Staff Memorandum 2024-21
Draft of 2024 Annual Report

At its October 2024 meeting, the Committee on Revision of the Penal Code directed staff to prepare a draft 2024 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,

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Draft 2024 Annual Report
Committee on Revision of the Penal Code
November 2024

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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 fifth Annual Report fulfilling its mandate. In that time, numerous recommendations by the Committee have become law in 21 bills passed by the Legislature and signed by the Governor, including 5 bills this year.

The 10 new recommendations in this Report are unanimously recommended by the Committee and include improving California's approach to drunk driving offenses, improving due process for asset forfeitures while preserving law enforcement's flexibility to use this powerful tool, removing significant ambiguity and confusion from the processes convicted people can use to prove they are innocent, and clarifying the limits of accomplice liability in murder cases.

The Committee's recommendations are based on testimony from more than 40 witnesses, public comment, thorough staff research, and deliberations of Committee members over the course of 5 public meetings. The recommendations are supported by legal analysis, empirical research, experience from other jurisdictions, and data provided to the Committee by the California Department of Corrections and Rehabilitation and the California Department of Justice and analyzed by the California Policy Lab.

As described in detail below, the recommendations are:

1. Harmonize and Clarify the Post-Conviction Processes for Showing Innocence and Wrongful Convictions
2. Expand Post-Conviction Discovery
3. Modernize Compensation for Innocent People
4. Improve California's Approach to Driving Under the Influence Offenses
    a. Create Judicial Diversion for First-Time DUI Offenses
    b. Expand the Use of DUI Collaborative Courts
    c. Streamline License Suspensions Related to DUI
5. Modernize Civil Asset Forfeiture
6. Establish Prosecutor-Led Diversion for Gun Possession Offenses
7. Eliminate Accomplice Liability for Implied Malice Murder
8. Limit Firearm Enhancements to People Who Used or Were Armed With a Gun
9. Prohibit the Felony-Murder Rule in Provocative-Act Murders
10. Specify that Proposition 57 Credits Apply to Indeterminate Sentences

Prefatory Notes & Data

Crime and Clearance Rates

As it has in 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 for 2023 in California, which includes corrected numbers for the Oakland Police Department,[1] shows the following:

- The overall violent crime rate was essentially flat compared to 2022, seeing a less than 1% decrease. Violent crime consists of homicide, aggravated assault, robbery, and rape.
- The overall property crime rate decreased by 1.8% compared to 2022. Property crime consists of burglary, car theft, all other thefts, and arson.
- The statewide homicide rate decreased by 16%.[2]

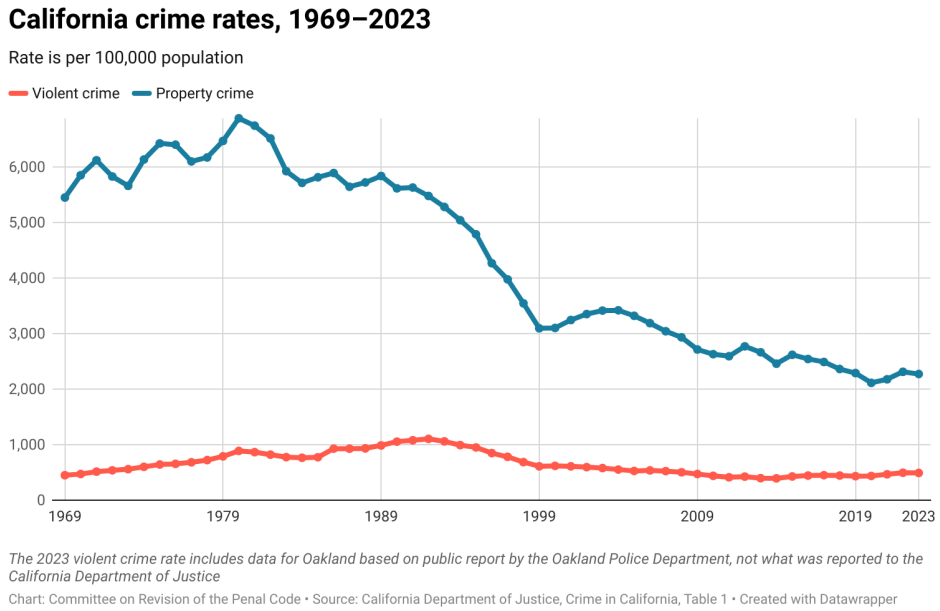
Despite recent increases in some categories of offenses, crime rates across California continue to be at record lows:

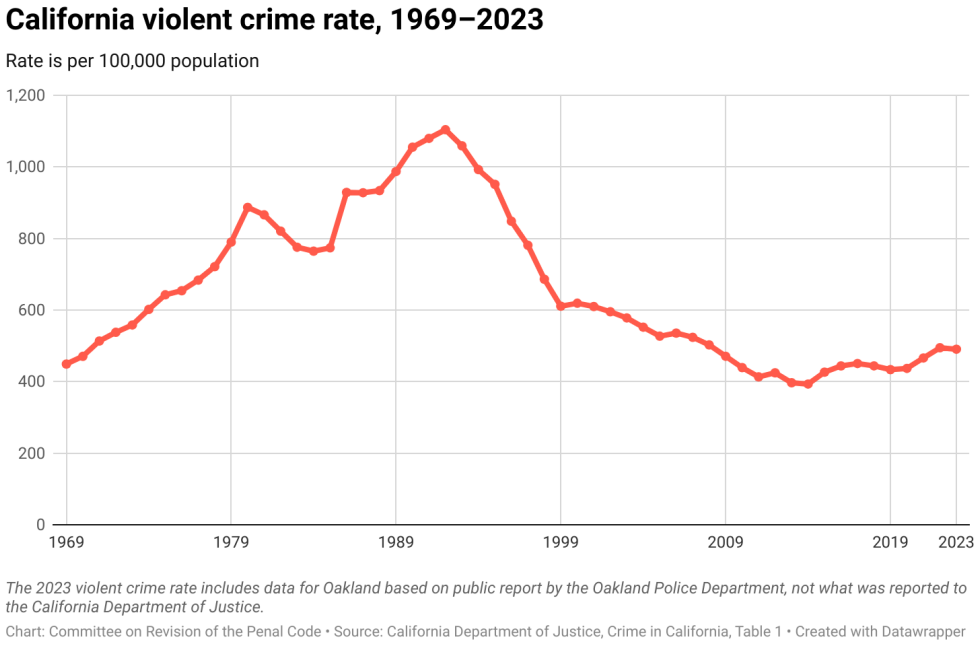
- Compared to pre-pandemic levels, the violent crime rate is 13% higher in 2023 than it was in 2019, but around the same level it was in 2008 and 56% lower than the peak violent crime rate recorded in 1992.
- The 2023 property crime rate is essentially the same as it was in 2019 before the pandemic, with a 0.77% decrease in 2023 compared to 2019. The 2019 property crime rate was the lowest recorded since at least 1969. The 2023 property crime rate is 67% lower than the peak property crime rate recorded in 1980.

[1] The Oakland Police Department — due to "human error" — reported incorrect violent crime data for 2023 to the California Department of Justice. The incorrect data showed a 138% annual increase in violent crime, driven mainly by aggravated assaults. Though the Oakland Police Department has acknowledged this error, the data maintained by the California Department of Justice has not been updated. The data presented here uses what the Oakland Police Department reported publicly (7,526 violent crimes in 2023, including 3,531 aggravated assaults), instead of the incorrect information reported to the California Department of Justice (15,591 violent crimes, including 11,169 aggravated assaults). See Danielle Echeverria, *California report says violent crime us up statewide. Our analysis suggests that's wrong*, San Francisco Chronicle, July 24, 2024. In addition, the crime data from the California Department of Justice is incomplete because a larger-than-usual number of agencies did not report full data in 2023, including the San Jose Police Department and the San Bernardino County Sheriff's Department. See *Crime in California 2023*, 5; Crimes and Clearances "READ ME", OpenJustice, 14–16 (June 2024). Because some of the differences in crime rates for 2023 compared to 2022 were relatively small, they could change if full data was reported.

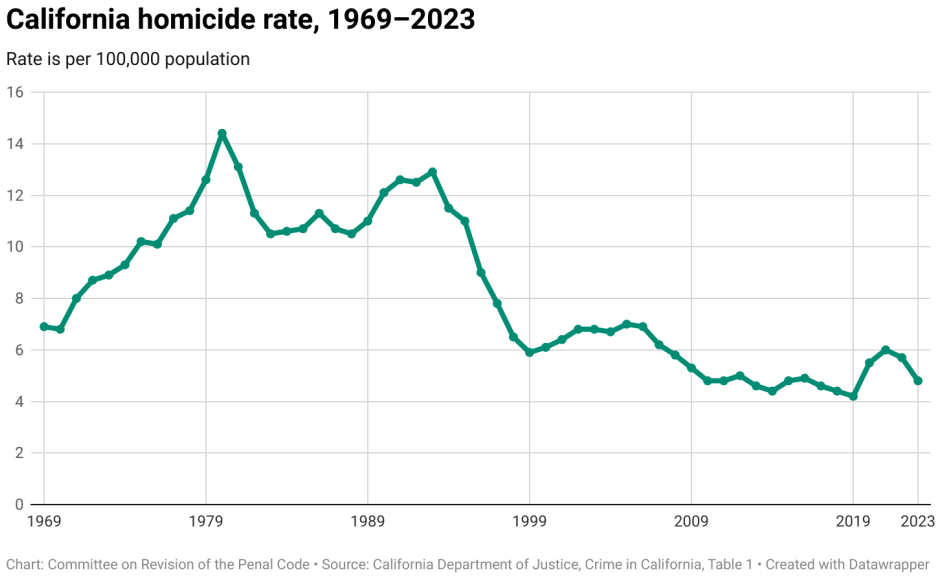
[2] California Department of Justice, *Crime in California 2023*, 1.

- After an increase during the COVID-19 pandemic — a trend seen throughout the United States[3] — California's homicide rate is now close to its pre-pandemic level (4.8 in 2023 vs. 4.2 in 2019). The 2019 homicide rate was the lowest recorded in California history since at least 1966. The 2023 homicide rate was 66% lower than the peak homicide rate recorded in 1980.





[3] See, e.g., Ernest Lopez and Bobby Boxerman, *Crime Trends in U.S. Cities: Year-End 2023 Update*, Council on Criminal Justice (January 2024).



Available data for 2024 shows promising signs of continued crime decreases. According to data from the FBI through the middle of 2024 covering 47 large cities in California, violent crime declined 3% and property declined 10% compared to the same time period in 2023.[4] Data for individual offenses are in the following table.

Year-to-date crime statistics, January–June, 2024 vs. 2023

	Murder	Rape	Robbery	Agg. assault	Burglary	Theft	Car theft	Arson
California	-20.00%	-15.17%	-4.46%	-1.29%	-16.65%	-10.05%	-3.76%	+3.08%

Source: FBI, Crime Data Explorer, Quarterly Uniform Crime Report. The California data includes 47 cities with approximately 9.8 million people, including San Diego, Long Beach, and Fresno, but does not include other large cities such as Los Angeles, Oakland, Sacramento, or San Francisco.

More recent data confirms this trend. According to data from the Major Cities Chiefs Association through September covering eight of the of the largest jurisdictions in California, violent crime has decreased an overall 6% — including a 14% decrease in homicides and an 18% decrease in reported rapes — compared to the same period in 2023.[5] (The Major Cities Chiefs Association does not report on property crime.)

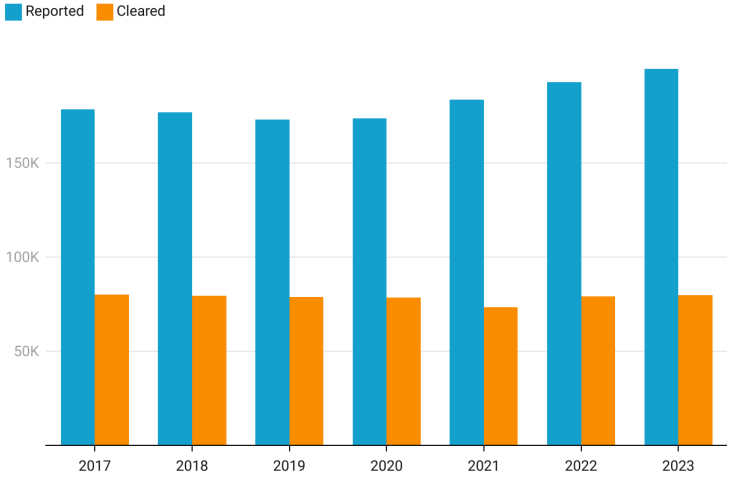
As the Committee regularly notes, while these statistics are important, they do not present a full picture of crime rates. Nationwide, most crime is unreported.[6] And the violent and property crime rates reported by the California Department of Justice leave

[4] FBI, Crime Data Explorer, Quarterly Uniform Crime Report, 2024 Quarter 2, inclusive of January through June 2024.
[5] Major Cities Chiefs Association, *Violent Crime Survey — National Totals, Midyear Comparison, January 1 to September 30, 2024, and 2023*, November 6, 2024.
[6] Susannah N. Tapp and Emilie J. Coen, *Criminal Victimization, 2023*, U.S. Department of Justice, Bureau of Justice Statistics, Table 4 (September 2024).

a lot out, including simple assault crimes, other sex offenses, most white-collar offenses, drug crimes, and other economic crimes such as wage theft.

And in California, the clearance rate — the rate at which law enforcement arrests a perpetrator — was 40% for violent offenses and 8% for property crimes.[7]

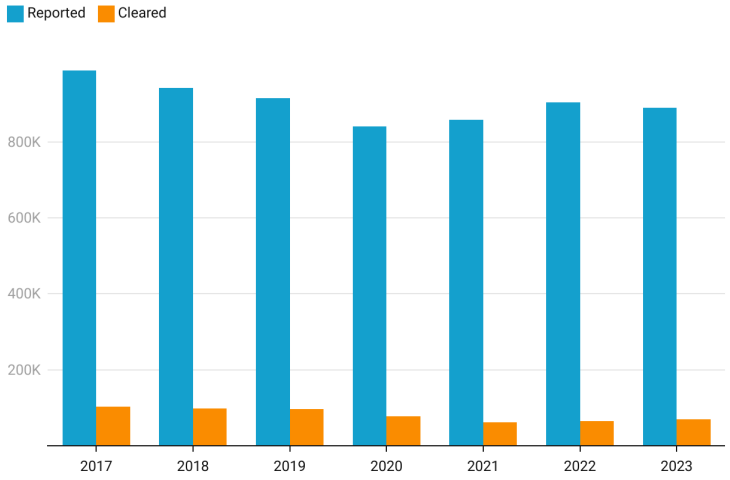
Violent crime clearances, 2017–2023



Violent crime is homicide, rape, robbery, and aggravated assault.

Chart: Committee on Revision of the Penal Code • Source: California Department of Justice • Created with Datawrapper

Property crime clearances, 2017–2023



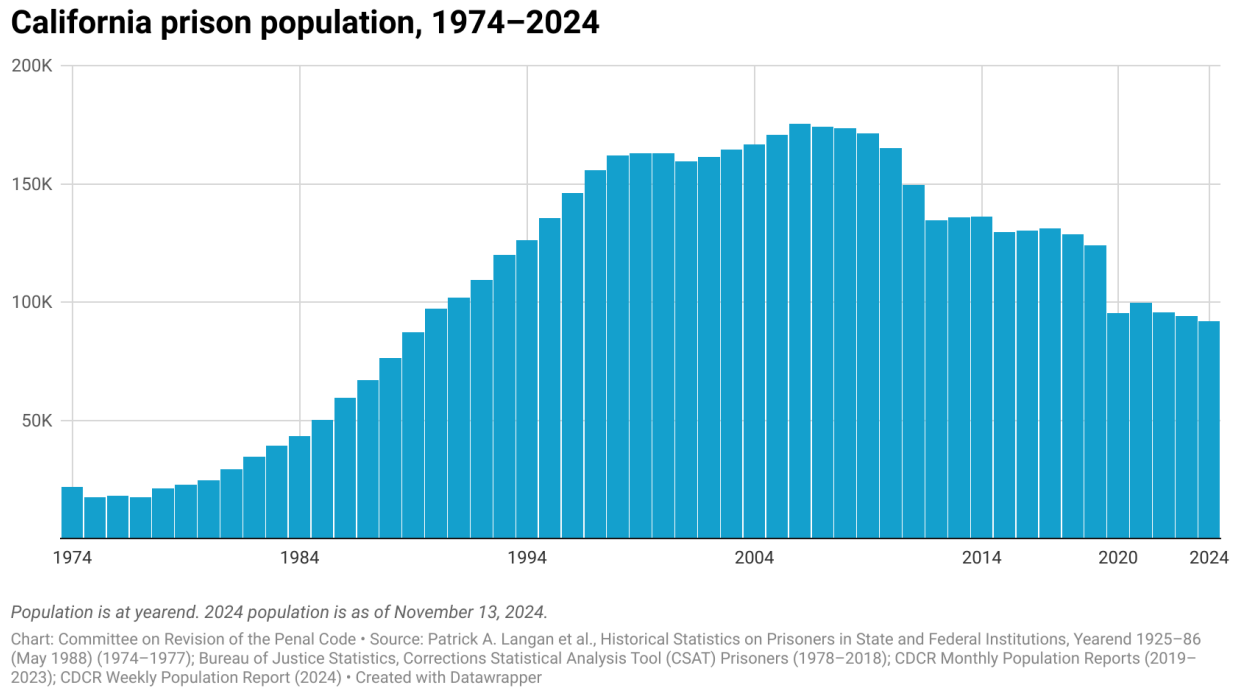
Property crime is burglary, car theft, and larceny.

