

***Flash Incarceration:  
Due Process in an Era of Intermediate  
Sanctions***

**DRAFT FOR COMMENTS**

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# Summary

State law currently defines flash incarceration as “a period of detention in county jail due to a violation of an offender's conditions of postrelease supervision.” Although this definition describes what flash incarceration is, it does not describe how or when flash incarceration should be administered. This paper answers both those questions.

*Morrissey v. Brewer* requires that counties provide notice and a hearing before flash incarcerating parolees, but with three important differences from the revocation process:

1. Counties do not need to provide both a probable cause investigation and final hearing to determine the facts as described in *Morrissey*. The short-term period of incarceration is the functional equivalent of a hold following a determination of probable cause in the revocation context and a two-stage hearing in this context would be inappropriate.
2. The courts are unlikely to conclude that an independent officer must undertake a mandatory investigation of the alleged violation triggering a period of flash incarceration. The costs of such a policy, in both labor and funds, would be prohibitive.
3. There is likely no requirement to produce the equivalent of a written statement of the “evidence relied on and reasons for revoking parole.” Such a document is necessary for contesting revocation in appellate proceedings, but the length of incarceration at issue here precludes further appeal.

A review of social science literature suggests the following design elements in a supervision program using flash incarceration:

1. Using an opt-in structure of review to conserve agency resources and expedite the process.
2. For small counties, assigning a dedicated Probation official. Larger counties should consider appointing independent deputy probation officers (DPO) to hearing duty, especially where probation departments regularly assign DPOs to the revocation courts.
3. Constraining discretion at the level of violation to ensure consistency and fairness in the administration of flash incarceration. For example, drug use is one violation for which a county could declare flash incarceration must be administered, as it is determined through the use of a clear, uncontroversial test.
4. Creating policies that enumerate when flash incarceration should be recommended, under what conditions recommendations of flash incarceration will be upheld on review, and the length of each period of flash incarceration. To the extent that such policies are created, informing offenders of these policies before they violate the conditions of their supervision is an effective way to encourage compliance and ensure the supervision system is perceived as fair.

# Introduction

California's Assembly Bill 109 (2011) and the corresponding clean-up legislation have ushered in an era of unprecedented change in the policies used by the State and its counties in criminal sentencing, incarceration, and parole.<sup>1</sup> Generally speaking, the State has shifted much of the responsibility for low-level offenders to the counties, providing them with a lump sum for each offender expected to be diverted from State control, and granting them nearly unbridled discretion over how they spend this money. This shift in funding and authority is known as “realignment.” One major effect of realignment is to place far more individuals under the supervision of county agencies than ever before. Changes in the Penal Code have reserved State prison for the most serious offenders and those serving a sentence of at least three years.<sup>2</sup> Offenders who otherwise would have gone to state prison will now serve their terms in county jails and “non-non-nons”<sup>3</sup> released from state prison will be supervised under county authority rather than the state Division of Adult Parole Operations. Rehabilitative efforts now play a major role in postincarceration supervision as a stated purpose of realignment.<sup>4</sup> To accommodate the twin mandates of increased supervision and community-based supervision, the State has also provided counties a variety of new supervision tools.

This paper considers one such tool: flash incarceration. State law currently defines flash incarceration as “a period of detention in county jail due to a violation of an offender's conditions of postrelease supervision.”<sup>5</sup> Although this definition describes what flash incarceration is, it does not describe how or when flash incarceration should be administered. The legal analysis and social science review contained herein is meant to guide counties as they answer the question of how to use flash incarceration in postrelease supervision efforts.

The report is structured as follows. First, this paper examines the historical efforts to use flash incarceration as a corrective tool, paying particular attention to those

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1. AB 94, AB 111, AB 117, SB 92, AB 118, SB 87 and AB 116 (all 2011) constitute current clean-up efforts.
  2. AB 109 makes numerous changes to the penal code such that individuals serving terms of more than one year may now be sentenced to county jail; it also amends Penal Code § 17 to include in the definition of felony those crimes for which imprisonment in county jail for more than one year is authorized.
  3. “Non-non-nons” refers to the population deemed appropriate for postrelease supervision by the county. This population is being released on non-serious, non-sex, non-violent convictions.
  4. See, e.g., Penal Code § 3450(b), discussing community-based reentry programs, the need for local control, and a research-based focus on reducing recidivism.
  5. Cal. Penal Code § 3454(c) (2011).

areas that influenced the recent authorization of flash incarceration. Second, a description of the statutory authorization for flash incarceration is presented. Third, the current use of flash incarceration from three counties is considered and the structural differences highlighted. Fourth, procedural due process rights in the context of flash incarceration are discussed and suggestions for preventing claims of constitutional violations presented. Finally, the social science behind the use of swift and certain sanctions is examined. The paper concludes with recommendations for county policymakers and a possible avenue for further consideration.

# The Historical Roots of Flash Incarceration

Criminal sanctions, most notably sentencing, have traditionally thought to serve one of four goals: deterrence, rehabilitation, incapacitation, or retributive justice.<sup>6</sup> The mid-twentieth century saw an explosion of rehabilitation efforts, often with California leading the way.<sup>7</sup> By the 1970s, rehabilitation had been discredited in the esteem of public opinion, and a period of ever-more-severe sanctions began.<sup>8</sup> With rehabilitation abandoned as the main goal of the correctional system, criminal sanctions were restructured to provide for deterrence, incapacitation, and retributivism. The restructuring process included the move to Three-Strikes-and-You're-Out sentencing for repeat felons, an increased use of incarceration over alternative sanctions, and a preference for determinate sentencing laws over the discretion of parole boards.<sup>9</sup>

We are just now exiting the period of “tough on crime” that started in the 1970s. Recent, widely-read publications recommend that communities ensure released prisoners and diverted convicts are given the support services they need to avoid future crime.<sup>10</sup> Such publications evince a renewed belief, however cautiously guarded, that rehabilitation efforts can and should work in the criminal justice context. This renewed focus on rehabilitation is partially a response to new data on intermediate sanctions and partially a reaction to the size of prison populations in the face of severe budget shortfalls. In the postrelease context, rehabilitation is often promoted alongside deterrence, as the former encourages pro-social activities and the latter prevents further criminal conduct.

Although our data is better than before, policymakers must remain aware that prior attempts to make use of intermediate sanctions were largely unsuccessful.

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6. See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice* 1 (2006).

7. See, e.g., Michael Tonry, *Intermediate Sanctions*, in *The Handbook of Crime & Punishment*, Michael Tonry (Ed.) New York: Oxford University Press (1998), 696 (dating community services efforts to the 1960s in Alameda County).

8. Henry Ruth and Kevin Reitz, *The Challenge of Crime: Rethinking our Response*, Harvard University Press (2003). The publication of James Q. Wilson, *Thinking About Crime*, Publisher (1975) is often credited with articulating the worry of many lawmakers and voters that rehabilitation programs cost vast sums of money without a correspond reduction in criminal behavior. *Thinking about Crime* is seen as the catalyst for a period of “tough on crime” sentencing policies aimed at general deterrence.

