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Looking Past The Hype: 10 Questions Everyone Should Ask About California's Prison Realignment

Abstract: California's Criminal Justice Realignment Act passed in 2011 shifted vast discretion for managing lower-level offenders from the state to the county, allocated over $2 billion in the first 2 years for local programs, and altered sentences for more than 100,000 offenders. Despite the fact that it is the biggest penal experiment in modern history, the state provided no funding to evaluate its overall effect on crime, incarceration, justice agencies, or recidivism. We provide a framework for a comprehensive evaluation by raising 10 essential questions: (1) Have prison populations been reduced and care sufficiently improved to bring prison medical care up to a Constitutional standard? (2) What is the impact on victim rights and safety? (3) Will more offenders participate in treatment programs, and will recidivism be reduced? (4) Will there be equitable sentencing and treatment across counties? (5) What is the impact on jail crowding, conditions, and litigation? (6) What is the impact on police, prosecution, defense, and judges? (7) What is the impact on probation and parole? (8) What is the impact on crime rates and community life? (9) How much will realignment cost? Who pays? (10) Have we increased the number of people under criminal justice supervision?

Keywords: prison realignment; California corrections; criminal justice; prisons; probation and parole; Jails; victim's rights; penology.

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1 Introduction

On April 2, 2011, Governor Jerry Brown signed into law Assembly Bill 109, the Criminal Justice Realignment Act of 2011. AB 109, commonly referred to as "realignment," took effect on October 1, 2011. AB 109 passed the legislature in a matter of hours after being introduced, and without any public input. Despite some misleading headlines, the law did not require the state to release anyone currently

in prison. It did, however, shift virtually all of the responsibility for monitoring, tracking, and imprisoning lower-level felons previously bound for state prison to county jails and probation. The legislation also makes it nearly impossible to return parolees to prison for non-felony parole violations, and instead caps punishment for these "technical violations" to shorter terms in county jail. In other words, California is changing the way that it manages its adult corrections system more completely than at any time in its history.

The importance of California's realignment experiment cannot be overstated. In a nation struggling to rethink its policies over mass incarceration, California's experiment with prison downsizing is critical. Realignment is testing the major crime policy issue of our time: Can we downsize prisons safely by transferring low-level offenders from state prisons to city and county systems, using an array of evidence-based community alternatives? Depending on the answer, California will become an important example of how to reduce the prison population and maintain public safety – or realignment will go down in history as just another failed attempt at prison diversion.

At its best, the state's post-realignment criminal justice system will maintain, or even reduce, California's historically low crime rates – but at lower fiscal and social costs than during the pre-realignment period. At its best, it will have spurred the use of risk assessments, enabling counties to implement best practices and to tailor their community corrections system in ways best suited to local conditions. At its best, as programs develop, information sharing will allow cross-county sharing of effective practices. At its best, realignment will return criminal justice to local control, reduce recidivism, and reserve prison for California's most dangerous offenders. At its best, investing in rehabilitation for lower-level offenders will reduce their recidivism, and over time, reduce the pressure on California to build more prisons, which takes money away from the education and work programs that might have helped offenders in the first place.

At its worst, however, realignment will expand the criminal justice system, leave counties unable to fund their programs, and show that alternatives to incarceration cannot work on a large scale. At its worst, low-level offenders will serve their sentences in county jail facilities, many of which are overcrowded and not equipped to hold inmates for long periods of time. At its worst, the state will have dumped tens of thousands of criminals back to cash-strapped counties with imaginary treatment plans that are never delivered upon. At its worst, the State will have simply transferred its crowding problem to local jails, sheriffs will be required to resort to early releases to alleviate crowding, and crime rates will rise. At its worst, overcrowded jails become revolving doors providing "get out of jail free" cards for offenders who continue to commit crime with impunity. Or, if jails become too crowded, the litigation that motivated

realignment in the first place will be replicated in the county jail system. At its worst, more people will end up under criminal justice supervision, but at the county rather than state level, and realignment will just have shifted its mass incarceration to counties without any decreased cost or recidivism reduction, and without any improvement to public safety. At its worst, with no set performance standards, nor any state body to determine the success or failure of the programs, Californians will have spent billions and be left with little data on whether realignment achieved its goals. In short, California's unprecedented prison downsizing experiment backfires.

This is the biggest penal experiment in modern history, yet no comprehensive evaluation was funded to evaluate its impact.[1] Regardless of whether you support or oppose realignment, most everyone is baffled by the fact that although the counties received funding to cover the cost of supervising realigned felons, the state did not establish any statewide standards, nor provide any funding, for objectively evaluating county practices. In contrast, when California enacted its last major criminal justice reform, the "Substance Abuse and Crime Prevention Act of 2000" (Proposition 36), diverting drug offenders to treatment, the legislation required the state to "allocate up to 0.5% of the fund's total monies each year for a long-term study to be conducted by a public university in California aimed at evaluating the effectiveness and financial impact of the programs that are funded pursuant to the requirements of this act."[2] With AB 109, there is not only no outside evaluation funded but no mandate for any statewide data collection, cost benefit analysis, or outcome report back to the legislature.

How will we know the impact of realignment on crime, incarceration, justice agencies, or offender's recidivism? In just the first 2 years since realignment's passage, California will have spent over $2 billion dollars to implement a criminal justice experiment of the largest scale, and over 100,000 offenders will have

1 California's Board of State and Community Corrections (BSCC) provides technical assistance to California's adult and juvenile justice system, including to local governments on realignment. Their statutory duties are to collect and maintain data about state and community correctional policies, capacities, and needs. BSCC is not conducting any outcome evaluation, but will disseminate information on promising and evidence-based practices once identified.

2 See California Department of Alcohol and Drug Programs, http://www.adp.state.ca.us/SACPA/Proposition_36_text.shtml (last visited Mar. 4, 2013). In addition to evaluation funding, Proposition 36 required annual "county reports" that "detailed the numbers and characteristics of client participants served as a result of funding provided by this act." (Sec. 1199.11). Proposition 36 also required two three-year follow up studies to evaluate the effectiveness and financial impact of the funded programs. In 2013, the US Department of Justice adopted a new requirement that two percent of all funds from its Office of Justice Programs would be set aside for research, evaluation and statistics. See Office of Justice Programs, Budget Request 2013, available at www.justice.gov/jmd/2013summary/pdf/fy13-ojp-bud-summary.pdf.

participated. If California adopted just a 0.1% set aside for research, that would equal about $1 million per year for evaluation. Such an allocation is a wise investment. Regardless of funding, we need to consider realignment's impact broadly. This article attempts to provide a framework for doing that.

To understand how realignment impacts criminal justice we need ask ten essential, interdependent questions:

1. Have prison populations been reduced and medical care sufficiently improved to bring prison medical care up to a Constitutional standard?
2. What is the impact on victim safety and victim rights?
3. Will more offenders participate in evidence-based treatment programs, and will their recidivism be reduced and their social functioning improved?
4. Will there be equitable sentencing and treatment across counties?
5. What is the impact on jails? What is realignments' impact on crowding, staff safety, jail conditions, pre-trial releases, and litigation?
6. What is the impact on police, prosecution, defense, and judges?
7. What is the impact on probation and parole?
8. What is the impact on crime rates and community life?
9. How much will realignment cost, and who ultimately pays?
10. Have we increased the total number of people under criminal justice supervision? Did realignment just change the location where inmates are incarcerated or the agency they report to?

This article proceeds as follows: First, we provide a brief overview of the key components of AB 109; and second, we discuss in turn the ten critical questions that everyone should be asking about California's realignment. For each of these questions, we attempt to identify the important issues at stake. Additionally, we provide analysis and data where available, to help provide at least a partial answer to these important questions.

2 Key Components of California's Public Safety Realignment Act (Assembly Bill 109)

2.1 Target Felon Population

While the Realignment legislation is comprehensive and complex, it primarily affects three major groups. (Realignment made no changes to juvenile justice sentencing or their correctional placement.) First, lower-level felony offend-

ers whose current and prior convictions are non-violent, non-sex-related, and non-serious[3] (referred to as "non-non-non's") will now serve their sentence under county jurisdiction rather than in state prison. Realignment amended about 500 criminal statutes eliminating the possibility of a state prison sentence upon conviction. These newly amended laws are contained in the California Penal Code, the California Health and Safety Code, and the California Vehicle Code. Realigned crimes include, for example, commercial burglary (California Penal Code 459 2nd), forgery (California Penal Code 470), possession of marijuana for sale (California Health and Safety Code 11359), corporal injury on a child (California Penal Code 273d), vehicular manslaughter (California Penal Code Section 192c), child custody abductions (Penal Code 278), and embezzlement from an elder or dependent adult (Penal Code section 368(d)(e)(f).[4]

After October 1, 2011, any adult convicted of these amended felony crimes [Penal Code Section 1170(h)] cannot be sentenced to prison unless they have a prior serious or violent felony conviction.[5] They can, however, be sentenced for the same length of time they would have been sentenced to prior to realignment, but that sentence regardless of its length, must be served in county jail and not state prison. The other big change for persons sentenced under section 1170(h) to county jail is that they will not be released to parole or postrelease supervision upon serving their term, unless the court chooses to impose a post-jail supervision period (i.e., split sentence). Once the jail sentence has been served, the defendant must be released without any restrictions or supervision.

Second, released prisoners whose *current* commitment offense qualifies as a "non-non-non" offense will be diverted to the supervision of county probation departments under "Post Release Community Supervision (PRCS)." Before realignment, state parole agents supervised individuals released from state prison. In fact, California was the only state that placed virtually *all* released prisoners on state supervised parole. Moreover, almost every offender's parole supervision period was for 3 years, although they could be discharged at 13 months if they had no new violations. After realignment, state parole agents will only supervise

3 As enumerated by the statute under Penal Code Section 1170(h), and fully discussed in Richard Couzens and Tricia A. Bigelow, Felony Sentencing After Realignment (2013).

4 *Ibid*. at Appendix I.

5 Offenders can be sentenced to prison even if they are currently convicted of a 1170(h) non-prison eligible crime if any of the following apply: 1) conviction of a current or prior serious or violent felony conviction listed in Penal Code section 667.5(c) or 1192.7c; 2) when the defendant is required to register as a sex offender under section 290; or 3) when the defendant is convicted and sentenced for aggravated theft under the provisions of section 186.1. See *ibid*. at 65.

individuals released from prison whose *current* offense is serious or violent (*regardless* of their prior criminal record), as well as certain other individuals, such as inmates who have been assessed to be mentally disordered or high risk sex offenders. All other prisoners will be released from prison directly to county jurisdiction. And, importantly, offenders now sent to county PRCS supervision terms are eligible for PRCS discharge at 6 months. Eligibility for PCRS and county probation supervision has been one of the most highly controversial aspects of AB 109, since *regardless* of prior criminal record, former state parolees are now sent to county probation supervision. Prison officials estimate that California county probation officers will now assume responsibility for supervising an additional 40,000 to 60,000 prisoners who were released in 2012 and qualify for PRCS.[6]

Third, parole and probation violators will generally serve their revocation terms in county jail rather than state prison. Before October 2011, individuals released from prison could be returned to state prison for violating their parole supervision. The maximum prison term for a violation of parole or probation was 1 year. Some of these violations were non-serious, such as a failed drug test or absences at a required program. Prior to realignment, these non-serious technical violators – about 20,000 parolees each year – were sent to prison.[7] Now, under realignment, offenders released from prison – whether supervised by the state (on parole) or by the counties (on PCRS) – who violate the technical conditions of their supervision (rather than committing a new crime) must serve their revocation term in local jail or community alternatives. The maximum jail sentence for a probation or parole violation is 6 months. The only exception to this requirement is that individuals released from prison after serving an indeterminate life sentence may still be returned to prison for a parole violation. Individuals realigned to county supervision will no longer appear before the State Board of Parole Hearings (BPH) for revocation hearings. Starting July 1, 2013, the county trial courts will hear allegations of violations and impose sanctions.[8]

In sum, the prison door has slammed shut on tens of thousands of offenders – estimated to be nearly 100,000 offenders in 2012–2013 alone – who used to be under state control and faced prison but after October 1, 2011, remain in their communities where jail is the most severe sanction they confront.