Chart: Committee on Revision of the Penal Code • Source: California Department of Justice • Created with Datawrapper

[7] California Department of Justice, *Crime in California 2023*, Table 15.

Incarceration Trends

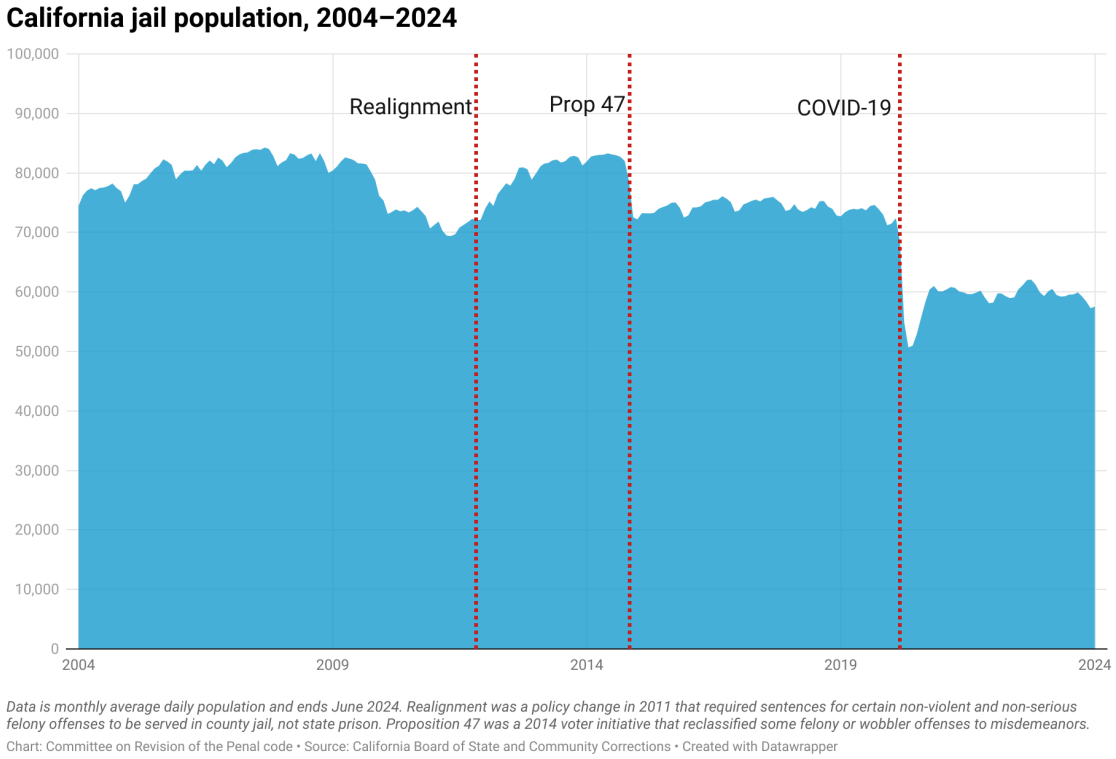
California's prison population is currently around 92,000 people, the lowest sustained level since 1990.[8] California's prison population dropped significantly during the COVID-19 pandemic and has remained at its lowest sustained level since 1989.[9]



The sustainability of this progress is uncertain: in November 2024, voters approved Proposition 36, which, among other provisions, expands the offense of "petty theft with a prior" and allows felony charges for some drug possession offenses. The Legislative Analyst's Office concluded that the harsher punishments allowed by Proposition 36 could increase the prison population by a few thousand people and increase costs by tens or hundreds of millions of dollars per year.[10]

[8] CDCR, Weekly Report of Population, As of Midnight, November 13, 2024.
[9] Bureau of Justice Statistics, Corrections Statistical Analysis Tool (CSAT) Prisoners (1989's yearend population was 87,297; 1990's was 97,309).
[10] Official Voter Information Guide, General Election, November 5, 2024, 60.

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 22% lower than it was before the pandemic and is around 56,000 people.



According to the Legislative Analyst's Office, Proposition 36 is also likely to lead to an increase in California's jail population.[11]

Legislative Update

In 2024, 5 bills passed by the Legislature and signed by the Governor implemented recommendations originated or supported by the Committee in previous reports.

Bill	**Topic**
AB 2215 (Bryan)	Pre-booking diversion by police officers
AB 2483 (Ting)	Post-conviction resentencing procedures
SB 1323 (Menjivar)	Competency to stand trial
SB 108 (Budget Act)	Continued MCRP funding
AB 3278 (Transportation)	License suspension clean-up

[11] Official Voter Information Guide, General Election, November 5, 2024, 60–61.

Committee staff testify regularly before the Legislature, and the Committee's research and analysis of California's criminal legal system continues to be relied on by courts, including the California Supreme Court.[12]

Unused Offenses Note

In its two previous reports, the Committee provided extensive data on offenses which had not been used to make arrests or as the basis of convictions. Due to data limitations, the Committee is not updating this data in this year's report but plans to issue a stand-alone report on this issue in 2025.

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 receive data from state and local agencies.[13]

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.

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 in the last year:

- *California's Nickel Prior Enhancement and Recent Reforms* (December 2023)
- *Consecutive Sentencing in California* (February 2024)
- *The Short-Term Impacts of Bail Policy in Los Angeles* (August 2024)
- *Short Stays in Prison* (September 2024)
- *Who Benefits from Automatic Record Relief in California* (October 2024)

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,[14] and the

[12] See, e.g., *People v. Walker*, 16 Cal.5th 1024, 1037 (2024); *People v. Clark*, 15 Cal.4th 732, 761 (2024); *People v. Burgos*, 16 Cal.5th 1, 33–34 (2024) (dissenting opinion of Justice Evans); *People v. Hardin*, 15 Cal.5th 834, 888 (2024) (dissenting opinion of Justice Liu); *People v. O'Bannon*, 326 Cal.Rptr.3d 345, 349–350 (2024); *People v. Gray*, 101 Cal.App.4th 148, 162 (2024).

[13] Government Code §§ 8286, 8286.5.

[14] 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 Justice System*, Urban

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

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 and Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That's Changing*, Poynter, January 4, 2021.

Recommendations

1. Harmonize and Clarify the Post-Conviction Processes for Showing Innocence and Wrongful Convictions

Recommendation
California's post-conviction relief statutes have been amended regularly since 2014, which has resulted in a tangle of different standards depending on various factors such as whether a person is in or out of custody, has previously filed a petition, or if the petition is based on new evidence. In addition, rigid procedural rules can prevent people from even being allowed to argue they are actually innocent of any crime and, even if a court agrees that the person is innocent, prosecutors often have the ability to continue prosecution.

The Committee recommends the following:

1. Specify a single unified standard for post-conviction claims based on new evidence that allows relief if the defendant shows a reasonable probability that the outcome of the case would have been different considering the new or false evidence.

2. Allow habeas petitions and motions to vacate that offer new evidence of innocence to be considered by a court despite procedural bars if the defendant shows by a reasonable probability they are actually innocent — meaning no offense was committed or they did not commit the offense.

3. Specify that one of the available remedies to a court in a habeas corpus case or motion to vacate is a dismissal of charges that bars further prosecution.

Relevant Statutes
Penal Code §§ 1385, 1473, 1473.5, 1473.6, 1473.7

Background and Analysis
The primary way a person convicted of a crime establishes their innocence is by filing a petition for "habeas corpus."[15] Unlike a direct appeal from a conviction, which only challenges the evidence and rulings during pre-trial and trial proceedings, a habeas corpus petition allows a convicted person to present evidence to a court that was not previously considered. California's habeas corpus statute was enacted in 1872 and not

[15] "Habeas corpus," also known as the "Great Writ," is a reference to the ancient writ of "habeas corpus ad subjiciendum," which is Latin for "that you have the body to submit to." See Legal Information Institute, "habeas corpus ad subjiciendum" definition. The writ was traditionally used to challenge the basis for the detention of the petitioner but has expanded over time. See *In re Clark*, 5 Cal.4th 750, 763–764 (1993). A habeas corpus petition can also be used to challenge denials of parole, prison or jail conditions, and denials of other rights. See, e.g., *In re Lawrence*, 44 Cal.4th 118,1 (2008) (denial of parole); *In re Von Staich*, 56 Cal.App.5th 53 (2020) (conditions); *In re Humphrey*, 11 Cal.5th 135 (2021) (bail).

significantly amended until 1975, when claims of false evidence were added to the statute as a means to vacate a conviction.[16] It was not updated again until 2014 but has been regularly amended since then — amendments have included creating parallel statutes for people no longer in custody to vacate their convictions[17] — without any uniformity in the standards.

As a result of these changes, in order to vacate a conviction, some claims require showing (in order of difficulty for the petitioner) a "reasonable probability" of a different result,[18] others require showing that a different result is "more likely than not"[19] — that is, by a preponderance of evidence — and at least one path to relief still requires evidence that "completely undermines the prosecution's case, is conclusive, and points unerringly to [the person's] innocence."[20] It is also unclear what someone with new evidence of innocence must prove to have a conviction vacated if they are no longer in custody as the language for this type of petition is different from all the others.[21]

[16] Stats. 1975, c. 1047 (AB 48). This amendment codified, with some modification, the due process requirements of *Napue v. Illinois,* 360 U.S. 264 (1959). See Penal Code § 1473(b)(3).
[17] See Penal Code §§ 1473.5, 1473.6, 1473.7.
[18] See *In re Richards*, 63 Cal.4th 291, 312–313 (2016) (standard applies to false evidence claims under Penal Code § 1473(b)(1) and is the same used to evaluate state-law errors under *People v. Watson*, 46 Cal.2d 818 (1956)); *People v. Hendrix*, 13 Cal.5th 933, 944 (2022) (*Watson* "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility").
[19] Penal Code §§ 1473(b)(1)(C) & (D).
[20] Penal Code § 1473.6(a)(1).
[21] Penal Code § 1473.7(a)(2). The statute specifies evidence that "requires vacation of the conviction or sentence as a matter of law or in the interests of justice."

Habeas corpus legal standards

Penal Code §	Scope	Custody?	Language	Burden
1473(b)(1)(A)	False evidence "introduced against a person at a hearing or trial relating to the person's incarceration"	In	"material on the issue of guilt or punishment"	Probability
1473(b)(1)(B)	"False physical evidence … which was a material factor directly related to the plea of guilty by the person"	In	"factual, probative, or material on the issue of guilt"	Probability
1473(b)(1)(C)	New evidence "that has not previously been presented and heard at trial and has been discovered after trial"	In	"admissible, and is sufficiently material and credible that it more likely than not would have changed the outcome of the case"	Preponderance
1473.7(a)(2)	"Newly discovered evidence of actual innocence"	Out	"requires vacation of the conviction or sentence as a matter of law or in the interests of justice."	Unclear
1473.6(a)(1)	"Newly discovered evidence of fraud by a government official"	Out	"completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence"	Unerring
1473.6(a)(2)	"Newly discovered evidence that a government official testified falsely at trial"	Out	"substantially probative on the issue of guilt or punishment"	Unclear
1473.6(a)(3)	"Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence"	Out	"substantially material and probative on the issue of guilt or punishment"	Unclear
1473(b)(1)(D)	Expert testimony: "significant dispute has emerged or further developed" about expert testimony "introduced at trial or a hearing"	In	"more likely than not affected the outcome of the case"	Preponderance
1473.5(a)	Expert testimony: related to intimate partner battering	Unclear, but limited to offenses before August 29, 1996	"reasonable probability, sufficient to undermine confidence in the judgment of conviction or sentence, that the result of the proceedings would have been different"	Probability

Created with Datawrapper

California should specify a single unified standard for post-conviction claims based on new evidence, including claims based on a significant dispute about expert testimony.[22] Such claims should allow vacatur of a conviction if the evidence shows there is a reasonable probability of a different outcome in the case. And as Joe Trigilio, Executive Director of Loyola Project for the Innocent, explained to the Committee, a unified standard would "protect pro se petitioners who don't have counsel … and ensure judges are applying a uniform standard" before counsel is assigned and has the opportunity to brief the case.[23]

The recommended "reasonable probability" standard has already been applied in several contexts: It applies to "false testimony" claims under the state habeas statute and is also used to assess state-law errors on appeal[24] and important federal constitutional rights, including the ineffective assistance of counsel[25] and claims that the prosecution did not disclose important evidence.[26]

This standard should also be applied in circumstances when habeas corpus petitions have historically been limited by complex procedural requirements. Under current law, a petition in a non-death-penalty case must be filed "as promptly as the circumstances allow."[27] There are also strict rules on "successive" petitions, meaning a person cannot engage in "piecemeal litigation" and must bring all their claims at once.[28] Courts have only allowed a person to bring an untimely or successive habeas petition in four narrow circumstances, one of which is that the petitioner is "actually innocent"[29] — which requires the extremely high showing that "the evidence was such that it would undermine the entire prosecution case and point unerringly to innocence or reduced culpability."[30]

These procedural bars can result in people with meritorious claims of innocence being unable to get into court to vacate their convictions. A recent unsuccessful bill, AB 3088 (Friedman), would have eliminated these procedural bars by requiring courts to always consider a habeas petition if "in light of all of the evidence now before the court, it is more likely than not the outcome of the case would have been different." Harmonizing the habeas standards would also allow petitioners who can offer evidence of innocence

[22] Penal Code § 1473(b)(1)(D).
[23] Committee on Revision of the Penal Code, Meeting on September 6, 2024, Part 2, 0:28:22–0:29:35.
[24] *People v. Hendrix*, 13 Cal.5th 933, 944 (2022).
[25] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[26] *People v. Salazar*, 35 Cal.4th 1031, 1043 (2005).
[27] *In re Douglas*, 200 Cal.App.4th 236, 242 (2011) (cleaned up).
[28] *In re Clark*, 5 Cal.4th 750, 767 (1993) (cleaned up).
[29] *Id.* at 797–798. A petitioner may also bring an untimely petition if they can show "error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner," that they were convicted or sentenced under an invalid statute, or that the death penalty was imposed by a sentencing authority which had a grossly misleading profile of the petitioner.
[30] *Id.* at 798, n. 33.

that was not previously considered by a court to show a reasonable probability that the outcome of the case would have been different.

Finally, once a habeas petition is granted, courts typically only vacate the conviction and sentence — which means the prosecution has an opportunity to prosecute the case again, possibly taking months or years to be decided. California courts are allowed to dismiss actions in furtherance of justice for a variety of circumstances under section 1385, and those dismissals are final if the court determines there is insufficient evidence showing the defendant committed the offense.[31] While the California Supreme Court has held that the "scope of a court's authority in granting habeas corpus relief is quite broad,"[32] the Penal Code should clarify that courts, at their discretion, after granting a habeas petition and vacating a conviction, may also dismiss the action in furtherance of justice and prevent further prosecution.

Convictions of innocent people present the most profound injustice in the criminal legal system and often reflect a total failure of the law enforcement, prosecutorial, defense, and judicial functions. They can also raise grave public safety issues — if the wrong person has been convicted in a serious case, the actually guilty person often remains free. Harmonizing the habeas standards, relaxing rigid procedural rules that prevent innocent people from getting into court, and allowing the court to dismiss a case so that it cannot be prosecuted again, will help correct these injustices.

