

# California Prison Downsizing and Its Impact on Local Criminal Justice Systems

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California has embarked on a prison downsizing experiment of historical significance. Facing a U.S. Supreme Court decision, *Brown v. Plata*, which ordered the state to reduce its prison population by 25% within two years, Governor Jerry Brown signed the Public Safety Realignment Act (AB 109). Realignment transferred authority for large numbers of convicted felons from the state prison and parole system to the state's fifty-eight counties. Counties were given state funding to deal with the increased number of offenders, and each county was given nearly unbridled discretion to develop its own custodial and post-custody plan. The hope is that Realignment, with its focus on locally designed rehabilitative services, will not only reduce prison overcrowding but also the state's 64% recidivism rate—meaning that six out of ten people who left a California prison returned to a California prison within three years of release.<sup>1</sup>

At the time of the *Plata* ruling on May 23, 2011, California's in-state prison population was approximately 162,000, down from an all-time high of 173,614 or 200% of design capacity in 2007.<sup>2</sup> By upholding the three-judge panel's population cap of 137.5%, the Supreme Court was ordering the California Department of Corrections and Rehabilitation (CDCR, the state's prison system) to reduce its prison population to 109,805, a reduction of about 35,000 prisoners or 25% of all prisoners housed at the time.<sup>3</sup> The task was not only daunting; it also represented the largest court-ordered reduction in prison populations ever in the United States. As the editor of *Prison Legal News* wrote, "Without doubt this is the most significant prisoner rights ruling of the 21st century, and it will no doubt keep that distinction for a long while."<sup>4</sup>

Laws are seldom self-executing, and research has consistently shown that practitioners—those responsible for translating "law-on-the-books" to

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<sup>1</sup> See CAL. DEP'T OF CORR. & REHAB., 2012 OUTCOME EVALUATION REPORT 13 (Oct. 2012), available at [http://www.cdcr.ca.gov/adult\\_research\\_branch/Research\\_Documents/ARB\\_FY\\_0708\\_Recidivism\\_Report\\_10.23.12.pdf](http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/ARB_FY_0708_Recidivism_Report_10.23.12.pdf).

<sup>2</sup> See CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT MAY 31, 2011 (2011), [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad1105.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1105.pdf).

<sup>3</sup> See CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT AUGUST 31, 2007 1 (2007), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad0708.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0708.pdf).

<sup>4</sup> Paul Wright, *From the Editor*, PRISON LEGAL NEWS, July 2011, at 12, available at [http://www.prisonlegalnews.org/includes/\\_public/\\_issues/pln\\_2011/07pln11.pdf](http://www.prisonlegalnews.org/includes/_public/_issues/pln_2011/07pln11.pdf).

“law-in-action”—determine eventual success.<sup>5</sup> Realignment impacts every decision along the stages of the criminal justice system, from arrest through sentencing and release from custody. Realignment also allows each county unprecedented flexibility and authority to design programs and services to manage realigned offenders in a way that makes the most sense locally. California is not only experimenting with how to downsize prisons, but its fifty-eight counties are experimenting with fifty-eight different approaches to sentencing and corrections reform. *The Economist* recently called Realignment, “one of the great experiments in American incarceration policy.”<sup>6</sup>

Ultimately, whether California’s Realignment experiment turns out to be just a short-term response to the state’s prison crowding problem or a longer-term solution with national implications for reducing mass incarceration and its attendant costs is squarely in the hands of local justice officials.<sup>7</sup> If it works, California—the nation’s largest state and home to one out of every ten U.S. prisoners<sup>8</sup>—will have shown that it can downsize prisons safely by transferring lower-level offenders from state prisons to county systems, using an array of evidence-based community corrections programs. California might not only alleviate a crisis, but also become a model for other states. If it does not work, counties will have simply been overwhelmed with inmates, unable to fund and/or operate the programs those felons needed, resulting in rising crime, continued criminality and jail (instead of prison) crowding.

This article presents the results of the first comprehensive look at how California’s fifty-eight diverse counties are handling this titanic shift. During the second year of Realignment’s implementation, a team of researchers at Stanford Law School conducted wide-ranging interviews with 125 staff in municipal police departments, county sheriffs’ departments, courts, prosecutors’ offices, public defender agencies, and probation departments. These officials are responsible for turning AB 109 law into reality. We also spoke with victim service agencies and offenders.<sup>9</sup> Interviewees were selected to represent diversity in agency and county perspectives. We basically wanted

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<sup>5</sup> Roscoe Pound made this distinction in his famous article *Law in Books and Law in Action*. 44 AM. L. REV. 12 (1910).

<sup>6</sup> *Prison Overcrowding: The Magic Number*, THE ECONOMIST, May 11, 2013, at 32.

<sup>7</sup> It is important to remember that conservative Governor Ronald Reagan reduced California’s prison population by 34% between 1969 and 1976. That decline lasted until 1977 when California’s prison population took a dramatic upturn, and California became a national leader in prison growth. See Rosemary Gartner, Anthony N. Doob & Franklin E. Zimring, *The Past is Prologue? Decarceration in California Then and Now*, 10 CRIMINOLOGY & PUB. POL’Y 291, 297–98 (2011).

<sup>8</sup> See LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 3 tbl.2, 6 tbl.6, 10 app. tbl.1 (2013).

<sup>9</sup> For the study’s complete findings and research methods, see JOAN PETERSILIA, VOICES FROM THE FIELD: HOW CALIFORNIA STAKEHOLDERS VIEW PUBLIC SAFETY REALIGNMENT (2014), <http://www.law.stanford.edu/sites/default/files/child-page/443444/doc/slspublic/Petersilia%20VOICES%20no%20es%20Final%20022814.pdf>. The National Institute of Justice, Award No. 2012-IJ-CX-0002, U.S. Department of Justice, and the James Irvine Foundation provided funding for the research. The author was the principal investigator of the study.

to know how Realignment was working from their county and agency perspectives and what changes were needed moving forward.

The findings illustrate that Realignment gets mixed reviews so far. Everyone agreed county officials are working more collaboratively toward reducing recidivism, and that new funding has fostered innovative programming. But our interviews also found counties struggling, often heroically, to carry out an initiative that was imposed upon them almost overnight. Along with the increases in jail and probation populations, many counties are dealing with more criminally sophisticated offenders. When offenders reoffend, there is often no space in county jails to house them. Sheriffs worried that the overcrowding and health care problems that led to *Brown v. Plata* could morph into county-level versions of the state problem. Prosecutors lamented the deep jail discounts given to arrestees due to crowded jails.

Judges were cautiously optimistic that mental health and other collaborative courts could reduce recidivism but worried about the lack of split sentencing. AB 109 allows courts the option to split sentences between time in jail and time under supervised release. Counties administer the programs but the state pays for them. Some counties are taking advantage of split sentencing, but in Los Angeles County, only 5% of felons have their sentences split, and the rest walk out of jail without supervision or services of any kind.<sup>10</sup> Judges, prosecutors, and victim service agencies were increasingly concerned about victim protection, and the neglect of victims' constitutional rights under the Victims' Bill of Rights Act of 2008. The California Constitution provides victims with the right to receive notice of and to be heard at any proceeding involving a post-arrest release decision in which the right of the victim is at issue.<sup>11</sup> Realignment has yet to fully integrate these victim rights with new policy and practices.

Probation officials were the most optimistic about Realignment and hoped that after a reasonable transition time and the institutionalization of better rehabilitation programming, counties will be able reduce their jail populations without compromising public safety. Doing so will require the use of risk assessments, better coordination of decision-making and information-sharing among state and county agencies, and more innovative and cost-effective use of alternatives to incarceration. Some counties are succeeding with their new responsibilities and funding, and their success can provide a blueprint for other counties on how to reduce offender recidivism.

Despite the distinctive experience across California's counties, most everyone agreed that changes forced by Realignment were overdue and, if given time, AB 109 will result in a better overall system. But legislative revisions are urgently needed. Stakeholders recommended using an offender's entire criminal history and risk level when determining whether the

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<sup>10</sup> *Id.* at 133.

<sup>11</sup> See CAL. CONST. art. I, § 28; *Victims' Bill of Rights Act of 2008*, CAL. OFFICE OF ATT'Y GEN., [https://oag.ca.gov/victimservices/content/bill\\_of\\_rights](https://oag.ca.gov/victimservices/content/bill_of_rights); see also Jessica Spencer & Joan Petersilia, *California Victims' Rights in a Post-Realignment World*, 25 FED. SENT'G REP. 226, 228–29 (2013).

county or state should supervise, capping county jail sentences at three years, and requiring split sentences (jail combined with probation) for all serious felons, along with several other improvements. Elected leaders seem to be listening and progress is being made on these and several other fixes, as discussed in Part IV. If progress continues, California's Realignment experiment may not only satisfy the courts but also serve as a springboard to rethink the nation's overreliance on prisons.

This article proceeds as follows: Part I presents a brief overview of the history of the *Plata* litigation, with a focus on overcrowding and prison capacity. Part II presents a brief overview of the Public Safety Realignment Act, including a description of its goals beyond prison crowding, target population, and funding plan. Part III lays out the findings from our stakeholder interviews, with separate sections devoted to probation officers, public defenders and prosecutors, the police, sheriffs, judges, and victims. Our conclusions and stakeholder recommendations are contained in Part IV.

### I. *BROWN V. PLATA* AND ITS PRECEDING LITIGATION<sup>12</sup>

It has been three years since the U.S. Supreme Court affirmed California's prisoner overcrowding order, spurring an unprecedented overhaul of California's sentencing and corrections system. In *Brown v. Plata*, the Supreme Court affirmed the three-judge district court's 2009 remedial order requiring the state to reduce its prison population to 137.5% of design capacity within two years.<sup>13</sup> Justice Kennedy's majority opinion concluded that "[w]ithout a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons.<sup>14</sup>

The Supreme Court found that California had violated the Eighth Amendment ban against cruel and unusual punishment by providing constitutionally inadequate medical and mental health services in its prisons, and that overcrowding was the "primary" source of the unconstitutional medical care. The Court determined that California had room for just 80,000 prisoners in its thirty-three state prisons, but housed more than twice that number, and as a result of such extreme crowding, medical and mental health care could not be delivered.

The state had appealed to the U.S. Supreme Court on the grounds that the lower court had violated the federal Prison Litigation Reform Act (PLRA), improperly intruding on the state's authority to administer its crimi-

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<sup>12</sup> The Supreme Court litigation arose out of two separate class action lawsuits, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*. The three-judge federal district court panel consolidated the cases and they are now referred to as *Brown v. Plata*.