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6 California Department of Corrections and Rehabilitation, The Future of California Corrections (2012), available at www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf [hereinafter CDCR].

7 Joan Petersilia, California's Correctional Paradox of Excess and Deprivation, in Crime and Justice (Michael Tonry, ed., University of Chicago Press 2007).

8 Before July 1, 2013, individuals supervised by state parole agents will continue to appear before BPH for revocation hearings. After that date, the trial courts will assume responsibility for conducting revocation hearings for state parolees.

2.2 Realignment Funding Formula, County Discretion, and State Monitoring

The State has allocated about $2 billion through 2013–2014 to implement realignment, and anticipates giving California's 58 counties roughly $4.4 billion by 2016–2017, excluding the funding allocated for county planning, staff training, local courts, and jail construction.[9]

The California Department of Finance uses a formula to determine each County's funding level. Roughly speaking, the legislature split the current cost of State supervision by about 50% to 60% with the counties. The current cost of housing a California prisoner is about $52,000 per prisoner, per year. Front-end realignment is being funded at about $25,000 per prisoner, per year. The cost of a year on parole in California is now about $8,500 a year, per parolee, so PRCS supervision was funded at about $5,000 per year, per offender.[10]

In the first fiscal year of Realignment, 60% each county's funding allocation was based on the county's historical average daily state prison population ("ADP") of persons convicted of non-violent offenses from the particular county; 30% was based on the size of each county's adult (18 to 64) population; and the remaining 10% was based on each county's share of grant funding under the California Community Corrections Performance Incentives Act of 2009 (SB 678). SB 678 was based on a county's ability to divert adult probationers from prison to evidence-based programs.[11]

The funding formula was controversial from the start. Critics contended that the meager funding did not cover the true costs of "evidence-based" mental health treatment, substance abuse, or the housing that such serious offenders required. The amount of money each individual county received was based mostly (60%) on a funding formula that weighed heavily the projected number of non-non-non's each county would have returning home from prison, using historical prison sentencing data. This formula rewarded counties that had previously sent a higher percentage of their lower-level offenders to state prison and penalized counties who historically had invested in community alternatives and as a result, sent fewer offenders to prison.

In the second and third years of Realignment, counties were given the best result among three options in which funding was based on: (1) the county's adult

9 Brian Brown et al., Legislative Analyst's Office, The 2012–2013 Budget: The 2011 Realignment of Adult Offenders – An Update (2012), available at http://www.lao.ca.gov/analysis/2012/crim_justice/2011-realignment-of-adult-offenders-022212.aspx.

10 *Ibid.*, at 43.

11 See *Ibid.*, at Figure 5. The last component of the formula refers to Senate Bill 678, also known as the California Community Corrections Performance Incentives Act, which in 2009 created a fiscal incentive for counties to improve probation outcomes.

population ages 18 to 64; (2) the status quo formula of FY 2011–12; or (3) weighted ADP.[12] Over a quarter of counties benefited from the new weighted ADP option, in some cases almost doubling what they would have received had their allocation been based on county population.[13]

Despite the new funding formula, many counties are still dissatisfied. In December 2012, thirteen rural Central California counties wrote a letter to Governor Brown complaining that urban counties are receiving a disproportionate amount of the AB 109 funding. This letter pointed to the fact that San Francisco and Marin Counties are receiving $24,000 per new offender, whereas Kern and Fresno Counties receive less than $8,000 per new offender.[14]

Initially, counties worried that the State had not guaranteed funding beyond the first 2 years. Some state leaders voiced concern that realignment would prove nothing but a shell game designed to dump the state's responsibilities onto already overburdened and underfunded counties. As Los Angeles County Supervisor Zev Yaroslavsky put it, "This has all the markings of a bait and switch. They promise us everything now, they shift this huge responsibility from the state to the counties now, and then a year or two or three from now, they will forget about that commitment, and it'll be – then was then and now is now, and we'll be left holding the bag."[15]

But in November 2012, California voters passed Governor Brown's Proposition 30, a sales and income tax increase. Proposition 30 increases personal income taxes on the wealthy and increases the sales tax by ¼ cent for 4 years. Proposition 30 is estimated to increase state revenues by about $7 billion annually, and the funds are to be used for education and to "guarantee funding for public safety services realigned from state to local governments."[16] The voters were never told how much would go to education and how much would go to realignment, but

12 County Administrative Officers Association of California realignment Allocation Committee, AB109 Allocation: Recommended Approach for 2012–13 and 2013–14 Briefing of County Administrative Officers (2012), available at http://www.csac.counties.org/sites/main/files/file-attachments/12.05.15_ab_109_allocation-051412_briefing_on_yrs_2_and_3_formula.pdf (presentation to the California State Association of Counties).

13 California State Association of Counties, Estimated funding levels for AB 109 Programmatic Allocation (2012–13 and 2013–14) (2012), available at http://www.csac.counties.org/sites/main/files/file-attachments/12.05.16_attachments_1_and_2_for_5-14-12_caoac_briefing.pdf.

14 Paige St. John, *Rural Counties Seek Bigger Share of Prison Money*, Los Angeles Times (Dec. 6, 2012), http://latimesblogs.latimes.com/california-politics/2012/12/rural-counties-seek-bigger-share-of-prison-money.html.

15 Carrie Kahn, *LA Prepares to Take on State Prisoners*, National Public Radio (Sept. 29, 2011), http://www.npr.org/2011/09/29/140922171/l-a-county-prepares-to-take-on-state-prisoners.

16 *California Legislative Analyst's Office*, http://ballotpedia.org/wiki/index.php/California_Legislative_Analyst%27s_Office (last visited Feb. 25, 2013) (Ballot Pedia, analysis of Proposition 30).

generally speaking, Proposition 30 was supposed to guarantee at least the same level of realignment funding going forward as had been given in the first 2 years.

This infusion of new funding surpasses any similar allocation for offender rehabilitation in California history, and the funding is now guaranteed for the next several years. The $64,000 question is: How will counties choose to spend their dollars? Scholars worry that instead of using AB 109 as an opportunity to invest in treatment and alternatives to incarceration, the money will mostly be used to increase law enforcement, electronic monitoring, and jail capacity. If that happens, realignment will have simply been a very expensive and painful game of musical chairs. Whether that happens is mostly up to the discretionary authority of the local Community Corrections Partnerships (CCPs), the topic we now turn to.

2.3 Community Corrections Partnership and Discretionary Decision-Making

Not only did Realignment transfer an unprecedented amount of money and responsibility to the counties, it gave them unprecedented discretion concerning how they chose to spend it. The Legislation (Penal Code 1230) required that each county establish a Community Corrections Partnership (CCP), comprised of the Chief Probation Officer as chair, the District Attorney, the Public Defender, the Presiding Judge of the superior court (or his/her designee), the Chief of Police, the Sheriff, and a representative from social services. The Committee develops the spending and program plan, and submits it to the County Board of Supervisors, where it is deemed acceptable unless the board rejects the plan by a vote of four-fifths. Realignment fundamentally embraces the notion that locals can do things differently and better than the state.

So the threshold question for any assessment of realignment is: How did these counties choose to spend the available funds? How did they divide the funds among various agencies (e.g., law enforcement, probation, social services)? And within the plans, have the counties set-aside funding for specific offender groups (e.g., the mentally ill) or community organizations (e.g., mentoring or faith-based programs)?

Stanford law students analyzed all of the 58 county plans approved in 2011–2012 and found that most of them included estimates of the number of offenders to be realigned to the county, a description of their local capacity and proposed programs for handling these offenders, and an expenditure plan.[17] While there

17 Angela McCray, Kathryn McCann Newhall and Jessica Greenlick Snyder, *Realigning the Revolving Door? An Analysis of California Counties' AB 109 Implementation Plans* (Stanford Criminal Justice Center, working paper 2012), available at http://www.law.stanford.edu/program/centers/scjc/#california_realignment. The McCray et al. analysis how now been expanded to include all 58 counties and will appear in a forthcoming report by Petersilia in 2013.

was a great deal of variation in the proposed county spending plans (as shown in Figure 1 below), the California average funding allocation for the first year of realignment was as follows:

- 35% to the sheriff's department, primarily for jail operations;
- 34% to the probation department, primarily for supervision and programs;
- 12% for programs and services provided by other agencies, such as for substance abuse and mental health treatment, housing assistance, and employment services;
- 19% unallocated/reserved funds.

Stanford researchers are also studying twelve counties in detail. These counties, as a group, capture the majority of the California population, approximate the state's population in terms of demographics and economic characteristics, and include the majority of the projected realignment population. Figure 1 displays these counties' realignment allocations, showing the diversity in funding choices across counties.

We are now collecting the 2012–2013 CCP plans and analyzing their budgets. At first glance, there do not appear to be major changes in funding allocations within counties or across the state. This data is critical to understanding how spending aligns with – or possibly thwarts – the Legislature's goals.

We are also analyzing how county characteristics (e.g., crime rate, population characteristics, fiscal health, political preferences) are associated with county

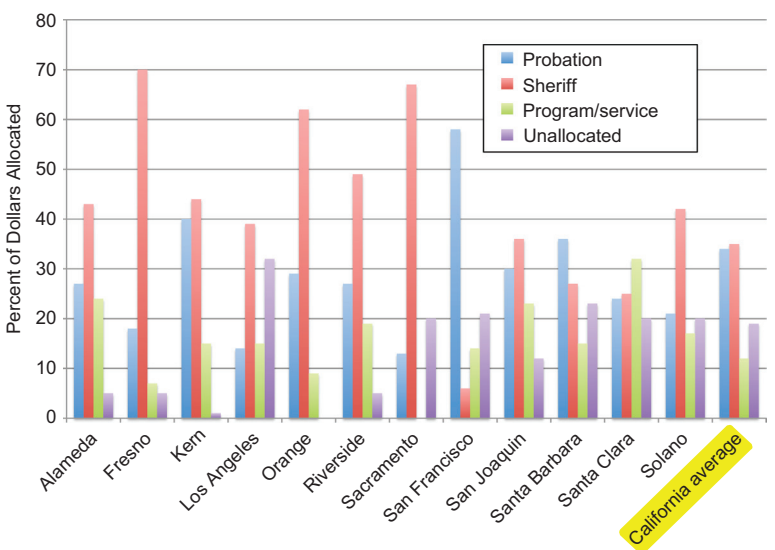

Figure 1: Realignment Funding Allocations by County and Category, 2011–2012.

choices on realignment spending. Our preliminary results suggest that counties tend to allocate a higher proportion of available realignment dollars to the sheriff when the serious crime rate is higher or the probability of (historical) imprisonment for offenses is higher. Counties tend to allocate a greater proportion of their realignment dollars to treatment when median household income is higher, the proportion of population below the poverty line is lower, and their residents have historically voted more Democratic. Understanding why counties spent their realignment dollars in the way they did is an important threshold question. The following 10 questions look to whether those dollars made any difference.

Question 1: Have prison populations been reduced and medical care sufficiently improved to bring prison medical care up to a Constitutional level?

The size of the prison population is the outcome everyone is watching. On the eve of the passage of realignment in October 2011, the prison population was 160,295, more than double what the prison system was designed to hold. In the first 3 months of realignment, the number of inmates in California prisons dropped by 11,000 – a decline of nearly 10% – an astonishingly steep decline.[18] By the end of 2012, California's prison population had dropped another 15,000, reaching 132,619 prisoners, its lowest level in 17 years. California's prison population has declined 24% since 2007, while its adult resident population increased by 5.6%.[19] In fact, realignment reduced California's inmate population so much that Texas now has a larger prison system, although Texas has about 12 million fewer residents.