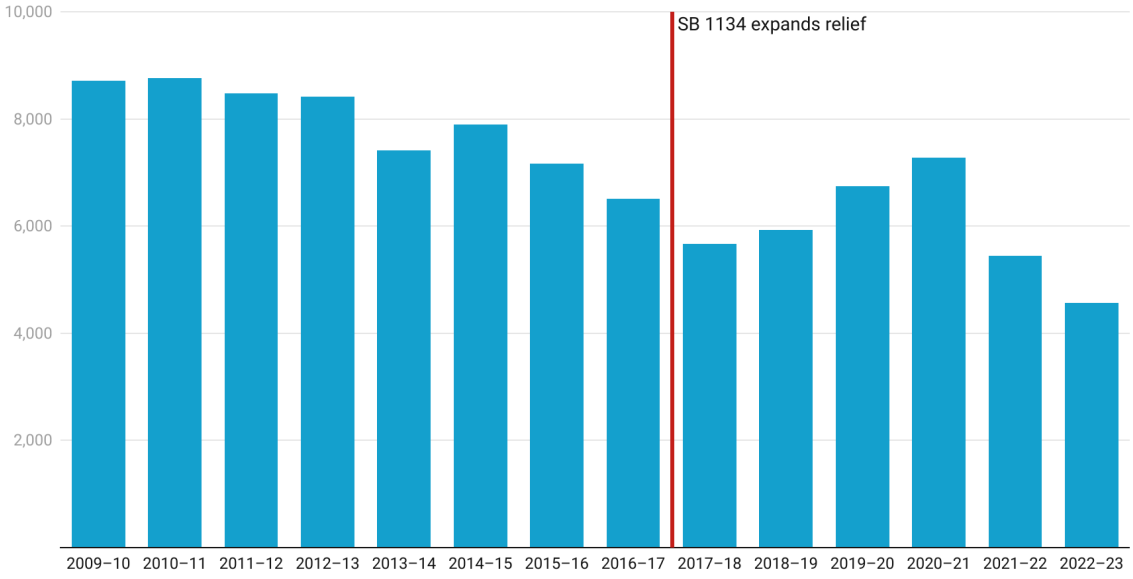
Empirical Research

Even though the Legislature has expanded the availability of habeas corpus to more people and made relief more achievable in some scenarios — most notably SB 1134, effective in 2017, which created a lower standard to vacate a conviction based on new evidence — the number of petitions filed in California's Superior Courts has decreased in recent years, as shown in the chart below. Note that this data include *all* habeas corpus petitions — not just those seeking to vacate convictions because of innocence issues. For this reason, the increase in petitions in Fiscal Years 2019–2020 and 2020–21 may be due to petitions related to prison or jail conditions caused by the COVID-19 pandemic.[33]

[31] See *People v. Superior Court of Santa Clara County*, 100 Cal.App.5th 679, 698 (2024). If a court views the evidence in the light most favorable to the prosecution and concludes that no reasonable trier of fact could find guilt beyond a reasonable doubt, the evidence is insufficient as a matter of law, which serves as a constitutional bar to retrying that offense.
[32] *In re Duval*, 44 Cal.App.5th 401, 411 (2020).
[33] See, e,g., *In re Von Staich*, 56 Cal.App.5th 53 (2020); 477 P.3d 537 (ordering reconsideration).

Habeas corpus filings, Fiscal Year 2009–10 to 2022–23

Data is petitions filed in Superior Courts.



Note that SB 1134 became effective in January 2017 but this data is divided into Fiscal Years that begin midway through the calendar year.

Source: Judicial Council of California, Statewide Caseload Trends reports • Created with Datawrapper

In addition, though statewide data is incomplete, the number of habeas corpus petitions resolved with a hearing is a small percentage of filed petitions. In the most recent year of data, Fiscal Year 2022–23, 356 petitions were resolved with a hearing, while more than 4,500 had been filed.[34] The rest of the petitions were disposed of summarily; there is no data on the number of petitions granted or denied.

Insights from Other Jurisdictions

At least four other states — Maryland, Massachusetts, Utah, and Wisconsin — use a similar legal standard to reasonable probability for new evidence claims.[35]

Other states also allow credible claims of innocence to proceed, despite procedural flaws, including Connecticut and Utah.[36] And in Michigan, successive habeas petitions

[34] Judicial Council of California, *2024 Court Statistics Report: Statewide Caseload Trends*, Table 13d. The Counties of Los Angeles, Sacramento, San Bernardino, San Diego, and San Francisco — and additional smaller counties — did not provide information on habeas corpus dispositions, though did provide the number of petitions filed. Petitions may not be resolved the same year as filing.

[35] See Utah Code Ann. 1953 § 78B-9-104(2)(a); *State v. Plude*, 750 N.W.2d 42, 52 (Wis. 2008); Md. Code Ann. Crim. Proc. § 8-301(a)(1); *Comm. v. Weichell*, 847 N.E.2d 1080, 1090 (Mass. 2006). See also *Hunt v. State*, 474 Md. 89, 114 (Court of Appeals of Md. 2021) ("Weighing the effect of newly discovered evidence in an actual innocence proceeding involves substantially the same inquiry as determining prejudice in the context of an ineffective assistance of counsel claim or assessing whether *Brady* evidence is material.")

[36] In Connecticut, a rebuttable presumption of delay without good cause generally applies when a petitioner files a subsequent habeas petition, but the presumption does not apply to claims asserting actual innocence. Conn. Gen. Stat. § 52-470(f). Utah law provides for a special innocence proceeding,

are allowed when there is a claim of new evidence or there is a significant possibility that the defendant is innocent of the crime.[37]

separate from the general habeas law, in which a petitioner may present newly discovered material evidence that, if credible, would clearly establish their factual innocence. Utah Code § 78B-9-402(2)(a)(i).

[37] Michigan Court Rules 6.502(G).

2. Expand Post-Conviction Discovery.

Recommendation
The Penal Code provides a limited statutory right to post-conviction discovery for people sentenced to a term of 15 years or more, but the statute can be updated to allow more efficient and broader access to information to show someone is innocent or has been wrongfully convicted.

The Committee therefore recommends the following:

1. Require prosecutors and law enforcement to disclose any favorable evidence discovered after conviction. "Favorable evidence" should be defined broadly, like it is in Texas, to include exculpatory, impeachment, or mitigating information that tends to negate the guilt of the person or tends to reduce the sentence, and should also include relevant rulings under the Racial Justice Act.

2. Allow a person convicted of a felony whose sentence included a period of incarceration greater than 1 year to obtain the prosecutor's entire file, not just what they would have been entitled to at trial. This disclosure should also include jury selection notes, which should be specifically exempted from the definition of work product.

3. Allow prosecutors working in Conviction Integrity Units to use investigatory tools, including subpoenas, search warrants, and access to confidential law enforcement records.

Relevant Statutes
Penal Code §§ 832.5, 832.7, 832.8, 1054.9, 1326, 1524
Evidence Code §§ 1043, 1045, 1560

Background and Analysis
A petitioner seeking habeas corpus relief must provide evidence to support their claims or the court will quickly reject their petition. Support for petitions, which can come in various forms, can be difficult to obtain years after a conviction. The Penal Code should be updated to allow more efficient discovery of evidence by convicted people and prosecutors that can show someone is innocent or has been wrongfully convicted.

After conviction, Penal Code section 1054.9 provides a limited right to obtain documents and other evidence from prosecutors and law enforcement. After first applying only to people with death or life without parole sentences, the statute was expanded in 2019 to apply to people with a sentence of at least 15 years for a serious or violent offense, although this threshold does not seem to be based on any particular sentencing data.[38] The defendant must have filed or be preparing to file a petition for habeas corpus (or if out of custody, a motion to vacate a conviction), must have tried to

[38] Penal Code § 1054.9(a).

obtain the materials from trial counsel, and must pay the "actual costs of examination or copying."[39]

As the Committee heard at the September meeting, one problem with the discovery statute is that it only allows someone to obtain what they would have been entitled to at the time of trial.[40] In other words, there is no requirement that prosecutors and law enforcement disclose to convicted people favorable evidence from after trial, such as exculpatory evidence or material from successful Racial Justice Act claims. As Nisha Shah, the Deputy Director at the Habeas Corpus Resource Center, explained in the September meeting, there is no way for a petitioner under the Racial Justice Act to discover other proven examples of bias, other than attorneys talking to each other.[41] Prosecutor's jury selection notes — which have been shown to contain evidence of racial bias in some cases[42] — are also not easily obtainable by defendants after conviction because they can be considered "work product."[43]

California's rules of ethics for attorneys help address parts of this problem but they are insufficient. Ethical rules require a prosecutor to make timely disclosures of any "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense."[44] Upon learning of the information, the prosecutor must promptly disclose the evidence to a court, to the defendant, and conduct an investigation. If the evidence establishes by clear and convincing evidence that a defendant was convicted for an offense they did not commit, the prosecutor must try to remedy the conviction.[45] But this ethics rule does not appear in the Penal Code and the California Supreme Court has not imposed such a requirement as a matter of constitutional law.[46] And the complex definition of favorable evidence in the ethics rule

[39] Penal Code § 1054.9(a) & (e).
[40] Penal Code § 1054.9(c) ("'discovery materials' means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial").
[41] Committee on Revision of the Penal Code, Meeting on September 6, 2024, Part 2, 0:56:12–0:57:38.
[42] Annelise Finney, *Allegations of Prosecutorial Bias Spark Review of Death Penalty Convictions in Alameda County*, KQED, April 22, 2024.
[43] *Box v. Superior Court*, 87 Cal.App.5th 60, 67 (2022) (defendant is entitled to discovery of the prosecution's jury selection notes only after showing a prima facie case of racial bias during jury selection).
[44] Rules of Professional Conduct, rule 3.8(f). California was also the first state to impose criminal penalties for prosecutors who intentionally and in bad faith withhold exculpatory material. Penal Code § 141.
[45] Rules of Professional Conduct, rule 3.8(g).
[46] Last year, the California Supreme Court held that a prosecutor's duty to disclose favorable evidence under as a matter of constitutional due process extends to habeas petitions, provided the evidence was known to or should have been known by the state at the time of trial. *In re Jenkins*, 14 Cal.5th 493, 527 (2023). The Court did not address what should happen when new exculpatory evidence is discovered after conviction. And the United States Supreme Court has held that a prosecutor does not have a post-conviction obligation to develop and disclose new exculpatory information that was not available at the time of the original trial, i.e. new DNA analysis. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009).

is overly-narrow and would not cover material related to sentencing or the Racial Justice Act.[47]

Prosecutors in Conviction Integrity Units — which often examine old convictions — have also encountered obstacles to efficiently investigating cases of innocence. For example, until a habeas petition is filed by a petitioner, there is no active criminal case, and it may be difficult for prosecutors to subpoena documents, obtain search warrants, or get confidential records of police officers if misconduct is alleged.[48]

Allowing people pursuing a habeas petition and prosecutors in Conviction Integrity Units access to more information will allow people to more efficiently investigate innocence claims.

Insights From Other Jurisdictions

Other states require more post-conviction discovery by law. North Carolina mandates open-file discovery to non-death-penalty defendants in post-conviction proceedings once they are represented by counsel.[49] Texas requires that prosecutors provide defendants with exculpatory, mitigating, or impeachment evidence even after trial, including material that "would tend to reduce the punishment for the offense charged."[50]

[47] Allowing prosecutors or courts to determine whether evidence is favorable, or material, has been criticized as inadequate. See, e.g., Daniel Medwed, *Brady's Bunch of Flaws*, 67 Washington and Lee Law Review, Volume 67, 1533, 1541–1544 (2010); Sophia Waldstein, *Open-File Discovery: A Plea for Transparent Plea-Bargaining*, 92 Temple Law Review 517, 549 (2020).
[48] See, e.g., Penal Code §§ 1326, 832.7(a).
[49] N.C. Gen. Stat. 15A-1415(f).
[50] Texas Code Crim. Proc. § 3914(h) (a defendant must receive "any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.").

3. Modernize Compensation for Innocent People.

Recommendation
California's system to compensate the innocent can be updated to clarify the statute, match processes and rewards in other states, and provide more equitable relief to innocent people.

The Committee therefore recommends the following:

1. Redraft the statutory compensation scheme to improve clarity, brevity, and consistency with other laws.
2. Apply the stream-lined process currently in place for convictions vacated through habeas corpus to acquittals after trial and convictions reversed on direct appeal for insufficient evidence.
3. Automatically adjust the compensation formula to account for inflation.
4. Allow persons to claim individual and specific harms entitling them to more than the statutory rate of $140 a day of incarceration.
5. Create a one-time lookback period that allows claimants who never filed a compensation claim or who did not receive compensation that would now be available to them under current law.
6. Compensate wrongfully convicted persons for other deprivations of liberty, including juvenile detention, involuntary hospitalization, and time spent on parole, probation, community supervision, and the sex offender registry.
7. Reimburse restitution, fines, fees, court costs, and other sums paid by the claimant that were required by the conviction and pay any child support arrears incurred due to the wrongful conviction.
8. Pay reasonable attorney fees and costs incurred in obtaining vacatur of the conviction and a successful compensation claim, including to pro bono attorneys.
9. Provide in-state tuition waivers for children of exonerees.
10. Allow a family member of the exoneree to pursue the claim after the death of the exoneree.

Relevant Statutes
Penal Code §§ 851.8, 1485.55, 4900-4904

Background and Analysis

Since 1942, California has offered, like a majority of states,[51] compensation to people who were wrongfully convicted and have proven their innocence. The compensation process is often the only way that people may receive money that could correct the injustice of a wrongful conviction: only about one-third of exonerated people in California have been able to receive monetary compensation via a federal civil rights lawsuit.[52]

California's process has evolved over time and, in some instances, can speedily award compensation for people who a court has found factually innocent. From 1970 to 2000 the maximum a person could receive was $10,000; the rate increased in 2000 to a daily rate with no cap, and increased again in 2016.[53] Under current law, a person who has been convicted and incarcerated for a felony offense that they did not commit will be compensated for each day of wrongful incarceration at $140 per day.[54] They have 10 years to bring a claim after an acquittal, dismissal of charges, pardon, or release from custody, whichever is later.[55]

The compensation process is administered by the California Victim's Compensation Board (CalVCB).[56] In general, claimants must prove by a preponderance of the evidence that the crime they were convicted of did not occur or was not committed by them and that they were wrongfully incarcerated as a result.[57]

In recent years, the Legislature has attempted to streamline the process in some circumstances. Since 2014, if a state or federal court has made a finding of factual

[51] See Innocence Project, *Key Provisions in Wrongful Compensation Laws* (May 2022) (38 states, the federal government, and Washington DC have laws to compensate the wrongfully convicted).
[52] National Registry of Exonerations, *Compensation by the Numbers: Federal Civil Rights Lawsuit Compensation*, July 15, 2024. Of 276 exonerees, 94 (34%) have received awards, with 24 cases (9%) still pending.
[53] From 1970 to 2000 the maximum someone could receive was $10,000. In 2000, California began offering compensation at the rate of $100 a day, with no cap. In 2016, this amount was raised to $140 per day ($51,100 a year).
[54] Penal Code § 4904.
[55] Penal Code § 4901(a).
[56] Government Code § 13901(b). CalVCB — which consists of the Secretary of Government Operations, the State Controller, and a member appointed by the Governor — determines these claims at regular public meetings. The current gubernatorial appointee is Contra Costa County District Attorney Diane Becton.
[57] Penal Code §§ 4900(a) & 4903(a); 2 C.C.R. §§ 644(d)(1) (burden of proof) & 640(f) (incarceration satisfies injury). There is no requirement that the person's conviction be vacated before applying for compensation. Until 2014, claimants also had to prove that they "did not, by any act or omission on his or her part, intentionally contribute to the bringing about of his or her arrest or conviction for the crime with which he or she was charged." See Stat. 2013, c. 800 (SB 618 (Leno)) (deleting this language). In addition, CalVCB considers California law as defined at the time of the offense, so more recent changes in the law that have decriminalized certain behavior does not allow compensation, including people whose convictions were modified due to changes to California's felony murder law. See 2 C.C.R. § 642(a)(3). "[E]xpress factual findings made by the court, including credibility determinations" during a habeas corpus proceeding are binding on CalVCB. Penal Code § 1485.5(c). See also Penal Code § 4903(c).

innocence, CalVCB must approve compensation without a hearing within 90 days of a claim.[58] Since 2022, if there has been an acquittal or dismissal of charges after a conviction has been vacated in a habeas corpus proceeding, CalVCB must presumptively approve compensation, even without an express finding of factual innocence by a court.[59] The Attorney General can overcome the presumption with clear and convincing evidence that the claimant committed the offense.[60] And finally, beginning on January 1 of this year, in similar circumstances, people can ask a court for a finding that they are entitled to compensation.[61] The court must grant this request unless the District Attorney shows with clear and convincing evidence the person committed the offense.[62]

While these changes have improved the efficiency of the process in certain circumstances, the changes have left some gaps in how compensation is determined and the state has not made changes to the value of compensation since 2016. For example, a person whose conviction is overturned on direct appeal due to insufficient evidence is considered to be exonerated by the California Department of Corrections and Rehabilitation[63] and entitled to $6,000 upon release,[64] yet they are not entitled to a presumption for compensation before CalVCB.

