has shown that sentences to state prison have worse recidivism outcomes compared to jail and probation.

For all these reasons, the Committee repeats the recommendation in its 2020 Annual Report that people who would be in prison for less than a year should remain in county jail. To facilitate this change, the state should give counties a portion of the savings to the state from the reduced admissions to prison.

California has used this approach to achieve similar policy goals in the past without impacting public safety:

- *Juvenile charge-back.* In 1996, SB 681 (Hurt) shifted a larger share of the cost of incarcerating juveniles onto counties. The cost to counties ranged from \$150 to \$2,600 a month (\$300 to \$5,220 in today's dollars) and depended on the seriousness of the offense.²⁴⁶

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.²⁴⁷ Juvenile crime continued to drop after the policy change.²⁴⁸

- *SB 678.* 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. In the first two years of the program from 2011 to 2013, a county generally received \$11,600 to \$13,050 (\$15,800 to \$17,800 in today's dollars) for each less person sent to prison from probation compared to a baseline.²⁴⁹

SB 678 reduced revocations by more than 30% after its first two years, reduced the prison population by more than 6,000 after the first year, and reduced state prison spending by over \$1 billion since implementation, all without increases in crime rates.²⁵⁰

- *Public Safety Realignment.* 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

²⁴⁶ Aurélie Ouss, *Misaligned Incentives and the Scale of Incarceration in the United States*, 191 *Journal of Public Economics*, 2 (2020); the amounts adjusted for 2023 dollars were calculated based on the average Consumer Price Index (CPI) data.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Orlando Sanchez Zavala, *Achieving the Goals of the SB 678 County Probation Grant Program*, California Legislative Analyst's Office, 10 (October 2023). Counties received either 40% or 45% of the savings the state estimated were produced by each less revocation to prison, including typical prison and supervision costs.

²⁵⁰ Mia Bird and 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). The Legislative Analyst's Office recently released a report questioning whether SB 678 should be updated to reflect the current context for community corrections; the report noted that the early years of the program "effectively achieve[d] its various goals." Zavala, *Achieving the Goals of the SB 678 County Probation Grant Program* at 14.

county probation departments.²⁵¹ This shift in responsibility from the state to counties was accompanied by funding, including financial incentives to reduce the number of people with a prior strike conviction sent to prison — \$27,309 a person.²⁵² Realignment resulted in a significant reduction in the prison population without a corresponding increase in the jail population and without substantial impacts to public safety.²⁵³

- *State hospital admissions.* 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.²⁵⁴

To give counties flexibility to meet the goal of reducing short prison stays, the Penal Code should be updated to allow a decision-maker — either the sentencing judge or probation department — to designate county jail as where someone will serve their time if they are expected to serve a year or less in CDCR.²⁵⁵

County incentives are a proven policy that can be used to reduce incarceration without impacts to public safety, and the state should use this tool to limit short stays in prison.

Empirical Research

From 2015 to 2022, 39% of people released from CDCR had been there for less than a year — almost 114,000 people. More than 44,000 of these people had been at CDCR for six months or less.

A study of data from 12 California counties showed that people with similar demographics and criminal histories were less likely to be reconvicted of new

²⁵¹ See Magnus Lofstrom and Brandon Martin, *Public Safety Realignment: Impacts So Far*, Public Policy Institute of California, 2 (September 2015).

²⁵² See Final Recommendation of Realignment Allocation Committee (October 2014).

²⁵³ Magnus Lofstrom, Mia Bird, and 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).

²⁵⁴ Welfare & Institutions Code § 4336.

²⁵⁵ People who have a prior strike conviction are currently required to be sentenced to state prison, a provision created by Proposition 184 in 1995, the Three Strikes law. Penal Code § 1170.12(a)(4). Modifying this policy may require a ⅔ vote in the Legislature because it was created by a voter initiative, but only a small portion (around 10%) of people who stay at CDCR less than a year have a prior strike conviction.

offenses if they were sentenced to county jail or probation instead of state prison.²⁵⁶

Other research has shown that financial incentives can shape discretionary decisions in the criminal legal system: in a survey of 178 prosecutors, those who were told about how much a sentence of incarceration would cost recommended prison sentences 33% shorter than prosecutors who were not told this information.²⁵⁷

Insights from Other Jurisdictions

California is a national leader in this type of policy, but other states have taken similar steps:

- RECLAIM Ohio incentivizes juvenile courts to use community-based options for rehabilitation, diverting youth away from state and community corrections stays. The more youth that are diverted away from custodial stays, the more money a juvenile court receives. As a result, more youth are being served locally – the population dropped from a high of 2,600 in 1992 to 375 youth in 2020.²⁵⁸
- Adult Redeploy Illinois provides financial incentives to counties for programs that allow diversion of people from state prisons into community-based programs. Programs are rigorously evaluated and have resulted in reduced prison admissions and lower costs.²⁵⁹ In 2021, the average intervention through the program cost \$4,400 per person, compared to per capita cost in state prison of \$43,400.²⁶⁰
- Like California, Wisconsin has also incentivized treatment of youth in the community. Since the 1990s, the state has provided each county with