The primary reason for the reduction in the state prison population has been the removal of the option to send parole violators back to state prison for non-felonious parole violations. During the first 8 months of realignment, the number of parole violators returned to prison was down by 47%. But prison commitments for less serious crimes were also down.[20] As shown in Figure 2, in

18 Magnus Lofstrom and Katherine Kramer, Capacity in California's Jails, (2012), available at http://www.ppic.org/main/publication_quick.asp?i=1034.

19 For prison population numbers, *see Monthly Total Population Report Archive*, California Corrections and Rehabilitation, http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Monthly/Monthly_Tpop1a_Archive.html (last visited Mar. 6, 2013) (each month comes from the respective monthly total population report). For California adult population numbers, *see American Fact Finder*, US Census Bureau, http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t (last visited Mar. 6, 2013) (adult population was calculated by multiplying the percent of the population 18 years and over by the total population).

20 LAO Legislative Analyst's Office, California's Criminal Justice System: A Primer 43 (2013) [hereinafter LAO].

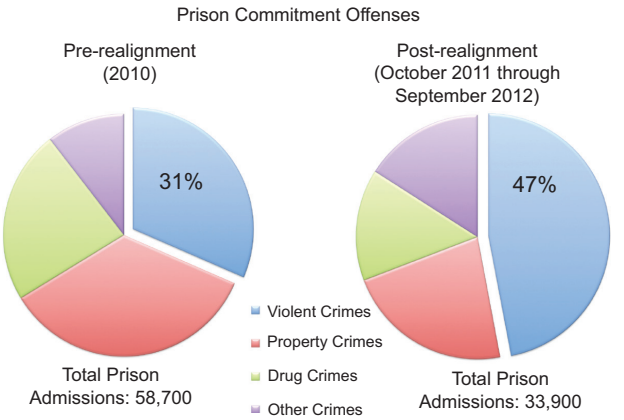

Figure 2: California Prison Admissions by Commitment Offense, 2010 vs. 2011–2012. Source: LAO Legislative Analyst's Office, California's Criminal Justice System: A Primer (2013) at 43.

2010 – the year before realignment – most admissions to state prisons were for property crime and drug crimes (58%). Decreases in commitments for drug sales other than for marijuana (down 75%), petty theft (down 62%), and marijuana offenses (down 69%) were substantial. In the first year following realignment, almost half of all admissions to state prison were for violent crimes (47%) – a 62% increase relative to 2010.[21]

Interestingly, the number of female prisoners has dropped by 45% since realignment passed – from about 10,500 inmates to 5,830 inmates by January 2013. A substantial portion of female inmates fell under the definition of non-non-non's, and their decline in the overall prison population allowed CDCR to convert a female prison into a facility for male inmates. From the state's vantage point, realignment is working: Prison is being increasingly reserved for the most serious and violent offenders.

On January 14, 2013 – just 14 months after realignment's enactment – Governor Brown called a press conference to declare California's long-running prison crisis over. "The prison emergency is over in California. There is no question that there were big problems in California prisons," but after "decades of work, the job is now complete."[22] Further reductions, the Governor said, would require releasing some significantly violent criminals, putting public safety at risk. He argued that

21 *Ibid.* at 43.

22 Don Thompson, *California Prison Population: Jerry Brown Challenges Inmate Cap*, Huffington Post (Jan. 8, 2013), http://www.huffingtonpost.com/2013/01/08/california-prison-populat_n_2433421.html.

while the State would not be able to meet the court's 2009 mandate to reduce its population to 112,000 inmates by June 2014, its prisons were now constitutional at the current level of about 133,000 and 150% of design capacity. The Governor said the "prisons are not overcrowded as a matter of fact," and the number of prisoners the state needs to reduce as stipulated by the courts is "arbitrary."[23] He said the state prison system deserved to be freed from federal oversight because of realignment. Governor Brown told reporters, "We've gone from serious constitutional problems to one of the finest prisons systems in the United States."[24] California recently saw its prison population stabilize and even start to climb slightly, but official projections show that it will have gained just 2,700 inmates by 2018.[25] A new normal for California prisons may be about 132,000–135,000 inmates. Of course, this could all change if serious crime increases.

Moreover, it is easy to lose sight of the fact that the motivating cause of the judicial order was not overcrowding itself, but the inadequacy of the medical and mental health care in prison. The judges held that prison crowding was preventing the delivery of adequate prisoner health care and that one inmate was dying each week from healthcare neglect. The court appointed a federal receiver, and ruled that reducing the prison population was a prerequisite to improving inmate health care. But less crowding will not in and of itself improve health care. Improving health care required the construction of new specialized space to provide health care and the hiring of trained medical professionals.

San Quentin prison opened a new hospital in 2010 with 50 beds, at a cost of over $136 million. Prisoners go there to receive medical, dental, and mental health care. San Quentin was the first prison in California to build a new health care facility after a federal judge ordered California to upgrade its prison hospital system in 2005, but it isn't the last. Slated for completion summer 2013, at a cost of $900 million, the California Health Care Facility in Stockton will provide 1,722 beds for inmates requiring long-term in-patient medical care and intensive in-patient mental health care. The completion of this facility is designed to ensure the continued constitutional levels of health care.

California's prison system comes at tremendous cost to the taxpayers. The average cost of housing a prisoner in the US is about $25,000–$27,000 per year. The California's Legislative Analyst Office recently reported that the annual cost to incarcerate an inmate in California is $51,998, twice the national average – with

23 *Ibid.*

24 *Ibid.*

25 California Department of Corrections and Rehabilitation, Fall 2012 Adult Population Projections (2012), available at http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Projections/F12pub.pdf.

$16,042 (31%) going to inmate health care. Importantly, just $926 (1.8%) of that roughly $52,000 goes to fund rehabilitation programs.[26] The hope is that the investments in inmate healthcare and medical facilities will improve California's prison healthcare system ultimately convincing a federal judge to end his oversight of prison medical care.

Improving California's prison healthcare system – and regaining State control of the entire prison medical system – is intricately tied to whether the state can keep its prison population down, which is totally dependent upon the success of realignment. Right now, the prison system is reaping the full benefits of realignment, primarily due to the decline of technical violations being admitted to prison. But, prison admissions over time remain unknown – mostly because local law enforcement and court systems will have a great deal of discretion in the new AB 109 system. Depending on how counties exercise that discretion, the decline in prisoners may not last. But of one thing we can be sure: this high profile court case[27] and the litigants involved in monitoring its progress, will be providing answers to these questions. In fact, this is the only one of the ten questions for which data is currently being collected as part of the court's continued monitoring.

Question 2: What is the impact on victim safety and victim rights?

Although the focus of AB 109 is clearly on what to do with offenders, it is important to note that realignment significantly impacts crime victims and witnesses. Victims' rights and safety is a significant concern that has, for the most part, gone unmentioned in realignment discussions. Despite their centrality, victims were not heavily involved in planning for realignment. They did not have a representative in the major policy negotiations when realignment was being designed. And AB 109 did not give them a voting seat on the local Community Corrections Partnership (CCP). Their rights to notification, safety, and a place of primacy in custody determinations were unaccounted for in the law's original form, and there is no clear sign that they are soon to be re-engaged. In short, in a rush to protect the constitutional rights of offenders, the rights and needs of victims appear to have been minimized.[28]

Realignment's impact on crime victims is multifaceted. More felons may be granted early release due to jail overcrowding, and these early releases may increase the risk of citizens becoming crime victims. On the other hand, if

26 LAO, *supra* note 21 at 50.

27 *Brown v. Plata*, 131 S. Ct. 1910, (2011).

28 Jessica Spencer and Joan Petersilia, *California Victims' Rights in a Post-Realignment World*, Fed. Sentencing Rep. (forthcoming Summer 2013).

counties divert offenders to more effective treatment and work programs, reducing recidivism, overall victimization rates will decline.

In addition to victimization issues, realignment may threaten the due process and statutory rights guaranteed California crime victims as a result of Marsy's Law, the California Victims' Bill of Rights Act of 2008. Marsy's Law created a substantial expansion of victims' rights and imposed certain obligations on district attorneys, peace officers, probation departments, parole, the courts, and the Governor. California victims have the legal right to be notified of all court proceedings, receive notification of adult inmate's status in prison, request special conditions of parole for the inmate when he or she is released from prison, and receive victim restitution. Victims have the right to reasonably confer with the prosecuting attorney and, upon request, be notified of and informed before *any* pretrial disposition of the case. Victims have a right to be heard at *any* proceeding involving a post-arrest release decision, plea, sentencing, post conviction release decision, or any proceeding in which a right of the victim is at issue.

Marsy's Law added a public safety bail provision [Art. I, § 28(f)(3)], which requires that in setting bail or own recognizance release, the protection of the public and the safety of the victim shall be the primary considerations. Importantly, Marsy's Law requires that the safety of the victim, the victim's family, and the general public be considered before any parole or other post-judgment release decision is made. It is not clear how realignment is preserving and enforcing these victim rights. What does seem clear is that the consequences of AB 109 on victim's rights have not been fully considered. The Crime Victims Action Alliance formally opposed AB 109 and sent a strong opposition letter to Governor Brown asking him to veto it. Fearing that it will negatively affect public safety, some victim lobbyist groups like Crime Victims United of California have uniformly disapproved of AB 109 and called for its repeal.[29]

Realignment may reduce the ability of victim's to collect restitution. Under the former system, victims would get their restitution payments through CDCR and the parole system, and an offender that failed to make those payments was violating a term of parole. Prisoners subject to longer periods of incarceration were usually required to work during their incarceration, and CDCR had the power to garnish any wages earned and put it toward any restitution order that was in place. However, offenders sent to PCRS instead of parole can now discharge their supervision at 6 months (half the minimum length of time under the old parole system). When offenders are discharged from PCRS, there is no administrative

29 *AB 109 – Public Safety Realignment*, Crime Victims Action Alliance, http://www.cvactionalliance.com/ab-109-public-safety-realignment; Crime Victims United of California http://www.crimevictimsunited.com/lawsuit.

body responsible for monitoring restitution payments. Victims often have little recourse to collect court ordered restitution under realignment. In addition, local authorities are now more responsible for collecting crime victim restitution payments – and given their workload, it often does not happen. "That's a major problem," says Kelly Keenan, chief assistant district attorney in Fresno County.[30] The CDCR tracks restitution orders for inmates in state prisons, collecting even after they are released on parole. But it's more difficult to track someone who serves a 3-year jail sentence and then leaves with no supervision or probation program. "We're struggling with it," Keenan says. For the present, he says, crime victims may have to go after restitution themselves in civil court.[31]

Realignment has also seriously diminished crime victims' access to the notice that Marsy's Law requires, mostly because it is not clear who is responsible for providing that notification and when. Realignment created several new types of custodial sentences (e.g., electronic monitoring, day reporting centers), and no one has yet determined which of those sentences require notice to the victim under Marsy's Law. CDCR had an automated system that allowed victims, family members of victims, or witnesses who testified against the offender to request to be notified of the release, parole hearing, death, or escape of their offender.[32] Local police chiefs are also apprehensive because under state parole supervision, there was a statewide database for checking criminals' status on the street. There is no similar statewide system for offenders on county probation. While there is an effort to put such a system in place, most counties have not allocated the funds required to do so. County jails and probation usually lack these structures, and so now an AB 109 offender could be released into the community without the victim being made aware of the release.

In some counties there are no processes to communicate with victims when the actual sentence of the offender is determined. Thus, victims often have no way of knowing whether the offender will be sentenced to county jail or state prison, the length of the sentence, and whether they will be under any form of supervision when they are released. This is all of grave concern to victims – and a violation of rights under Marsy's Law. Such legal conflicts could result in significant litigation challenging various applications of realignment. Additional administrative staff and resources could be required if prosecutors have to notify victims so that they have the opportunity to be heard at all stages of court processing. Such notifications will likely require additional court appearances, increasing

30 Spencer and Petersilia, *supra* note 28.

31 Pamela A. MacLean, *Prison Realignment: Now What?* California Lawyer, Aug. 17, 2012, http://www.callawyer.com/Clstory.cfm?eid=923950.

