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Reforming Adult Felony Probation to Ease Prison Overcrowding: An Overview of California S.B. 678

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**Reforming Adult Felony Probation to Ease Prison Overcrowding:
An Overview of California S.B. 678**

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I. Introduction

In 2009, California’s prison overcrowding crisis made national headlines.¹ A panel of three federal judges ordered the state to reduce its prison population to 137.5 percent of design capacity within two years in order to conform with constitutional requirements.² Faced with the threat of releasing as many as 50,000 offenders into the community, lawmakers and state officials rushed to devise plans that would satisfy the federal mandate at the same time as preserving public safety.

Yet the specter of tens of thousands of offenders living in the community is not a future scenario, but a present-day fact. As of December 31, 2008, approximately 445,822 adults in California were under “community supervision,” serving the remainder of a state prison term on

¹ Solomon Moore, *Court Orders California to Cut Prison Population*, N.Y. TIMES, Feb. 9, 2009.

² Opinion and Order at 120, Three Judge Court, *Coleman v. Schwarzenegger, Plata v. Schwarzenegger* (No. CIV S-90-0520 LKK JFM P) (N.D. Cal., S.D. Cal. Aug. 4., 2009).

parole or directly sentenced to probation.³ Roughly three-quarters of adults serving sentences in the community⁴—or about three times the number of offenders in California prison at any time⁵—are probationers. The large numbers on probation are directly tied to the state prison population: felony offenders who failed probation supervision account for about 40 percent of all new felony prison admissions each year,⁶ or roughly 10 percent of yearly total prison admissions.⁷

The prison crisis, accompanied by a crippling prison budget,⁸ an economic downturn, and an estimated \$20 billion deficit,⁹ forced the California Legislature, after years of neglect, to turn its attention to California's adult probation population. This extraordinary political moment opened the door for the 2009 passage of S.B. 678, the Community Corrections Performance Incentives Act (CCPIA),¹⁰ which provides stable funding for county probation departments to implement evidence-based practices.

This paper provides a holistic examination of the Community Corrections Performance Incentives Act, including an overview of the current state of California's dysfunctional adult probation system, the political maneuvering which led to the passage of S.B. 678, and the

³ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, PROBATION AND PAROLE IN THE UNITED STATES, 2008, at 17 (Dec. 2009), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1764> [hereinafter BUREAU OF JUSTICE STATISTICS].

⁴ *Id.* at 19.

⁵ As of December 31, 2008, the CDCR reported a total prison population of 164,919. CAL. DEP'T OF CORR. AND REHABILITATION, MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 31, 2008, *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.asp.

⁶ MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, ACHIEVING BETTER OUTCOMES FOR ADULT PROBATION 20 (May 29, 2009), *available at* <http://www.lao.ca.gov/laoapp/PubDetails.aspx?id=2074> [hereinafter LEGISLATIVE ANALYST'S OFFICE].

⁷ CAL. DEP'T OF CORR. AND REHABILITATION, EXPERT PANEL ON ADULT OFFENDER AND RECIDIVISM REDUCTION PROGRAMMING, REPORT TO THE CALIFORNIA STATE LEGISLATURE, A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA 24 tbl.3 (2007), *available at* www.cdcr.ca.gov/News/2007_Press_Releases/docs/ExpertPanelRpt.pdf [hereinafter EXPERT PANEL]. Total annual prison admissions includes parole violators as well as new felony convictions from the courts.

⁸ The 2009-2010 California Department of Corrections and Rehabilitation Budget is approximately \$8.2 billion, and has replaced California's university system as the largest state expenditure. Joan Petersilia, *A Retrospective View of Corrections Reform in the Schwarzenegger Administration*, 22 FEDERAL SENTENCING REPORTER, Feb. 2010, at 149.

⁹ *State lawmakers pass proposal to cut budget deficit by \$1.1 billion*, L.A. TIMES, Mar. 4, 2010, *available at* <http://latimesblogs.latimes.com/lanow/2010/03/state-senators-budget-deficit.html>.

¹⁰ CAL. PENAL CODE §§ 1228-1233.8.

challenges facing its successful implementation. In particular, California’s own failed reform efforts, comprehensive analyses of probation in California, and other states’ probation legislation provide insight into the inadequacies of California’s adult probation system and how the CCPIA seeks to address the inadequacies. While the CCPIA could successfully realign the formerly adverse incentives that the decentralized probation system has created, implementation poses significant challenges for the translation of theory into practice. Should implementation prove successful, the CCPIA will mark a significant shift in how California uses adult probation—from an under-resourced catch-all for repeat offenders, to a front-end partner in the justice system.

II. Probation in California

It is not an exaggeration to say that in its current state, adult probation in California is broken system. The dismal condition of probation is not a new phenomenon. For years, county probation departments have struggled with piecemeal funding and decentralization of standards and resources. Reports cataloguing the shortcomings of the probation system—if in fact it could be called a “system” at all, since that implies unified structure and central management—and calling for reform have appeared with some regularity since at least 1990. These reports and a failed legislative attempt at reform in 1994 will be discussed in greater detail in Part III.

However, for a brief summary of the current quality of California’s probation services, it is enough to quote the 2003 Final Report of the Probation Services Task Force: “the status quo in the probation system is not acceptable. . . . [T]he probation structure as it exists today functions poorly on many levels.”¹¹

The rate of adult felony probationers in California who fail to successfully complete their probation terms is high. Most of these felony “probation failures” are then sent to state prison as

¹¹ PROB. SERV. TASK FORCE, FINAL REPORT 70 (2003), *available at* www2.courtinfo.ca.gov/probation/report.htm.

a result of new felony convictions or violations of the terms of their probation. The Legislative Analyst's Office reported in 2009 that adult felony probationers are revoked to state prison at a statewide average rate of about 7.5 percent; revocation to prison is as high as 12 to 16 percent in some counties,¹² and the overall level of revocation of adult probationers (to jail and prison) is likely even higher. These probation failures are thus incredibly costly for the state. The California Department of Corrections and Rehabilitation (CDCR, the state prison system) estimates that each failed probationer sentenced to state prison will serve 8.6 months there.¹³ With the average annual cost of incarcerating a state prisoner estimated at \$49,000,¹⁴ this means that each failed probationer revoked to prison costs California an average of \$35,116.

California's high rate of probation failure and generally dysfunctional adult probation system may be traced to two primary problems: First and most significantly, a lack of stable and adequate funding for county probation departments creates overburdened caseloads for probation officers; this in turn contributes to a low level of supervision for many serious offenders as well as a lack of programming, such as treatment and job training, which can help offenders successfully complete their probation terms. Inadequate funding also creates adverse incentives for probation departments and courts to keep probationers in the community rather than send them to state prison. Second, California's decentralized probation system leads to a dearth of unified standards and goals for probation departments to follow. As a result, some probation departments in California have fallen behind the curve on best practices.

¹² LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 30-31. The Legislative Analyst's Office revocation statistics are likely lower than the reality: they include only new admissions to state prison with a probation revocation flag on their record, and may not include probationers who had their probation terminated prior to being sent to state prison. *Id.* Probation revocation statistics from the California Department of Justice's Criminal Justice Statistics Center indicate higher levels of felony probation revocation, although many of these revocations may be to county jail rather than prison. California Department of Justice, Criminal Justice Statistics Center, Adult Probation and Local Adult Supervision, *available at* <http://ag.ca.gov/cjsc/statisticsdatatabs/SuperCo.php>. Until there are better data reporting systems in place, the true rates of revocation will remain unknown.

¹³ EXPERT PANEL, *supra* n.7.

¹⁴ LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 19.

A. California's Adult Probation Population

The challenges facing California's probation departments are rooted in the population and composition of probationers themselves. Probation is the most frequently imposed form of criminal sentence in California—nor is it limited to the least serious offenders. Estimates of the state's adult probation population range from roughly 325,000¹⁵ to 350,000.¹⁶ This places California third, after Texas and Georgia, for the highest number of adult probationers in the United States.¹⁷ The majority of these probationers are felony offenders. Roughly three-quarters of adult probationers in California,¹⁸ or 270,000 adults,¹⁹ are felony convicts. Mirroring national data, probationers are overwhelmingly sentenced for drug and property offenses. In 2007, 41 percent of adult probationers were serving sentences for drug crimes, and 23 percent for property crimes.²⁰ Although data regarding the criminogenic makeup of this population is scant, national studies indicate that probationers have high rates of substance abuse, mental illness, and unemployment—all factors which correlate with criminal activity.²¹

In addition to a large and needy population, California's probation departments have struggled to keep pace with the changing demographics of probationers. Over the past fifteen years, the United States has experienced a rapid growth in the population of adults on probation,²² and California is no exception. From 1991 to 1999, the state's total adult probation

¹⁵ BUREAU OF JUSTICE STATISTICS, *supra* n.2, at 19 (statistics compiled for 12/31/08).

¹⁶ LEGISLATIVE ANALYST'S OFFICE, *supra* n.5, at 3 (2007 data).

¹⁷ BUREAU OF JUSTICE STATISTICS, *supra* n.2, at 18-19.

¹⁸ LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 8-9.

¹⁹ CAL. PENAL CODE § 1228(a).

²⁰ LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 9.

²¹ *See, e.g.*, Ditton, P.M., *Mental health and treatment: Inmates and probationers* (1999); LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 9.

²² At year end 1995, the Bureau of Justice Statistics reported a probation population of a little over 3 million. Joan Petersilia, *Probation in the United States*, 22 CRIME AND JUSTICE 149, 149-150 (1997). At year end 2008, that number had increased by over a million to 4,270,917. BUREAU OF JUSTICE STATISTICS, *supra* n.2, at 1.

population increased seven percent;²³ from 1997 to 2007 it increased 15 percent.²⁴ The number of new probation sentences entered each year *more than doubled* over the last decade, from 15,788 in 1999 to 35,684 in 2008.²⁵ Significantly, this increase in the number of adult probationers includes a shift in the underlying offenses from less serious to more serious. In fact, the number of misdemeanor probationers *decreased* by 15 percent over the last decade.²⁶ The rise in the total probation population is thus due to a two-decade-long increase in the number of felony probationers. In 1996, the California Research Bureau reported an increasing backlog of sentenced felons resulting in increasing probation referrals.²⁷ This phenomenon is born out in the data: from 1990 to 1999, the number of felony probationers nearly doubled, from 130,000 to 245,000,²⁸ and then grew by approximately 30,000 more over the next ten years. Thus, not only are probation departments dealing with a significantly larger population than they were ten or twenty years ago, but also a more risky population requiring more supervision. This “clearly has placed different and more intensive service demands on probation departments.”²⁹

Unfortunately, probation departments have not been able to keep pace. The California Legislative Analyst’s Office reports that the rate at which California’s probationers successfully complete their probation terms is lower than the national average by 10 percent.³⁰ According to

²³ PROB. SERV. TASK FORCE, *supra* n.11, at 3.

²⁴ LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 8.