<sup>13</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011). Design capacity is the number of beds the prison system would operate if it housed one inmate per cell and used single-level bunks in dormitories, and had no beds in places not designed for housing (e.g., gymnasiums).

<sup>14</sup> *Id.* at 1939.

nal justice system, and compromising the state's ability to reduce overcrowding in a manner that protects public safety. But the high Court denied the state's appeal on all grounds. Justice Anthony Kennedy, writing for the majority in a 5–4 decision, described dismal conditions where prisoners were denied minimal care and suicidal inmates were held in “telephone-booth sized cages without toilets”<sup>15</sup> and prisoners with mental illnesses “languished for months, or even years, without access to necessary care.”<sup>16</sup> He wrote:

A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society. If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.<sup>17</sup>

Justice Scalia filed a vigorous dissent, calling the order affirmed by the majority “perhaps the most radical injunction issued by a court in our Nation’s history: an order requiring California to release the staggering number of 46,000 convicted criminals,”<sup>18</sup> which would result in “inevitable murders, robberies and rapes to be committed by the released inmates.”<sup>19</sup> Justice Alito echoed the same theme in his dissent when he wrote, “[T]he majority is gambling with the safety of the people of California. . . . I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims.”<sup>20</sup>

The Supreme Court did not actually order prisoner releases. Justice Kennedy wrote, “The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the design capacity of its prisons or by transferring prisoners to county facilities or facilities in other States.”<sup>21</sup> Justice Kennedy conceded that there was “no realistic possibility that California would be able to build itself out of this crisis,” in light of the state’s financial problems.<sup>22</sup> In 2011, California was facing a daunting \$25 billion shortfall and future estimated annual budget gaps of \$20 billion.<sup>23</sup>

The state had already spent billions of dollars trying to comply with the federal lawsuits, and spending on inmate medical, dental, and mental health care had more than doubled over the last decade to a projected \$2.3 billion

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<sup>15</sup> *Id.* at 1924.

<sup>16</sup> *Id.* at 1926 (quoting *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995)).

<sup>17</sup> *Id.* at 1928.

<sup>18</sup> *Id.* at 1950 (Scalia, J., dissenting).

<sup>19</sup> *Id.* at 1957.

<sup>20</sup> *Id.* at 1967–68 (Alito, J., dissenting).

<sup>21</sup> *Id.* at 1929.

<sup>22</sup> *Id.* at 1919.

<sup>23</sup> CAL. LEGIS. ANALYST’S OFFICE, THE 2011–12 BUDGET: CALIFORNIA’S FISCAL OUTLOOK (Nov. 10, 2010), [http://www.lao.ca.gov/reports/2010/bud/fiscal\\_outlook/fiscal\\_outlook\\_2010.aspx](http://www.lao.ca.gov/reports/2010/bud/fiscal_outlook/fiscal_outlook_2010.aspx).

annually by 2012.<sup>24</sup> California also spends three times more per inmate on medical care than any other state.<sup>25</sup> Overall, state spending on corrections more than tripled as a share of all state expenditures, rising from 3% in 1980 to nearly 11% (\$9.6 billion) in 2011.<sup>26</sup> California's annual spending per inmate was \$51,889 in 2011–2012<sup>27</sup>—65% more than the U.S. national average of \$31,286.<sup>28</sup>

But despite the state's extraordinary spending on prisons, its return-to-prison recidivism rate is among the nation's highest at 57.8%, far outpacing the national average of 43.3%.<sup>29</sup> As I concluded in my review of the California system, "No other state spends more on its corrections system and gets less."<sup>30</sup>

A. *Public Safety Realignment (AB 109): California's  
"Most Viable Plan"*<sup>31</sup>

How could state officials possibly respond to the Court's *Plata* order? After all, it meant reducing the state's prison population to pre-1993 levels when California had six million fewer residents. The answer to the *Plata* ruling was the 2011 Public Safety Realignment Act ("Realignment" or "AB 109"), signed by Governor Jerry Brown on April 4, 2011. The core of Realignment's population reduction was transferring responsibility for thousands of non-serious, non-violent, and non-sexual cases ("N3s") to counties through detention and/or supervision. Felons convicted of certain serious, violent, and aggravated sex offenses continue to serve their time in state prison, but sentences for more than five hundred other felony crimes must be served through county jail time or probation. After October 1,

<sup>24</sup> See CAL. LEGIS. ANALYST'S OFFICE, PROVIDING CONSTITUTIONAL AND COST-EFFECTIVE INMATE MEDICAL CARE 10 (2012) [hereinafter CAL. LEGIS. ANALYST, INMATE MEDICAL CARE]; Don Thompson, *California Spending More than \$2B for Criminal Health Care*, BAKERSFIELDNOW.COM (Oct. 19, 2012, 1:24 PM), <http://www.bakersfieldnow.com/news/local/High-pay-a-costly-legacy-of-Calif-prison-receiver-174992821.html>.

<sup>25</sup> See CAL. LEGIS. ANALYST, INMATE MEDICAL CARE, *supra* note 24, at 11 (noting that California spent about \$16,000 per inmate on health care in 2010, while the other 39 states surveyed averaged \$5,000 per inmate).

<sup>26</sup> See Cal. Dep't of Corr. & Rehab., THE FUTURE OF CALIFORNIA CORRECTIONS 2 (2012).

<sup>27</sup> CAL. LEGIS. ANALYST'S OFFICE, CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 50 (2013).

<sup>28</sup> See CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 fig.4 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

<sup>29</sup> PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 10–11 (2011), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolution\\_Door\\_America\\_Prison%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/sentencing_and_corrections/State_Recidivism_Revolution_Door_America_Prison%20.pdf).

<sup>30</sup> Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 207, 211 (Michael H. Tonry ed., 2008) [hereinafter Petersilia, *Paradox*].

<sup>31</sup> Governor Brown Pledges State Support as Local Leaders Launch Realignment, OFFICE OF GOVERNOR EDMUND G. BROWN (Sept. 29, 2011), <http://gov.ca.gov/news.php?id=17245>.

2011, counties must now handle virtually all drug and property crime sentences, which represented 54% of all adults convicted in 2010.<sup>32</sup>

Governor Brown expressed confidence that California's system was prepared for these changes, noting, "It's bold, it's difficult and it will continuously change as we learn from experience. But we can't sit still and let the courts release 30,000 serious prisoners. We have to do something, and this is the most-viable [sic] plan that I've been able to put together."<sup>33</sup>

Governor Brown correctly predicted the immediate reduction in prison populations. During 2012, the first full year of Realignment, total admissions to California prisons declined 65%, from 96,700 admissions in 2011 to 34,300 admissions in 2012.<sup>34</sup> Admissions to California prisons on parole violations decreased by 87%, from 60,300 in 2011 to 8000 in 2012. California went from admitting 140,800 offenders to prison in 2008 to 33,990 in 2012—nearly an 80% decrease in prison admissions in just four years.<sup>35</sup>

Without a doubt, this is the largest reduction in prison admissions ever undertaken in the United States.<sup>36</sup> In fact, the Department of Justice recently announced a 1.7% decline in the U.S. prison population from 2011 to 2012, marking the third consecutive year of slight decreases.<sup>37</sup> But over half (51%) of the nation's *entire* prisoner count reduction comes from the 10% decline in California.<sup>38</sup> Excluding the decline in California's prison population, the nationwide prison population would have remained relatively stable during recent years.

But by year-end 2013, California's in-state prison population was about 125,000 inmates, still 16,000 inmates over the population cap set by the courts.<sup>39</sup> In January 2013, California told the district courts it would be unable to meet the 137.5% capacity requirement, stating that "the population

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<sup>32</sup> See CAL. OFFICE OF THE ATT'Y GEN., CRIME IN CALIFORNIA: 2010 53 tbl.40 (2011) (showing that 109,494 of 201,820 adult arrestees convicted in 2010 were convicted of property and drug offenses).

<sup>33</sup> Nick Smith, *Inmates Trade Prison Cells for Jail Under Plan*, ABC 7 NEWS (Oct. 1, 2011), <http://abclocal.go.com/kgo/story?section=news/state&id=8375360>.

<sup>34</sup> E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES 1991–2012 19 tbl.14 (2013).

<sup>35</sup> *Id.*

<sup>36</sup> Several states have recently reduced their prison populations using a combination of sentencing reforms, alternatives to prison for drug offenders, reducing time served in prison, and reducing parole revocations, but the sheer size of California sets it apart from other states. See, e.g., RAM SUBRAMANIAN & REBECCA TUBLITZ, VERA INST. OF JUSTICE, REALIGNING JUSTICE RESOURCES: A REVIEW OF POPULATION AND SPENDING SHIFTS IN PRISON AND COMMUNITY CORRECTIONS (2012); Marc Mauer, *Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism*, CRIM. JUST. z27 (Spring 2011).

<sup>37</sup> See CARSON & GOLINELLI, *supra* note 34, at 23–24.

<sup>38</sup> See *id.*

<sup>39</sup> CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 25, 2013 (2013), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad131225.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad131225.pdf).

reductions currently required by the [Supreme] Court cannot be achieved by means that are consistent with sound prison policy or public safety.”<sup>40</sup>

On January 24, 2014, the state requested an additional two years to meet the population reduction deadline. In a clear legal win for Governor Brown, on February 10, 2014 the three-judge panel granted California a two-year extension and ordered the state to reduce the adult prison population to 137.5% of design capacity by February 28, 2016. In a statement, Governor Brown said, “the state now has the time and resources necessary to help inmates become productive members of society and make our communities safer.”<sup>41</sup>

From the state’s perspective, the population targets are within reach, the state is on the right path in redirecting resources from prison to programs, and Realignment just needs more time to work. But the burden shifted to California’s counties is enormous, and how they carry out their newfound obligations will ultimately determine Realignment’s success.

The critical question remains: How are counties managing the influx of prisoners and parolees? After all, they have to absorb tens of thousands of diverted prisoners and parolees. Shifting these lower-level offenders to local custody could strain county health care and social services programs further. State budget cuts have already devastated many of the essential programs upon which former prisoners depend, especially for mental health care and alcohol and drug treatment.