32 *Request for Victim Services (CDCR 1707)*, California Department of Corrections and Rehabilitation, http://www.cdcr.ca.gov/Victim_Services/application.html (last visited Feb. 28, 2013).

prosecutor, defense, and judicial resources. If they fail to provide opportunities for victim and witness input, realignment may indeed conflict with existing law and the State Constitution.

Question 3: Will more offenders participate in evidence-based treatment programs, and will their recidivism be reduced?

At its core, realignment is designed to increase treatment for offenders. In 2007, California's Expert Panel on Adult Offender Programming found that fewer than 10% of all prisoners and parolees participated in substance abuse or vocational education programs, despite the fact that nearly three quarters of all inmates had serious needs in these areas. Moreover, 50% of all exiting prisoners did not participate in *any* rehabilitation or work program, nor did they have a work assignment, during their entire prison stay. Offenders did not get help on parole either: 60% of parolees did not participate in *any* parole programs while under state supervision. In other words, most California prisoners and parolees left the state system with their literacy, substance abuse, and employment needs unmet.[33] It is not surprising that California's 3-year rearrest rate for released prisoners was 70%–the highest in the nation.

Realignment proponents argue that shifting program authority and funding to local governments will result in better programs and more accountability for outcomes. Counties have a far greater stake than the state does in trying to rehabilitate as many offenders as possible, because they have to live with them after they are released. Those going to county jail will almost surely return to the same community after serving their sentences. At its core, realignment is designed to increase offender program participation rates and improve offenders' chances of success.

But for realignment to actually reduce offender recidivism, three things must happen. The first two necessary elements to reducing offender recidivism are squarely within the counties' control: First, offenders must have the *opportunity to participate* in treatment programs, and second, the program's design must incorporate elements consistent with the *principles of effective correctional intervention*. Research has shown that programs incorporating these principles reduce recidivism. California developed the Correctional Program Assessment Process, which is a checklist of items that must be present for a program to qualify as an

33 Joan Petersilia and Marisela Montes, co-chairs, Meeting the Challenges of Rehabilitation in California's Prison and Parole System: A Report from Governor Schwarzenegger's Expert Panel on Rehabilitation (Dec. 2007), available at http://www.cdcr.ca.gov/news/docs/govrehabilitationstriketeamrpt_012308.pdf.

"evidence-based program."[34] If offenders do not participate in these types of programs post-realignment, we should not expect recidivism reduction.

The third necessary element to reducing offender recidivism is less within the counties' control: Offenders must *want to take advantage* of the programs offered. Counties can open up more programs, and those programs can be evidence-based, but if the offender does not want to take advantage of them, recidivism will not be reduced. After all, we must remember that many of these offenders are the same ones who failed the last time they were "treated" or jailed in county facilities. "You can lead a horse to water, but you can't make it drink." In discussions of recidivism reduction, we often forget this basic point: We can offer offenders opportunities, but if they don't actively participate, they will not succeed.

While realignment is designed to increase offender programming, it is unclear whether it will has done so significantly in the first year. Yes, more offenders are under the *supervision* of county organizations, but it is unclear how much money is actually going to evidence-based programs or how good the funded programs are. To be sure, there are counties that are using their realignment dollars to invest in better programs. Sacramento, Solano, and thirty-one other counties are funding Adult Day Reporting Center (ADRCs) for realigned offenders, where clients receive counseling, GED tutoring, and employment assistance at no cost to offenders. Santa Clara County funded the Santa Clara Reentry Center,[35] and San Diego, Merced, San Francisco[36] and Santa Barbara[37] created Community Assessment and Social Services Centers: one-stop hubs for all services provided to AB 109 offenders. San Mateo County has funded "Service Connect," a full service program that begins working with the inmates prior to their prison release. The Orange County Sheriff's Department has initiated an in-jail transition program, which combines classroom learning with a re-entry coordinator at release. The San Francisco and Sacramento District Attorney's Office has dedicated resources to an "alternative sentencing planner." This new position is designed to give

34 See Ryken Grattet et al, Evidence-based Practices in Corrections: A Training Manual for the California Program Assessment Process (CPAP) (2006), available at http://ucicorrections.seweb.uci.edu/pdf/CPAPTrainingManual.pdf.

35 *Re-Entry Resource Center Brings Crucial Services to Former Offenders as they Transition Back to the Community*, County of Santa Clara News Releases (Oct. 18, 2012), http://www.sccgov.org/sites/opa/nr/Pages/Re-Entry-Resource-Center-Brings-Crucial-Services-to-Former-Offenders-as-they-Transition-Back-to-the-Community.aspx.

36 Trent Rhorer and Wendy Still, Public Safety Realignment Act of 2011 (AB109): Impacts on San Francisco County (2012), *available at* http://www.cwda.org/downloads/meetings/conference2012/Realignment-San-Francisco.pdf (presentation at County Welfare Directors Association of California).

37 *San Francisco Realignment: A Well Resourced Traditional Model*, Reentry Court Solutions (Oct. 8, 2012), http://www.reentrycourtsolutions.com/tag/san-francisco-realignment-plan/.

prosecutors information about local community-based sentencing options and identify diversion-appropriate defendants. Many counties have also expanded electronic monitoring and jail work release programs. The lessons learned from these innovative programs will be instructive for the rest of the state.

Despite these examples of promising programming, analysis of the county spending plans (shown in Figure 1) during the first year suggests that perhaps not much money is being invested in rehabilitation – and even less in evaluations to see whether the programs reduced recidivism. This is concerning because even well intentioned efforts can do harm if they are not well designed and appropriately targeted. Research has shown that some popular rehabilitation programs currently in use are not effective at reducing criminal behavior (e.g., intensive supervision or electronic without treatment). But other programs are effective, such as therapeutic custody programs with aftercare for drug offenders. Quality vocational education programs with job placement have yielded positive results, as have cognitive behavior treatment in prison and in the community. Gender-responsive programs have demonstrated positive outcomes for female offenders.[38] Fully implementing evidence-based rehabilitation programs should reduce California's recidivism rate by about 10–20% overall, although programs with different risk populations can expect different recidivism reduction outcomes.[39]

Many people have become concerned with the discrepancy between the 58 different counties implementing AB 109. Some, like Donald Specter, the director of the Prison Law Office, have lamented the lack of "guiding principles, oversight, or monitoring" from the State and predicts "extreme variations" in the effectiveness of county programming.[40] For example, almost all counties plan to employ GPS monitoring, but only 34% of counties plan to use drug courts or community service as part of an alternative sentencing regime.[41] For rehabilitation, virtually all of the 58 county plans mentioned they intended to use evidence-based programming, but only five counties spent more than one paragraph describing what they meant by this.[42] Eighty percent of counties plan to use vocational training,

38 The Office of Justice Programs' CrimeSolutions.gov uses rigorous research to determine what works. This website identifies programs that have been reviewed and rated as "effective" by reviewers. However, just because a particular program isn't classified as "effective" doesn't necessarily mean the program couldn't *be* effective, only that there is no rigorous research to date demonstrating that it has or has not been proven effective. See Office of Justice Program Crimes Solutions.gov, http://www.crimesolutions.gov.

39 Mark W. Lipsey and Francis Y. Cullen, *The Effectiveness of Correctional Treatment: A Review of Systematic Reviews*, 3 Ann. Rev. L. & Soc. Sci. 297, 297–320 (2007).

40 Jennifer Medina, California Begins Moving Prison Inmates, *NY Times*, Oct. 8, 2011, at A14.

41 McCray, Newhall and Snyder, *supra* note 17.

42 *Ibid*. at 30–31.

and 60% plan to provide economic support, but only 3% plan to use mentoring programs.[43] About 65% of the counties plan to partner with community-based organizations, although only 34% plan to actually have a contract with them.[44]

As previously discussed, our analysis of county plans revealed that just 12% of the total first year allotment for realignment across the state was given to community agencies that provide treatment services. It may be that funds within the probation or sheriff's department will be spent on treatment, but so far that doesn't appear to be the case. We found that about 35% of all the AB 109 money allocated in the first year was earmarked for probation and sheriff staff salaries.[45]

Planned realignment spending on these different categories is widely divergent, as shown in Figure 1. Some counties like Sacramento plan to spend a disproportionate amount of their AB 109 funding on salaries of county officials, while others like San Francisco, Orange, Riverside, and Santa Cruz are spending less money on salaries.[46] Some counties plan to use a majority of AB 109 funds to focus on a single issue; for example Riverside allocated over $4 million to its Department of Mental Health.[47] Other counties, like Santa Clara, took a more balanced approach, allocating about 25% each to the sheriff, probation, and social services, and leaving about 20% in reserve.[48]

What might be even more concerning than the relatively small chunk of realignment funds going to services and the significant divergence between counties, is the fact that few rigorous studies are being done to assess the costs and impacts of those rehabilitation programs that are being funded. Some counties are conducting process evaluations but, as far as we know, no county is conducting a randomized trial or cost benefit analysis of realignments' impact. This is an important missed opportunity. How will we know if investing in rehabilitation versus incarceration worked or not? Ideally, we would conduct a true experiment to assess AB 109-funded programs, by comparing initially equivalent program participants (individuals who participated in the AB 109 program) with control individuals (individuals who did not participate in the program but share characteristics with those who did). Even if counties can not apply a true experimental design to their program evaluation, they should compare "quasi-control" groups, where the control group is matched to the program group on similar characteristics (e.g., age, race, prior criminal record), and then behavior is measured pre- and post-program participation. We should shift to offender behavior outcomes (such

43 *Ibid.*
44 *Ibid.*
45 *Ibid.* at 82.
46 *Ibid.* at 78.
47 *Ibid.* at 81.
48 *Ibid.* at 82.

as days drug free, job retention) rather than simply measuring recidivism, which can be driven by policy changes rather than real offender behavior changes.

To us, this is probably the most important of the 10 questions – and the one not receiving serious attention. Without program evaluations, we will not be able to ever answer the most important question that realignment raises: what works, with whom, and what are the costs and benefits?

Question 4: Will there be equitable sentencing and access to treatment across California's 58 counties?

Under realignment, judges now have widespread discretion to impose a jail term or a community-based alternative for a large class of convicted criminals. Because the realigned "non-non-non" offenders must now serve their sentences at the county level as opposed to state prison, judges now have wide discretion to impose a jail term (for the same sentence length that the offender would have received pre-realignment), a community-based alternative, or some combination of jail and mandatory supervision. This latter option is known as split sentencing, where the judge imposes a sentence that is a combination of county jail time and mandatory probation supervision.

As Berkeley law professor Jonathan Simon wrote, if judges simply sentence felons to jail instead of prison for the same time period, they will have simply "traded one form of incarceration, state prison, for another, county jail; a cynical shell game designed to relieve court pressure without altering our basic addiction to incarceration."[49]

Some counties may well do that, particularly if they have unused jail capacity. In fact, realignment seems to have been somewhat inspired by the observation that pre-realignment, the county jails in California had 10,000 empty beds while state prisons had an excess of 30,000 prisoners.[50] But other counties appear to be using their AB 109 funds to expand collaborative courts, particularly drug, mental health, and veteran courts. Still other counties are imposing split sentences where offenders serve a few months in jail followed by intensive supervision or programming.

Sentencing disparity across counties has likely increased under realignment. In the first 9 months of realignment, there were about 21,500 felony offenders sentenced to local jail terms under Penal Code section 1170(h)(5).[51] Approximately

49 Jonathan Simon, *California penal policy: Realignment and beyond*, The Berkeley Blog (Oct. 11, 2011), http://blogs.berkeley.edu/2011/10/11/california-penal-policy-realignment-and-beyond/.

