

I. Policy Recommendations

In order to redress the harms set forth in Chapter 11, An Unjust Legal System, the Task Force recommends that the Legislature take the following actions:

- Allocate Funds to Remedy Harms and Promote Opportunity
- Eliminate Barriers for African American Prospective Attorneys by Funding Legal Education and Ending Discriminatory Gatekeeping at the State Bar
- Prohibit Cash Bail and Mandate that Those Who Are Acquitted or Exonerated be Reimbursed by the Entity or Entities at Fault
- Enact Enforceable Legislation with Penalties that Dismantles the School to Prison Pipeline and Decriminalizes the Youth Justice System
- Amend the Penal Code to Clarify and Confirm Decriminalization of Transit and Other Public Disorder Offenses
- Amend the Penal Code to Shift Public Disorder Infractions and Low-Level Crimes Outside of Law Enforcement Jurisdiction
- Prohibit Pretextual Traffic and Pedestrian Stops, Probation Inquiries, and Consent-Only Searches
- Mandate Policies and Training on Bias-Free Policing
- Enact Legislation that Requires the Department of Justice to Promulgate Model Law Enforcement Policies Designed to Prevent Racial Disparities in Policing
- Repeal Three Strikes Sentencing
- Abolish the Death Penalty (See Chapter 19 for the text of this recommendation.)
- Strengthen and Expand the Racial Justice Act

- Assess and Remedy Racially Biased Treatment of African American Adults and Juveniles in Custody in County Jails, State Prisons, Juvenile Halls, and Youth Camps
- Accelerate Scheduled Closures of Identified California State Prisons and Close Ten Prisons Over the Next Five Years, with Financial Savings Redirected to the California American Freedmen Affairs Agency
- Require Payment of Fair Market Value for Labor Provided by Incarcerated Persons (See Chapter 19 for the text of this recommendation.)
- Emphasize the “Rehabilitation” in the California Department of Corrections and Rehabilitation (See Chapter 19 for the text of this recommendation.)
- Prohibit Private Prisons from Benefiting from Contracts with CDCR to Provide Reentry Services to Incarcerated or Paroled Individuals (See Chapter 19 for the text of this recommendation.)
- Increase Efforts to Restore the Voting Rights of Formerly and Currently Incarcerated Persons and Provide Access to Those Who Are Currently Incarcerated and Eligible to Vote (See Chapter 21 for the text of this recommendation.)
- Eliminate Legal Protections for Peace Officers Who Violate Civil or Constitutional Rights (See Chapter 20 for the text of this recommendation.)
- Recommend Abolition of the Qualified Immunity Doctrine to Allow Victims of Police Violence Access to Justice (See Chapter 20 for the text of this recommendation.)
- End the Under-Protection of African American Women and Girls (See Chapter 25 for the text of this recommendation.)

Allocate Funds to Remedy Harms and Promote Opportunity

For too long, state funds have been used inefficiently and in a manner that did not achieve results for African Americans in California. The existence of an unjust legal system, as detailed in Chapter 11, is due in no small part to the lack of funding available to those who have been most victimized by a system that is racist not only in effect, but as described herein, *by design*. The Task Force

accordingly recommends that the Legislature fund a number of programs and initiatives that will empower the African American community to support itself in working to overcome this institutional racism in the legal system.

First, in order to create a body of reference for repeatable, scalable programs, the Legislature should create a program to provide hyper-local grants or contracts to community-based organizations with track records of successful public safety work, and ensure that there is effective reporting, publication of methodologies and outcomes, and transparency and quality control

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mechanisms on the grants and contracts. Second, the Legislature should allocate funding, potentially through state-funded universities, for disparity studies to inform public contracts and grants to community-based organizations working to further criminal justice reforms. Third, in order to ensure that law enforcement is inclusive of the African American population, the Legislature should fund grant programs to incentivize African American employment in law enforcement, especially those who are descendants of persons enslaved in the United States, particularly in underserved areas or in areas that have an established history of racist laws, policies, or impact. Fourth, to ensure that African American individuals on probation are able to fully participate in society and overcome the negative effects of their supervision as a result of an unjust legal system, the Legislature should create a mechanism to compensate individuals on probation. Finally, exoneration compensations should be increased, with particular compensation to be provided for lost wages.

Eliminate Barriers for African American Prospective Attorneys by Funding Legal Education and Ending Discriminatory Gatekeeping at the State Bar

As discussed in Chapter 11, An Unjust Legal System, part of the reason that the criminal justice system fails California’s African American population is the lack of African American attorneys, due to the barriers that prevent individuals from becoming attorneys. One such barrier involves the moral character review process associated with admission to the State Bar, which places

particular emphasis on criminal history.¹ “[B]ecause applicants are screened based on their criminal records, the moral character review process will likely reflect the racial disparities that plague the U.S. criminal justice system as a whole.”² The Task Force accordingly recommends that the Legislature take action to make the legal profession more accessible for aspiring African American attorneys, especially individuals who are descendants of an enslaved person, by prohibiting the State Bar of California from considering offenses in moral fitness determinations that disproportionately affect African Americans and that do not reflect on moral character. The Legislature should also establish a fund or scholarship program to pay for the education of descendants pursuing legal degrees (consistent with recommendations elsewhere in this report for those pursuing medical, science, and education degrees). The Legislature should consider emphasizing community-serving roles such as public defenders, public interest attorneys, and children’s rights positions in establishing eligibility for the receipt of these funds, in order to maximize the beneficial impact on the relevant community, but without precluding or discouraging opportunities to pursue other subject matter areas as well as private practice.

Prohibit Cash Bail and Mandate that Those who are Acquitted or Exonerated be Reimbursed by the Entity or Entities at Fault

The cash bail system is at the core of many of the class and race-based inequities in the criminal legal system. As discussed in Chapter 11, An Unjust Legal System, those with resources can bail out and return to their homes, families, and jobs; those without resources languish in jail and suffer innumerable collateral consequences, despite not having been convicted of any crime and despite the presumption of innocence. Pretrial detention can last months and even years, during which incarcerated individuals suffer countless harms including deteriorating mental and physical health, risk of sexual violence, and lasting trauma.³ Ties to the outside world can be quickly severed, including through the loss of housing, employment, and even children.⁴ Ultimately, these harms exert

As with other stages of the criminal legal system, racial disparities persist in pretrial detention outcomes and the setting of bail.⁶ For example, Black defendants are 10 to 25 percent more likely to be detained pretrial or to face financial conditions upon release, and median bond amounts are often about \$10,000 more (and potentially as high as double the amount) for Black defendants than for white defendants.⁷ Despite the staggering cost of bail, many individuals and their families piece together the funds needed, and then end up indebted to bail bondsmen. The result, as a recent study of the Los Angeles County bail program concluded, “is a multi-billion dollar toll that demands tens of millions of dollars annually in cash and assets from [the] most economically vulnerable persons, families, and communities.”⁸

The disparities associated with cash bail have led to widespread reform efforts across the nation and in California, with mixed results. For example, the implementation of pretrial assessment tools in New Jersey and Kentucky have not reduced disparities to the extent anticipated.⁹ In California, the Legislature in 2018 passed Senate Bill No. 10 (SB 10), which would have replaced cash bail with a pretrial risk assessment tool assessing flight and danger risks.¹⁰ But the legislation was stayed and, in 2020, SB 10 was repealed through Proposition 25.¹¹