## II. AN OVERVIEW OF PUBLIC SAFETY REALIGNMENT (AB 109)

The Legislature made it clear that Realignment was not intended to be solely a narrow mechanism of compliance with the *Plata* mandate; rather, Realignment was aimed at the *source* of the overcrowding problem—getting offenders the help they need so they won’t recidivate.<sup>42</sup> AB 109 states that “the purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.”<sup>43</sup>

Theoretically, Realignment is designed to promote rehabilitation and reentry by moving offenders closer to their families and community-based services. Community agencies can more easily access inmates in local jails, building relationships and encouraging inmates to access their services after release. In fact, recognizing that change is best achieved at the local level

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<sup>40</sup> Defs.’ Mot. to Vacate or Modify Population Reduction Order at 20, *Coleman v. Brown*, No. 2:90-cv-00520 LKK JFM P (E.D. Cal. Jan. 7, 2013), <http://www.cdcr.ca.gov/News/docs/3JP-docs-01-07-13/PLATA-COLEMAN-ECF-MOT-TO-VACATE.PDF>.

<sup>41</sup> Ian Lovett, *Court Gives California More Time on Prisons*, N.Y. TIMES, Feb. 11, 2014, at A12.

<sup>42</sup> CAL. PENAL CODE § 17.5(b) (2014) (“The provisions of this act are not intended to alleviate state prison overcrowding.”).

<sup>43</sup> *Id.* § 17.5(a)(7).



and that counties are better at rehabilitating offenders than the state is one of the underlying premises of the bill.

The Legislature's underlying hope, as written in the general legislative findings to Realignment, declares that instead of solely adding jail capacity, the Legislature views AB 109 as a "reinvest[ment]" of resources to support "locally run community-based programs" and evidence-based practices "encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity."<sup>44</sup> The legislation further defines evidence-based practices as those "supervision policies, procedures, programs, and practices demonstrated by scientific research."<sup>45</sup>

Each county was required to create a Community Corrections Partnership ("CCP") to develop a comprehensive plan for carrying out AB 109's demands in their local jurisdiction. The legislation placed few limits on how counties could spend their money, and it did not require them to report any results to the state or to measure the outcomes of their programs. Built upon the principle of increased local control, counties are free to rely heavily on their local jails, invest in law enforcement personnel, or choose from a wide variety of less severe (public and private) alternatives, such as electronic monitoring, drug courts, day reporting centers, or split sentencing (a sentence in which the offender serves a reduce jail term followed by probation). As a result of these strengthened partnerships, Realignment is providing the space for fifty-eight coalitions to think about how to do things better in their localities. A study of the counties' first year Realignment spending plans found that they vary tremendously in terms of how their funding is allocated and the issues that they have prioritized.<sup>46</sup>

#### A. *Target Offender Population and Program Funding*

California's Public Safety Realignment Act (AB 109) is quite comprehensive. It touches every aspect of criminal case processing from arraignment and bail through discharge from parole. The initial Public Safety Realignment Act was signed into law on April 4, 2011.<sup>47</sup> It is now over eight hundred pages long, and has been clarified and amended six times since its original passage.<sup>48</sup>

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<sup>44</sup> *Id.* § 17.5.

<sup>45</sup> *Id.* § 17.5(a)(9).

<sup>46</sup> Details of how they spent their funds can be found in SARA ABARBANEL ET AL., STANFORD CRIMINAL JUSTICE CTR., REALIGNING THE REVOLVING DOOR: AN ANALYSIS OF CALIFORNIA COUNTIES' AB 109 2011–2012 IMPLEMENTATION PLANS (2013); JEFFREY LIN & JOAN PETERSILIA, STANFORD CRIMINAL JUSTICE CTR., FOLLOW THE MONEY: HOW CALIFORNIA COUNTIES ARE SPENDING THEIR PUBLIC SAFETY REALIGNMENT FUNDS (2014).

<sup>47</sup> AB 109, Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 15.

<sup>48</sup> See Fact Sheet, Cal. Dep't of Corr. and Rehab., 2011 Public Safety Realignment Fact Sheet (Dec. 19, 2013), <http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf> (listing the six amendments made to AB 109 during California's 2011–12 Legislative Session: AB 117, AB 111, AB 94, AB 118, SB 89, and SB 87).

While the legislation is complex, it has three basic functions.<sup>49</sup> First, it requires offenders convicted of a low-level felony after October 1, 2011 to serve their sentences locally, rather than in state prison. Low-level offenders are defined as those who do not have a current or prior conviction for a violent, serious, or sex crime—the so-called “non-non-non” (“N3”) offenders. California Penal Code §1170(h) defines the crimes that cannot be sentenced to prison, and California Penal Codes §1192.7(c) and 667.5(c) define “serious” or “violent” felony convictions.<sup>50</sup> Virtually all drug and property offenses are now served in county jail. In addition, many officials were troubled by AB 109’s definition of “low-level offenders,” with many suggesting it vastly understated the seriousness of some crimes included in the original bill. In response to that concern, clean-up legislation (AB 118) was passed just one month after AB 109 was signed, identifying approximately eighty non-violent, non-serious, and non-sexual crimes, and designated them as still punishable by state prison.<sup>51</sup> But many other serious crimes remain punishable only by a jail term, including commercial burglary, most drug crimes, vehicular manslaughter, possession of weapons, identity theft, elder financial abuse, and hate crimes. AB 109 did not release any prisoners or make any changes to the *length* of sentence; it only stipulated that the sentence must be served in county jail and not state prison.

Second, AB 109 requires counties to supervise low-level offenders released from state prison after October 1, 2011. Prior to AB 109, virtually all offenders who completed their prison sentences were paroled to their home counties, supervised by state parole agents. Since October 1, 2011, lower-level parolees are supervised by county probation rather than state parole. State parole agents will only supervise individuals released from prison whose *current* offense is serious or violent, or who are assessed to be mentally disordered or high risk sex offenders. Former parolees are now supervised by probation officers under post-release community supervision (PRCS). To qualify for PRCS, “low-level” means that released inmates: (1) did not serve their *just completed* prison term for a violent or serious felony, although the inmate could have served a *prior* prison term for a violent or serious felony; (2) are not classified by CDCR as high-risk sex offenders; (3)

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<sup>49</sup> The best source on the legal aspects of Realignment is RICHARD J. COUZENS & TRICIA A. BIGELOW, *FELONY SENTENCING AFTER REALIGNMENT* (rev. 2014), available at [www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf).

<sup>50</sup> These classifications are now enumerated in CAL. PENAL CODE § 1170(h). Offenders can be sentenced to prison even if they are currently convicted of a § 1170(h) non-prison eligible crime if any of the following apply: (1) the defendant has a current or prior conviction for a serious or violent felony conviction listed in CAL. PENAL CODE § 667.5(c) or 1192.7(c); (2) the defendant is required to register as a sex offender under § 290; or (3) the defendant is convicted and sentenced for aggravated theft under the provisions of § 186.1. See *id.* at 42. An excellent source of materials on the legal aspects of Realignment can be found at Judicial Council of California, *Criminal Justice Realignment Resource Center*, CAL. JUDICIAL BRANCH (last visited Apr. 15, 2014), <http://www.courts.ca.gov/partners/890.htm>.

<sup>51</sup> For a list of crimes that remain punishable in state prison, see COUZENS & BIGELOW, *supra* note 49, at App. I.

are not a third-striker under the state's Three Strikes law; and (4) are not required to undergo treatment by the Department of Mental Health.

By December 2013, just twenty-seven months after AB 109 went into effect, CDCR reported that the parole population had fallen from 132,424 in 2010 to 47,885—a 64% decline, bringing it back to 1987–88 population levels.<sup>52</sup> As a result of this massive downsizing, the CDCR Division of Adult Parole Operations reduced its staff by 45 percent in the first two years post-realignment, with additional layoffs continuing.<sup>53</sup> There is no doubt that California has seen some of the nation's steepest increases in parole populations and is now witnessing, by far, the nation's steepest decreases.<sup>54</sup>

Third, AB 109 prohibits the return of most probationers and parolees to prison for “technical” violations (i.e., violations of the rules of supervision rather than the commission of a new crime). Instead, AB 109 establishes a maximum penalty of 180 days in county jail for technical violators. As of July 1, 2013, county court-appointed hearing officers will decide how to respond to technical violations, and they can use their discretion to impose jail time, refer to community programs, or continue on supervision without sanction—but they can *not* return the offender to prison. Prior to Realignment, these non-serious technical violators—about 15,400 to 18,000 parolees each year—were sent to prison.<sup>55</sup>

Realignment funding may be one of the most important determinants of its success. The California Department of Finance uses a formula to determine each county's funding level primarily based on how many offenders are projected to be realigned to the counties. Roughly speaking, the Legislature funded Realignment by giving counties about half of the current cost of state prison (which was about \$56,000 per year, per offender 2012–13) and parole supervision (about \$6,000 per year, per offender).<sup>56</sup> Through AB 109, the Legislature has allocated over \$7 billion in the first two years of implementation to assist California's fifty-eight counties in carrying out the legis-

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<sup>52</sup> See CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 1991 19 tbl.8 (1993); CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT DECEMBER 11, 2013 (2013), [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/WeeklyWed/TPOP1A/TPOP1Ad131211.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad131211.pdf). CDCR estimates that by June 2019, the parole population will be just 33,000. CAL. LEGIS. ANALYST'S OFFICE, THE 2014–15 BUDGET: GOVERNOR'S CRIMINAL JUSTICE PROPOSALS 21 (2014).

<sup>53</sup> CAL. DEP'T OF CORR. & REHAB., THE FUTURE OF CALIFORNIA CORRECTIONS 63 (2012), available at <http://www.cdcr.ca.gov/2012plan/> (showing that the total Division of Adult Parole Operations (DAPO) is expecting to reduce field staffing from 2,383 in 2012-2013 to 1,532 in 2015-16).

<sup>54</sup> Importantly, AB 109, as amended by AB 117, *requires* counties to discharge parolees who do not violate their conditions of community supervision for one year and *allows* counties to discharge parolees who go without a violation for six months. AB 109, Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 15. See also Petersilia, *Paradox*, *supra* note 30, at 264 (“The number of parole returns to prison in 2004 was about 77,000 per year, down from 90,000 in 2000.”); *id.* at 266 (“Just 20 percent of parole violators returned to prison in 2004 are purely technical violators of the sort seen in other states.”).

<sup>55</sup> *Id.*

<sup>56</sup> As told to the author by the California Department of Finance.

lation's provisions.<sup>57</sup> Counties were initially worried that state funding could be discontinued. But California voters passed Proposition 30 in November 2012, a sales and income tax increase, which guarantees in the State Constitution funding for Realignment going forward. With Realignment funding constitutionally guaranteed, county officials might be more willing to commit to long-term planning, prevention, and non-traditional avenues for minimizing the use of prison.

