

Voices from the Field:

# How California Stakeholders View Public Safety Realignment

Joan Petersilia, Ph.D.

With Sara Abarbanel, John Butler, Mark Feldman, Mariam Hinds, Kevin Jason, Corinne Keel, Matt Owens, and Camden Vilkin

***DRAFT FOR REVIEW AND COMMENTS***

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# Preface

This report summarizes the findings of a Stanford Criminal Justice Center study of the intended and unintended effects of California's 2011 Public Safety Realignment Act, which shifts responsibilities for low-level offenders away from the state system to the local county level. The purpose of the study was to describe, from the viewpoint of county stakeholders charged with implementing the law, what is happening on the ground as Realignment evolves and takes shape across California's 58 counties.

The researchers interviewed police, sheriffs, judges, prosecutors, defense attorneys, probation and parole agents, victim advocates, offenders and social service representatives. Additional findings can be found in:

Jeffrey Lin and Joan Petersilia. "Follow the Money: How California Counties Are Spending Their Public Safety Realignment Funds." *Stanford Criminal Justice Center* (forthcoming, 2013).

Sarah Lawrence. "Managing Jail Populations to Enhance Public Safety: Assessing and Managing Risk in the Post-Realignment Era." *Stanford Criminal Justice Center* (June 2013).

Lisa Quan, Sara Abarbanel, and Debbie Mukamal. "Decarceration through Realignment: Changes in the Correctional System in California, 2004-2012." *Stanford Criminal Justice Center* (forthcoming, 2013).

Robert Weisberg. "Assessing Judicial Sentencing Preferences After Public Safety Realignment: A Survey of California Judges." *Stanford Criminal Justice Center* (forthcoming, 2013).

Jessica Spencer and Joan Petersilia. "Voices From the Field: California Victims' Rights in a Post-Realignment World." *Federal Sentencing Reporter* 25 (2013).

Joan Petersilia and Jessica Greenlick Snyder. "Looking Past The Hype: 10 Questions Everyone Should Ask About California's Prison Realignment." *California Journal of Politics and Policy* 5, no. 2 (2013).

Sara Abarbanel, Angela McCray, Kathryn McCann Newhall, and Jessica Snyder. "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans." *Stanford Criminal Justice Center* (2013).

*DRAFT FOR REVIEW AND COMMENTS*

W. David Ball and Robert Weisberg. "The New Normal? Prosecutorial Charging in California After Public Safety Realignment." Stanford Criminal Justice Center (forthcoming, 2014).

These and other papers are available at Stanford Law School's Criminal Justice Center website, <http://www.law.stanford.edu/organizations/programs-and-centers/stanford-criminal-justice-center-sjcj/california-Realignment>.

The intended audience for these reports includes policymakers, state and local government officials, and others who are interested in understanding or influencing state or federal policy decisions that have consequences for California counties. The reports should also prove useful to legal scholars and criminologists. Our interviews and data provide a window on how law-as-written becomes law-in-action as legal actors implement Realignment in the real world.

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# Abstract

Passage of California's Public Safety Realignment Act (AB 109) initiated the most sweeping correctional experiment in recent history. Launched on October 1, 2011, Realignment shifted responsibility for most lower-level offenders from the state to California's 58 counties. By mid-2013, more than 100,000 felons had been diverted from state prison to county jail or probation.

This report summarizes the results of interviews conducted with California stakeholders responsible for implementing the law. Over the past nine months, Stanford Law School researchers conducted 125 interviews in 21 counties to produce a snapshot of how California is faring under Realignment so far. We talked with police, sheriffs, judges, prosecutors, defense attorneys, probation and parole agents, victim advocates, offenders, and social service representatives. Our goal was to determine how Realignment had influenced their agency's work and what changes they would make to the law.

Our interviews revealed a justice system undergoing remarkable changes, arguably unprecedented in depth and scope. Stakeholders' opinions varied widely, and their comments reflected their role in the system more than the county they represented. Overall, probation officials were the most enthusiastic champions of Realignment, welcoming the momentum the legislation provided their rehabilitation focus. Probation departments have opened day reporting centers, expanded the use of risk assessment tools, and worked hard with community partners to establish quality evidence-based programs for offenders. Public defenders are also optimistic but expressed concerns about the longer county jail terms their clients face and the conditions under which they are served. Conversely, prosecuting attorneys generally gave Realignment negative reviews, lamenting their loss of discretion under the law. Judges expressed mixed opinions, although most were concerned about a loss of discretion and said AB 109 had greatly increased the courts' workload. Law enforcement—both front line police and sheriffs—varied more than any other group in their assessment of Realignment, with their opinions largely influenced by local jail capacity. While most police applauded the spirit of Realignment, including the expansion of local control and treatment options for offenders, all of those interviewed worried about declining public safety. Sheriffs were challenged by overloaded county jails, which in many counties have been strained by a flood of inmates and a tougher criminal population that has increased the likelihood of jail violence. Sheriffs also noted that longer jail stays were challenging their ability to provide adequate medical and mental health care, and that crowding was forcing them to release some offenders early. On the positive end of the spectrum, most stakeholders said Realignment had spawned increased collaboration at all levels of the criminal justice system and a more holistic view of offender management.

In just two short years, Realignment has changed the face of California's criminal justice system and everyone agrees that, like it or not, it is here to stay. Most of those interviewed agreed that California's worst-in-the-nation recidivism rate under the old system was unacceptable, and that a new approach was needed. Although 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. Stakeholders recommended several changes to Realignment, suggesting that the Legislature: (1) allow an offender's entire criminal history 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; and (3) permit certain repeated technical violations to be punished with a prison sentence. Other top concerns related to jail overcrowding, the lack of a statewide offender database for probationers, the disuse of split sentencing, and a lack of funding for evidence-based programming, particularly for mentally ill offenders.

This report presents an overview of Realignment along with our methodology, findings, conclusions, and recommendations. Separate chapters are devoted to Realignment's impact on police, sheriffs and jails, public defenders, district attorneys, judges, and probation.

# Executive Summary

In mid-2011, California embarked on a prison downsizing experiment of historical significance. Facing a U.S. Supreme Court decision ordering the state to reduce its prison population by roughly 25% within two years, Governor Jerry Brown signed the Public Safety Realignment Act (AB 109). Commonly known as “Realignment,” the law shifted responsibility from the state to the counties for certain lower-level offenders and parolees. Felons convicted of “serious,” “violent” and the most aggravated sex offenses continue to serve their time in state prison, but sentences for hundreds of other felonies now must be served through county jail time or probation. Realignment also prohibits virtually all parolees who commit technical violations from being returned to state prison, regardless of their conviction crime or prior record. The county workload pressures created by Realignment cannot be overstated: By mid-2013, more than 100,000 offenders had been diverted from state prison to county control. Moreover, counties now must handle virtually all drug and property crime sentences, which represented 54% of all adults convicted in California in 2010. The Legislature is giving California’s 58 counties more than \$1 billion annually to support Realignment, and encouraging them to invest in locally run, evidence-based rehabilitation programs. Given California’s recent inability to control recidivism despite its enormous investment in imprisonment, policymakers are banking on counties to do a better job.

For a nation seeking new correctional approaches after the costly and arguably unproductive era of mass incarceration, California represents a high-stakes test kitchen. Realignment is anchored in the theory that by managing lower-level offenders in locally run, community-based programs using evidence-based practices, the state will achieve improved public safety outcomes by helping more former felons lead crime-free lives. Will Realignment help the state reduce its 67% recidivism rate, nearly twice the national average? It’s too early to answer that critical question. With this report Stanford University researchers sought to assess the impact of Realignment on county stakeholders during the initiative’s first 22 months (October 1, 2011-August 1, 2013). Our wide-ranging, often surprising findings are based on interviews with 125 staff in municipal police departments, county sheriffs’ departments, courts, prosecutors’ offices, public defender agencies, mental health and victim services agencies, and probation departments. We also spoke with offenders.

## **Findings**

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. 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—as yet unrealized—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, 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, rather than a narrower agency perspective. Realignment also has 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. As such, we must listen to these expert “voices from the field” and continue tweaking AB 109 to ensure those in the trenches get the support they need to make this ambitious law produce results on the ground.

## **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 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 \$90 million—or 25% the total AB 109 allocation—flowing into probation in the first year alone, 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. There are now nearly 25 DRCs across California, virtually all of them receiving some AB 109 funding.

In addition, nearly all probation agencies reported adopting risk/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 has professionalized probation, and allowed 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 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. In Orange County, for instance, officials said they 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 a key challenge. Almost overnight probation caseloads were hardened by the addition of many former prisoners with lengthy histories of crime, mental illness, sex offenses, and substance abuse. The changing character of such caseloads has prompted some probation agencies to arm its officers, a move that has stirred controversy given the quasi-rehabilitative role such officers are expected to play.

Compounding these problems, offenders were shifted to county responsibility well before probation departments and service providers had sufficient staff and programs in place to



handle 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 assess 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.

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. 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. With 75% of all offenders not receiving a split sentence—and hence experiencing no oversight or treatment through probation—“evidence-based programming” really isn’t happening much at all. 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.

## **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 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 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 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. This sense of a poor criminal justice “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 cases and forcing them to agree to plea bargains carrying shorter sentences.

Prosecutors also 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, the California District Attorneys Association pushed clean-up legislation (AB 118) that added about 60 felonies to the prison-eligible category. But prosecutors say many other serious crimes remain punishable only by a jail term, such as commercial burglary, vehicular manslaughter, possession of weapons, identity theft, elder abuse, hate crimes, and human trafficking.

Another key deficiency of AB 109 cited by prosecutors is the handling of offenders who commit “technical” violations. 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>1</sup> Now, courts must handle the hearings for suspected violators, and the most serious penalty is a 90-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.

More generally, prosecutors said that rather than adopting as far-reaching a plan as Realignment, lawmakers instead could have provided state corrections the authority to release lower-risk inmates and place them in community alternatives. Prosecutors also favored another proposal considered by the Legislature before adoption of AB 109, one that would have realigned only those offenders sentenced to 36 months or less in state prison. That proposal used *sentence length*, rather than the *conviction crime*, as the determining factor in realignment, and would have avoided the very long terms now being served in county jails.

While all prosecutors noted shortcomings of AB 109, some also believe it can spawn needed change and innovative strategies. In San Francisco, for example, 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, challenged those in the criminal justice system to think differently and find new policy solutions to hold offenders accountable and help reduce recidivism. 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 at the state prisons. We have run

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<sup>1</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.

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

## **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. Most believed that more criminals are on the streets and that crime has been rising as a result. In July 2013, the California Attorney General's Office released its *Crime in California* report, which confirmed these suspicions. Violent and property crime increased about 3% to 5% between 2011 and 2012.

While scholars say it's too early to link Realignment to an increase in crime, the numbers are creating real problems for some cities—particularly those that had police layoffs before Realignment. Oakland is one of them. In 2010, Oakland laid off 80 officers because of budget cuts, and this year is grappling with a 21% spike in murders and other major offenses. San Jose also experienced an increase in the homicide rate, which reached a 20-year high in 2012.

In addition to coping with rising crime, police said they now had 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 statewide, centralized database of probationers. 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.

## **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 programs 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/Coleman* 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 wasn't 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, noting in interviews 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 through 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 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: In jails plagued with overcrowding, sheriffs often feel the only option to assure inmate safety and prevent violence is to keep more inmates in lock down. As a result, few offenders have access to rehabilitation programs, and extreme idleness is a problem.

Some of these conditions seem startlingly familiar, closely mirroring the problems that produced the successful claim in *Plata/Coleman* that state prison conditions violated the Eighth Amendment. Have we simply moved these constitutional violations from the state prisons to the county jails? Currently, 37 of California's 58 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 AB 900 will help, providing 21 of California's 58 counties with dollars for jail construction—enough to add about 10,811 beds.<sup>2</sup> But construction takes time, and no new jails have yet been completed.

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, apply evidence-based practices to reduce recidivism, and absorb a population that they firmly believe is best managed at the local level. One such county is San Francisco, where jail and post-release systems are considered a model. Before Realignment San Francisco County sent relatively few felons to state prison, so impacts under AB 109 were comparatively minimal. The county jail had excess capacity and its population remains at a historic low. Santa Clara County also has excess jail capacity.

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<sup>2</sup> "AB 900 Jail Construction Financing Program Board of State and Community Corrections Project Status Update—Phases I and II." Board of State and Community Corrections (2013).

Sheriffs in these and other counties blessed with recovering economies, excess bed space and relatively abundant program resources pre-AB 109 are adopting truly innovative approaches that can serve as best practices models going forward. But for those with overloaded jails, Realignment amounts to a stressful scramble to divert, sanction and rehabilitate the inmate population before overcrowded conditions prompt early releases and litigation.

Although population management is a key concern, many sheriffs interviewed said they are even more anxious about the *type* of inmate now housed in local jails, and the length of sentences imposed on those inmates. Jails were never intended nor designed to serve as state prisons, and they are generally not equipped with medical facilities or vocational and rehabilitation opportunities needed for long-term inmates. The California State Sheriffs' Association reported that by February 2013, there were 1,109 jail inmates sentenced to 5 to 10 years in jail, and 44 who were sentenced to more than 10 years. The most common crimes committed by those serving 10 years or more are drug trafficking, although Riverside County sentenced one offender to a 12-year jail term for multiple counts of child abuse.<sup>3</sup> Complicating matters for Sheriffs, jails lack space to segregate vulnerable inmates, a standard practice in state prisons. Consequently, Sheriffs anticipated an increase in jail violence and inmate-on-inmate victimization.

## **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>4</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. Other

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<sup>3</sup> "Letter for Survey of Sheriffs re Long Term Offenders in Jail." California State Sheriff's Association (February 26, 2013).

<http://www.calsheriffs.org/images/SummaryMemoreLongTermSentences021913.pdf>.

<sup>4</sup> After July 1, 2013, the state Board of Parole (BPH) will only be responsible for parole considerations for lifers, medical parole hearings, mentally disordered offender cases, and sexually violent predator cases.

judges, particularly those accustomed to collaborative courts, shared probation's more positive view of Realignment. 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. 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. 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 small part of their caseloads, noting that criminal work accounted for less than 20% of the total cases that came before them. In addition, some judges said their counties simply don't 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 PRCs 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. As more flat 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), 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. In most counties, judicial discretion has been reduced while the sheriff's discretionary authority has increased. Some judges said this increased authority of sheriffs threatened the concept of independent and impartial judges and raised questions about due process and the separation of powers.



One additional concern expressed by every judge interviewed was how victims were faring under AB 109. California used to have some of the strongest victim rights of any state but judges worried that Realignment was diluting some of these legal rights.

## **Recommendations: Where Do We Go From Here?**

Despite the dramatically distinctive experiences unfolding under Realignment in California's 58 counties, several common concerns and suggested revisions emerged from our interviews. The most frequently mentioned suggestions were:

- (1) **Create a statewide tracking database for offenders under probation supervision in the counties.** The change from state-based to county-based supervision of offenders leaving prisons has created an information void for law enforcement officials. There is no statewide or cross-county database of offenders on PRCS, mandatory supervision or probation. Without this tool, officers lack adequate information indicating whether those they encounter on the street are a) entitled to the full range of Fourth Amendment search and seizure protections because they are not under criminal justice supervision or b) a potentially dangerous offender who is under supervision.
- (2) **Allow an offender's criminal history to be considered when determining whether the county or state will supervise a parolee.** Complete adult and juvenile criminal conviction records should be considered when determining if the state or county will supervise an offender leaving prison. Those offenders with extensive prior serious or violent convictions in California or elsewhere should be ineligible for county supervision and required to report to parole. Under Realignment, only the current conviction offense is considered when determining whether inmates leaving prison will be placed on PRCS or parole. As a result, offenders with serious and violent prior convictions—including moderate-risk sex offenders—are reporting to county probation officers. Already shouldering expanded caseloads, these officers are ill equipped to manage such sophisticated offenders. Some counties are so concerned that they are arming their probation officers. While this reaction is logical, it raises potential conflicts with the rehabilitative role probation plays in the criminal justice system.
- (3) **Cap county jail sentences at three years.** County jails were built to house inmates for a maximum stay of one year, but under Realignment sentences are extending well beyond that. Serving a five, seven, or ten-year sentence in a county jail will likely deprive an inmate of adequate mental and medical healthcare, addiction treatment, sufficient recreational time and space, regular visitation, and

other benefits, services and rights that are maintained in state prisons. To meet these needs, county jails would need to overhaul, at a minimum, the medical and mental health provision protocols and facilities they offer. This would require funding that no doubt exceeds what sheriffs' have received under Realignment. Instead, lawmakers should amend AB 109 to cap jail time at three years and send those with longer terms to prison.

- (4) **Impose a prison sentence for certain repeated technical violations.** Pre-Realignment, technical violations of a parolee's terms of supervision could result in a return to prison for up to one year. Now violators are sent only to county jail, and only for a maximum of six months. In counties where the jails are crowded and sheriffs are releasing some inmates early, technical violators may be one of the first groups freed to create room for more serious offenders. This cycle of supervision, violation, brief punishment, and release gives an offender little incentive to comply with supervision rules. Sex offenders, for example, have begun to cut off their electronic monitors and abscond from supervision knowing that the only consequence will be a brief stint in jail. To encourage compliance with supervision conditions, certain repeated serious violations should bring prison time.

## Conclusion

On August 12, 2013, Attorney General Eric Holder delivered the keynote address at the American Bar Association meeting in San Francisco. Holder announced that the federal government was committed to reducing the nation's bloated prison population and directed all federal prosecutors to exercise more discretion toward the harsh sentencing of low-level drug crimes. At the time of his speech, nearly half of all inmates in the Federal Bureau of Prisons were held on drug offenses. "We need to ensure that incarceration is used to punish, deter and rehabilitate," Holder said, "not merely convict, warehouse and forget." He continued by urging new approaches for managing lower-level drug offenders, noting that they were "best handled at the local level." Finally, he directed federal officials to develop guidelines and programs to divert offenders to community sanctions instead of prison.

Given that the Attorney General spoke in San Francisco, it is perhaps surprising that he failed to mention the unprecedented prison downsizing experiment unfolding in California. Just 9% of California's prisoners are now held on drug crimes, down from

20% in 2005.<sup>5</sup> California has cut the number of prisoners in state facilities for drug convictions in half during the last two years. In short, Realignment has completely transformed California's criminal justice system in a very short time, and while opinions about its effectiveness and potential vary dramatically, everyone agrees it is here to stay.

As with any piece of comprehensive legislation, it was impossible to anticipate how Realignment would play out on the ground, and as our interviews demonstrate, AB 109 has caused the gears and levers of the criminal justice system to interact in unpredictable ways, creating some unforeseen results. As highlighted above, the challenges are significant. Without consistent, honest evaluation of the progress and problems by those guiding the ship, Realignment will crash against the rocks, just another failed correctional initiative run aground.

We can avoid that fate, but we must acknowledge—not ignore—the hard realities our counties face in developing effective programs, transforming offender behavior, incapacitating those whose crimes merit it, and, ultimately, reducing recidivism. Only then will California's Realignment experiment fulfill its potential and serve as a springboard to change the country's overreliance on prisons. It is an experiment the whole nation is watching.

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<sup>5</sup> Reese, Phillip. "California drug criminals now half as likely to serve time in state prison." *Sacramento Bee* (April 19, 2013). <http://www.sacbee.com/2013/04/19/5356761/california-state-prison-incarceration.html>.

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# Chapter 1: The Road to Realignment

It has been just over two years since the U.S. Supreme Court affirmed California’s prisoner release 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>6</sup> The Supreme Court declared that “without 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.

## ***Brown v. Plata* and the Mandate to Downsize California Prisons**

The Supreme Court found that California had violated the Eighth Amendment ban against cruel and unusual punishment by providing constitutionally inadequate medical<sup>7</sup> and mental health<sup>8</sup> 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 33 state prisons, but housed more than twice that number in its cells, 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

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<sup>6</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011). California’s Three Judge Panel issued its decision in 2009 addressing two consolidated class-action lawsuits, one filed in 1990 (Coleman), the other in 2001 (Plata). The Court issued its ruling on May 23, 2011. Design capacity generally refers to the number of beds that the California Department of Corrections and Rehabilitation (CDCR) would operate if it housed only one inmate per cell, used single-level bunks in dormitories, and had no beds in places not designed for housing (e.g., gymnasiums). California’s current design capacity is 79,858. So how did the Court reach the 137.5% number? A review of the Court testimony reveals that Joe Lehman, a former corrections director in three states opined that 130% would give prison staff the ability to provide necessary services. A former Texas prison executive also supported the 130% figure. A former Secretary of the CDCR agreed with the 130% figure, and the Federal Bureau of Prisons has long used the 130% of design capacity benchmark. But the state’s 2004 Corrections Independent Review Panel, chaired by former Governor George Deukmejian, came up with a recommendation of 145% of design capacity. After considering all the expert testimony, the three-judge panel concluded that the proper upper bound for the CDCR population with respect to design capacity was lower than 145% but higher than 130%. Averaging the two estimates, the three-judge panel settled on 137.5%. The Supreme Court found that this was a reasonable balance based upon the evidence. Some, including Governor Brown and Justice Kennedy have called the 137.5% of capacity an arbitrary number.

<sup>7</sup> Originally filed as *Plata v. Davis* in 2001. (*Plata v. Davis*, 329 F. 3d 1101 (2003).