As explored below, other states provide more holistic compensation. California should learn from these jurisdictions and update its process to more fully compensate exonerees.

Empirical Research

The number of claims filed with CalVCB has increased in recent years. For example, in Fiscal Year 2019–2020, 24 claims were submitted to CalVCB; in 2023–24 it was 89. Though many claims are dismissed soon after filing for failure to include sufficient information,[65] 85 people have received compensation since 1997 for a total of $61,338,940, with 38 of those claims granted in the last 5 years.[66]

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[58] Penal Code §§ 1485.55(a), (c) & 4902(a). See also Penal Code § 851.865(a). Vacaturs under Penal Code § 1473.7(a)(2) are not included in this process unless the person who has had their conviction vacated requests that the court make an express finding of innocence. Penal Code §§ 1485.55(b) & (c). A person making such a request must show "by a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner." Penal Code § 1485.55(b).

[59] Penal Code § 4900(b). See Stats. 2021, c. 490 (S.B. 446).

[60] Penal Code § 4902(d).

[61] Penal Code § 1485.55(d).

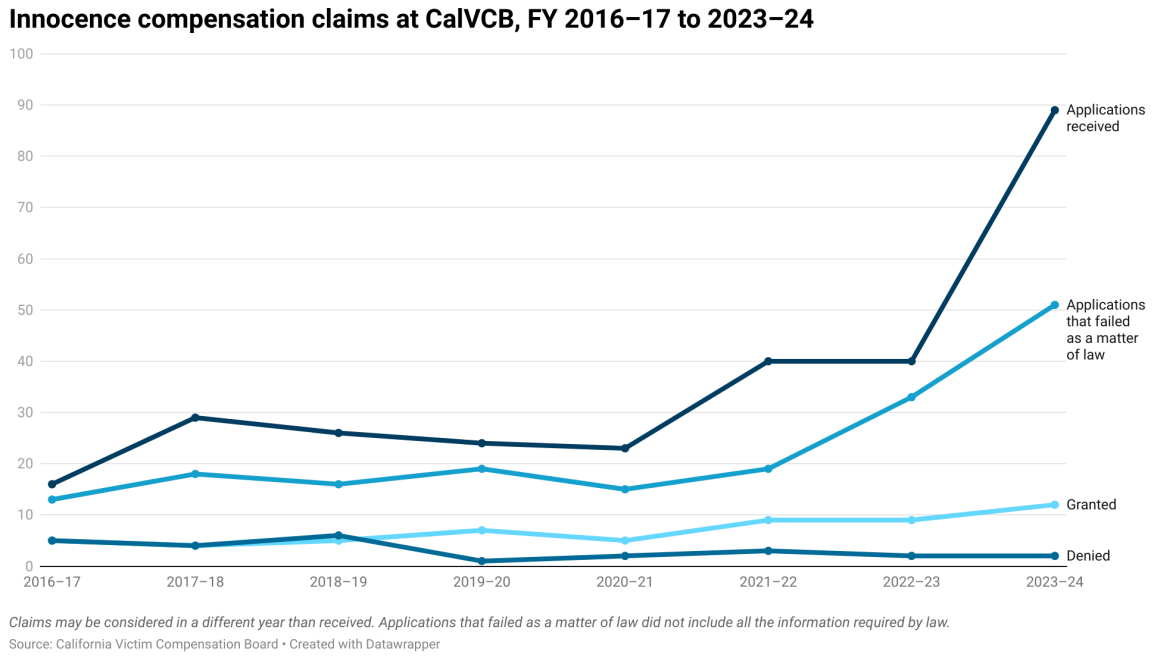
[62] Penal Code § 1485.55(d)(1).

[63] Penal Code § 3007.05(j)(1).

[64] Penal Code § 3007.05(i).

[65] See 2 C.C.R. § 642(a) (hearing officer can dismiss claims "that are untimely or are otherwise not in compliance with Penal Code sections 4900 and 4901").

[66] California Victim Compensation Board, Board Decisions for Penal Code Section 4900 Claims.



Exonerees who were incarcerated for long sentences have also been deprived of the opportunity to build a legacy for themselves and their families.[67] They were not able to earn wages, build credit history, purchase a home, or help a child pay for college.[68] And many families accrue significant financial burdens during incarceration: in addition to having to fill the direct financial gaps left by the absence of their loved one, they may also pay for mental health support and phone calls and visits to the incarcerated person, among other costs.[69]

Insights From Other Jurisdictions

California's compensation scheme has a clearly-defined formula for compensation based on time spent incarcerated and provides relatively quick payment if a court has found that someone is factually innocent. But it does not address an exoneree's full economic damages, such as loss of income or loss of earning potential, or harm to their families. For example, in New York, a factually innocent person may claim damages that are specific to the harms the individual endured instead of a flat amount of compensation per day.[70]

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[67] Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongfully Convicted*, 82 Missouri Law Review 369, 430 (Spring 2017).
[68] *Id.*
[69] Saneta deVuono-powell et al, *Who Pays? The True Cost of Incarceration on Families,* Ella Baker Center, 2015.
[70] New York requires the court to "award damages in such sum of money as the court determines will fairly and reasonably compensate" people. 860 N.Y. Court of Claims Act § 8-b." This may include awarding compensation for lost wages, physical or mental suffering, stigma attached to the type of conviction, presence or absence of a previous significant criminal history, and deprivation of a parenting role. See *Baba-Ali v. New York*, 878 N.Y.S.2d 555 (2009).

Other states also provide broader compensation for exonerees and their families than California does, including:

- Adjusting compensation amounts for inflation.[71]
- Waiving tuition at state universities and educational institutions for exonerees and their children.[72]
- Paying child support arrears accrued during the period of incarceration directly to the department responsible for collecting payments.[73]
- Reimbursement of fines, fees, or restitution paid by successful claimants.[74]
- Awarding reasonable attorney fees for bringing compensation claims.[75] Some states also reimburse attorneys for fees incurred working on overturning the wrongful conviction.[76]
- Compensating for time spent on the sex offender registry, parole, probation, and other similar restraints on liberty.[77]
- Paying economic damages, such as lost wages, and reimbursing medical and dental expenses incurred as a result of incarceration.[78]
- Allowing for a look-back period for people who received compensation under a previous, more stringent law.[79]

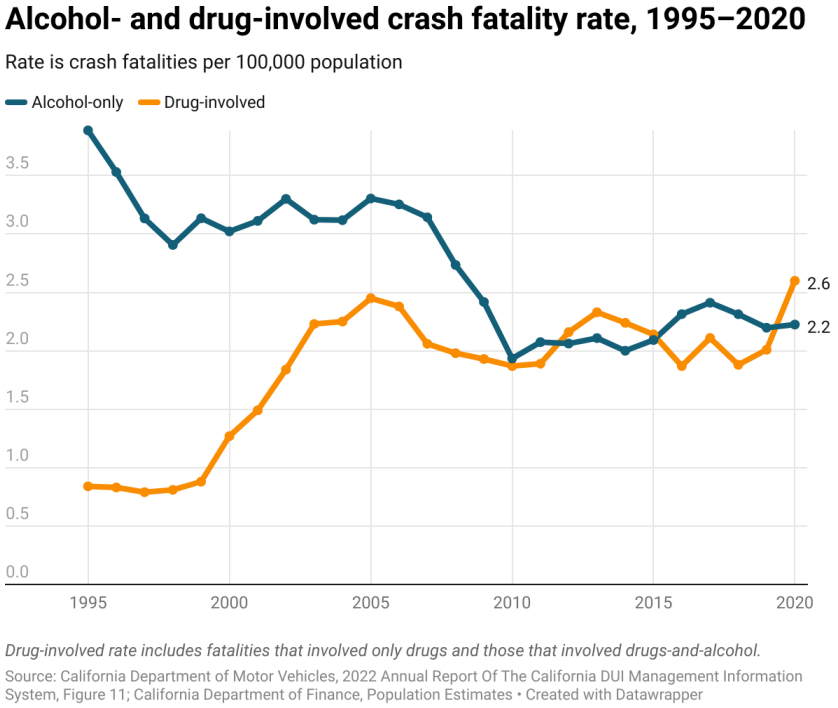
[71] Conn. Gen. Stat. § 54-102uu(d)(2); Fla. Stat. § 961.06(1)(a); Ill. Comp. Stat. § 705-505/8(c); Ohio Rev. Code § 2743.49; Va. Stats. § 8.01-195.11(A); Wa. Rev. Code § 4.100.060(5).
[72] Co. Rev. Stat. § 13-65-103(2)(e)(II)); Wa. Rev. Code § 28B.15.395.
[73] Co. Rev. Stat. § 13-65-103(2)(e)(III); D.C. § 2-423.02(a)(1)(B); Minn. Stat. Ann. § 611.365(a)(5); Tx. Civ. Prac. & Rem. Code § 103.052(a)(2); Wa. Rev. Code § 4.100.060(5)(c).
[74] See, e.g., Co. Rev. Stat. § 13-65-103(2)(e)(V); Fla. Stat. § 961.06(1)(c); Va. Stats. § 8.01-195.11(C); Wa. Rev. Code § 4.100.060(5)(d).
[75] See, e.g., Co. Rev. Stat. § 13-65-103(2)(e)(IV); Fla. Stat. § 961.06(1)(d); Minn. Stat. Ann. §611.365(2)(b); Va. Stats. § 8.01-195.11(C).
[76] See, e.g., Fla. Stat. § 961.06(1)(d); Iowa Stat. § 663A.1(6)(a); Ohio Rev. Code § 2743.48(E)(2)(a).
[77] Co. Rev. Stats. § 13-65-103(3)(a)(II); D.C. § 2-423.02(a)(1)(A)(ii); Id. Code § 6-3503(1)(b); K.S.A. § 60-5004(e)(1)(B); Minn. Stat. Ann. § 611.365.(a); Nev. § 41.950(1)(b); Or. Rev. Stats § 30.657(5)(a)(B); Tx. Civ. Prac. & Rem. Code § 103.052(b).
[78] See e.g., Ohio Rev. Code § 2743.48 (E)(2)(a)-(d) (a person may recover total sum of any fines or court costs paid, $52,625 per year of imprisonment, *and* any loss of wages, salary, or other earned income); Minn. Stat. Ann. § 611.365(2)(a) (person may recover the sum of $50,000 per year of imprisonment and additional monetary damages, which may include economic damages, such as lost wages and reimbursement for medical and dental expenses, and noneconomic damages for any physical or nonphysical injuries or sickness incurred as a result of incarceration).
[79] La. Rev. Stat. § 15:572.8(H)(3); Minn. Stat. Ann. § 590.11(2); Ohio Rev. Code § 2743.48(A)(5).

- Allowing a personal representative of the exoneree to pursue the claim after the death of the exoneree.[80]

[80] Minn. Stat. Ann. § 611.365(7); Va. Stats. § 8.01-195.11(D).

4. Improve California's Approach to Driving Under the Influence Offenses

Driving under the influence of drugs or alcohol presents serious public safety concerns. According to data maintained by the Department of Motor Vehicles (DMV), in 2020, there were more than 1,900 alcohol- or drug-involved crash fatalities and at least 24,000 crash-injuries involving alcohol and drugs.[81]



California's criminal legal system plays an important role in addressing these offenses: between 2016 and 2020, law enforcement officers made almost 700,000 DUI arrests and more than 70% of those arrests resulted in a conviction.[82] Convictions for first-time DUIs likely account for over 40% of all misdemeanor convictions in a given year.[83]

The following related set of recommendations would improve road and public safety while also saving significant court and other costs.

[81] California Department of Motor Vehicles, *2022 Annual Report of the California DUI Management Information System* ("*DUI MIS Report*"), 76, Figure 11 (April 2023).
[82] *Id.* at i, DUI Summary Statistics: 2010–2020.
[83] Judicial Council of California, *2021 Court Statistics Report, Statewide Caseload Trends,* Tables 9a & 9c (212,291 misdemeanor guilty pleas in traffic and non-traffic cases occurred in Fiscal Year 2019–20); *DUI MIS Report*, 25, Table 5b (in 2019, there were 83,512 misdemeanor DUI convictions and 12,552 alcohol- or drug-involved reckless driving convictions).

a. Create Judicial Diversion for First-Time DUI Offenses

Recommendation
California law allows courts to divert most misdemeanor offenses to treatment instead of requiring a criminal conviction — but does not allow diversion for any misdemeanor DUI offenses, which account for nearly 100,000 convictions a year. Data shows that most people (70%) who are convicted of a first-time DUI offense are not convicted of another drunk driving offense in the future. Diverting first-time DUI offenses with strict treatment requirements would allow the state to hold people accountable for impaired driving while freeing up needed court resources to focus on repeat offenders.

The Committee therefore recommends the following:

- Direct judges to grant diversion for first-time DUI misdemeanor offenses as early in the court process as possible unless there are aggravating factors such as injury or having a minor in the vehicle.
- Require regular evaluation of court-mandated DUI programs and that programs offer reduced fees for low-income participants.

Relevant Statutes
Penal Code §§ 1001.80, 1001.95–97
Vehicle Code §§ 23152, 23153, 23593, 23640

Background and Analysis
While the number of DUI convictions per year has been declining over the last decade, there were still over 100,000 DUI convictions in 2019.[84] And while approximately 64,000 convictions were for a first-time offense,[85] almost all people convicted of DUI offenses were sentenced to probation (96%) and a large majority (74%) were also required to serve a jail sentence in addition to probation.[86]

Diversion programs — which defer criminal proceedings while the charged person completes a set of obligations to earn a dismissal of the charges — are available for nearly all misdemeanor offenses in California at a judge's discretion.[87] However, under current law, DUIs are not eligible for diversion, with the exception being diversion for current or former members of the military.[88] Research shows that diversion for DUI can

[84] *DUI MIS Report,* 21, Table 5a.
[85] *DUI MIS Dashboard,* DUI Convictions.
[86] *DUI MIS Report,* 32, Figure 5.
[87] Penal Code §§ 1001.95–97.
[88] Vehicle Code § 23640(a); Penal Code § 1001.80(l) (military diversion). See *Tellez v. Superior Court,* 56 Cal.App.5th 439 (2020) (mental health diversion not allowed). For decisions forbidding court-initiated misdemeanor diversion, see *Grassi v. Superior Court,* 73 Cal.App.5th 283 (2021); *People v. Superior Court of Riverside County,* 81 Cal.App.5th 851 (2022); *Tan v. Superior Court of San Mateo County,* 76 Cal.App.5th 130 (2022).

be more effective at reducing recidivism than the traditional criminal process,[89] and that an arrest is enough to deter most people convicted of a first-time DUI from reoffending.[90]As explained to the Committee by Lauren Knoth-Peterson, Senior Research Scientist for the Washington Public Safety and Policy Research Center, diverting first-time DUI offenses can help avoid the unique stigmatizing effects that a criminal conviction has on women and people of color.[91]

Moreover, recent legislation in California established automatic criminal record clearance for most misdemeanor convictions, including DUIs.[92] The law allows the records of convictions to be "sealed," meaning they are no longer accessible to third parties like employers or housing providers after people have completed the terms of their sentence and any probationary period.[93] Since the California Department of Justice began automatically clearing records in July 2022, over 12 million records have been relieved, and misdemeanor DUI convictions are the most common type (30%) of records relieved.[94] Diverting first-time DUI offenses would speed up the process already in place while incentivizing people to quickly complete their obligations and saving court costs.

Many of the current criminal penalties for a first-time DUI conviction, which include license suspension, orders to complete a DUI program, install an ignition interlock device, or pay a fine, should apply as conditions of diversion.