9. Determinate sentencing is the ultimate expression of disbelief in the rehabilitative model. It is concerned only with the length of time a prisoner serves and is unresponsive to the programming prisoners use, the emotional and education progress they may make in prison, and the possibility of better social and personal outcomes if prisoners are released early.

10. Kamala Harris, *Smart on Crime*, Chronicle Books (2009), ch. 19.

Experiments with short-term periods of incarceration – generally three to six months – in the 1980s were mostly abandoned after data showed that recidivism rates were not significantly affected and cost savings remained more elusive than promised.<sup>11</sup> Early attempts to use other intermediate sanctions in the mid-1980s resulted in “intensive supervision, house arrest, and electronic monitoring [being] oversold as being able simultaneously to divert offenders from incarceration, reduce recidivism and save money while providing credible punishments.”<sup>12</sup> These efforts often suffered from crucial design flaws. Many programs failed because there was a lack of alternatives to incarceration for violations observed under the new and sophisticated monitoring systems.<sup>13</sup> Furthermore, in most programs there was an inappropriate assignment of low-risk individuals to supervision designed to handle higher-risk populations.<sup>14</sup>

Despite these failings, evaluations of these programs have raised the prospect for new, successful supervision programs based on lessons learned. Alternatives to incarceration are increasingly being proposed and some states have embraced the suggestion that “guidelines may be able to diminish [the problem of net-widening] by setting standards of judges’ decisions.”<sup>15</sup> In an effort to build on the results of past experiments, California directed counties to use intermediate sanctions in accordance with empirical data and research-based practices.<sup>16</sup>

A great deal of popular and academic writing has been generated on recent attempts at intermediate sanctions, in particular Project HOPE (Hawaii’s Opportunity Probation with Enforcement).<sup>17</sup> Articles about Project HOPE and flash incarceration have run in the *Wall Street Journal*,<sup>18</sup> the *Atlantic*,<sup>19</sup> and the *New York Times*.<sup>20</sup> Project HOPE is a probation supervision program in which intensive control is paired with

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11. See, Doris Layton MacKenzie and Alex Piquero, *The Impact of Shock Incarceration Programs on Prison Crowding*, 40 *Crime & Delinquency* 222 (1994); Mark Olser, *Shock Incarceration: Hard Realities and Real Possibilities*, 55 *Federal Probation* 34 (1991).

12. Michael Tonry, *Intermediate Sanctions*, in *The Handbook of Crime & Punishment*, Michael Tonry (Ed.) Oxford University Press (1998), 683.

13. *Id.* at 684.

14. *Id.* at 684.

15. *Id.* at 704.

16. AB109 § 229(4).

17. See, Angela Hawken, *HOPE for Probation: How Hawaii Improved Behavior with High-Probability, Low-Severity Sanctions*, 4 *Journal of Global Drug Policy and Practice* 1 (2010); *The Impact of Hawaii’s HOPE Program on Drug Use, Crime and Recidivism*, The PEW Center on the States, Jan. 2010; Robert L. DuPont, *HOPE Probation: A Model that Can Be Implemented at Every Level of Government*, Institute for Behavior and Health, Sept. 2009, available at: [www.ibhinc.org/pdfs/HOPEPROBATION.pdf](http://www.ibhinc.org/pdfs/HOPEPROBATION.pdf).

18. Mark Schools, *Scared Straight...by Probation*, *Wall Street Journal*, July 24, 2008.

19. Graeme Wood, *Prison Without Walls*, *The Atlantic*, Sept. 2010.

20. Jeffery Rosen, *Prisoners of Parole*, *New York Times*, Jan. 8, 2010.

swift, certain, and relatively low-level punishment. Individuals sentenced to probation supervision under HOPE are drug tested frequently, provided expedited hearings when they test positive for drugs or violate other conditions of probation, and sentenced to very short stays in jail for each violation. HOPE will be discussed in detail in the later in this paper, but the program is important to identify early as the most recent and successful example of intermediate sanctions designed for a population with a high violation rate.

With the reported success of Project HOPE, several localities around the country have begun experimenting with the use of flash incarceration in probation and parole supervision. The California Department of Corrections and Rehabilitation (CDCR) has been running a pilot program based on HOPE in Sacramento. Likewise, Alaska has instituted the Probationer Accountability with Certain Enforcement (PACE) program in an attempt to reproduce HOPE's outcomes. This is a critical time to consider the benefits and drawbacks of program modeled on HOPE. As analyses of the program's effects in Hawaii and elsewhere are completed, there is great promise in lessons-learned from an on-going supervision program to build new corrections systems. The next section describes three counties use of flash incarceration under Penal Code § 3454 as a means of framing the later discussion of legal issues and social science finding.

# Statutory Authorization for Flash Incarceration

## *AB 109 (2011)*

AB 109 modified the penal code to make flash incarceration a tool universally available to the state's 58 counties. Penal Code § 3451 requires counties to identify a county agency as the supervising county agency responsible for postrelease community supervision (PRCS).<sup>21</sup> The Penal Code authorizes the supervising county agency to use flash incarceration in the supervision of parolees on PRCS.<sup>22</sup> In doing so, § 3454 places two limitations on the use of flash incarceration. First, only the county agency identified under § 3451 as responsible for individuals on PRCS is authorized to use flash incarceration.<sup>23</sup> Every county plan to date has identified the county's probation department as the supervising agency and, consequently, the decision to use flash incarceration so far lies only with the probation departments. Second, the statute authorizes the use of flash incarceration only with respect to individuals on PRCS. County probation departments are thus authorized under state law to use flash incarceration against parolees on PRCS, but not against individuals on regular county probation.

Although flash incarceration results in jail time, it is not revocation because the time spent in jail is limited to ten days and after release the individual is returned to county supervision to complete the remainder of the supervision period. The purpose behind flash incarceration is found in § 3450, which presents intermediate sanctions as a means of serving the corrective needs of supervising officials without revoking parole or probation.<sup>24</sup> The new penal code fully embraces flash incarceration, declaring “flash incarceration [is] encouraged as one method of punishment for violations of an offender's condition of postrelease supervision.”<sup>25</sup> Flash incarceration is intended to “appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations.”<sup>26</sup>

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21. All statutes cited hereafter refer to the California Penal Code (2011) unless otherwise specified.

22. § 3454(c) states that “each county agency responsible for postrelease supervision” may use flash incarceration.

23. § 3454(b) defines an “agency responsible for postrelease supervision, as established by the county board of supervisors pursuant to subdivision (a) of Section 3451.”

24. § 3450(b)(3) states “Criminal justice policies that rely on the reincarceration of parolees for technical violations do not result in improved public safety;” § 3450(b)(8)(A) includes flash incarceration in a list of intermediate sanctions.