<sup>8</sup> Originally filed in 1990. *Coleman v. Wilson*, 912 F. Supp. 1282 (E. D. Cal. 1995).

the State's authority to administer its criminal 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.<sup>9</sup>

Justice Anthony Kennedy, writing for the majority in a 5-to-4 decision, described dismal conditions where prisoners were denied minimal care and suicidal inmates were held in "telephone-booth sized cages without toilets" and prisoners with mental illnesses "languished for months" without access to care of any sort. He wrote:

Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. 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>10</sup>

Justice Antonin 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...The majority is gambling with the safety of the people of California."<sup>11</sup>

The Supreme Court did not actually order prisoner releases, but the impact was the same. Justice Kennedy wrote that, "The order in this case does not necessarily require the State to release any prisoners. The State may comply by raising the capacity of its prisons or by transferring prisoners to county facilities or facilities in other States." Because the order limits the prison population as a percentage of design capacity, it nonetheless has the "effect of reducing or limiting the prison population."<sup>12</sup> Justice Kennedy said 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>13</sup> In 2011, California was facing a daunting \$26 billion shortfall and future estimated annual budget gaps of \$20 billion.

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

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<sup>9</sup> For an excellent review of the legal issues, see Schlanger, Margo. "Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics." *Harvard Civil Rights-Civil Liberties Law Review* 48, no. 1 (2013): 165-216.

<sup>10</sup> Justice Kennedy majority opinion, *Brown v. Plata*, 131 S. Ct. 1910 (2011). <http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf>.

<sup>11</sup> Justice Scalia's dissenting opinion, *ibid.* at 1.

<sup>12</sup> *Ibid.* at 13.

<sup>13</sup> Liptak, Adam. "Justices, 5-4, Tell California to Cut Prisoner Population." *New York Times* (May 24, 2011). <http://www.nytimes.com/2011/05/24/us/24scotus.html>.

capacity in 2007.<sup>14</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 at the time. The initial date for the CDCR to meet this population cap was December 27, 2012. For the first time in the more than twenty-year litigation battle, the courts ordered the CDCR to abide by very specific benchmarks and timetables, and to report their progress back to the Court at six-month intervals. The task was not only daunting; it also represented the largest court-ordered reduction in prison populations ever in the U.S.

The state continued to seek relief from the *Plata* benchmarks, but the courts made just one accommodation, which was to allow the state a six-month extension for meeting the court-ordered population cap. The new and (it appeared) final deadline for state compliance was June 26, 2013. By that time, California was told it could house no more than the 109,805 inmates in its 33 state prisons. California missed the target, housing 132,764 prisoners on June 26, 2013.<sup>15</sup> The Court has threatened to hold the state and Governor Brown in contempt of court for refusing to comply with their orders.

At the time of this writing, 120,027 inmates were housed in the State's 33 adult institutions, which amounts to 147.1% of design capacity.<sup>16</sup> In fact, California's current prison population is at its lowest level since August 1995, when California had 6 million fewer residents than it has today. But even with those steep population reductions, the state will not meet the court-mandated number, as their projections show they will be about 8,5000 above the cap on December 31, 2013.<sup>17</sup> On September 24, 2013, the three-judge panel extended the deadline to achieve the court-ordered population reduction to February 24, 2014.

On April 12, 2013, Governor Brown declared the state's prison system no longer overcrowded. At his press conference, he said:

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<sup>14</sup> See "Monthly Population Report as of Midnight May 31, 2011." California Department of Corrections and Rehabilitation.

[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); "Monthly Population Report as of Midnight August 31, 2007." California Department of Corrections and Rehabilitation.

[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). In 2006, then-governor Arnold Schwarzenegger said conditions in the state's prisons amounted to a state of emergency.

<sup>15</sup> The CDCR prison population figures can be found at: "Three-Judge Court Updates." California Department of Corrections and Rehabilitation (2013).

[http://www.cdcr.ca.gov/News/3\\_judge\\_panel\\_decision.html](http://www.cdcr.ca.gov/News/3_judge_panel_decision.html).

<sup>16</sup> "Defendants' Request for an Extension of December 31, 2013 Deadline and Status Report in Response to June 30, 2011, April 11, 2013, June 20, 2013, and August 9, 2013 Orders." *Brown v. Plata*, 131 S. Ct. 1910 (2011). (September 16, 2013).

<sup>17</sup> *Ibid.*

Since 2006, the inmate population in the state's 33 prisons has been reduced by more than 43,000. We have spent more than a billion dollars to build new health care facilities and hire hundreds of new doctors, nurses and support staff. We are providing constitutional level of care. The Court's population cap is based on an outdated one person per cell concept of design capacity that does not accurately reflect the prison system's true capacity. No other prison system in the country uses this one-inmate-per-cell measurement to determine capacity. With all the additional treatment space California has added, coupled with the dramatic reduction in the inmate population, California's prison system is no longer overcrowded.

The inmates' lawyers contend that we could release thousands of felons into California communities without threatening public safety. That's simply not true. Any further forced reduction of the prison population is unnecessary and unsafe.<sup>18</sup>

On June 28, 2013, Governor Brown asked for an immediate stop to the judge's order to release those additional 10,000 inmates by the end of the year. The State's central argument was that all the lower-risk prisoners (e.g., property and drug offenders) had already been released and that further releases mean letting out violent and dangerous prisoners with a known high probability of recidivism based on the State's own risk assessment tool.<sup>19</sup> But the Court again denied the state. In fact, the court's blistering rebuttal suggests that the Court has lost patience. The three-judge panel expressed frustration with the State's "intransigence," "defiance," "unwillingness to comply," and "repeated failure to take the necessary steps to remedy the constitutional violations in its prison system." The State was ordered to "immediately take all steps necessary to comply with [the] Court's ...Order ...requiring defendants to reduce overall prison population to 137.5% design capacity by December 31, 2013." Failure to take the necessary steps or report on such steps "shall constitute an act of contempt."

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<sup>18</sup> "Fact Sheet: Three-Judge Panel Ruling on CDCR Inmate Population." California Department of Corrections and Rehabilitation (2013). <http://www.cdcr.ca.gov/News/docs/3JP-April-2013/3JP-Fact-Sheet-April-15-2013.pdf>.

<sup>19</sup> On June 28, 2013, the State filed a stay of the release order, arguing that all the lower risk inmates had previously been released and that releasing an additional 10,000 prisoners "raises serious question about public safety when even inmates deemed 'low risk' are released"—citing evidence from the University of California risk assessment showing that even inmates classified as "low risk" recidivate such that 41% are returned to California prisons within three years, and that 11% are such "low risk" offenders have been "rearrested for a violent felony within 3 years of release." But the argument fell on deaf ears, and just a week later on July 3, 2013, the three-judge panel refused to delay its prison release order or timetable. "Defendants' Motion To Stay Three-Judge Court's June 20, 2013 Order Requiring Defendants To Implement Amended Plan Pending Appeal; Memorandum Of Points And Authorities, *Brown v. Plata*." *Brown v. Plata*, 131 S. Ct. 1910 (2011). (June 28, 2013).

On July 10, 2013, Governor Jerry Brown filed a request in the U.S. Supreme Court to delay a federal court order to release any more prisoners. The state presented new evidence of dramatic improvements prison healthcare, citing an Office of the Inspector General (OIG) report that medical care of inmates has improved at the state's prisons since an initial round of inspections in 2011. The OIG report concludes that most prisons' overall medical care scores improved significantly, with all 33 prisons exceeding the 75% minimum overall score. Four of the 33 prisons had overall scores exceeding 85% compliance with standards in 20 different areas of care.<sup>20</sup>

On August 2, 2013, a divided Supreme Court (6-3 vote) refused to grant the stay, and ordered California to proceed with the release of about 9,600 more inmates—nearly 8% of all state prisoners—by December 31, 2013.<sup>21</sup> California now must bring its in-state prison population down to 112,164 prison inmates by the end of the year. The ruling was a major setback for Governor Brown. In a statement, CDCR Secretary Jeff Beard said the state would continue its challenges to the release order. “While California’s stay request was denied today, the state will pursue its appeal to the U.S. Supreme Court so that the merits of the case can be considered without delay,” he said.<sup>22</sup>

The long-running legal battle is basically between the three-judge panel, arguing that prison officials are stonewalling and not moving fast enough to reduce the prison population, and the State, arguing that just days before the *Brown v. Plata* case was decided by the Supreme Court, Governor Brown signed the historic Public Safety Realignment Act (AB 109), a comprehensive package of crime legislation and if Realignment is given time, it will give the Court the prison downsizing it demands. In their latest filing with Supreme Court Justice Anthony Kennedy, the state argues that being forced to obey the “court’s latest orders will require the release of inmates...[who] pose a substantial risk of committing new and violent crimes.”<sup>23</sup> Realignment, on the other hand, is better public policy—balancing the state’s need for prison downsizing with the public’s need for safety.

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<sup>20</sup> Barton, Robert A., Roy W. Wesley, and James C. Spurling, Office of the Inspector General. “Comparative Summary And Analysis Of The First, Second, And Third Medical Inspection Cycles Of California's 33 Adult Institutions.” (2013).

[http://www.oig.ca.gov/media/reports/MIU/SUMMARY/Comparative\\_Summary\\_and\\_Analysis\\_of\\_the\\_First\\_Three\\_Medical\\_Inspection\\_Cycles\\_of\\_Californias\\_33\\_Adult\\_Institutions.pdf](http://www.oig.ca.gov/media/reports/MIU/SUMMARY/Comparative_Summary_and_Analysis_of_the_First_Three_Medical_Inspection_Cycles_of_Californias_33_Adult_Institutions.pdf).

<sup>21</sup> The Court rejected Brown's plea over the objections of Justices Samuel Alito, Antonin Scalia, and Clarence Thomas, who all said they would have granted the state's request. Justice Scalia wrote that he did not believe the federal courts have the authority to order California to remove thousands of inmates from its prison system. He wrote, “The order goes beyond the power of the courts.”

<sup>22</sup> “CDCR Responds to Supreme Court Denying a Stay.” California Department of Corrections and Rehabilitation (2013). <http://cdcrtoday.blogspot.com/2013/08/cdcr-responds-to-supreme-court-denying.html>.

<sup>23</sup> “Application to The Honorable Justice Anthony M. Kennedy as Circuit Justice.” *Brown v. Plata*, 131 S. Ct. 1910 (2011). (July 10, 2013).

## The Promise of California's Public Safety Realignment Act (AB 109)

Realignment shifts much of the responsibility for supervising and rehabilitating tens of thousands of offenders from the state prison to the county-based corrections program. It represents a fundamental shift to handling criminal offenders, and the state believes if it is given more time to succeed, Realignment will prove far superior to the one-time prison release orders the Court might favor. After all, Realignment took effect less than two years ago, and it has already been credited with reducing the in-state prison population by 25,000 prisoners in just the first year.<sup>24</sup> The Governor believes that his Realignment plan is safer and more sustainable; whereas the Court believes the state needs 10,000 more felons removed from state prisons post haste.

The State isn't only worried about the sheer numbers, but also the seriousness of the next round of potential prison releases. California's unprecedented prison reductions over the last several years—down 42,000 since 2006—have narrowed the potential pool of safe-to-release inmates. Under Realignment, inmates convicted of non-serious, non-violent, or non-sexual offenses have already been diverted to local custody and supervision. Accordingly, many of the remaining inmates have been convicted of serious, violent, or sex offenses and releasing these more serious offenders poses an undue risk to public safety.<sup>25</sup> The state is essentially arguing that “they are no longer cutting fat, but now cutting into muscle.”

Prison rights advocates believe there are still prisoners who can be safely released. They argue that the harsh mass incarceration policies of the last two decades have so over-incarcerated Californians that we haven't yet reached bottom.

Law enforcement leaders, county executives, and elected officials throughout California are siding with Governor Brown. They are resisting more prison releases, and their coalition has intensified in recent months. Counties are feeling uniformly overwhelmed with the Realignment changes that went into effect on October 1, 2011 and don't believe they can safely absorb additional offenders. County jail populations have increased steadily since Realignment. Between June 2011 and June 2012, California's prison

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<sup>24</sup> Since Realignment went into effect in October 2011, the population in the State's 33 institutions has decreased by approximately 25,000. The current population is 31,530 fewer inmates than when the Court issued its prisoner reduction order in January 2010, 36,846 fewer inmates compared to the 2008 population in the record at the evidentiary hearing, and 42,555 fewer inmates than when Plaintiffs moved to convene the Court in 2006. “Declaration Of Jeffrey Beard, Ph.D., In Support Of Defendants' Response To April 11, 2013 Order Requiring List Of Proposed Population Reduction Measures; Court-Ordered Plan”, *Brown v. Plata*, 131 S. Ct. 2 (2011). <http://www.cdcr.ca.gov/News/docs/3JP-May-2013/Beard-May-2-Decl.pdf>.

<sup>25</sup> *Ibid.* at line 4, line 27.

population declined by roughly 27,100, while the average daily jail population grew by about 8,600, or 12%. As a result, 16 counties are operating jails above rate capacity, up from 11 counties the previous year.<sup>26</sup> In a letter dated April 12, 2013, addressed to Governor Brown, the California State Sheriffs' Association requested that any future responses by the Administration to the Court must include the option of additional CDCR capacity. Realignment has also placed increasing demands on police, courts, probation, and local mental health and drug treatment services.

Most of the major California justice organizations issued press releases supporting the Governor's request to stay the latest prison release order and appeal the *Plata* case back to the U.S. Supreme Court.<sup>27</sup> The California State Association of Counties, which represents California's 58 counties at the state and federal level, puts it this way:

Governor Brown and the State Department have made significant progress in the past couple of years in reducing the prison population. Counties have shouldered much of that burden through public safety Realignment...shifting responsibility for more offenders to the county level would have a negative impact on the progress we are already making.<sup>28</sup>

California's four previous governors wrote a brief to the Supreme Court asking the Court to support Governor Brown request to delay further prison releases. The former governors filed a friend-of-the-court brief, which said freeing more inmates "threatens the people of California with grave and irreparable harm from increased crime."<sup>29</sup> They noted that preliminary statistics show an uptick in crime last year after the State began sentencing thousands of inmates to county jails. Their brief uses recently released FBI statistics to show that in the last year while the Realignment program was in effect, the percentage change in number of violent and property crimes in cities of over 100,000 in population has jumped more in California than in the nation. Murder, for example, increased only 1.5% nationally but 10.5% in California. Rape declined by 0.3% nationally but increased 6.4% in California cities. And property crime is even more dramatic: California rates were sharply higher in every property crime category when compared to national rates over the last year. Auto theft increased just 1.3% in large U.S. cities, but in California, it increased 15%. While it is unclear whether or not AB 109 is to

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<sup>26</sup> Lofstrom, Magnus and Steven Raphael, Public Policy Institute of California. "Impact of Realignment on County Jail Populations." (2013). [http://www.ppic.org/content/pubs/report/R\\_613MLR.pdf](http://www.ppic.org/content/pubs/report/R_613MLR.pdf).

<sup>27</sup> For examples, see "Three-Judge Court Updates." California Department of Corrections and Rehabilitation (2013). [http://www.cdcr.ca.gov/News/3\\_judge\\_panel\\_decision.html](http://www.cdcr.ca.gov/News/3_judge_panel_decision.html).

<sup>28</sup> "Finigan Statement in Response to CDCR Filing, May 3, 2013." California State Association of Counties (2013). <http://www.cdcr.ca.gov/News/docs/3JP-May-2013/Finigan-Statement-CDCR-Filing-50313.pdf>.

<sup>29</sup> "Motion To File Amici Brief, Motion To File Under Rule 33.2, And Brief Amici Curiae Of Former Governors Pete Wilson, George Deukmejian, Gray Davis, And Arnold Schwarzenegger In Support Of The Application For Stay." *Brown v. Plata*, 131 S. Ct. (2011). [http://www.cjlf.org/briefs/Plata\\_MotionforStay.pdf](http://www.cjlf.org/briefs/Plata_MotionforStay.pdf).

blame, “If the reductions made already are a substantial cause of this spike, as is entirely possible, then further releases of even more dangerous inmates will cause additional and irreparable harm,” the former governors said.<sup>30</sup>

A central argument being made by the state and the counties is that, if given time, Realignment will result in the prison reductions the Court desires. After all, AB 109 is not California’s first Realignment experiment, and recent efforts have significantly reduced state corrections populations.<sup>31</sup> In 2007, the state passed landmark juvenile justice legislation (SB 81), which began limiting admission to state juvenile facilities to those who committed non-violent, non-serious, and non-sexual offenses.<sup>32</sup> Dubbed the “juvenile justice realignment,” the legislation set rigid eligibility requirements for committing youth to state juvenile justice facilities, and in turn, passed the cost savings on to county-run juvenile justice systems. SB 81 mandated that the juvenile courts commit only the most serious and violent juveniles to the state. As a result of these new standards, the state juvenile justice population dropped by 45% in the following six years.<sup>33</sup>

Then, in 2010, the state made county probation departments responsible for supervising juveniles released from state facilities, who the state had previously supervised. And in 2009, Governor Schwarzenegger signed the Corrections Performance Incentives Act (SB 678). SB 678 sought to “encourage the development of evidence-based intervention programs” by establishing a Community Corrections Program in each county, to be implemented by probation with the advice of a Community Corrections Partnership. Under SB 678, it was required that the programs consist of evidence-based practices such as “risk and needs assessment tools, . . . intensive probation supervision, intermediate sanctions, program evaluation, and program fidelity.” SB 678 also created a means of funding those practices based on each county’s success in reducing the number of felony probationers going to state prison. By the time AB 109 was passed, the foundation had already been laid for the CDCR to devolve some of its duties onto the counties.

State leaders, backed by research and expert panels, judged these previous (SB 678 and SB 81) Realignment attempts hugely successful. If given time, the state argued, AB 109 could be similarly successful. But everyone agrees that Realignment is a struggle for

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<sup>30</sup> Ibid.

<sup>31</sup> California also implemented the Probation Subsidy Act of 1965, which created financial payments to counties that reduced the number of felons sent to youth and adult state prisons. Counties were not required to participate in the Probation Subsidy Program, and over time, county participation dropped significantly. It was replaced in 1978 by the California Justice System Subvention Program.

<sup>32</sup> Taylor, Mac, Legislative Analyst's Office. “California's Criminal Justice System: A Primer.” (2013). <http://www.lao.ca.gov/reports/2013/crim/criminal-justice-primer/criminal-justice-primer-011713.pdf>.

<sup>33</sup> Dawood, Noor, Prison Law Office. “Juvenile Justice at a Crossroads: The Future of Senate Bill 81 in California.” (2009). <http://www.prisonlaw.com/pdfs/SB81report.pdf>.



California counties, and mandating even more releases—particularly of more serious offenders and as quickly as the Court demands—will threaten the very tenuous nature of Realignment’s implementation so far. As the state’s filing on May 3, 2013 noted,

...Realignment was achieved because it was developed in collaboration with all impacted stake-holders, including sheriffs, probation officers, police chiefs, district attorneys, county officials, mental health providers, community leaders, and state legislators....Piling on more responsibilities on the counties at this point could jeopardize Realignment itself by eroding its support and creating a climate that could lead to the law being changed....Now is absolutely *not* the time to impose further obligations on already strained counties.<sup>34</sup>

A great deal of hope and promise resides within California’s Public Safety Realignment Act (AB 109), and the importance of its implementation cannot be overstated. *The Economist* recently called Realignment, “one of the great experiments in American incarceration policy.”<sup>35</sup> If it works, California 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. If it doesn’t work, counties will have simply been overwhelmed with inmates, unable to fund and/or operate the programs those felons needed, which ultimately results in continued criminality and jail (instead of prison) crowding.

## Study Goals and Contributions

Which of the above scenarios prove true all depends on how California’s 58 diverse counties choose to *implement* Realignment. Scholars have consistently demonstrated that it is much easier to pass a law than to implement it. Laws are never self-executing, and there is a huge disjuncture between laws-on-the-books and laws-in-action. To understand whether Realignment will actually deliver on its promises and expectations, we need to understand how those responsible with implementing Realignment are operationalizing it in their day-to-day decisionmaking. Our main study goal is to learn how Realignment is taking shape and being implemented at the county level. We wanted to hear directly from county decision-makers about their experience in implementing

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<sup>34</sup> “Amended Defendants’ Response To April 11, 2013 Order Requiring List Of Proposed Population Reduction Measures; Court ordered Plan”, *Brown v. Plata*, 131 S. Ct. (2011): page 3, line 20-23; page 4, line 4-5; and page 4, line 2-3. <http://www.cdcr.ca.gov/News/docs/3JP-May-2013/Coleman-03-03-13-Amended-Response.pdf>.

<sup>35</sup> “Prison Overcrowding: The Magic Number.” *The Economist* (May 11, 2013). <http://www.economist.com/news/united-states/21577411-california-hasnt-emptied-its-prisons-enough-trying-magic-number>.

Realignment so far. We believe these “voices from the field” will help us better understand the implementation and impact of AB 109.

Lipsey’s (1980) classic study demonstrated how stakeholders (he calls them “street level bureaucrats”) are the intermediary mechanisms through which abstract legal codes are translated into day-to-day operational practice. He argued, “Policy implementation in the end comes down to the people who actually implement it.”<sup>36</sup>

For Realignment, these street level bureaucrats include the hundreds of police officers, judges, prosecutors, defense attorneys, jailers, and probation officers who on a daily basis are being asked to exercise their considerable discretion and provide the force behind AB 109.

Studies have confirmed that legal statutes created at the highest levels are frequently “decoupled” from the behavior of frontline agents, and if you don’t study this decoupling, you will never know what worked and what didn’t.<sup>37</sup> Researchers often are asked to study final outcomes (e.g., recidivism rates of participants), but such studies are insufficient. If the program reduced recidivism, for example, we often don’t know *why* the result happened or how to replicate the program. If it didn’t work, we aren’t sure why.