²⁵ CALIFORNIA DEP’T OF JUSTICE, CRIMINAL JUSTICE STATISTICS CTR, FINAL LAW ENFORCEMENT, PROSECUTION, AND COURT DISPOSITION OF ADULT FELONY ARRESTS BY TYPE OF DISPOSITION, STATEWIDE, *available at* http://stats.doj.ca.gov/cjsc_stats/prof08/00/6.htm. The annual number of new split sentences including probation fluctuated from year to year between 1999 and 2008, but maintained a rough average of about 128,000. Combining split sentences and pure probation sentences, the annual number of new probation sentences was 140,705 in 1999 and 164,416 in 2008. *Id.*

²⁶ LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 8.

²⁷ MARCUS NIETO, CAL. RESEARCH BUREAU, THE CHANGING ROLE OF PROBATION IN CALIFORNIA’S CRIMINAL JUSTICE SYSTEM I (May 1996) [hereinafter NIETO, THE CHANGING ROLE OF PROBATION].

²⁸ PROB. SERV. TASK FORCE, *supra* n.11, at 3.

²⁹ *Id.*

³⁰ LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 20. Indeed, as early as 1994, California’s failure rate diverged from the national average. The California Research Bureau reported that one in seven adult probationers in California had

the U.S. Department of Justice, in 2008, of 199,528 “exits” from probation in California, only 87,246 were “completions.”³¹ This means that less than half of adults removed from probation successfully completed their terms, while the rest lost probation status due to failure. A probationer “fails” probation when he has his probation status revoked due to a technical violation, like failing a drug test, or he is convicted for a new crime. Of those who fail each year, a significant portion—somewhere from 14,532³² to an upward estimate of 20,000³³—wind up in state prison.

B. Structure, Governance, and Practices

Despite the size and complexity of California’s probation population, there is little centralized state oversight. The general statute governing probation in California is Penal Code § 1203, which defines probation as “the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under supervision of a probation officer.”³⁴ Other than this provision, there exists relatively scant statutory language detailing the structure or governance of probation departments, leaving counties to adopt most of their own practices unhindered by state oversight.³⁵

California’s placement of primary responsibility for probation in the hands of counties rather than the state is unique. California is the only state in the nation to follow a strictly local

his or her probation revoked, in comparison with a national average of one in 10. NIETO, THE CHANGING ROLE OF PROBATION, *supra* n.27.

³¹ BUREAU OF JUSTICE STATISTICS, *supra* n.2, at 23.

³² EXPERT PANEL, *supra* n. 7, at 143 (2006 data).

³³ CAL. PENAL CODE § 1228(b) (2007 data).

³⁴ CAL. PENAL CODE § 1203.

³⁵ CAL. PENAL CODE §§ 1203.5, 1203.6 and CAL. WELF. & INST. CODE §§ 225, 270, 271 govern the appointment process for chief probation officers; however, even this process varies widely among counties. PROB. SERV. TASK FORCE, *supra* n.11, at 40–41. CAL. PENAL CODE § 1203.71 grants probation officers the powers of a peace officer with regard to probationers under their supervision; § 1203.73 grants probation officers necessary expense allowances from the county’s funds. And CAL. PENAL CODE §§ 1203 *et seq.* sets the basic requirements of probation, including pre-sentence reports and reporting of probation violations.

operational model for probation.³⁶ The state has 58 independent probation departments, one for each of the 58 counties. In each county, one Chief Probation Officer oversees and supervises the department, appointing deputy probation officers and other staff.³⁷ In most counties, the Chief Probation Officer is in turn appointed by the superior court,³⁸ but the local executive branch controls the management and finances of probation.³⁹

Probation departments perform a diverse array of roles for the community. Probation not only “supervises” probationers—a task which itself includes varying responsibilities, from support to drug testing to enforcement—but also refers probationers to programs, investigates crimes, oversees payment of court fines, and manages custody facilities and electronic monitoring systems.⁴⁰ Probation thus assumes the difficult but important task of “link[ing] the system’s many diverse stakeholders, including law enforcement; the courts; prosecutors; defense attorneys; community-based organizations; mental health, drug and alcohol, and other services providers; the community; the victim; and the probationer.”⁴¹ The multitude of probation’s roles and partnerships, combined with the decentralization of probation in California and the diverse populations in counties, multiplies inconsistencies among probation departments as to procedures used and programs available.

As a result, while some probation departments proceed largely in keeping with current best practices, others are far behind.⁴² The California Legislative Analyst’s Office (LAO), after conducting a study of 31 counties, noted that “many probation departments do not follow all of

³⁶ PROB. SERV. TASK FORCE, *supra* n.11, at 61.

³⁷ *Id.*, at 40.

³⁸ In several major population centers, including Los Angeles and San Diego, the CPO is appointed by the local board of supervisors rather than the court. *Id.*

³⁹ *Id.*, at 61.

⁴⁰ LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 7-8; PROB. SERV. TASK FORCE, *supra* n.11, at 49-54.

⁴¹ PROB. SERV. TASK FORCE, *supra* n.11, at 1.

⁴² *See generally* LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 17-18.

the best probation practices identified in research.”⁴³ For example, the LAO found that only 80 percent of surveyed counties use an evidence-based risk and needs assessment to evaluate at least some segments of probationers.⁴⁴ In addition, risk/needs assessments are not widely used among the counties to make sentencing recommendations in pre-sentence reports or in the process of prioritizing which probationers ought to receive intensive rehabilitation.⁴⁵ Even assuming departments identify the probationers best positioned to benefit from rehabilitation, some counties lack rehabilitation programs open to probationers, while other counties’ rehabilitation programs “suffer from limited capacity, few available locations, and questionable quality.”⁴⁶ Finally, evaluating the efficacy of probation departments’ programs becomes challenging or impossible due to varied data tracking systems. While several counties, such as San Francisco, have begun using electronic systems to track data such as probation revocation rates,⁴⁷ other counties still rely on paper,⁴⁸ making compilations of data impossible to create or evaluate.⁴⁹ Many probation departments could not inform the LAO how many probationers were participating in rehabilitation programs; less than half of responding counties were able to report the number of probation violations in a year.⁵⁰

The only factor most counties have in common is the excessive caseloads adult probation officers juggle.⁵¹ The rising numbers of probationers (see above) and lack of funding (see below)

⁴³ *Id.*, at 5, 17.

⁴⁴ *Id.*

⁴⁵ *Id.*, at 17.

⁴⁶ *Id.*

⁴⁷ Interview with Wendy Still, Chief Adult Probation Officer, City and County of San Francisco (April 28, 2010).

⁴⁸ Telephone interview with Karen Pank, Executive Director, Chief Probation Officers of California (May 5, 2010). “Although many departments indicated that they would like to be able to track the above data, they currently lack the information technology systems that would be needed to do so.” LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 18-19.

⁴⁹ “[O]ur survey found that a majority of probation departments do not track the type of performance or outcome data that is necessary to evaluate the effectiveness of probation activities and programs.” *Id.* at 18.

⁵⁰ *Id.*

⁵¹ PROB. SERV. TASK FORCE, *supra* n.11, at 47.

directly contribute to this phenomenon. For California's estimated 270,000 adult probationers, there are only about 3,000 sworn adult probation officers supervising them.⁵² The American Probation and Parole Association recommends 50 cases per officer and 20 cases for specialize caseloads.⁵³ While these targets are idealistic not realistic, caseloads in California far exceed that; officers oversee an average of 100 to 200 cases, with specialized caseloads averaging around 70.⁵⁴

High caseloads translate to less supervision for adult probationers, particularly those not assigned to special oversight. All departments have "banked" caseloads, which receive little or virtually no supervision.⁵⁵ According to the Chief Probation Officers of California (CPOC), approximately 52 percent of all probationers in California are on banked caseloads.⁵⁶ The low level of supervision for banked cases results in a problematic pattern: a probationer will build up repeated violations without sanctions, meanwhile escalating his criminal behavior, until a tipping point when his next violation results in a jail or prison term.⁵⁷ CPOC explains that banked caseloads mean "there is little opportunity to intervene in the offenders [sic] course of current criminal behavior."⁵⁸ Given that experts acknowledge that recidivism rates are high for felony probationers with minimal supervision,⁵⁹ it is unsurprising that California's failure rate is so high.

⁵² LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 9.

⁵³ *Id.* at 25.

⁵⁴ *Id.* at 18. The trend of large caseloads and "banking" probationers had already begun in 1996: "[C]ounty probation officials are managing larger adult offender caseloads with fewer resources, often resulting in little or no supervision. . . . Probation departments are increasingly placing sentenced offenders into 'banked' caseloads (a new form of unsupervised probation) with a statewide average ratio of 629 offenders per probation officer" NIETO, THE CHANGING ROLE OF PROBATION, *supra* n.27.

⁵⁵ PROB. SERV. TASK FORCE, *supra* n.11, at 47.

⁵⁶ CHIEF PROB. OFFICERS OF CALIFORNIA, ADULT PROBATION SERVICES AND THE NEED TO INCREASE PUBLIC SAFETY, ACCOUNTABILITY, COMPETENCY DEVELOPMENT AND COST EFFECTIVENESS (Nov. 2008), *available at* <http://67.199.72.34/php/Information/Papers/papers.php>.

⁵⁷ LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 18.

⁵⁸ CHIEF PROB. OFFICERS OF CALIFORNIA, *supra* n.56.

⁵⁹ Petersilia, *Probation in the United States*, *supra* n.22, at 181.

C. Funding and Adverse Incentives

Lack of adequate funds for adult probation is the primary cause of California’s probation woes. Probation departments “do not enjoy a stable, reliable funding base,”⁶⁰ and instead subsist on a “patchwork”⁶¹ financial structure that leaves adult probation services badly under-resourced. Compared with the money spent on prison and even parole—both of which are state run—funds devoted to probation are meager at best. Per year, maintaining an offender on probation costs about \$1,250; the state spends more than three times that amount on parolees—an average of \$4,500 a year—and forty times that to incarcerate a prisoner.⁶²

As with management, the funding model for probation is local, and therein lies some of the problem. Prior to the implementation of S.B. 678 in 2009, counties supplied two-thirds of probation funding; one-quarter of funding came from the state; departments obtained the rest of their budget from federal grants and various court fees.⁶³ California is once more an outlier in this respect—only one other state in the nation relies on local government as its primary source of funding for probation.⁶⁴

Although in 2009 California supplied one-quarter of probation funds, it is important to emphasize that prior to the passage of S.B. 678, the state provided no stable, ongoing funding for adult probation services.⁶⁵ Proposition 172, a half-cent statewide sales tax for local public safety departments, contributes some funds for probation; in 2007 and 2008, the state also gave \$10 million in one-time grants to improve probation supervision and services for adults ages 18 to

⁶⁰ PROB. SERV. TASK FORCE, *supra* n.11, at 43

⁶¹ *Id.* at 6.

⁶² LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 19.

⁶³ *Id.* at 12.

⁶⁴ LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS 29 (Jan. 25, 2007), *available at* www.lhc.ca.gov/studies/185/Report185.pdf.

⁶⁵ LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 12.