In parallel with these and other legislative efforts, litigants have also raised constitutional challenges to the cash bail framework. Most significantly, in *In re Humphrey* (2021) 11 Cal.5th 135, the California Supreme Court held that the setting of bail that an individual cannot afford violates the rights to both equal protection and substantive due process.¹² The Court accordingly ruled that bail must be set at a level that an accused individual can reasonably afford, and it further ruled that an accused individual cannot be held in custody prior to trial absent an individualized determination regarding danger and flight risk.¹³ Unfortunately, despite the breadth of the *Humphrey* decision, it has had little practical impact on the corrosiveness of bail.¹⁴ For example, despite *Humphrey*, the pretrial jail population, bail amounts, and average length of pretrial detention have not decreased.¹⁵ Moreover, lower courts consistently fail to follow the dictates of *Humphrey*, and many have read *Humphrey* to increase their authority to impose no-bail holds.¹⁶

Ultimately, the problem of wealth-based detention requires legislative action, and the Task Force accordingly recommends that the Legislature take all steps necessary to definitively end cash bail. These reforms should include, at a minimum: the codification of a presumption of pretrial release in all criminal cases; increased funding for non-law enforcement pretrial services agencies

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significant pressure on defendants to accept plea bargains in order to be released from custody rather than fighting the charges at trial.⁵

to improve pretrial release support programs; and a statewide zero bail schedule.¹⁷ If the Legislature chooses to implement a pretrial assessment tool or equivalent algorithm, such as in SB 10, special care must be taken to ensure that the tool does not perpetuate the same biases and disparities that have infected so many other parts of the criminal legal system.¹⁸ Finally, the Legislature should also establish a framework for timely compensation of those held pretrial who were later acquitted and/or exonerated. The Legislature should also establish a methodology for apportioning responsibility for reimbursing those individuals who have been found to have been as-

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sessed inappropriate or excessive bail, whether through the fault of the investigating, arresting, or prosecuting agency or mishandling of the matter by the court system.

Enact Enforceable Legislation with Penalties that Dismantles the School to Prison Pipeline and Decriminalizes the Youth Justice System

Chapter 6, *Separate and Unequal Education*, details the ways in which African American students are disproportionately subject to exclusionary discipline in school, which in turn leads to higher risk of dropout and juvenile justice involvement. Moreover, African American students are more likely to attend schools with law enforcement on campus and greater security measures, and African American students are also more likely to be arrested than their white peers. Commonly known as the “school-to-prison pipeline,” this dynamic has devastated the African American community by victimizing its youth. The Task Force accordingly recommends several measures to mitigate and ultimately end the school-to-prison pipeline, in addition to those recommended to address the harms discussed in Chapter 6 regarding school discipline.

School-Related Recommendations

The Task Force recommends eliminating law enforcement and probation officers from school campuses.¹⁹ Current funding for school policing should be reallocated to school social workers, guidance counselors, psychologists, wellness centers, and therapeutic resources that

support trauma-informed curriculum, mentoring programs, and school field trips to historically meaningful locales.²⁰ In the alternative, the Task Force recommends at least limiting and restricting the presence and activity of peace officers in California schools. Specifically, the proposed legislation would: (1) repeal California Education Code section 38000, subdivision (b), and eliminate school police departments; (2) prohibit the use of supplemental and concentration grant funding to finance peace officers operating as school police, school security, or school resource officers, which presently is permitted under California’s local control funding formula under certain

circumstances;²¹ (3) require a memorandum of understanding, subject to public board approval, between school districts and law enforcement agencies that provide services to school campuses; (4) require training by the Commission on Peace Officer Standards and Training (POST) for all peace officers, with supplemental training for peace officers with substantial juvenile-specific duties, and require that the training be updated

regularly, at least every three years, as the current training has not been updated for decades and best practices for juvenile justice changes rapidly; (5) require implicit bias training for all peace officers, with supplemental training for those with substantial juvenile-specific duties that takes into account juvenile behavioral and emotional development; and (6) require data collection and annual reviews tracking disparities in police encounters.

The Task Force also recommends that the Legislature require that any new law enforcement facilities, including but not limited to precincts, stations, or jails, be a specified, appropriate distance away from schools. Children should not have to walk past a police station, jailhouse, or other carceral institution on their way to school. Preexisting police precincts that are in close proximity to schools should be required to provide resources to help actively disrupt the school-to-prison pipeline.

Juvenile Justice Recommendations

The juvenile justice system imposes a closely related set of discriminatory harms against African American youth. As discussed in Chapter 6, *Separate and Unequal Education*, and in Chapter 11, *An Unjust Legal System*, the juvenile justice system disproportionately arrests and detains African American students as compared to other ethnic groups, and it fails to provide the kind of rehabilitation it purports to focus on. The Task Force accordingly recommends several reforms to the juvenile justice system.

First, the Task Force recommends establishing presumptive diversion for the vast majority of youth offenses. Underlying diversion is the recognition that most youth do not need court-based intervention. Although approaches vary, research suggests that diverting young people from justice systems as early as possible—prior to formal arrest and prosecution and thus without any court proceedings—is an effective and promising practice.²² Where diversion practices exist, non-white youth have had disproportionately less access to such a pathway in lieu of justice involvement.²³

Second, the Task Force recommends limiting juvenile probation terms and restricting formal supervision for youth. Probation can increase the likelihood that youth will be charged with probation violations, resulting in incarceration, often for minor transgressions.²⁴ Wardship probation, therefore, should be limited to six months as a default—with robust case planning driven by clearly identified goals and needs assessments—and any extension after six months should require the decision of a judge, with the need for any extensions required to be established by clear and convincing evidence. Currently, there are no restrictions on which youth may be formally supervised by probation.²⁵ As noted above, the system should divert as many youth as possible, and formal probation should be reserved for serious cases where youth are adjudicated of felony offenses. Lastly, the number and type of conditions or terms of probation should be limited, and the quality of supports and services should be improved.

Third, the Task Force recommends that the Legislature prohibit the application of strike enhancements for any juvenile adjudication (including retroactively), as was previously proposed in Assembly Bill No. 1127.²⁶ Juvenile court adjudications can be considered prior convictions under California’s “Three Strikes law.”²⁷ Youth sixteen and older can thus receive permanent “strikes” on their adult records if adjudicated for specified felonies.²⁸ A wide range of crimes are “strike-able” offenses, including non-violent crimes such as residential burglary and certain drug or gang-related crimes.²⁹ The behavior underlying many of these strike charges is often deeply rooted in normal adolescent development.³⁰

Fourth, the Task Force recommends that the Legislature end all adult prosecution of youth. Youth in criminal court face adult penalties, including lengthy state prison terms and all of the collateral, lifelong effects of an adult record.³¹ Transferring a youth to the adult system has another irrevocable effect: Youth miss opportunities for age-appropriate treatment, education, and developmentally important activities.³² Moreover, Black youth are significantly more likely than white youth to be prosecuted in adult court.³³

Amend the Penal Code to Clarify and Confirm Decriminalization of Transit and Other Public Disorder Offenses

Transit mobility laws perpetuate vestiges of slavery to the extent that they criminalize poverty and race, limit economic opportunity, and lead to the displacement of African Americans. Several recent laws were designed to decriminalize fare evasion and other low-level transit violations.³⁴ However, the Task Force is informed that the transit departments, their law enforcement partners, and the courts are still criminally citing people for fare evasion because they interpret the law to allow for continued criminal prosecution.³⁵ Accordingly, the Task Force recommends that the Legislature amend these decriminalization statutes to make clear to relevant agencies, law enforcement, and the courts that people must not receive criminal citations for transit violations (e.g., replace any “may” language with “must”). The Legislature should also afford victims a private right of action to seek compensation for unlawful arrests and/or prosecutions for fare evasion and other low-level transit violations.