²⁵⁶ Mia Bird, Viet Nguyn and Ryken Grattet, *Recidivism Outcomes Under a Shifting Continuum of Control*, *American Journal of Criminal Justice*, 48, 808–829 (2023). The 12 counties covered about 60% of the state population and were Alameda, Contra Costa, Humboldt, Fresno, Kern, Los Angeles, Orange, Sacramento, San Bernardino, San Francisco, Shasta, and Stanislaus. The research also compared recidivism across three high-volume offenses – car theft, burglary, and drug possession – and found lower reconviction rates for probation sentences for all three offenses compared to prison. For jail sentences, car theft and drug possession had lower reconviction rates than prison sentences, but burglary had a higher reconviction rate with a jail sentence than a prison sentence.

²⁵⁷ Eyal Aharoni, Heather M. Kleider-Offut, and Sarah F. Brosnan, *Correctional “Free Lunch”? Cost Neglect Increases Punishment in Prosecutors*, *Frontiers in Psychology*, November 12, 2021.

²⁵⁸ Melissa W. Burek et al, *RECLAIM Ohio Initiative’s Effect on Public Safety Report*, Ohio Department of Youth Services, (December 2022).

²⁵⁹ Adult Redeploy Illinois, *State Fiscal Year 2021: Annual Report*, Illinois Criminal Justice Information Authority (December 2022).

²⁶⁰ *Id.* at 4.

funding to pay for services, programs, and placements. Counties are then charged the full cost of each youth placed in state correctional institutions – except for serious offenses— eliminating the financial incentive to place young people in state custody.²⁶¹

Additional Considerations

- Any incentive program must ensure that it does not reward the wrong behavior. For example, a county should not be rewarded for sending a smaller percentage of its convictions to state prison for less than a year because it lengthened sentences or expanded the pool of people it was prosecuting. To avoid these perverse incentives, the program should be carefully tuned to a baseline that would not allow for gaming the system.
- Money awarded under an incentive program should be limited on what it can be spent on – in particular, it should be spent on diversion and other non-incarceratory programs.
- As the Committee has noted in the past, conditions in many county jails are constitutionally inadequate, with serious harm to the safety and health of people incarcerated there.²⁶² Counties must improve the conditions of their jails – as well as offering meaningful rehabilitative programming – in order to maximize the benefits of this proposal.

²⁶¹ Wisconsin Legislative Fiscal Bureau, 2021-2023 Budget Summary, *Paper #220: Youth Aids Allocations*, 1 June 2021.

²⁶² See, e.g., Bob Egelko, *Judge: S.F. must allow people held in San Bruno jail time outdoors, judge rules* *San Francisco Chronicle*, October 17, 2023; Alameda County Grand Jury, 2021–2022 Alameda County Grand Jury Final Report, 77–112; Christian Martinez, *L.A. County and ACLU Reach “extraordinary” agreement to address jail conditions*, *Los Angeles Times*, June 17, 2023.

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.²⁶³

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 Committee and the Commission. By law, no person can serve on both the Commission and the Committee simultaneously.²⁶⁴ Neither body has any authority over the substantive work of the other²⁶⁵ and they each have different statutory duties.²⁶⁶

The Committee consists of 7 members. Five are appointed by the Governor for 4-year terms.²⁶⁷ One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules.²⁶⁸ The Governor selects the Committee's chair.²⁶⁹

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.²⁷⁰

²⁶³ Government Code § 8280(b).

²⁶⁴ See Government Code § 8281.5(d).

²⁶⁵ 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.

²⁶⁶ Compare Government Code §§ 8289, 8290 (duties of Commission) with Government Code § 8290.5 (duties of Committee).

²⁶⁷ Government Code § 8281.5(a), (c).

²⁶⁸ Government Code § 8281.5(a).

²⁶⁹ Government Code § 8283.

²⁷⁰ Government Code § 8290.5(a).

The Committee is required to prepare an annual report for submission to the Governor and the Legislature.²⁷¹

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.²⁷² In 2023, it held 4 meetings. Meetings were conducted entirely by teleconference.²⁷³

Personnel of the Committee

At the time of this report in 2023, 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. Carlos Moreno

Priscilla Ocen

Judge Thelton Henderson also served as a member of the Committee from 2021 to 2023.

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

Joy F. Haviland

Senior Staff Counsel

Thomas M. Nosewicz

Legal Director

Rick Owen

Senior Staff Counsel

²⁷¹ Government Code § 8293(b).

²⁷² Government Code §§ 11120–11132.

²⁷³ This was made possible by Government Code § 11133 (added by 2022 Cal. Stat. ch. 48 (SB 189) § 20 & 2023 Cal. Stat. ch. 196 (SB 143) § 6).

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

Lizzie Buchen
Lara Hoffman
Natasha Minsker

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

Mia Bird
Omair Gill
Johanna Laco
Molly Pickard
Steven Raphael
Nefara Riesch
Alissa Skog
Thomas Sloan

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

Sharon Reilly
Executive Director

Debora Larrabee
Chief of Administrative Services

Megan Hayenga
Office Assistant

This report was designed by Taylor Le.