What happens between the passage of the law and the final outcomes is like a black box. When an airplane takes off, a flight data recorder captures information of time, altitude, airspeed, vehicle acceleration, heading, and radio transmissions. In the event of a crash, black box data helps aviation scientists understand what happened and, perhaps more importantly, inform strategies to promote airplane safety. Implementation research can be thought of as a black box, providing information about the journey from theory or law to actual practice.<sup>38</sup>

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<sup>36</sup> Lipsky, Michael. *Street-level bureaucracy: Dilemmas of the individual in public services*. New York: Russell Sage Foundation (1980).

<sup>37</sup> For an excellent review, see Jenness, Valerine and Ryken Grattet. “The Law-In-Between: The Effects of Organizational Perviousness on the Policing of Hate Crime.” *Social Problems* 52 (2005): 337-359. Interestingly, Jenness and Grattet found that this disjuncture between policymaking and policy implementation is especially pronounced in the crime policy area, “given the pro innovation leanings of legislatures and the anti-innovation tendencies of many law enforcement officers.” (at 354).

<sup>38</sup> Woolsey, Katherine and Kathleen Biebel. “Implementation Research: The Black Box of Program Implementation.” *Center for Mental Health Services Research Issue Brief* 4, no. 7 (November 2007). <http://escholarship.umassmed.edu/cgi/viewcontent.cgi?article=1012&context=pib>.

Our overall goal in this study is to describe, from the viewpoint of stakeholders charged with implementing the law, what is happening on the ground as Realignment evolves and takes shape over California's 58 counties. We generally asked these questions:<sup>39</sup>

- (1) What is happening? (Documenting)
- (2) Is it what was expected or desired? (Assessing)
- (3) Why is it happening as it is? (Explaining)
- (4) How might things be improved? (Recommending)

We wanted to answer these questions both within criminal justice agencies (i.e., police, probation) and across California's 58 diverse counties. We suspect that counties, faced with different economic and political environments, will have experienced Realignment differently. Our methodology reflected that nested approach, and is explained in greater detail in Chapter 3. Between November 2012 and August 2013, we interviewed 125 officials in 21 counties.

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

## **Organization of the Report**

The remainder of this report presents our methodology, findings, and conclusions. Chapter 2 presents a brief overview of Realignment, including the target population and funding plan. Chapter 3 outlines our study methodology, discussing how the counties and individual interviewees were selected for inclusion, and highlighting the questions asked. Chapters 4 through 9 discuss our substantive findings, separated out by stakeholder group. Chapter 4 focuses on the police; chapter 5 on sheriffs and jails; chapter 6 on public defenders; chapter 7 on district attorneys; chapter 8 on judges; and chapter 9 on probation. Our conclusions are contained in chapter 10.

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<sup>39</sup> Our approach is modeled after Werner, Alan. *A guide to implementation research*. Washington, D.C.: Urban Institute Press (2004). They recommend the first three questions, but given our policy and legislative focus, we added the fourth question.

# Chapter 2: Overview of The Public Safety Realignment Act (AB 109)

California's Public Safety Realignment Act is quite comprehensive and complex. It touches every aspect of criminal case processing, from arraignment and bail, through discharge from parole. The initial Public Safety Realignment Act (AB 109) was signed into law on April 4, 2011. It is now over 800 pages long, and has been clarified and amended five times since its original passage.<sup>1</sup> The most substantial clarifying legislation was contained in AB 117 (Chapter 39, Statutes of 2011), which was clean up legislation to AB 109, and removed the Division of Juvenile Justice from Realignment), and AB 118 (Chapter 40, Statutes of 2011), which clarified the local revenue funding framework. In July 2012, SB 1023 revised further the felony crimes that are punishable by imprisonment in state prisons, including sale of a controlled substance to a minor in a park, repeat violation of various sex offenses with children under 16 years of age, and other serious offenses. At the same time, SB 1023 revised statutes to make certain previously designated prison-eligible crimes now punishable instead by county jail. These crimes include several weapons crimes and check fraud.<sup>2</sup> For ease, we will simply refer to all of the combined legislation as Realignment or AB 109.

Despite the complexities contained in AB 109/AB 117/AB118, there are four fundamental aspects to understanding Realignment:

- (1) Target felon population—who is subjected to the new law, as of what date, and what sentencing and supervision changes are required;
- (2) Funding formula—how the money shifts from state coffers to county budgets;
- (3) The Community Corrections Partnerships—how a county coalition of key stakeholders decide what programs, custody, and/or sanctioning policies their county will adopt and fund;
- (4) Evidence-Based Programming—which programs and policies are recommended for funding.

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<sup>1</sup> California State Assembly. Public Safety Realignment Act, AB 109. (2011). [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0101-0150/ab\\_109\\_bill\\_20110404\\_chaptered.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110404_chaptered.html). See summary of clarifying and additional amendments to AB 109 at “Fact Sheet: 2011 Public Safety Realignment.” California Department of Corrections and Rehabilitation (2013). <http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf>.

<sup>2</sup> Warner, Nick. “Legislative Update.” *California Sheriff* (July 2012). <http://www.calsheriffs.org/images/MagazinePDFs/CSSA-Sheriff-Mag-July-2012.pdf>.

## Target Felon Population

Realignment is prospective only and applies only to persons convicted after October 1, 2011. No prison inmates are transferred to county jails, and the law applies only to adult sentencing. The Division of Juvenile Justice is unaffected by Realignment. Realignment does not change the correctional placement of offenders convicted of serious, violent, or high-risk sex crimes. Realignment basically revised the definition of a felony to include specified lower-level crimes that would be punishable in jail or another local sentencing option for more than one year, while maintaining the same length of sentences.

Prior to AB 109, a felony was defined as “a crime punishable by death or imprisonment in the state prison.” AB 109 amended California Penal Code §17 to redefine a felony as a crime punishable with death, or imprisonment in the state prison, *or imprisonment in a county jail for more than one year*.<sup>3</sup>

Realignment primarily affects three major offender groups. They are:

**(1) Newly-convicted felons, convicted of lower level crimes, are now kept under county supervision (the N3s).**

Lower-level felony offenders whose current and prior convictions are non-violent, non-sex-related, and non-serious (colloquially referred to as triple-non’s or N3s) now serve their sentence under county jurisdiction rather than in state prison.<sup>4</sup> Out-of-state prior convictions for crimes that are the equivalent of a California serious or violent felony are also disqualifiers. Juvenile crimes, however, are not disqualifiers. The final disqualifier, which is very rare, is an enhancement pursuant to California Penal Code §186.11, commonly known as the white collar enhancement.

Realignment amended about 500 criminal statutes eliminating the possibility of a state prison sentence upon conviction. Virtually all drug and property offense are now

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<sup>3</sup> However, this definition was amended in ABX1 17: A felony is now a crime punishable with death, or imprisonment in the state prison, or imprisonment in a county jail under the provisions of subdivision of §1170. This amendment avoids the unintended effect of reducing certain crimes punishable pursuant to California Penal Code §1170(h) for less than one year in imprisonment is a misdemeanor. The upshot was that felony sentences could now be served in county jails with no maximum time period specified (i.e., no cap).

<sup>4</sup> As enumerated by the statute under California Penal Code §1170(h). It is also fully discussed in Couzens, J. Richard and Tricia A. Bigelow. “Felony Sentencing After Realignment.” *Felony Sentencing Reporter* 25 (2013). An excellent source of materials on the legal aspects of Realignment can be found at “Criminal Justice Realignment Resource Center.” California Judicial Branch. <http://www.courts.ca.gov/partners/890.htm>.

punished in county jail. These newly amended laws are contained in the California Penal Code, the California Health & Safety Code, and the California Vehicle Code.<sup>5</sup>

Realigned crimes no longer eligible for prison include, for example, commercial burglary (California Penal Code §459 2nd), forgery (California Penal Code §470); possession of marijuana for sale (California Health & Safety Code 11359), vehicular manslaughter (California Penal Code §192c), child custody abductions (California Penal Code §278), and embezzlement from an elder or dependent adult (California Penal Code §368(d)(e)(f)).<sup>6</sup> All told, hundreds of criminal offenses now fall into the jail-only category.

In addition, ABx17 added in about 80 felonies that were not serious, violent, or California Penal Code §290 registerable in the penal code (and hence, not categorically state prison felonies) and designated them as still punishable by state prison. Included in this category are crimes such as Criminal Gang Activity (California Penal Code §186.33), felony stalking (California Penal Code §646.9) and felony driving under the influence causing injury (California Vehicle Code 23153). Collectively, these are often called Excluded Felonies.<sup>7</sup>

California prisons are now generally reserved for convictions of robbery, rape, murder, kidnap, residential burglary, and aggravated theft (loss of more than \$100,000), and very serious crimes involving children.

After October 1, 2011, any adult convicted of these non-non-non's and other amended felony crimes (California Penal Code §1170(h)) cannot be sentenced to prison unless they have a prior "serious" or "violent" felony conviction (as defined by California Penal Code §1192.7(c) or 667.5(c)).<sup>8</sup>

There is no limit to the amount of time that can be served in county jail for realigned crimes, and AB 109 did make any changes to the *length* of sentence, it only stipulated

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<sup>5</sup> There are 62 additional crimes that are not defined in the California Penal Code as serious, violent or California Penal Code §290 registerable offenses, but will be served in state prison. These crimes can be found at "Crime Exclusion List." California Mental Health Directors Association. [http://www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107\\_forensics/ab\\_109\\_crime\\_exclusion\\_list\\_%287-22-11%29.pdf](http://www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107_forensics/ab_109_crime_exclusion_list_%287-22-11%29.pdf).

<sup>6</sup> For complete listing of crimes that no longer prison-eligible, see Couzens, J. Richard and Tricia A. Bigelow. "Felony Sentencing After Realignment." *Felony Sentencing Reporter* 25 (2013) at Appendix I.

<sup>7</sup> Ibid.

<sup>8</sup> Offenders can be sentenced to prison even if they are currently convicted of an 1170(h) non-prison eligible crime if any of the following apply: (1) conviction of a current or prior serious or violent felony conviction listed in California Penal Code §667.5(c) or 1192.7c; (2) when the defendant is required to register as a sex offender under §290; or (3) when the defendant is convicted and sentenced for aggravated theft under the provisions of §186.1. See *ibid.* at 65.

that the sentence must be served in county jail and not state prison.<sup>9</sup> While most realigned crimes are punishable by a base sentence of three years or less, some crimes carry weightier base sentences or may be subject to lengthy enhancements. All the previous enhancements still apply, such as additional custody time for circumstances as using a gun, gang involvement, and repeat offending.

Inmates serving felony sentences in county jails are eligible to earn half-time credit on their terms. Time spent on home detention (i.e., electronic monitoring) is credited as time spent in jail custody, and also eligible for the half-time credits.

The other big change for persons sentenced under §1170(h) to county jail is that they will not be released to parole or any post-release supervision upon serving their term, unless the court chooses to impose a post-jail supervision period (i.e., split sentence). Once the jail sentence has been served, the defendant must be released without any restrictions or supervision. State parole is now limited to offenders released from prison whose current commitment offense is a serious or violent felony as defined by California Penal Code §1192.7(c) or §667.5(c).

**(2) Released prisoners who used to go to state parole now go to probation, with shorter revocation terms for violations, to be served in jail rather than prison.**

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

After Realignment, state parole agents will only supervise individuals released from prison whose current offense is serious or violent (regardless of their prior criminal record), as well as certain other individuals, such as inmates who have been assessed to be Mentally Disordered or High-Risk Sex Offenders.

All other prisoners will be released from prison directly to county PRCS jurisdiction. PRCS is also subject to a three-year maximum term, but individuals who do not violate the terms of their release may be discharged by probation after six months, and *must* be discharged after one year if they are violation free (§3456(a)). If PRCS offenders violate their technical probation conditions, counties are encouraged to use alternative-to-jail

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<sup>9</sup> Storton, Kathryn B. and Lisa R. Rodriguez, California District Attorneys Association. “Prosecutors’ Analysis of the 2011 Criminal Justice Realignment.”(2011): 3-4.  
<http://www.cpoc.org/assets/Realignment/cdaarealignguide.pdf>.

sanctions, but if they choose to incarcerate in county jail, the maximum revocation term in jail is six months (and they can earn half-time conduct credits on the revocation term) (§3000.08(g), §3455(d)). The maximum six months jail revocation term for technical violations is half the maximum (1 year) prior to Realignment.

Eligibility for PRCS and county probation supervision has been one of the most highly controversial aspects of AB 109, since *regardless of prior criminal record*, former state parolees are now sent to county probation supervision. Prison officials estimate that California county probation officers will now assume responsibility for supervising an additional 40,000 to 60,000 prisoners who were released in 2012 and qualify for PRCS.<sup>10</sup>

§3451(a) recommends that PRCS be consistent with evidence-based practices. “Evidence-based practices” refer to “supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or postrelease supervision.” (§3450(b)(9)).

**(3) Parolees and probationers who commit technical (non-crime) conditions of supervision.**

Parole and probation violators will generally serve their revocation terms in county jail rather than state prison. Before October 2011, individuals released from prison could be returned to state prison for violating their parole supervision. Some of these violations were non-serious, such as a failed drug test or absences at a required program. Prior to Realignment, these non-serious technical violators—about 20,000 to 30,000 parolees each year—were sent to prison.<sup>11</sup> Technical violations include violations that are not themselves crimes, such as failing a urine test, or failing to report to community service.

Now, under Realignment, offenders released from prison—whether supervised by the state (on parole) or by the counties (on PRCS)—who violate the technical conditions of their supervision (rather than committing a new crime) *must* serve their revocation term in local jail or community alternatives (e.g., house arrest, drug treatment, flash incarceration). The only exception to this requirement is that individuals released from prison after serving an indeterminate life sentence may still be returned to prison for a technical parole violation.

Individuals realigned to county supervision no longer appeared before the State Board of Parole Hearings (BPH) for revocation hearings after October 1, 2011. And as of July 1,

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<sup>10</sup> “The Future of California Corrections.” California Department of Corrections and Rehabilitation (2012). <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf>.  
[www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf](http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf).

<sup>11</sup> Petersilia, Joan. “California’s Correctional Paradox of Excess and Deprivation.” *Crime and Justice* 37, no. 1 (2008): 207-278.



2013, county trial courts now hear allegations of violations and impose sanctions for state parolees. After July 1, 2013, the state Board of Parole Hearings (BPH) will only be responsible for: parole considerations for lifers; medical parole hearings; Mentally Disordered Offenders cases; and sexually violent predator cases.

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

## **Realignment Funding and State Monitoring**

AB 109's sister-bill, AB 117, provided a plan by which counties would be awarded funds to support their efforts. The California Department of Finance (DOF) used a formula to determine each county's funding level. Roughly speaking, the legislature split the current cost of state supervision by about 50% with the counties. The current cost of housing a California prisoner is about \$56,000 per prisoner, per year. Front-end Realignment is being funded at about \$25,000 per prisoner, per year. The cost of a year on parole in California is now about \$8,500 a year, per parolee, and PRCS supervision was funded at about \$5,000 per year, per offender.<sup>12</sup>

Each county received a different amount of money based on this dollar amount and allocated by a formula that considered the number of offenders that county historically sent to state prison, the county's adult population, and prior success with probation outcomes.<sup>13</sup> In the first fiscal year of Realignment, 60% each county's funding allocation was based on the county's historical average daily state prison population ("ADP") of persons convicted of non-violent offenses from the particular county; 30% was based on the size of each county's adult (18 to 64) population; and the remaining 10% was based on each county's share of grant funding under the California Community Corrections Performance Incentives Act of 2009 (SB 678). SB 678 was based on a county's ability to divert adult probationers from prison to evidence-based programs.

The State has allocated about \$2 billion through 2013-14 to implement Realignment, and anticipates giving California's fifty-eight counties roughly \$4.4 billion by 2016-17,

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<sup>12</sup> The formula establishing the statewide allotment was developed by the State Department of Finance and agreed to by County Administrative Officers (CAO) and California State Association of Counties (CSAC). The formula may be adjusted in future years.

<sup>13</sup> Hopper, Allen, Margaret Dooley-Sammuli, and Kelli Evans. "Public Safety Realignment: California At A Crossroads." *ACLU of California* (2012). [https://www.aclunc.org/docs/criminal\\_justice/public\\_safety\\_realignment\\_california\\_at\\_a\\_crossroads.pdf](https://www.aclunc.org/docs/criminal_justice/public_safety_realignment_california_at_a_crossroads.pdf). at 10.

excluding the funding allocated for county planning, staff training, local courts, and jail construction.<sup>14</sup>

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

In the second and third years of Realignment, counties were given the best result among three options in which funding was based on: (1) the county’s adult population ages 18 to 64; (2) the status quo formula of FY 2011-2012; or (3) weighted ADP.<sup>15</sup> Over a quarter of counties benefited from the new weighted ADP option, in some cases almost doubling what they would have received had their allocation been based on county population.<sup>16</sup>

Initially, counties worried that the State had not guaranteed funding beyond the first two years. Some state leaders voiced concern that Realignment would prove nothing but a shell game designed to dump the state’s responsibilities onto already overburdened and underfunded counties. As Los Angeles County Supervisor Zev Yaroslavsky put it, “This has all the markings of a bait and switch. They promise us everything now, they shift this huge responsibility from the state to the counties now, and then a year or two or three from now, they will forget about that commitment, and it’ll be—then was then and now is now, and we’ll be left holding the bag.”<sup>17</sup>

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<sup>14</sup> Email to Joan Petersilia, from Drew Soderborg at Legislative Analyst’s Office (LAO) (September 6, 2013).; Brown, Brian, Legislative Analyst's Office. “The 2012–13 Budget: The 2011 Realignment of Adult Offenders—An Update.” [http://www.lao.ca.gov/analysis/2012/crim\\_justice/2011-realignment-of-adult-offenders-022212.aspx](http://www.lao.ca.gov/analysis/2012/crim_justice/2011-realignment-of-adult-offenders-022212.aspx). See also “Defendants’ Request for an Extension of December 31, 2013 Deadline and Status Report in Response to June 30, 2011, April 11, 2013, June 20, 2013, and August 9, 2013 Orders.” *Brown v. Plata*, 131 S. Ct. 1910 (2011). (September 16, 2013) at 9.

<sup>15</sup> “AB 109 Allocation: Recommended Approach for 2012-13 and 2013-14, Briefing of County Administrative Officers.” County Administrative Officers Association of California Realignment Allocation Committee (2012). [http://www.csac.counties.org/sites/main/files/file-attachments/12.05.15\\_ab\\_109\\_allocation-051412\\_briefing\\_on\\_yrs\\_2\\_and\\_3\\_formula.pdf](http://www.csac.counties.org/sites/main/files/file-attachments/12.05.15_ab_109_allocation-051412_briefing_on_yrs_2_and_3_formula.pdf).

<sup>16</sup> “Estimated Funding Levels For AB 109 Programmatic Allocation.” California State Association Of Counties. (2012). [http://www.csac.counties.org/sites/main/files/file-attachments/12.05.16\\_attachments\\_1\\_and\\_2\\_for\\_5-14-12\\_caoac\\_briefing.pdf](http://www.csac.counties.org/sites/main/files/file-attachments/12.05.16_attachments_1_and_2_for_5-14-12_caoac_briefing.pdf).

<sup>17</sup> Kahn, Carrie. “L.A. County Prepares To Take On State Prisoners.” *National Public Radio* (September 28, 2011). <http://www.npr.org/2011/09/29/140922171/l-a-county-prepares-to-take-on-state-prisoners>.

But in November 2012, California voters passed Governor Brown’s Proposition 30, a sales and income tax increase. Proposition 30 constitutionally guaranteed a source of funding for Realignment.<sup>18</sup> Proposition 30 is estimated to increase state revenues by about \$7 billion annually, and the funds are to be used for education and to “guarantee funding for public safety services realigned from state to local governments.”<sup>19</sup> The voters were never told how much would go to education and how much would go to Realignment, but generally speaking, Proposition 30 was supposed to guarantee at least the same level of Realignment funding going forward as had been given in the first two years. Interestingly, since the economy has improved since 2012 and since Proposition 30 revenues are based on sales and income taxes, the dollars available for Realignment have actually increased since its passage. Of course, if the economy falters, the AB 109 funding would also decline.

This infusion of new funding—conservatively estimated at \$1 billion annually—surpasses any similar allocation for offender rehabilitation in California history, and the funding is now guaranteed for the next several years. The \$64,000 question is: How will counties choose to spend their dollars? While the counties received substantial funding to cover the cost of supervising realigned felons, the state did not establish any statewide standards, nor provide any funding, for objectively evaluating county practices. Scholars worry that instead of using AB 109 as an opportunity to invest in treatment and alternatives to incarceration, the money will be used to increase law enforcement, electronic monitoring, and jail capacity. If that happens, Realignment will have simply been a very expensive and painful game of musical chairs. Whether that happens is mostly up to the discretionary authority of the local Community Corrections Partnerships (CCPs).

## **Community Corrections Partnerships (CCPs) and Discretionary Decisionmaking**

Not only did Realignment transfer an unprecedented amount of money and responsibility to the counties, it gave them unprecedented discretion concerning how they chose to spend it. Neither the California Department of Corrections and Rehabilitation (CDCR), the Department of Finance, nor any other state agency needs to approve these local plans. That is all in the hands of local governmental leaders.

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<sup>18</sup> Ballotpedia. “California Proposition 30, Sales and Income Tax Increase (2012).” [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_30,\\_Sales\\_and\\_Income\\_Tax\\_Increase\\_%282012%29](http://ballotpedia.org/wiki/index.php/California_Proposition_30,_Sales_and_Income_Tax_Increase_%282012%29).

<sup>19</sup> Petersilia, Joan and Jessica Greenlick Snyder. “Looking Past The Hype: 10 Questions Everyone Should Ask About California’s Prison Realignment.” *California Journal of Politics and Policy* 5, no. 2 (2013).