25.⁶⁶ But other than these one-time grants, most state money goes to juvenile probation programs. In the mid-1990s, the Juvenile Crime Enforcement and Accountability Challenge Grant Program and the Juvenile Justice Crime Prevention Act began funneling state resources to those under age 18.⁶⁷ This resulted in a “somewhat overbalanced emphasis on juvenile services,” which means that “the limited number of remaining staff and resources is often sorely insufficient to properly supervise the adult probation population.”⁶⁸ Too few probation officers overseeing adults, insufficient availability of programs and other resources, large banked caseloads, and low supervision directly follow from lack of funds.

This dearth of funds for adult probation and the inadequate supervision and resources creates an incentive structure adverse to keeping probationers in the community. Probation officers are incentivized to recommend incarceration rather than probation since the state must then bear the financial burden of that offender; moreover, sending a probationer to prison is one less case for their already overburdened loads. Judges are incentivized to revoke probation and sentence someone to state prison for the same reason. In addition, judges know there is a lack of supervision of and resources available to the felony offenders they might otherwise sentence to probation. Why keep a felony offender in the community with little oversight or opportunity when sending the offender to prison at least incapacitates him from criminal activity on someone else’s dime? Former Sacramento Superior Court Judge Roger K. Warren explained that “the principal reason . . . judges are sentencing too many non-violent offenders to prison is the absence of effective community corrections programs providing intermediate punishments and

⁶⁶ *Id.*

⁶⁷ PROB. SERV. TASK FORCE, *supra* n.11, at 44; LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 12; Telephone interview with Jerry Powers, Legislative Chair, Chief Probation Officers of California, and Stanislaus County Chief Probation Officer (April 29, 2010).

⁶⁸ PROB. SERV. TASK FORCE, *supra* n.11, at 44.

necessary and appropriate treatment and rehabilitation services.”⁶⁹ Probation departments, law enforcement, and courts worry about the headlines that could result from an unsupervised criminal on the streets. And where resources are scarce and passing the buck is easy to do, many county actors will choose to shift the burden to the state. The Little Hoover Commission concluded that as a result of these adverse incentives, “the State squanders its most expensive resource on low-level offenders who could be more effectively supervised by local authorities.”⁷⁰

III. Attempts to Fix Probation in California and Elsewhere

The problems with adult probation in California have been apparent to those familiar with the situation for at least two decades. S.B. 678 is only the latest attempt to fix adult probation. To properly understand the origins of the new law and the potential challenges facing its implementation, it is necessary to survey the various reform efforts and failed projects that preceded it. S.B. 678 builds upon experience gleaned over the years from California’s own failed laws, the accumulation of knowledge regarding criminogenic factors and best practices, several expert reports, and legislative experiments in other states.

A. California’s Failed Probation Legislation

The California Legislature enacted the first probation laws in 1903.⁷¹ However, the first major legislative attempt to substantively impact county probation practices was the California Probation Subsidy Act of 1965. The Probation Subsidy Act was an incentive-based funding provision, the basic structure of which has much in common with S.B. 678.⁷² The Probation

⁶⁹ LITTLE HOOVER COMM’N, *supra* n.64, at 26.

⁷⁰ *Id.* at 27.

⁷¹ See CAL. PENAL CODE § 1203 *et seq.*

⁷² MARCUS NIETO, CAL. RESEARCH BUREAU, COMMUNITY CORRECTION PUNISHMENTS: AN ALTERNATIVE TO INCARCERATION FOR NONVIOLENT OFFENDERS (MAY 1996), *available at* <http://www.library.ca.gov/crb/96/08/index.html> [hereinafer NIETO, COMMUNITY CORRECTION PUNISHMENTS].

Subsidy Act provided counties up to \$4,000 for each adult or juvenile offender supervised in the community rather than sent to prison.⁷³ The state provided counties the subsidies based on probation departments' improvement over historical commitment levels,⁷⁴ thus incentivising counties to maintain probationers in the community and lower their revocation rates. Proponents of the Subsidy Act optimistically argued that

the state payment is sufficient to provide excellent supervisory and ancillary programs for three or four times as many persons as were not committed. . . . In fact, the program should increase public protection through prevention of delinquency and reduction of repeated criminality.⁷⁵

Especially in its early years, the Subsidy Act lived up to these expectations, diverting more than 45,000 offenders from state institutions to local probation programs.⁷⁶ However, various factors contributed to the Legislature's eventual decision to cease the subsidies. First, although the Subsidy Act provided counties with more funding, most counties did not implement new services for offenders, such as halfway houses and day service centers.⁷⁷ Second, the Act's subsidies did not keep pace with the rate of inflation, undermining its efficacy at enticing counties to supervise offenders.⁷⁸ And third, the Legislature came to consider the program too costly. As nationwide sensibilities shifted from rehabilitation to incapacitation, California's move to a determinate sentencing scheme as well as the passage of tough on crime laws multiplied the number of offenders and the cost of prisons.⁷⁹ Ending the subsidies immediately saved money for the state, although in the long term it might have proven more cost effective to fix the Subsidy Act rather than scrap it. As a result, in 1978 the Legislature replaced the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ STANFORD CRIMINAL JUSTICE CTR., STATE/COUNTY CRIMINAL JUSTICE PARTNERSHIPS IN CALIFORNIA: AN ABBREVIATED HISTORY 2, available at http://www.pewcenteronthestates.org/report_detail.aspx?id=32980.

⁷⁶ MARCUS NIETO, COMMUNITY CORRECTION PUNISHMENTS, *supra* n.72.

⁷⁷ *Id.*

⁷⁸ STANFORD CRIMINAL JUSTICE CTR., *supra* n.75, at 2.

⁷⁹ MARCUS NIETO, COMMUNITY CORRECTION PUNISHMENTS, *supra* n.72.

Probation Subsidy Act with the County Justice System Subvention Program, which provided counties with grants to support local justice programs. Later the Subvention Program became a block grant with few requirements for grantees, and thus had little impact on prison commitments. By 1992, the Subvention Program represented only 7.5 percent of county probation expenditures statewide.⁸⁰

Legislators enacted the second major attempt to impact probation in the mid-1990s as part of a trend of states enacting “community corrections acts.” These diverse acts all created “mechanisms by which state funds [were] granted to local governments and community agencies to encourage local sanctions in lieu of prison or jail.”⁸¹ Already in the late 1980s, a population crunch threatened California state prisons. In 1990, the California Blue Ribbon Commission on Inmate Population Management recommended adopting a community corrections act to expand community-based intermediate sanctions.⁸² As a result, the Legislature passed the Community-Based Punishment Act of 1994.⁸³ The Community Based Punishment Act would establish a “partnership between state and local government” to expand probation in an effort to “ease prison overcrowding.”⁸⁴ As recommended, the Community Based Punishment Act encouraged counties to develop “intermediate sanctions” such as short-term jail stays, boot camp, home detention and electronic monitoring, community service, drug testing, rehabilitation, and job training.⁸⁵ The Legislature recognized that probation programs required a “consistent, reliable,

⁸⁰ STANFORD CRIMINAL JUSTICE CTR., *supra* n.75, at 2-3. “The County Justice Subvention Program still exists, *see* Cal. Welf. & Inst. Code § 1805 *et seq.*, but deals only with probation services for juveniles.” *Id.* at 3.

⁸¹ MARCUS NIETO, COMMUNITY CORRECTION PUNISHMENTS, *supra* n.72.

⁸² LITTLE HOOVER COMM’N, *supra* n.64, at 28.

⁸³ CAL. PENAL CODE § 8050 *et seq.*

⁸⁴ CAL. PENAL CODE § 8051(a), (c), “Legislative Findings.”

⁸⁵ CAL. PENAL CODE § 8052(e).

and separate funding source;” it designated the California Board of Corrections to oversee the approval of county corrections plans and the annual doling out of funds.⁸⁶

Those funds never materialized. The Achilles heel of the Community Based Punishment Act was not its goals or even its basic structure, but the total lack of long-term guaranteed funding or startup moneys. Implementation was “contingent upon the availability of funding” from the state budget, federal funds, private grants, and “[o]ther sources as may be identified as suitable”⁸⁷ The Community Based Punishment Act comically instructed the Board of Corrections to “seek startup funding . . . from public and private sources commencing as soon as practicable.”⁸⁸ In 1995, the Legislature allocated \$2 million to the Board of Corrections to fund county planning grants.⁸⁹ This paltry sum was never replicated. Needless to say, the Community Based Punishment Act was a total failure as a result of these vague financial directives.⁹⁰

Following the 1994 act, there were no further legislative initiatives to fix adult probation until the state prison crisis came to a head in the late 2000s. But the 1965 Probation Subsidy Act and the 1994 Community Based Punishment Act communicate important lessons regarding implementation of reforms. First, the Probation Subsidy Act’s initial success proves that state funds for county probation, if properly structured, can incentivize counties to supervise offenders in the community. Second, successful implementation of a probation reform act requires a guaranteed and steady source of funding—both start-up and long-term. Third, once programs are implemented, the Legislature ought to have periodic evaluations of the program and make

⁸⁶ CAL. PENAL CODE § 8061.

⁸⁷ CAL. PENAL CODE § 8090 *et seq.*

⁸⁸ CAL. PENAL CODE § 8092.

⁸⁹ NIETO, THE CHANGING ROLE OF PROBATION, *supra* n.27, at 12.

⁹⁰ See LITTLE HOOVER COMM’N, *supra* n.64, at 28.

adjustments as necessary.⁹¹ If the Legislature had adjusted the Probation Subsidy Act to account for inflation, the Subsidy Act might have proved more successful in the long-term. And fourth, in a partnership between state and local authorities, each party must try to require accountability of the other. For example, California ought to have required probation departments to implement new programs with subsidies from the 1965 Act. Relations between state and locals are notoriously difficult in California, and public safety collaborations tend to be strained.⁹² Mutual accountability is necessary for such collaborations to work.

B. Best Practices and Recommendations

In the thirty or so years since California abandoned the Probation Subsidy Act, criminologists have made major advances in understanding what factors tend to impact offenders' rates of recidivism, and what programs and sentencing structures are best able to reduce the risk of reoffense. A body of "best practices" for community punishment and other forms of corrections has gradually emerged and is only now gaining headway in policy. Significantly, this research shows that behavior change and rehabilitation can be successful when implemented properly for the right subsection of offenders.⁹³

Briefly, best practices include: 1) a combination of surveillance and treatment for probationers, rather than one or the other alone;⁹⁴ 2) the use of evidence-based practices risk and

⁹¹ In fact, the CBPA did provide for an annual progress report to the Legislature, but only on request. CAL. PENAL CODE § 8061(j).

⁹² STANFORD CRIMINAL JUSTICE CTR., *supra* n.75, at 1.

⁹³ See, e.g., MATTHEW T. DEMICHELE, AM. PROB. & PAROLE ASS'N, PROBATION AND PAROLE'S GROWING CASELOADS AND WORKLOAD ALLOCATION: STRATEGIES FOR MANAGERIAL DECISION MAKING 12, *available at* <http://www.appa-net.org/eweb/docs/appa/pubs/SMDM.pdf> ("The research evidence in favor of offender behavior change as the most effective strategy to enhance public safety is impressive and voluminous.") (citing various studies).