50 Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 Harvard Civil Rights & Civil Disabilities Law Review (forthcoming 2013).

51 Penal Code section 1170(h) refers to those felons who are convicted of a felony offense that is non-serious, non-violent, and non-sexual and are now receiving county jail instead of prison terms.

5,000 or 23% of those offenders were sentenced to a split sentence.[52] The remaining 77% were sentenced to a straight-term jail sentence, with no mandatory supervision to follow. Once their jail term is served, they must be released, and have no post-incarceration supervision.

Counties vary significantly with respect to the imposition of split sentencing. Los Angeles, with roughly a third of all felons in the state, imposes split sentencing in just 5% of its cases, whereas Contra Costa imposes it in 84% of its cases. On July 1, 2013, county judges will be taking on another new role and will become responsible for the parole revocation hearings for the realigned parole population. The California Board of Prison Terms (BPH) currently oversees all parole revocation hearings and decides disposition, but judges will assume that responsibility shortly. Given the vast county differences observed so far in the use of split sentencing, we can presume that the punishment meted out to parole violators across the state will be similarly disparate. Counties differ in terms of culture, resources, treatment availability, and system capacity, and these aspects are certain to play themselves out not only in sentencing decisions but also parole revocation decisions. As Barry Krisberg of UC Berkeley, recently observed, "The counties will get several billion dollars that they can spend with virtually no oversight or accountability. This *laissez faire* approach means that 58 counties will produce many differing versions of the reform – we will see the emergence of justice by geography."[53]

We should worry about whether realignment allows unfettered discretion, which in turn leads to widespread sentencing disparities. As a general matter, defendants with similar criminal records found guilty of similar crimes should receive similar sentences and access to treatment. Of course, this ideal has never been fully realized in California or elsewhere,[54] but we must be diligent to assure that realignment does not increase the impact of extralegal factors, such as race, income, and geography, on sentencing outcomes. In fact, it is important to remind ourselves that California current system of determinate sentencing was adopted in 1977 in part to rid the state of racial biases and geographical differences that were evident in its former highly discretionary indeterminate sentencing law. Researchers should track type and length of sentence imposed on felons convicted of different crimes with different criminal records, and pay particular

52 Chief Probation Officers of California, *Split Sentencing in California under Realignment*, 1 CPOC Issue Brief (Winter 2012) 1, 2.

53 Barry Krisberg, *Realigning the criminal justice system in California*, The Daily Californian, November 1, 2011, http://www.dailycal.org/2011/11/01/realigning-the-criminal-justice-system-in-california/.

54 David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates – And Why It Should*, 28 Ga. St. U. L. Rev. 987 (2012).

attention to how these sentences vary across counties and with the demographic characteristics of the defendants (e.g., age, race, gender).

Question 5: What is the impact on jails? How does realignment impact crowding, staff safety, institutional violence, and medical care?

The most immediate impact of realignment was to exacerbate jail overcrowding. When sentencing began on October 1, 2011, all qualifying low level offenders convicted on non-non-non offenses – as well as PRCS violators – began serving their sentences locally rather than in state prison. The door to prison for these offenders had shut, and if judges wanted to impose incarceration, local jail was their only option.

But some of California's jails were already dangerously overcrowded. Currently, 17 of California's 58 county jails are operating under a court-ordered population cap, and 20 more have a self-imposed cap on their jail populations.[55] Realignment caused an immediate increase in jailed inmates. By March 2012, the California jail population reached 78,796 inmates, 11% higher than the same period in 2011.[56] Sheriffs reported being forced to release 11,000 inmates early each month due to lack of space.[57]

The legislature recognized the need for added jail capacity and passed Assembly Bill 900, creating $1.2 billion in state matching funds for county jail expansions, and a later Senate Bill 1022 added an additional $500 million to expand jail capacity. As of May 2012, 18 counties had received conditional awards for a total planned gain of 9,222 jail beds.[58] With these jails built, California will have expanded its jail capacity to about 88,000 inmates. As *California Lawyer* put it, "Prison building, essentially, has gone local."[59]

The jail building phenomena, however, might have long-term costs to the counties. As Magnus Lofstrom of Public Policy Institute of California writes, "Counties need to analyze closely the long-term benefits of building their way out of capacity problems. The costs of operating new facilities are substantial: construction costs account for less than 10% of the total cost of a jail over its lifetime."[60]

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55 Magnus Lofstrom, Joan Petersilia, Steven Raphael, Public Policy Institute of California, Evaluating the Effects of California's Corrections Realignment on Public Safety 10 (2012).

56 Board of State and Community Corrections, Jail Profile Survey: 2012, 2nd Quarter Survey Results (2012), available at http://www.bscc.ca.gov/download.php?f=/2012_2nd_Qtr_JPS_full_report.pdf.

57 *Ibid.*

58 Lofstom and Kramer, *supra* note 18.

59 MacLean, *supra* note 32.

60 Lofstom and Kramer, *supra* note 18.

But it isn't just inmate population increases that worry jail managers. Equally problematic are the very long sentences being imposed under 1170(h), the special medical and mental health needs of the AB 109 populations, and the custody and classification issues raised by this new more serious offender population.

Since realignment, through the use of enhancements, some offenders have received staggeringly long sentences to county jail. A recent study by the California State Sheriff's Association found that since realignment 1,153 inmates have been sentenced to serve over 5 years in county jail, with 44 of these inmates sentenced to terms longer than 10 years.[61] One inmate in Los Angeles County is serving a 43-year term in the county jail for drug trafficking.[62] Some other counties have seen similarly long sentences, with one inmate sentenced to 23 years in Santa Barbara County, and two Sacramento County inmates sentenced to 18 years.[63] The Sheriff's Association report found that the majority of offenders sentenced to 5 or more years (58%) were from just three counties (Los Angeles, San Bernardino, and San Diego).

Such long sentences, however, are rare. The sheriff's report notes that just 2.7% of offenders sentenced under realignment [1170(h)] were sentenced to 5 to 10 years and 0.1% were sentenced to more than 10 years. To date, about 42,000 felons have been sentenced to jail as a result of PC 1170(h), and an estimated 2.75% were sentenced to 5 or more years. Los Angeles reports that 98% of its 1170(h) inmates had less than 2.5 years left to serve after receiving their sentence.[64] Regardless of their number, jails are not equipped to handle long-term prisoners.

The second major concern is about the changed nature of the local jail population. Garden Grove Police Chief Kevin Raney in Orange County asserted that many of the low-level offenders are actually "hardened criminals," adding, "[a]s we were looking at some of the packets (of inmates sent to local jails), you look at the prior convictions and they are startling, alarming and concerning."[65] Lt. Charles Powell of Santa Barbara similarly noted that the influx of a different population of inmates affected by realignment has negatively affected jail dynamics. He said, "Our average daily population in the jail is increasing dramatically and

61 Don Thompson, *Jails House 1,100 Long Term Inmates*, Associated Press, Feb. 28, 2013, http://www.utsandiego.com/news/2013/feb/28/ap-exclusive-jails-house-1100-long-term-inmates/.
62 *Ibid.*
63 Gillian Flaccus, *Calif. inmate realignment law puts pressure on county jails, but full effects remain unclear*, The Republic, May 18, 2012, http://www.therepublic.com/view/story/553867254923406ba92f9c3e07bf6ee4/CA--California-Prisons-Realignment/.
64 Mark Feldman, *Realignment: The Sheriff's Perspective* (Stanford Criminal Justice Center, working paper, Mar. 4, 2013).
65 Norberto Santana, *Orange County Grapples With Wave of State Parolees*, Voice of Orange Country, May 23, 2012, http://www.voiceofoc.org/countywide/county_government/article_9ac41a8e-a4f2-11e1-8b93-0019bb2963f4.html.

we're really struggling with how to deal with that *type* of population."[66] Further, Cmdr. James Buttrey, who used to manage corrections for the Merced County Sheriff's Department, noted, "They're all bad guys in jail. There's nobody left in jail that's singing too loud in church."[67]

Counties are also unprepared for the medical and mental health care costs of realignment. County jails generally lack the infrastructure to house long-term inmates with significant healthcare needs. Jails also have problems with disability access and having enough space to separate gangs and other vulnerable inmates. As Bill Brown, Sheriff of Santa Barbara County, observed, the funding formula for jail inmates was based on the marginal cost of each inmate and did not sufficiently account for the fixed costs of constructing medical infrastructure where none existed. Counties that do not have a full complement of medical personnel inside the jail will have to find a specialist on the outside to diagnose and treat the inmate. In small rural counties, the closest specialist willing to treat inmates may be hours away, and the jail will have to utilize its resources to transport the inmate to receive treatment. If counties are unable to provide adequate healthcare, they will likely see an increase in lawsuits and litigation costs.

Sheriff Keith Royal of Nevada County, the president of the California State Sheriffs' Association, said members were worried about their capacity to provide "adequate treatment" in jails and about "litigation at the local level." Because a number of counties, including Los Angeles County, are already under court supervision because of the unconstitutional conditions of their jails, many experts fear that one of AB 109's hidden costs could be an increase in litigation over the overcrowded jails. Orange County District Attorneys and Public Defender Frank Ospino agree that the county is facing huge ligation costs with so many new legal challenges concerning the overcrowded county jails.[68]

Two months after AB 109 was passed, the Prison Law Office (PLO) sued Fresno County on behalf of four inmates who say the county's jail system violates their constitutional rights by denying them medical and mental health care. In March 2013, the PLO sued Riverside jails on behalf of three prisoners, claiming the County is subjecting them to cruel and unusual punishment by depriving them of basic medical and mental health care. Almeda County was sued in November 2012, and Monterey County is expecting to be sued. The Prison Law Office is the same firm that sued the state to improve medical care for inmates – ultimately leading to realignment.

66 *Ibid.*

67 Joshua Emerson Smith, *Softer sentences in hard times; packed jails spark debate*, Merced Sun-Star, May 5, 2012, http://www.mercedsunstar.com/2012/05/05/2334586/softer-sentences-in-hard-times.html.

68 Santana, *supra* note 65.

In March 2012, the ACLU released a report that was very critical of the counties that were reacting to realignment by building more jails. The report confirmed the growing fears of many people: that many counties, instead of pursuing cost-effective methods to reduce recidivism through programs, were repeating the same mistakes of the state correctional system by locking offenders away for the maximum amount of time without engaging in a serious effort to help them avoid returning to criminal behavior.[69] The report explained that, "left unchecked, these counties will build larger jail systems that will cost more tax dollars than they do now and hold more people than they do now."[70] Emily Harris of Californians United for a Responsible Budget, which opposes heavy prison spending, said, "If realignment just becomes a massive jail expansion plan, we are continuing the 30 years of failed corrections policy."[71]

Counties are caught between a rock and a hard place: If they do not expand jail capacity, they risk huge litigation costs due to crowding and inadequate care. But if they use most of their realignment dollars to simply build more jail beds, they will have missed an opportunity to test whether local resources and programming could rehabilitate offenders. If realignment becomes just a massive jail expansion program, we will ultimately have created a corrections system that costs more than it does today with little positive benefit.

Question 6: What is the impact on police, prosecution, defense attorneys, and judges?

There are myriad ways that realignment will impact the workings of law enforcement and the court system. These impacts will be highly variable from county to county and likely determine the entire success or failure of realignment. It is important to ask: How and in what ways will prosecutorial discretion, plea bargaining, judicial sentencing and court processing change? How will the workload of the district attorneys, judges, and defense attorneys be impacted? Will these various actors change their working relationships with one another and with what impact?