The legislation (California Penal Code §1230.1) required that each county establish a Community Corrections Partnership (CCP), comprised of the Chief Probation Officer as chair, the District Attorney, the Public Defender, the Presiding Judge of the superior court (or his/her designee), the Chief of Police, the Sheriff, and a representative from social services.<sup>20</sup> In its formation of Community Corrections Partnerships, AB 109 appears self-consciously designed to create cross-systems collaboration and buy-in among the various actors responsible for implementing the new regime in each county. In addition to requiring the participation of various county officials, the California Penal Code also mandates a representative of a successful community-based organization and a representative of victims to be part of the CCP. The CCP is tasked with developing and implementing the county's Realignment approach, including its spending plan.<sup>21</sup>

AB 109 also establishes an Executive Committee (EC) of the CCP, composed entirely of county officials.<sup>22</sup> The EC approves the plan of the larger CCP and sends it to the County Board of Supervisors for approval. The plan shall be deemed accepted by the county board of supervisors unless the board rejects the plan by a vote of four-fifths of the board, in which case the plan goes back to the CCP for further consideration.<sup>23</sup> The EC is comprised of the chief probation officer, chief of police, sheriff, district attorney, public defender, a presiding judge of the superior court (or designee), and a representative from either the County Department of Social Services, Mental Health, or Alcohol and Substance Abuse Programs, as appointed by the County Board of Supervisors.

## **How Did Counties Allocate Their AB 109 Funding?**

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

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<sup>20</sup> To effectuate Realignment, AB 109 and AB 117 took advantage of the Community Corrections Partnership (CCP) previously established under SB 678 in 2009. SB 678 had authorized each county to establish a CCP to allocate the state's Corrections Performance Incentive Fund. To be eligible for SB 678 funds, the Chief Probation Officer in each county was required to chair the CCP and develop and implement a program to divert adult probationers from prison.

<sup>21</sup> California Penal Code §1230(b)(1). <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=01001-02000&file=1228-1233.7>.

<sup>22</sup> See "Local Planning Process." California Department of Corrections and Rehabilitation. <http://www.cdcr.ca.gov/realignment/Local-Planning-Process.html>.

<sup>23</sup> The first year approved AB 109 plans are available at CalRealignment. "List of County Plans." <http://www.calrealignment.org/county-implementation/list-of-county-plans.html>.

Stanford law students analyzed all of the 58 county plans approved in 2011-2012 and found that most of them included estimates of the number of offenders to be realigned to the county, a description of their local capacity and proposed programs for handling these offenders, and an expenditure plan.<sup>24</sup> While there was a great deal of variation in the proposed county spending plans (shown fully in a companion report),<sup>25</sup> the California average funding allocation for the first year of Realignment was as follows:<sup>26</sup>

- 36% to the sheriff's department, primarily for jail operations;
- 25% to the probation department, primarily for supervision and programs;
- 16% for programs and services provided by other agencies, such as for substance abuse and mental health treatment, housing assistance, and employment services;
- 5% for intensive supervision and detention alternatives;
- 2% for miscellaneous;
- 16% unallocated/reserved funds.

We have collected some of the 2012-2013 CCP plans and, at first glance, there do not appear to be major changes in funding allocations within counties or across the state. We do generally see fewer unallocated dollars and more money being allocated to treatment and programming, with some counties signing new contracts with community-based organizations.<sup>27</sup> Counties are also continuing with hiring, as many were unable to hire for all allocated positions during their first year.

This data is critical to understanding how spending aligns with—or possibly thwarts—the legislature's goals. We also analyzed how county characteristics (e.g., crime rate, population characteristics, fiscal health, political preferences) were associated with county choices on Realignment spending.<sup>28</sup> Our comparative analyses show that AB 109 county spending choices are driven by complicated dynamics, but certain key factors can be identified. Counties that have emphasized Sheriff and Law Enforcement spending are

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<sup>24</sup> McCray, Angela, Kathryn McCann Newhall, and Jessica Greenlick Snyder. "Realigning the Revolving Door? An Analysis of California Counties' AB 109 Implementation Plans (Working Paper)." *Stanford Criminal Justice Center* (2012). The McCray et al. analysis has now been expanded to include all 58 counties.

<sup>25</sup> Abarbanel, Sara et al. "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans." *Ibid.* (2013). <https://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slpublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties090913.pdf>.

<sup>26</sup> These percentages differ slightly than those reported in Petersilia and Snyder (2013), as a slight change in the budget analysis was made after its publication in order to better include alternative detention services/intensive supervision and insure consistency of program allocations.

<sup>27</sup> For example, of the 23 counties for which we have 2012-2013 CCP budgets, only four counties allocated more than 10% of their budgets to reserves, and only two allocated more than 15%. For allocations to programs and services of the 23 counties' 2012-2013 budgets we have, the average allocation was 21%, compared to the 16% average in 2011-2012.

<sup>28</sup> Lin, Jeffrey and Joan Petersilia. "Responding to Realignment: Examining County Variation in AB 109 Spending Plans." *Stanford Criminal Justice Center* (forthcoming, 2013).

largely reacting to local needs around crime and law enforcement capacity, though these needs may be conditioned by political-ideological factors (i.e., preference for using prison to punish drug offenders). Counties that have emphasized Programs and Services appear to do so because of public faith in law enforcement, and this public support is conditioned by local and organizational need. Understanding why counties spent their Realignment dollars in the way they did is an important threshold question.

## Evidence-Based Correctional Programming

At its core, Realignment is designed to increase treatment for offenders. While Governor Brown and the legislature clearly felt pressure due to the Supreme Court mandates, those close to California politics were of the opinion that the pressure gave the State an opportunity to cut costs and move to a more effective rehabilitation system. In fact, Governor Brown’s AB 109 signing statement didn’t even mention the Court mandates but focused almost entirely on the rehabilitation benefits that AB 109 could offer the state. He wrote:

For too long, the state’s prison system has been a revolving door for lower-level offenders and parole violators who are released within months—often before they are even transferred out of a reception center. Cycling these offenders through state prisons wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision.<sup>29</sup>

AB 109 added §17.5(d) to the California Penal Code, which states: “California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state’s substantial investment in its criminal justice system.”

In 2007, California’s Expert Panel on Adult Offender Programming found that fewer than 10% of all prisoners and parolees participated in substance abuse or vocational education programs, despite the fact that nearly three quarters of all inmates had serious needs in these areas. Moreover, 50% of all exiting prisoners did not participate in *any* rehabilitation or work program, nor did they have a work assignment, during their entire prison stay. Offenders didn’t get help on parole either: 60% of parolees didn’t participate in *any* parole programs while under state supervision. In other words, most California prisoners and parolees left the state system with their literacy, substance abuse,

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<sup>29</sup> “Governor Brown Signs Legislation To Improve Public Safety And Empower Local Law Enforcement.” Office of the Governor. (2011). <http://gov.ca.gov/news.php?id=16964>.

and employment needs unmet.<sup>30</sup> It is not surprising that California’s three-year rearrest rate for released prisoners was 70%—the highest in the nation.

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

But for Realignment to actually make an impact on offender recidivism, two things must happen. First, offenders must have the *opportunity to participate* in treatment programs, and second, the program’s design must incorporate elements consistent with the *principles of effective correctional intervention*.<sup>31</sup> Each of these aspects is squarely within the control of county leaders.

Research has shown that programs incorporating certain evidence-based principles reduce recidivism 10 to 20%.<sup>32</sup> If offenders don’t participate in these types of programs post-Realignment, we shouldn’t expect recidivism reduction.

AB 109 recommends (but does not mandate) the use of evidence-based practices (EBP) for activities and services funded through the enabling legislation. It states:

**Evidence-based practices** refers to supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individual under probation, parole, or post-release supervision.

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<sup>30</sup> Petersilia, Joan and Marisela Montes (Co-Chairs). “Meeting the Challenges of Rehabilitation in California’s Prison and Parole System: A Report From Governor Schwarzenegger’s Rehabilitation Strike Team.” [http://www.cdcr.ca.gov/news/docs/govrehabilitationstriketeamrpt\\_012308.pdf](http://www.cdcr.ca.gov/news/docs/govrehabilitationstriketeamrpt_012308.pdf).

<sup>31</sup> In “Looking Past The Hype: 10 Questions Everyone Should Ask About California’s Prison Realignment,” Petersilia and Snyder note that there is a third necessary element to reducing offender recidivism is less within the counties’ control: Offenders must want to take advantage of the programs offered. Counties can open up more programs, and those programs can be evidence-based, but if the offender doesn’t want to take advantage of them, recidivism will not be reduced. After all, we must remember that many of these offenders are the same ones who failed the last time they were “treated” or jailed in county facilities. You can lead a horse to water, but you can’t make it drink. In discussions of recidivism reduction, we often forget this basic point: Counties can offer offenders opportunities, but if they don’t actively participate, they will not succeed.

<sup>32</sup> Cullen, Francis T. and Paul Gendreau. “Assessing Correctional Rehabilitation: Policy, Practice, and Prospects.” *Policies, Processes, and Decisions of the Criminal Justice System, U.S. Department of Justice* 3 (200): 109-175. [https://www.ncjrs.gov/criminal\\_justice2000/vol\\_3/03d.pdf](https://www.ncjrs.gov/criminal_justice2000/vol_3/03d.pdf).

Consistent with local needs and resources, the CCP plan may include recommendations to maximize the effective investment of criminal justice resources in evidence-based correctional sanctions and programs, including, but not limited to, day reporting centers, drug courts, residential multiservice centers, mental health treatment programs, electronic and GPS monitoring programs, victim restitution programs, counseling programs, community service programs, educational programs, and work training programs. (AB 109 §458)

The term evidence-based practices is invoked in a variety of fields to refer to interventions for which there are systematic evidence of more successful outcomes when they are used than when they are not. Focusing on recidivism as a primary outcome measure, and analyzing evaluations of a variety of programs, some researchers have declared a consensus on the principles of evidence-based practices in corrections to include:

- **Risk.** Target interventions at offenders with a higher risk (probability) of re-offending. Lower-risk offenders may be harmed by excessive intervention, e.g., putting a normally responsible wage-earner in jail and causing loss of employment and interventions are more cost effective with those more likely to re-offend. Furthermore, actuarial measures or instruments that reflect, among groups of offenders, an observed association between risk factors, such as lengthy criminal history or drug abuse and likelihood of recidivism, should assess risk of re-offending.
- **Need.** Target interventions to “criminogenic” needs, i.e., needs of offenders known to lead to criminal conduct, such as poor education levels, family dysfunction, drug or alcohol abuse, criminal associates, and antisocial attitudes. Such needs are distinguished from other risk factors, such as age and length of criminal history, because they are dynamic, i.e., subject to change as a result of intervention.
- **Responsivity and Appropriate Treatment.** Use methods that have been shown to work for the type of person being treated, adapted to their distinctive challenges and learning styles, with enough intensity (e.g., contact hours) to address the severity of their needs, and which teach and model practical skills. Cognitive-behavioral methods have generally been more effective than some other approaches.

Realignment was fundamentally designed to infuse funding into local government to enable counties to implement more scientific, evidence-based programming for offenders.



## Chapter 3: Study Methodology

California has a population of more than 38 million residents, or 12.1% of the entire U.S. population. With a state as big, as populous, and as complex as California, it is impossible to adequately summarize how Realignment (AB 109), is playing out “statewide” or in an “average” county. But we did want to understand how stakeholders from divergent counties perceived Realignment’s impacts.

California’s 58 counties were very different from one another prior to Realignment—in terms of crime rates, financial resources, politics, and demographics—and so we expect their approaches post-Realignment will be different as well. Los Angeles County, for example, has the largest population of any county in the nation (10.4 million residents), exceeded by only eight states. Compare that to Alpine County, California’s smallest county with just 1,129 residents, all rural. Crime rates also vary considerably by county—from a high of nearly 7,000 violent and property crimes per 100,000 population in San Joaquin County to a low of just over 2,000 per 100,000 population in Ventura County.<sup>1</sup>

Generally speaking, the California coast, where most of the population is clustered, has a majority of liberal Democrats and inland California has a majority of conservative Republicans. The Bay Area is especially left-leaning, and San Francisco is probably the most liberal part of the state and one of the most liberal parts of the country. Per capita income varies widely by geographic region. California’s Central Valley is the most impoverished part of the state, with migrant farm workers often making less than minimum wage. Recently, the San Joaquin Valley was characterized as one of the most economically depressed regions in the U.S., on par with the region of Appalachia. On the other hand, Northern California’s economy is booming with high-tech development, and is experiencing some of the highest economic gains of anywhere in the U.S.<sup>2</sup> These county-level differences will certainly influence stakeholders’ pre- and post-Realignment choices and behavior.

To capture this variability, we used a nested methodology, first selecting counties and then within those counties, interviewing the major criminal justice stakeholders. If the individual agreed to be interviewed, personal interviews were conducted, using questions that were designed to elicit both general and specific details regarding their opinions and practices pre- and post-Realignment. This chapter describes our sample selection, interview administration, and questions posed.

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<sup>1</sup> “Collected Correctional Statistics.” Center on Juvenile and Criminal Justice California Sentencing Institute. <http://casi.cjcg.org/>.

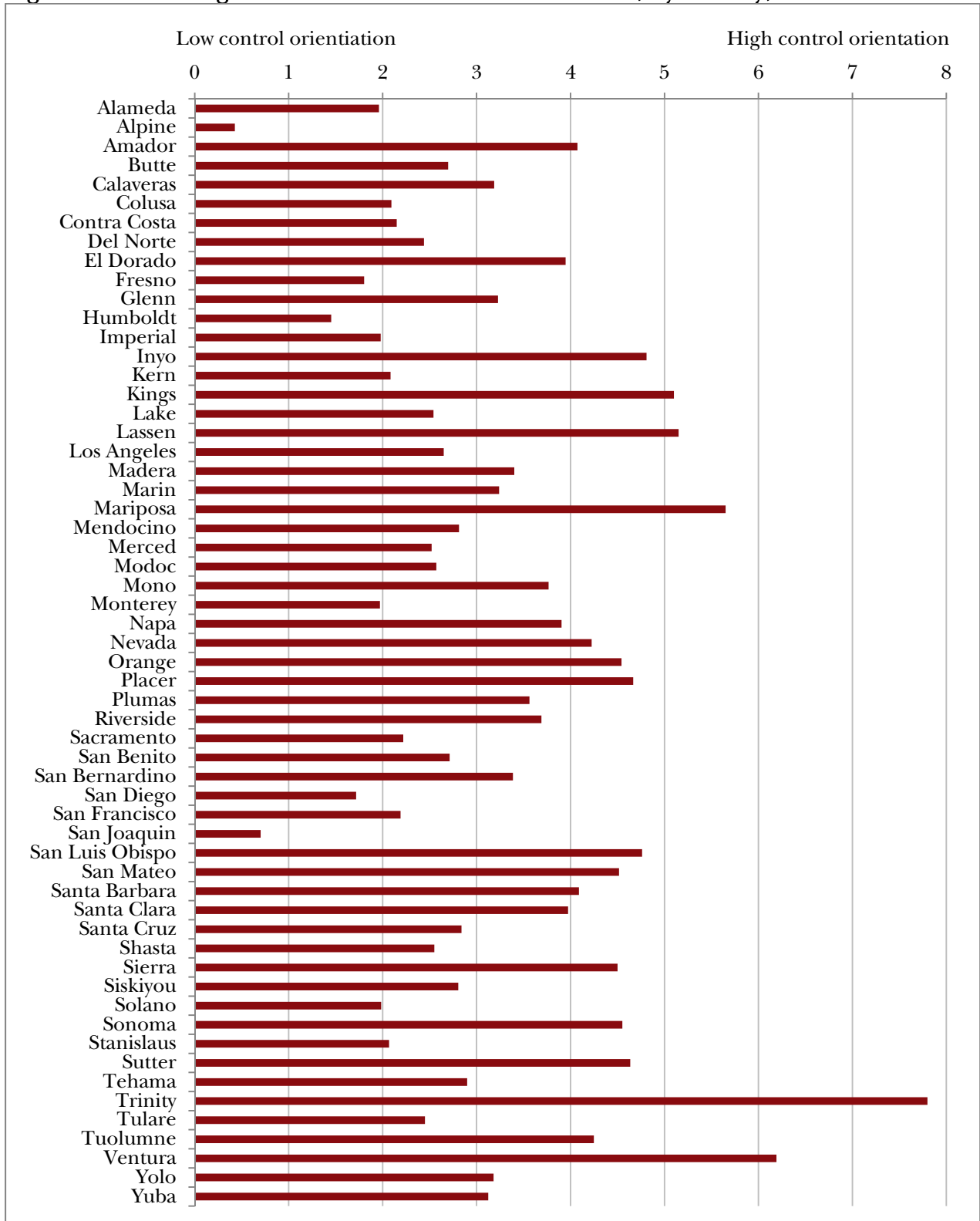
<sup>2</sup> Crawford, Mark. “Location California: Diversifying Economy Shows Promise.” *Area Development Online* (April 2012). <http://www.areadevelopment.com/stateResources/california/California-economy-on-the-mend-262626.shtml>.

## **Selection of Study Counties**

We wanted to select counties for our interviews that differed in their pre-and post-Realignment orientation to the use of state prison. To collect such information, we used two sources of data: official felony case processing information for the pre-AB 109 measures, and an analysis of the county approved Realignment spending plans.

Prior to the start of the interviews, we collected detailed criminal case processing information for each of California's 58 counties pre-Realignment. The data came from the California Attorney General's Office. For each county, we then calculated the percent of arrested felons sentenced to incarceration (i.e., prison or jail) in 2009. Then we divided this percentage by the serious (Part I) crime rate per 1,000 residents in 2010. The results are contained in Figure 1, Pre-AB 109 Preference for Incarceration, by County. Conceptually, Figure 1 represents each county's pre-Realignment "preference for incarceration," or punitiveness towards crime (e.g., counties that have a higher percent of convicted felons sent to prison are more punitive than counties that impose far fewer prison sentences, taking the level of crime into account).

Figure 1: Pre-Realignment Preference for Incarceration, by County, 2009-2010



For smaller counties with few felonies to process, the metric above may be disproportionately influenced by a small sample size (see note on Table 1). Nonetheless for our purposes, it enabled us to roughly array the counties by their preference for incarceration vs. community-based sanctions for felony arrestees.

We then wanted some way to characterize counties' preferences for incarceration post-Realignment. Not only did we want to know how their official court processing might change, but the details of exactly how they planned to approach sanctioning felony offenders after they received AB 109 funding. To collect this information, we obtained and coded in great detail each county's approved 2011-2012 Realignment plan. All of these documents were a matter of public record. The goal in coding these plans was to capture how each county spoke about and planned to spend their 2011-2012 Realignment funding. We were interested in capturing not only which agencies (e.g., sheriff, probation, courts) were going to receive, but given their funding, what agencies and programs received funding.

This proved to be a complex task, and is explained fully in "*Realigning the Revolving Door? An Analysis of California Counties' AB 109 Implementation Plans.*"<sup>3</sup> We began by creating a comprehensive list of virtually all the programs, tasks, and activities that any county had mentioned in their plans (e.g., alternatives to incarceration, risk assessment, reentry and rehabilitation, probation, jails, law enforcement, measurement of outcomes and data collection, mental health treatment, substance abuse treatment, and housing). We then coded each plan for whether the specific plan had "mentioned" the particular topic, and secondly, whether each plan discussed the particular item "in depth." This allowed us to differentiate between plans that simply mentioned the programs, perhaps in a bulleted list of things that they thought evidence-based, and plans that described in detail how they planned to implement a specific program. We felt that counties that described in-depth the programs they planned to fund, rather than simply listing them, had probably given more serious thought to the idea and had a higher likelihood of following through with implementing those programs.