Therefore, the Committee recommends a misdemeanor DUI diversion law as follows:

- **Presumptive diversion for first DUIs except for aggravated cases.** While many first-time DUIs are suitable, diversion should not be available when the driver had a minor in the vehicle or injured someone.
- **Completion of all currently required classes and treatment.** Nearly all (90%) of people convicted of a first DUI are ordered to complete a 3 or 9-month DUI program. While the Committee recommends that any DUI diversion program continue this requirement, it notes that for many people, the high cost of the classes is a barrier to completion,[95] and currently, none of the DUI program providers in the state offer a reduced fee for low-income participants, though

[89] Lauren Knoth and R. Barry Ruback, *Conviction or Diversion and the Labeling of First-Time DUI Offenders: An Analysis of Sentencing and Recidivism in Pennsylvania*, Justice Quarterly, 38:1, 72-100 (2021).
[90] *Id.* See also *Getting to Zero* at 267.
[91] Committee on Revision of the Penal Code Meeting on March 26, 2024, Part 1, 0:50:59—0:51:15.
[92] AB 1076 (2021).
[93] Penal Code § 1203.425.
[94] Alissa Skog, et al, *Who Benefits From Automatic Record Relief in California?*, California Policy Lab (2024)
[95] RJ Vogt, et al., *So Many Roadblocks: How California's Program Fees System Traps Low-Income Drivers,* ACLU SoCal (September 2022).

that option is permitted by law.[96] To address this, the Committee recommends that the state require programs to offer reduced fees for low-income participants. Additionally, there is no strong evidence that these classes are effective in reducing DUI recidivism and the DMV has been unable to evaluate the programs' effectiveness due to data limitations,[97] so the state should require regular evaluation of their effectiveness.

- **Priorability.** A DUI charge dismissed because of diversion should count as the equivalent of a prior conviction in subsequent prosecutions for DUI. This would allow law enforcement and others to appropriately identify people who have a prior DUI and present a greater risk to public safety.[98]

- ***Watson* advisement.** Similarly, people granted DUI diversion should be given a "*Watson* advisement," a warning courts are required to give to people convicted of DUI that a future DUI causing the death of another person could result in murder charges.[99]

- **Discretionary ignition interlock devices.** Research on the effectiveness of requiring all people convicted of a DUI to install an IID is mixed. While several studies conducted in other states have found that installation of the devices reduced DUI recidivism during the period in which they were installed,[100] studies on the impact of a mandatory IID pilot program in California concluded that mandatory IID installation did not have a general or specific deterrent impact and that more research was needed to determine whether a mandatory IID law would be effective.[101] Current law gives judges discretion to impose an IID upon a

[96] California Code of Regulations § 9878(f)(3); Committee on Revision of the Penal Code meeting on March 26, 2024, Part 3 of 4, 0:31:06–0:31:33. As noted in the Committee's 2023 report, people who are unable to pay for court-ordered programs often face continued legal involvement and additional sanctions, which in this case can include prolonged or permanent license suspension. Committee on Revision of the Penal Code, *2023 Annual Report,* 48–51 (December 2023). See also RJ Vogt, et al., *So Many Roadblocks: How California's Program Fees System Traps Low-Income Drivers,* ACLU SoCal (September 2022).
[97] *DUI MIS Report* at 68.
[98] The National Highway Traffic Safety Administration has cautioned that diversion programs resulting in no record of an offense could prevent the identification of people with repeat DUIs. See B.B. Kirley, et al., *Countermeasures that Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices,* National Highway Traffic Safety Administration, 1–54 (2023).
[99] See Vehicle Code § 23593; *People v. Watson,* 30 Cal.3d. 290 (1981).
[100] R. W. Elder, et al., *Effectiveness of Ignition Interlocks for Preventing Alcohol-Impaired Driving and Alcohol-Related Crashes: A Community Guide Systematic Review,* American Journal of Preventive Medicine, 40(3), 362–376 (2011).
[101] Eric Chapman, Sladjana Oulad Daoud, and Scott Masten, *General Deterrent Evaluation of the Ignition Interlock Pilot Program in California,* California Department of Motor Vehicles (January 2015). See also California Department of Motor Vehicles, *Specific Deterrent Evaluation of the Ignition Interlock Pilot Program in California* (June 2016).

person convicted of a first-time DUI based on the facts of the case.[102] A DUI diversion law should leave judges with this discretion.

Other states allow diversion for first-time DUIs and diversion is supported by the advocacy group Mothers Against Drunk Driving, when conditions such as mandatory installation of IIDs and exclusions for repeat offenders are in place, as told to the Committee by Ian Goldstein, Vice President of Public Affairs for MADD.[103]

Establishing presumptive diversion for most first-time DUI offenses ensures accountability while significantly reducing court costs and enhancing public safety. The Committee believes this recommendation will contribute to safer roads, effective deterrence, and prioritization of public safety and rehabilitation.

Empirical Research

In a 2021 study, researchers assessed the impacts of DUI diversion for first-time DUI offenses in Pennsylvania by examining nearly 35,000 cases in which diversion was granted.[104] The research found that there were no overall differences in the 4-year recidivism rates of people who were diverted compared to people who were not but that the harsher sanctions associated with a DUI conviction had particularly negative effects on women and people of color.[105] The research concluded that an arrest for DUI is a strong enough deterrent to keep most people from reoffending, without the need for additional, harsher punishments.[106]

In California, over 70% of people convicted of a first-time DUI did not have another DUI within 15 years.[107] This data supports the conclusion that allowing diversion for this group of people would not negatively impact public safety.

Insights From Other Jurisdictions

Diversion for DUIs is available in some states in some circumstances, including Florida,[108] Kansas,[109] Louisiana,[110] Oregon,[111] Pennsylvania,[112] and Texas.[113]

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[102] Vehicle Code § 23725.3.
[103] See Written Submission of Ian Goldstein to Penal Code Committee, March 26, 2024; Committee on Revision of the Penal Code Meeting on March 26, 2024, Part 1, 1:27:11—1:27:127.
[104] Lauren Knoth and R. Barry Ruback, *Conviction or Diversion and the Labeling of First-Time DUI Offenders: An Analysis of Sentencing and Recidivism in Pennsylvania*, Justice Quarterly, 38:1, 72-100 (2021).
[105] *Id.* at 89–94.
[106] *Id.* at 94.
[107] *DUI MIS Report*, Table 12.
[108] See Fla. Stat. Ann. §§ 397.334, 948.08, 948.16 (allowing pretrial diversion in general and not exempting DUIs).
[109] KS ST §§ 12-4414, 22-2907, 22-2908. Traffic Resource Center for Judges, *Pre-Trial Diversion Programs for DUIs* (February 2015).
[110] LA R.S. 15:242.
[111] OR ST §§ 813.210-813.270.
[112] 234 Pa. Code Rule 300-320.
[113] See *Lee v. State*, 560 S.W.3d 768 (2018).

b. Expand the Use of DUI Collaborative Courts

Recommendation
Collaborative courts provide substance abuse treatment and case monitoring in place of standard punishments for people convicted of repeat DUI offenses. While highly effective in reducing DUI recidivism, there is no statutory framework for DUI collaborative courts and most counties do not currently operate them.

The Committee therefore recommends the following:

Establish a statutory framework for DUI collaborative courts and offer funding to encourage counties to utilize them.

Relevant Statutes
Vehicle Code §§ 23542, 23548, 23552

Background and Analysis
California's criminal legal system can do more to address the high risk that repeat DUI offenders pose by prioritizing effective treatment over punitive measures. While most people who are convicted of a DUI in California do not reoffend, of the nearly 90,000 DUI convictions in 2019, 27%— approximately 24,000 convictions — were for repeat offenses.[114]

People convicted of multiple DUIs pose a higher risk of recidivating and are less likely to complete court-ordered DUI programs.[115] They are also more likely to have an underlying alcohol or drug problem that is more effectively addressed through treatment than traditional criminal punishment.[116] While current law requires courts to order people convicted of DUI to complete state-approved DUI programs,[117] these programs typically provide education, evaluation, and supervision services, not treatment for underlying substance abuse disorders.[118]

Collaborative courts provide substance abuse treatment and ongoing case monitoring in place of standard punishments for people convicted of repeat DUI.[119] Many use clinical assessments to screen for alcohol dependence and develop treatment plans that are implemented and monitored by a multidisciplinary, nonadversarial team that includes the court, attorneys, law enforcement, and community treatment and service agencies.[120] Participants in collaborative courts are incentivized to complete their

[114] *DUI MIS Report*, 21, Table 5a.
[115] *DUI MIS Report*, 52, Figure 8b, Table 13.
[116] *Getting to Zero* at 263, 267. See also California Office of Traffic Safety, *California Impaired Driving Plan*, 62 (2022).
[117] Vehicle Code §§ 23538(b), 23542(b), 23548(b).
[118] See California Office of Traffic Safety, *California Impaired Driving Plan*, 63 (2022).
[119] *Id.*
[120] *Getting to Zero* at 265–268. See also Judicial Council of California, *Collaborative Justice Courts Fact Sheet* (January 2024).

programs through reduced or waived jail time, fines, and in some cases, shortened probation terms.[121] Despite their effectiveness, due to limited funding and no statutory framework, only 20 counties operate DUI courts.[122] While the California Office of Traffic Safety provides grants to support DUI courts, only 3 counties were provided funding in 2023.[123]

At its March meeting, the Committee heard from Superior Court judges across the state who preside over DUI collaborative courts. Judge Lawrence Brown, who oversees Sacramento County's collaborative courts, told the Committee that in addition to the cost savings DUI collaborative courts provide compared to incarceration, they strike a proper balance between treatment and accountability.[124] San Joaquin County Superior Court Judge Kristine Eagle also highlighted the effectiveness of the DUI collaborative court in her county but explained that these courts are entirely grant-funded.[125] Orange County Superior Court Judge Scott Cooper, who supervises collaborative courts in Orange County, told the Committee that in addition to the reduced recidivism and cost savings associated with DUI collaborative courts, many of his program participants overcome generational alcohol abuse by engaging in the services provided in collaborative court.[126]

To expand access to these life-changing programs, the Committee recommends establishing a clear statutory framework and increasing funding support for DUI collaborative courts. This framework would specify that courts have the discretion to stay mandatory punishments for participants who complete their programs[127] would allow collaborative court stakeholders to more directly incentivize collaborative court participants to stay on the path to recovery. The Committee's complementary recommendation to establish wide-spread diversion for first-time DUI offenses would free up needed resources to fund these specialized courts, allowing more counties to adopt or expand them.

By promoting accountability alongside rehabilitation, California can reduce DUI-related harm and support long-term community safety.

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[121] *Getting to Zero* at 269. See also Judicial Council of California, *Collaborative Justice Courts Fact Sheet* (January 2024).
[122] Judicial Council of California, *Collaborative Justice Courts Fact Sheet* (January 2024).
[123] California Office of Traffic Safety, *California Highway Safety Plan 2023*, 43–44 (2022).
[124] Committee on Revision of the Penal Code Meeting on March 26, 2024, Part 2, 1:28:4—1:29:18.
[125] Committee on Revision of the Penal Code Meeting on March 26, 2024, Part 2, 1:29:43—1:29:56.
[126] Committee on Revision of the Penal Code Meeting on March 26, 2024, Part 2, 1:39:43—1:40:32.
[127] These include probation terms longer than standard probation terms, installation of ignition interlock devices, and jail time. See Vehicle Code §§ 23538, 23542, 23548, 23550 (jail sentence), 23575.3 (IID), 23600 (probation term).

Empirical Research

Almost all people convicted of DUI are ordered to complete a state-approved DUI education program (91%).[128] Of those arrested for DUI in 2019 who were ordered by a court to enroll in a DUI program, 68% of people with a first conviction completed their program, but only 31% of people with a second conviction did.[129]

Based on research showing that DUI collaborative courts are highly effective at reducing recidivism, the National Highway Traffic Safety Administration and the National Academy of Sciences have recommended that all states implement them.[130]

[128] *DUI MIS Report*, 32, Figure 5.
[129] *Id.*, Table 13.
[130] *Getting to Zero* at 269. See also B.B. Kirley, et al., *Countermeasures that Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices*, National Highway Traffic Safety Administration, 1–53 (2023).

c. Streamline License Suspensions Related to DUI

Recommendation
California law uses both administrative and criminal systems to suspend a person's license after they have been arrested and convicted of DUI. The use of the two systems results in duplicative license suspensions that are excessively punitive and not geared toward improving public safety.

The Committee therefore recommends the following:

Update the license suspension rules for DUIs so that a person's license is suspended only once and not multiple times during the course of a case.

Relevant Statutes
Vehicle Code §§ 13351.85, 13353.3, 13353.6(h), 13353.7(b), 13353.75(c)

Background and Analysis
Under current law, the California Department of Motor Vehicles uses an administrative process to suspend a person's license shortly after they are arrested for DUI, and in most cases, before the criminal case has been resolved.[131] These suspensions last 4 months for a first DUI and 1 year for a second or subsequent DUI.[132]

But in addition to the administrative suspension, after a person is convicted in criminal court —which can be several months after the arrest[133] — the DMV is required to suspend a person's license again ranging from 6 months for a first conviction to 5 years for a fourth or subsequent conviction, with no credit given for the administrative suspension.[134]

License suspensions can cause people to lose jobs and hinder their ability to find new employment.[135] People who drive with a suspended license can be arrested, charged with a new criminal offense, fined, and subjected to continued criminal legal involvement.[136]

Streamlining California's DUI license suspension process to eliminate redundant penalties can reduce barriers to employment and help minimize prolonged involvement in the criminal legal system, promoting individual stability and public safety.

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[131] Vehicle Code § 13353.3.
[132] *Id.*
[133] DMV data show that the statewide median time from DUI arrest to conviction is approximately 4 months. See *DMV MIS Report*, Table 5b.
[134] Vehicle Code §§ 13352, 13353.2.
[135] See *Paying More for Being Poor*, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, 7–8; (May 2017); See also *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, Back on the Road California, 26–28(Apr. 2016).
[136] Vehicle Code §§ 14601, 14601.2.

Empirical Research

A 2023 review of available research conducted by the National Highway Traffic Safety Administration found that:

- License suspensions are effective in reducing recidivism when imposed as swift and certain administrative sanctions, but less so when imposed after the lengthy and uncertain court process.[137]
- Since some people continue to drive with a suspended license, and many do not reinstate their license when they become eligible, lengthy court-imposed suspensions do little to reduce DUI recidivism.[138] Encouraging people to quickly reinstate their licenses with appropriate conditions is a more effective way to promote road safety.[139]

[137] B.B. Kirley, et al., *Countermeasures that Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices*, National Highway Traffic Safety Administration, 1–11 (citing studies) (2023).
[138] *Id. at 1-62.*
[139] *Id.*

5. Modernize Civil Asset Forfeiture

Recommendation
Asset forfeiture is a legal process that allows the state to keep cash and other property if it is connected to criminal activity. While state law puts some guardrails in place, due process protections for property owners can be minimal. California can improve the fairness of its asset forfeiture process by exempting minimum amounts of cash from being forfeited without an accompanying criminal conviction and allowing crime victims to receive some of the forfeited assets.

The Committee therefore recommends the following:

1. Exempt cash and property totaling less than $10,000 from civil or administrative forfeiture.

2. Update the forfeiture distribution formula to allow proceeds to support crime victims.

Relevant Statutes
Health & Safety Code §§ 11488.4, 11489

Background and Analysis
California's asset forfeiture laws, like most states and the federal government, allow police and prosecutors to permanently keep cash, cars, homes, and other property that is involved in a crime. Asset forfeitures can happen as part of resolving criminal charges, but in many drug cases a conviction is not required and can instead occur as "civil" asset forfeiture. Forfeiture proceeds are distributed according to a statutory formula, but the formula does not allow proceeds to support crime victims.

In California, there are no minimum requirements on the value of property that can be forfeited — meaning that very small amounts of money can be taken, which may be difficult for a low-income person to challenge or not worth the cost to challenge in court. The Legislature's last significant engagement with asset forfeiture was in 2016 with the passage of SB 443 (Mitchell), which added some due process protections and limited when local law enforcement agencies could receive a share of federally forfeited property.[140] While California does require a criminal conviction for cash or

[140] Forfeiture is also permissible under federal law and state agencies can receive a portion of the forfeiture if they are involved in the investigation that led to the forfeiture. In 2022, $40.7 million more was received by California agencies for forfeitures under federal law. Department of the Treasury, *Treasury Forfeiture Fund, Accountability Report: Fiscal Year 2022*, 49; Department of Justice, *Equitable Sharing Payments of Cash and Sale Proceeds by Recipient Agency for California*, Fiscal Year 2022. SB 443 allows state agencies to participate in federal forfeitures only if those forfeitures meet the due process protections under state law. See Health & Safety Code § 11471.2. Federal law — which cannot be modified by state law — also controls how proceeds from asset forfeitures under federal law can be used. United States Department of Justice, *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies*, March 2024, 16.

property valued under $40,000 in drug cases, this protection only applies if the owner of the property contests the forfeiture. If a person does not contest the forfeiture within 30 days — and data from four states that track the number of forfeitures contested shows only about 20% of forfeitures are contested[141] — then prosecutors may take property under $25,000 administratively, without any involvement by a judge, as long as they follow certain notice provisions.[142] Judicial proceedings are required, however, when a person either contests the forfeiture of the property, or the total amount of property is above $25,000.