⁹⁴ Criminologists have found that in programs where offenders receive a combination of surveillance and relevant treatment or "prosocial activities" such as education and employment programs, recidivism was reduced by 20 to 30 percent. See, e.g., Petersilia, *Probation in the United States*, *supra* n.22, at 186; Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?* CORRECTIONS MANAGEMENT QUARTERLY (1999), at 23; see also DEMICHELE, *supra* n.93, at 8, 11-14 (recommending an "integrated approach of surveillance, treatment, and enforcement.").

needs assessment tools;⁹⁵ 3) swift, certain, and proportionate punishment for all probation violations, with a concomitant range of graduated sanctions⁹⁶ and positive incentives for offenders;⁹⁷ and 5) community coordination and cooperation.⁹⁸ Over the last decade, various statewide studies and reports have recommended reforms for California’s probation system, including some of these best practices.

In 2000, California’s Administrative Office of the Courts appointed a Probation Services Task Force to perform a comprehensive review of probation in California. When it issued its Final Report in 2003, the Task Force set out 17 recommendations to improve the unacceptable “status quo.” These recommendations included the provision of stable and adequate funding; more centralized governance of probation; the development of measurable goals and objectives; the adoption of risk/needs assessments and meaningful program evaluations; creating a graduated continuum of services and sanctions, especially for adults; and greater collaboration among courts, counties, and other community agencies.⁹⁹

Nothing immediately resulted from the Task Force report. In 2007, as the prison overcrowding crisis came to a head, the Little Hoover Commission published a report titled

⁹⁵ “Evidence-based practice (EBP) is the objective, balanced, and responsible use of current research and the best available data to guide policy and practice decisions, such that outcomes for consumers are improved. . . . [E]vidence-based practice focuses on approaches demonstrated to be effective through empirical research rather than through anecdote or professional experience alone.” CRIME AND JUSTICE INST. & THE NAT’L INST. OF CORR., IMPLEMENTING EVIDENCE-BASED POLICY AND PRACTICE IN COMMUNITY CORRECTIONS ix (2009, 2nd edition). See also PROB. SERV. TASK FORCE, *supra* n.11, at 81; LEGISLATIVE ANALYST’S OFFICE, *supra* n.6, at 13; DEMICHELE, *supra* n.93, at 8, 10, 21, 30 (recommending risk/needs actuarial tools).

⁹⁶ See, e.g. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME AND JUSTICE 1, 8 (2006); PROB. SERV. TASK FORCE, *supra* n.11, at 8.

⁹⁷ See, e.g., COLORADO DIV. OF CRIMINAL JUSTICE, EVIDENCE BASED CORRECTIONAL PRACTICES 5, available at www.nga.org/Files/pdf/0805SENTENCERES10.PDF (“Researchers have found that optimal behavior change results when the ratio of reinforcements is four positive to every negative reinforcement”).

⁹⁸ Given probation’s position as the “link” between justice system actors, successful collaboration with key stakeholders, such as police and service providers, is crucial to the success of community corrections programs. See, e.g., Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, *supra* n.94, at 27 (“Workable, long-term solutions must come from the community and be embraced and actively supported by the community.”); PROB. SERV. TASK FORCE, *supra* n.11, at 76, 96; DEMICHELE, *supra* n.93, at 28.

⁹⁹ PROB. SERV. TASK FORCE, *supra* n.11, at 61-98.

“Solving California’s Corrections Crisis,” subtitled “*Time is Running Out.*” Although the Little Hoover Commission evaluated the whole corrections structure, it in particular recommended “reallocating resources [from state prison] to community based alternatives,”¹⁰⁰ and “assist[ing] counties in expanding intensive probation,”¹⁰¹ as well as implementing evidence-based practices and a “continuum of alternatives to prison.”¹⁰² Various witnesses told the Commission that California should re-establish something like the original Probation Subsidy Act.¹⁰³

Finally, in 2009, as the Legislature was drafting S.B. 678, the Legislative Analyst’s Office published a report on probation, “Achieving Better Outcomes for Adult Probation.” The LAO identified a set of best practices for probation, including the use of risk and needs assessments, program reviews and evaluations based on data collection, referral to treatment and assistance services, a reduction in probation officers’ caseloads, and a system of graduated sanctions to combat the cycle of criminal activity buildup followed by revocation. Ultimately, the LAO settled on recommending an incentive-based funding program for probation, not unlike the one recently implemented in Arizona (see below).

C. Legislative Initiatives in Other States

California is not the only state to experience a problematic rise in its prison population and a concomitant rise in probationers. A small number of other states—Kansas and Arizona, in particular—have implemented experimental legislation in an attempt to reduce probationers’ recidivism.¹⁰⁴ S.B. 678 is not identical to any of these initiatives, but it does adopt certain of their provisions. Although these states have different probation systems than California, it is

¹⁰⁰ LITTLE HOOVER COMM’N, *supra* n.64, at 3.

¹⁰¹ *Id.* at vi.

¹⁰² *Id.* at 31.

¹⁰³ *Id.* at 28.

¹⁰⁴ Other states, such as Hawaii, have reformed probation through innovative programming rather than legislation. See Part V for a brief discussion of HOPE.

worthwhile to examine their initiatives to better understand the policy choices California has made.

Kansas and Arizona each passed formal legislation addressing probation reform, Kansas in 2007 and Arizona in 2008.¹⁰⁵ Both states articulated similar overall goals for the legislation, including increasing public safety, increasing services for probationers, and ultimately reducing the rate of probation revocation.¹⁰⁶ As well, both states were concerned with their rising prison populations and crime rates.¹⁰⁷ However, although their goals were the same, the states' approaches did differ in significant respects.

Kansas' S.B. 14, the Community Corrections Statewide Risk Reduction Initiative (RRI), set up a competitive grant application system for counties and established a statewide goal of reducing each probation agency's revocation rate by 20 percent, using a FY 2006 baseline.¹⁰⁸ Under the RRI, probation agencies (called "community corrections" in Kansas) submit grant proposals to the Department of Corrections, which then distributes funds to community corrections agencies based on their formulation of plans which accord with the RRI's stated requirements.¹⁰⁹ In particular, the RRI requires the adoption of risk assessment instruments,

¹⁰⁵ Kansas S.B. 14, codified as KAN. STAT. ANN. § 75-52,112; Arizona S.B. 1476, codified as ARIZ. REV. STAT. ANN. §§ 12-267, 12-270, 13-924.

¹⁰⁶ KAN. STAT. ANN. §§ 75-112(a) and (b); ARIZ. REV. STAT. ANN. §§ 12-267(A)(2)(e), 12-270(A); S.B. 1476, 2008 48th Leg., 2nd Reg. Sess., § 4 "Legislative Findings." (Ariz. 2008) (House Engrossed Senate Bill).

¹⁰⁷ S.B. 1476, 2008 48th Leg., 2nd Reg. Sess., § 4 "Legislative Findings" (Ariz. 2008) (House Engrossed Senate Bill). ("1. Arizona's prison population is unacceptably high and among the highest in the nation. 2. Arizona's prison population is expected to increase by fifty per cent from 2007 to 2017 . . ."); PEW CTR. ON THE STATES, KANSAS SENTENCING AND CORRECTIONS PROGRESS UPDATE 1 (Jan. 2, 2008), *available at* http://www.pewcenteronthestates.org/report_detail.aspx?id=33186 (noting that the Kansas "Sentencing Commission projected in 2006 that the prison population would grow 26 percent over the next 10 years, costing taxpayers an additional \$500 million . . ."). In fact, S.B. 14 introduced sweeping reform of the entire correctional system, including an increase in good-time credit awarded to state prison inmates for completion of programs, and a comprehensive review of Kansas' sentencing policies. Third Conference Committee Report Brief House Substitute for Senate Bill 14 (May 1, 2007).

¹⁰⁸ KAN. STAT. ANN. § 75-52,112(a); Kansas Department of Corrections, The Senate Bill 14 Risk Reduction Initiative, <http://www.doc.ks.gov/publications/the-senate-bill-14-risk-reduction-initiative> (last visited May 13, 2010).

¹⁰⁹ KAN. STAT. ANN. §§ 75-52,112(a), (b).

provision of evidence-based treatment and services, and ongoing data tracking and evaluation of set goals.¹¹⁰ Significantly, the grants are tied to outcomes: the Department of Corrections continues to fund programs only if they are meeting their established goals.¹¹¹

Rather than set a statewide revocation reduction goal, Arizona's S.B. 1476, the Safe Communities Act, creates an incentive-based funding initiative for county probation departments whereby probation receives a portion of the money saved by the state prison system when probationers remain in the community. Annually, the Joint Legislative Budget Committee calculates for each county the costs avoided by the Department of Corrections that may be attributed to reducing the county's rate of revocation.¹¹² This is accomplished by comparing the number of revocations to state prison in each county with a county-specific baseline revocation rate established in 2007-2008; the Budget Committee does the same for the number of probationers with new felony convictions.¹¹³ As long as the number of revocations and new convictions are decreasing compared with its baseline rates, each county will receive 40 percent of the cost savings, to be spent on substance abuse treatment, risk reduction programs, and victim services.¹¹⁴ This provides a source of funding for probation departments that is directly tied to their ability to reduce revocations and improve services; at the same time, it insures a cost-savings for the state, since 60 percent of total cost savings remain unallocated.

In addition to providing a steady stream of funding for outcomes-improving probation departments, the Arizona Safe Communities Act also provides "earned time credit" for

¹¹⁰ KAN. STAT. ANN. § 75-52,112(b).

¹¹¹ KAN. STAT. ANN. § 75-52,122(d) ("The department of corrections shall evaluate the programs which received a grant using a research-based process evaluation targeting the critical components of effective programs to ensure that the program is being delivered as such program was designed. Continued funding shall be contingent on the program meeting the established goals.").

¹¹² ARIZ. REV. STAT. ANN. § 12-270(A)(1).

¹¹³ ARIZ. REV. STAT. ANN. § 12-270(A)(1) and (2).

¹¹⁴ ARIZ. REV. STAT. ANN. §§ 12-270(B), 12-267(e).

probationers for their good behavior.¹¹⁵ On the recommendation of an adult probation officer, a judge may reduce a probationer's term of supervision by 20 days for every month in which the probationer 1) "exhibits positive progression toward the goals and treatment of the probationer's case plan," 2) is current on court ordered restitution, or 3) is current in completing community restitution.¹¹⁶ The earned-time credit provision creates a positive incentive for probationers to engage with services such as treatment and education, to interact with their probation officers, and to fulfill their other obligations. The goal, of course, is both to improve offenders' chances of success on probation and to successfully graduate more probationers from their sentences.

Although Arizona's statute is arguably more innovative than Kansas', particularly with regard to its sharing of cost-savings, Kansas' RRI does place more emphasis on developing the kinds of meticulously planned programs that are shown to work well at reducing recidivism, including evidence-based practices, probation staff training, treatment services, education and employment training, data collection and careful evaluation. Regardless of differences, both initiatives have shown early promise, although the real funds for Arizona's program will not be distributed until 2010-2011. According to the Kansas Department of Corrections (KDOC), programs which received the RRI grants achieved the 20 percent revocation reduction goal within one year and exceeded it in two years.¹¹⁷ Between 2006 and 2009, Kansas reported a statewide decrease in revocations to prison of 24.9 percent.¹¹⁸ It simultaneously experienced a

¹¹⁵ ARIZ. REV. STAT. ANN. § 13-924(A).