We then analyzed each of the 58 county budgets and combined each county's narrative analysis with their budget allocations. Our goal was to array all of the counties on their preference for programs and services on the one end of the continuum and surveillance/custody on the other. To get this array, counties were assigned points

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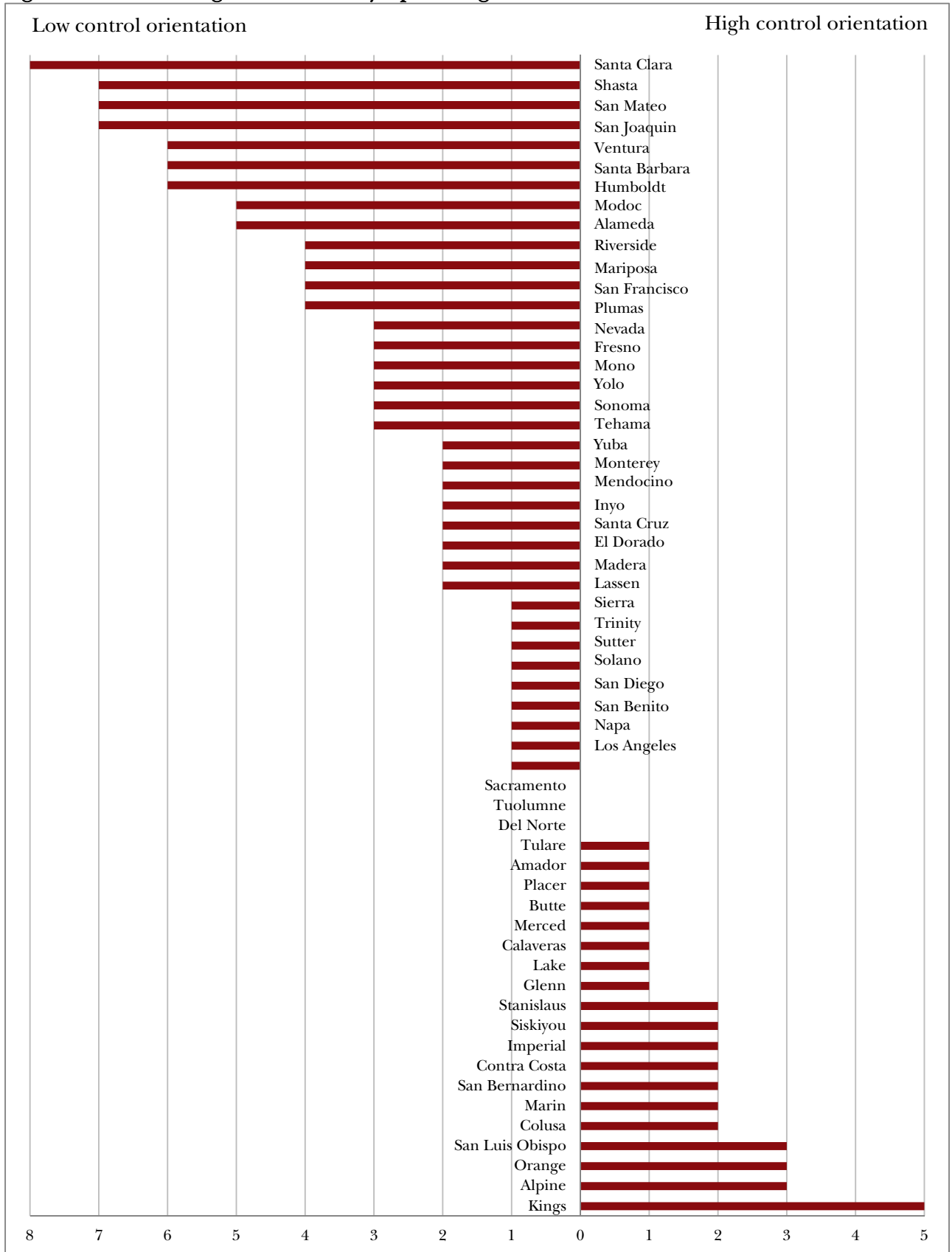
<sup>3</sup> See Lin, Jeffrey and Joan Petersilia. "Responding to Realignment: Examining County Variation in AB 109 Spending Plans." *Stanford Criminal Justice Center* (forthcoming, 2013). See also Abarbanel, Sara et al. "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans." *Stanford Criminal Justice Center* (2013). <https://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties090913.pdf>.

toward the low or high control part of the array based on the number of programs of each type they mentioned, with extra weight given to mentions and depth discussion of specific programs.<sup>4</sup> Points were given also for county budget allocations based on where the county fell in regards to the median and 75<sup>th</sup> percentile of percentage of total planned expenditure on control. Positive points were given for low control narrative and budget items; negative points were given for high control narrative and budget items. A county's total points were combined to equal their array score. Figure 2 contains our results.

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<sup>4</sup> Specific items were given extra weight: five relating to high control, and five related to low control. The items relating to high control are law enforcement helping with supervision of probation, building/expanding jails, high risk probation unit, arming probation, and hiring law enforcement; the items relating to low control are transitional housing, specialty courts, mental health (depth), substance abuse (depth), or education services (depth).

Figure 2: Post-Realignment County Spending Preferences



Conceptually, our two indexes shown in Figures 1 and 2 are designed to roughly reflect a counties' pre- and post- orientation towards the use of incarceration versus local community-based options.

The first was their “preference for prison” before Realignment, and the second was their plan and planned spending post-Realignment, and we could then identify those counties that planned to spend more than the average on law enforcement/surveillance activities rather than on treatment/rehabilitation activities. For example, for the pre-Realignment orientation, counties were split based on pre-Realignment conviction and incarceration rates. Counties such as San Bernardino and Modoc Counties are in the high and low control orientation pre-AB 109 boxes, respectively, in part due to the 72% of felons incarcerated in 2009 in San Bernardino County, compared to 30% in Modoc County. For the post-AB 109 control orientation, counties were split based on their narrative and budgets of their county plans. Imperial County was classified as high control orientation post- AB 109 in part due to allocating 58% of its budget to sheriff and law enforcement and discussion in its plan on jails. This is compared to Monterey County, which was classified as low control orientation post-AB 109 in part due to allocating only 31% of its budget to sheriff and law enforcement, and 16% for programs and services, in addition to speaking in depth about specialty courts and mental health programs. The next step was to simply cross-tabulate these two indexes to create ranges of approaches pre- and post-Realignment, as shown in the Table 1. The counties are distributed fairly evenly across the nine cells.<sup>5</sup>

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<sup>5</sup> Some of the measures we used to assess pre-AB 109 control orientations were not reliable for the smallest counties because the arrest numbers in these counties were so small. As a result, small county conviction and incarceration rates were subject to substantial statistical noise and the low/medium/high ratings assigned to them were not entirely believable.

**Table 1: Pre- and Post-Realignment County “Control” Orientation**

	<b>AB 109 Implementation Plans</b>		
<b>Pre-AB 109 control orientation</b>	<i>Low control orientation</i>	<i>Medium control orientation</i>	<i>High control orientation</i>
<i>Low control orientation</i>	Nevada, <b>San Francisco</b> , Plumas, Santa Cruz, <b>Alameda</b> , Mono, Humboldt, Mendocino, Modoc, Sonoma	Del Norte, Sierra, <b>San Diego</b>	Alpine, <b>Contra Costa</b> , Marin, Calaveras, Imperial
<i>Medium control orientation</i>	<b>Fresno</b> , Mariposa, <b>San Joaquin</b> , <b>Ventura</b>	<b>Los Angeles</b> , Napa, <b>Solano</b> , El Dorado, Inyo, Yuba, Lake, <b>Merced</b> , <b>Sacramento</b>	Glenn, <b>Orange</b> , Stanislaus, Colusa, Placer, San Luis Obispo, <b>San Benito</b>
<i>High control orientation</i>	Monterey, <b>Santa Barbara</b> , <b>San Mateo</b> , Shasta, <b>Santa Clara</b>	Tuolumne, Sutter, Trinity, <b>Madera</b> , <b>Amador</b> , <b>Lassen</b> , <b>Riverside</b> , Tehama, Yolo	Kings, San Bernardino, Siskiyou, Tulare, Butte, <b>Kern</b>

\*Small counties are those with fewer than 500 felony arrests in 2000. Due to their small numbers, the pre-Realignment “preference for prison” estimates may be unstable. List of small counties: Alpine, Amador, Calaveras, Colusa, Del Norte, Glenn, Inyo, Lake, Lassen, Mariposa, Modoc, Mono, Plumas, Sierra, Siskiyou, Trinity, Tuolumne Counties.

*Note: Counties highlighted in yellow are the counties in which interviewed county stakeholders.*

The information in Table 1 was not only useful to fully understand the context in which our interviewees and agencies were operating, but it also assured that we had representatives from counties that reflected very different orientations to Realignment. In all, we interviewed 125 individuals across 21 counties.



## **Selection of Interviewees**

Within each selected county, we began by requesting interviews with all of the members of the CCP. In some cases, the CCP member referred us to someone they felt was more knowledgeable concerning day-to-day Realignment operations. For instance, the Los Angeles County District Attorney referred us to the chief charging deputy. As word spread that we were conducting interviews on Realignment, people contacted us indicating a willingness to be interviewed. This happened with some of the smaller counties, who felt they might not have been interviewed otherwise. Over the course of the study, we also sought the perspectives of victim advocates, parole agents, and county mental health workers, and those findings are published in separate articles.<sup>6</sup> The complete list of persons interviewed is contained in Appendix A. To add the critically important offender's perspective, we sponsored two panel discussions with offenders who came to Stanford Law School and met with the entire interview team in a question and answer session.

## **Interview Administration and Questions Asked**

We prepared for our interviews by compiling both general and specific questions for each of our stakeholder representatives. General questions were both macro-level (how do you think Realignment is going?) and questions about the county overall (how did the CCP decide its funding priorities?) Specific questions asked about carrying out the responsibilities associated with that office (e.g., for sheriffs: how has the decision to detain pretrial inmates changed post-Realignment?). Appendix B lists the complete questionnaire.

As Chapter 1 noted, our questions were organized around four broader themes: documenting, assessing, explaining, and recommending. For example,

- (1) What is happening? (Documenting)
  - General questions: How well do you feel you understand Realignment? What kind of training have you received? How and in what ways has you and (your specific office) **changed their behavior** under Realignment? Have resources been adequate? If not, in what ways have they limited successful implementation? How has Realignment impacted your

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<sup>6</sup> See Spencer, Jessica and Joan Petersilia. "Voices From the Field: California Victims' Rights in a Post-Realignment World." *Federal Sentencing Reporter* 25 (2013); Weis, Alyssa and Jennifer Williams. "From The Shadows to The Forefront: How Realignment is Affecting the Mentally Ill Offender Population in Jails and Upon Reentry." (forthcoming); Vilkin, Camden and Jennifer Williams. "Post-Realignment Parole: Loud Bark, Soft Bite." (forthcoming).

relationships with other parties in the system? Has it resulted in more collaboration or adversity, and in what ways have these relationships materialized?

- Specific agency interviews:
  - Law Enforcement. Has street level enforcement changed post-Realignment? If yes, in what specific ways? How has the profile of the jail population changed? How are you handling the changes in risk level, longer-term inmates, and increased medical and mental health needs? To what extent are you implementing new rehabilitation programs? What alternatives to detention are you finding most useful? How are you handling jail overcrowding? What pretrial policies have changed post-Realignment? Are you fearful of litigation, and if so, what conditions are likely to trigger legal intervention?
  - Prosecutors and Defense: How and in what ways have prosecutors' charging decisions and decisions to negotiate pleas changed under Realignment? Now that prison is "off the table," has the bargaining between prosecution and defense changed? How has Realignment changed strategic decision-making processes and communication among key stakeholders in the system? Are DA's changing their charging decisions because of Realignment? If so, how? What factors impact whether charging decisions have changed in a given county? How has crowding in county jails impacted bail decisions and other aspects of case processing? Do you believe that the courtroom workgroup (particularly judges, defense bar, and prosecutors) has changed their practices post-Realignment, and if yes, in what ways?
  - Courts: How has sentencing discretion changed post-Realignment? Is your court using split sentencing, flash incarceration, alternative bail schedules, or expedited case processing methods to handle increased caseload? How have your interactions with key stakeholders changed? How will you handle the new responsibility of sanctioning parole violators within the county? Does the limitation of alternative sanction programs constrain your sentencing practices?

*DRAFT FOR REVIEW AND COMMENTS*

- Probation: How would you describe probation's expanded role under Realignment? How has your county balanced rehabilitation versus surveillance? What concrete training has been initiated as a result of Realignment? How are higher risk and specialized offenders (e.g., Mentally Disordered, sex offenders) being handled post-Realignment? What types of intermediate sanctions are being developed post-Realignment, and how are they being utilized within sentencing? Was the information you received from the California Department of Corrections and Rehabilitation (CDCR) adequate to prepare for released prisoners and parolees? How are you using the principles of evidence-based practices to guide your Realignment practices?

(2) Is it what was expected or desired? (Assessing)

- General questions: Are program processes and systems operating as planned? Which practices and policies seem to be working well and which are in need to improvement? Do your practices reflect the priorities set forth in your CCP spending plan? In what ways has the program's environment affects its implementation, operations, and results?

(3) Why is it happening as it is? (Explaining)

- General questions: If the program is not operating as planned, why? If it is working (or not), what social, cultural, political, or economic factors seem to explain the success (or failure) in your county? What are the implications of these factors for program transferability?

(4) How may legislation, program processes, and/or systems be improved? (Recommending)

Our interviews were rather informal, semi-structured conversations. About half the interviews were conducted face-to-face, with the other half using video or telephone conferencing. Most of the interviews were conducted with two to four questioners, and these interview teams were composed of students and faculty at Stanford Law School. Detailed notes were taken at each interview, and several interviews were tape-recorded. Drafts of the notes taken were usually sent to the interviewee for approval, and in many instances, the interviewee would provide clarifying feedback.

## **Limitations of Our Approach**

While our approach has many benefits for studying Realignment, it also has limitations that impact the applicability of our findings. We interviewed representatives in just 21 of 58 counties, and although these counties were selected to encompass a broad range of situations and strategies towards Realignment, we don't know how representative they are of the remaining counties. And each of our interviewees has their own unique perspective, and there is no way to assess whether their perspective and experiences are similar to others in their same county. If we had interviewed different stakeholders from the same county, we might have received different answers to our questions. However, we did interview several major stakeholders in each of these counties, and we were surprised at the consistency in responses within a given county. The following chapters summarize our major findings.

# Chapter 4: Police and Local Law Enforcement<sup>1</sup>

## Introduction

In many ways, city police are the forgotten actor in the Realignment (AB 109) discussion. They were almost entirely left out of the initial Realignment debate and were not included in many of the Community Corrections Partnerships that were formed in the legislation's wake. In part because of this, they were also left out of the major funding granted to counties to aid in the policy implementation. In some ways this makes sense. Unlike the other actors, police departments are highly localized—formed around towns, cities, and communities rather than counties. Still, few actors are more affected by Realignment than police. Despite this underprivileged position in the early debate and implementation, police departments have become one of the focal points for Realignment observers. Specifically, nearly every news agency, elected official, and academic in California is struggling to understand how, if at all, Realignment has affected crime levels.

The effect of the increase in local offenders is complicated by already dwindling police budgets in many jurisdictions throughout the state. According to Krisberg and Marchionna, the total number of sworn police officers in California has been steadily dropping for years. The total number of sworn police officers in California's large cities dropped from 23,355 officers in 2008 to 22,129 officers in 2011, while California's resident population continued to grow.<sup>2</sup> Police layoffs have been especially severe in high-crime areas such as Vallejo, Sacramento, and Oakland, which all saw a rise in crime after police were cut.<sup>3</sup> A recent study by RAND found that increasing the size of the

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<sup>1</sup> This chapter was drafted by John Butler.

<sup>2</sup> Krisberg, Barry and Susan Marchionna. "Fact Sheet: Police, Prisons, and Public Safety in California." *The Chief Justice Earl Warren Institute on Law and Social Policy* (2013).

[http://www.law.berkeley.edu/files/WI\\_Policing\\_Fact\\_Sheet\\_4.13.pdf](http://www.law.berkeley.edu/files/WI_Policing_Fact_Sheet_4.13.pdf).

<sup>3</sup> White, Bobby. "California Cities Cut Police Budgets." *The Wall Street Journal* (October 31, 2008).

<http://online.wsj.com/article/SB122540831980086085.html>; Goode, Erica. "Crime Increases in Sacramento After Deep Cuts to Police Force." *The New York Times* (November 3, 2012).

[http://www.nytimes.com/2012/11/04/us/after-deep-police-cuts-sacramento-sees-rise-in-crime.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2012/11/04/us/after-deep-police-cuts-sacramento-sees-rise-in-crime.html?pagewanted=all&_r=2&); Preuitt, Lori and Kris Sanchez. "Suffer These Crimes in Oakland? Don't Call the Cops." *NBC Bay Area* (July 13, 2010). <http://www.nbcbayarea.com/news/local/Suffer-These-Crimes-in-Oakland-Dont-Call-the-Cops-98266509.html>.

police force could reduce crime.<sup>4</sup> Studies also find that laying-off police officers can contribute to a rise in crime.<sup>5</sup> Though the effect of police numbers on crime rates is debatable, it is important to note that there are factors beyond Realignment that have shaped policing in California in the past several years.

The effect of police lay-offs was intensified by Realignment. While the police force dwindled, Realignment allowed for the early release of more serious offenders from jail than ever before. Realignment also sent more offenders to probation departments, and probation was often ill-equipped to deal with this more difficult population, requiring police to step in and help. Police were left with more work to do and fewer resources to do it with.

Municipal law enforcement was not covered systematically in the AB 109 legislation. They were not granted any money in the initial state allotment and were not included as mandatory members of the Community Corrections Partnerships. Despite this, police lobbied for and were granted \$24 million in 2013 from the State to support Realignment-related expenses and \$27 million for 2014.<sup>6</sup> This figure, divided among the more than 300 police departments throughout the state, is much smaller than the \$850 million given to the 58 counties for the implementation of Realignment during the nine months of Realignment.<sup>7</sup>

In this context we therefore chose to focus on interviews with police chiefs of a diverse set of cities and municipalities, focusing on the following key questions:

- How has street level enforcement of crime changed as a result of Realignment and why?
- What impact has Realignment had on crime rates in California?
- What are the remaining barriers to implementation for front line law enforcement?

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<sup>4</sup> Heaton, Paul, The RAND Corporation. "Hidden in Plain Sight: What Cost-of-Crime Research Can Tell Us About Investing in Police." (2010).

[http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP279.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP279.pdf).

<sup>5</sup> See Levitt, Steven D. "Using Electoral Cycles in Police Hiring to Estimate the Effects of Police on Crime: Reply." *The American Economic Review* 92, no. 4 (2002): 1244-1250.; Kovandzic, Tomislav V. and John J. Sloan. "Police levels and crime rates revisited: A county-level analysis from Florida (1980–1998)." *Journal of Criminal Justice* 30, no. 1 (2002): 65-76.

<http://www.sciencedirect.com/science/article/pii/S0047235201001234>.

<sup>6</sup> "Police departments to receive grant funding." *The Stockton Record* (January 19, 2013).

[http://www.recordnet.com/apps/pbcs.dll/article?AID=/20130119/A\\_NEWS02/301190315](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20130119/A_NEWS02/301190315).

<sup>7</sup> Edwards, Andrew and Brian Charles. "Southern California police say they need more resources to confront potential inmate releases." *Los Angeles Daily News* (June 19, 2013).

<http://www.dailynews.com/general-news/20130620/southern-california-police-say-they-need-more-resources-to-confront-potential-inmate-releases>.

- Have police departments been forced to cut back on enforcement due to additional duties and ongoing resource constraints?
- What effect, if any, has Realignment had on police legitimacy with the populace?
- How are police departments using the money they have been granted from the state to implement AB 109?

## Prior Research Studies

George Kelling and Mark Moore argue that the evolution of policing can best be described as moving from a politicized system to professionalization, then to constitutionalism and finally to community policing.<sup>8</sup> In the first stages, the primary role of the police was recognized as keeping “order.”<sup>9</sup> In the 1970’s, scholars and police departments were looking at how police could solve more crimes, gather better evidence and generally perform their duties more efficiently, as opposed to pure order-maintenance.

By the 1980’s, crime nationwide had continued to grow, especially in cities, and an initial wave of studies showed that previous police practices were ineffective at tackling the crime problem.<sup>10</sup> These studies were paired with those showing increased effectiveness for programs that engaged local communities in crime fighting.<sup>11</sup> These studies were buttressed by the 1982 article by Kelling and Wilson that coined the phrase “Broken Windows Policing.”<sup>12</sup> The theory was that “disorder and crime are usually inextricably linked,” so by concentrating on lower-level offenses, police restore order in a community, thus affecting citizen perceptions and lowering overall crime rates. “The essence of the police role in maintaining order,” Kelling and Wilson write, “is to reinforce the informal control mechanisms of the community itself.” The “Broken Windows Theory” as this came to be known, represented the beginning of a sea change in policing towards

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<sup>8</sup> Kelling, George L. and Mark H. Moore. “The Evolving Strategy of Policing.” *Harvard University Kennedy School of Government, Perspectives on Policing* 4 (November 1988).

<sup>9</sup> Kelling, George L. and James Q. Wilson. “Broken Windows: The Police and Neighborhood Safety.” *The Atlantic* (March 1982).

<sup>10</sup> See, e.g., Langworthy, Robert H. “Do Stings Control Crime? An Evaluation Of A Police Fencing Operation.” *Justice Quarterly* 6, no. 1 (March 1989): 27-45. (Sting Operations); Loftin, Colin and David McDowall. “The Police, Crime, and Economic Theory: An Assessment.” *American Sociological Review* 47, no. 3 (1982): 393-401. (Hiring More Officers); Kelling, George L. et al. “The Kansas City Preventive Patrol Experiment: Summary Report.” *Police Foundation* (1974). (Motorized Patrols); and Tien, James M., James W. Simon, and Richard C. Larson. “An Alternative Approach to Police Patrol: The Wilmington Split-Force Experiment.” *U.S. Government Printing Office* (1978). (Rapid Response to Calls).

<sup>11</sup> See, e.g., Kelling, George L. et al. “The Kansas City Preventive Patrol Experiment: Summary Report.” *Police Foundation* (1974).

<sup>12</sup> Kelling, George L. and James Q. Wilson. “Broken Windows: The Police and Neighborhood Safety.” *The Atlantic* (March 1982).

community policing. By the end of the 1990's, community policing had become the "national mantra of the American police."<sup>13</sup>

Though policing is a well-researched area of study, there hasn't been a systematic study of police behavior post-Realignment. A report by the Center on Juvenile & Criminal Justice attempted to determine whether or not Realignment was to blame for the rise in crime in 2012.<sup>14</sup> Their study assumes that if Realignment is a causal factor in a county's rise in crime, the percentage rise in crime will correlate with the percentage of realigned offenders under community supervision.<sup>15</sup> The study concludes that realigning more prisoners was not connected to increases in crime. Using Sacramento and Oakland as examples, the study points out that the two counties have similar population sizes, similar profiles, and similar sized realigned populations but vastly different increases in crime (19.5% property crime rise in Alameda County, compared to 3.2% in Sacramento County). This report marks an admirable first attempt at trying to uncover the relationship between crime rates and Realignment, but more research is still needed. First, as the authors rightly point out, the 2012 crime rate data is still preliminary and represents only one year of Realignment implementation. More time and data will be required to more definitively determine the cause of the recent statewide rise in crime. Second, the study suffers from insufficient geographic specificity. The authors use counties as the units of measurement, but policing happens locally. Future studies should examine the effect of Realignment on individual municipalities. A more apt comparison would have been between Oakland and Sacramento than Alameda County and Sacramento County.