After assets are forfeited in drug cases — which make up the large majority of forfeiture cases — California law directs the majority of proceeds (65%) to the law enforcement agencies that participated in the forfeiture.[143] And 15% of that 65% must be set aside in a special local fund for programs to "combat drug abuse and divert gang activity."[144] This set-aside — which amounted to approximately $4 million in 2023 — should be modernized to also allow support for crime victims. Alameda County Deputy District Attorney Steven Jesse Corral, who appeared before the Committee at the July meeting, supported expanding the definition, especially for victims of human trafficking.[145]

Civil asset forfeiture, without legal limits, can raise significant due process concerns, especially when a property owner does not have the means or resources to contest the forfeiture. Setting reasonable thresholds for when a prosecutor may permanently forfeit property without a criminal conviction will provide property owners with more due process.

Empirical Research

From 2018 to 2023, more than $186 million across approximately 11,400 drug cases was forfeited in California under state law.[146] The smallest amount forfeited was $1 and the largest was $5,442,850; 13% of forfeitures were for less than $1,000, 24% were for less than $1,500, 39% were for less than $2,500 and 74% were for less than $10,000.

But the total amount of funds represented by these lesser forfeitures is quite small: the money forfeited in amounts under $10,000 ($26.7 million) was only 14% of the total

[141] Ian MacDougall, *Police Say Seizing Property Without Trial Helps Keep Crime Down. A New Study Shows They're Wrong.*, ProPublica, Dec. 14, 2020 (only 1% of forfeitures were challenged in Colorado).
[142] Health and Safety Code § 11488.4(j)(5)(B).
[143] Health and Safety Code § 11489(b)(2)(D). The funds are distributed as follows: 65% to the law enforcement agencies that participated in the forfeiture, 15% of this must be deposited in a special local fund for programs "designed to combat drug abuse and divert gang activity"; 10% to the prosecutorial agency that processes forfeiture action; 24% to the state General Fund, of which up to $10 million shall be made available for school safety and security; and 1% to the Environmental Enforcement and Training Account.
[144] Health & Safety Code § 11489(b)(2)(A)(i).
[145] Committee on Revision of the Penal Code, Meeting on July 12, 2024, Part 4, 0:42:33–0:43:22.
[146] California Department of Justice, *Asset Forfeiture Report: Calendar Year* Reports for 2018–2023, Table 3. This total excludes amounts forfeiture under federal law and received by state and local law enforcement agencies.

amount forfeited from 2018 to 2023. In other words, requiring a minimum amount before civil forfeiture can occur in drug cases would help protect due process and reduce court and law enforcement costs with likely little bottom-line impact in the amount of money received.

Additionally, setting a minimum threshold for civil forfeiture in California would not prohibit a prosecutor from forfeiting amounts under $10,000 altogether: prosecutors could still do so by obtaining a criminal conviction.[147] Of all forfeitures completed between 2018 and 2023 that were for $10,000 or less, at least 50% were completed with a guilty plea in a criminal case.[148]

Insights From Other Jurisdictions

Other states have taken similar steps to limit civil forfeiture. In 2021, Minnesota passed legislation that prohibits prosecutors from administratively forfeiting cash less than $1,500.[149] The State Auditor, which is responsible for tracking forfeiture in Minnesota, explained that forfeitures of small-dollar assets are not a large part of public safety budgets, but the amounts forfeited can be significant to individuals.[150] Four other states — Maine, Nebraska, New Mexico, and North Carolina — have eliminated civil forfeiture and only allow criminal forfeiture.[151]

[147] Under current law, if a person does not contest the forfeiture, a prosecutor may administratively forfeit (i.e. without judicial oversight and without a criminal conviction) any property less than $25,000. Health and Safety Code § 11488.4(j)(5)(B).

[148] Another 35% of the forfeitures did not indicate how they were obtained. Only 14% of forfeitures were done with no charges or dropped charges.

[149] Minn. Stat. § 609.5314(1).

[150] Eric Rasmussen, *Auditor: Police Use of Controversial Forfeiture Law Declining in Minnesota,* KSTP TV, September 28, 2023.

[151] Lisa Knepper et al, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture,* 3d Edition, 5, 39 (December 2020), 39; Maine Rev. Stat. Ann. tit. 15 § 5821; N.C. Gen. Stat. § 75D-5 (civil forfeiture is still available in racketeering cases).

6. Establish Prosecutor-Led Diversion for Gun Possession Offenses

Recommendation
The Penal Code authorizes judge-initiated diversion for most misdemeanor offenses including gun possession. However, judge-initiated diversion is not available for felony charges, and while prosecutors can offer diversion in either misdemeanor or felony gun possession cases, their authority to do so is not explicitly authorized in the Penal Code.

The Committee therefore recommends the following:

Explicitly allow prosecutors to offer diversion programs to individuals charged with misdemeanor and felony illegal gun possession offenses.

Relevant Statutes
Penal Code §§ 1001.95, 25400, 25850, 26100, 26350

Background and Analysis
Research shows that community gun violence is committed by a relatively small number of people. An analysis of data from nearly two dozen cities across the United States found that on average, at least half of homicides and nonfatal shootings in these cities were committed by and/or against people accounting for less than 1% of the city population.[152]

Despite this, arrests for weapons possession are common, accounting for nearly 10% of arrests each year in California. These arrests often result in jail or prison sentences, even though many people carry firearms solely for personal safety, without any intent to engage in further criminal activity.[153] Incarcerating these individuals frequently intensifies the conditions linked to community violence, such as poverty, poor access to education, untreated trauma, and lack of affordable housing.[154] Even convictions that avoid jail time have been shown to produce significant, long-lasting increases in recidivism.[155]

As Mike McLively, Policy Director at the Giffords Center for Violence Intervention explained to the Committee at its July meeting, some communities are countering this

[152] Stephen Lurie, et al., *The Less Than 1%: Groups and the Extreme Concentration of Urban Violence*, National Network for Safe Communities (November 2018).
[153] See Melissa Barragan, et al., *"Damned if You Do, Damned if You Don't": Perceptions of Guns, Safety, and Legitimacy Among Detained Gun Offenders*, Criminal Justice and Behavior, 43(1) 140–155 (October 2015); See also Dorthy Dillard, et al., *Understanding the Perception of Place and Its Impact on Community Violence*, Delaware Journal of Public Health 10(2): 46–49 (June 2024).
[154] Daniel Kim, *Social Determinants of Health in Relation to Firearm-Related Homicides in the United States: A Nationwide Multilevel Cross-Sectional Study*, PLOS Medicine 16, no. 12, December 17, 2019.
[155] John Humphries, et al., *Understanding the Revolving Door of Conviction, Incarceration, and Recidivism*, Cato Institute (October 30, 2024).

cycle through prosecutor-led gun diversion programs.[156] These initiatives have shown promising results by addressing root causes and reducing recidivism.

While current law does not explicitly prohibit diversion for unlawful gun possession, and judges may grant diversion in misdemeanor cases despite opposition from prosecutors,[157] judges and prosecutors can be reluctant to offer diversion due to public safety concerns.[158] Additionally, many may be unaware of these innovative programs and some communities have yet to develop community-based programs tailored to unlawful gun possession.

The Penal Code should be updated to expressly permit prosecutors to offer diversion for gun possession offenses, including carrying a concealed firearm, carrying an unloaded firearm, and carrying a loaded firearm in public or in a vehicle.[159] The law should specify eligibility for diversion when unlawful gun possession is the sole charge, regardless of whether it is classified as a misdemeanor or felony.

By adopting a clear legal framework that allows for prosecutor-led diversion for unlawful gun possession, California can break cycles of incarceration, address the root causes of violence, and foster safer communities. Embracing these evidence-based approaches would be a meaningful step toward reducing gun violence while supporting individuals in high-violence communities.

Empirical Research
A University of Chicago study of a gun diversion program in Minneapolis found that graduates of the program had significantly lower odds of a violent or weapons-related offense compared to the comparison group.[160] The program, developed through collaboration between the local prosecutor and a trusted community-based organization, offers life skills classes, mentoring, and other support services to people charged with misdemeanor gun possession offenses as an alternative to conviction and incarceration.[161] Over 6 to 9 months, trained counselors use a mix of cognitive behavioral and group therapy to address trauma, faulty thinking, and the ability to regulate one's emotions.[162] Researchers found that only 13% of program graduates were convicted of a new offense within two years compared to 40% of the comparison group.[163]

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[156] See Written Submission of Mike McLively to Committee on Revision of the Penal Code, July 9, 2024.
[157] Penal Code § 1001.95.
[158] See, e.g., San Luis Obispo Superior Court, Court Misdemeanor Diversion Guidelines (categorically prohibits gun possession offenses from court-initiated misdemeanor diversion).
[159] See Penal Code §§ 25400 (concealed), 25850 (loaded in public), 26100 (loaded in a vehicle), 26350 (unloaded).
[160] Epperson, et al., *An Examination of Recidivism Outcomes for a Novel Prosecutor-Led Gun Diversion Program*, Journal of Criminal Justice, Vol. 92 (May—June 2024).
[161] *Id.* Committee staff also spoke to the director of the Minneapolis program, Priscilla Brown.
[162] Staff interview of Pathways to New Beginnings Director Priscilla Brown.
[163] *Id.* at 4.

7. Eliminate Accomplice Liability for Implied Malice Murder

Recommendation

Recent legislation, SB 1437, limited accomplice liability for murder based on the principle that a person should only be punished for their own actions and personal culpability. However, a once-obscure legal theory — aiding and abetting implied malice murder — allows people who did not kill or intend to kill to be found guilty of murder, inconsistent with this principle.

The Committee therefore recommends the following:

Eliminate murder liability for aiding and abetting implied malice murder.

Relevant Statutes

Penal Code §§ 188, 189

Background and Analysis

This year, the Committee began a review of California's accomplice liability laws — legal doctrines that allow someone who did not directly commit an offense to be convicted and punished as if they had.[164] The Committee is concerned that the scope of these doctrines may often impose punishments incommensurate with an accomplice's actual culpability. The Committee intends to return to this general topic with additional study, but this year has focused on issues arising from accomplice liability for murder, which raise immediate concerns following recent court rulings approving a confusing legal standard applied to accomplices in "implied malice" murder cases. The Committee urges the Legislature to address these issues as follow-up to its landmark efforts in this area with SB 1437 in 2019.

The Committee focused on accomplice liability for murder due to the seriousness of murder convictions in California, which carry the most severe penalties in our criminal legal system: indeterminate sentences of 15 years to life, 25 years to life, or, in some cases, imprisonment for life without the possibility of parole or even death.[165]

Recognizing the gravity of these penalties, the Legislature recently affirmed with SB 1437 that murder convictions should be limited to individuals who actually committed the killing, aided in the killing with the shared intent to kill, or acted as a major participant in a specified felony with reckless indifferent to human life.[166] Before SB 1437, California applied murder liability much more broadly, allowing accomplices who acted without the intent to kill and were not directly involved in the killing to be convicted of murder for many years.[167] This broader liability was often based on legal

[164] See Penal Code § 31.
[165] Penal Code §§ 190(a) & 190.2.
[166] SB 1437 (Skinner 2018).
[167] See *People v. Chun*, 45 Cal.4th 1172 (2009); *People v. Cavitt*, 33 Cal.4th 187.

theories that relaxed requirements around proving the individual's mental state regarding the killing.[168]

Two legal theories in particular, the felony-murder and natural and probable consequences doctrines, were frequently used to convict accomplices of murder that they did not directly participate in or intend. The second-degree felony-murder rule permitted murder convictions for accomplices to "inherently dangerous" felonies, regardless of intent,[169] while the natural and probable consequences doctrine applied a "reasonably foreseeable" standard to hold accomplices liable for murders that resulted from an offense they aided.[170] Notably, these doctrines did not require prosecutors to prove the accused person's state of mind regarding the killing itself.[171]

In 2019, Senate Bill 1437 (Skinner 2018) made significant reforms to restrict the application of these doctrines, restoring a core legal principle that punishment should reflect an individual's personal level of culpability.[172] SB 1437 eliminated both the second-degree felony-murder rule and natural and probable consequences doctrine as grounds for murder liability.[173] It also created a process for people convicted of murder under these theories to petition to vacate their convictions.[174] Despite these reforms, current law still allows murder liability for accomplices under certain conditions, such as when they assist in a murder with intent to kill or engage in an enumerated felony as a major participant with reckless indifference to human life.[175]

In addition to these well-established legal theories, a novel theory to establish accomplice liability for murder developed after SB 1437 was passed — aiding and abetting implied malice murder. Under this theory, a person who assists in a life-endangering act with conscious disregard for human life can be convicted of murder even if they did not directly participate in or intend the killing.[176] This theory was fully-approved by the California Supreme Court in June 2023 and that case has

[168] See *People v. Dillon,* 34 Cal.3d. 441, 476–477 (1983).
[169] *People v. Chun,* 45 Cal.4th 1172, 1182 (2009); *People v. Patterson,* 49 Cal.3d 615, 617–618 (1989) (in determining whether a felony in inherently dangerous to human life, fact-finder must consider the elements of the felony in the abstract, not the particular facts of the case (citing *People v. Williams,* 63 Cal.2d 452, 458 (1965)).
[170] *People v. Prettyman,* 14 Cal.4th 248, 254 (1996). In 2014, the California Supreme Court specified that natural and probable consequences liability could not extend to first-degree premeditated murder because doing so was "inconsistent with reasonable concepts of culpability." *People v. Chiu,* 59 Cal.4th 155 (2014).
[171] See *People v. Dillon,* 34 Cal.3d. 441, 476–477 (1983) (felony-murder rule); *People v. Prettyman,* 14 Cal.4th 248, 254 (1996) (natural and probable consequences doctrine).
[172] SB 1437 § 1(d).
[173] *People v. Gentile,* 10 Cal.5th 830 (2020).
[174] Penal Code § 1172.6.
[175] Penal Code § 189(e).
[176] See *People v. Reyes,* 14 Cal.5th 981 (2023).

been cited in appellate courts more than 200 times since June 2023.[177] The theory has allowed murder convictions in cases with similar fact patterns as those previously prosecuted under the felony-murder and natural and probable consequences doctrines. For example, it has supported murder prosecutions for accomplices who neither committed the fatal act nor anticipated that a weapon would be used.[178]

In addition to being inconsistent with the goals of SB 1437, as explained to the Committee by Jennifer Hansen, an attorney for the California Appellate Project, the elements of aiding and abetting implied malice murder are complex and can be difficult for courts and juries to apply, which raises serious administrability questions about using this theory to impose the most serious sentences in our system.

Additional reforms are needed to align accomplice liability for murder with the objectives of SB 1437. The Committee therefore recommends abolishing aiding and abetting implied malice murder to ensure that only those who act with the highest culpability face murder convictions and their accompanying life sentences.

Eliminating this theory does not eliminate criminal liability for accomplices altogether. Accomplices will still be held accountable for serious offenses they participated in, such as assault or burglary, often with sentencing enhancements. Other legal standards would continue to apply to those who intend or directly participate in killings. The Committee affirms, however, that murder convictions and indeterminate life sentences should be reserved for the most culpable individuals and not applied to accomplices who lacked an intent to kill.