25. § 3454.

26. *Id.*

Although the law is clear on which agency may impose flash incarceration and against whom, it is vague on exactly how flash incarceration should be administered. Periods of flash incarceration cannot last longer than ten days and are contingent on a violation of the conditions of release.<sup>27</sup> Consistent with the intent of allowing county experimentation, however, the specific mechanisms for the imposition of flash incarceration are not set forth in the statute. The rest of this paper considers how counties should use their discretion to produce desired outcomes.

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27. § 3454(c).

# The Current Structure of Flash Incarceration

## *A Review of Three Counties*

### **Los Angeles**

Los Angeles County occupies a unique space in the State because of its sheer size and has consequently taken a cautious approach to the use of flash incarceration.<sup>28</sup> Officials in the Probation Department reported that there is currently only one circumstance in which flash incarceration is being used: the failure of parolees to make an initial appearance before their probation case manager. In these cases, department officials ask the revocation court to issue an arrest warrant for the absconding individual. Both the Sherriff's Department and LAPD assist probation officers in arresting the violating individual, who is then brought to the revocation-hearing officer. A deputy probation officer who has been assigned full-time to the revocation court does an initial investigation into the reasons for the failure to appear. The investigation provides an opportunity for the individual to proclaim innocence, which is recognized when there is a mistake of identity or a "valid" reason for not making the initial appearance. The one example given as a valid reason for missing an initial appointment involved an individual who had stage-four cancer and was hospitalized immediately after being released from prison. If an individual's failure to appear is not excused, the deputy probation officer requests the imposition of flash incarceration from superior probation officers.

Officials in Probation reported that the decision to narrowly restrict the use of flash incarceration was based on two beliefs: first, that flash incarceration had never been used in a jurisdiction as large as Los Angeles County, and second, that jail space was likely to be in short supply with the addition of the non-non-non population to county jails. To the first point, officials felt that if flash incarceration was widely used the sheer numbers would preclude ensuring that a hearing officer would be available to

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28. Information about Los Angeles County's use of flash incarceration was provided by Doug Sweet (Deputy Public Defender) and Scott Stickney (Probation Director).

hear each case recommending the sanction. Officials wanted to implement the sanction in the same manner as Hawaii's Project HOPE, but reasoned that the geographic expanse of LA County combined with the huge population under supervision required a slower phase-in. Furthermore, officials in Probation were concerned that prior research on flash incarceration would not be valid in the unique landscape of Los Angeles. Thus, officials decided to begin a ground-up evaluation of flash incarceration in the PRCS context. Their plan is to incrementally increase the violations for which flash incarceration is used so that they can study its efficacy in a variety of circumstances.

To the second point, Probation worked closely with the Sheriff's office to ensure that flash-incarcerated individuals did not deprive the jails of the beds necessary to house the now-normal flow of felons and misdemeanants. In January 2012, the number of individuals AB 109 added to the county jail's roster is significantly lower than expected. As county officials reassess the space available in the jails, Probation is considering new avenues in which flash incarceration might be used. Consequently, Probation is now actively exploring how flash incarceration should be used where PRCS parolees fail to complete drug and mental health treatment.

It should be noted that the Public Defender's office asserts that flash incarceration is used in areas outside the statutory purpose. Probation is using § 3454 to initiate "holds" meant to keep individuals under PRCS "in custody pending the formal filing of a Petition to Revoke PRCS." For each of these holds, Probation has consistently imposed the maximum, ten-day period of incarceration. § 3454 was intended to be an alternative sanction to revocation, not a tool to extend the time individuals stay in custody pending a revocation hearing. Furthermore, this pattern of practice appears to use § 3454 to forestall the timing requirements associated with the start of revocation proceedings. It not entirely clear that whether the *Valdivia* injunction<sup>29</sup> applies to the counties when they receive state prisoners or whether §§ 1200 *et seq.* should govern revocation proceedings for parolees on PRCS. In either case, it is likely the County is

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29. The *Valdivia* permanent injunction governs many of the requirements of CDCR and the Department of Parole when revoking parole. Importantly, the *Valdivia* injunction triggers procedures that start at the imposition of a "hold," including 1) consideration of probable cause within forty-eight hours, 2) written notice of allegations within three days, and 3) a hearing and determination of probable cause within ten days of the written notice.

using § 3454 to hold individuals subject to parole revocation for an additional ten days without a hearing.

## **Santa Clara**

Santa Clara has placed the decision to use flash incarceration squarely with their probation officers, although they state that as general policy the decision to use the sanction should be reviewed by a supervisor within the Probation Department.<sup>30</sup> Under ideal circumstances, the deputy probation officer makes a determination to use flash incarceration, receives approval from a supervising probation officer, and then imposes the sanction. Individuals under PRCS have the opportunity to appeal this decision to their deputy probation officer, but have no recourse to an independent review of the decision to flash incarcerate.

Examples of violations subject to flash incarceration include testing positive for drugs and failing to appear for treatment programs, arriving to a probation meeting intoxicated and then getting arrested for making threats, and testing positive on a Friday when treatment is next available Monday. The last example was the first reported use of flash incarceration in a preventive manner. Although even here the sanction was administered in response to a violation of release conditions, the violation on its own is not of the type that would normally trigger the use of flash incarceration. Rather than use the sanction as a corrective measure, here it is used when it is acknowledged that the behavior cannot yet be corrected and a means of keeping the individual from spiraling out of control is needed.

## **Sonoma**

Sonoma possibly has the most robust review process.<sup>31</sup> Every individual on PRCS is given a form that states the alleged violation for which they are being flash incarcerated and provides an opportunity to admit the violation or object to the

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30. Information about Santa Clara County's use of flash incarceration was provided by Karen Fletcher (Deputy Chief Probation Officer), Calvin David Kilmer (Supervising Probation Officer), and Sean Rooney (Supervising Probation Officer).

31. Information about Sonoma County's use of flash incarceration was provided by Sheralynn Freitas (Deputy Chief Probation Officer).

allegation and request an administrative review.<sup>32</sup> The Probation Department has assigned the duty of administrative review to the Director of Adult Services. Upon a request of review, the Director will evaluate evidence submitted by the probation officer and the individual on PRCS, will make a determination of the facts, and will either sustain or modify the order for flash incarceration. The determination of facts and the appropriateness of using the sanction are recorded in writing on the form signed by the parolee under PRCS. Of the twenty-one instances of flash incarceration, not one individual has challenged the imposition of a period of flash incarceration.

### **Commonalities and Differences**

Los Angeles, Santa Clara, and Sonoma counties present widely divergent examples of counties using flash incarceration in connection with PRCS and the way in which they administer the sanction. In each county, the discretion to flash incarcerate rests with the deputy probation officer (DPO). However, each county uses various modes of control to constrain this discretion in different ways. In Los Angeles, flash incarceration is constrained on a violation dimension and can only be used where an individual absconds. In Santa Clara, constraint operates on a process dimension and the judgment of the DPO must be explained to a supervising officer before flash incarceration can be used. Sonoma does not constrain discretion a priori, but constrains discretion on a correctional dimension by allowing the PRCS parolee a review of the facts before determining the appropriateness of the sanction.