Amend the Penal Code to Shift Public Disorder Infractions and Low-Level Crimes Outside of Law Enforcement Jurisdiction

A significant proportion of law enforcement contact with the public relates to low-level, non-violent offenses. Thus, for example, law enforcement is frequently tasked with enforcing public disorder offenses, such as illegal camping, public intoxication, disorderly conduct, minor trespass, and public urination.³⁶ Although the subjects of these contacts are often experiencing homelessness, a mental health crisis, or both, the responding officers typically possess neither training nor expertise in working with these vulnerable populations.³⁷ This disconnect often results in the use of excessive and sometimes fatal force that falls disproportionately on Black individuals.³⁸

Given the devastating impacts of this kind of over-policing, the Task Force recommends that the Legislature prohibit law enforcement from criminally enforcing public disorder infractions and other low-level crimes. Instead, a public health and safety institution, without criminal arrest or prosecution powers, would enforce prohibitions such as sleeping on the sidewalk, fare evasion, and similar transit-related or other public disorder violations that criminalize poverty. People arrested or criminally prosecuted for these administrative violations should be granted a private right of action to sue for damages or should automatically receive a damages payout. Relatedly, the Task Force recommends that the Legislature establish a compensation scheme for those

previously convicted of loitering with intent to commit prostitution, given that the Legislature has already repealed the criminal prohibitions against such conduct.³⁹

Prohibit Pretextual Traffic and Pedestrian Stops, Probation Inquiries, and Consent-Only Searches

Traffic stops are one of the most frequent means of law enforcement contact with the public.⁴⁰ Given the myriad potential traffic violations, officers have broad discretion over whether to enforce the countless minor violations they may observe each day. And when officers decide to conduct a traffic stop, it can often be pretextual, meaning that while the stop is ostensibly to address a minor traffic infraction, in reality it is being used by the officer as a means to conduct a comprehensive investigation and search.⁴¹ Unsurprisingly, pretext stops are disproportionately used against African American drivers, with sometimes fatal consequences.⁴² In recognition of this concerning practice, the Legislature passed the Racial and Identity Profiling Act (RIPA) in 2015.⁴³ Under RIPA, all California law enforcement agencies are required to collect and report data regarding all stops and detentions, as well as the outcome of those contacts (e.g., searches and the outcome of searches).⁴⁴ The legislation also established the RIPA Board, which is tasked with analyzing and publishing the reported data, and making recommendations to address its findings.

Since its inception, the RIPA Board has consistently found “trends in disparities for all aspects of law enforcement stops, from the reason for stop to actions taken during stop to results of stop.”⁴⁵ For example, in its most recent report, the Board found that Black individuals represented a higher proportion of stopped individuals than their proportion of the population,⁴⁶ and that Black individuals were also more likely to have forced used against them than white individuals.⁴⁷ Moreover, stopped individuals perceived to be Black were searched at more than two times those perceived to be white, and Black youth were searched at nearly six times the rate of white youth.⁴⁸ Yet for searches conducted pursuant to consent, officers were least likely to find contraband during searches of Black individuals as compared to white.⁴⁹

These RIPA data and conclusions—which are consistent with national data⁵⁰—demonstrate the racially biased rate of pretext stops. Yet there is typically no Fourth Amendment remedy for an individual whose stop was pretextual, even if they can prove that they were stopped solely due to their race. Indeed, in *Whren v. United States* (1996) 517 U.S. 806, the United States Supreme Court held that an officer’s subjective intentions, even if racist,

are irrelevant to an asserted Fourth Amendment violation, outside the context of an inventory search or administrative inspection.⁵¹ The Court stated that the Constitution prohibits selective enforcement of the law based upon race, but the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.⁵² However, equal protection challenges to traffic stops are especially difficult to prove, largely because of the leeway that *Whren* and traffic laws afford police.⁵³

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In its 2023 Report, the RIPA Board called on the Legislature to take steps to eliminate pretext stops.⁵⁴ Specifically, the Board encouraged the Legislature, law enforcement agencies, and local district attorneys to “limit enforcement of traffic laws and minor offenses that pose a low risk to public safety and show significant disparities in the rate of enforcement.”⁵⁵ It also proposed that armed law enforcement only conduct traffic stops when there is a public safety concern, and to more generally shift traffic enforcement out of the law enforcement purview.⁵⁶ The California Committee on Revision of the Penal Code issued a similar set of recommendations in 2022, and it specifically recommend that law enforcement be prohibited from stopping drivers for technical, non-safety related traffic offenses.⁵⁷ Outside of California, several localities, and at least one state, have enacted reforms to curtail or prohibit pretext stops.⁵⁸

The Task Force joins in the reform movement against pretext stops, and recommends that the Legislature prohibit law enforcement traffic stops for low-level infractions such as expired registration, lighting equipment issues, air fresheners, and tinted windows. Enforcement of these types of offenses could be achieved through other means, such as mailed citations or warnings, or through other entities, such as unarmed traffic enforcement officers. The Legislature should also consider restricting the actions an officer can take during a permissible traffic stop, such as precluding the officer from inquiring as to probation or parole status or requesting (absent probable cause) permission to search the vehicle. Finally, fines and fees associated with the relevant traffic infractions should be eliminated.

Mandate Policies and Training on Bias-Free Policing

Existing law prohibits a peace officer from engaging in racial or identity profiling,⁵⁹ but law enforcement agencies (LEAs) are not required to have any policy that specifically addresses bias or prohibits bias-based policing. Peace officers, therefore, may lack guidance on how to interact with the public in a neutral and fair manner and how to assess whether a call for service is rooted in the bias of the caller against another person (i.e., bias-by-proxy). Indeed, a recent report from the Auditor of the State of California found that officers from five separate law enforcement agencies had exhibited biased conduct either while on duty and/or in social media posts.⁶⁰ Finally, law enforcement bias extends not only to perceived suspects, but also to African American victims, particularly women and girls. As discussed in Chapter 8, Pathologizing African American Families, African American women are often hesitant to report abuse due to distrust of law enforcement, and that distrust is justified given that government actors and the judicial system have unfairly disregarded and stereotyped them.

The Task Force accordingly recommends that the Legislature enact legislation to require LEAs to maintain a publicly-posted policy that: (1) prohibits bias-based policing; (2) provides guidance on how to interact with community members in a fair and unbiased manner; and (3) explains how to respond to calls for service that are based on the bias of the caller. The Task Force also recommends that LEAs be required to collect and analyze data to understand and correct for systemic bias towards both suspects and victims. LEAs would also be required to provide academy training and continuing training on bias-free policing, including training on implicit bias, as has been previously proposed in Assembly

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Bill No. 243.⁶¹ Finally, the Task Force also recommends that the Legislature enact workplace protections for counter-bias cultural humility trainers, who are often employees of agencies and may be ostracized and experience retaliation for their role in implementing trainings such as those required by Assembly Bill Nos. 241 and 242.⁶²

Enact Legislation that Requires the Department of Justice to Promulgate Model Law Enforcement Policies Designed to Prevent Racial Disparities in Policing

There are no uniform and comprehensive model policies for countering racial bias or reducing racial disparities, and many LEAs have adopted standardized policies developed by private entities, which do not always align with best practices. Model policies on these issues would ensure uniformity and would reduce instances of officer misconduct and excessive force. Accordingly, the Task Force recommends that the Legislature enact legislation to require the California Department of Justice to promulgate model policies and training materials designed to counter racial bias and reduce racial disparities in law enforcement contacts and uses of force. The policies should cover, among other topics: (1) permissible use of force, as well as use-of-force training, reporting and investigation; (2) citizen complaints; (3) bias prevention; (4) stops and searches; (5) interactions with vulnerable populations; (6) community engagement and transparency; and (7) recruitment, hiring, and retention. LEAs would be required to adopt these model policies or their equivalents, and implement training for sworn and non-sworn employees, as well as management and leadership at all levels.