Crime rates are not the sole impact Realignment might have on policing. The current state of policing in California might be in direct opposition to traditional broken windows policing. Police departments are spending less time on minor crimes and disturbances and more time monitoring more serious offenders. Broken windows policing requires great attention to the "order-maintenance" functions of the police force, but Realignment makes that difficult in many communities. Faced with resource constraints, Realignment has effectively splintered the consensus on community policing in California. Some communities seem to be moving to a fifth stage of policing—a supervision model—where many police resources are being realigned to focus on roles traditionally served by parole, probation and jails: the governance and monitoring of offenders.

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<sup>13</sup> Greene, Jack R. "Community Policing in America: Changing the Nature, Structure, and Function of the Police." *Policies, Processes, and Decisions of the Criminal Justice System, U.S. Department of Justice 3* (2000): 299-370, 301. [https://www.ncjrs.gov/criminal\\_justice2000/vol\\_3/03g.pdf](https://www.ncjrs.gov/criminal_justice2000/vol_3/03g.pdf).

<sup>14</sup> Males, Mike and Lizzie Buchen. "California's Urban Crime Increase in 2012: Is "Realignment" to Blame?" *Center on Juvenile & Criminal Justice* (January 2013).

<sup>15</sup> Ibid.



## Findings

### Realignments' Impact on Street Level Policing

Policing has been challenging for years now. Whether because of budget cuts, changes in strategy, or responses to waves of crime, it is hard to isolate a single factor that has impacted policing. After interviews with police officials, however, several factors have stood out as likely being affected by AB 109 and its implementation. These factors are discussed below.

**After Realignment, front line law enforcement officers are responsible for doing more probation compliance checks as probation struggles to catch up with the changing probation population.**

Already resource-starved police departments are being forced to divert further resources to conduct compliance checks on the recently released probation population and other offenders on community supervision. Some departments have used this as a conscious strategy of crime reduction; others have simply had to step in to support a struggling probation department. Realignment gave unprecedented responsibility to county probation departments.<sup>16</sup> By diverting felons to jails instead of prison, AB 109 was ensuring that the probation population would grow and that probation would be populated with people who had previously been on parole. In other words, probation would be responsible for a larger and more serious caseload than ever before. Officials throughout the state agree that probation was not immediately ready to supervise a more difficult population.<sup>17</sup> As a result of this lack of preparedness, police departments have been picking up much of the slack—performing duties that would typically be done by probation staff. In response to this, many probation departments are training their staffs differently and increasing the number of armed probation officials (discussed more fully in Chapter 9).

While the probation departments are growing, training and becoming accustomed to the new population, police officers have provided crucial support. Despite being unfunded by the state, many police departments have devoted a percentage of their officer time or

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<sup>16</sup> For more on this, see Chapter 9 of this report covering changes to the probation department.

<sup>17</sup> This sentiment is commonplace, but the urgency of the problem was communicated passionately by Sacramento Sheriff Scott Jones. “Prison realignment raises questions about crime rate.” Sacramento Sheriff Scott Jones on News 10. <http://www.news10.net/video/1184091988001/0/Prison-realignment-raises-questions-about-crime-rate>.

have provided overtime to officers to support the additional responsibilities. In Fairfield, the sheriff's office provided some monetary support for officer overtime and the probation department, sheriff, and police chiefs have worked together to coordinate compliance checks. The police chief of Fairfield has diverted police resources from an existing drug task force into efforts to follow-up with probationers. Even in Alameda, which has experienced less change since Realignment, front line law enforcement officers are doing more compliance checks now than before AB 109. The Los Angeles Police Department (LAPD) recently reported that it is devoting more than 100 officers and will spend \$18 million monitoring ex-offenders released from prison to county supervision. The LAPD complained that while Los Angeles County received \$720 million over three years to deal with Realignment, police departments in the county split just \$7 million to cover the added AB 109 workload.<sup>18</sup>

In some counties, the increased role of police in probation compliance checks is a function of multiple causes. In Sacramento County, for example, there is the compounding of problems that existed even before Realignment. The county has 60 to 100 PRCS offenders now, and they are being added to 1,200 probationers and an additional 200 sex registrants.<sup>19</sup> Sacramento County was heavily hit by the recession and laid off county employees, especially probation.<sup>20</sup> Because of these cut backs, managing the offender population was difficult before Realignment. Now that there is an influx of new offenders, probation is not equipped to handle the expansion. As a result, the police have been increasingly taking on responsibility for compliance checks and managing the probation and PRCS populations. In fact, in Citrus Heights, the entire crime fighting strategy is based on policing the PRCS and probation populations.<sup>21</sup> In that community, compliance checks are used as a preemptive strike against crime. Police are not responding as much to more minor incidents, such as traffic accidents, and spending more time focusing on the PRCS population.

Whether the shift is caused by resource constraints or proactive policing strategy, the result is that police are spending more of their time dealing with the probation population than they had previously. Though every police official we spoke to stressed that they were still committed to community policing, the central tenant of community policing—that police should reinforce existing community control mechanisms and ensure an orderly community—is lost when police are concentrating their efforts on only serious offenders.

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<sup>18</sup> Palta, Rina. "LAPD Chief Beck: More than 100 cops monitoring felons released under state prison realignment." *California Public Radio, KPCC* (August 20, 2013).

<http://www.scpr.org/news/2013/08/20/38800/realignment-forcing-lapd-to-shift-resources-chief/>.

<sup>19</sup> Telephone Interview with Police Official, *Citrus Heights Police Department* (March 2, 2013).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

Property and violent crime is up in many communities.

Police are seriously worried about how Realignment will impact the crime rate. Though some studies have suggested that the rise in crime statewide is not related to Realignment, police officers we interviewed believe crime is rising.<sup>22</sup>

Across the state, police officers have reported rising property crime in their communities. As one Fresno police official explained, “the area that we’re not seeing any reduction, in fact we’re seeing increases, is in property crimes. It is a direct correlation of consequences at the jail as well as our court systems have been decimated over the last year or so.”<sup>23</sup> In Fresno, as elsewhere, police are seeing people arrested of burglary only to be released before arraignment due to jail crowding and stressed court dockets. Similarly, in Fairfield, police officials have seen an increase in property crime specifically linked to Realignment:

Both violent crime and property crimes have gone down dramatically and then our numbers in 2011 and 2012 are skyrocketing primarily on the property side. What’s the one change in circumstances is the issue of realignment, the issue of felons that nobody knows where they are, nobody knows who they are, and nobody has anything to give the ability or the capacity to respond to either the support perspective or a supervisory and accountability perspective. It’s been very, very difficult.<sup>24</sup>

Police officer impressions seem to be reflected in the data. Reviewing FBI and Attorney General crime data for 2012 reveals a slight uptick in property and violent (Part I) crimes for the year almost across the board in all of the major cities in California.<sup>25</sup> This data lends some credence to the lived impression of police chiefs. In Oakland, for example, overall Part I crime per 100,000 people increased in 2012 by 23% as compared to 2011.<sup>26</sup> In San Jose, Part I crime per 100,000 people increased 24% from 2011 to 2012.<sup>27</sup> There is variation across cities, though—between 2011 and 2012, Part I crimes per 100,000 people increased less than 1% in Stockton, and actually went slightly down in Fresno and Los Angeles.

<sup>22</sup> Males, Mike and Lizzie Buchen. “California’s Urban Crime Increase in 2012: Is “Realignment” to Blame?” *Center on Juvenile & Criminal Justice* (January 2013).

<sup>23</sup> Interview with Police Official, *Fresno Police Department* (March 11, 2013).

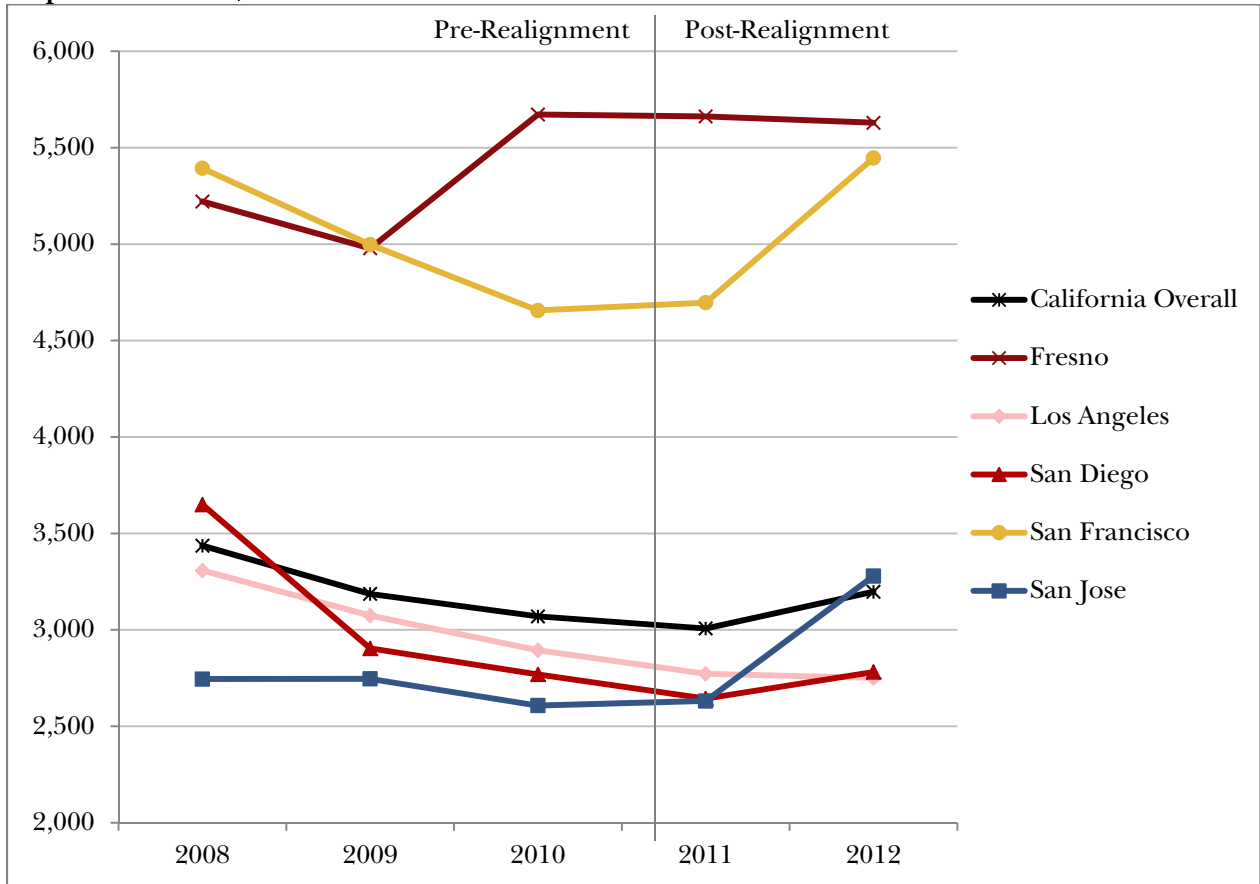
<sup>24</sup> Telephone Interview with Police Official, *Fairfield Police Department* (March 11, 2013).

<sup>25</sup> “FBI Uniform Crime Repors, Crime in the United States.” Federal Bureau of Investigations (various years). <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#crime>.

<sup>26</sup> Ibid.

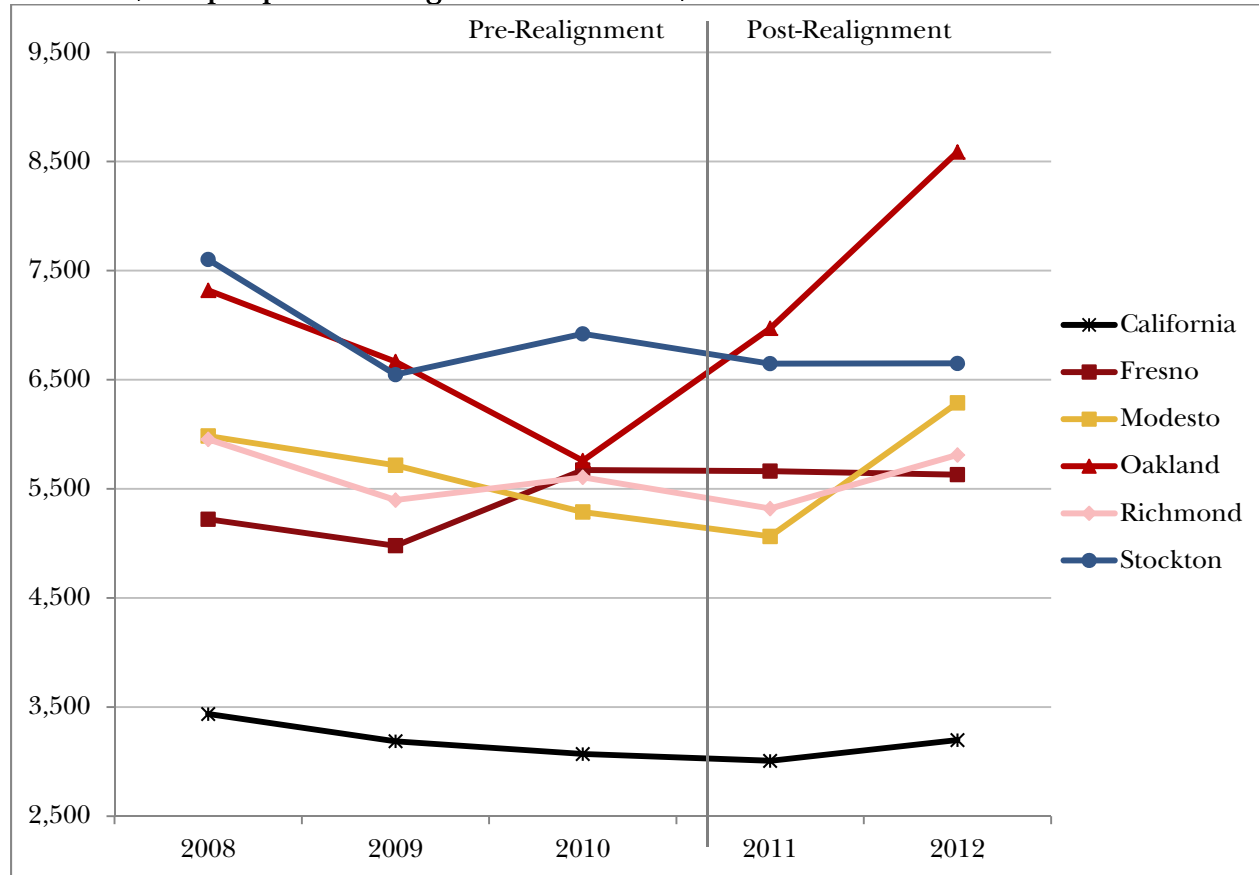
<sup>27</sup> Ibid.

**Figure 3: Part I Crime per 100,000 population for California Overall and 5 Most Populous Cities, 2008-2012**



**Note:** Crime rates by city were calculated based on the crimes reported and city population listed in the FBI Uniform Crime Report. Crime rate for California was calculated with the crime totals from the California Attorney General's Crime in California 2012 report and population and the overall population totals from the U.S. Census.

**Figure 4: Part I Crime per 100,000 population for California Overall and 5 Cities over 100,000 people with Highest Crime Rate, 2008-2012<sup>28</sup>**

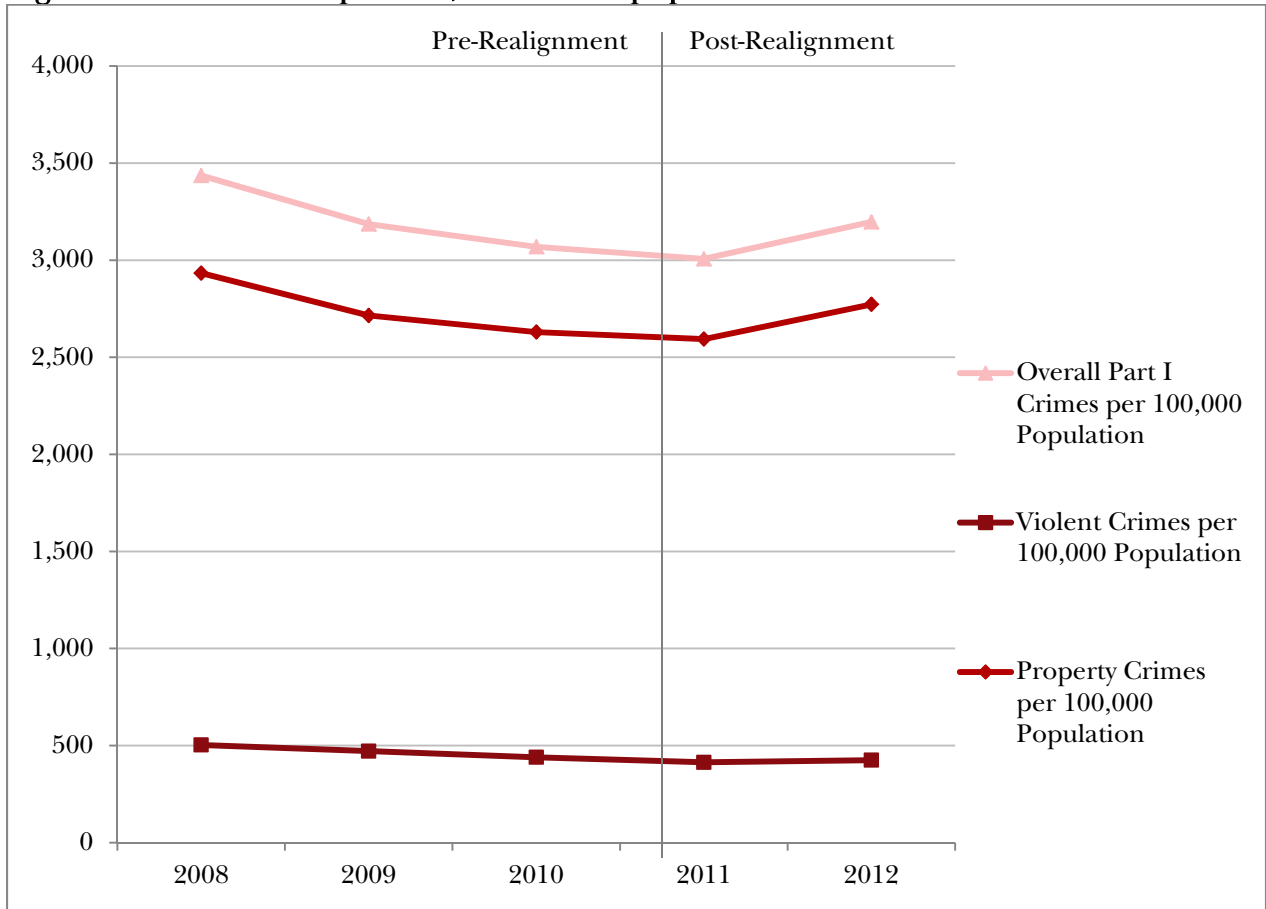


*Note: Crime rates by city were calculated based on the crimes reported and city population listed in the FBI Uniform Crime Report. Crime rate for California was calculated with the crime totals from the California Attorney General's Crime in California 2012 report and population and the overall population totals from the U.S. Census.*

Looking at crime rates in California over this same period, violent crime rates have stayed mostly flat, with a less than 3% growth in the rate of violent crime between 2011 and 2012, as compared to a growth of 7% in the violent crime rate in California over the same period. The overall Part I crime rate mirrors the violent crime rate, increasing 6.3% from 2011 to 2012.

<sup>28</sup> Vallejo was the city with the 5<sup>th</sup> highest crime rate, but was not included because it changed its reporting practices during this time frame, and so its data is not comparable over time. Instead, Fresno, with the next highest crime rate, was substituted.