This infusion of new funding far surpasses any similar allocation for adult offender rehabilitation in California history, and the funding is now guaranteed for the next several years. Critics of Realignment say the money could better be spent on health, education, and mental health programs for people not involved in the justice system.<sup>58</sup> But proponents argue that reducing incarceration has far-reaching ripple effects that benefit everyone. Of course, the extent of any impacts from Realignment depends on how it is going for local criminal justice agencies, the subject to which we now turn.

### III. FROM RHETORIC TO REALITY: HOW STAKEHOLDERS VIEW THE IMPACTS OF REALIGNMENT

California is the largest and most diverse state in the nation, and we wanted our study to represent that diversity. To capture this variability, we first selected counties that differed in crime rates, financial resources, politics, demographics, and pre- and post-Realignment orientation towards the use of incarceration versus community-based options. Within the selected counties, we then interviewed the major criminal justice stakeholders. Between November 2012 and August 2013, we interviewed 125 officials in twenty-one counties. Our interviews took place during the second year of AB 109 implementation. By year two, stakeholders had useful experience with how Realignment was impacting counties. After all, more than 100,000 offenders have had their sentences altered through mid-2013.<sup>59</sup> These offenders used to be under state control and faced prison terms but

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<sup>57</sup> CAL. LEGIS. ANALYST'S OFFICE, THE 2012–13 BUDGET: THE 2011 REALIGNMENT OF ADULT OFFENDERS—AN UPDATE 11 (2012), available at <http://www.cdcr.ca.gov/Reports/docs/External-Reports/Refocusing-CDCR-After-2011-Realignment-022312.pdf>.

<sup>58</sup> See, e.g., Laura Repke, *Would Disabled Receive Better Care in Prison?*, S.F. CHRON. (Mar. 31, 2011, 4:00 AM), <http://www.sfgate.com/opinion/openforum/article/Would-disabled-receive-better-care-in-prison-2376903.php> (noting that the single largest budget cut signed into law by Governor Brown in 2011–12 was \$568.6 million, representing 20% of all state funding for services for people with developmental disabilities). Meanwhile, prisons—protected by a court order—face only a 1% cut. Educators also lament that spending per inmate has soared from \$33,000 in 1995 to \$60,000 today, an 82.3% increase, accounting for inflation. By comparison, K-12 spending has increased only 17.9% since 1995 with inflation adjustments. That means spending on current prisoners has risen five times faster than spending on students. Charlotte Dean, *CA Spending Per Inmate Rising Faster Than Spending Per Child*, INDEP. VOTER NETWORK (Aug. 12, 2013), <http://ivn.us/2013/08/12/ca-prison-problems-preventable-with-regular-investment-in-upkeep>.

<sup>59</sup> See LISA QUAN ET AL., STANFORD CRIMINAL JUSTICE CTR., REALLOCATION OF RESPONSIBILITY: CHANGES TO THE CORRECTIONAL SYSTEM IN CALIFORNIA POST-REALIGNMENT 9–10

now remain in local communities where jail is the most severe sanction they confront.

Our interviews were informal, semi-structured conversations usually lasting one to two hours. Our goal was to determine how Realignment had influenced their agency's work and what changes they would make to the law.

Broadly speaking, Realignment gets mixed reviews so far. Our interviews elicited a portrait of counties struggling, often heroically, to carry out an initiative that was poorly planned and imposed upon them almost overnight, giving them little time to prepare.

Kim Raney, then-President of the California Police Chiefs Association, said, "The first year was like drinking from a fire hose," as counties scrambled to cope with an influx of offenders far larger than expected, and with more serious criminal histories and needs. That said, everyone agreed Realignment is here to stay and that the old system was yielding disappointing results and siphoning too many taxpayer dollars from other vital public programs. Those interviewed also agreed that Realignment has the potential to improve the handling of lower-level property and drug felons. But as our conversations revealed, AB 109 has wrought tremendous change in every phase and at every level of the criminal justice system, requiring many painful adjustments. Realignment asks stakeholders to put aside personal agendas and work collaboratively toward a shared goal of reducing recidivism. Although everyone embraces that goal, getting there is proving a monumental and often frustrating challenge, and many unintended consequences of this well-intentioned law are surfacing along the way.

Despite the obstacles, our interviews suggest that even in the early going, counties are experiencing some success. Officials reported collaborating with one another in surprising and unprecedented ways, embarking on jointly funded initiatives, eliminating duplication, and approaching justice from a system-wide perspective, rather than a narrower agency perspective. Realignment has also encouraged counties to take a more holistic view of offender needs, treating them within their family and community contexts.

Overall, many stakeholders expressed a realistic attitude toward Realignment, noting that, when it comes to crime and punishment, pendulum shifts take time and achieving results requires stamina and patience. Realignment represents a titanic policy shift and tremendous opportunity for reform, but it will only deliver lasting benefits if counties can make it work. But while these general perspectives were shared, different agencies voiced very different views about how Realignment is going so far.

*A. Probation*

Of all the agency staff interviewed, representatives of probation—the workhorse of the criminal justice system, especially under AB 109—spoke with the most unified and positive voice. They unequivocally felt that Realignment gave them an opportunity to fully test whether well-tailored rehabilitation services can keep lower-level felony offenders from committing new crimes and returning to prison. If Realignment is to amount to more than an experimental, emergency response to a court directive over prison crowding, it will depend heavily on how well probation agencies deliver effective programs and services. Probation is, in essence, the epicenter of Realignment, burdened with the massive responsibility—unfair as it may seem—of determining how best to change offender behavior.

With more than \$300 million—or 25% of the total AB 109 allocations—flowing into probation in the first year alone,<sup>60</sup> there is no doubt that the long-underfunded agencies are producing positive results. Our interviews showed that across the state, probation agencies have launched pilot projects that, if successful, will significantly strengthen community corrections in California and nationally. One of the most promising options is the Day Reporting Center (DRC), often described as “one-stop” centers where offenders can access educational programs, cognitive behavioral therapy, and employment services, and meet with probation officers. Offenders are assessed for needs and then matched to services that best address those needs. At least twenty-five California counties now have DRCs, virtually all of them receiving some AB 109 funding. Most counties have also expanded their electronic monitoring programs, often coupled with rehabilitation and education programs. Interestingly, private correctional companies operate many of the newer AB 109-funded programs, as they were nimble and flexible enough to quickly develop the variety of programs that local counties deemed necessary.

In addition, nearly all probation agencies reported adopting risk and needs classification instruments to measure an offender’s predicted risk of recidivism and to help target treatment to those most likely to benefit. The adoption of such actuarial tools is fundamental to delivering evidence-based services and has professionalized probation by allowing officials to better triage services and the level of monitoring provided by officers.

While new funding has made new things possible, our interviews confirmed the hard realities and additional burden probation agencies are facing. Above all, probation chiefs expressed frustration with the poor policy and planning that preceded Realignment, lamenting that it all happened far too fast, and that at times, they simply feel overwhelmed. The unanticipated volume of offenders was one problem. State prison officials provided counties with a projection, but the numbers were often inaccurate, sometimes wildly so. For example, Orange County Sheriff Sandra Hutchens said that

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<sup>60</sup> ABARBANEL ET AL., *supra* note 46, at 86.

Orange County received twice as many inmates as the state Department of Corrections and Rehabilitation had forecast.

The seriousness of the realigned population's criminal backgrounds was also unexpected and remains probation officers' most serious challenge. This issue has caused the most controversy throughout all the agencies: the state had indicated that only *non-violent* offenders would be placed under local supervision, yet a large number of AB 109 offenders have prior convictions for violent crimes. A recent analysis by University of California Irvine (UCI) researchers found that released prisoners diverted to county probation/PRCS supervision were *higher risk* than those retained on state parole supervision—exactly the opposite of Realignment's intent.<sup>61</sup> The UCI report concludes, “[C]ounties are receiving some of the most criminally active offenders in the state . . . .”<sup>62</sup>

County officials in the larger counties are feeling the burdens most intensely. Los Angeles (LA) County, for example, operates the largest probation population in the world. Prior to AB 109, LA County was supervising more than 80,000 probationers. AB 109 added about 18,400 PRCS adult felons to LA Probation's caseload in the first two years of Realignment.<sup>63</sup> LA Chief Probation Officer Jerry Powers reported that according to their LS/CMI risk assessment, 67% of the offenders who have been sent to LA Probation by the State for PRCS/county supervision score high risk, and just 3% score low risk.

As LA County Assistant Chief Probation Officer Margarita Perez told the *Los Angeles Daily News*:

This includes offenders with serious, violent and/or sex offenses in their backgrounds, gang members, offenders with serious mental health issues, and offenders who have served prison terms in addition to the ones for which they were released under Realignment.

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<sup>61</sup> JULIE GERLINGER & SUSAN TURNER, UNIV. OF CAL., IRVINE CTR. FOR EVIDENCE-BASED CORR., CALIFORNIA'S PUBLIC SAFETY REALIGNMENT: CORRECTIONAL POLICY BASED ON STAKES RATHER THAN RISK 7 (rev. Dec. 2013), available at <http://ucicorrections.seweb.uci.edu/files/2014/01/CAs-Public-Safety-Realignment-Correctional-Policy-Based-on-Stakes-Rather-than-Risk.pdf>. The researchers found proxy-PRCS offenders—those sent to the counties for supervision—had *lengthier* criminal records and a *higher* percentage of prior prison commitments for “serious” and/or “violent” convictions when compared to those retained by the state on traditional parole (i.e., proxy-state parolees). The proxy-PRCS offenders had an average of five prior California prison commitments. And, according to the California Static Risk Assessment (CSRA), 59% of the proxy-PRCS were in the “high risk” to recidivate category, and 23% of these high risk offenders were considered “high violent” by the CSRA instrument. Among the proxy-state parolees, 48% are in the “high risk” category and over half are in the low- and moderate-risk groups. Importantly, the UCI analysis also shows that the proxy-PRCS probationers have serious needs: 5% are required to register as a sex offender, and 11% have a “mental health flag” in their CDCR prison records. CDCR's definition of “prior record” only includes prior commitment to a California prison, and excludes prior commitments to county jail, or to a federal or out-of-state prison.

<sup>62</sup> *Id.* at 13.

<sup>63</sup> CNTY. OF L.A., PUB. SAFETY REALIGNMENT TEAM, PUBLIC SAFETY REALIGNMENT: YEAR-TWO REPORT 2 (2013), [http://ccjcc.lacounty.gov/LinkClick.aspx?fileticket=GZ99E\\_ljoHk%3d&portalid=11](http://ccjcc.lacounty.gov/LinkClick.aspx?fileticket=GZ99E_ljoHk%3d&portalid=11).