As illustrated by the examples given by the counties, each dimension of control allows for a different use of flash incarceration. Controlling for violation constrains flash incarceration to use only in the same situations and does not require DPOs invest much energy in deciding whether to use the sanction. Controlling for the decision-making process allows for the exact opposite use of flash incarceration than that seen in violation-control schemes; DPOs may use flash incarceration in any circumstances where there is a violation so long as they can convince their supervisor that the sanction is appropriate. Control on the process dimension provides an important check on

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32. See Appendix A for the form Sonoma County uses.

discretion, but fails to regulate consistency. Controlling for the factual appropriateness of flash incarceration produces similar outcomes to process control, but provides review that is obvious to the offender and comes after a formal decision to flash incarcerate has been made.

# Due Process in the Context of Flash Incarceration

AB 109 left to counties the discretion to craft policies and implement programs. As seen above, this freedom was used to craft a variety of programs with varying levels of procedural safeguards. The ACLU of California, among others, has expressed its concern that all intermediate sanctions should comply with constitutional standards.<sup>33</sup> Because the efficacy of any program must be situated within the constitutional framework that underlies all criminal policy, the threshold question of what legal obligations adhere to the use of flash incarceration must be answered before turning to research findings. Programs with robust protections, like Sonoma County, can be assumed to pass constitutional muster. If the same could be said for the other counties, a determination of the due process required in the context of flash incarceration would be overly-academic in a paper meant to guide practitioners in a novel area of law. However, the specific safeguards identified in the above section suggest that many counties do not have programs that comply with constitutional mandate.

## **Deprivation of Liberty and Procedural Due Process**

In *Morrissey v. Brewer*,<sup>34</sup> the Supreme Court first held that the 14th Amendment requires four specific procedures before revocation of parole can proceed.<sup>35</sup> There, the petitioner had been on parole, arrested at the order of his parole officer, and then sent back to prison on a revocation based solely on the parole officer's written recommendation.<sup>36</sup> In deciding the question of due process, the Court engaged in a two-stage due process analysis of determining whether the deprivation was one that fell within the 14th Amendment and, if so, what specific due process procedures were required. The Court found that the nature of the deprivation – incarceration after a

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33. ACLU of California, *Community Safety, Community Solutions. Implementing AB109: Enhancing Public Safety, Saving Money and Wisely Allocating Limited Jail Space*, 16, available at:

[http://www.aclunc.org/issues/criminal\\_justice/asset\\_upload\\_file464\\_10365.pdf](http://www.aclunc.org/issues/criminal_justice/asset_upload_file464_10365.pdf)

34. 408 U.S. 471, (1972).

35. *Id.* at 489.

36. *Id.* at 472-73.

period of freedom – fell squarely under the text of the 14th Amendment.<sup>37</sup> However, the Court also recognized that a liberty interest in the parole context is not as robust as it is elsewhere because the interest is “conditional liberty properly dependent on observance of special parole restrictions.”<sup>38</sup>

In determining the processes due to a parolee facing revocation, the Court balanced the State’s interest in returning parolees to state prison against the interest of parolees in remaining free in society absent a legitimate parole violation.<sup>39</sup> The Court set the “liberty of a parolee, [which] includes many of the core values of unqualified liberty,”<sup>40</sup> against the State’s “overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversarial trial.”<sup>41</sup> An additional factor in the Court’s analysis was society’s interest in “not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole.”<sup>42</sup> On balance, the Court concluded that “an effective but informal hearing” for revocation may suffice.<sup>43</sup> Specifically, these interests dictated that notice and an opportunity for a hearing before an impartial officer be given for a determination of probable cause and then again for a factual determination of the underlying offense.

The Court tailored their requirements for due process to the typical revocation process, in which probable cause to detain a parolee is first established by the state, allowing for immediate detention of the individual, and a full revocation hearing occurs within a reasonable time period afterwards.<sup>44</sup> In the first stage of the revocation process, the Court required that: 1) an investigation and determination of probable cause is made by someone – generally an administrative officer – independent to the case, 2) the parolee is given notice of his hearing before the officer and a list of the allegation made against her, 3) the parolee has the opportunity to speak or appear at the

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37. *Id.* at 482.

38. *Id.* at 480.

39. *Id.* at 483-84.

40. *Id.* at 482.

41. *Id.* at 483.

42. *Id.* at 484.

43. *Id.* at 485.

44. *Id.* at 485.

hearing and to offer evidence of her innocence, and 4) a summary record of the evidence is created by the hearing officer and made available upon the issuance of a decision.<sup>45</sup> The procedures required for a final determination of parole revocation are the same, although instead of establishing probable cause the hearing officer must make “a final evaluation of contested relevant facts.”<sup>46</sup> Additionally, although the Court required an investigation for the purpose of determining probable cause,<sup>47</sup> no investigation is needed at the revocation stage as a summary of the state’s evidence will be on record.

In *Gagnon v. Scarpelli*,<sup>48</sup> the Court extended the safeguards identified in *Morrissey* to the context of probation.<sup>49</sup> The Court concluded that the probation context is, like parole revocation, a forum outside prosecution, but one that “does result in a loss of liberty.”<sup>50</sup> In extending *Morrissey*’s procedural safeguards to the probation context, the Court reaffirmed the principle that deprivations of liberty coming from incarceration, even in the non-adversarial context of state supervision, require adherence to the notice and hearing requirements.

## **Due Process in the Context of Flash Incarceration**

Flash incarceration raises a novel legal question because it is not parole revocation and does not result in the same deprivation of liberty usually seen in the revocation context. Following *Morrissey*, a two-stage analysis should be used to determine whether process is due in the use of flash incarceration and, if so, what specific process is required. Because flash incarceration results in jail for parolees, it subjects a parolee to a deprivation of liberty similar to parole revocation. Although the length of incarceration differs drastically from that of full revocation, the difference here is of degree and not kind. The *Morrissey* Court was explicit that liberty deprivation under the 14th Amendment triggers due process protection.<sup>51</sup> Like revocation, then, flash incarceration results in a deprivation of liberty within the meaning of the 14th

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45. *Id.* at 487.

46. *Id.* at 488.

47. *Id.* at 485.

48. 411 U.S. 778 (1973).

49. *Id.* at 782.

50. *Id.* at 782.

51. 408 U.S. at 482.

Amendment. The analysis next turns to what process is due to parolees facing flash incarceration.