¹¹⁶ ARIZ. REV. STAT. ANN. § 13-924(B). Certain offenders are not eligible for earned time credit, including those on probation for more serious felony offenses or misdemeanor offense, those on lifetime probation, and sex offenders. ARIZ. REV. STAT. ANN. § 13-924(C). In other words, earned time credit is not available for probationers with the highest and the lowest risk of re-offense.

¹¹⁷ Roger Werholtz, Secretary of the Kansas Department of Corrections, Statement at Hearing on Justice Reinvestment, U.S. House of Representatives (April 1, 2009), *available at* www.justicereinvestment.org/files/Kansas.Werholtz.pdf.

¹¹⁸ KANSAS DEP'T OF CORR., THE STATEWIDE COMMUNITY CORRECTIONS RISK INITIATIVE ANNUAL REPORT FY 2009, at 1, *available at* <http://www.doc.ks.gov/publications/the-senate-bill-14-risk-reduction-initiative>.

26.4 percent increase in probationers successfully completing their probation terms.¹¹⁹ Each community corrections agency submitted to the KDOC a detailed RRI plan, which included a succinct goal and program data.¹²⁰ In the first two years, the KDOC engaged in extensive risk reduction education and skills development for community corrections staff and helped agencies develop evidence-based practices individualized to their targeted populations.¹²¹ Arizona, meanwhile, also exhibits positive trends, including a one-year 12.8 percent decrease in revocation to jails or prison,¹²² and a 1.9 percent decrease in probationers' new felony convictions.¹²³ If these positive trends can be attributed to the Safe Communities Act—and in fact the report does not chart any definite linkage—then results must flow from the earned-time credit, since the incentive-based funding does not begin until 2010-2011.¹²⁴

Although Arizona and Kansas each have very different probation systems than California, the early success of these legislative attempts to reform probation provide an optimistic outlook for California's new initiative.

IV. California S.B. 678, The Community Corrections Performance Incentives Act

For more than a decade, those familiar with California's probation system grew increasingly blunt regarding its inadequacy for handling the rising numbers of adult felony probationers sentenced to the community. Finally in 2009, the Legislature heeded their warnings, drafting a bill which declared that "Adult probation is a ticking time bomb waiting to go off."¹²⁵

The Senate Committee on Public Safety acknowledged that "[t]he state has been overlooking

¹¹⁹ *Id.*

¹²⁰ *Id.* at 15-78.

¹²¹ *Id.* at 2-11.

¹²² ARIZONA ADULT PROB., PROBATION REVOCATION & CRIME REDUCTION REPORT 7 (July 1, 2008 – June 30, 2009).

¹²³ *Id.* at 10.

¹²⁴ ARIZ. REV. STAT. ANN. § 12-270(B).

¹²⁵ S.B. 678, S. Comm. on Public Safety, Analysis (Cal. April 28, 2009).

probation as an essential partner in community corrections,”¹²⁶ and noted that “probation is so sorely under-resourced” that “very little can be done to stop [felony probationers’] cycle of offending.”¹²⁷ However, this official recognition of the need to reform adult probation arrived only as the result of an extraordinary moment of crisis in California’s justice system and after careful political maneuvering on the part of probation supporters. The resulting statute, the Community Corrections Performance Incentives Act, is a hybrid of the Arizona and Kansas acts, and includes many of the expert recommendations described in Part III.

A. The Perfect Political Storm

The Chief Probation Officers of California (CPOC), the statewide association of California probation officers which became the primary sponsor of S.B. 678, had for several years prior to S.B. 678’s passage worked on educating members of the government regarding the need for funds for adult probation.¹²⁸ Beginning in the mid-1990s, the Legislature began approving various grants and funding sources for juvenile probation which successfully reduced the number of juveniles in state institutions.¹²⁹ One initiative was the Juvenile Justice Crime Prevention Act, passed in 2001, which provided a steady source of funding to counties for programs targeting at-risk youth and young offenders.¹³⁰ The rate of juvenile incarceration dropped by 70 percent between 1994 and 2004.¹³¹ According to Jerry Powers, CPOC Legislative Chair, this preventative partnership between the state and counties demonstrated that “if you put

¹²⁶ S.B. 678, Assem. Comm. on Public Safety, Analysis (Cal. June 16, 2009).

¹²⁷ S.B. 678, S. Comm. on Public Safety, Analysis (Cal. April 28, 2009).

¹²⁸ Telephone interview with Karen Pank, *supra* n.48; telephone interview with Jerry Powers, *supra* n.67.

¹²⁹ For a summary of these grants and initiatives, *see* SUSAN TURNER & TERRY FAIN, RAND, ACCOMPLISHMENTS IN JUVENILE PROBATION IN CALIFORNIA OVER THE LAST DECADE (2005), *available at* www.rand.org/pubs/technical_reports/2005/RAND_TR297.pdf.

¹³⁰ *Id.* at xiii.

¹³¹ *Id.* at xiv. In 2007, Governor Schwarzenegger signed the Juvenile Justice Realignment Act, which furthered the transition from state incarceration to local supervision of juvenile offenders. Petersilia, *A Retrospective View of Corrections Reform in the Schwarzenegger Administration*, *supra* n.8, at 151.

money in on the front end, you save money on the back end, so everyone saves money.”¹³² Given the success of the juvenile initiatives, those in probation began to work toward something similar for adult services.¹³³

CPOC Executive Director Karen Pank helped the association put together a strategic plan to bring attention to the issue; Ms. Pank, who had recently left Governor Schwarzenegger’s office, suggested they make a pitch appealing to the governor’s public safety platform. “We knew we had this looming prison crisis, so what better way than to be proactive,” Ms. Pank said.¹³⁴ Governor Schwarzenegger, who had vowed to reform California’s correctional system early in his tenure,¹³⁵ liked the idea so much he proposed \$100 million in funds for adult probation as part of the 2007-2008 budget. But the budget line did not get past the Legislature, where prison overcrowding had not yet reached the boiling point.

However, the prison and budget crises did help coalesce CPOC’s attempts to educate legislators regarding the need to fund adult probation. In 2007, CPOC became an intervener in *Plata v. Schwarzenegger*, one of the federal lawsuits about overcrowding in California’s prisons. The association joined the lawsuit to argue that California ought to invest in probation in order to prevent offenders from being sent to prison in the first place.¹³⁶ Mr. Powers, who is also the Chief Probation Officer for Stanislaus County, offered testimony before the federal three-judge panel and later at a joint-legislative hearing regarding the potential release of inmates ordered by the suit. “I told them I was opposed to the release,” Mr. Powers said. “You could do the same thing [i.e. decrease the prison population] in a much safer manner by slowing down the flow to

¹³² Telephone interview with Jerry Powers, *supra* n.67.

¹³³ Telephone interview with Karen Pank, *supra* n.48; telephone interview with Jerry Powers, *supra* n.67.

¹³⁴ Telephone interview with Karen Pank, *supra* n.48.

¹³⁵ Petersilia, *A Retrospective View of Corrections Reform in the Schwarzenegger Administration*, *supra* n.8, at128.

¹³⁶ Telephone interview with Karen Pank, *supra* n.48.

prison in the first place.”¹³⁷ CPOC’s arguments interested staff members of the Senate Committee on Public Safety, who in late 2008 had learned about the new Arizona Safe Communities Act as well as a recent Pew Center report encouraging states to draft similar performance-incentive acts for community corrections.¹³⁸ Senator Mark Leno, the Chair of the Senate Committee on Public Safety, reached out to CPOC regarding the possibility of addressing the prison crisis through probation.¹³⁹

Two factors in particular influenced the drafting of the legislation: California’s fiscal crisis and Sacramento’s notoriously unforgiving politics. The fiscal crisis combined with the prison overcrowding crisis to create an extraordinary moment in California politics—what Senator Leno termed “the perfect storm”¹⁴⁰—in which criminal justice reformers were able to break through the state’s otherwise “nearly impassable political barriers”¹⁴¹ The three-judge panel had ordered the release of inmates; the Legislature needed to cut spending. Reducing the prison population was therefore an immediate goal, and improving probation a way to do it. But the lack of funds meant that money for adult probation could not be provided in the way that the Legislature had previously funded juvenile probation—with state grants and budget items.¹⁴² Alison Anderson, the Chief Counsel for the Senate Committee on Public Safety, has worked on public safety since 1994 and saw potential in Arizona’s funding incentives model. “We’re upside-down in how we invest some of our public safety dollars,” Ms. Anderson said. She began

¹³⁷ Telephone interview with Jerry Powers, *supra* n.67.

¹³⁸ Telephone interview with Alison Anderson, Chief Counsel, California Senate Committee on Public Safety (May 10, 2010); PEW CTR ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, PERFORMANCE INCENTIVE FUNDING (Dec. 15, 2008), *available at* www.pewcenteronthestates.org/.

¹³⁹ Telephone interview with Karen Pank, *supra* n.48.

¹⁴⁰ Mark Leno, *Reforming Corrections: We’ve Only Just Begun*, CAP. WKLY., Nov. 30, 2009, *available at* <http://dist03.casen.govoffice.com/>.

¹⁴¹ *Id.*

¹⁴² Interview with Alison Anderson, *supra* n.138.

to think that “maybe there’s a way we can share state savings with locals.”¹⁴³ Arizona’s funding incentives model is better suited to hard economic times than Kansas’ grant-based approach because it requires no state funding without concomitant savings. However, while the double-crisis did create a window of opportunity, Sacramento politics remained a formidable barrier to the passage of any reform effort. Senator Leno is a high-profile Democrat. Ms. Pank felt that a bipartisan approach would be necessary to give the bill any chance of success.¹⁴⁴ Before drafting began, the idea was pitched to former Senator John Benoit, a Republican, as a way to increase public safety while decreasing the prison population. Senator Benoit agreed to become the co-author of the bill with Senator Leno.¹⁴⁵ With a bipartisan pact in place, Ms. Anderson began drafting a bill that would provide funding for adult probation.

The resulting legislation, The Community Corrections Performance Incentives Act (CCPIA), introduced as S.B. 678, is “specifically designed to pay for itself”¹⁴⁶ at the same time that it provides stable funding for adult felony probation, and thus promises economic viability. The CCPIA incorporates recommendations of the Pew Center report, the LAO report, the Probation Services Task Force, and the Little Hoover Commission’s 2007 findings.¹⁴⁷ As a result, the CCPIA is an amalgamation of Arizona’s incentive-based model and the evidence-based emphasis of Kansas’ results-driven act.

B. The Three-Step Funding Formula

The CCPIA specifically targets adult felony probationers. As in Arizona, the CCPIA sets up a formula by which county probation departments receive annual funds from the state

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Telephone interview with Karen Pank, *supra* n.48; telephone interview with Jerry Powers, *supra* n.67; telephone interview with Alison Anderson, *supra* n.138.

¹⁴⁶ Press Release, Leno-Benoit Plan to Reduce Prison Population Clears Major Hurdle (June 16, 2009), *available at* <http://dist03.casen.govoffice.com/>.