Many have very lengthy criminal histories and multiple convictions and/or arrests.<sup>64</sup>

Los Angeles Probation recently reported that the one-year recidivism rate—defined as a return to custody based on a new arrest, conviction, revocation, or flash incarceration (a jail stint of ten days or less imposed for violating probation)—for offenders released from prison to Los Angeles County on PRCS was 60%.<sup>65</sup>

Of course, the State says it provided Los Angeles County with nearly \$600 million in the first two years to help deal with the situation—increasing LA Probation’s annual operating budget by about 35%. The Department is in the process of hiring 360 new officers to bring officers’ caseloads down, but there are still seventy-two offenders for every one probation officer—arguably too high to closely monitor such high-risk offenders. The Department is also in the process of arming more of its probation officers to handle these more serious offenders, along with increasing funding for drug and mental health treatment. Chief Powers is making the unprecedented move to more than triple the number of his armed probation officers, from thirty to one hundred. “It is a natural response to an ever increasing number of higher threat individuals and the operations that go along with supervising them,” Powers said in our interview.

Central to the larger issues about Realignment’s impact on probation going forward is how this infusion of more serious offenders will change the character and culture of the quasi-rehabilitative role that probation has historically played—and AB 109 funding was supposed to strengthen. Historically, probation has been designed to be the supportive stage of the criminal justice process, relative to arrest, trial, and incarceration. How can a probation officer engage in “motivational interviewing” (a technique to create a greater bond between officer and client, and a key component of evidence-based practices) when the probation officer has a weapon strapped to his or her waist?

Compounding these problems, offenders were shifted to county responsibility well before probation departments and service providers had sufficient staff and programs in place to treat them. Hiring new probation staff was one challenge, given cumbersome county government requirements involving a lengthy process of advertising, interviewing applicants, checking references, and giving preference based on seniority. Similar delays slowed the signing of contracts for services, particularly with agencies that were not already part of the county governance structure or community providers that did not have existing contracts with probation, such as electronic monitoring companies. The accelerated timeframe also deprived counties of time to as-

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<sup>64</sup> Christina Villacorte, *Probation Arms More of Its Officers to Cope With Realignment*, L.A. DAILY NEWS (May 2, 2013, 9:00 PM), <http://www.dailynews.com/general-news/2013-05-03/probation-arms-more-of-its-officers-to-cope-with-realignment>.

<sup>65</sup> CNTY. OF L.A., PUB. SAFETY REALIGNMENT TEAM, *supra* note 63, at iii.



ness programs described as anchored in evidence-based practices or, once funded, to monitor the quality of services being delivered.

Almost two years into Realignment, probation chiefs said such pressures were easing, and many felt confident in the quality of programs taking root in their counties. In fact, the California State Association of Counties highlighted eleven counties in 2013 that are using their AB 109 funding to help offenders succeed.<sup>66</sup> Examples include Ventura County's Specialized Training and Employment (STEPS) program that helps offenders connect with local employers, Merced County's "All Dads Matter" program which teaches fathers parenting skills and how to reconnect with their children, and Marin County's Recovery Coaches effort, which identifies community mentors to assist offenders with drug, alcohol, and mental health needs. These and dozens of other new and innovative programs are being made possible by AB 109 funding and, over time, will undoubtedly serve as incubator sites and pilot tests for scaling up of successful interventions.

Even the best programs, however, cannot produce results if offenders are not participating in them, and, across the state, the lack of split sentencing remains a problem. Split sentencing is a jail term followed by probation supervision. AB 109 allows judges to have significant leeway to impose any distribution of incarceration and supervision that they deem appropriate. A recent study found that rates of split sentencing varied greatly across counties, but that statewide 75% of all offenders in the first year of Realignment did not receive a split sentence.<sup>67</sup> One of the core principles of evidence-based practices is the combination of custody *and* aftercare. Without split sentencing, probation officials have no ability to work with offenders or monitor their compliance. If that pattern persists, recidivism rates will remain high. Aware of that likelihood, probation officials support legislative changes that would mandate split sentencing, particularly for the more serious realigned felons most in need of supervision and services.

### B. Public Defenders and Prosecutors

Both district attorneys and public defenders believed Realignment had given defense attorneys more leverage in their negotiations with prosecutors, but beyond that issue, they did not agree on much in our interviews. Public defenders, who provide legal representation for indigent defendants, supported Realignment as a long-overdue course correction for a system that relied far too heavily on punitive approaches, especially incarceration. By taking prison off the table for lower-level offenders, Realignment gives public defenders the ability to secure acquittals or obtain appropriate community

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<sup>66</sup> See *Spotlighting Our Counties' Best Practices*, CAL. STATE ASS'N OF CNTYS., <http://www.csac.counties.org/2013-county-innovation-videos> (last visited Apr. 15, 2014).

<sup>67</sup> SARAH LAWRENCE, STANFORD CRIMINAL JUSTICE CTR., *MANAGING JAIL POPULATIONS TO ENHANCE PUBLIC SAFETY: ASSESSING AND MANAGING RISK IN THE POST-REALIGNMENT ERA 17* (2013), available at <https://www.law.stanford.edu/sites/default/files/child-page/440504/doc/slspublic/Paper%20on%20jail%20mgmt%20July%202013.pdf>.

sanctions for more of their clients. They believe the state's high recidivism rate was caused by its high incarceration rate and that Realignment will result in better outcomes, particularly for low-level drug crimes.

Despite being pleased with the increased use of Day Reporting Centers, specialized courts, and other community alternatives flourishing under Realignment, public defenders did confess some concerns. The first involved the infrequent use of split sentences, a reflection of many defendants' desire to do flat jail time. Aware that the jails are crowded, offenders know they will be released after doing a fraction of their sentence, and thus avoid further monitoring and the probation conditions that go along with it. Several public defenders were worried, too, about the long-term implications for recidivism reduction if offenders continue to eschew probation in favor of straight time. They want their clients in programs that help them confront their criminogenic problems and reduce the chance they will reoffend, but defendants tend to view things from a more short-term perspective.

Public defenders also identified a chasm between the ideal of Realignment and its reality in many counties, noting that treatment was either unavailable or not intensive enough for the most serious offenders. All of those interviewed agreed the most critical needs were services for sex offenders and the mentally ill, as well as housing and crisis beds.

Finally, public defenders said they lacked sufficient resources to handle their increased workload post-AB 109. Already stretched thin by oversized caseloads, public defenders have been overwhelmed by new responsibilities, mostly undertaken without sufficient new funding under Realignment.

As for prosecutors, they seemed less supportive of Realignment than any other group of stakeholders. While they expressed a willingness to work within the new framework, and acknowledged occasional feelings of cautious optimism, they also shared a strong sense of frustration throughout our interviews. Among their misgivings was the perception that taking prison "off the table" for some very serious, repeat offenders had resulted in less deterrence, less incapacitation, and ultimately less public safety. The police arrest, the detectives investigate, the district attorney files and makes the case, the judge passes sentence, and then, under Realignment, the final outcome of this tremendous resource expenditure is that the offender may get a very short stint in county jail, the prosecutors lamented. Moreover, crowding is forcing early releases from jail. Riverside County Sheriff Stan Sniff said 7,000 inmates were released early in 2012 due to a lack of beds. One prosecutor likened it to a "get out of jail free card" and another said felons were increasingly in a "zone of no consequences." This sense of a poor sentencing payoff was expressed not only by district attorneys but also by police and judges.

Steve Cooley, three-term former Los Angeles County District Attorney, was perhaps the most vocal in his criticism, calling Realignment a "public safety nightmare." Like Cooley, most prosecutors believe that Realignment undermines their ability to keep dangerous offenders off the streets—both newly convicted felons and former parolees. By taking the big hammer of

prison out of prosecutors' hands Realignment has made negotiations more difficult, leaving district attorneys with weaker bargaining positions and forcing them to agree to plea bargains carrying shorter sentences.

Prosecutors cite AB 109's handling of offenders who commit "technical" violations as another key deficiency of the bill. A technical violation of probation or parole is misbehavior by an offender under supervision that is not by itself a criminal offense (e.g., testing positive for drug or alcohol use, contacting a victim, failure to attend treatment). Under Realignment, virtually no technical violator can be returned to prison, a major change from the days when the state parole board sent about 35,000 such violators each year to prison for up to a year.<sup>68</sup> Now, courts must handle the hearings for suspected technical violators, and the most serious penalty is a 180-day jail term, even for those whose backgrounds include serious crimes. As a result, prosecutors said repeat offenders were cycling through the system much more often, and that they must charge serious transgressions as new crimes in order to ensure a dangerous offender receives prison time. Between July 1, 2013 (when the state transferred the revocation process from the state Board of Parole Hearings to the County Superior Courts) and December 20, 2013, there have been over 33,100 parole violations.<sup>69</sup> Out of these violations, only 4,000 (12%) have resulted in a parole petition to the Court requesting revocation to state prison.<sup>70</sup> All other technical violations (29,000 as of January 2014) must be handled locally. Some prosecutors wondered whether Realignment would turn out to be a Faustian bargain, a deal done for present gain without regard for future costs or consequences.

While all prosecutors noted shortcomings of AB 109, some also believe it can spawn needed change and innovative strategies. San Francisco District Attorney George Gascón says Realignment has freed him up to accomplish things not possible under the old state-dominated correctional system. Realignment, he said, challenges those in the criminal justice system to think differently and find new policy solutions to hold offenders accountable and help reduce recidivism. A key virtue of Realignment rests on classic economics: it requires counties to internalize the costs of conviction and sentencing made at the county level—costs previously externalized on state prisons and parole agents. Gascón created a new position, an Alternative Sentencing Planner, to help prosecutors determine which punishment best fits offenders. He also created California's first-ever county Sentencing Commission, which analyzes sentencing patterns and outcomes and will suggest sentencing changes to enhance public safety and offender reentry.

In Los Angeles, the newly elected District Attorney, Jackie Lacey, also expressed a moderate view of Realignment. While acknowledging the serious challenges in the sprawling county, Lacey said, "We've run out of room

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<sup>68</sup> The only exception is that individuals released from prison after serving an indeterminate life sentence may still be returned to prison for a technical parole violation.

<sup>69</sup> E-mail from Dan Stone, Dir. of Dep't of Adult Parole Operations, Cal. Dep't of Corr. & Rehab., to author (Dec. 20, 2013) (on file with author).