The realignment legislation provided counties with additional options for managing realigned offenders but to make full use of them, court personnel have to become familiar with them. The most important new sentencing option is "split sentencing," which allows the judge to sentence a felon to jail and community supervision. This is somewhat different than what prior law allowed, where

69 Chris Megerian, *ACLU Is Critical of State Prison Realignment*, L.A. Times, Mar. 22, 2012.
70 *Ibid.*
71 *Ibid.*

a judge often sentenced someone to either jail or probation. In addition, AB 109 allows county probation officers and judges to return offenders who violate the terms of their community supervision to jail for up to 10 days, which is commonly referred to as "flash incarceration." The rationale for using flash incarceration is that short terms of incarceration when applied soon after the offense is identified can be more effective at deterring subsequent violations than the threat of longer terms following what can be lengthy criminal proceedings.[72] It appears that counties are slowly increasing the use of split sentencing and flash incarceration, but many are still unfamiliar or unsupportive of the concepts, and as such, there is concern that there will be growing sentencing disparities across counties for similar crimes. In this way, it is as if realignment has created 58 systems of justice, each with their own sentencing commission.

The complexity and redundancy of the California penal code has always enabled prosecutors – indeed, often required them – to exercise discretionary judgement in mapping provable facts on to alternative statutory crime definitions. In light of AB 109, some prosecutors may believe that, holding sentence length constant, the experience of county jail is inherently more lenient than state prison, or they may fear putting too great a burden on county resources. If so, where the facts fit overlapping crime definitions, District Attorneys might tilt towards exercising that discretion in the direction of charging prison-eligible felonies, rather than crimes in the 1170(h) non-prison category. This tendency might be greater if prosecutors believe that jail crowding is so severe that it might lead judges to choose split sentences or strengthen the hand of defense lawyers in plea bargaining. It is currently unclear whether these effects will occur, and to what extent.

Most experts believe realignment increases defense attorneys' leverage in negotiations with prosecutors. Freedman and Menchin quote an attorney from the San Francisco Public Defender's Office who said, "The Public Defender will have a little bit of an upper hand in the sense that more options are on the table, such as supervision, and more things are off the table, such as prison."[73] Perhaps the most frequently mentioned source of defense attorneys' newfound power

72 Mac Taylor, Legislative Analyst's Office, The 2013–13 Budget: Governor's Justice Proposals (2013), available at http://www.lao.ca.gov/analysis/2013/crim_justice/criminal-justice-proposals/criminal-justice-proposals-021513.pdf. See also, Angela Hawken and Mark Kleiman, Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE, National Institute of Justice, 2009, available at https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf.

73 Malaina Freedman and Craig Menchin, Realignment's Impact on the Public Defender and District Attorney: A Tale of Five Counties, 20 (Stanford Law School, working paper, 2012), available at http://www.law.stanford.edu/organizations/programs-and-centers/stanford-criminal-justice-center-scjc/california-realignment.

is the removal of prison from the host of options facing an 1170(h) defendant. Prosecutors used to induce pleas by offering to take prison off of the table if the defendant agreed to plead guilty. Most agree that the removal of prison changes the dynamics and augments the defense attorney's leverage.

Whether realignment works or not will likely depend on how local authorities handle prosecutorial charging, plea-bargaining, and sentencing. AB 109 cut off the parole revocation route to prison (and SB 18 and AB 109 reduced the number of parolees and length of supervision), but a possible unintended consequence is that prosecutors will feel more pressure to file new criminal charges, and if felons are convicted, those charges will resulted in *longer* prison terms than the previous parole revocation terms. Pre-realignment, parole violators could be returned to prison for a maximum 12-month prison term for technical violations, but the actual prison time served averaged 3–4 months (once pre-trial and good time credits were applied). A critically important question, for which we do not yet have enough data to answer, is whether many of these former "technical violations" will now be filed as new felony charges. The growth of California's prison population heavily depends on how many of these filings result in prison terms, and the length of prison sentence imposed.

These changes do not simply alter the population of prisons and jails. The institutions of criminal justice constitute a hydraulic, interactive system in which any change in one part can catalyze changes in the practices of the prosecution, the defense, and the judiciary. For example, these sentencing changes will greatly impact prosecutorial discretion and guilty plea rates. It is an axiom of criminal law that prosecutors can induce guilty pleas from defendants by trading off the prosecutor's power to threaten higher charges and very serious sentences. The prosecutors' ability in this regard and the likelihood of guilty plea is enhanced especially when charges carry mandatory or fixed minimum sentences.

If AB 109 removes some of the arrows from the prosecutor's quiver, cases that previously ended in guilty pleas may result in different outcomes because defense counsel might advise defendants that it may be worth their while to risk a trial, including a jury trial, on the lower maximum charges they face. The guilty plea rate, which approaches 95% of the convictions across jurisdictions, is the biggest cost- and efficiency savings the prosecutor and the courts have (and even the public defenders) enjoy. So counties will have to hazard guesses as to how many more full trials, including jury trials, will occur as result of AB 109. Any increase will put pressure on staffing in district attorneys' offices, on the available space and staff resources of and caseloads of the Superior Courts, and on the budgets for indigent defense representation. This potential change in trial rates is just one example of the unintended consequences arising from AB 109 that counties should be prepared to address.

Question 7: What is the impact on probation and parole?

Of all the agencies involved in realignment, probation occupies center stage. It is safe to say, that the success of realignment hinges on the performance of probation – and in many ways the future of California probation hinges on the success of realignment. The Chief Probation Officer is the chair of the CCP—the engine of change for each county under Realignment. Probation is also the natural leader within each county to coordinate community-based punishments for PRCS offenders. As Don Meyer, Chief of Probation for Sacramento County, recently told the authors, "We've been the silent partner of the criminal justice system. Now we're out in front."

Parole too has a critically important – albeit more nuanced – role to play in realignment's success. Both agencies have to accommodate an increasingly serious offender population, all while adhering to formal agency mission statements and public pronouncements that prioritize rehabilitation. But line staff in both of these agencies echo the same sentiment: they are being asked to do too much, too fast, with too little. It is not just that resources are insufficient, which is what most focus on, but that offenders – *regardless* of how many programs are thrown at them – have to make the personal decision to fully participate and take advantage of program opportunities.

For California's probation system, realignment gives it an opportunity to test whether it can reduce recidivism through evidence-based programming. Probation has always supervised two-thirds of Californians under correctional supervision but never gotten the resources commensurate with their responsibilities. According to a study by the Pew Center on the States, for every dollar spent on prisons, the US spend just 6 cents on probation and parole.[74] Realignment balances the scales slightly by investing more in community-based treatment. As shown in Figure 1, probation received 34% of all allocated first-year realignment money. Probation is seeing a significant infusion of much-needed cash to implement offender programming.

While the resources are welcomed, they came with a very big string attached: The population now sent to probation is more serious and more of them are struggling with addiction and mental illness. One of the biggest points of controversy is the fact that released prisoners are now reassigned to county-probation *regardless* of their prior criminal record. Assignment to PCRS is determined only by the current prison conviction offenses regardless of prior record, mental health status, or in-prison behavior.

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74 The Pew Center on the States, One in 31: The Long Reach of American Corrections (The Pew Charitable Trusts, Mar. 2009).

This systematically alters probation's caseload and creates a higher-need, higher-risk population. In fact, CDCR's research division is tracking the characteristics of prisoners being realigned to county probation/PCRS versus those being retained on state parole. CDCR data reveal that in the first year of realignment prisoners sent to PCRS were *more* likely to have a "high" California Static Risk Assessment (CSRA) score. In the first year, 55% of PCRS offenders scored "high risk" compared with 44% of those retained on state parole (see www.acjrca.org/images/ppf12/1seale.pptx). It is quite possible that California's realignment experiment is systematically testing whether the evidence-based programs shown to work in previous settings, usually with much less serious offenders, will work in California with it's higher risk population.

It is critically important to remember that even those identified as "low" and "medium" risk prisoners using California's Risk Assessment have historically had high recidivism rates. A recent study by CDCR tracked the cohort of prisoners released in 2007–2008 for 3 years. By the end of the 3 years, 41% of prisoners classified as "low risk" and 57% of those classified as "medium risk" were returned to a California prison. While these recidivism rates were lower than for prisoners classified as "high risk" (who had a 74% return-to-prison rate within 3 years), most would not consider an average 50% return-to-prison rate "low risk." It is better thought of as low*er* risk (and it is important to recall that this figure represents a return to a California prison, not rearrest, return to jail, or return to another state or federal prison). Susan Turner at the University of California Irvine, who developed California's risk assessment tool, reported that 11% of those classified as "low risk" and 22% of those classified as "moderate risk" were rearrested for a violent felony within 3 years of release. Between 23% and 38% of those classified as "high risk" were rearrested for a violent felony within 3 years of release.[75] So, regardless of how one slices the data, California counties are dealing with a risky offender population. The challenge in California's realignment experiment is whether evidence-based alternatives – which for the most part have been tested on lower risk populations – can work here. Tracking offenders' characteristics, the programs they participate in, and the resulting social and criminal justice outcomes is critically important to advancing knowledge of the utility of evidence-based programming for higher risk offenders.

75 California Office of Research, California Department of Corrections and Rehabilitation: 2012 Outcome Evaluation Report (Oct. 2012), available at http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY_0708_Recidivism_Report_10.23.12.pdf; For data on rearrests and reconvictions, by crime type and risk level, see Susan Turner, California Static Risk Assessment (CSRA) (2008), available at www.acjrca.org/ppt08/2.pvdmt-turner.ppt.

Supervising higher risk offenders will change the cultures of probation and parole agencies. Since both agencies will see a hardening of their caseloads, what impact will this have for supervision and support mechanisms? Probation was designed for less serious offenders. Probation staff members work for the county. They often have social-work degrees, they usually are not armed, and they are not considered sworn law enforcement officers. Historically, probation is designed to be the "helping" part of the criminal justice system. Yet many probation agencies are now arming more of their officers, and there is more concern for staff safety.

Probation is hiring agents while parole is laying them off – yet there is little difference in their high-risk caseloads post-realignment. Interestingly, to accommodate probations' increase in staffing levels, probation departments are looking to recruit laid off parole agents since they already have safety and weapons training. These "transfers" may still benefit State coffers, since parole agents are paid about 30–50% more than probation officers, they do not need additional training or weapons certification, and when they transfer to probation they lose eligibility for membership in the California Correctional Peace Officers Association (CCPOA), arguably the most powerful union in the state.[76]

Long-term members of CCPOA get hefty pensions and lifetime medical insurance, something the State wants to reduce. If California can downsize the State's CCPOA workforce, and replace it with less expensive agents doing essentially the same job with lower salaries and fewer benefits, the State wins. This economic benefit should not go unnoticed when we examine why realignment – and the shift from state to county supervision – took the form that it did. But, importantly, when you infuse probation agencies with former parole agents, you also bring into probation the surveillance culture that permeated parole in recent years.

There are serious implications if parole agents simply turn around and get hired to work for county probation departments. Parole agents were considered law enforcement officers for a reason – they supervised the most serious criminals. If they are doing the same job for probation – will they be able to switch their "enforcement" hats for "rehabilitation" hats? If they bring their "nail 'em and jail 'em" mentality to the new job, will rehabilitation programs have been given a fair try? Interestingly, the State won't save as much money as budget analysts project,

76 California CCPOA members have by far the most generous wages and benefits that prison officers get anywhere in the county. In 2009, corrections employees received an average of $70,000 a year and more than 40,000 of them earned over $100,000. See Brian Joseph, *State prison system lucrative for corrections*, Orange County Register, Jan 6, 2011, http://www.ocregister.com/articles/-283117-html. Since then, wages have gone up. Their contract includes pensions of up to 90% of salary starting at as early as 50 – more than teachers, nurses or firefighters get. The CCPOA contract was very much on the minds of legislators when they approved the realignment legislation.

because the State may have to pay twice; it may pay the former parole agents' pensions and that same person's new county probation-agent salary.