In determining the specific due process required in the flash incarceration context, the balance of interest tips further toward the state than it does in the context of full parole revocation. First, parolees on PRCS have a qualified liberty interest in remaining free in their community. Like revocation, flash incarceration disrupts the individual's opportunity to "be gainfully employed and [...] to be with family and friends and to form the other enduring attachments of normal life."<sup>52</sup> The disruption is not at the level of a full revocation, but even a period of five days of incarceration – half the maximum time authorized by § 3454 – is sufficient to end employment at many hourly or part-time jobs and to cause an individual to miss important life events. The Court in *Morrissey* did not use the length of incarceration as determinative of the process due, stating that "[i]n many cases, [but not all] the parolee faces lengthy incarceration."<sup>53</sup> For the parolee, short-term incarceration is as worthy of notice and an opportunity to a hearing as full revocation.

Opposite the interest of the parolee, the State has an interest in ensuring compliance with its conditions of liberty, although this interest is somewhat different than in the revocation context. With revocation, the State has made a determination that an individual is no longer suited to remain in society. In contrast, the imposition of flash incarceration under § 3454 is meant to be a corrective sanction that impels the parolee to abide by the conditions of parole and remain in society. Here, the interest of the State combines with the interest of society in "restoring [the parolee] to normal and useful life within the law."<sup>54</sup> Counties use flash incarceration as a corrective tool rather than a simple determination of the inappropriateness of a parolee remaining in society. Flash incarceration does not end community-based supervision, but instead briefly suspends it.

The short period of incarceration may impose a practical problem for counties providing due process protections for those facing flash incarceration. Counties that

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52. *Id.* at 482.

53. *Id.* at 482.

54. *Id.* at 484.

immediately incarcerate individuals for a very short period upon the belief that individuals have violated a parole condition will likely be unable to provide independent review of the factual allegations surrounding the violation before the period of flash incarceration has been completed. For example, officials in Santa Clara discussed using flash incarceration to hold parolees who tested positive for drugs over the weekend. The rationale communicated was that such a period of incarceration would apply a swift sanction while preventing the parolee from continuing to use drugs and allowing a chance to attend an addiction support service immediately upon release. However, this policy will not allow for review of the decision to apply flash incarceration in counties where the reviewing entity does not meet on the weekend. This example not only illustrates the problems inherent in providing an independent review for each parolee subject to flash incarceration, but also shows how flash incarceration often combines the interests of the state with the interest of society in ensuring that offenders remain drug-free and learn to navigate their community.

The practical problems for counties in using flash incarceration weigh squarely in favor of the State when determining what process is due under a balance-of-interests test. Understandably, many counties may feel that the requirements of due process will prevent them from using flash incarceration in some circumstances where it is effective; if true, this would deny counties one their best tools in ensuring that as many offenders as possible are successfully reintroduced to society. The interests of the State and society in applying sanctions that result in short-term incarceration are sometimes best served by the ability to move swiftly and with a minimal amount of formal process.

On balance, *Morrissey* requires that counties provide notice and hearing before flash incarcerating parolees, but with three important differences from the revocation process. First, counties likely do not need to require both a probable cause investigation and final hearing to determine the facts as described in *Morrissey*. The short-term period of incarceration is the functional equivalent of a hold following a determination of probable cause in the revocation context and a two-stage hearing in this context would be inappropriate. Second, *Morrissey* requires that an independent hearing officer conduct an investigation into the probable cause to hold a parolee subject to

revocation.<sup>55</sup> The courts are unlikely to conclude that it is mandatory for an independent officer to undertake an investigation. The costs of such a policy, in both labor and funds, would be prohibitive. Furthermore, because the liberty interest of the parolee is less impacted by a period of flash incarceration, automatically triggering such a safeguard is unnecessary. If a parolee desires a hearing, he is entitled to a neutral arbiter as defined in *Morrissey*, but there is likely no affirmative duty on the county to provide review by an arbiter in the absence of specific request. Finally, this context will not require the states to produce the equivalent of a written statement of the “evidence relied on and reasons for revoking parole.”<sup>56</sup> Such a document is necessary for contesting revocation in appellate proceedings, but the length of incarceration at issue here precludes further appeal. Due process likely requires a written statement of the determination that there is cause to flash incarcerate similar to the statement of probable cause as stipulated under *Morrissey*.<sup>57</sup> In light of the need to move swiftly when using the sanction, however, it is unlikely the statement needs to be detailed or list all the evidence presented.

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55. *Id.* at 485-86.

56. *Id.* at 489.

57. *Id.* at 487 (requiring determinations of probable cause to be recorded in written, summary form).

# When Should Counties Use Flash Incarceration

## *A Social Science Review*

The due process framework for the use of flash incarceration does not answer the important question of when counties should make use of their § 3454 authority. Indeed, Los Angeles County Probation officials explicitly cited the lack of empirical research on the efficacy of flash incarceration as one of the primary reasons for initially making very limited use. The need for social science data on flash incarceration is immediate, although significant levels of data may only be available after counties have used flash incarceration long enough to produce generalizable results. This section begins with a review of three theories of control, considers Chicago's Project Safe Neighborhoods and Project HOPE in light of these theories, and presents a brief discussion of Sonoma's experience with flash incarceration.

### **Psychological Biases**

Negotiating the tension between due process rights and the practical realities of flash incarceration need not sound the death knell for efficient uses of flash incarceration. Rather, counties should make use of policies that operate on the cognitive biases of individuals. Johnson and Goldstein explain how programs requiring the individual to actively opt-in are underused compared to programs where individuals are automatically enrolled and must actively opt-out.<sup>58</sup> Because active management of participation status imposes "physical, cognitive, and [often] emotional costs,"<sup>59</sup> individuals must reach a threshold level of motivation before asserting their option to change status. There is no literature on what this threshold is in the case of flash incarceration, but policymakers should note that rights as hugely important as the 5th Amendment privilege against self-incrimination are routinely left unasserted despite

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58. Eric J. Johnson and Daniel Goldstein, *Do Defaults Save Lives?*, 302 Science 1338 (November 21, 2003).

59. *Id.* at 1339.

widespread knowledge.<sup>60</sup> Although the 5th Amendment privilege could be construed as an opt-out program in which a person must make a conscious decision to answer questions, it can also properly be considered an opt-in program.<sup>61</sup>

## **Deterrence**

An overview of the four major deterrence theories is laid out in a recent study of Chicago's Project Safe Neighborhoods (PSN) effort to reduce gun violence beginning in 2003.<sup>62</sup> The first theory is the classic deterrence model, in which rational actors weigh the costs and benefits of criminal activity when deciding whether or not to break the law.<sup>63</sup> The second theory discounts all rational calculation on the part of individuals predisposed to criminal activity, instead viewing high-risk populations as "more impulsive and interested in immediate gratification than are other people."<sup>64</sup> Under this theory, changes in punishment policies fail to affect the decision-making process of those inclined to commit crimes. Third, the authors consider the theory that increasing the cost of crime has an effect only on the crime-prone, largely on account of the disparate impact that changes in the law have on those that might behave criminally. This theory trades on the fact that law-abiding citizens find changes in criminal policy irrelevant to their day-to-day actions but those who are likely to commit crimes have a vested interest in determining what the possible consequences of their actions are. Finally, a hybrid model exists whereby individuals exist along a spectrum from highly socialized law-abiders to highly socialized criminals. Changes in criminal policy are unlikely to have an impact on the behavior of individuals situated toward either end of the spectrum, but those in the middle are "marginal offenders" whose behavior is plastic.