<sup>70</sup> *Id.*

at the state prisons. We have run out of room at the county jail. . . . Let's peel the lower-risk people off and save room for people who are very dangerous.”

### C. Police

Police officers walking the beats in cities across California had few positive comments about Realignment. They considered it an unfunded state mandate, imposed on them at a time when they were already facing budget cuts that had led to officer layoffs and expanded obligations. Moreover, unemployment remains high and the fiscal crisis that began in 2008 forced budget cuts in California's social services—the very services offenders need. As Sacramento Police Chief Rick Braziel put it:

Sacramento had a three-year reduction in crime, but now we've seen a 21 percent increase in violent crime—from assault with a deadly weapon all the way up to homicide—compared to last year. . . . We don't see that trend changing, and we expect it to get worse as we see more and more prisoners getting out without supervision, without services, and without jobs. Even if a released prisoner wants to turn his life around, there's no support system.<sup>71</sup>

California's long-term crime decline is reversing, and police said Realignment is to blame. During our interviews, police continually warned of crime increases, and academic studies now confirm their views. A recent study by the nonpartisan Public Policy Institute of California (PPIC) found that crime rates increased significantly during the first year of Realignment (from 2011 to 2012). Property crime continued to drop nationally, but in California it rose nearly 8%, and California's property crime increases were higher than the increases in states whose crime trends were similar to those of California before Realignment.<sup>72</sup> Violent crimes in California also increased by 3.2% in the first year after Realignment, but that increase closely tracks national trends and closely matches the rate of increase experienced by other states that had similar crime rates to California before Realignment. The report finds there is “robust evidence that realignment is related to increased property crime. . . . In particular, we see substantial increases in the number of motor vehicle thefts, which went up by 14.8 percent between 2011 and 2012.”<sup>73</sup> Police said they did not need an academic study to tell them what they already knew: more criminals are on the streets and crime is rising as a result.

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<sup>71</sup> POLICE EXEC. RESEARCH FORUM, THE EARLY RELEASE OF PRISONERS AND ITS IMPACT ON POLICE AGENCIES AND COMMUNITIES IN CALIFORNIA 21 (2011), available at <http://ric-zai-inc.com/Publications/cops-p216-pub.pdf>.

<sup>72</sup> MAGNUS LOFSTROM & STEVEN RAPHAEL, PUB. POLICY INST. OF CAL., PUBLIC SAFETY REALIGNMENT AND CRIME RATES IN CALIFORNIA 4 (2013), available at [http://www.ppic.org/content/pubs/report/R\\_1213MLR.pdf](http://www.ppic.org/content/pubs/report/R_1213MLR.pdf).

<sup>73</sup> *Id.* at 2.

In addition to coping with rising crime, police said they now have fewer options to control offenders' behavior. When an arrest is made in some counties, offenders are quickly released due to jail crowding. From the police point of view, this means officers have invested valuable resources and completed abundant paperwork with little perceived benefit. Police expressed frustration not only with newly convicted felons being sentenced to jail and promptly set free—"they beat me home," one officer said—but also with the handling of parole violators, who now face few consequences for breaking supervision rules. Police said offenders appeared to be getting bolder as the penalties grew weaker. The revolving door of state prison has become the revolving door of county jail—and it swings faster.

Municipal police agencies provide service to more than three out of four Californians, and their officers make almost two-thirds of all felony and misdemeanor arrests in the state. Despite the importance and reach of these local crime fighters, the potential impacts of Realignment on policing were not well examined by planners, and police departments have not been fully compensated for the extra work AB 109 requires of them. Struggling to cope, many police officers expressed anger and said their concerns had been overlooked.

Specifically, they said Realignment threatened recent progress made through community policing and other problem-solving techniques designed to proactively address crime—strategies they believed had led to California's crime decline over the past few decades. Stretched thin, police departments reported that they can no longer engage in such efforts and, in some cases, no longer respond to calls reporting lower-level crimes.

By far the largest concern expressed by police was the need for a state-wide, centralized database of all the newly-realigned offenders. In the past, an officer who stopped a suspect could check the state parole database quickly to determine his status—and conduct a legal search if the suspect was a parolee. That extra authority often meant the difference between a routine traffic ticket and a drug bust. Now, officers lack that tool, which they said had seriously eroded their effectiveness in controlling crime and apprehending criminals.

#### *D. County Sheriffs*

California's sheriffs are responsible for running the county jails, but their role under Realignment extends far beyond custody and basic crime control. As jails have become more crowded with AB 109 offenders, and as both funding and the need for community alternatives have increased, sheriffs have become central figures in offender treatment. In some counties, they are making decisions about who should remain in custody, who should be released pre- and post-conviction, and what community services and sanctions an offender receives, both initially and in response to a technical violation of probation or parole. Many sheriffs are even running their own work release and electronic monitoring programs, very similar to the pro-

grams run by probation. Ironically, if the state had given the same discretionary release authority and “relief valve” to prison officials to control inmate populations, California might have avoided the *Plata* litigation that ultimately led to AB 109.

Sheriffs were divided over the impacts of Realignment. Despite their concerns about glitches and unanticipated consequences, many sheriffs acknowledged that the old system was not working well, that the revolving door between jail and prison was not protecting the public, and that a new approach was needed. As such, sheriffs said they were working more closely than ever with probation departments to develop alternatives to custody so they can keep jails at a constitutionally acceptable capacity. They also are joining forces to create a fuller menu of appropriate treatment, following the principles of evidence-based practices. Sheriffs said they understand the potential benefits of community-based sanctions and services. Orange County Sheriff Sandra Hutchens echoed what we heard from many, noting that, “they are coming home anyway . . . they are our citizens . . . we have seen them before . . . let’s see if we can’t do something different this time.” Collaborating with probation, some sheriffs have created a full continuum of sanctions, ranging from fines to county jail and onto electronic monitoring and discharge. Some questioned this expanded role for law enforcement, but others seemed enthusiastic about the countywide approach.

One key challenge faced by sheriffs is the deterioration of jail conditions as populations swell to accommodate diversions from state prisons. In the quarter preceding the start of Realignment, the average daily jail population was 71,293 but by yearend 2012 it reached 80,136, an increase of approximately 11%.<sup>74</sup> California’s large and abrupt change in jail inmates has impacted national statistics. The increase in the national jail population between midyear 2011 and midyear 2012 was 8,923 inmates. According to the U.S. Bureau of Justice Statistics’ estimates, 85% of that increase is attributable to California jails.<sup>75</sup>

Because jails are typically not well equipped to house people for extended periods, the increase in individuals serving long sentences in jails was a concern of many stakeholders. In interviews with public defenders, the one consistent concern was that some clients were suffering in deplorable jailhouse conditions. In particular, some offenders needing mental or medical care have waited weeks before receiving any treatment. Indeed, in talking with jail inmates about such conditions, we found a surprising twist: many offenders, particularly those facing long terms, would prefer to do their time in prison. One reason is that in jails plagued with overcrowding, sheriffs often feel the only option to assure inmate safety and

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<sup>74</sup> See TODD D. MINTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2012 2 fig.2 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>.

<sup>75</sup> See *id.* at 1–3 (calculated from figures 1–3). The report notes, “Excluding the increase in California’s jail population, the nationwide jail population would have remained relatively stable . . . .” *Id.* at 1.

prevent violence is to keep more inmates in lockdown. In the most crowded jails, they are also converting any available space to house inmates. Santa Barbara County recently released a report showing its jail was so cramped for space that part of the jail's basement was converted into inmate housing to provide fifty more beds.<sup>76</sup> As a result of jail crowding, fewer offenders have access to rehabilitation programs and extreme idleness is a problem.

Many sheriffs noted an increase on inmate-on-inmate assaults since AB 109. A recent Associated Press study confirmed their impressions.<sup>77</sup> That study found that "county jails that account for the vast majority of local inmates in California have seen a marked increase in violence since they began housing thousands of offenders who previously would have gone to state prison." They looked at data from the ten counties that account for 70% of California's total jail population and found a surge in jail violence (both toward other inmates and staff) in the year following AB 109. Los Angeles County, the largest jail system in the U.S., experienced a 44% increase in inmate-on-inmate assaults last year compared to an increase of 21% in its inmate populations.<sup>78</sup>

Simultaneously, CDCR saw a 15% drop in inmate-on-inmate assaults within state prisons, while attacks on employees dropped 24% as the prison population dramatically declined.<sup>79</sup> In Fresno County, where inmate-on-inmate fights have increased 48% since Realignment, Fresno County Assistant Sheriff Tom Gattie observed, "The violence is just being transferred to the local facilities from the state system."<sup>80</sup> Many sheriffs observed that Realignment makes the county jail system more like a prison, with more serious inmates serving longer than a year in a facility not built for that purpose.

Orange County also reported a marked increase in contraband and gang activity in the jail since Realignment began, and a recent Grand Jury Report confirms these impressions.<sup>81</sup> County officials' hypothesis is that the sophistication of the AB 109 population accounts for the increase. They believe offenders are intentionally getting "flash incarcerated" (i.e., ten days jail time for technical violations) so they can enter the jail, deliver contraband, and connect with gang members, knowing that they will be released in a number of days.

Some of these conditions seem startlingly familiar, closely mirroring the problems that produced the successful claim in *Plata* that state prison conditions violated the Eighth Amendment. Has Realignment simply moved

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<sup>76</sup> Alex Kacik, *The \$140 Million North County Jail Question*, MISSION & STATE (Feb. 6, 2014), <http://www.missionandstate.org/features/140-million-north-county-jail-question>.

<sup>77</sup> Don Thompson, *California Jail Violence Rises on Reforms*, ASSOCIATED PRESS (Nov. 28, 2013, 6:06 PM), <http://bigstory.ap.org/article/ap-exclusive-calif-jail-violence-rises-reforms>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 2012–2013 ORANGE CNTY. GRAND JURY, DETENTION FACILITIES REPORT: PART I - ADULT JAILS 9 (2013), [http://www.ocgrandjury.org/pdfs/2012\\_2013\\_reports/OCGJ-Report-Adult-Jails062713.pdf](http://www.ocgrandjury.org/pdfs/2012_2013_reports/OCGJ-Report-Adult-Jails062713.pdf) (noting that jail criminal reports for drug violations and assaults have increased dramatically in the two years since AB 109).

these constitutional violations from the state prisons to the county jails? Could the health care problems that led to *Plata* morph into county-level versions of the state problem? Currently, thirty-seven of California's fifty-eight county jails are operating under either a self-imposed or court-ordered population cap. Given the success of the *Plata* litigation, a surge of county-level Eighth Amendment suits is likely to emerge. The Prison Law Office has already filed class action lawsuits seeking to remedy Eighth Amendment violations in the Fresno County and Riverside County jails. Sheriffs are trying to intervene early and address jail conditions before the courts become involved.