¹⁴⁷ *See* S.B. 678, S. Comm. on Public Safety, Analysis (Cal. April 28, 2009); S.B. 678, Assem. Comm. on Public Safety, Analysis (Cal. June 16, 2009).

commensurate with each county’s success in preventing probationers from being sent to state prison. The formula involves three steps. In the first step, a cooperative of several statewide agencies and organizations¹⁴⁸ calculates for each county its annual probation revocation rate as well as the annual statewide probation revocation rate.¹⁴⁹ The counties are then placed in two tiers: those with failure rates no more than 25 percent higher than the statewide failure rate (Tier 1), and those with failure rates more than 25 percent above than the statewide rate (Tier 2).¹⁵⁰

In the second step, the annual county revocation rate is compared to a baseline revocation rate, calculated for each county using 2006-2008 data,¹⁵¹ in order to arrive at a yearly estimate of the *number* of probationers each county successfully prevented from revocation to prison.¹⁵² Tier 1 counties will receive funds equal to 45 percent of the costs that the CDCR avoided for that county as a result of not having to incarcerate those probationers. This is calculated by multiplying the number of probationers successfully prevented from revocation by 45 percent of the annual cost to incarcerate in prison and supervise on parole a failed probationer.¹⁵³ The Tier 2 counties will receive 40 percent of costs avoided.¹⁵⁴

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|--|
| <p>Tier 1: Higher Performing Counties</p> <p># Probationers Prevented from Revocation to Prison x .45(annual incarceration cost for one revoked probationer)</p> |
| <p>Tier 2: Lower Performing Counties</p> <p># Probationers Prevented from Revocation to Prison x .4(annual incarceration cost for one revoked probationer)</p> |

¹⁴⁸ These include the California Director of Finance, CDCR, CPOC, the Administrative Office of the Courts, and the Joint Legislative Budget Committee. CAL. PENAL CODE § 1233.1.

¹⁴⁹ CAL. PENAL CODE §§ 1233.1(b) & (c).

¹⁵⁰ CAL. PENAL CODE § 1233.2.

¹⁵¹ CAL. PENAL CODE § 1233(a).

¹⁵² CAL. PENAL CODE § 1233.1(d). The number of felony probationers revoked to prison include those sent for conviction of a new felony offense as well as those revoked for other violations. *Id.*; *see also* CAL. PENAL CODE § 1233.1(e).

¹⁵³ CAL. PENAL CODE § 1233.3(a).

¹⁵⁴ CAL. PENAL CODE § 1233.3(b).

Thus counties with higher success rates (Tier 1) will receive a larger portion of costs avoided attributed to their success, although the exact dollar amount will be dependent on the number of probationers prevented from revocation. This means that larger counties with smaller success rates might still receive more funding than small but highly successful counties.

The third step is meant to reward the state's highest performing counties, all of which will be in Tier 1. Counties with revocation rates more than 50 percent below the statewide revocation rate can choose between receiving the Tier 1 calculation and a "high performance grant."¹⁵⁵ Annually, the state will calculate five percent of total savings to the state attributed to all counties' successful reduction of revocations that year. Each county opting for a high performance grant will receive a share of the five-percent calculation based on the county's total population (not just probationers) of 18 to 25-year-olds.¹⁵⁶

Ms. Anderson explained that the high performance grants, which do not appear in the Arizona bill, are intended to insure adequate recognition of counties that are already high-performing.¹⁵⁷ To understand how the high performance grant might benefit a county, contrast Contra Costa County and Orange County. In 2005 to 2007, Contra Costa County had an average revocation rate of one percent, placing it well below the statewide average of 7.5 percent.¹⁵⁸ Orange County, in contrast, had a 10.7 percent average revocation rate, placing it in Tier 2.¹⁵⁹ However, Orange County has a total population of adult felony probationers more than five times the size of Contra Costa's.¹⁶⁰ So, even though Contra Costa will be Tier 1, the number of Contra Costa probationers prevented from revocation might be much smaller than Orange

¹⁵⁵ CAL. PENAL CODE § 1233.4(e).

¹⁵⁶ CAL. PENAL CODE § 1233.4.

¹⁵⁷ Telephone interview with Alison Anderson, *supra* n.138.

¹⁵⁸ LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 30, 31. See note 6 for an evaluation of the accuracy of these revocation rates.

¹⁵⁹ *Id.*

¹⁶⁰ Orange county has 16,331 adult felony probationers; Contra Costa has 3,039. *Id.*

County's, and the funds it receives from the Tier 1 calculation smaller than Orange County's Tier 2 calculation. But Contra Costa's total 18-25 year-old population is large—about 124,000.¹⁶¹ Contra Costa would therefore receive a fairly large amount of the high performance grant if it opted to do so; this would potentially amount to more money than the Tier 1 calculation would otherwise provide.

This three-step formula aims to realign the fiscal relationship between the state and county probation departments, and in the process, realign the adverse incentives formerly in place. The CCPIA encourages counties to supervise offenders in the community, rather than pass the buck to the state; the lower a county's failure rate, the more state funds it will receive. The formula is good for the state as well, since it saves a portion of the money that it would otherwise spend on incarcerating probationers. The Assembly Appropriations Committee projects annual General Fund savings of tens of millions of dollars, with savings of \$30 million projected for 2009-2010.¹⁶² The Department of Finance projected that if half of the roughly 20,000 felony probationers revoked to prison instead remained in the community—an ambitious estimate—annual savings for the state would be as high as \$255 million, while counties could receive up to \$127.3 million.¹⁶³

C. Evidence-Based Programs and Practices

In addition to creating a complex but strategic funding formula, the CCPIA stipulates that county probation departments must spend these funds on “evidence-based community corrections practices and programs”¹⁶⁴ for adult felony probationers. In particular, the CCPIA

¹⁶¹ CAL. EMERGENCY MGMT AGENCY, REQUEST FOR APPLICATION FOR THE EVIDENCE-BASED PROBATION SUPERVISION PROGRAM 2 (NOV. 2, 2009), *available at* <http://www.calema.ca.gov/WebPage/oeswebsite.nsf/LEVSPortal?OpenForm&Key=2009>.

¹⁶² S.B. 678, S. Analysis (Cal. Sept. 11, 2009).

¹⁶³ S.B. 678, Cal. Dep't of Finance, Bill Analysis (Cal. Aug. 24, 2009), *available at* http://www.dof.ca.gov/legislative_analyses/search.php.

¹⁶⁴ CAL. PENAL CODE § 1230(b)(3).

recommends implementing and expanding the use of risk and needs assessments to evaluate what level of supervision and which programs each offender requires. It also suggests the use of intermediate sanctions such as electronic monitoring, mandatory community service, “restorative justice programs,” and incarceration in county jail; “providing more intense probation supervision;” and expanding the availability of evidence-based programs and rehabilitation for substance abuse, mental health, cognitive behavior, and employment training.¹⁶⁵

While the California Department of Finance and the Administrative Office of the Courts calculate and disburse the annual funds, county probation departments retain control of designing and implementing the evidence-based programs as they see fit. Pursuant to the CCPIA, probation must set up an advisory committee, called the Community Corrections Partnership, to advise in development and implementation of evidence-based practices. The Community Corrections Partnership is mandated to include a range of public safety stakeholders, such as the presiding judge of the superior court, the district attorney and public defender, the sheriff and chief of police, representatives of county social services, mental health, education, and employment, and a representative of victims.¹⁶⁶ Thus, the CCPIA encourages the kind of community participation and cooperation demonstrated to be an essential part of the successful implementation of community corrections programs.

Finally, and critically both for the proper functioning of the funding formula as well as for the successful implementation of evidence-based practices, the CCPIA requires probation departments to identify and track data and “outcome-based measures.”¹⁶⁷ This includes basic data such as the number of adults on felony probation, the number of revocations to state prison, the number of probationers successfully completing their terms, the percentage of state moneys

¹⁶⁵ CAL. PENAL CODE §§ 1230(b)(3)(A) – 1230(b)(3)(D).

¹⁶⁶ CAL. PENAL CODE §§ 1230(b)(1), 1230(b)(2)(A) – 1230(b)(2)(M).

¹⁶⁷ CAL. PENAL CODE § 1231(a).

expended on evidence-based programs, and the percentage of offenders supervised in accordance with evidence-based practices.¹⁶⁸ In order to facilitate the accurate collection of data for the bill,¹⁶⁹ the Legislature passed a companion bill, S.B. 431, which requires an adult probationer's county of residence to facilitate the offender's supervision.¹⁷⁰ This fixes a situation in which probationers formerly could be placed on probation in a county other than where they reside, creating situations of duplicate supervision or no supervision at all.¹⁷¹

Significantly, the CCPIA requires that counties reserve five percent of funds to evaluate the effectiveness of their programs and practices,¹⁷² thereby encouraging reliance on evidence and outcome-based measures not only to implement programs, but also to determine whether such programs are delivering the desired outcomes. The bill also builds in some degree of state oversight. Annually, probation departments must submit a written report to the Administrative Office of the Courts and CDCR evaluating the effectiveness of their programs. In turn, the state agencies disbursing the funds must annually report to the Governor and Legislature regarding statewide performance-based outcomes stemming from the CCPIA and “[t]he impact of the moneys . . . to enhance public safety”¹⁷³

In theory, therefore, the CCPIA incorporates many of the best practices and recommendations of the various reports which have addressed probation in California. In particular, it encourages a combination of surveillance and treatment for probationers, the use of evidence-based risk and needs assessment tools and practices, with critical evaluation of program efficacy, and coordination and cooperation with the community. It also seeks to address two of

¹⁶⁸ CAL. PENAL CODE §§ 1231(b), 1231(d).

¹⁶⁹ Telephone interview with Alison Anderson, *supra* n.138.

¹⁷⁰ CAL. PENAL CODE § 1203.9.

¹⁷¹ Press Release, *supra* n.146.

¹⁷² CAL. PENAL CODE § 1230(b)(4).

¹⁷³ CAL. PENAL CODE § 1232.

the problems inherent in California's decentralized probation model: lack of state oversight and failure to collect data. Although the CCPIA retains California's county-based probation system, it does require greater cooperation between state agencies and locals as far as data collection and funds disbursement. Ideally, this would enable the state to monitor the overall effectiveness of the programs and require some level of accountability from counties without meddling too much in local affairs. Ultimately, the CCPIA represent a shift in perspective on adult probation: "For a long time, adult probation was not seen as something that has outcomes," said Natalie Pearl, Research Director for San Diego County Probation. "This bill is one of the first opportunities we've had to get funding for adult services."¹⁷⁴

D. Focus on Public Safety and Startup Funds

While the CCPIA creates a new financial structure, it is worthwhile to consider what the Act does *not* implement. First, the CCPIA does not alter the existing sentencing structure. No crimes are re-categorized as requiring probation rather than incarceration. Second, the CCPIA does not adopt Arizona's approach and provide probationers the possibility of shortening their sentences with earned-time credit. Third, the CCPIA does not shift responsibility for probation to the state: probation remains a local public safety program receiving some state funds. And fourth, the CCPIA does not itself provide startup funding for evidence-based programs.