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60. See, Richard Leo, *The Impact of Miranda Revisited*, 86 *Journal of Criminal Law and Criminology* 621 (1996). There is an alternative explanation to this fact, one that explains a suspect's willingness to talk to police while in custody as a function of the psychological manipulation and skill that police detectives bring to bear against a suspect. This explanation certainly has merit, but it is better as a description of the reasons behind deciding to speak with the police (and thus make an affirmative waiver of rights) than it is an explanation of why assertion of 5th Amendment rights is not forthcoming.

61. Explicit invocation of the right to remain silent is needed under *Michigan v. Mosley*, 423 US 96 (1975).

62. Andrew Papchristos, Tracey Meares, and Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 *Journal of Empirical Legal Studies* 2, 223 (July 2007).

63. *Id.* at 234.

64. *Id.*

Mark Kleiman draws on an economic theory of behavior to describe how a rational actor under the first theory decides when the benefits of criminal activity are worth the risk of punishment.<sup>65</sup> Kleiman compares the economic cost of criminality (F) to the cost incurred in abiding by laws (C).<sup>66</sup> Where  $F < C$ , a rational actor will choose to violate the law. However, elevating F above C will not result in a total abstention from criminal behavior on the part of rational actors unless C is also made certain.<sup>67</sup> Consider the example of the law student who is tempted to cheat on her exam. Although the costs of being discovered – failing the course, possible expulsion, later problems with the Character & Fitness portion of Bar admission – greatly outweigh the potential benefit of cheating, the barriers to uncovering cheating and the low levels of supervision in exam conditions in many cases make cheating a rational proposition.<sup>68</sup> Under Kleiman’s model, the rational actor will refrain from criminal activity when the certainty of punishment is assured and F outweighs C. Underlying the rational-actor model is the assumption that agents are adequately informed of both the cost of violation and the probability that they will be caught.

## **Norm-Taking and Project Neighborhood**

In addition to the theories of deterrence discussed above, the authors of the Chicago study noted that much of PSN was structured around an effort to get offenders to internalize the social norms of not committing gun crimes.<sup>69</sup> The authors cite a process-based model of self-regulation in which compliance with the law “is powerfully determined by people’s subjective judgments about the fairness of the procedures through which the police and the courts exercise their authority.”<sup>70</sup> Where the process for regulating behavior is perceived to be fair, individuals “buy in” to the process and compliance rates drastically improve.

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65. Mark A. Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment*, Princeton University Press (2009), ch. 4.

66. *Id.* at 50.

67. *Id.* at 50-52.

68. This is a discussion of rational cost/benefit analysis only. Many law students likely abstain from cheating because of moral compunction about obtaining entry to a profession that has well-defined ethical standards through dishonest means.

69. *Id.* at 236-238

70. *Id.* at 237. For further discussion, see Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime & Justice* 283 (2003).

In large part, fairness is perceived when individuals feel that “authorities are neutral and unbiased and make their decisions using objective indicators, not their personal views.”<sup>71</sup> Fairness can be communicated using “openness and explanation, because it provides [] an opportunity to communicate evidence that [...] decision making is neutral.”<sup>72</sup> Beyond neutrality, programs engender a perception of fairness when “people are treated with dignity and respect and their rights are acknowledged; and [...] they have an opportunity to participate in the situation by explaining their perspective.”<sup>73</sup> Consequently, PRCS procedures that explain their neutrality, treat individuals with dignity, and allow for meaningful participation will be perceived as fair by most people and increase satisfaction and acceptance of ultimate dispositions.

PSN focused on former-offenders who were at high-risk for gun offenses.<sup>74</sup> Law-enforcement and ex-offenders ran forums in which they discussed the consequences of gun violence in an attempt to get individuals to adopt norms against gun violence. After highlighting the life choices the individuals would soon make, attention was directed to the large number of service-providers onsite who were offering immediate assistance with employment and housing. These forums focused on the agency of high-risk offenders, pushing the message that each potential offender had a number of options and would either suffer or benefit from the consequences of their actions. On the whole, individuals were encouraged to see their decisions as their own and to adapt their actions to desired outcomes.

The evaluation found that the project was successful and observed “homicide rates dropped faster in the PSN beats compared to the control group.”<sup>75</sup> The study found that “much of the observed homicide decline should be attributed to the offender forums, but it is not clear from the aggregate data exactly what aspects of the forum appears to be associated with the drop in crime.”<sup>76</sup> The results from this and the HOPE literature suggest that the norms held by parolees are extremely important in program

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71. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime & Justice* 283, 298 (2003).

72. *Id.*

73. *Id.* at 300-301.

74. Papachristos, et al., *supra* note 60, at 231.

75. *Id.* at 259.

76. *Id.* at 266.

success and can be shaped by program design that encourage agency and are perceived as fair.

## **Project HOPE**

Hawaii's Opportunity Probation with Enforcement (HOPE) was created in 2004 to resolve a central tension in many probation courts: the revocation process required too much time to complete and was inappropriate for many low-level probation violations, but there were few other formal options available to probation officers.<sup>77</sup> This tension created a system in which violations of the conditions of probation failed to result in sanctions until the violations were numerous enough to sustain revocation proceedings.<sup>78</sup> Thus, the probation system failed to provide any meaningful guidance to individuals who were out of compliance and resulted in a binary choice for probation agents: do nothing or file for revocation.

HOPE restructured the probation experience to include mandatory drug testing, an immediate hearing when probationers tested positive for drugs, and certain incarceration for those who were determined to have violated the conditions of probation. At the beginning of an individual's term of supervision, she must attend a mass hearing in which all the new HOPE probationers are encouraged to comply with the conditions of probation and are informed that the consequence of not complying is short-term incarceration. HOPE began its use of flash incarceration with drug testing because "the facts were simple – Did the test come back positive? – and the consequences not very drastic, [so] the hearings could be fairly quick."<sup>79</sup> Hearings are held the same day as a dirty drug test or, if the test occurs in the afternoon, the morning after. HOPE ensures that individuals are incarcerated only for actual, measurable violations and that a determination of violation can be made without much work from the probation officers. In this way, probation appointments, drug treatment sessions, drug tests, and other conditions of supervision became mandatory with a real

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77. Kleiman, *supra* note 63, at 35.

78. *Id.*

79. *Id.* at 37.

consequence for non-compliance. Every failure to satisfy these obligations resulted in the immediate sanction of a seven-day stay in jail.