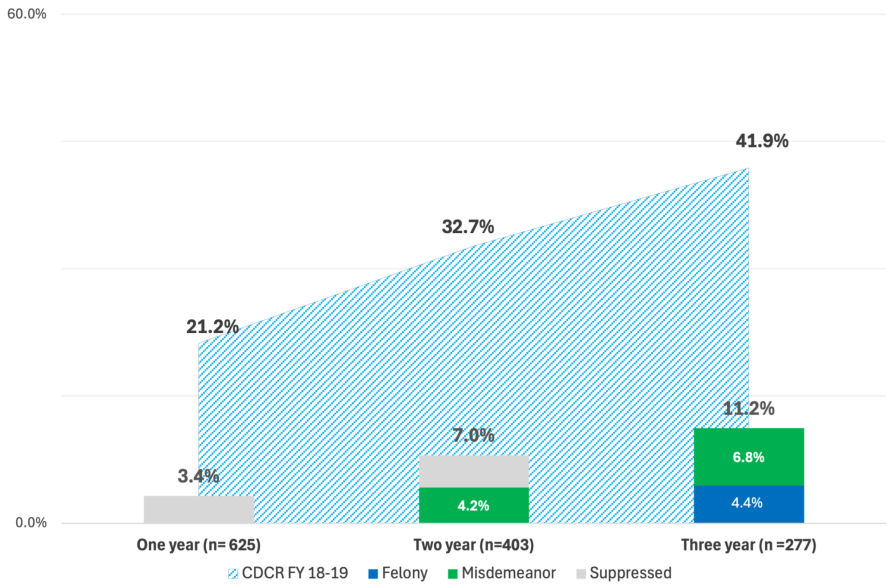
Empirical Research

The resentencing provisions of SB 1437 created a process for people convicted of murder to petition to vacate their conviction if it was based on the felony-murder or natural and probable consequences doctrines.[179]

Research conducted by the California Policy Lab for the Committee shows that people released after being resentenced under SB 1437 have one of the lowest new conviction rates among California's entire resentenced population with only 3.4% convicted of a new offense within one year of release and only 11% convicted of a new offense after three years, with most of the new convictions being for misdemeanors.[180]

[177] See Written Submission of Jennifer Hansen to Committee on Revision of the Penal Code, October 22, 2024.
[178] See *People v. Glukhoy*, 77 Cal.App.5th 576 (2022); *People v. Powell*, 63 Cal.App.5th 689 (2021); *People v. Superior Court of San Diego County (Valenzuela),* 73 Cal.App.5th 485 (2021).
[179] Penal Code § 1172.6.
[180] Presentation of California Policy Lab to Committee on Revision of the Penal Code, October 29, 2024, slide 10.

New conviction rates for people released under SB 1437



People who have been resentenced and released under SB 1437 are disproportionately Black and female compared with other resentenced populations: 40% of the SB 1437 population was Black (compared to 24% of people released from CDCR in Fiscal Year 19–18) and 12.4% were women (compared to 7.3%).[181] They are also people who are younger at the time of their offense and have served longer sentences comparatively, with a median age at offense of 21 and time served at release of 17 years.[182]

Additional Considerations

Under the resentencing provisions of SB 1437, petitioners must be denied relief if they could be convicted of murder under a still-valid theory.[183] As a result, resentencing relief has been denied to people convicted of first-degree murder even though their conviction is no longer valid under current law on the basis that there is sufficient evidence to convict them of a lesser degree of murder.[184] For example, a person convicted of first-degree felony murder, who would not be guilty under current law because they weren't a major participant in the underlying felony who acted with reckless indifference to human life, could have their petition denied, and the first-degree murder conviction remains in place if they could be convicted of second-degree murder under the aiding and abetting implied malice theory.

One court has noted that this results in "rough justice rather than perfect justice" and that the Legislature could amend the Penal Code "to ensure that no defendant remains

[181] Presentation of California Policy Lab to Committee on Revision of the Penal Code, October 29, 2024, slide 8.
[182] *Id.*
[183] Penal Code § 1172.6(a)(3).
[184] See *People v. Gonzalez*, 87 Cal.App.5th 869, 880–881 (2023).

convicted of a crime greater than what he or she would be guilty of under the revised statutes."[185]

The Committee recommends that these resentencing provisions be amended to allow judges to reduce murder convictions and sentences to the appropriate degree so that no person remains convicted of a crime greater than current law would allow. The law should also allow people whose SB 1437 petitions were denied on the ground that they could be convicted of a lesser degree of murder to return to court for reconsideration of their petition.

In addition, if accomplice liability for implied malice murder is eliminated, people who have been denied relief under SB 1437 on that theory should be able to have their cases reconsidered by a court to see if their murder convictions should still stand.

[185] *People v. Didyavong*, 90 Cal.App.5th 85, 96–97 (2023).

8. Limit Firearm Enhancements to People Who Used or Were Armed With a Gun

Recommendation

Two firearm enhancements in the Penal Code — the "armed" and "use" enhancements — can be applied to accomplices who did not know another person had or was going to use a gun. These enhancements can significantly lengthen a person's prison sentence even though their lack of involvement reduces their culpability.

The Committee therefore recommends the following:

- Require accomplices to be personally armed with a gun for the "armed" enhancement to apply.
- Eliminate the exception in gang cases to the requirement that a person must personally use or discharge a firearm for the "use" enhancement to apply.

Relevant Statutes

Penal Code §§ 12022, 12022.53

Background and Analysis

Armed enhancement • Penal Code § 12022

The "armed" firearm enhancement adds 1 year to a sentence for being armed with a firearm during the commission or attempted commission of any felony and 3 years when the firearm is an assault weapon or machine gun.[186] The enhancement does not require a gun to actually be on someone's person before it can apply: a gun must merely be "available for use, either offensively or defensively."[187] Courts have held that multiple people can be "armed" with a single gun for the purposes of this enhancement.[188]

Under current law, the armed enhancement applies not only to individuals who were personally armed but also to accomplices who may not have been aware that another principal was armed.[189] For example, a getaway driver for a robbery can receive this enhancement even if they did not know that the individuals who completed the robbery were armed with guns.[190]

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[186] Penal Code § 12022(a)(1), (2). The arming enhancement cannot be applied to offenses in which possession of a gun is an element of the offense. See *Ex parte Shull*, 23 Cal.2d 745, 749-751 (1994); *People v. Clark*, 62 Cal.App.5th 939 (2021).
[187] *People v. Pitto*, 43 Cal.4th 228, 236 (2008).
[188] See *People v. Mendival*, 2 Cal.App.4th 562 (1992).
[189] *Alfred v. Garland,* 64 F.4th 1025, 1046 (9th Cir. 2023);*People v. Caraballo*, 246 Cal.App.4th 936. 940 (2016); *People v. Overten*, 28 Cal.App.4th 1497, 1501 (1994). See also *People v. W.L.*, 2018 WL 6499446, *7 (First Appellate District 2018); *People v. Withers*, 2018 WL 4611146 (Fourth Appellate District 2018); *People v. Jurian*, 2018 WL 1100763, *19 (Second Appellate District 2018).
[190] *People v. Overten*, 28 Cal.App.4th 1497, 1501 (1994).

"10-20-life" use enhancement • Penal Code § 12022.53

The Penal Code also includes a separate sentence enhancement for personal use or discharge of a firearm during certain specified felonies, commonly referred to as the "10-20–life" gun enhancement.[191] This enhancement imposes a consecutive term of 10 years for using a firearm, 20 years for personally and intentionally discharging it, and 25 to life if the discharge causes great bodily injury or death.[192]

Unlike the "armed" enhancement, this enhancement generally does not apply to accomplices who did not personally use the firearm.[193] However, an exception exists for cases where a gang enhancement is also proven. In these instances, the "use" enhancement can be applied to accomplices even if they were unaware that the perpetrator used or intended to use a firearm.[194] The effect of this rule is that someone who did not personally use a firearm in a gang-related case can receive a gun enhancement carrying a 20-year or life sentence.[195]

⁂

The Committee has concluded that these enhancements as can be currently applied to accomplices in the circumstances described above are not fair and do not result in appropriate sentences. To ensure that sentencing enhancements align with individual culpability, the Committee recommends that firearm enhancements be reserved for individuals who directly used or were knowingly armed with a firearm. This approach would reduce excessively harsh penalties for individuals with lesser involvement in the crime.

Empirical Research

Armed enhancement: Data from the California Department of Corrections and Rehabilitation show that from 2013 to 2023, there were approximately 2,000 people admitted to prison with the armed enhancement as part of their sentence. Unfortunately, the data does not distinguish between directly armed people and those who may have received the enhancement as an accomplice. There were significant race and age disparities: 87% of people with the enhancement were non-white and nearly 50% were 25 years old or younger when they were admitted to prison.

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[191] Penal Code § 12022.53. The distinction between gun "use" and being "armed" requires the court to ask whether the person took some action — not necessarily firing the weapon — with the gun in furtherance of the crime; if so, the gun was "used." See *Alvarado v. Superior Court*, 146 Cal.App.4th 993 (2007).
[192] *Id.* A person can receive multiple enhancements for one occasion in which they used or discharged a firearm if they are convicted of multiple charges based on multiple victims. *In re Tameka C.*, 22 Cal.4th 190, 195–198 (2000).
[193] *People v. Walker*, 18 Cal.3d 232 (1976).
[194] Penal Code § 12022.53(e). See also *People v. Gonzales*, 87 Cal.App.4th 1, 11–19 (2001).
[195] The gang enhancement and personal use of a firearm enhancement cannot be added together unless the person is the actual shooter. Penal Code § 12022.53(e)(2).

Use enhancement with gang enhancement: Data shows that from 2013 to 2023, 603 people were admitted to prison with both the "10-20-life" firearm use enhancement and a gang enhancement. Of these, 108 people may have received the gun enhancement as an accomplice because time was not added to their sentence for each enhancement. Of all people receiving both enhancements, nearly all of them (96%) were Black or Hispanic, more than half of them were 25 years old or younger at the time they were admitted to prison, and 96% were 39 or younger.[196]

Additional Considerations

As the Committee has routinely recommended, any changes to the application of sentencing enhancements should be applied retroactively to ensure equal treatment of people currently incarcerated on an enhancement that would not be allowed under current law.

[196] For an additional 28 people, neither enhancement added time to the sentence.

9. Prohibit the Felony-Murder Rule in Provocative-Act Murders

Recommendation
California's "provocative act" murder doctrine holds people responsible for murders they did not directly commit or intend if they provoke a deadly response through dangerous actions. This already expansive liability is further intensified by California's felony-murder rule, which can escalate these cases to the most severe penalties in the legal system.

The Committee therefore recommends the following:

Prohibit the felony-murder rule from elevating a murder conviction based on the provocative-act doctrine from second-degree to first-degree murder.

Relevant Statutes
Penal Code §§ 189, 190.2

Background and Analysis
California courts have long allowed a person to be convicted of murder if they commit or assist a "provocative act" — a violent or aggressive action during the crime likely to provoke a deadly response — which leads to someone else (such as a crime victim or police officer) killing someone in response.[197] For example, a person who initiates a gun battle can be convicted of murder if a third-party kills someone in response, even if that person was not directly involved in the killing or if the person killed was also an accomplice to the crime.[198] Courts have held that the provocative act murder doctrine is a valid legal theory even after the changes made to murder liability by SB 1437 in 2019.[199]

The provocative act doctrine differs from the felony-murder rule because it involves a third-party's lethal response, rather than a direct killing by a perpetrator or accomplice during a felony.[200] Courts have held that the felony-murder rule cannot be used to establish murder liability when a third-party causes the death, even if the situation arose during a felony that could otherwise trigger it.[201]

But confusingly, once second-degree murder liability is established under the provocative act doctrine, the felony-murder rule can elevate the offense to first-degree murder if the underlying crime is among those enumerated in statute.[202] This elevation

[197] *People v. Gilbert*, 63 Cal.2d. 690 (1965). See also CALCRIM 560.
[198] *Id.* at 703. See also *People v. Gallegos*, 54 Cal.App.4th 453, 461 (1997).
[199] *People v. Antonelli*, 93 Cal.App.5th 712, 721 (2023).
[200] *People v. Washington*, 62 Cal.2d 777, 781-783 (1965). See also *People v. Antonelli*, 93 Cal.App.5th 712 (2023).
[201] *People v. Washington,* 62 Cal.2d 777, 781–783 (1965).
[202] Penal Code § 189(a); *People v. Gilbert*, 63 Cal.2d 690 (1965). See also *Pizano v. Superior Court*, 21 Cal.3d 128, 139, 4 (1978).

opens the door to even harsher sentences, including life without the possibility of parole or the death penalty, based on the felony-murder special circumstance, despite the individual neither directly causing nor intending the fatal outcome.[203]

These rules allow someone who did not directly kill and did not intend to kill to be sentenced to life without parole or even death because of a third-party's response to their actions. Although the number of convictions in such cases appears to be small — only a few dozen according to appellate attorney Nathanial Miller, who appeared before the Committee at its October meeting[204] — the outcomes in these cases involve disproportionately severe penalties for people whose level of culpability does not warrant such extreme punishments.

To ensure fairness, the Committee recommends that the Legislature amend the law to prohibit using the felony-murder rule to elevate a murder conviction based on the provocative-act doctrine from second-degree to first-degree murder. This change would align punishment more closely with the defendant's actual actions and intentions.

Insights from Other Jurisdictions

Most states, like California, do not allow the felony-murder rule to establish murder liability for killings committed by a non-accomplice third-party.[205] However, unlike in California, several states impose additional limitations. Some, like New York and Missouri, allow the use of the felony-murder rule but restrict liability to second-degree murder,[206] while others, like Michigan, Nevada, and Pennsylvania prohibit murder convictions when the person killed is an accomplice.[207] Certain states including Maryland and Massachusetts, go further, barring all murder liability when the killing is committed by a third-party.[208] In states with any of these limitations, using the felony-murder rule to impose first-degree murder liability is prohibited.

[203] Penal Code § 190.2(a)(17); *People v. Briscoe*, 92 Cal.App.4th 568, 595 (2001).
[204] Committee on Revision of the Penal Code Meeting on October 29, 2024, Part 2 1:16:40–1:17:13.
[205] See Written submission of Nathaniel Miller to Committee on Revision of the Penal Code, October 29, 2024.
[206] New York (N.Y. Penal Law § 125.25); Florida (*State v. Wright,* 379 So.2d 96 (1079)); Missouri (*State v. Burrage,* 465 S.W.3d 77 (2015)).
[207] Michigan (*People v. Austin*, 370 Mich. 12 (1963)); Nebraska (*State v. Rust,* 197 Neb. 528 (1977)); Nevada (*Sheriff, Clark County v. Hicks*, 89 Nev. 78 (1973)); Pennsylvania (*Commonwealth v. Redline,* 391 Pa. 486 (1958).
[208] Alaska (*Pfister v. State*, 425 P.3d. 183 (2018)); Maryland (*Campbell v. State*, 293 Md. 248 (1982)); Massachusetts (*Commonwealth v. Dawson*, 490 Mass. 521 (2022)).

10. Specify that Proposition 57 Credits Apply to Indeterminate Sentences

Recommendation
Beginning in 2017, people incarcerated with a life sentence could earn credits for both good conduct and completion of educational and other programs, which improve public safety by incentivizing good behavior and rehabilitation. Recent litigation has resulted in CDCR being unable to release people with indeterminate sentences who had earned earlier release dates with these credits and been approved for release by the parole board because they are a low risk to public safety.

The Committee therefore recommends the following:

Specify in the Penal Code that the credits created under Proposition 57's constitutional provisions should continue to be applied to minimum eligible parole dates.