Planned Activities for 2024

In 2024, the Committee expects to follow the same general deliberative process that it used in past years. It will hold regular 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 for policies that improve public safety, reduce unnecessary incarceration, 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 2023, shared their expertise with staff, 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 or their organization'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.

The Committee also extends special gratitude to Brian Hebert, who recently retired as the Executive Director of the California Law Revision Commission and played an integral part in establishing the Committee.

Panelists
(in alphabetical order)

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

Allison Rosenmayer
Deputy Public Defender, San Joaquin County Public Defender's Office

Shima Baradaran Baughman
Professor of Law, Brigham Young University Law School

Mia Bird
Assistant Adjunct Professor, UC Berkeley Goldman School of Public Policy

Doug Bond
Chief Executive Officer, Amity Foundation

Kimberley Brauer
Section Chief, California Department of Social Services Data Stewardship and Integrity Bureau

Andrea Brayboy
Chief, CalFresh and Nutrition Branch, California Department of Social Services

Francine Byrne
Director of Criminal Justice Services, Judicial Council of California

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

Alex Chohlas-Wood
Executive Director, Stanford Computational Policy Lab

Jeff Chorney
Deputy Public Defender, Alameda County

Brendan Cox
Director of Policing Strategies, LEAD National Support Bureau

Lois M. Davis
Senior Policy Research, RAND Corporation

Capt. Geoffrey Deedrick
Los Angeles Sheriff's Department

Leon Dixon
Managing Attorney and Acting Regional Counsel, Legal Services of Northern California

Jennifer Doleac
Executive Vice President of Criminal Justice, Arnold Ventures

Antionette Dozier
Senior Attorney, Western Center on Law and Poverty

Greg Fidell
Policy Director, Initiate Justice

Lisa Foster
Director, Fines and Fees Justice Center

Andrew Gutierrez
Supervising Deputy Public Defender, Office of the Public Defender, County of Santa Clara

Jennifer Hansen

Deputy State Public Defender, Office of the State Public Defender

Doug Haubert
Long Beach City Prosecutor

Kamaria Henry
Managing Deputy District Attorney, Riverside County

Evan Kuluk
Deputy Public Defender, Alternate Defender Office, Contra Costa County

Anita Lee
Principal Fiscal and Policy Analyst, California Legislative Analyst's Office

Amy E. Lerman
Professor of Public Policy and Political Science, UC Berkeley Goldman School of Public Policy & Director, Possibility Lab

Aili Malm
Professor of Criminology and Criminal Justice, California State University Long Beach

John Martire, President
California Welfare Fraud Investigators Association

Robert Mestman
Senior Assistant District Attorney, Orange County District Attorney's Office

Aurélie Ouss
Assistant Professor, Department of Criminology, University of Pennsylvania

Erica Shehane
Director for LEAD, Officer of Diversion and Reentry, Los Angeles County Department of Health Services

Tarra Simmons
Washington State Representative

Bryan Slater
Supervising Deputy District Attorney, Gang Team, Santa Clara County District Attorney

Bryan Sykes
Associate Professor of Criminology, University of California, Irvine

Diana Teran

Director of Prosecution Support Operations, Los Angeles County District Attorney

Matthew Wechter

Supervising Attorney, San Diego County Public Defender

Philanthropic and Other Support

The Committee is grateful to Arnold Ventures for providing generous support relating to the Committee’s research and data analysis with the California Policy Lab. The Committee also extends special thanks to the personnel at the California Department of Corrections and Rehabilitation Department of Research, and the California Department of Justice Research Department. The Committee also received generous support from staff and faculty at Stanford Law School and the Three Strikes Project.

Appendix A: Biographies of 2023 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 the University of California, Los Angeles.

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.

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.

Priscilla Ocen, of Los Angeles, is a Professor of Law at Loyola Law School, where she teaches criminal law, family law and a seminar on race, gender and the law. Ocen received the inaugural PEN America Writing for Justice Literary Fellowship and served as a 2019–2020 Fulbright Fellow, based out of Makerere University School of Law in Kampala, Uganda, where she studied the relationship between gender-based violence and women's incarceration. Ocen recently served as a Special Assistant Attorney General for the California Department of Justice advised Attorney General Rob Bonta on issues related to criminal justice reform. She was also a member and former Chair of the Los Angeles Sheriff's Oversight Commission. She earned a juris doctor degree from the University of California Los Angeles, School of Law.

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.

Appendix B: Unused Offenses Data

To conduct this analysis, the California Policy Lab used a list of felony offenses maintained by the California Department of Justice Criminal Justice Information Services (CJIS) Division. The list was limited to felonies outside the Penal Code. This generated 228 felony offenses with corresponding CJIS codes. Those CJIS codes were then matched with criminal disposition data in California’s Automated Criminal History System to generate the results below. The offense names are largely those used in the California Center for Judicial Education and Research (CJER) Felony Sentencing Handbook.

[Offense list to come.]