Repeal Three Strikes Sentencing

Three Strikes sentencing⁶³ has been one of the most prominent drivers of mass incarceration in California over the past three decades. Enacted in 1994 through Proposition 184 and Assembly Bill No. 971,⁶⁴ the Three Strikes Law imposed, among other enhancements, a life sentence for anyone convicted of a felony who had previously been convicted of two or more violent or serious felonies. As initially enacted, the Three Strikes Law led to life terms for many individuals whose third strike was non-violent, such as stealing loose change from a parked car.⁶⁵ The Three Strikes Law can also enhance sentences for individuals with just one strike because a single prior strike doubles the maximum punishment for any newly charged felony.⁶⁶

In 2012, California voters approved Proposition 36, the Three Strikes Reform Act. Proposition 36 eliminated life sentences for non-serious, non-violent crimes, and it also established a procedure for individuals serving life sentences to petition the court for resentencing. Proposition 36 did not alter the doubling impact of a prior strike, nor did it require that the second felony be serious or violent.

Several other remaining features of the law reflect its expansive scope. For example, there is no limit on how old a strike can be,⁶⁷ though many other states have five or ten year “washout” periods.⁶⁸ Juvenile convictions can also count as strikes for 16 or 17 year olds,⁶⁹ making California the only state in the nation that allows for strikes against children.⁷⁰

Despite Proposition 36, Three Strikes continues to heavily impact the length of prison terms in California. As of 2021, more than 30,000 people were serving prison terms lengthened by Three Strikes, including more than 7,400 whose current conviction is neither serious nor violent.⁷¹ Indeed, nearly 65 percent of admissions to prison with a double-sentence enhancement are for non-violent, non-serious felonies.⁷² Although both prosecutors and judges can exercise discretion, in certain circumstances, to avoid application of strike-enhanced sentences, this discretion has led to significant disparities across counties (and likely within a given county among different judges).⁷³ For example, while nearly 40 percent of individuals sentenced in Tuolumne and Placer counties were sentenced under the Three Strikes Law, at least six California counties impose strike-enhanced sentences less than 20 percent of the time.⁷⁴

Three Strikes sentencing also disproportionately impacts African Americans. Specifically, 37 percent of those sentenced under Three Strikes are Black, although Black individuals comprise only five percent of California.⁷⁵ Black individuals sentenced under Three Strikes are also overrepresented relative to their share of the pris-

and removal of the offending individual from society. The data, however, does not support these claims. Although crime rates fell in the years after Three Strikes was enacted, studies have found that rates had already been declining nationally for several years prior to enactment.⁷⁹ Among individuals released early through resentencing after the passage of Proposition 36, the recidivism rate stands at less than two percent—well below state and national averages.⁸⁰

Many states have reformed their Three Strikes laws to mitigate their harsh impacts.⁸¹ At the federal level, the First Step Act amended the federal Three Strikes law to reduce the maximum punishment from life in prison to 25 years.⁸² In California, recent efforts to repeal Three Strikes by voter initiative have fallen short,⁸³ and so the Task Force now recommends that the Legislature take all necessary steps to repeal the Three Strikes Law. Because of the tens of thousands of individuals currently incarcerated as a result of Three Strikes sentences, the Task Force recommends that the repeal be made retroactive and that it allow for currently-imprisoned individuals to petition the court for resentencing.

Strengthen and Expand the Racial Justice Act

The Racial Justice Act—in particular, its prohibition against racial disparities in charging, conviction, and sentencing decisions—is California’s direct response to the U.S. Supreme Court’s decision in *McCleskey v. Kemp* (1987) 481 U.S. 279.⁸⁴ The Court in *McCleskey* held that

evidence of racial disparities across death penalty decisions does not suffice to demonstrate an equal protection violation.⁸⁵ The accused person “must prove that the decisionmakers in *his* case acted with discriminatory purpose.”⁸⁶ As most prosecution decisions take place behind closed doors, relatively few openly share racist views, and prosecutors and other court actors often lack awareness of their own biases, the *McCleskey* decision erected a nearly insurmountable hurdle for the vast majority of challengers to racial disparities in the criminal legal system.⁸⁷

In *McCleskey*, the defense team had presented the seminal “Baldus study,”⁸⁸ which, after controlling for more than 200 non-racial factors impacting sentencing,⁸⁹ found significant racial disparities in the State of Georgia’s application of the death penalty, based on the race of the person accused of the crime, the race of the victim, and the combination of the two.⁹⁰ The Baldus study showed that a Black person accused of killing a white person was



on population,⁷⁶ meaning that Three Strikes effectively amplifies preexisting disparities in the criminal legal system. The statewide racial disparities are also present at the county level in that certain counties impose Three Strikes sentences in a more racially disparate manner than others.⁷⁷ In parsing these data, the California Committee on Revision of the Penal Code identified a “disturbing trend:” “when the criminal system has the option to punish more harshly, it does so disproportionately against people of color.”⁷⁸

Proponents of Three Strikes laws typically claim that they reduce crime through both general deterrence

4.3 times more likely to be sentenced to death than was an individual who was accused of killing a Black victim.⁹¹ Subsequent studies of various jurisdictions have shown even greater disparities than were found by Professor Baldus and his colleagues.⁹²

The *McCleskey* majority did not dispute the Baldus study findings,⁹³ and observed that racial “disparities in sentencing are an inevitable part of our criminal justice system,”⁹⁴ and expressed the concern that, “taken to its logical conclusion,” a claim challenging such disparities “throws into serious question the principles that underlie our entire criminal justice system.”⁹⁵ Justice Brennan, in dissent, observed that this statement, on its face, “suggest[ed] a fear of too much justice.”⁹⁶

In 2020, California’s Legislature declared that it would no longer “fear . . . too much justice.” It enacted the California Racial Justice Act of 2020 (RJA) and thereby introduced a potentially powerful new tool for eradicating both implicit and explicit bias in California’s criminal justice system. The RJA directs that “[t]he state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.”⁹⁷ Rejecting the *McCleskey* decision, the RJA prohibits race disparities in charging decisions, convictions, and sentencing.⁹⁸ The RJA initially applied only prospectively to cases in which judgment had not been entered prior to January 1, 2021, but the Racial Justice Act for All subsequently made the RJA retroactive, thus opening the door to challenging prior convictions and sentences attributable to racial bias.⁹⁹

The RJA offers the potential for data-driven solutions to those involved in our unjust legal system. But data-driven solutions require data. As discussed in Chapter 31, data collection practices on the part of prosecuting offices and courts across California are inconsistent. Uneven, incomplete data collection and barriers to accessing data undermine the RJA and effectively deny the promise of protection from bias that the Legislature intended the statute to provide.