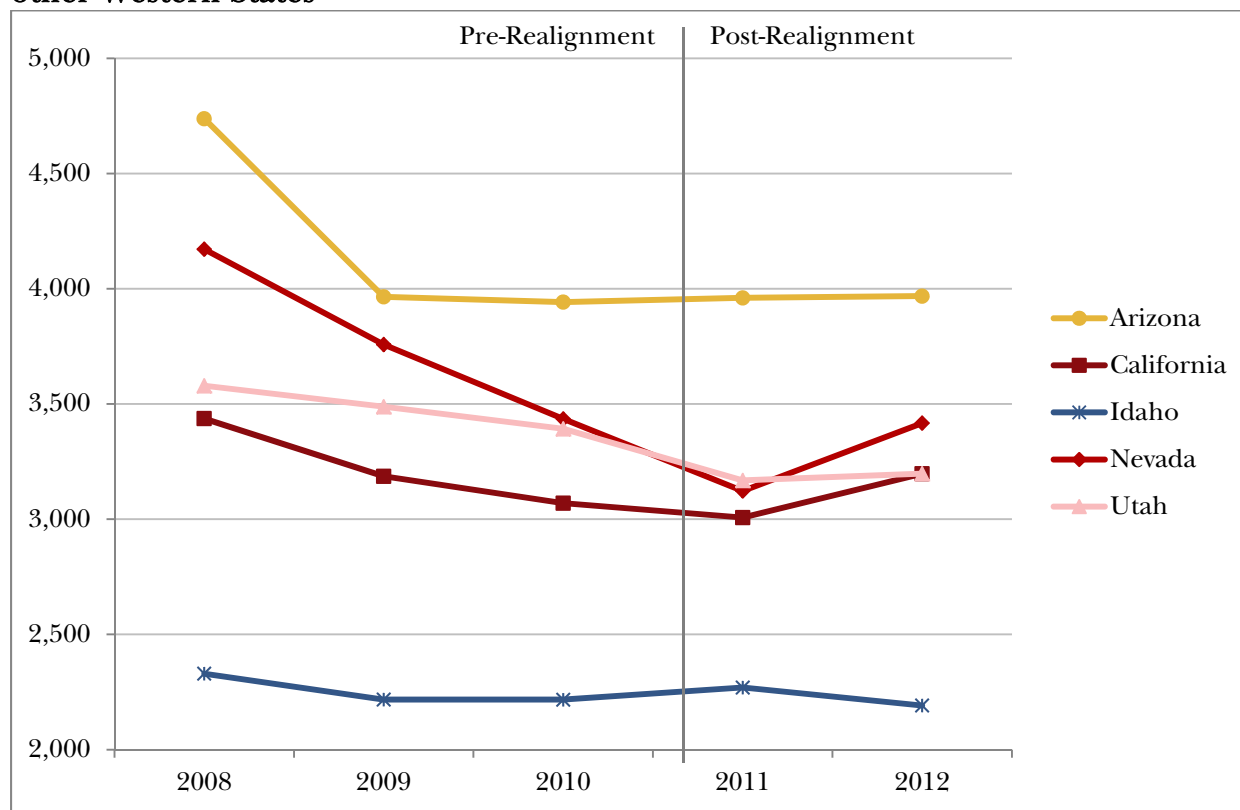
Figure 5: Part I Crime per 100,000 overall population for California 2008-2012



**Note:** Crime rate for California was calculated with the crime totals from the California Attorney General's Crime in California 2012 report and population and the overall population totals from the U.S. Census.

Looking at California in context of surrounding states, the overall Part I crime rate change looks similar to that in Nevada, where the Part I crime rate went up 9.4% between 2011 and 2012, as compared to the 6.3% increase in California over the same period.

**Figure 6: Part I Crimes per 100,000 population, 2008-2012, California compared to other Western States**



*Source: For all states other than California: FBI, Crime in the United States, 2008-2012, Table 5. For California: "Crime Data." Office of the Attorney General California Department of Justice. <http://oag.ca.gov/crime>.*

Officers believe that property crime rates are rising because the types of offenders that are being realigned are specifically those that have a record of property crime convictions. Violent offenders are still being sent to prison. Property criminals are the ones who are being released early and are going back to commit more property crimes. All of this is intensified by the lack of supervision once released, as one Fairfield police official said, “when you release a number of these individuals back into a community and there is limited supervision of programs they do have an influence on the neighborhood.”

**Auto thefts are up in cities across California.**

In addition to the general property crime rates, auto theft, in particular, has been up throughout the State. Even in towns where other property crimes are down or stable,

auto theft remains high.<sup>29</sup> We heard this reported almost universally from police chiefs. The huge increases were striking, and merit investigation independent of the overall property crime rate.

In Fresno, as elsewhere throughout the state, auto thefts have been rising after years of decline. “We had reduced auto theft every single year from 2001 all the way through 2009 and then 2010 we started to see increases in auto theft,” explained one police official. Many of these thefts were perpetrated specifically by the realigned population. As one police official said, “the people that we were arresting for auto theft we were arresting multiple times; the same people. Some of these individuals 15 and 18 times a year.” The spike in auto thefts has even been reported in local press accounts. In Redlands, the police report a 30% rise in auto theft.<sup>30</sup> In Tracy, too, auto theft rose from 2011 to 2012 by 21%.<sup>31</sup> These accounts are reflected throughout the state.

Looking at FBI projected crime statistics for 2012, the picture is less clear. Many communities do seem to have experienced a slight uptick in auto thefts. In some cities, such as San Jose, there seems to be a very large spike in the auto thefts per 100,000 residents from 2011 to 2012—67%.<sup>32</sup> Similarly, in Stockton, the auto thefts per 100,000 residents increased 47% from 2011 to 2012. In others, such as San Diego, the change is slight. Even in Fresno, a community that has been dramatically affected by Realignment and jail overcrowding, the rate of auto thefts dropped in 2012.<sup>33</sup>

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<sup>29</sup> “FBI Uniform Crime Repors, Crime in the United States.” Federal Bureau of Investigations (various years). <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#crime>. Thefts have risen 4% compared to a 43% increase in auto thefts.

<sup>30</sup> Edwards, Andrew and Brian Charles. “Southern California police say they need more resources to confront potential inmate releases.” *Los Angeles Daily News* (June 19, 2013). <http://www.dailynews.com/general-news/20130620/southern-california-police-say-they-need-more-resources-to-confront-potential-inmate-releases>.

<sup>31</sup> “Crime Report, City of Tracy: 2011 and 2012 Comparisons.” Tracy Police Department. [http://www.ci.tracy.ca.us/common/images/uploads/Department%20Photos/Police%20Department/stats\\_thumb.jpg](http://www.ci.tracy.ca.us/common/images/uploads/Department%20Photos/Police%20Department/stats_thumb.jpg).

<sup>32</sup> “FBI Uniform Crime Repors, Crime in the United States.” Federal Bureau of Investigations (various years). <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#crime>.

<sup>33</sup> *Ibid.*



Figure 7: Auto Theft per 100,000 population for California Overall and 5 Most Populous Cities, 2008-2012

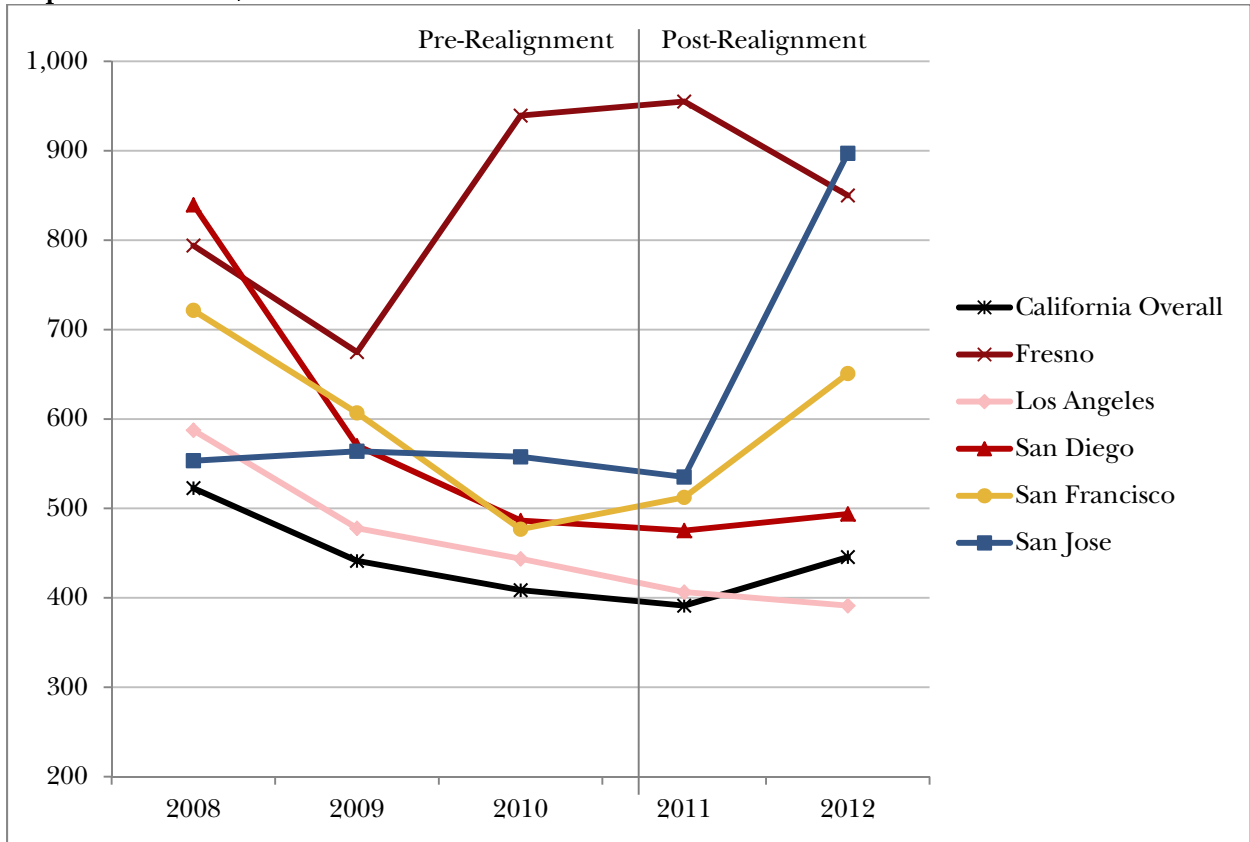
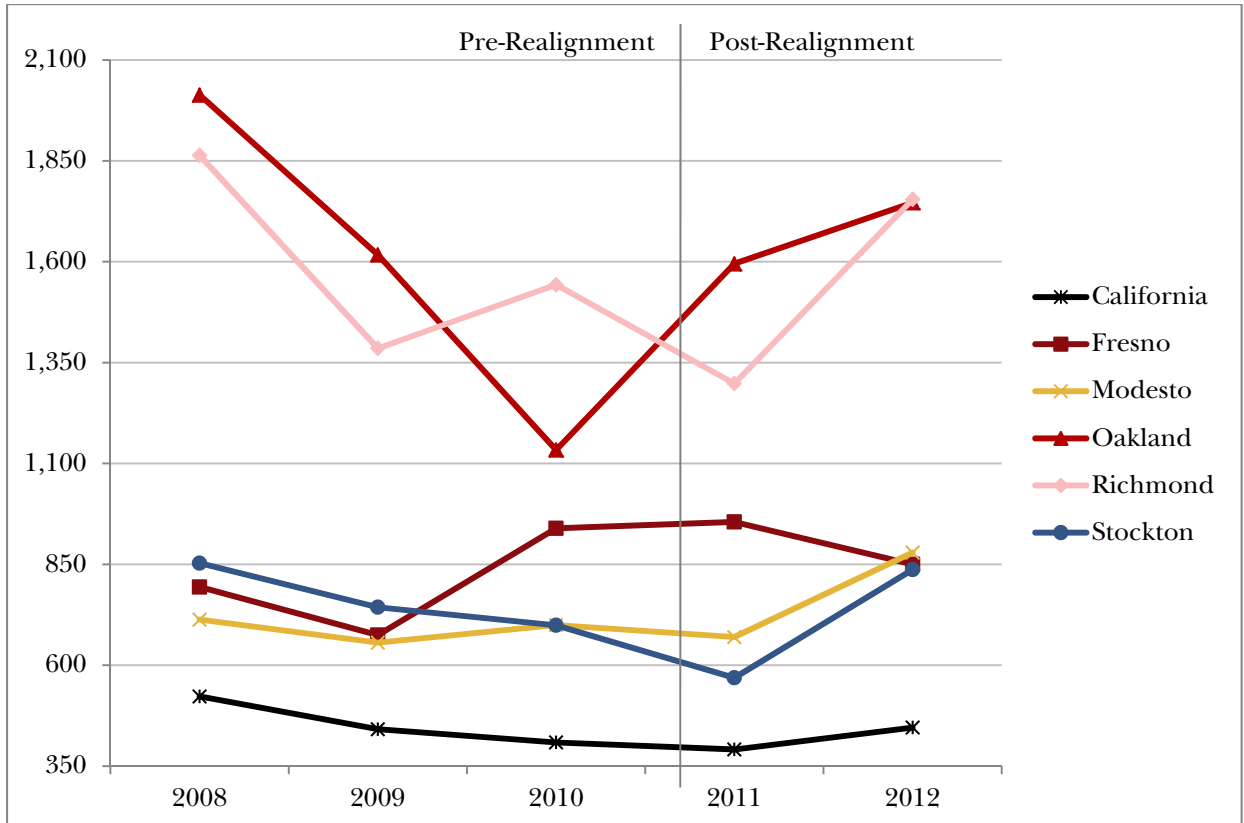


Figure 8: Auto Theft per 100,000 population for California Overall and 5 Cities over 100,000 people with Highest Crime Rate, 2008-2012<sup>34</sup>



*Note: Crime rates by city were calculated based on the crimes reported and city population listed in the FBI Uniform Crime Report. Crime rate for California was calculated with the crime totals from the California Attorney General's Crime in California 2012 report and population and the overall population totals from the U.S. Census.*

More quantitative research would be needed to determine the cause of the increase, but police offered a few theories. Police speculate that auto theft represents the quintessential crime committed by the Realigned population. It is non-violent, fairly low cost, and a crime of opportunity rather than premeditation.

A second possibility is that auto theft represents a truer measure of property crime because of the reporting requirement to obtain insurance payouts. Because many police departments are responding less to lower level property crimes, more citizens are failing to report them. The result is that reported property crime is actually a lagging indicator, not reflective of the actual level of crime. Auto theft is exempt from this because in order to claim insurance on the car, the victim must report the crime as stolen, therefore autos

<sup>34</sup> Vallejo was the city with the 5<sup>th</sup> highest crime rate, but was not included because it changed its reporting practices during this time frame, and so its data is not comparable over time. Instead, Fresno, with the next highest crime rate, was substituted.

are more likely to be reported stolen, even when the police response is minimal or non-existent.

**Police do not have access to a statewide list of probationers' names, risk levels, or prior criminal records.**

Perhaps the largest Realignment-caused barrier to police effectiveness is the lack of a statewide database of probationers. With police departments taking a more active role in supervision of probationers, there is an increasing need for access to probation records just as that access is receding. In the past, most of the records police needed were held by parole—a statewide department. Now, with a growing and higher risk population being released to probation, the population that used to be on parole—a statewide system—is now on probation—a county system. In the past, when police stopped a suspect they were able to check their name against the parole database quickly and effectively. Once the person was found to be on parole, the police could better interpret the situation and the person they were encountering. As one officer put it: “Sadly, there are times that we catch these [copper thieves], they get released, and then it’s only later on through a repeat offense or from an offense in another city that we find out ‘Oh, hey. Yeah, this was supposed to be a PRCS guy from somewhere else.’”<sup>35</sup> Some police officials speculate that people under community supervision will travel out of the county to commit a crime in order to avoid being tracked as a probationer if they happen to be stopped.

Police reply that obtaining probation records now is “very spotty.”<sup>36</sup> An officer might have to know someone personally in the local probation department and say, “Hey, I know a cop here who knows a probation officer here and I can call them and they can get me things.” Though line-level communication between probation and police is common, it remains informal and not institutionalized at the upper levels. This problem presents itself acutely in Citrus Heights, where the border of the town borders another county as well—Placer County. Probationers in Placer County need only cross the street to commit crimes in Citrus Heights, yet the police department has no way of formally accessing the probation database of Placer County to retrieve information on people.

The most important impact of this lack of coordination is that it curtails their search ability when they stop a probationer. Police are allowed more latitude to search probationers without a warrant.<sup>37</sup> Offenders under community supervision “do not enjoy

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<sup>35</sup> Telephone Interview with Police Official, *Fairfield Police Department* (March 11, 2013).

<sup>36</sup> *Ibid.*

<sup>37</sup> *People v. Mason*, 5 Cal. 3d 764-766 (1971).

the absolute liberty to which every citizen is entitled.”<sup>38</sup> This extra authority could mean the difference between a traffic stop and a drug bust. In California, the courts have consistently reaffirmed warrantless probation searches as a valuable tool of law enforcement that “serve[s] to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.”<sup>39</sup> Without this powerful tool, police are limited in their ability to search people on PRCS and lose the powerful “deterrent purposes of the search condition.”<sup>40</sup>

This is the number one problem identified by the police chiefs we interviewed. The simplest and most impactful thing the State can do to reform AB 109 would be to centralize probationer data into a statewide system that local law enforcement officers could access.

**Many police departments have stopped responding to lower level crimes, overburdened by budget cuts and other responsibilities and citizens have stopped reporting them.**

The inability to respond to lower level crimes can have a deep impact on citizen perceptions of police and acceptance by the citizenry of police authority. While heavy-handed “broken windows” policing can negatively affect police legitimacy in some situations, the lack of response to citizen complaints is also damaging.<sup>41</sup> Citizen perception of police effectiveness is shaped significantly by their personal interactions with the police and by what is portrayed in media.<sup>42</sup>

Though many officers do not admit to wholly ignoring citizen calls, almost all police officials we interviewed shared stories where the department has stopped taking lower level crime reports. The sorts of incidents that police are no longer being responded to include traffic accidents with no injuries, petty theft, and even some auto theft.<sup>43</sup>

The result, contend police officers, is that citizens have become less likely to report certain crimes. In Fairfield, for example, citizens are telling officers, “we’re just not going to report it [burglary] because we know that nothing is going to get done with it.”<sup>44</sup>

<sup>38</sup> *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

<sup>39</sup> *People v. Robles*, 23 Cal. 4th 789, 795 (2000).

<sup>40</sup> *People v. Reyes*, 19 Cal. 4th 743, 752 (1998).

<sup>41</sup> Gallagher, Catherine et al. “The Public Image of the Police.” *The International Association of Chiefs of Police* (2001).

<http://www.theiacp.org/PoliceServices/ProfessionalAssistance/ThePublicImageofthePolice/tabid/198/Default.aspx#ch2>.

<sup>42</sup> *Ibid*.

<sup>43</sup> Interview with Kim Raney, *Covina Police Department* (February 19, 2013).

<sup>44</sup> Telephone Interview with Police Official, *Fairfield Police Department* (March 11, 2013).

Police seem to understand the frustration felt by citizens, faced with police who lack the ability to strictly punish offenders. As one police officer quoted citizens as saying:

‘Hey, this is the fifth time I’ve been ripped off. I’ve got to report it now. We’re the ninth or tenth car in the neighborhood that’s been broken into. We’re now reporting it. We’ve had other things taken and missing. We just haven’t reported it because we just know you can’t do anything about it but now this time we’re filing a report.’<sup>45</sup>

Despite this impression, the police response time in Fairfield has only slowed a little and the department still encourages victims to report all crimes—even lower level crimes.<sup>46</sup>

Not all cities have been similarly impacted. Our interviewees suggested that Alameda, for example, has not been heavily impacted by Realignment. There have been some general cuts to programs, but none of it was determined by Realignment. In fact, Alameda is one of the few departments in the state that still responds to accident calls that have no injuries.<sup>47</sup> “We prefer face to face contact with our community versus online reporting,” explained one officer.<sup>48</sup> At a time when many police preferences are subsumed to the realities of budget and increased crime, Alameda has been able to continue at the same pace, with the same priorities throughout Realignment. They benefit from a small community and a low crime rate that a larger department, such as the Oakland Police Department right next door, don’t have.

**Police perceive a loss of legitimacy from citizens.**

With some departments less likely to respond to lower level crime and many citizens less likely to report crimes, police sense a decline in their legitimacy with the population. In town meetings across the state, police are sensing hostility from the citizenry in response to a perceived spike in crime and lack of police control. Though often anecdotal, police are concerned that the lack of transparency of Realignment and the perceived spike in crime leaves citizens blaming their local police department for any victimization.

Police in Los Angeles County have heard citizens complain about the perceived lack of accountability for crimes. One police officer explained; “if there is a crime committed and you’re responsible for that crime there should be some consequences. I think people are starting to doubt. Are there any sanctions or consequences for criminal

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Telephone Interview with Police Official, *Alameda Police Department* (March 7, 2013).

<sup>48</sup> Ibid.

behavior anymore?”<sup>49</sup> For many, this begs a philosophical question about punishment and culpability. In communities with overcrowded jails, such as Fresno and Riverside, citizens are reporting crimes only to see the person they reported back on the street the next day.<sup>50</sup> Is justice being done? As one officer put it, “right now we have a criminal justice system with no justice.”<sup>51</sup> The stories from police officers are plentiful: “I had one citizen who had their car stolen and the individual we arrested and put in jail, he got out early release and a couple of days later stole that person’s car again.”<sup>52</sup> In other communities, this has led to citizens not reporting crimes. As a police official in Fairfield said, “a lot of folks say that they aren’t reporting crimes because they know we’re down and they feel like there is nothing that can be done. There is both anger and apathy amongst much of the community.” The result, when combined with the fact that many police departments are no longer responding to lower-level crime reports, is that citizens have and will continue to lose respect for police authority. As one police chief articulated;

I think they might be less likely to report crimes especially if you tell them ‘I can’t send an officer out there but you can go to our website and you can fill out a report on the website’... Some people might think ‘If they don’t care I’m not going to waste my time.’<sup>53</sup>

Citizens feel “that they are on their own a little bit more than they used to be and that is because of all the early releases that have occurred.”<sup>54</sup> These comments echo a theory proposed by Kelling and Wilson in 1982: that when police fail to respond, citizens will cease to report and the crucial connection between police and the citizenry will be severed. As Kelling and Wilson write, citizens call to report a crime,

Patrol cars arrive, an occasional arrest occurs but crime continues and disorder is not abated. Citizens complain to the police chief, but he explains that his department is low on personnel and that the courts do not punish petty or first-time offenders. To the residents, the police who arrive in squad cars are either ineffective or uncaring: to the police, the residents are animals who deserve each

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<sup>49</sup> Interview with Kim Raney, *Covina Police Department* (February 19, 2013).

<sup>50</sup> McAllister, Toni. “Early Release Possible For Inmates As Local Jails Fill.” *Lake Elsinore-Wildomar Patch* (January 7, 2012). <http://lakeelsinore-wildomar.patch.com/groups/police-and-fire/p/early-release-possible-for-inmates-as-local-jails-fill>.

<sup>51</sup> Interview with Kim Raney, *Covina Police Department* (February 19, 2013).