Central to HOPE is an expedited due process hearing. Before an imposition of flash incarceration, a hearing occurs before a judge with a prosecutor, defense attorney, and probation officer present.<sup>80</sup> The judge that hears the case is the sentencing judge for the probationer, but the prosecutor and defender can be any assistant DA or PD on-hand.<sup>81</sup> These hearings are generally quick, with 83% of the hearing taking less than 15 minutes a piece.<sup>82</sup> The speed of the hearings is at least partly a result of the simplicity of the evidence; drug tests and sign-in sheets are offered by the DA, the individual is given a chance to speak or offer other evidence, and the judge makes a determination of whether the alleged violation occurred. When it is determined that a violation has occurred, the individual is flash incarcerated. This last point is essential: every determination of a violation results in incarceration. Under HOPE, there is some discretion for the length of time an individual must serve, but the individual must receive the sanction for violations.

Although it is hard to disaggregate the effect of consistency in implementation from the effect of any use of flash incarceration, Mark Kleiman cautions that “success or failure of attempts to replicate HOPE elsewhere may be at risk more from failures of delivery than from recalcitrant clients.”<sup>83</sup> This admonishment is consistent with the literature on norm-taking, in which perceived consistency and objectiveness are the hallmarks of a fair system. Individuals under HOPE supervision are encouraged to adopt norms of compliance through the agency given to those on probation and the perceived fairness of the system. First, the program moves the “psychological locus of control from external to internal by making outcomes strongly predictable in terms of client’s actions.”<sup>84</sup> This is accomplished by removing all discretion to not report violations from the probation officers and all discretion not to incarcerate violators from

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80. *Id.* at 83.

81. *Id.*

82. Angela Hawken and Mark Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii’s HOPE*, submitted to the National Institute of Justice, (December 2, 2009), Fig. 8 at 31.

83. *Id.* at 28.

84. Hawken and Kleiman, *supra* note 80, at 36.

judges. The consistency of sanction conditions probationers to view consequences as determined by their behavior, and this fact makes the probationer an active agent. Next, fairness is established at the warning hearing where “the consequences are clearly laid out in advance, [and] there is no sense that the sanctions [...] are arbitrary or the result of animus.”<sup>85</sup>

In HOPE, the warning hearing assures that every participant in HOPE knows that the consequence of violating probation conditions is incarceration, removing the problem of imperfect information. This knowledge is confirmed when probationers are incarcerated every time they actually fail a condition of their probation. This knowledge not only establishes fairness, it also provides rational actors with the information they need to correctly reason their way to compliance.

The results coming out of HOPE are impressive. 81% of individuals under supervision had no more than one positive urinalysis in a 12-month period despite frequent, random drug tests announced on the day they are to be given.<sup>86</sup> The reviewers of HOPE caution that they cannot conclusively state “whether regular random drug testing on its own would have produced the HOPE effect, or whether the combination of testing and sanctions is necessary.”<sup>87</sup> Nonetheless, other measures of success, like rates of missed appointments with probation officers, fell drastically with the imposition of the HOPE program.<sup>88</sup> The vast majority of HOPE participants stop violating the conditions of their probation by the third month of supervision. The fact that some individuals still require revocation only speaks to the irrational nature of human nature and the problems presented by the irrationality-inducing state of drug addiction. Beyond compliance rates, amongst HOPE probationers in treatment, jail, specialized units, and general supervision, over 60% of respondents (n=211) in each category reported a positive perception of HOPE.<sup>89</sup>

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85. *Id.*

86. *Id.* at 20.

87. *Id.* at 49-50.

88. 86% of probationers under HOPE supervision missed fewer than 2 appointments over a 12-month period. *Id.* at 23.

89. Hawken and Kleiman, *supra* note 80, 47-48.

## **Initial Review of Sonoma**

Early results from Sonoma County suggest that properly designed program in California can administer flash incarceration without a large drain on resources. The twenty-one reported instances of flash incarceration were all served without a single request for administrative review. It is unclear whether the lack of complaint from PRCS parolees is due to their psychological bias towards the default, their perception that the system is fair, rational balancing of the costs of review, or another factor. However, Sonoma's structure for administering flash incarceration is not necessary scalable to larger counties. Administrative reviews of non-drug violations will likely take longer than a review of a drug violation. Sonoma County approximates that a typical administrative review of a determination of flash incarceration will take two hours and cost about \$180 dollars of county money.<sup>90</sup> This level of resource consumption is likely untenable for larger counties supervising high numbers of individuals under PRCS. However, county discretion in the structure of PRCS should allow all counties to apply these principals in a manageable fashion. Larger counties, for example, will likely not make use of the director of adult services to provide all review.

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90. \$180 dollars is cost of salary and benefits for two hours of the Probation Department Adult Division Director.

# Recommendation for Structuring Flash Incarceration

There are a few design elements that all counties should use if they choose to impose flash incarceration. First, counties need to create a process of review that comports with the constitutional requirements of notice and an opportunity for an independent hearing. I recommend that counties use opt-in systems to conserve agency resources and expedite the process, although there are a variety of hearing structures that will satisfy due process requirements. For small counties, assigning a dedicated Probation official may be the best policy. Larger counties should consider appointing independent deputy probation officers to hearing duty, especially where probation departments regularly assign DPOs to the revocation courts.

Second, probation departments should consider what dimensions of constraint they find desirable. Constraining discretion at the violation level can help ensure consistency and fairness. For example, drug use is a common cause of parole violation and is supervised through the use of a clear, uncontroversial test. In the face of a dirty test, DPOs can easily write up an allegation of condition-violation, present it to the parolee alongside the determination that a parolee should be flash incarcerated, and feel confident that few parolees will seek review of the determination of flash incarceration. When parolees do request review, the process can be completed quickly and without much preparation. Some counties may decide they want to encourage a more flexible relationship between DPOs and parolees on PRCS and adopt a system in which DPOs have complete discretion as to when flash incarceration should be used, subject to independent review if the parolee requests it.

Third, counties should consider how they will promote deterrence and norm-taking amongst parolees on PRCS. Notice hearings similar to those used in HOPE are one cost-effective way in which individuals can be encouraged to actively manage their behavior. Consistency can be structured into numerous areas of supervision; it would be prudent to create policies that enumerate when flash incarceration should be

recommendation, under what conditions recommendations of flash incarceration will be upheld on review, and the length of each period of flash incarceration. To the extent that such policies are created, informing offenders of the policies before they violate the conditions of their supervision is an effective way to encourage compliance and ensure the supervision system is perceived as fair.

Finally, counties should share data regarding their PRCS outcomes with each other and external researchers. Although data from Los Angeles may be only narrowly useful in Sonoma, there may be lessons about the efficacy of using flash incarceration for individuals absconding from parole that can validate or distinguish Sonoma's experience. The opportunity to pilot a different program in every county is fantastic and the lessons learned should be shared with as wide an audience as possible.