In order to ensure that the RJA has the greatest possible effect in countering the legacy of institutional racism and implicit bias in our criminal justice system, the Task Force recommends that the Legislature take the following concrete actions to strengthen the RJA and ensure that litigants can vindicate their rights under the statute.

Data Collection

The starting point is data. Comprehensive, standardized collection of data is needed for the identification, presentation, and evaluation of RJA claims, including for those with older convictions. Recognizing the centrality of data, the Legislature enacted Assembly Bill No. 2418 (AB 2418),¹⁰⁰ the Justice Data Accountability and Transparency Act, mandating that agencies collect and transmit specified data, including data on the race of accused persons and victims, to the Department of Justice. However, AB 2418 included a funding contingency, and the law has not been funded to date.

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As part of its assessment of RJA-relevant data collection practices across the state, the Task Force requested that the California Department of Justice Research Center survey all 58 California Superior Courts and District Attorney Offices, as well as a select group of 11 of the largest City Attorney offices, regarding what data elements their agencies regularly collect when dealing with criminal cases. The 126 responding criminal justice agencies and courts completed an online questionnaire pertaining to data collected and maintained by their agency, with a focus on what racial data the agencies hold as well as data on factors that may involve prosecutorial or judicial discretion.

In reviewing the data collected in this survey, the Task Force found that there appears to be a large amount of discretion, and likewise variability, in what data elements are collected across California District Attorneys Offices, Superior Courts, and select City Attorney Offices, and between counties. The Task Force concludes that this unevenness in data is a result of the absence of requirements like those set forth in AB 2418. This lack of consistency and absence of data on key variables could present substantial challenges to presenting and evaluating claims of racial discrimination in the criminal justice system, and could increase the difficulty of sustaining claims of RJA violations. And individuals will also face more challenges in some California counties with less comprehensive data collection and reporting practices than others.

The Task Force urges the Legislature to fully fund AB 2418 and to provide additional funding as needed to ensure that all RJA-relevant data is collected and maintained, extracted as needed from case files, and made available to the public. AB 2418 provides a roadmap for data collection and will be a critical step forward, but monitoring will be needed, including to determine if there is a need to expand the scope of data collected. The Legislature must also ensure that discretionary decision-making (such as the decision to forego charges, offer diversion or a lesser charge, or threaten an enhancement) is documented, with reasons given when discretion is exercised or leveraged, and that these decisions are tracked so that case-to-case comparisons can be made.¹⁰¹

Linking RJA and RIPA Data

In connection with data collection and tracking, the Task Force additionally recommends that data collection systems be revised so that prosecutorial data collected under the RJA may be linked back to corresponding initiating law enforcement contact records collected under the Racial and Identity Profiling Act. This will allow necessary transparency and the ability to follow the domino effect of bias throughout the criminal law enforcement and adjudication systems.

Require Prosecutors to Prove Charging Decisions and Sentencing Recommendations Do Not Violate the RJA

The RJA places the onus on the government not to charge, convict, or sentence on the basis of race—but the practical burden is left to the individual. The Task Force recommends that the Legislature amend the RJA to require prosecutors to demonstrate at the outset that their charging decisions and sentencing recommendations do not violate the RJA. The Legislature should specify that prosecutors have an affirmative obligation to turn over evidence of relevant potential disparities. The Task Force recommends that prosecutors be required to disclose all RJA-relevant materials immediately upon request of a defendant or affirmatively by the date of arraignment. The Task Force recommends that courts be required to provide an advisement of rights under the RJA and require that prosecutors disclose their violations of the RJA and any instances of having withheld RJA-relevant data. The Task Force further recommends that the Legislature fund the development and maintenance of accessible databases that will track information statewide about prosecutor misconduct or any other findings relevant to the RJA.

Codify Penalties for RJA Discovery Violations

Where prosecutors violate the RJA, consequences must follow. The Task Force thus recommends that the Legislature codify penalties for any individual prosecutor that commits discovery violations related to RJA requests. Available penalties should include adverse inference jury

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instructions and case dismissal. Additionally, offices that routinely fail to collect or disclose RJA data should also be subject to penalties, including but not limited to financial sanctions and, where appropriate, removal of authority to prosecute implicated cases.

Courts, too, are bound by the Racial Justice Act. Steps must be taken to ensure that there is transparency, accountability, and fairness on the part of judges. In addition to fulsome RJA-relevant data collection regarding jury verdicts and judicial decision-making, the Task Force recommends that the Legislature ensure that litigants have remedies that include cause strikes for circumstances in which courts fail or refuse to ensure compliance with the RJA.

Establish RJA Enforcement Body

Oversight and enforcement are critical to fulsome RJA application. The Task Force accordingly recommends that the Legislature establish and fully fund a Racial Justice Act Commission or similar independent body with enforcement authority and responsibility to track, monitor, and analyze data generated by the RJA process. The Commission could be created as an arm of the California American Freedman Affairs Agency or as an independent advisory body similar to the RIPA Board. Its responsibilities would include, at a minimum:

- Establishing key performance indicators and other quality control metrics to ensure compliance by prosecutor's offices and courts;
- Analyzing data and publishing annual reports on prosecutorial bias, bias in convictions, and bias in sentencing;

- Collecting and analyzing data and publishing reports on bias and disparities in all facets of charging, conviction, and sentencing decisions, on the part of prosecutors, courts, and, where applicable, juries;
- Establishing a federal nexus to ensure that California data on prosecutorial bias and criminal legal racial profiling is uploaded and synced to national racial profiling databases.

Fund RJA Advocacy and Compliance Monitoring

Enhanced capacity across the state will be critical to RJA implementation. Toward this end, the Task Force recommends that the Legislature dedicate funding to provide grants, technical assistance, data analysis, and other resources to public defenders, appointed counsel, criminal defense bar support centers, watchdog organizations and community-based organizations to build expertise and capacity for RJA advocacy and compliance monitoring.

Require Agencies to Review Prior Convictions for RJA Violations

Those who suffer the consequences of a biased legal system should not have to shoulder further burden. The Task Force recommends that the Legislature require state and local agencies to affirmatively review prior convictions for potential RJA violations so that the onus does not rest with those who have endured the consequences of racially and ethnically disparate charging and

beyond the minimum amount. There should be no cap on the amount of damages that could be recovered. This RJA compensation scheme could be modeled on Penal Code section 4900 et seq., but not limited by its provisions. As a related recommendation, there should be statewide tracking of successful RJA claims to inform further legislation in this area.

Clarify that RJA Challenges May Be Raised in Pending Matter and Original Proceeding

The Task Force has recommended an end to the Three Strikes law. To the extent it remains in effect, the Task Force recommends that the Legislature clarify that RJA challenges to prior strikes may be raised in a pending matter as well as in the original proceeding.

Apply the RJA to Parole Proceedings

While the RJA applies across a broad range of prosecutorial and court decisions, it does not clearly apply to parole decisions. The Task Force recommends that the Legislature amend the RJA so that it also applies to parole proceedings to ensure that racial bias is not infecting such hearings.

Require Implicit Bias Training in the Criminal Process

Finally, although the RJA is largely geared towards identifying and remedying racist and biased outcomes in the criminal justice system, the Legislature should also work to *prevent* such outcomes to begin with. Accordingly, the Task Force recommends that the Legislature require that all California prosecutors, criminal defense attorneys, and judges complete periodic implicit bias training that specifically addresses implicit bias in the criminal process.¹⁰³ Such legislation would build off of Assembly Bill No. 242,¹⁰⁴ which requires generalized implicit bias training for all court staff that interact with the public and for all members of the California bar.