Although the CCPIA does align with many policy-based arguments, politics influenced what drafters ultimately decided to include in the bill. Ms. Pank said that creating an earned-time-credit provision or including any sentencing reform were politically unfeasible options. Sentencing reform, in particular, is a dead issue in Sacramento. Since 1984, seven attempts to create a statewide sentencing commission to evaluate and reform California's penal code have

¹⁷⁴ Telephone interview with Natalie Pearl, Research Director, San Diego County Probation (May 12, 2010).

failed due to political opposition.¹⁷⁵ In addition, CPOC and county probation departments did not wish to cede control over probation to the state; and the CDCR certainly did not have the political desire or capacity to assume responsibility for even more offenders. According to Ms.

Pank:

We were very clear that this was a delicate balance. We needed to juxtapose this solution [to the prison crisis] with all the other proposed solutions. We needed to show that this is not changing sentencing; this is not a realignment of county programs to the state. . . . If we had done anything that looked like a sentencing change, that would have upset the political balance of this big piece of legislation.¹⁷⁶

Aware of the politics at play, those supporting S.B. 678 strategically emphasized public safety and fiscal outcomes, rather than altering sentencing or diverting offenders who would normally go to prison. Ms. Anderson explained that a focus on diversion would have undermined efforts to pass the bill: “In California, in order to get broad bipartisan support, that as a goal was not going to get us where we wanted to go.”¹⁷⁷ In the Senate, the Committee on Public Safety told legislators said that S.B. 678 would accomplish three goals: 1) reduce crime through increased supervision of felony offenders; 2) reduce prison overcrowding, “not by early release but by decreasing the criminal activity of those already on felony probation;” and 3) establish sustainable funding and save money for the state.¹⁷⁸ Notably, rehabilitation, treatment, restorative justice, and diversion are not listed among those three reasons.

The strategic, bipartisan focus on outcomes, combined with a crisis situation, worked. S.B. 678 unanimously passed the Senate and the Assembly in September 2009. But the passage of the bill alone, without startup funds, would be problematic. The failure of the 1994

¹⁷⁵ Lauren Geissler, *Creating and Passing a Successful Prison Reform Commission in California* 14 (Stanford Criminal Justice Ctr., Working Paper, 2006) , available at www.law.stanford.edu/program/centers/scjc/workingpapers/LGeissler_06.pdf.

¹⁷⁶ Telephone interview with Karen Pank, *supra* n.48.

¹⁷⁷ Telephone interview with Alison Anderson, *supra* n.138.

¹⁷⁸ S.B. 678, S. Comm. on Public Safety, Analysis (Cal. April 28, 2009).

Community Based Punishment Act communicated an important lesson to the CCPIA’s sponsors. “S.B. 678 is really a great piece of legislation. It really sets up a place to pivot the criminal justice system. But it wouldn’t work if there wasn’t any startup money,” Ms. Pank said. Federal funding offered a solution: the American Recovery and Reinvestment Act of 2009 made stimulus funding available to states for public safety projects. Through the Edward Byrne Memorial Justice Assistance Grant (JAG) program, probation departments are eligible for a portion of \$44.5 million to jump-start the implementation of evidence-based programs and practices.¹⁷⁹ The Legislature approved the one-time federal grant funding as part of the 2009-2010 Budget Act, which also reserved \$424,000 for the Administrative Office of the Courts to begin administering the CCPIA.¹⁸⁰ With all the pieces thus in place, the CCPIA is set to begin reforming the state of adult felony probation in California.

V. Implementing S.B. 678

The passage of S.B. 678, while groundbreaking, is just the beginning of the efforts to reform adult probation in California. California’s own legislative history demonstrates that good legislative work comprises only a small fraction of the battle. The movement from planning to implementation can—and undoubtedly will—pose unforeseen challenges. Data collection, funding administration, the daily actions of probation officers—all these areas and others open a myriad of potential pitfalls. Moreover, probation has limited time to demonstrate the act’s efficacy to legislators: the CCPIA sunsets in 2015.¹⁸¹ It is therefore useful to take note of those areas which may pose particular challenges to implementation. If implementers exercise caution and flexibility, the CCPIA could prove a long-term success.

¹⁷⁹ CAL. EMERGENCY MGMT AGENCY, *supra* n.161.

¹⁸⁰ S.B. 678, S. Analysis (Cal. Sept. 11, 2009).

¹⁸¹ CAL. PENAL CODE § 1233.8.

A. A Survey of County Plans

Beginning in 2010, probation departments will receive the one-time JAG stimulus grants distributed over a period of three years; the size of the grants, which total \$44.5 million, are proportionate to each county's population of adults ages 18 to 25 years.¹⁸² Counties submitted applications for JAG stimulus funds to Cal EMA (Emergency Management Agency) in late 2009. These grant applications, accompanying submissions to county supervisor boards, and interviews with chief probation officers, provide details of probation department plans for the implementation of the CCPIA.¹⁸³ A survey of the grant applications of seven diverse counties, some Tier 1 (Stanislaus, San Diego, San Francisco, Tulare), some Tier 2 (Riverside, Sierra, Fresno), some with very large adult felony probation populations (San Diego: 21,940; Riverside: 13,052) and others smaller (San Francisco: 4,733; Sierra: 44) gives some indication of the immediate actions probation departments are taking to implement evidence-based practices.¹⁸⁴ The grant applications and other sources show that counties are beginning the process of hiring probation officers, implementing risk/need assessments, and exploring options for increasing evidence-based services and sanctions.

The Recovery Act requires grant recipients demonstrate that funding helped retain or create jobs.¹⁸⁵ As a result, all counties applying for grants plan to hire new probation officers or retain others that, due to budget cuts, might otherwise be let go. Given the high caseloads across

¹⁸² CAL. EMERGENCY MGMT. AGENCY, *supra* n.161, at 2.

¹⁸³ *Id.* According to Cal EMA, the purpose of the grant program "is to provide evidence-based supervision, programs, or services to adult felon probationers in an effort to reduce the likelihood that they will commit new crimes or other violations and be sent to prison." *Id.* Although the Request for Application does not explicitly mention the CCPIA, its goals, including collection of relevant data, are consistent with the CCPIA's and the legislative intent was to provide this grant to counties as startup funding until the CCPIA's incentive-based funding begins to be distributed. *See* S.B. 678, S. Analysis (Cal. Sept. 11, 2009).

¹⁸⁴ LEGISLATIVE ANALYST'S OFFICE, *supra* n.6, at 30-31. Calculations of counties' assignments to Tier 1 or Tier 2 are based on the Legislative Analyst's Office provision of revocation rates for 2005-2007, with an average statewide rate of 7.5 percent. Counties with revocation rates under 9.375 (25 percent above 7.5) are Tier 1, while those with rates higher than 9.375 are Tier 2. *See* note 6 for an evaluation of the accuracy of this data and rate calculations.

¹⁸⁵ CAL. EMERGENCY MGMT. AGENCY, *supra* n.161, at 13.

counties, the retention or addition of probation officers is indeed critical to the success of any probation reform; moreover, implementing evidence-based practices will likely require more time per probationer than previously provided. For example, Tulare County, which will receive a total of \$635,044 over three years, plans to use 99 percent of grant funds to pay the salary and benefits of four new probation officers.¹⁸⁶ Tulare, currently the sixth most poverty stricken county in the United States with a 14.9 percent unemployment rate, would not otherwise be able to implement evidence-based practices:

Adult offenders in Tulare County receive very few specialized services that assist them in maintaining a crime-free lifestyle. Current adult supervision probation caseloads average over 100 probationers per officer and do not allow for intensive supervision services nor adequate assessment of offender needs.¹⁸⁷

Lowering caseloads is a goal even for the highest performing counties, like San Francisco.

Wendy Still, the San Francisco Chief Adult Probation Officer, said that San Francisco will also be adding a probation officer in an ongoing effort to lower caseloads to 80 offenders per officer.¹⁸⁸

In addition to adding staff, probation departments which formerly did not use risk/needs assessment tools are spending JAG funds to purchase and implement these. For example, Tier 2 counties Fresno, Riverside, and Sierra each lacked an assessment tool prior to 2010.¹⁸⁹ Fresno County will use part of its \$1.3 million grant funding to implement the use of an assessment tool to help determine “what interventions would best address the offender’s risk of reoffending and

¹⁸⁶ Cal. Emergency Mgmt Agency, Project Summary for Tulare County, Evidence-Based Probation Supervision Program; Tulare Cnty Prob. Dep’t, Application for Evidence-Based Probation Supervision Program, Budget Narrative 1.

¹⁸⁷ Cal. Emergency Mgmt Agency, Project Summary for Tulare County, Evidence-Based Probation Supervision Program.

¹⁸⁸ Telephone interview with Wendy Still, *supra* n.47

¹⁸⁹ *See, e.g.*, Cnty. of Riverside Prob. Dep’t, Submittal to the Board of Supervisors County of Riverside 2 (Dec. 10, 2009), available at www.clerkoftheboard.co.riverside.ca.us/agendas/2009/12_22_2009/03.39.pdf.

thus returning to prison.”¹⁹⁰ Sparsely populated Sierra County will use a portion of its \$37,353 grant to participate along with 15 other counties in the development of an assessment tool.¹⁹¹

Many counties are also planning on expanding evidence-based services for probationers, a task possible only through increases in staffing and the use of risk/needs assessment tools. San Francisco intends to implement a pilot program targeted at felony probationers ages 18 to 25; in addition to higher levels of supervision, probationers who fall into this category will have increased access to services in four target areas: substance abuse, housing, education, and employment. Wendy Still said that the idea is to show that the program works for this target group, and thereafter expand outwards to the rest of the probation population using CCPIA funds.¹⁹² Since San Francisco will likely fall within the small pool of counties eligible for the high performance grants, Ms. Still said she will select whichever calculation—Tier 1 or high performance—will provide more money. In San Diego, roughly \$2 million of the county’s \$3.4 million in stimulus funding will go toward accepting contract bids from community providers of direct services.¹⁹³ Although San Diego is a Tier 1 county with a large adult felony probation population, Natalie Pearl said the right types of services are not currently available to probationers. In particular, she said, San Diego will be looking for carefully tailored contract proposals for cognitive behavioral services, substance abuse treatment, and vocational and educational training.¹⁹⁴

Several counties, including Stanislaus, Fresno, and Tulare, are intending to combine access to services with increased supervision through the creation of targeted day reporting

¹⁹⁰ Fresno Cnty Bd. of Supervisors, Agenda Item, Evidence Based Probation Supervision Program with the California Emergency Management Agency (Jan. 26, 2010).

¹⁹¹ Sierra Cnty, Agenda Transmittal and Record of Proceedings, Authorization to apply for a Recovery Justice Assistance Grant (JAG) through California Emergency Management Agency (Cal EMA), under Senate Bill 678 (Dec. 15 2009).

¹⁹² Interview with Wendy Still, *supra* n.47.

¹⁹³ Telephone interview with Natalie Pearl, *supra* n.174.