These are complicated issues and no one is studying them. Both probation and parole are undergoing significant changes, and it is not clear how they will play out over time. Prior to realignment, parole agents supervised all inmates released from prison. Post-realignment, parole agents will supervised only offenders whose current commitment offense is a serious or violent felony, or when the offender has been convicted of a third strike. All high-risk sex offenders or officially diagnosed mentally disordered offenders report to parole. But while parole agents will be supervising the most serious offenders in the State, they now are dependent on county judges and sheriffs to impose a sanction for a technical violation (e.g., using drugs, not participating in treatment). Parolees who violate parole conditions can no longer go to prison but must serve their revocation terms in county jails (where they face a maximum 6-month term in jail, whereas before they faced a maximum 1-year term in prison).

For parole, the threat of revocation has lost its teeth because of the 6-month cap in county jail (and they might be released much sooner if the jail is overcrowded). Because of this, agents have lost their most powerful tool for encouraging offenders to comply with the conditions of parole, including participating in mandated treatment. On the other hand, since they do not have sure access to jail to punish violations, parole agents might work harder to find intermediate sanctions other than jail to respond to violations. If such programs do not exist or are unavailable to parolees, the agents essentially have no recourse but to ignore the violations. The same dynamic is now in play with probation agents and their caseloads. It is unclear how these changing dynamics will alter parole and probation supervision, but it is critically important to realignment's ultimate success.

Probation will experience expansion in terms of scope, personnel and funds. For most probation departments, the immediate task will be surveillance of former parolees. Depending on county investments and political will, some will experiment and succeed with community alternatives. These innovative probation departments will provide an opportunity for counties to learn from each other. However, if not monitored closely, probation will lose its rehabilitation function and be totally focused on surveillance. In the end, this will backfire, since evidence-based corrections require surveillance plus treatment.

There is another emerging development that deserves attention: being referred to as "AB 109 exceptionalism." The term is borrowed from health care, where a debate is being waged over "AIDS exceptionalism."[77] When the HIV/AIDS epidemic

77 Julia H. Smith and Alan Whiteside, *The history of AIDS exceptionalism*, 13 J. Int. AIDS Soc. 47, (2010), *available at* http://www.biomedcentral.com/1758-2652/13/47.

grew in the 1980s, the government poured billions into research and treatment, treating HIV/AIDS differently from other diseases. Now critics claim that the HIV/AIDS category is receiving a response above and beyond "normal" diseases and interventions, diverting resources and threatening overall public health. In a paradox, some say the decline of these other services makes it harder to care for people whose behavior puts them at risk for AIDS/HIV, but who are not yet infected.

California policymakers are voicing similar concerns with the AB 109 funding. California now invests close to $1 billion a year on the AB 109 offender classification. If we assume even 30% of it goes to fund work, education, and housing opportunities for realigned offenders, that means we are deploying $300 million a year – a significant infusion of rehabilitation funding in California's cash-strapped social services system. Special need offenders *outside* of the AB 109 population – including the mentally ill, developmentally disabled, and first time probationers – who might be on lower-risk caseloads, may not have access to the specialized AB 109 funding and programs.

The irony is that we might be ignoring the risky behavior of "regular" probationers we could have helped *before* they committed a serious felony, while spending our dollars on much higher risk offenders, simply because they are members of the triple-non designate group targeted by the legislation. Ideally we would have enough resources to deliver needed programming to all offenders, but that seems naïve. Even worse, some have pointed out that the programs those *in* the criminal justice system can take advantage of – e.g., Section 8 housing, job training, substance abuse counseling – are made possible due to cuts in those exact same programs for *non*-criminally involved Californians.[78] The Los Angeles County Housing Authority announced in September 2012 that it will move parolees to the front of the line for limited and much-sought-after Section 8 housing vouchers, which provide rent subsidies to low-income individuals.[79] A mother, whose son is blind with cerebral palsy and intellectual disabilities, wrote to the *San Francisco Chronicle* in an article titled "Would disabled receive better care in prison?"[80] She noted that California programs to support persons with disabilities – including dental, healthcare, housing, work training, counseling – have all been drastically reduced over the last 5 years to fund those exact programs for prisoners. This isn't the place to debate priorities for funding but rather to point out the irony of what realignment funding portends in the years ahead.

78 See, e.g., Laura Repke, Would disabled receive better care in prison?, *San Francisco Chronicle*, Mar. 31, 2011, http://www.sfgate.com/opinion/openforum/article/Would-disabled-receive-better-care-in-prison-2376903.php#ixzz1IIsIR99n.

79 Editorial, Helping homeless ex-cons, *LA Times*, Apr. 18, 2012, http://www.latimes.com/news/opinion/opinionla/la-ed-section8-homeless-lancaster-20120418,0,6314406.story.

80 Repke, *supra* note 78.

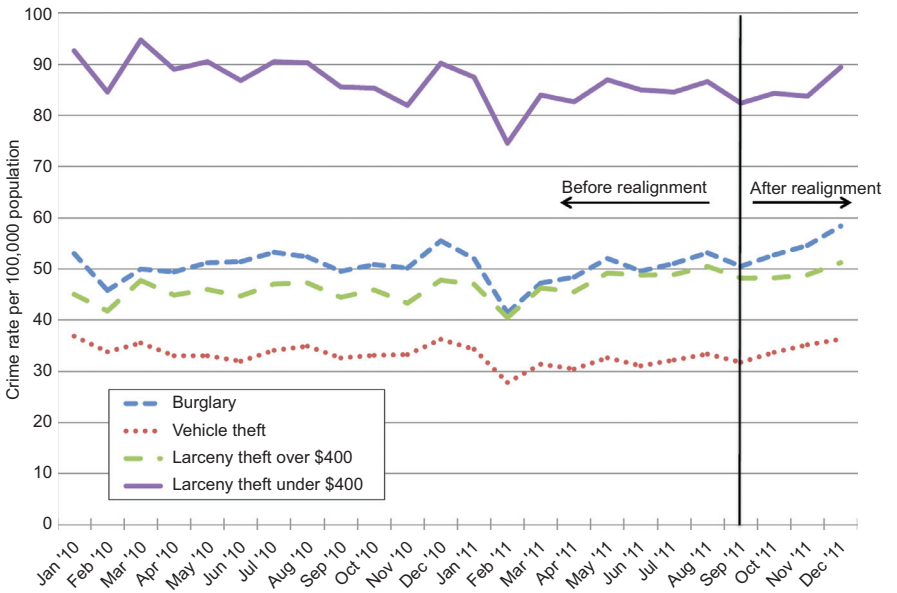

Figure 3: California's Property Crime Rate, 2010–2011.
Source: Magnus Lofstrom, *Crime Trends in California*, Public Policy Institute of California 2012, http://www.ppic.org/main/publication_show.asp?i=1036.

Question 8: What will the impact be on crime rates and community life?

California's overall crime rate has declined every year since 2003 and now has reached its lowest level in the past 50 years. This declining trend is similar to the rest of the nation. Will realignment increase or decrease crime rates, or have no negligible impact? Potentially, crime could rise as offenders serve shorter sentences and more of them are on the streets. On the other hand, realignment could contribute to a decrease in crime if counties apply evidence-based programs that have been found in other states to reduce recidivism. This is an important question to answer, both at the state and local levels. Realignment's impact on crime will likely vary by county, particularly since counties differed on crime rates pre-realignment and are using their funds in vastly different ways post-realignment.

Magnus Lofstrom, an economist at the Public Policy Institute of California (PPIC), recently analyzed county level crime data from the California Attorney's General's Division of Criminal Justice Information Services and concluded that statewide "violent crime continues to decline but that the downward trend in property crimes is ending."[81] However, as shown in Figure 3 below, his analysis

81 Magnus Lofstrom, *Crime Trends in California*, Public Policy Institute of California, (September 2012), http://www.ppic.org/main/publication_show.asp?i=1036.

reveals that the property crime rate has been higher in nearly every month since May 2011 – several months *before* California implemented public safety realignment. Statistics on felony larceny theft are the strongest indication that some property crime may be on the rise: since July 2010, this rate has increased in all but 2 months (February and March 2011) relative to the same month in the previous year. When looking at the change in property crime rates pre-realignment to post-realignment (from September 2011 to December 2011, the latest data available), the property crime rate has increased approximately 11%. Looking at this same time period, we find that violent crime has dropped 4.3%.[82]

Many law enforcement practitioners throughout California blame realignment for rising crime in their communities. On public radio station KPBS Chief William Lansdowne of the San Diego Police Department said that San Diego's increased crime rate was caused in part by the "state mandated return of prison inmates to county jails."[83] In Humboldt County, the Willits News reported that police officials are blaming the spike in property crime on realignment.[84] In Bakersfield, Sheriff Donny Youngblood was recently quoted in news reports connecting the increased crime rate in Kern County to AB 109: "When you have that many people who should be in custody and aren't, it just goes without saying that we're going to have a higher crime rate than we did in 2011."[85]

Despite the fact that these news reports rely on correlation as evidence of causation, there is reason to take the stories seriously. A recent study found that the average daily jail population in California has increased about one inmate for every three felons who are no longer serving time in state prison. "This finding suggests that some inmates who would have been incarcerated prior to realignment are now either not locked up or are not spending as much time in jail."[86]

Many counties have addressed the fear of rising crime rates by hiring more law enforcement officers, or hiring back law enforcement officers that they had previously been forced to lay off because of strapped county budgets. Approximately

82 If larceny under $400 is included, the rate is 10.5%. If larceny under $400 is excluded, the property crime rate has increased 11.8% post-realignment. For these statewide data (including violent crime) *see CJSJ Statistics: Crimes and Clearances*, State of California Department of Justice, Office of the Attorney General, http://oag.ca.gov/crime/cjsc/stats/crimes-clearances.

83 *San Diego Crime Rate increases 6.9 Percent*, KPBS, Feb. 13, 2013, http://www.kpbs.org/news/2013/feb/13/san-diego-crime-rate-increases-69-percent/.

84 Grant Scott-Goforth, Humboldt: Spike in property crimes coincides with prison realignment, *The Willits News*, Feb. 17, 2013, http://www.willitsnews.com/ci_22607046/officials-spike-property-crimes-coincides-prison-realignment.

85 Angela Chen, Crime spiked last year; local officials blame prison realignment, *Bakersfield Now*, Jan. 22, 2013, http://www.bakersfieldnow.com/news/local/Crime-spiked-last-year-local-officials-blame-prison-realignment-187998161.html.

86 Lofstrom and Kramer, *supra* note 18.

35% of the allocated first year AB 109 funding was spent on sheriff's departments, and $33 million of this was for the salaries of new sheriffs' deputies.[87]

Other county sheriffs are concerned not just about the increasing numbers of prisoners on their streets, but also a general message to would-be-criminals that they will not be punished as harshly. A recent article in the *Los Angeles Times* highlighted the growing problem of sex offenders cutting off their GPS monitoring bracelets with little consequence because of jail overcrowding and shorter jail terms if they are caught (maximum 6 months). The article noted that 3,400 arrest warrants have been issued for sex offender GPS tamperers since realignment went into effect, an increase of 28% compared to the year before realignment.[88] State Senator Ted Lieu, D-Los Angeles, has introduced a new bill requiring parolees who tamper with their GPS monitors to be sent back to prison for up to 3 years.

Many in law enforcement believe that the lack of a "hammer" or threat of a prison sentence is undermining deterrence and will ultimately increase crime. But not all share these predictions. Los Angeles County Sheriff Lee Baca "believes his deputies can do a better job than the state when it comes to managing 'low-level offenders'."[89] Indeed, Butte County District Attorney Mike Ramsey said, up to this point, realignment is being achieved without a serious compromise to public safety.[90] Although the overcrowding in Butte County jails has forced the sheriffs to release inmates early every day, they credit increased rehabilitation programs with keeping crime levels down.[91]

These differing viewpoints among the counties demonstrate how important accurate measurement of crime rates and recidivism will be to assessing the success of realignment. In addition to analyzing the effects on overall crime rate, researchers should assess the impacts of realignment on specific crime categories, as the impacts are likely to vary. It is worth noting that crime fluctuations are difficult to explain due to several factors, including the demographics of the population, citizen and police actions, and the actions of the population-

87 McCray, Newhall and Snyder, *supra* note 17; see, e.g., AB 109 Impact Report Shows More Inmates Than Expected, *Central Coast News*, Apr. 17, 2012.