Relevant Statutes
California Constitution, Article 1 § 32
Penal Code § 3046
15 California Code of Regulations §§ 3043–3043.6

Background and Analysis
A recent court decision interpreting the scope of Proposition 57's amendments to the California constitution has upended the parole process for people with indeterminate life sentences.[209] As a result, around 20 people a month who the parole board has found safe to release are having their release dates pushed back.[210]

In 2016, California voters approved Proposition 57, the Public Safety and Rehabilitation Act.[211] Among other provisions, Proposition 57 gave CDCR "authority to award credits earned for good behavior and approved rehabilitative or educational achievements."[212] While California statutes had long provided for credits for many incarcerated people, Proposition 57's grant of power to CDCR was embedded in the California constitution,[213] was "notwithstanding … any other provision of law,"[214] and was to "be broadly construed to accomplish its purposes."[215] The goals of Proposition 57 were to reduce overcrowding in California's prisons — which the United States Supreme Court had held

[209] See *Criminal Justice Legal Foundation ("CJLF"), et al. v. California Department of Corrections and Rehabilitation ("CDCR"), et al.* Sacramento County Superior Court Case No. 34-2022-80003807, Ruling on Submitted Matter and Order, December 13, 2023.
[210] Committee on Revision of the Penal Code Meeting on September 6, 2024, Part 2, 1:23:49–1:24:10; Cayla Mihalovich, *They Earned Parole. A Court Order Keeps Them From Returning Home*, KQED, August 25, 2024.
[211] See California Secretary of State, Statement of Vote, General Election, November 8, 2016, 70 (64.5% in favor).
[212] Cal. Const. Art. 1, § 32(a)(2).
[213] Compare Penal Code § 2933 with Cal. Const. Art. 1, § 32(a).
[214] Cal. Const. Art. 1, § 32(a).
[215] Proposition 57, §§ 5 and 9.

violated the United States constitution[216] — while enhancing public safety and improving rehabilitation.[217]

After an extensive regulatory process, including thousands of public comments, the California Department of Corrections and Rehabilitation issued new credit-earning regulations in May 2017.[218] Among other credit rules, these regulations allowed people with an indeterminate sentence — a sentence that requires appearing before the parole board to determine if release is appropriate, such as a 15 to life sentence — to advance their "minimum eligible parole date" with credits.[219] The MEPD is the earliest someone can be released from prison if they have an indeterminate sentence. Until these regulations in 2017, most life sentences could not be reduced with credits.[220]

From 2017 until the middle of 2024, credits were regularly used to determine when someone with a life sentence was eligible for release. But only their eligibility. No one with an indeterminate sentence was released until the Board of Parole Hearings determined they did not pose an "unreasonable risk of danger to society if released from prison."[221] Between 2018 and 2023, the approval rate by the Board of Parole Hearings for people eligible for an initial parole hearing — the group of people most likely to have had their MEPDs reduced by credits — was 11%.[222]

This status quo changed because of litigation brought by a nonprofit on behalf of itself and three crime victims.[223] The lawsuit alleged that Proposition 57's credit-earning provisions were unlawful on various grounds.[224] A Superior Court judge in Sacramento County rejected almost all of the lawsuit's contentions but agreed with one of them: that credits promulgated by CDCR under its constitutional authority from Proposition 57 could not apply to reduce minimum eligible parole dates for people with indeterminate life sentences.[225]

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[216] *Brown v. Plata*, 563 U.S. 493 (2011).
[217] Cal. Const. Art. 1, § 32(a) ("The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order").
[218] See Board of Parole Hearings, Fact Sheet: Criminal Justice Legal Foundation v. California Department of Corrections, et al. Litigation Update Background, 1 (July 2024); Tracey Kaplan and Robert Salonga, *Prop 57: Debate rages on about which inmates should be released early*, The Mercury News, September 5, 2017.
[219] 15 CCR § 3043(a).
[220] See Prison Law Office, CDCR Time Credits, 4 (July 2024). Exceptions included convictions for gross vehicular manslaughter while intoxicated with a prior conviction, Penal Code § 191.5(d); attempted murder against a public official, Penal Code § 217.1(b); and a "habitual offender" law that required causing great bodily injury before it could be imposed. Penal Code § 667.7(a)(1).
[221] See Board of Parole Hearings, *The California Parole Hearing Process Handbook*, 39, March 8, 2024. See also Penal Code § 3041(b)(1).
[222] Board of Parole Hearings, *Report of Significant Events* 2018–2023, 1.
[223] *CJLF v. CDCR,* Sacramento County Superior Court Case No. 34-2022-80003807.
[224] *CJLF v. CDCR*, Sacramento County Superior Court Case No. 34-2022-80003807, Ruling on Submitted Matter and Order, December 13, 2023, 3–4.
[225] *Id*. at 15–18.

The court reached this conclusion because, in its view, Penal Code section 3046 "prevents credits from reducing an inmate's MEPD" and nothing in the text of or ballot materials for Proposition 57 discussed credits for indeterminately-sentenced people.[226] The court concluded that "the authority to grant credits, in and of itself, is not sufficient to advance an inmate's MEPD."[227]

As a result, CDCR cannot apply credits to release anyone with an indeterminate sentence, even if the parole board has approved the person for release. But the Board of Parole Hearings is not prevented from conducting parole hearings based on an MEPD that was determined with credits — the end result being a confusing process where people have parole hearings, are approved for release, and then wait more months and years until a newly-calculated MEPD allows their release.[228]

The case is currently on appeal in the Third Appellate District, with briefing scheduled to be completed in early December 2024.[229] An appellate decision will take an unknown number of months to issue and a further appeal to the California Supreme Court is likely.

As Jennifer Shaffer, Executive Officer of the Board of Parole Hearings, told the Committee, the incarcerated people most affected by this litigation are those who have completed the most significant rehabilitative programming.[230] These are the people who earned the most amount of credits and therefore had their MEPD most affected. And in the past, Kathleen Allison, Secretary of the Department of Corrections and Rehabilitation, explained to the Committee that people are more incentivized to participate in prison rehabilitative programming when it is paired with some hope of future release.[231] Ms. Shaffer also noted that crime victims are impacted by the uncertainty in release dates created by the litigation.

The Committee has concluded that the Legislature should clarify to the maximum extent possible that the Penal Code does not prevent credits promulgated by CDCR under its constitutional authority from applying to MEPDs. Doing so would improve public safety by allowing sentence-reducing credits to incentive rehabilitation for people in prison. It would also save the state significant money by continuing the release from prison of people who present a very low risk to the public.

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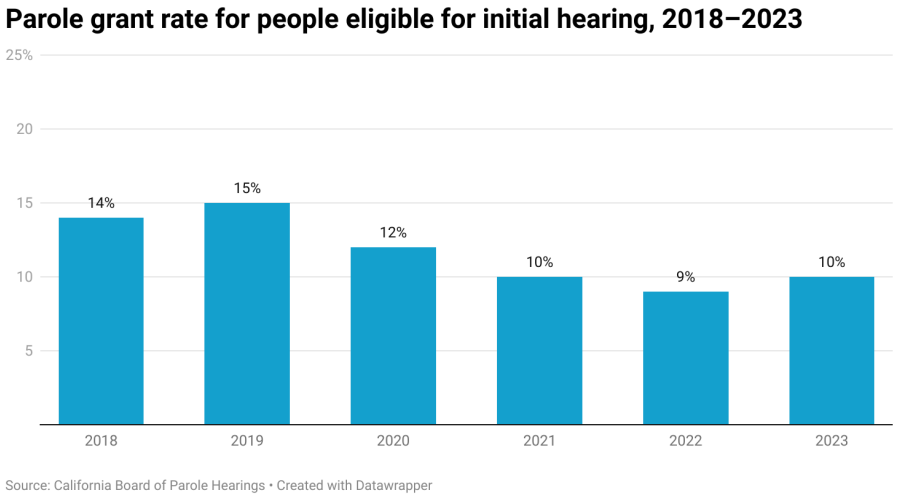
[226] *Id.* at 16–18.
[227] *Id.* at 17.
[228] *CJLF v. CDCR*, Sacramento County Superior Court Case No. 34-2022-80003807, Order Granting in Part and Denying in Part Petitioners' Motion to Enforce Petition for Writ of Mandate and Granting in Part and Denying in Part Respondent's Motion for a Discretionary Stay of Judgment Pending Appeal, May 29, 2024, 2.
[229] See Docket for *CJLF v. CDCR*, Third Appellate District Case No. C100274.
[230] Committee on Revision of the Penal Code Meeting on September 6, 2024, Part 2, 1:24:46–1:25:04.
[231] Committee on Revision of the Penal Code, Meeting on May 13, 2021, Part 3, 0:17:30–0:20:58.

Empirical Research

People found suitable for release by the Board of Parole Hearings are among the safest to release from prison and are only approved for release after extensive consideration by the parole board and, for many, the Governor.[232]

For example, between 2018 and 2023, only 11% of people eligible for their first parole hearing were found suitable for release.[233]



And between Fiscal Years 2011–12 and 2018–19, the parole board approved 5,248 people for release; less than 3% had a new conviction of any kind — misdemeanor or felony — within 3 years of release, and less than half of a percent (23 people) had a new felony conviction for an offense against a person.[234]

Research has shown that in-prison credit-earning schemes improve safety for incarcerated people and those working in prisons.[235] Studies of credit-earning systems in other states have shown that recidivism outcomes lower for people who receive credits and end up serving less time incarcerated.[236] Other research has shown that

[232] If the person's conviction was for murder, the Governor must also review the decision. California Constitution, Article 5, § 8(b); Penal Code § 3041.2. For non-murder cases, the Governor can request additional review by the parole board of any parole grant. See Penal Code § 3041.1.
[233] Board of Parole Hearings, *Report of Significant Events* 2018–2023, 1.
[234] *Id.* at 10.
[235] See Jennifer Doleac, *The possibility of parole: A powerful incentive that makes us all safer,* Route Fifty, May 6, 2024 (discussing studies). See also *People v. Brown*, 54 Cal.4th 314, 317 (2012) (describing benefits of credits). See also Mary Kate Batistich et al., *Therapy to Reduce Violence and Improve Institutional Safety During Incarceration*, NBER Working Paper 33147 (November 2024).
[236] See, e.g., N.Y. Dept. of Corr. Services., Merit Time Program Summary: October 1997–December 2006, ii–iii (2007); E.K. Drake, R. Barnoski, and S. Aos, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs*, Revised, Washington State Institute for Public Policy, 7 (Apr. 2009)

people who have the opportunity to earn time off a sentence have fewer disciplinary violations while incarcerated.[237]

[237] William D. Bales and Courtney H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, Journal of Criminal Justice 40, 401–402 (2012).

Administrative Report

Creation of the Committee

The Committee on Revision of the Penal Code was formed on January 1, 2020.[238]

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.[239] Neither body has any authority over the substantive work of the other[240] and they each have different statutory duties.[241]

The Committee consists of up to 7 members. Five are appointed by the Governor for 4-year terms.[242] One is an assembly member selected by the Speaker of the Assembly and one is a senator selected by the Senate Committee on Rules.[243] The Governor selects the Committee's chair.[244]

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.[245]

The Committee is required to prepare an annual report for submission to the Governor and the Legislature.[246]

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.[247] In 2024, it held 5 meetings. Meetings were conducted entirely by teleconference.[248]

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[238] Government Code § 8280(b).
[239] See Government Code § 8281.5(d).
[240] Government Code § 8290(c).
[241] Compare Government Code §§ 8289, 8290 (duties of Commission) with Government Code § 8290.5 (duties of Committee).
[242] Government Code § 8281.5(a), (c).
[243] Government Code § 8281.5(a).
[244] Government Code § 8283.
[245] Government Code § 8290.5(a).
[246] Government Code § 8293(b).
[247] Government Code §§ 11120–11132.
[248] Government Code § 1123.5.

Personnel of the Committee

At the time of this report in 2024, the following people were members of the Committee:

Chair
Michael Romano

Legislative Members
Senator Nancy Skinner
Assemblymember Isaac Bryan

Gubernatorial Appointees
Hon. Peter Espinoza
Priscilla Ocen
Heidi Rummel

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

Joy F. Haviland
Senior Staff Counsel

Thomas M. Nosewicz
Legal Director

Rick Owen
Senior Staff Counsel

The following people provided substantial support for the Committee's legislative program:

Natasha Minsker
Danica Rodarmel

The following people from the California Policy Lab provided data analysis and research support for the Committee:

Mia Bird
Johanna Lacoe
Molly Pickard
Manny Prunty
Steven Raphael
Nefara Riesch
Alissa Skog
Thomas Sloan

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

Sharon Reilly
Executive Director

Debora Larrabee
Chief of Administrative Services

Megan Hayenga
Office Technician

Planned Activities for 2025

In 2025, 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 legal 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 other sources in California. That data will be used by the Committee as a tool in evaluating the need for and effect of possible reforms.

Acknowledgments

Many individuals and organizations participated in Committee meetings in 2024, shared their expertise with staff, made public comment, or otherwise contributed towards this report. The Committee is deeply grateful for their assistance. Panelists who presented to the Committee 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.

Panelists
(in alphabetical order)
Obie Anthony
Founder and Executive Director, Exonerated Nation

Hon. Lawrence Brown
Sacramento County Superior Court

Bayliss Camp
Branch Chief, Research and Development, Department of Motor Vehicles

Joel Caplan
Professor, Rutgers School of Criminal Justice

Katie Cardenas
Deputy Executive Officer, External Affairs and Compliance Division, California Victim Compensation Board

Dr. Gena Castro Rodriguez
Executive Director, National Alliance for Trauma Recovery Centers

Steven Jesse Corral
Deputy District Attorney, Alameda County District Attorney's Office

Hon. Scott Cooper
Orange County Superior Court

Reygan Cunningham
Co-Director, California Partnership for Safe Communities

Dr. Annette Dekker
Assistant Professor, Department of Emergency Medicine, UCLA David Geffen School of Medicine

Hon. Kristine Eagle
San Joaquin County Superior Court

Jon Eldan
Founder and Executive Director, After Innocence

James Fell
Principal Research Scientist, NORC at the University of Chicago

Ari Freilich
Director, Department of Justice, Office of Gun Violence Prevention

Lynda Gledhill
Executive Officer, California Victim Compensation Board

Ian Goldstein
VP of Public Affairs, Mothers Against Drunk Driving

Brandon Greene
Director of Policy Advocacy, Western Center on Law and Poverty

Jennifer Hansen
Attorney, California Appellate Project

Jasmin Harris
Director of Policy, The Innocence Center

Jeannie Ho
Section Chief, DUI Licensing Unit, California Department of Health Care Services

Janelle Ito-Orille
Division Chief, Licensing and Certification Division, Department of Health Care Services

Robin Johnson
Assistant Chief, California Highway Patrol

Lauren Knoth-Peterson
Senior Research Scientist, Washington Public Safety and Policy Research Center

Ruy Laredo
Legislative Coordinator, Legislative and Governmental Affairs, Department of Health Care Services

Anita Lee
Principal Fiscal & Policy Analyst, Legislative Analyst's Office

Chief Kathy Lester
Sacramento Police Department

Marisa McKeown
Deputy District Attorney, Santa Clara District Attorney

Mike McLively
Policy Director, Giffords Center for Violence Intervention

Nathaniel Miller
Attorney at Law

James Mink
Policy Lead, After Innocence

David Muhammad
Executive Director, National Institute for Criminal Justice Reform

Crystal Sanchez
Branch Chief, Licensing and Certification Division, Department of Health Care Services

Jennifer Shaffer
Executive Officer, Board of Parole Hearings

Nisha Shah
Deputy Director of Litigation, Habeas Corpus Resource Center

Dr. Breena Taira
Director of Social Medicine, Olive View-UCLA Medical Center

Thomas Trainor
Deputy in Charge, Conviction Integrity Unit, Los Angeles County District Attorney

Joseph Trigilio
Associate Clinical Professor and Executive Director, Loyola Project for the Innocent, Loyola Law School

Michael Vidmar
Deputy District Attorney, Santa Clara District Attorney

Julia Weber
Consultant, Giffords Law Center to Prevent Gun Violence

Dr. Garen J. Wintemute
UC Davis, Director, Violence Prevention Research Program

Dustin Woida
Sergeant, California Highway Patrol

Belle Yan
Assistant Professor and Supervising Attorney, University of San Francisco School of Law Racial Justice Clinic

Philanthropic and Other Support

The Committee is grateful to the Legislature and Governor for providing generous support for the Committee's research and data analysis with the California Policy Lab. The Committee also extends special thanks to 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: Biographies of 2024 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 Ofce 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, served as director of the Office of Diversion and Reentry at the Los Angeles County Department of Health Services from 2016 to 2021. 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.

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 and 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.

Heidi Rummel, of Los Angeles, is Clinical Professor of Law and Director, Post-Conviction Justice Project, at USC Gould School of Law. Under her supervision, second and third-year law students represent clients serving life terms in California prisons, many of whom were sentenced for crimes they committed in their youth. The Project has won the release of close to 200 clients through the parole process, on habeas corpus challenging the denial of parole, on resentencing petitions, and on habeas corpus challenging murder convictions where expert testimony of intimate partner violence was not admitted at trial. Prior to joining the USC Gould School of Law faculty, Rummel served in the United States Attorney's Office in Los Angeles from 1996-2005 prosecuting federal criminal civil rights offenses, including human trafficking, police misconduct, and hate crimes. She also prosecuted gang crimes, arson cases, and child pornography offenses, and served as deputy chief in the General Crimes Section. Previously, Rummel was an Assistant United States Attorney for the District of Columbia, where she handled state court prosecutions and appellate matters. She clerked for the Honorable Thomas Penfield Jackson of the United States District Court for the District of Columbia. Rummel holds a BA from the University of North Carolina at Chapel Hill with highest honors and a JD from the University of Chicago with honors.

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. Until December 2024, Senator Skinner represented 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.