The Task Force accordingly recommends that the Legislature establish a compensation scheme for successful RJA petitioners. Under this scheme, a successful RJA claim would trigger immediate compensation.

sentencing decisions. To achieve this, the Legislature should mandate and fund post-conviction justice units at the state and local level and require these units to annually report to the California Department of Justice.¹⁰²

Compensate Successful RJA Petitioners

Compensation is necessary for both accountability and repair. The Task Force accordingly recommends that the Legislature establish a compensation scheme for successful RJA petitioners. Under this scheme, a successful RJA claim would trigger immediate compensation. The scheme would set forth a schedule of minimum monetary awards (that is reviewed and/or updated every two years) that are automatically available, but would not preclude litigation to recover individualized damages

Assess and Remedy Racially Biased Treatment of African American Adults and Juveniles in Custody in County Jails, State Prisons, Juvenile Halls, and Youth Camps

California's prison and jail populations are disproportionately African American.¹⁰⁵ The compounding negative effects of incarceration on the African American community are well-documented, but impacted individuals may face additional biases—both explicit and implicit—while incarcerated.¹⁰⁶ This discrimination could exist, for

example, in the disciplinary system, credit awards, educational opportunities, physical and mental health, and the loss of parental rights, which would exacerbate the substantial harms imposed by incarceration, jeopardize reentry success, and further destabilize African American communities.¹⁰⁷ To date, however, there has been no systematic assessment of the disparate impact of California prison and jail policies and practices.

The Task Force recommends that the Legislature request that the State Auditor conduct a comprehensive audit of the policies and practices of the California Department of Corrections and Rehabilitation regarding racial disparities in: access to education programming; in-custody work opportunities that contribute to reduction in time served; retaliatory practices in response to filing of grievances or voicing concerns, including those related to racial disparities; in-custody deaths; loss of paren-

and convictions as well as harsher sentences. Protection from bias should not end at the jailhouse door. The Legislature should extend protection from racial disparities to carceral settings like jails and prisons.

Accelerate Scheduled Closures of Identified California State Prisons and Close Ten California State Prisons Over the Next Five Years, with Financial Savings Re-Directed to the California American Freedmen Affairs Agency

The mass incarceration of African Americans has myriad causes, many of which are outlined in Chapter 11, Unjust Legal System. One of those root causes is the prison industrial complex, through which the overlapping interests of the government and various prison-related industries lead to over-criminalization and incarceration.¹⁰⁸ This dynamic

can lead to mounting prison populations that are due *not* to increased crime, but instead due to profit and/or other improper motives such as a perceived need to fill empty prison beds.¹⁰⁹ In California, the prison population has steadily declined since approximately 2010,¹¹⁰ but there has not been a commensurate closure of

In California, the prison population has steadily declined since approximately 2010, but there has not been a commensurate closure of prisons.

tal rights (e.g., initiated by dependency court ordered hearings under Welfare & Institutions Code section 366.26); and access, or lack thereof, to quality psychiatric and psychological services. The audit should focus on determining whether racial disparities exist and their extent. Should the results of the audit demonstrate the existence of racial disparities, the Legislature should require that the California Department of Corrections and Rehabilitation collect, maintain, and publish data pertaining to racial disparities, and be subject to oversight from an independent task force until these racial disparities have been eliminated. Similar audits and/or data collection requirements should be imposed for county jail and juvenile inmates.

The Task Force further recommends that the Legislature take steps to eliminate and prohibit any negative disparities experienced by African Americans and do so without requiring proof of deliberate intent, in recognition of the impact of implicit bias. Through the Racial and Identity Profiling Act and the Racial Justice Act, California has taken steps to address how discrimination and bias feed African Americans into the criminal justice system and subject them to more serious charges

prisons. Although Governor Gavin Newsom has directed the closure of some prisons, some of these closures are not scheduled to occur until 2025.¹¹¹ Moreover, the Legislative Analyst's Office recently determined that additional prisons could be closed without exceeding the federal-court ordered¹¹² prison population limit,¹¹³ and some advocates have argued that more prisons could be closed by 2025 than either the Governor or the Legislative Analyst Office estimate.¹¹⁴ These closures would save the state billions of dollars.

Given the persistence of harmful and wasteful prisons in California, the Task Force recommends the closure of ten California prisons over the next five years. The Task Force additionally recommends that any currently planned closures, such as the California Correctional Center, the Chuckawalla Valley State Prison, and the California City Correctional Facility¹¹⁵ be accelerated. Finally, all funds saved from these closures should be redirected to support the programs of California American Freedmen Affairs Agency, and the facilities themselves repurposed as appropriate to support African Americans, with specific benefits flowing to those who are descendants of a person enslaved in the United States.

Endnotes

¹ Cohn et al., [Unlocking The Bar: Expanding Access to the Legal Profession for People with Criminal Records in California](#) (July 2019) Stanford Law School (as of May 18, 2023).

² *Id.* at p. 5.

³ [After Cash Bail: A Framework for Reimagining Pretrial Justice](#) (Jan. 14, 2020) The Bail Project (as of May 18, 2023).

⁴ *Ibid.*

⁵ Wiltz, [Locked Up: Is Cash Bail on the Way Out?](#) (Mar. 1, 2017) State-line (as of May 18, 2023).

⁶ Sawyer, [How Race Impacts Who is Detained Pretrial](#) (Oct. 9, 2019) Prison Policy Initiative (as of May 18, 2023).

⁷ *Ibid.*

⁸ Bryan, et al., [The Price for Freedom: Bail in the City of L.A.](#) (Dec. 2017) UCLA Bunche Center (as of May 18, 2023).

⁹ Sawyer, [How Race Impacts Who Is Detained](#), *supra*.

¹⁰ Sen. Bill No. 10 (2017-2018 Reg. Sess.).

¹¹ [Statement of Vote: General Election, November 3, 2020](#) California Secretary of State Alex Padilla, p. 14 (as of May 18, 2023).

¹² *In re Humphrey* (2021) 11 Cal.5th 135, 151-152.

¹³ *Id.* at pp. 152, 154.

¹⁴ See Virani et al., [Coming up Short: The Unrealized Promise of In re Humphrey](#) (Oct. 2022) U.C.L.A. Law Bail Practicum (as of May 18, 2023).

¹⁵ *Id.* at p. 3.

¹⁶ [2022 Annual Report and Recommendations](#) (Dec. 2022) California Committee on Revision of the Penal Code, pp. 64-73 (as of May 18, 2023).

¹⁷ See generally Virani et al., [Coming up Short](#), *supra*, at pp. 36-41.

¹⁸ See, e.g., Callahan, [Algorithms Were Supposed to Reduce Bias in Criminal Justice—Do They?](#) (Feb. 23, 2023) The Brink (as of May 18, 2023).

¹⁹ See [2023 Annual Report](#) (Jan. 1, 2023) Racial and Identity Profiling Advisory

Board, p. 107 (as of May 31, 2023) (“Racial disparities exist among youth contacts with police, including differences in the frequency of contact, the type of contact (i.e., personal or vicarious), and actions taken as a result of the contact.”); *id.* at p. 131 (noting California data showing that Black students were referred to law enforcement four times more frequently than white students).

²⁰ See [2023 Annual Report](#), *supra*, at p. 132 (discussing California Department of Education’s analysis regarding unmet mental health needs of California students).