88 Paige St. John, Paroled sex offenders disarming tracking devices, LA Times, February 23, 2012, at A1.

89 David Greenwald, *D-Day Approaches for AB 109 and Realignment – No One Sure What it Means*, Vanguard Court watch of Yolo County (Sept. 26, 2011), available at http://davisvanguard.org/index.php?option=com_content&view=article&id=4721:d-day-approached-for-ab-109-and-realignment-no-one-sure-what-it-means&catid=74:judicial-watch&Itemid=100.

90 Greg Welter, Prison Realignment Hasn't Yet Compromised Safety in Butte County, *Oroville Mercury-Register*, Apr. 21, 2012.

91 *Ibid.*

at-large. A rigorous statistical model will have to be employed to determine whether, holding all other relevant factors constant, there is any relationship between realignment and crime rates. This issue, more than anything, will likely determine public opinion of the success of realignment, yet this issue, more than anything, is incredibly difficult to measure accurately.

Question 9: How much will realignment cost, and who pays?

Before the ink was dry on AB 109, everyone was complaining about the money factor. Many counties said the money was not enough and the formula for determining how much each county got was poorly conceived. Other counties feared the State's financial commitment to the counties would be short-lived, reminiscent of previous criminal justice reforms. As previously noted, Proposition 30 has now provided constitutional protection for realignment funding. But how much is realignment really costing us? How is the money being spent? What have we gotten for our investment? Have the costs and burden simply shifted to other social service agencies? What will be the impact on social services systems?

It is hard to get a full accounting of how much money the State is investing in realignment, as several different bills fund portions of it. According to California's Department of Finance, realignment will reduce the state inmate population by about 40,000 inmates (roughly one-fourth of the total inmate population) upon full implementation by 2014–2015. The state parolee population is projected to decline by 77,000 parolees (roughly three-fourths of the total parole population) in 2014–2015. The Legislative Analyst's Office suggested that this reduction in inmate and parolee population resulted in a state savings of about $453 million in 2012, and the savings will increase to $1.5 billion by 2014.[92]

CDCR claims the cost savings are even greater. Last spring it released a report titled *The Future of California Corrections*, which predicted annual savings to California of $1.5 billion for maintaining the smaller inmate population and another $4.1 billion from bond authority that would no longer be needed for new prison construction. California's prison budget grew from about $5 billion in 2000 to over $9 billion in 2012, and currently CDCR expenditures are 11% of all general fund expenditures. When faced with a $26 billion General Fund deficit in 2011, realignment looked like a huge cost saver. By 2022, the CDCR predicted, California would save $30 billion in prison costs.[93]

92 Legislative Analyst's Office, 2011 Realignment: Addressing Issues to promote Its Long-Term Success (2011), available at http://www.lao.ca.gov/reports/2011/stadm/realignment/realignment_081911.aspx.

93 CDCR, *supra* note 6.

Governor Brown uses those figures to tout the cost savings of realignment. And he is correct: If the State had been forced keep its prison population while satisfying the court's noncrowding requirements, it is estimated that California would have had to build nine new prisons at a cost of $7.5 billion – plus an addition $1.6 billion per year to operate them.[94]

But those costs are too narrowly conceived. A more accurate realignment cost-benefit calculation should include an estimate of the total criminal justice dollars spent on each offender during a particular follow up period (e.g., 2 years after sentence). These costs should (minimally) include law enforcement, court and corrections costs. If the offender completes the program and is not rearrested, reprocessed and resentenced over a certain period of time, the system has benefited and saved those reprocessing costs. Conversely, if the realigned offender is rearrested, reprocessed and re-incarcerated, the system incurs those additional costs as well. A more comprehensive cost-benefit analysis would also include the costs of other government services (e.g., medical care provided by the public health system) that are utilized in the supervision and control of offenders.

The cost of crime is not borne solely by government agencies, but by victims and society at large. Social scientists typically differentiate between tangible and intangible costs of crime. Tangible costs involve direct financial costs to individuals, business or government from out of pocket expenditures or lost productivity. They include costs such as property loss, medical treatment, and lost productivity for victims, crime prevention expenditures by business, and expenditures for offender adjudication and incarceration by government entities. These costs can typically be measured using accounting and other expenditure data. A recent RAND study including these costs reported that the cost of a motor vehicle theft averaged $9,000, and the cost of a rape, $217,000.[95] It is clear that the estimates of other social costs of crime are large, certainly more than simply the cost of criminal justice operations. Researchers should begin collecting data that would allow a more rigorous cost benefit assessment of realignment.

There are also long-term cost *benefits* if offenders who desist from crime are now productive members of society, perhaps employed and paying taxes, and providing for their families. The "costs avoided" could be added to cost-benefit calculations. If realigned felons have a higher rate of economic self-sufficiency than felons sentenced to prison, the long term cost savings could be significant.

Taxpayers should demand a full accounting – and a statistical model that keeps track of the costs. In theory, realignment has the potential to be very positive for California. It is cheaper to send someone to county jail than to state prison, especially

94 *Ibid.*

95 Paul Heaton, RAND, Hidden in Plain Sight: What Cost-of-Crime Research Can Tell Us About Investing in Police, (2010), available at http://www.rand.org/pubs/occasional_papers/OP279.html.

for a term of only a few months. Administrators avoid a lot of transportation and intake costs. And ending the constant churning of new people in and out of the state prisons should make the prisons themselves safer and more stable. Moreover, keeping offenders closer to home makes it easier for families to visit. County officials are better placed than state bureaucrats to tailor programs to the needs and punishment philosophies of their community. Since county officials are local, they may establish partnerships with local non-profits or social service providers that offenders may rely upon for support after release. Ideally, forcing counties to bear more of the cost of their own policing and prosecuting decisions will encourage more thoughtful decisions about how to allocate scarce law enforcement resources.

Question 10: Will realignment increase the total number of people under correctional control and supervision?

Criminologists often use the term "correctional control" to describe the *total* corrections population under supervision at any given time. The total consists of all offenders supervised on probation or parole as well as those incarcerated in prisons and local jails. The Bureau of Justice Statistics recently released the correctional control rate for the US as a whole, noting about 2.9% of adults in the US (or 1 in every 34 adults) were under some form of correctional supervision at year end 2011, a rate comparable to 1998.[96]

As realignment moves forward, we must monitor California's total correctional control population. Tracking such data will show us whether we have downsized state prison and parole populations while simultaneously increasing jail and probation populations. In 10 years, will more people be locked up and on supervision than in 2011 when realignment went into effect? If the correctional control rate goes up, we can rest assured that we haven't implemented programs that work to reduce recidivism, but simply changed the address where offenders live and report – from prison to jail, and from parole to probation. Realignment will have been just an expensive shell game.

The authors are tracking California's correctional populations, and as shown in Table 1, there were 575,129 adults under correctional control in California at year-end 2012, or approximately 2.05% of the adult population. This figure is down from 725,085 or 2.8% of all California adults under correctional control in 2004.[97] So the total number of adults under correctional supervision is declining.

96 Lauren E. Glaze and Erika Parks, *Correctional Populations in the United States, 2011,* NCJ 239972, Bureau of Justice Statistics (Nov 2012).

97 Jeffrey Lin and Jesse Jannetta, *The Scope of Correctional Control in California*, University of California Irvine, Center for Evidence-Based Corrections (2006), available at http://ucicorrections.seweb.uci.edu/pdf/Bulletin706Da.pdf.

Table 1: California Adults Under Correctional Supervision, 2012.

Status	Total population	Rate per 100,000 CA adults	Percent of CA adults
Prisoners	132,935	463	0.46%
Jail Inmates	78,263	205	0.21%
Parolees	65,931	230	0.23%
Probationers	298,000	1049	1.05%
Total	575,129	2005	2.05%

Source: Jail data provided by the Board of State and Community Corrections; prison and parole data comes from the California Department of Corrections and Rehabilitation (CDCR) population reports; the probation population data are from 2011 and come from the Bureau of Justice Statistics, US Department of Justice (http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus11.pdf).

But for those remaining in custody, will we simply have substituted jail for prisons? According to CDCR, the prison population is projected to level out at about 128,00 by June 2013, reaching 131,000 by 2018. The jail population is now

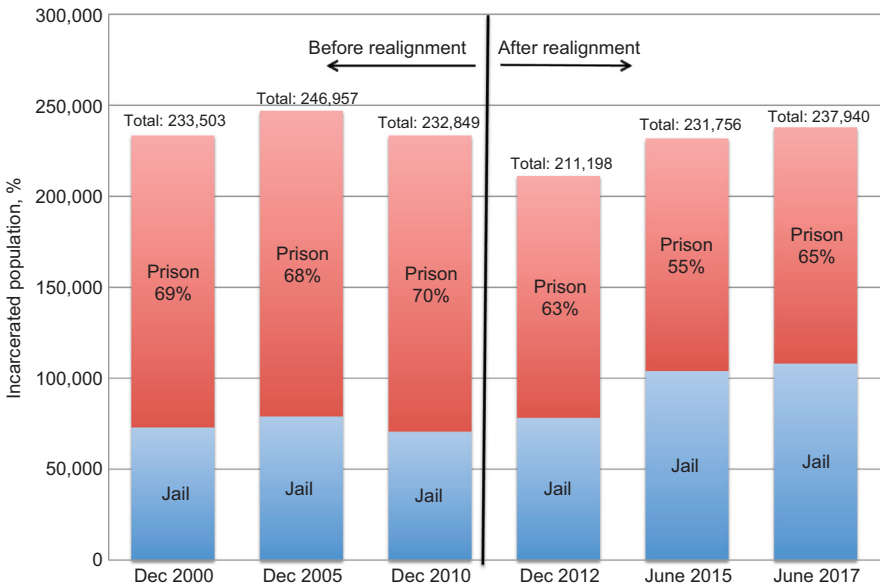

Figure 4: California's Prison vs. Jail Populations, 2000–2017.
Source: Jail population data was provided by the Board of State and Community Corrections; jail population projections are from the "Impact of AB109 on Local Jail Population 2007–2017" graph from James Austin at the National Institute of Corrections Board Hearing, August 22, 2012; prison population data and projections come from the California Department of Corrections and Rehabilitation (CDCR) monthly population reports.

at about 78,000 inmates and is projected to reach 108,000 by 2017. As shown in Figure 4 below, the total population for prison and jail combined is projected to increase to 231,756 by 2015. This is nearly the same number of offenders in prison and jail in June 2010, right before realignment passed. By 2017, the total jail plus prison population may actually be 5,091 higher than it was pre-realignment. If these projections prove true, realignment will not have been the massive experiment in community corrections that proponents had hoped for; it will have simply changed the inmate's address from state prison to county jail.

It is important to note that this estimate is based on projections that are dependent on historically high recidivism rates. Therefore, an optimist might argue that the projections are overestimates because they do not take full account of the long-term recidivism reductions that might accrue should some of the realignment programs work. Nonetheless, the idea that realignment, the biggest correctional reform initiative in California history, could result in static or even increased numbers of adults under correctional control is sobering.

3 Conclusion

California is at a crossroads, a time of rethinking possibilities. The importance of California's realignment experiment cannot be overstated. It will test whether the nation's largest state can reduce its prison population in a manner that maintains public safety. Realignment's significance is precisely why it needs to be closely monitored. Answering these questions and many more will help state and local officials learn what worked and what didn't, what problems were encountered in implementation, and which offenders benefited from the program. Ultimately, answering these questions will tell us whether the accomplishments were worth the resources invested.