New funding provided by the State (AB 900) will help, providing twenty-one of California's fifty-eight counties with dollars for jail construction—enough to add about 10,926 beds.<sup>82</sup> But construction takes time, and no new jails will be completed before 2015.

Some projections show that by year-end 2017, California will have nearly the same number of inmates in correctional custody (jail *plus* prison) as it did before Realignment.<sup>83</sup> If that proves true, Realignment will not have reduced California's overall incarceration rate but will have only changed the *place* where sentences are served (i.e., jail instead of prison). But the shift from prison to jail may still be a positive development if jails are better able to deliver locally-based treatment programs and connect offenders to family and jobs, bringing down their recidivism rates. Progressive sheriffs are using their state jail construction funds to build a different type of jail, one that has space for more programming with an eye towards reentry planning. Santa Barbara County Sheriff Bill Brown, for example, is building a new \$80 million state-funded jail. But instead of building a traditional brick-and-mortar jail, he is using this as an opportunity to rethink how the physical space can better be used to foster offender reentry. He is considering a Reentry Pod where the last months of jail are spent learning job and living skills, and reconnecting with family and community organizations that can assist after release.

Meanwhile, many sheriffs have become highly creative in managing their release authority under Realignment, using risk assessments, and operating their own work furlough programs, electronic monitoring systems, and day reporting centers. Sheriffs also said they are using good time credits and flash incarceration for probation violators. By necessity, their expanded duties under Realignment have turned these elected law enforcement leaders into treatment providers, probation managers, and reentry coordinators. For sheriffs in counties rich in resources and with jail beds to spare, Realignment has been an opportunity to expand and create innovative programming, ap-

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<sup>82</sup> Magnus Lofstrom and Brandon Martin, *Just the Facts: California's County Jails*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (June 2013), [http://www.ppic.org/main/publication\\_show.asp?i=1061](http://www.ppic.org/main/publication_show.asp?i=1061).

<sup>83</sup> QUAN, *supra* note 59.



ply evidence-based practices to reduce recidivism, and absorb a population that they firmly believe is best managed at the local level.

### *E. Judges*

Judges' opinions regarding Realignment varied widely. All of those interviewed voiced frustration that AB 109 was poorly drafted, was undergoing continual revisions, and, given its 800-page length and multiple amendments, required extensive judicial training. Most judges agreed that it would have made more sense to test Realignment on a smaller scale before rolling it out statewide, especially given the lack of time for preparation and planning. Summing it up compellingly, Los Angeles County Judge David Wesley said adjusting to Realignment was "like trying to change the tires on the bus while the bus is moving." All judges also expressed concerns about the added workload under AB 109, particularly given their new responsibility for nearly all parole, probation, and PRCS revocation hearings.<sup>84</sup>

Some judges were strongly opposed to Realignment's new mandates, saying that instead of individualizing sentencing, as intended, AB 109 had done just the opposite. While the judge imposes the final sentence, the actual sentence served is now more a function of jail capacity. Other judges, particularly those accustomed to drug courts and other collaborative courts, shared probation's more positive view of Realignment.<sup>85</sup> These judges have experience working with probation and community treatment specialists to provide services to offenders with mental health, substance abuse, and domestic violence issues. They have seen evidence that investing in a holistic and intensive community approach, one that is more patient with relapses and not as quick to incarcerate, holds promise.<sup>86</sup> Santa Clara County Judge Steve Manley, a highly respected jurist who presides over drug, mental health, and veteran courts, said Realignment opens the door for judges to not only impose sentences but to actively manage offenders' treatment and compliance post-sentencing. Judge Manley said the coercive power of the court can play a significant role in offender recovery, exerting not just a punitive force but also a therapeutic one.

But collaborative courts are expensive, and not all judges favor them. Some said their counties could not afford to spend so much money on such a

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<sup>84</sup> As of July 1, 2013, the state Board of Parole (BPH) is only responsible for parole considerations for lifers, medical parole hearings, mentally disordered offender cases, and sexually violent predator cases. *Board of Parole Hearings*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/BOPH> (last visited Apr. 15, 2014).

<sup>85</sup> "Collaborative courts—also known as problem-solving courts—[promote accountability by] combin[ing] judicial supervision with rehabilitation services that are rigorously monitored and focused on recovery to reduce recidivism and improve offender outcomes." *Collaborative Justice Courts*, CAL. JUDICIAL BRANCH, <http://www.courts.ca.gov/programs-collabjustice.htm> (last visited Apr. 15, 2014). Such courts are distinguished by direct interaction between defendants and judge, and judicial oversight of the treatment process.

<sup>86</sup> For a review of the research supporting this promising approach in California, see *Collaborative Justice Courts: Research*, CAL. JUDICIAL BRANCH, <http://www.courts.ca.gov/3082.htm> (last visited Apr. 15, 2014).

small part of their caseloads, noting that serious criminal work accounted for less than 15% of the total cases that came before them.<sup>87</sup> In addition, some judges said their counties simply do not yet have the community-based resources to make such courts work, rendering Realignment appealing in principle but difficult to execute in reality.

One concern many judges shared was the lack of post-custody time and supervision that they could impose on an offender. They worried that they lacked sufficient discretion to ensure that criminals are both properly incapacitated and properly monitored when released. Some judges said the limitations of post-release community supervision do not allow enough time to change criminal behavior and reduce recidivism. For many counties, this situation has become a catch-22: Judges do not have faith in probation to deliver effective programs, so they sentence more and more inmates to straight time (i.e., jail without post-custody programs or supervision). As more straight-time offenders recidivate, probation may be blamed for ineffective programming. But research shows that probation is most effective when it combines custody and aftercare (i.e., split sentencing),<sup>88</sup> and probation officials are not afforded that opportunity when offenders are sentenced to straight time.

Finally and importantly, judges pointed out that while AB 109 was designed to give judges *more* discretion and more flexibility to individualize sentencing, taking into account risk factors and community alternatives, it has not done that. Rather, AB 109 has undermined their discretion and shifted it outside of the courtroom and into the jails.

Most of the judges we interviewed felt that judicial discretion has been reduced while the sheriff's discretionary authority has increased. Some judges said this increased authority of sheriffs threatens the concept of independent and impartial judges, and raises questions about due process and the separation of powers.

#### F. *Victim Rights and Safety*

Virtually every judge and prosecutor we spoke with was concerned about how victims were faring under AB 109.<sup>89</sup> California has long been a national leader in the field of victim rights, and voters further expanded these rights in 2008 when they approved Marsy's Law, the California Vic-

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<sup>87</sup> For FY 2011–12, almost 8.5 million cases were filed in California's Superior Courts, with approximately 243,000 felony cases and one million misdemeanor cases. Together, these comprise roughly 15.2% of total Superior Court filings. See JUDICIAL COUNCIL OF CAL., 2013 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2 (2013), available at [www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf](http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf).

<sup>88</sup> For a review of the research on the importance of aftercare services, see STEVE V. GIES, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *The Need for Aftercare*, in JUVENILE JUSTICE PRACTICE SERIES: AFTERCARE SERVICES (2003), available at <https://www.ncjrs.gov/html/ojjdp/201800/page1.html>.

<sup>89</sup> For a fuller discussion of these issues, see generally Jessica Spencer & Joan Petersilia, *California Victims' Rights in a Post-Realignment World*, 25 FED. SENT'G REP. 226 (2013).

tims' Bill of Rights Act of 2008.<sup>90</sup> It created seventeen distinct rights for victims, including the right to restitution from the offender, to confer with prosecutors, to receive notice of *any* proceedings related to the case (bail hearings, pretrial release hearings, plea agreement hearings), and to be heard at sentencing. Victims also have a right to be notified when their offender is up for parole or released from jail or prison custody. The state prison system had a rather well developed statewide system to notify victims of their offenders' release and revocation; it was relatively easy with just one statewide system. The state computerized system recorded victim notification wishes and contact information. Judges say it is not clear how these victim rights are being protected post-Realignment. But offenders released from prison to county-level supervision are supervised by local law enforcement agencies, and CDCR no longer has jurisdiction over any person who is released from prison to county-level supervision. All of these procedures need to be recreated at the county level, and they have not been to date. The fifty-eight different county systems have little experience handling these issues, which may be allowing victim notification to fall through the cracks.

Judges also often order victim restitution, no contact restraining orders, and other special probation or parole terms that are designed to protect victim safety. As a greater number of offenders get discharged from supervision, it is unclear who is responsible for collecting restitution or assuring compliance with restraining orders. Crimes that involve fraud, property damage, or injuries caused by drunken driving, for example, often include payments to victims.

The state's prisons had a seamless system for siphoning 50% of the money out of an inmate's prison account—money earned from a prison job or deposition by family or friend—to pay victims for their losses.<sup>91</sup> But now that the N3s are serving their time in county jails, the jails do not have either the in-custody work programs or the administrative structure to collect restitution. At first, county jails did not even have the authority under the Realignment law to take prisoners' money for restitution, a loophole that took more than a year to close. Corrective legislation went into effect on January 1, 2013, giving the counties the authority to collect money from jail inmates,<sup>92</sup> but with few work programs, unclear administrative procedures, and sheriffs preoccupied with crowding, our research found that collecting restitution often does not happen. If jailed inmates are released without any probation supervision, there is no mechanism to collect victim restitution when the offender returns to the community. Judges and prosecutors told us that a critical oversight of AB 109 was that no one addressed these victim issues.

There is even more urgency to address victim issues now that judges have taken over revocation hearings. Victims of alleged violations have a

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<sup>90</sup> See CAL. CONST. art. I, § 28.

<sup>91</sup> Gillian Flaccus, *Realignment Law Jeopardizes Victim Compensation*, SAN JOSE MERCURY NEWS (Apr. 27, 2013, 11:38 AM), [http://www.mercurynews.com/breaking-news/ci\\_23122117/Realignment-law-jeopardizes-victim-compensation](http://www.mercurynews.com/breaking-news/ci_23122117/Realignment-law-jeopardizes-victim-compensation).