²¹ For information on the local control funding formula, see Cal. Dept. of Ed., [Local Control Funding Formula](#) (as of May 18, 2023).

²² See, e.g., [California Commits Nearly \\$60 Million To Divert Youth Away From Jails, Toward Supports](#) (Mar. 31, 2022) National Center for Youth Law (as of Mar. 15, 2023).

²³ See [2023 Annual Report](#), *supra*, at p. 108 (noting that youth of color are less likely to be diverted than white youth.).

²⁴ [Youth Probation in California: A Legal Map](#) (Aug. 2020) Youth Law Center, p. 2 (as of May 30, 2023).

²⁵ *Ibid.*

²⁶ Assem. Bill No. 1127 (2021-2022 Reg. Sess.).

²⁷ Davis, [California Lawmaker Adding to Growing Calls for an End to ‘Three Strikes’ Laws for Teens](#) (Jan. 20, 2023) The Imprint (as of May 25, 2023).

²⁸ *Ibid.*

²⁹ See Pen. Code, §§ 1192.7, subd. (c), 667.5, subd. (c); Welf. & Inst. Code, § 707, subd. (b).

³⁰ See, e.g., [Adolescent Brain Development](#), Coalition for Juvenile Justice (as of May 18, 2023) (noting that “[a]dolescents are more likely to be influenced by peers, engage in risky and impulsive behaviors, experience mood swings, or have reactions that are stronger or weaker than a situation warrants.”).

³¹ Ridolfi et al., [The Prosecution of Youth as Adults](#) (2016) (as of Jan. 17, 2023).

³² *Id.* at p. 2.

³³ *Id.* at p. 11; see also Welf. & Inst. Code, § 707.

³⁴ See Sen. Bill No. 882 (2015-2016 Reg. Sess.); see also Sen. Bill No. 1320 (2009-2010 Reg. Sess.).

³⁵ See also Campuzano-Santamaria, [Reconsidering the Criminality of Fare Evasion: Implementation Practices in California](#) (June 2016) Western Center on Law and Poverty at pp. 14-15 (as of April 6, 2023).

³⁶ Subramanian and Arzy, [Rethinking How Law Enforcement Is Deployed](#) (Nov. 17, 2022) Brennan Center for Justice (as of May 18, 2023).

³⁷ *Ibid.*

³⁸ Burke, [Policing Mental Health: Recent Deaths Highlight Concerns Over Officer Response](#) (May 16, 2021) NBC News (as of May 18, 2023).

³⁹ The Legislature recently repealed provisions proscribing loitering with intent to commit prostitution, and it also authorized dismissals, sealing, and re-sentencing, as applicable. (See Sen. Bill No. 357 (2021-2022 Reg. Sess.)) However, the bill did not provide a mechanism for monetary relief for those charged or convicted under the statute.

⁴⁰ See, e.g., Pierson et al., [A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States](#) (July 2020) 4 Nature Human Behavior, p. 736 (as of Nov. 29, 2022).

⁴¹ Egelko, [California Should Ban ‘Pretext Stops’ by Police, State Committee Says](#), San Francisco Chronicle (Dec. 19, 2022) (as of May 25, 2023).

⁴² See, e.g., [2022 Annual Report](#) (2022) California Racial Identity and Profiling Advisory Board, pp. 8, 141 (as of May 18, 2023).

⁴³ Sen. Bill No. 953 (2015-2016 Reg. Sess.).

⁴⁴ See Gov. Code, § 1252.5.

⁴⁵ See [2023 Annual Report](#), *supra*, at p. 7.

⁴⁶ *Id.* at p. 8.

⁴⁷ *Id.* at p. 9.

⁴⁸ *Id.* at pp. 9-10.

⁴⁹ *Id.* at p. 12.

⁵⁰ Pierson, *A Large-Scale Analysis of Racial Disparities*, *supra*, at p. 736.

⁵¹ *Whren v. United States* (1966) 517 U.S. 806, 813.

⁵² *Ibid.*

⁵³ See, e.g., Gates, *The Long Road to Ending Pretextual Stops* (Nov. 4, 2020) Harv. C.R.-C.L. L. Rev. (as of May 31, 2023).

⁵⁴ *Annual Report, Recommendations and Best Practices 2023* (Jan. 1, 2023) Racial and Identity Profiling Advisory Board, p. 2 (as of April 11, 2023).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ See *Annual Report and Recommendations* (Dec. 2022) California Committee on Revision of the Penal Code (as of Jan. 11, 2023).

⁵⁸ See, e.g., Virginia Sen. Bill No. 5029 (2020 Special Sess. I); City of Philadelphia, Pennsylvania Bill No. 210636-A (2021); City of Pittsburgh, Pennsylvania Code of Ordinances § 503.17 (2021); Oregon Sen. Bill No. 1510 (81st Oregon Leg. Assem. - 2022 Reg. Sess.).

⁵⁹ Pen. Code, § 13519.4, subd. (f).

⁶⁰ Tilden, *Law Enforcement Departments Have Not Adequately Guarded Against Biased Conduct* (April 2022) Auditor of the State of California, pp. 1-4 (as of March 16, 2023).

⁶¹ Assem. Bill No. 243 (2019-2020 Reg. Sess.).

⁶² Assem. Bill No. 241 (2019-2020 Reg. Sess.); Assem. Bill No. 242 (2019-2020 Reg. Sess.).

⁶³ Pen. Code, §§ 667, 667.5, 1170.12.

⁶⁴ Assem. Bill No. 971 (1994-1995 Reg. Sess.).

⁶⁵ *Three Strikes Basics*, Stanford Three Strikes Project (as of May 18, 2023).

⁶⁶ Bird et al., *Three Strikes in California* (Aug. 2022) California Policy Lab, p. 7 (as of May 18, 2023).

⁶⁷ Pen. Code, § 667, subd. (c)(3).

⁶⁸ See *Annual Report and Recommendations* (Dec. 2021) California Committee on Revision of the Penal Code, p. 41 (as of May 18, 2023).

⁶⁹ See Pen. Code, §§ 1192.7, subd. (c), 667.5, subd. (c); Welf. & Inst. Code, § 707, subd. (b).

⁷⁰ Chemerinsky et al., *Op-Ed: California's 'Three Strikes' Law Still Carries a Devastating Human and Financial Cost. End it Now* (Aug. 12, 2022) L.A. Times (as of April 12, 2023).

⁷¹ See *Annual Report and Recommendations* (Dec. 2021) California Committee on Revision of the Penal Code, p. 48 (as of May 18, 2023).

⁷² Bird et al., *Three Strikes in California*, *supra*, at p. 5.

⁷³ *Id.* at p. 10.

⁷⁴ See *Annual Report and Recommendations* (Dec. 2021) California Committee on Revision of the Penal Code, p. 44 (as of May 18, 2023) (noting that Colusa, Trinity, Humboldt, Calaveras, Sutter, and Contra Costa Counties imposed strike-enhanced sentences less than 20 percent of the time).

⁷⁵ See *id.* at p. 42; Johnson et al., *California's Population* (Jan. 2023) Public Police Institute of California, p. 2 (as of May 31, 2023).

⁷⁶ Bird et al., *Three Strikes in California*, *supra*, at p. 5.

⁷⁷ See *Annual Report and Recommendations* (Dec. 2021) California Committee on Revision of the Penal Code, p. 45 (as of May 18, 2023).