# Questions Remaining

## **Use of § 3454 in Probation Supervision**

Beyond § 3454, counties may plan to use flash incarceration in the supervision of individuals who are not released from state prison or who have not been committed to prison. As mentioned above, § 3451 applies to county agencies supervising only those individuals “release[d] from prison,” not individuals convicted of misdemeanors or those who serve their felony sentence in county jail under the new penal code.

§1203.1(j) allows for the modification or revocation of a probation order by a judge upon the violation of a condition of probation. Thus, judges have the legal authority to modify a probation sentence to include an immediate period of incarceration followed by the renewal of supervision. Such a system would be analogous to the process HOPE uses. This program might also be extended to the mandatory supervision of felons who fall under the authority of county agencies through § 1170(h). § 1170(h)(5) allows a court to split a sentence between incarceration and supervision, “with the terms, conditions, and procedures generally applicable to persons placed on probation.”<sup>91</sup>

Whether counties will add flash incarceration to these areas of supervision remains to be seen. In all likelihood, the decision to adapt flash incarceration to these areas will be determined by the outcome of flash incarceration with parolees under PRCS. Hopefully, counties will wait for an initial evaluation of the current changes before further modifying the policies they use for supervision.

## **Termination of PRCS Under § 3456**

Penal Code § 3456 permits counties to discharge individuals on PRCS after six months without a violation that results in a “custodial sanction.”<sup>92</sup> After a year of supervision without “custodial sanction,” the counties are directed to release individuals on PRCS.<sup>93</sup> Although the statute does not define a “custodial sanction,” some counties are interpreting this phrase to mean any period of flash incarceration. For example, the Los Angeles County Probation Department is treating flash incarceration under § 3454 as a custodial sanction for the purposes of PRCS termination. In practice, Los Angeles

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91. § 1170(h)(5)(B).

92. §3456(a)(2) (2012).

93. §3456(a)(3).

County's interpretation of § 3456 will prevent the Probation Department from ending the supervision of individuals on PRCS earlier than six months after the most recent period of flash incarceration. One can imagine that flash incarceration would not reset the clock under § 3456, reserving the term "custodial sanction" for modifications of parole that include a medium-term stay in jail. Because no individual on PRCS will be eligible for termination of supervision until April 1, 2012 at the earliest, this issue has yet to be litigated.

## **Net-Widening**

The use of § 3454 has the potential to subject many more individuals to correctional system supervision and sanctions than pre-Realignment conditions. Net-widening is the name given to the phenomenon whereby rehabilitative additions to the criminal justice system lead to more, not less, incarceration or criminal sanction. Whether net-widening will occur with the use of flash incarceration has yet to be seen, but counties should be aware of the possibility for net-widening.

One instance of net-widening is the unintended increase in incarceration that often accompanies the use of drug courts. O'Hare argues that drug courts present a pathway out of the typical criminal justice system.<sup>94</sup> However, this pathway is available primarily to "defendants who would otherwise receive time served or other relatively light sentences."<sup>95</sup> As such, drug courts "are less a diversion from prison than a diversion from other alternatives to prison."<sup>96</sup> Because drug courts have fairly high failure rates and tend to impose significant incarceration sentences for noncompliance and failure, individuals supervised by drug courts may *increase* the incarceration numbers for drug crimes. One author found that the presence of drug courts encourages police to make more arrests of drug users on the assumption that drug users will be rehabilitated instead of incarcerated.<sup>97</sup> This pattern of policing, reasonable given the mission of drug courts, further contributes to the number of individuals who are subject to state supervision and incarcerative sanctions.

Although flash incarceration promises to aid probation officers in their efforts to provide meaningful supervision of parolees on PRCS, it also raises the potential for

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94. Michael M. O'Hare, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 Stan. Law & Pol. Rev. 463, 479 (2009).

95. *Id.*

96. *Id.* at 480.

97. Joel Gross, *The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts*, 10 U. Md. L.J. Race, Religion, Gender & Class 161, 167 (2010).

significant net-widening. Because flash incarceration can be used for any violation of a parolee's release conditions, there are any number of reasons for which a parolee might be flash incarcerated. If probation officers use flash incarceration early and consistently to establish the seriousness of noncompliance, a mainstay of the Project HOPE model, it is possible that incarceration rates will increase. A three-year follow-up of individuals released from CDCR institutions in 2006-07 found that 45% of the individuals released that year returned to prison on parole revocations.<sup>98</sup> 50% of all parole revocations were based on technical violations of parole process.<sup>99</sup> A discussion of two ways § 3454 could affect these numbers follows.<sup>100</sup>

The availability of § 3454 could decrease the number of individuals subject to incarceration by improving compliance with the conditions of parole. If revocation for 20,000 individuals is based on technical violation, then compliance with parole processes could make a huge impact in the number of individuals returned to custody on a parole revocation. To achieve a net decrease in incarceration, the use of flash incarceration would need to impel compliance without subjecting parolees to the same level of incarceration as full revocation would. Presumably, there are many parolees who violate their conditions of supervision and remain on parole. If flash incarceration is used against all violators, it is likely that many more than 20,000 parolees over three years will be subject to a period of incarceration. As the number of individuals subject to incarceration increase, the average length of incarceration must be significantly reduced to avoid increases in incarceration.

The alternative is that flash incarceration will increase the total level of incarceration. This could occur if the majority of the individuals who are revoked fail to respond to the imposition of flash incarceration. Where revocation occurs only after multiple violations, noncompliance would mean significantly more incarceration for these individuals. Furthermore, enforcing sanctions against technical violations will increase the total number of individuals subject to jail time. In light of the decision by some counties to interpret a period of flash incarceration as a custodial sanction for §

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98. California Department of Corrections and Rehabilitation, *2011 Adult Institutions Outcome Evaluation Report*, 49, Figure 23 (2011).

99. *Id.* at 52, Table 25 (Continued).

100. It is tempting to consider the extent to which flash incarceration will effect the numbers from the mid-2000s. However, Secretary Cate has pointed out that the correctional system of the mid-2000s was unsustainable. He urges that we instead consider AB 109 against alternatives to AB 109. Nonetheless, the numbers provide a good starting point for a discussion of changes in incarceration rates.

3456 purposes, the use of flash incarceration will also ensure that many individuals are under supervision for longer periods of time.

Finally, counties may decide to use flash incarceration with probationers where flash incarceration is successfully used to manage compliance for individuals under PRCS. This would effect a large increase in the number of individuals subject to incarceration. Depending on the rates of probation revocation, flash incarceration could again either increase or decrease the overall level of incarceration in each county.

## Conclusion

The changes to the penal code effected by AB 109 will require a great deal of study before counties can create the optimal structure for their correctional systems. Some of this study will only be completed after field tests produce an initial cache of data. It must be remembered that flash incarceration is a relatively small portion of a systemic change that has affected funding, jail populations, and correctional supervision responsibility. Nonetheless, flash incarceration promises to be an important, and possibly contentious, tool in the new array of intermediate sanctions available to counties.