<sup>92</sup> CAL. PENAL CODE § 2085.5(d) (2014).

state constitutional right to attend hearings and present testimony. California law allows victims to provide victim impact statements and requires judges to consider those statements in making sentencing decisions.<sup>93</sup> But judges said they are not sure who is giving victims notice of such hearings in case they wish to participate. With sheriffs now making jail release decisions more frequently, offenders are often being released without split sentences and without victim notification.

The CDCR had an automated system that allowed victims, family members of victims, or witnesses who testified against the offender to request to be notified of the release, parole hearing, death, or escape of their offender.<sup>94</sup> Under state parole supervision, there was also a statewide database for checking criminals' status on the street. Local police chiefs are apprehensive because there is no similar statewide system for offenders on county probation.

California used to have some of the strongest victim rights of any state, but judges worry that AB 109 is diluting some of these long-fought-for legal rights. A few counties are trying to rectify these oversights; for example, the Calaveras County DA's office is adding a new victims' services program coordinator to its staff. But judges say that California's victim rights are not being upheld under Realignment, and they anticipate litigation in this area.

#### IV. GETTING IT RIGHT: STAKEHOLDER CONSENSUS RECOMMENDATIONS

In just two short years, Realignment has changed the face of California's criminal justice system and everyone agrees that it is here to stay. County stakeholders are basically on board, as they know the previous system was failing on almost every dimension, and that a new approach was needed. Although most thought AB 109 was rolled out too fast and still needs major tweaks, those interviewed endorsed the law's foundation, with counties accepting responsibility for lower-level offenders and the state handling the most serious and violent criminals. Surprisingly, nobody we interviewed said Realignment should be repealed.

But stakeholders felt that Realignment should not merely push state prison ills onto county governments and that the Legislature needed to urgently fix some major flaws. The most commonly recommended changes were to: (1) allow an offender's entire criminal history and risk level to be considered when determining whether the county or the state will supervise a parolee; (2) cap county jail sentences at a maximum of three years; (3) permit certain repeated technical violations (e.g., violations of domestic restraining orders, sex offender restrictions) to be punished with a prison sentence; (4) create a statewide tracking database for offenders under state and

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<sup>93</sup> CAL. PENAL CODE § 1191.1 (2014).

<sup>94</sup> See Office of Victim & Survivor Rights & Servs., *Request for Victim Services (CDCR 1707)*, CAL. DEP'T OF CORR. & REHAB., [http://www.cdcr.ca.gov/Victim\\_Services/application.html](http://www.cdcr.ca.gov/Victim_Services/application.html) (last visited Apr. 15, 2014).

county correctional supervision; (5) collect data at the individual- and county-level to determine what is working and what is not; and (6) require that all felony sentences served in county jail be split between jail time and mandatory supervision, unless a judge deems a split sentence unnecessary.

The Legislature and Governor Brown seem to be listening. In 2013, California State Senator Ted Lieu became particularly concerned with the number of sex offenders who were cutting off their electronic monitoring devices and facing few consequences (since technical violations could not be returned to prison). In explaining the need for new legislation, Lieu said:

An increasing number of California parolees are cutting off their GPS monitoring devices because they're convinced little will happen to them. . . . Cutting off an ankle bracelet is a parole violation, which can incur 180 days in county jail. When you count in the overcrowded county jails and other factors, sometimes they don't serve any time, or sometimes just a few days.<sup>95</sup>

Senate Bill 57 was signed into law by Governor Jerry Brown and requires convicted sex offenders who cut off their court-ordered GPS bracelets to be returned to jail for a minimum of 180 days.<sup>96</sup> SB 57 went into effect January 1, 2014. Of course, such mandatory penalties, while perhaps warranted, could worsen jail crowding.

In January 2014, State Assemblymember V. Manuel Pérez introduced the Realignment Omnibus Act of 2014 (Assembly Bill 1449) to incorporate this study's first three major recommendations.<sup>97</sup> Attorney General Kamala Harris is working with law enforcement officials to establish a statewide offender database and recently launched the California Recidivism Reduction and Re-Entry initiative to disseminate best practices.<sup>98</sup> And on January 9, 2014, Governor Brown released his proposed state budget for 2014-15 and included several of the Realignment changes practitioners were hoping for.<sup>99</sup> According to the *Sacramento Bee*,<sup>100</sup> the budget proposes \$500 million

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<sup>95</sup> Sen. Ted W. Lieu, *Sen. Ted W. Lieu Introduces Plan Making It a Felony for Parolees to Cut Off GPS-Aided Ankle Bracelets* (Jan. 7, 2013), <http://sd28.senate.ca.gov/news/2013-01-07-sen-ted-w-lieu-introduces-plan-making-it-felony-parolees-cut-gps-aided-ankle-bracele>.

<sup>96</sup> SB 57 Electronic Monitoring: Removing or Disabling GPS Device: Offense, 2013 Cal. Stat. ch. 776 (codified at CAL. PENAL CODE § 3010.10 (2013)).

<sup>97</sup> As of March 2014, the Standing Committee on Public Safety is reviewing AB 1449, which would make three changes to California Penal Code § 1170. First, it would allow an offender's full adult criminal history to be considered when determining whether the county or state will supervise a parolee. Second, it would mandate that individuals with a past conviction for a crime eligible for state custody be placed in state custody again, even if the current crime would not require such treatment. Third, it would impose a one-year prison sentence on anyone convicted of two or more serious technical probation violations. See A.B. 1449, 2013-14 Leg., Reg. Sess. (Cal. 2014).

<sup>98</sup> Att'y Gen. Kamala D. Harris, *Attorney General Kamala D. Harris Launches Initiative to Reduce Recidivism in California* (Nov. 20, 2013), <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-launches-initiative-reduce-recidivism>.

<sup>99</sup> See *Governor's Budget 2014-15: Corrections and Rehabilitation*, CAL. DEP'T OF FIN. (Jan. 10, 2014), <http://www.ebudget.ca.gov/2014-15/StateAgencyBudgets/5210/agency.html#addinfo>. The State budget will have hearings in May 2014 before a final vote in summer 2014.

more for jail facilities to ease overcrowding, provides an additional \$100 million for court operations to support the expanded duties of the judiciary under AB 109, and importantly, proposes legislation to require county jail felony sentences to be split between incarceration and mandatory supervision, unless the court finds it in the interest of justice not to do so.

That last item is extraordinarily important. Though AB 109 gives the Courts the power to split sentences, some judges have declined to do so. If passed, this provision creates a right to a split sentence (unless the court makes a special finding), releasing offenders to the supervision of Probation and optimally involving them in rehabilitation programs that will help reintegrate them into the community. To support expanded community supervision, the proposed budget expands funding for mentally ill offenders, and county substance abuse and reentry programs. And to ease the challenges that long-term inmates are posing for sheriffs, inmates sentenced to more than ten years in county jails under Realignment would again serve their time in state prison.

These recommendations and budget adjustments should reduce the burdens Realignment has placed on the counties, and allow them to concentrate on those offenders evidence has shown to be most amendable to evidence-based programs. Most county officials believe Realignment can work—if the state will work with them to tweak the flaws in the original legislation. And now that the Court has given California two more years to fix its prison crowding problem, counties are more optimistic about long-term criminal justice reform.

## V. CONCLUSIONS

Over the two years since Realignment began, California's justice system has changed in ways that are unprecedented in both depth and scope. The reallocation of responsibility across the major components of California's corrections system has been nothing short of remarkable, as thousands of individuals have been shifted from the state's jurisdiction to counties' jurisdictions. Only time will tell whether California's Realignment experiment will fundamentally serve as a springboard to change the nation's overreliance on prisons. It is an experiment the whole nation is watching.

On August 12, 2013, Attorney General Eric Holder delivered the keynote address to the American Bar Association meeting in San Francisco. He announced that the federal government was committed to reducing the nation's bloated prison population. He directed all federal prosecutors to exercise more discretion toward the harsh sentencing of low-level drug crimes. At the time of his speech, 47% of all inmates in the Federal Bureau of Prisons were held on drug offenses. Mr. Holder said, "We need to ensure that

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<sup>100</sup> David Siders et al., *Jerry Brown's Budget Plan Proposes Cautious Spending, Paying Down Debt*, SACRAMENTO BEE, Jan. 8, 2014, <http://www.sacbee.com/2014/01/08/6057902/jerry-browns-budget-plan-proposes.html>.

incarceration is used to punish, deter and rehabilitate—not merely convict, warehouse and forget.”<sup>101</sup> He urged new approaches for the handling of lower-level drug offenders whom he said were “best handled at the local level.” He directed federal prosecutors across the country to develop new guidelines and programs to divert prisoners to community sanctions instead of prisons.

Given that his speech was given in San Francisco, it is surprising that the Attorney General did not use the opportunity to look into the future using California’s experiment in prison downsizing to see how such a program might play out. Just 8.7% of California’s prisoners are now held on drug crimes, down from 20% in 2005.<sup>102</sup> California has cut the number of prisoners in state facilities for drug convictions in half during the last two years.

It is one thing to urge prison downsizing, but such pronouncements will be hugely counterproductive if policymakers act without giving serious thought to how communities will deal with all the offenders who are released. The United States has “downsized” before—just recall the disastrous consequences of the nation’s deinstitutionalization of the mentally ill.<sup>103</sup> It is easy to implement policies of *no*-entry that drive down incarceration rates. California has done that. The much harder challenge is to increase prisoner *re*-entry. California is just starting to work on that.

The criminal justice system is complicated and has a lot of moving parts, and actions in one part of the system can cause unanticipated and harmful effects elsewhere. The stakeholders interviewed here, and the lessons California is learning about the impacts of downsizing the nation’s largest prison system are hugely instructive.

Realignment represents an extraordinary policy shift and opportunity for reform, but the devil will be in the details. It will only produce true and lasting reform if counties are able to make it work. If we fail to listen to these expert “voices from the field,” we will likely misstep. If we listen and follow their on-the-ground experiences and advice, we might just begin—step-by-step, decision-by-decision—to create a criminal justice system that better protects victims, does not overburden taxpayers, and facilitates offender reintegration back into society.

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<sup>101</sup> Att’y Gen. Eric Holder, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

<sup>102</sup> See JAY ATKINSON ET AL., CAL. DEP’T OF CORR. & REHAB., PRISON CENSUS DATA AS OF JUNE 30, 2013 tbl.3 (2013), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/Census/CENSUSd1306.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd1306.pdf).

<sup>103</sup> See E. FULLER TORREY, AMERICAN PSYCHOSIS: HOW THE FEDERAL GOVERNMENT DESTROYED THE MENTAL ILLNESS TREATMENT SYSTEM 87–91 (Oxford Univ. Press 2014).