⁷⁸ See *id.* at p. 46.

⁷⁹ Bird et al., *Three Strikes in California*, *supra*, at p. 33.

⁸⁰ *Three Strikes Basics*, *supra*.

⁸¹ See *Annual Report and Recommendations* (Dec. 2021) California Committee on Revision of the Penal Code, p. 48 (as of May 18, 2023).

⁸² George, *What's Really in the First Step Act?* (Nov. 16, 2018) The Marshall Project (as of May 18, 2023).

⁸³ Thomas, *How California's Justice System Struck Out* (Sept. 20, 2022) The Progressive Magazine (as of May 25, 2023).

⁸⁴ See, e.g., *Young v. Superior Court of Solano County* (2022) 79 Cal.App.5th 138, 147-157 (discussing legal landscape and legislative findings underlying the Racial Justice Act); Assem. Bill No. 2542 (2019-2020 Reg. Sess.) § 2; see also Assembly Member Ash Kalra, *AB 2542 - Racial Justice Act Fact Sheet* (Aug. 1, 2020) (as of May 16, 2023).

⁸⁵ *McCleskey v. Kemp* (1987) 481 U.S. 279.

⁸⁶ *Id.* at p. 292 (emphasis in original).

⁸⁷ See, e.g., Office of Governor Newsom, *Governor Newsom Signs Landmark Legislation to Advance Racial Justice and California's Fight Against Systemic Racism & Bias in Our Legal System* (Sept. 30, 2020) (as of May 18, 2023) (“The McCleskey decision has the functional effect of requiring that criminal defendants prove intentional discrimination when challenging racial bias in their legal process. This is a high standard and is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted.”).

⁸⁸ See Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience* (1983) 74 J. Crim. L. & Criminology 661 (as of May 31, 2023).

⁸⁹ *Id.* at note 81; see *McCleskey*, *supra*, 481 U.S. 279 at pp. 325, 338 (dis. opn. of Brennan, J.) (“Professor Baldus and his colleagues have compiled data on almost 2,500 homicides committed during the period 1973-1979. They have taken into account the influence of 230 nonracial variables, using a multitude of data from the State itself.”).

⁹⁰ *McCleskey*, *supra*, 481 U.S. 279 at pp. 286-287.

⁹¹ *Id.* at p. 287.

⁹² Phillips & Marceau, *Whom the State Kills* (July 29, 2020) 55 Harv. C.R.-C.L. L.Rev. 585, 587 (finding that “the overall

execution rate is a staggering seventeen times greater for defendants convicted of killing a white victim.”); Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides 1990–1999* (2005) 46 Santa Clara L.Rev. 1, 19–20 (as of May 31, 2023); Petersen, [Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion](#) (2016) 7(1) Race & Justice 7, 23 (as of May 31, 2023); Liptak, [New Look at Death Sentences and Race](#) (Apr. 29, 2008) N.Y. Times (as of May 18, 2023); see also [Governor Gavin Newsom Orders a Halt to the Death Penalty in California](#) (Mar. 13, 2019) Office of Governor Gavin Newsom (noting 2005 study finding that “those convicted of killing whites were more than three times as likely to be sentenced to death as those convicted of killing blacks and more than four times as likely as those convicted of killing Latinos.”).

⁹³ *McCleskey*, *supra*, 481 U.S. 279.

⁹⁴ *Id.* at pp. 312–313.

⁹⁵ *Id.* at pp. 314–315; *cf. id.* at p. 294 (“In its broadest form, *McCleskey*’s claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application.”).

⁹⁶ *McCleskey*, *supra*, 481 U.S. 279 at p. 339 (dis. opn. of Brennan, J.). See also Bedau, [Someday McCleskey Will Be Death Penalty’s Dred Scott](#), L.A. Times (May 1, 1987) (as of May 31, 2023) (setting forth legal historical prediction that the *McCleskey* decision “will be the death penalty’s *Dred Scott*.”).

⁹⁷ Pen. Code, § 745, subd. (a); Assem. Bill No. 2542 (2019–2020 Reg. Sess.).

⁹⁸ Pen. Code, § 745, subds. (a)(3), (a)(4).

⁹⁹ See Assem. Bill No. 2542 (2019–2020 Reg. Sess.); see also Assem. Bill 256 (2021–2022 Reg. Sess.).

¹⁰⁰ Assem. Bill No. 2418 (2021–2022 Reg. Sess.).

¹⁰¹ As set forth in Chapter 31, Racial Justice Act Survey Report, Racial Justice Act-relevant data collection practices vary significantly across the state. Lack of access to critical data represents a limitation to the efficacy of the Racial Justice Act’s implementation.

¹⁰² The Attorney General’s Office has such a unit. (See [Attorney General Bonta Establishes First-Ever Post-Conviction Justice Unit within the California Department of Justice](#) (Feb. 17, 2023) California Department of Justice, Rob Bonta, Attorney General (as of May 31, 2023).

¹⁰³ Kang et al., [Implicit Bias in the Courtroom](#) (2012) 59 UCLA L.Rev. 1124, 1139–42 (discussing potential impacts of implicit bias on prosecutor and defense counsel decision-making.).

¹⁰⁴ Assem. Bill No. 242 (2019–2020 Reg. Sess.).

¹⁰⁵ See, e.g., [Incarceration Trends in California](#) (Dec. 2019) Vera Inst. of J. (as of May 18, 2023).

¹⁰⁶ See, e.g., [Laws Mandating Data Collection Reveal Discrimination](#) (Feb. 2020) Equal J. Initiative (as of April 5, 2023) (noting that Black inmates in Minnesota were sentenced to solitary confinement at disproportionately higher rates than white inmates.).

¹⁰⁷ Tilden, [Law Enforcement Departments Have Not Adequately Guarded Against Biased Conduct](#) (April 2022) Auditor of the State of California (as of April 5, 2023) (finding that California Department of Corrections and Rehabilitation, among other law enforcement agencies, had failed to address biased conduct among correctional officers.).

¹⁰⁸ [What is the Prison Industrial Complex?](#) (2023) Tufts Univ. Prison Divestment (as of May 18, 2023).

¹⁰⁹ *Ibid.*

¹¹⁰ Graves, [Racial Disparities in California’s State Prisons Remain Large Despite Justice System Reforms](#) (June 2021) Cal. Budget & Policy Center, p. 6 (as of May 18, 2023).

¹¹¹ Duara, [Gavin Newsom Moved to Close 4 California Prisons. How Many More Can He Shut?](#) (Feb. 23, 2023) Cal Matters (as of March 16, 2023).

¹¹² In *Brown v. Plata* (2011) 563 U.S. 493, the Supreme Court held that a court-ordered population limit was necessary to remedy a violation of incarcerated persons’ Eighth Amendment rights.

¹¹³ Petek et al., [The 2023–24 Budget: The California Department of Corrections and Rehabilitation](#) (Feb. 2023) Legislative Analyst’s Office, p. 6 (as of March 16, 2023).

¹¹⁴ Howard et al., [The People’s Plan for Prison Closure](#) (2023) Californians United for a Responsible Budget, p. 4 (as of March 16, 2023).

¹¹⁵ [Reduction/Closure Information](#) (2023) Cal. Dept. of Corrections and Rehabilitation (as of Jan. 24, 2023); Sandrosky, [Prison Population Falls but Spending Still Up in Newsom Budget](#) (Jan. 23, 2023) Capitol Weekly (as of Jan. 24, 2023).