¹⁹⁴ *Id.*

centers.¹⁹⁵ All three counties will assign probationers to high supervision caseloads based on the outcome of assessment tools. Stanislaus, for example, is specifying intensive supervision for approximately 59 medium-to-high risk 18-to-25 year-old felony probationers.¹⁹⁶ Day reporting centers place probation officers under the same roof as services, allowing a one-stop shop for daily interactions with probation officers, drug testing, job training, housing assistance, peer support groups, and other services.

Finally, both San Diego and Stanislaus intend to increase probationer accountability through implementing sanction models in which offenders receive immediate hearings and escalating sanctions for any violations. Stanislaus, in addition to increasing services through a day reporting center, will emulate an evidence-based program in Hawaii called HOPE (Hawaii's Opportunity Probation with Enforcement).¹⁹⁷ Through the use of unscheduled drug testing and the threat of immediate, short-term jail sentences ("flash incarceration"), HOPE has demonstrated success in significantly decreasing positive drug tests and lowering arrest rates among probationers.¹⁹⁸ Ms. Pearl said that San Diego is looking at a similar model used in Houston and hopes to create a program tailored to San Diego's resources and needs.¹⁹⁹

B. Potential Challenges for Implementation

The statewide implementation of the CCPIA is underway and so far appears to be conforming with the intent of legislators. However, already there are several areas of concern for implementation which probation departments and state administrations should carefully

¹⁹⁵ Bd of Supervisors of the Cnty of Stanislaus, Action Agenda Summary, Approval to Accept an Edward Byrne Memorial Justice Assistance Grant from the California Emergency Management Agency (March 30, 2010); Cal. Emergency Mgmt. Agency, Project Summary for Tulare County, *supra* n.186; Fresno Cnty Bd of Supervisors, *supra* n.190.

¹⁹⁶ Bd of Supervisors of the Cnty of Stanislaus, *supra* n. 195.

¹⁹⁷ *Id.*

¹⁹⁸ ANGELA HAWKEN & MARK KLEIMAN, RESEARCH BRIEF, EVALUATION OF HOPE PROBATION (July 2008) available at http://www.pewcenteronthestates.org/report_detail.aspx?id=56841. See also Mark Schoofs, *Scared Straight...by Probation*, WALL ST. J., July 24, 2008.

¹⁹⁹ Telephone with Natalie Pearl, *supra* n.174.

consider: county budget shortfalls; the need for extensive training; and the omission of concrete incentives for probationers.

First, while the CCPIA guarantees some funding from the state once the initiative is up and running—that is, once counties can show results—before those results develop, counties must depend on the stimulus grants and county funds. While the JAG grants are a positive development, federal funds may not be enough to provide the needed startup money.

Unfortunately, the CCPIA asks probation to develop greater supervision and resources at a time when many counties face severe budget cuts. For example, Tulare County cut its Probation Department’s budget by 6.03 percent in FY 2009-2010, freezing some salaries and instituting a mandatory furlough.²⁰⁰ Stanislaus intends to implement a “flash incarceration” system, but the Sheriff’s Department is closing 250 beds due to budget cuts.²⁰¹ And San Francisco Mayor Gavin Newsome told agencies, including probation, to submit reports anticipating worst-case scenario budget cuts of 10 to 20 percent.²⁰² Karen Pank said that with all of the budget cuts, “I’m concerned that \$45 million of start-up funding won’t go as far as we had hoped.”²⁰³ That would leave probation departments without the funds necessary to implement the programs and practices needed to begin fulfilling the CCPIA’s revocation-reduction objective. Moreover, for less populous counties, the stimulus grants may not be enough to cover the costs of assessment tools and data management systems. As a result, Ms. Pank said she would not be surprised if some smaller counties decide that it is not cost effective for them to partake in the CCPIA program at all.²⁰⁴

²⁰⁰ Cal. Emergency Mgmt. Agency, Project Summary for Tulare County, *supra* n.186.

²⁰¹ Telephone interview with Jerry Powers, *supra* n.67.

²⁰² Matt Smith, *DA: Further Newsom Budget Cuts Would Lead to ‘Surrender the Safety of Our Streets,’* SF WEEKLY, Mar. 8, 2010, available at http://blogs.sfweekly.com/thesnitch/2010/03/before_ag_endorsement_kamala_h.php.

²⁰³ Telephone interview with Karen Pank, *supra* n.48.

²⁰⁴ *Id.*

Funding issues aside, the mere implementation of evidence-based practices and programs alone, without ongoing training and monitoring of probation officers and staff, will accomplish little. As the National Institute for Corrections admonishes, “Implementing evidence-based policy and practices is not a simple task; it requires a fundamental change in the way community corrections does business, and a shift in the philosophies of those doing this work.”²⁰⁵ Turning theory into practice can backfire if program components are altered or ignored due to political pressure or shoddy training:

Those interested in translating the ‘what works’ literature into operational programs must make certain that the programs are implemented fully and coherently, not dismantled or watered down through the political process in ways that undermine their effectiveness.²⁰⁶

Wendy Still agrees that, even in high-performing San Francisco, instituting best practices is slow work which requires training. “We have a long way to go,” she said. “There are cultures that have to change within institutions.” However, the text of the CCPIA does not mention probation staff training. And while the act requires departments reserve some funds for the evaluation of programs, this back-end focus misses critical work that must be done at the front end. The California Public Defenders Association, which opposed S.B. 678, criticized the bill for “presuppos[ing] that each Probation Department is a clinically trained treatment provider.”²⁰⁷ Indeed, in San Diego, Natalie Pearl predicts that the largest challenge for implementation of the CCPIA will be insuring that all probation officers and staff are properly using the evidence-based methods:

I see the major challenge as fidelity to the evidence based practice knowledge. I don’t think most of us really understand what [constant and careful following of

²⁰⁵ CRIME AND JUSTICE INST. & THE NAT’L INST. OF CORR., *supra* n.95, at xv.

²⁰⁶ Robert Weisberg & Joan Petersilia, *The dangers of Pyrrhic victories against mass incarceration*, DAEDALUS 9 (Summer 2010).

²⁰⁷ S.B. 678, Assem. Comm. on Public Safety, Analysis (Cal. June 16, 2009).

EBP] means. . . . Unless you maintain integrity to that model, it won't reduce recidivism.²⁰⁸

As a result, San Diego is taking the training of its officers seriously. As part of the its grant funding, the county will be collaborating with the University of California San Diego to provide two days of training per month for its line officers. Although San Diego already uses a risk/needs assessment, Ms. Pearl said training will focus on the needs half of the equation. Officers will learn how to better manage cases and motivate offenders to change. Proper implementation will call for a shift in officer attitude from an all-enforcement mentality to a mixture of supervision and social work.²⁰⁹ Unless other counties likewise devote resources to training, the theory behind evidence-based practices will likely fail to produce real outcomes when implemented.²¹⁰

In addition to failing to mention or build in resources for training, the Legislature opted to refrain from including earned-time credits for probationers who follow court orders and participate in programming. The possibility of shortened probation terms for good behavior would provide probationers positive incentives to alter their criminal conduct. The California Public Defenders Association criticized S.B. 678 for this omission and suggested that it include incentives for probationers “including, but not limited to, reduction in the length of probation supervision.”²¹¹ Although conceivably the CCPIA could reduce revocations without such incentives, this situation has not been tested. Arizona’s early success appears to be largely the result of the earned-time credit provision. Moreover, the experience of drug courts and other evidence-based programs indicates that “positive reinforcement for good behavior is often critical for producing long-term behavioral improvement,” especially for individuals with long

²⁰⁸ Telephone interview with Natal, *supra* n.174.

²⁰⁹ *Id.*

²¹⁰ The implementation of Kansas’ RRI is a good example of the amount of training and leadership needed to help evidence-based practices work in reality. The Department of Corrections has engaged in extensive and ongoing training of probation agency staff. *See* KANSAS DEP’T OF CORR., *supra* n.118.

²¹¹ S.B. 678, Assem. Comm. on Public Safety, Analysis (Cal. June 16, 2009).

histories of coercive interactions with the law.²¹² Of course, judges are already enabled by law to reduce probation terms,²¹³ so probation departments do not need an act to recommend a term reduction to judges. Wendy Still said San Francisco intends to do just that if a probationer is doing well on probation and participating in programs.²¹⁴ In fact, positive incentives need not be limited to a reduction in probation time, but could be as simple as positive feedback from a figure of authority, such as a judge, or recognition at a graduation ceremony, as occurs in drug court. That said, positive incentives of this ilk only work if the probationer is aware of them *ex ante*, and they are dependent on the involvement of a judge in the oversight of a probationer's case.

The success of the CCPIA might very well depend on probation's proactive outreach to county judges. Judges have the power not only to decide whether to sentence offenders to probation in the first place, but also to determine the conditions of probation. Judges can set goals for the offender, shorten probation terms, and show lenience if an offender violates the terms of his probation. Judges also have the influence to draw together justice system actors such as prosecutors and defenders, thus proving an important ally in the creation of community cooperation and motivation. In fact, Little Hoover Commission recommended that judges should be empowered to "oversee the progress of offenders in the assigned community sanctions."²¹⁵

The Public Defender Association likewise agreed that "intensive judicial supervision will enhance public safety and increase positive outcomes for a great number of [probation program]

²¹² NAT'L ASS'N OF DRUG COURT PROF'LS, PRINCIPLES OF EVIDENCE-BASED SENTENCING & OTHER COURT DISPOSITIONS FOR SUBSTANCE ABUSING INDIVIDUALS (August 10, 2009), *available at* <http://www.nadcp.org/learn/positions-policy-statements-and-resolutions/principles-evidence-based-sentencing-other-court-d>.

²¹³ CAL. PENAL CODE § 1203.3 ("The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. The court may at any time when the ends of justice will be subserved [sic] thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person so held.").

²¹⁴ Interview with Wendy Still, *supra* n.47.

²¹⁵ LITTLE HOOVER COMM'N, *supra* n.64, at 32.

participants.”²¹⁶ While the CCPIA does include the chief judge of the county superior court on the Community Corrections Partnership committee, probation departments ought to make a concerted effort to obtain buy-in and active support for local judges whether or not they decide to provide offenders with positive incentives.

VI. Conclusion

After twenty years of neglect, California’s adult probationers are finally receiving the legislative attention this high-risk, high-needs population desperately needs. If implemented properly, California’s S.B. 678, the Community Corrections Performance Incentives Act, could represent a sea-change in how the California justice system engages with low-level offenders. In large part, the CCPIA is a well-crafted piece of legislation which incorporates expert recommendations and lessons learned from failed projects. By providing sustainable funding tied to probation departments’ implementation of evidence-based practices, the CCPIA seeks to realign the fiscal relationship between counties and the state and to reverse the adverse incentive structure which leads counties to incarcerate rather than rehabilitate. So far, counties beginning implementation of the CCPIA appear to be adhering to legislative intent; but implementation will likely prove difficult. In order to insure the success of the CCPIA, probation departments should devote adequate resources to staff training, provide positive incentives for probationers, and reach out to judges and other justice system actors. As well, the state and the counties should demand accountability of one another: annual reports evaluating outcomes should be read and then acted on. Like any long-term project, the CCPIA will require some short-term investment in order to produce benefits down the road.

²¹⁶ S.B. 678, Assem. Comm. on Public Safety, Analysis (Cal. June 16, 2009).