<sup>52</sup> Interview with Police Official, *Fresno Police Department* (March 11, 2013).

<sup>53</sup> Interview with Kim Raney, *Covina Police Department* (February 19, 2013).

<sup>54</sup> Interview with Police Official, *Fresno Police Department* (March 11, 2013).

other. The citizens may soon stop calling the police, because ‘they can't do anything.’<sup>55</sup>

Communities that have taken a more proactive approach to Realignment have fared better. Police in Citrus Heights, for example, have done a good job of preparing the community for Realignment ahead of time. The police department has taken an active role in educating the community on AB 109 and explaining the police role in managing the offender population.<sup>56</sup> They hold trainings and information sessions on what AB 109 is and how it affects the community. As a result, the police do not sense dissatisfaction from the population.<sup>57</sup> The department is focused on building relationships with the community and using those relationships to seek the help of citizens in monitoring the PRCS population through neighborhood watch organizations. The active education campaign on the part of the police department helped soften the blow for the community and prepared them for increases in crime. It also shifted blame from the police to the criminals themselves and enlisted the support and contribution of citizens in lowering the threat of the policy.

The result of this loss of respect and legitimacy in most departments might be the rise of private security measures.<sup>58</sup> Officers in Fairfield believe citizens are increasingly likely to feel that the police are incapable of providing for their security. Business owners are asking police, “Do I need to get guns in my business? Do I need to go ahead and ask you for a concealed weapon permit?”<sup>59</sup> Police worry that the increase in gun ownership will lead to an increase in gun theft and then an increase in violent crime as a result.<sup>60</sup>

**Police departments have started to collaborate more on the county level to deal with Realignment.**

As mentioned, police were almost entirely left out of the early Realignment planning. Some of the reasoning for this is that Realignment is set up to function as a countywide program. All of the planning, spending, and data monitoring happens on the county level. This fits nicely with the other impacted agencies that are mostly county-based.

<sup>55</sup> Kelling, George L. and James Q. Wilson. “Broken Windows: The Police and Neighborhood Safety.” *The Atlantic* (March 1982).

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Bayley, David H. and Clifford D. Shearing. “The Future of Policing.” *Law & Society Review* 30, no. 3 (1996): 585-606. A similar trend was identified in California during times of budget cuts and was covered by the popular press. See Yoder, Steve. “As Police Budgets are Cut, Citizens Step In.” *The Fiscal Times* (August 7, 2012). <http://www.thefiscaltimes.com/Articles/2012/08/07/Police-Budget-Cut#page1>.

<sup>59</sup> Telephone Interview with Police Official, *Fairfield Police Department* (March 11, 2013).

<sup>60</sup> Ibid.

Post-AB 109, local police departments are beginning to collaborate more on the county level. Where existing countywide partnerships existed, police departments have had an easier time collaborating now. As one police official said, “when you have centralized state funding like this I think it does make more sense to work more together with all the jurisdictions and the stake holders.”<sup>61</sup>

After the first year of AB 109 implementation, police lobbied for and were given a \$24 million grant from the State to spend on Realignment related expenses for 2013, and a second allotment of \$27 million for FY 2013-2014. Like other Realignment money, the grant was to be disbursed to the counties with each county getting a percentage of the money in relation to how many prisoners were realigned.<sup>62</sup> Each county assigned one chief to manage the allotment and the various counties were allowed to distribute the money between the departments however they saw fit.<sup>63</sup> With the exception of Alameda County, all of the counties are using the money almost exclusively for countywide programs.

In Solano County there has long been a tradition of collaboration. Police officers already collaborated on a countywide probation compliance team. The allotment for the county—about \$242,000—will be spent on providing two more officers to that countywide team, based in Fairfield and Vallejo, the two cities with the most probationers. In Fresno County, a lot of the money (50%) will likely go to support the district attorney’s office. The remainder will be spent on a countywide crime analyst and a new GPS system. Sacramento County is being very deliberate in their allocation. As one police official involved with the allocation process said, “The basis for which we decide this is not just on where they all live; it is on, as a county, how to best put together a collaborative and regional model where we can address this at a countywide level rather than focus on 81 jurisdictions.” To that end, the county is likely going to start a countywide task force, with officers based in affected cities. The office will be based in Sacramento—the most affected city—but would be coordinated countywide and have countywide responsibilities.

Some counties are still reserving money for local police stations. Alameda, for example, is spending some of the money on a countywide analyst, but the bulk of their \$480,000 allotment will go directly to the Oakland Police Department, the most affected community in the county, to support local policing activities.

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<sup>61</sup> Telephone Interview with Police Official, *Citrus Heights Police Department* (March 2, 2013).

<sup>62</sup> “Police departments to receive grant funding.” *The Stockton Record* (January 19, 2013). [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20130119/A\\_NEWS02/301190315](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20130119/A_NEWS02/301190315).

<sup>63</sup> Interview with Kim Raney, *Covina Police Department* (February 19, 2013).



Overall, the money represents an opportunity for collaboration between departments. Many police chiefs see countywide spending as cost effective, since you can hire a few analysts who do crime data analysis for all of the communities in the county. Other police chiefs see the countywide collaboration as a truer reflection of crime patterns. As one chief explained, offenders on PRCS may live in one town, work in another town and commit crime in a third town. Having that person tracked and monitored by just the town of the person's residence does not make sense. Countywide collaboration is in part a reflection of this. Some chiefs also acknowledge that countywide collaboration reflects the governor's demand for more collaboration in Realignment implementation. Taken together, these actions represent a sea change in policing in California. Realignment has contributed to the regionalization of policing at the county level and encouraged the collaboration of various police departments in their spending.

## **Conclusions and Recommendations**

After just over one-year of Realignment, police are still unsure of how to react. Most police chiefs are content to let the policy continue without repealing it, but are nervous about the effect it might have on their communities. It is still too early to be sure what long-term effect Realignment will have on policing, but the short-term effect has been huge. Police departments are operating in ways they never have before. Some of the changes, such as countywide collaboration on crime analysis and enforcement, have been beneficial and have resulted in practices that will likely continue. Other changes, such as ceasing to respond to lower level crime reports have likely had a negative impact on citizen perceptions of the police. Others have been mixed. On one hand, some police departments have used probation compliance checks as an opportunity to be proactive about crime fighting, others have seen compliance checks as a burden on already strained resources.

The most critical and concrete change that police request is the development of a statewide database of probationers. One police chief articulated it bluntly: "We need a statewide database where officers on the street, if they come across somebody they are checking the person looking for warrants and identification, finding out who the person is. There needs to be a database so we can find out if they are on probation under Realignment; what their offenses are and what the conditions are." Though it was not uncommon for a police chief to advocate for the full repeal of AB 109, the policy's proponents and opponents could all agree that it would be vastly improved by the introduction of such a database.

# Chapter 5: Sheriffs<sup>1</sup>

“Nine years ago you couldn’t have convinced me to be interested [in programs]. But I’ve been involved with it enough, I’ve gone myself and experienced the transformation these folks go through.... When you’re talking about the long-term goal of reducing recidivism, I don’t think sixty to seventy percent is a passing grade. I think we need to do it differently, and I think AB 109 ...has provided us with an opportunity to ...change how we incarcerate.”

- Chief Alexander Yim, Los Angeles County Sheriff’s Department

“We can do a better job locally if properly funded.”

- Sheriff Margaret Mims, Fresno County Sheriff’s Office

In October 2011, Public Safety Realignment Act (AB 109) passed with the full support of the California State Sheriffs Association. As discussed, the legislation realigned those charged with any of 500 non-serious, non-violent, non-sex offenses (“triple-non”), parole revocations, flash incarceration and post release community supervision (PRCS) to serve their time in county jail rather than state prison, regardless of the length of the sentence. The sheriffs stood to inherit this population—their needs and their challenges.

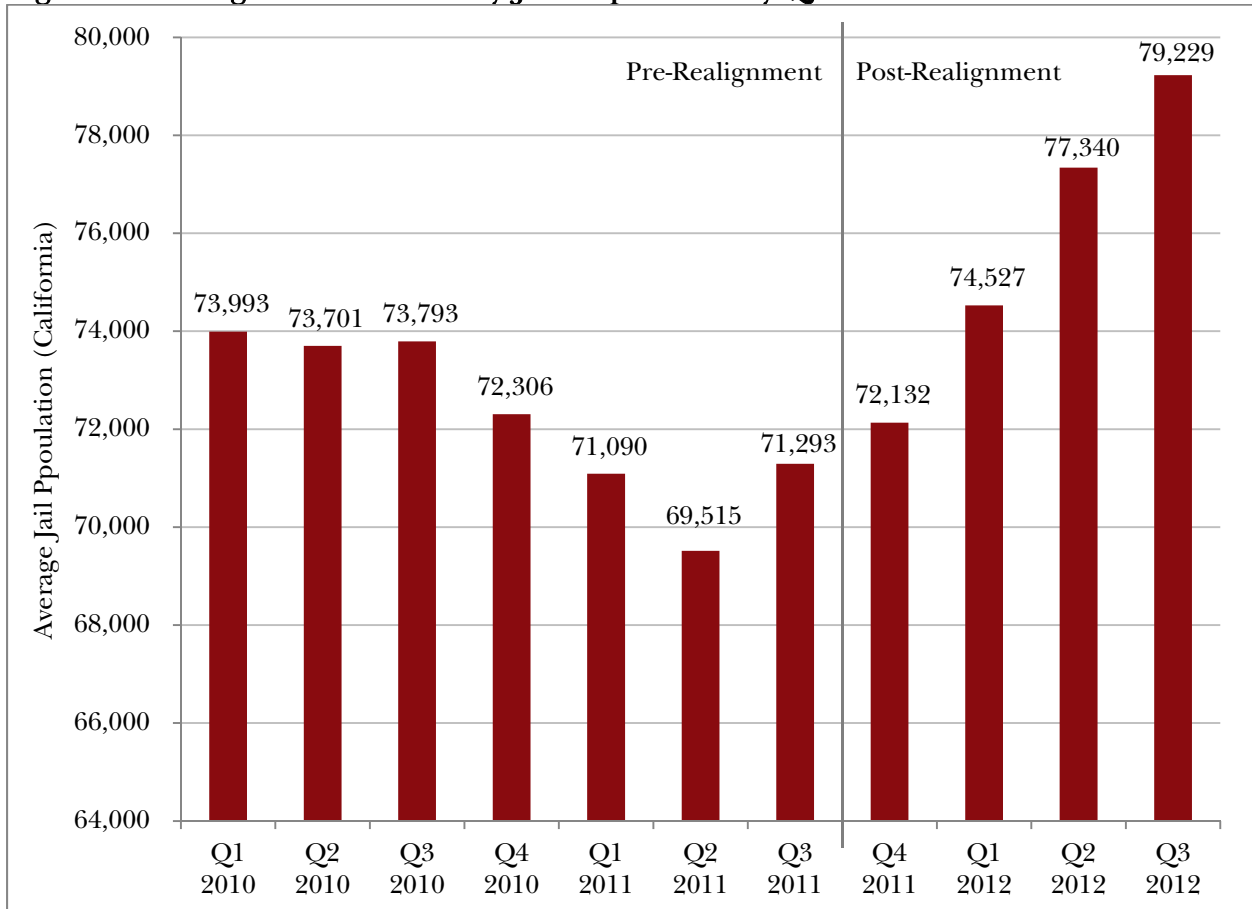
One year later, many County jails were bursting at the seams. Under Realignment, tens of thousands of sentenced individuals who previously would have served time in state prison are now serving it in county jails. In the quarter preceding the start of Realignment (Q3 2011) the average daily population (ADP) for California’s jails was 71,293 (see Figure 9). Twelve months later Q3 2012), jail ADP was 79,229, an increase of approximately 11% or an additional 7,936 inmates.<sup>2</sup>

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<sup>1</sup> This chapter was written by Mark Feldman.

<sup>2</sup> Lawrence, Sarah. “Managing Jail Populations to Enhance Public Safety: Assessing and Managing Risk in the Post-Realignment Era.” *Stanford Criminal Justice Center* (June 2013). <https://www.law.stanford.edu/sites/default/files/child-page/440504/doc/slspublic/Paper%20on%20jail%20gmt%20July%202013.pdf>. at 7.

Figure 9: Average California Daily Jail Population by Quarter



Source: Board of State and Community Corrections, Jail Profile Survey

While sheriffs are having to adjust to remarkable changes post-AB 109, many have also seized the opportunity to reevaluate the county criminal justice system, and many are creating innovative programs designed to facilitate reentry and reduce recidivism. Out of principle or necessity, nearly every sheriff we interviewed has bought in to the rehabilitative purpose of Realignment. Whether they are able to implement rehabilitative practices is for many a secondary question. For counties that were near or over capacity prior to Realignment, simply absorbing the AB 109 population has been like “drinking out of a fire hydrant.” For those with beds to spare, Realignment has been an opportunity to expand programming and implement evidence-based practices targeted to reduce recidivism, and to take in a population that they firmly believe is best incarcerated at the county level. And for those on the borderline, Realignment is a race against the clock to develop successful programs and alternatives to incarceration, pre- and post-sentence, to divert and rehabilitate the inmate population before they are forced to early release.

Realignment has posed a very different set of jail management issues for counties that are at capacity compared to those that are not. Thus, we selected our counties based on pre and post-Realignment capacity, aiming for a range of counties that were stressed prior to Realignment, those with excess capacity post Realignment, and those on the borderline. The "stressed" counties were at capacity and early-releasing inmates to comply with court-imposed or self-imposed population caps prior to realignment. Borderline counties were approaching capacity, and non-stressed counties had excess capacity at the time of our interviews.

**Table 2: Jail Crowding in Counties Studied**

<b>Stressed Pre-Realignment</b>	<b>Borderline</b>	<b>Non-Stressed</b>
Fresno, Riverside, Los Angeles, Santa Barbara, Amador	Orange	Alameda, Santa Clara, San Francisco, Lassen

In order to understand how the population has changed post Realignment, we began each interview asking each sheriff to paint a picture of jail management in the county prior to Realignment. This was a crucial starting point, since we have found the manner and degree to which Realignment has affected each county is highly dependent on the county's capacity, resources, and criminal justice culture prior to Realignment. We then asked how the population has changed post-AB 109, focusing on the numeric influx of realigned inmates (1170(h), parole revocations, PRCS, and flash incarceration) and the impact of the new population on the jail. In particular, we inquired about the dangerousness of the population, and capacity issues related to housing long-term, criminally sophisticated, and mentally ill populations.

The majority of our interviews focused on the tools at the sheriff's disposal to manage the inmate population. This section divided into two main subjects— in-custody programming and release valves. We were interested in whether programs have expanded or contracted with AB 109, and the county's plans for future programming once the population stabilizes. In discussions with stressed counties, we focused on the release valves available to the sheriff, including alternative supervision for sentenced and presentenced populations, early release, and contracts with the California Department of Corrections and Rehabilitation (CDCR) and other counties to house inmates.

Ultimately, the Sheriff's Department is only the back end of the criminal justice system, and its role cannot be understood in a vacuum. The inmate population in the jails is a direct function of other county actors—law enforcement, judges, district attorneys, public defenders and probation— and if we are to comprehend the sheriff's decisions as jailer

we must also understand his relationship with these other actors. Indeed, increased collaboration between county criminal justice departments was frequently cited as a positive outcome of Realignment. Given the direct impact on jail capacity, we were particularly interested in judges' willingness to issue split sentences and law enforcement's consideration of jail overcrowding when making arrests.

## **Findings**

From the perspective of the sheriffs in most of the counties interviewed in this study, Realignment been a net positive shift. Now that the counties have to house and treat their offenders locally, they are increasingly forced to internalize the cost of their criminal justice system. As a result, every sheriff reported that a major success of Realignment is that departments across the county criminal justice system are reevaluating the way they do business and working more closely together to reform the system. In particular, sheriffs are working closely with probation to share information about inmates and facilitate "warm handoffs" between the departments.

Sheriffs feel they can treat offenders better closer to home provided they have adequate resources to do so. Many counties are now developing innovative community-based incarceration programs geared towards reducing recidivism, and some are creating reentry centers in the jail and in the community. Nearly every sheriff's office has begun to adopt risk assessment tools previously used by probation and the courts to determine who is suitable for early release and community-based treatment.

Yet some counties, despite a stated desire to increase programming and implement best practices, face seemingly insurmountable capacity and budget constraints. Lassen County and Alameda Counties lost a significant source of income when the CDCR canceled their contracts to house state inmates. Lassen County is a prime example of a county that wants to provide better services, but does not have the resources to do so. Programming quickly becomes a secondary consideration when the sheriff can barely afford to hire enough staff to avoid early releasing inmates, or to provide adequate medical care. Realignment has successfully shifted the discussion at the county level towards rehabilitation and reducing recidivism, but if the rehabilitative purpose of Realignment is to be fully realized, some counties may require additional financial assistance.

The offender's perspective merits further study. Some counties report that inmates are disincentivized from participating in programming, in and out of custody, when they know they will be early-released. They are returned to the community without having participated in programming and armed with the knowledge that there is a reduced—or,

in some cases, non-existent—punishment for a given crime. Thus, without the threat of incarceration, the offender may no longer be deterred from committing the crime in the first place.

The importance of improved relations with other actors in the criminal justice system cannot be overemphasized. Ultimately, while sheriffs have release valves at their disposal, they are at the back end of the system and can only work with the population they are given. To relieve pressure on the jail such that stressed counties can focus on implementing evidence-based programs for those in custody, sheriff's departments and probation should simultaneously work to reform the front-end of the system.

## **County Profiles**

One of the primary difficulties with AB 109 is that its funding structure was applied uniformly, despite the fact that counties were in very different positions prior to AB 109 and would face very different obstacles post AB-109. While there are many similarities across counties and lessons learned from cross-county comparison, no two counties tell exactly the same story of Realignment. To comprehend how all the pieces fit together, and to better understand how the sheriffs are responding to Realignment, it is of paramount importance to examine the complete picture within individual counties. Thus, we will begin by describing the story of Realignment in two counties—one stressed, and one non-stressed. Then we will separately profile Los Angeles County, a county that merits its own category as it accounts for one-third of California's state prison population.

### **Stressed County Profile: Fresno County**

Sheriff Mims has plans to improve programming in the future, but for now, Fresno County is grappling with its bursting population. Fresno County has been at or near capacity and under a consent decree since 1993 allowing them to release inmates when they reach 90% capacity.<sup>3</sup> Prior to Realignment, the economic downturn had forced them to close three floors of the jail. With AB 109 funding, Sheriff Mims reopened two of the floors. The first to reopen housed 432 minimum-security male inmates and filled in 14 days; the second floor, also 432 beds, filled in 10 days. Sheriff Mims noted that demand for jail space is so high that they would have reached capacity soon after the floors reopened even without the addition of the AB 109 population.

For Fresno County, a county plagued by capacity and budgetary issues prior to AB 109, Realignment was implemented too quickly and with too little assistance from the state.

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<sup>3</sup> "Criteria for Inmate Release from Custody Pursuant to Federal Court Order." Fresno County Sheriff's Office Jail Division Policies and Procedures at 1.

The AB 109 population was larger than initially expected. The CDCR had projected Fresno County would house 508 realigned inmates on November 20, 2012; there were 743. The influx has caused Fresno County to reach deeper onto lists of increasingly serious inmates for early release. Fresno County's early release policy includes eleven levels, the higher the number the more serious the offense. The highest levels are the sentenced AB 109 populations. Since Realignment, Fresno County has early released up to level nine.

Despite Sheriff Mims' assertion that, as a result of the federal consent decree, "[Fresno County is] not overcrowded; we're prohibited from being overcrowded," Fresno County has already been sued by the Prison Law Office, alleging unconstitutionally inadequate healthcare similar to the suit brought against the state in *Plata*.

In spite of seemingly hopeless capacity issues, Sheriff Mims sees Realignment as a catalyst for refocusing the criminal justice system to reduce recidivism. Because of increased pressure on the jails, Sheriff Mims said that "[t]he way we're having to look at the justice system now is 'how do we keep people from reoffending?' rather than 'how long can we put somebody away for?'" Using AB 109 funds, Fresno County has increased substance abuse and mental health beds, and created a new pretrial alternative supervision program. Additionally, Sheriff Mims has received a grant with the National Institute for Justice to design a jail to community reentry program.

### **Non-stressed County Profile: Santa Clara County**

In stark contrast to Fresno County, prior to Realignment, the Santa Clara County jails were well below capacity, departments across the county criminal justice system collaborated towards shared objectives, and evidence-based programs had been the standard for years. In such an environment, AB 109 has been an opportunity to reach a greater population of local offenders with programs targeted to their needs, and has fostered further collaboration among county actors.

The Santa Clara County jail system faced capacity problems in the early nineties. Gary Graves, now Chief Operating Officer, led a jail population task force comprised of judges, the district attorney, public defender and pretrial services to reassess bail schedules and open jail beds. Now, with a total population of 3,720 on January 21, 2013,<sup>4</sup> Santa Clara County has just over 5,000 beds available. Even after absorbing the AB 109 population, the average daily jail population has actually decreased from two years ago when it reached nearly 5,000.

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<sup>4</sup> See "Daily Jail Population Statistics." Santa Clara County.  
<http://www.sccgov.org/sites/doc/Administration/Pages/About-Us.aspx>.

With space to spare, the Santa Clara County Sheriff's Department reports that they have primarily used AB 109 funds to expand programming. Prior to Realignment, Santa Clara County offered evidence-based life skills programs (e.g., drug, anger management, and GED). Now, with AB 109 funds, they have been able to expand their services to include programs targeted towards preparing inmates for reentry. The Community Alternative Supervision Unit (CASU) is a new program currently only available to the AB 109 population that places select inmates who have successfully completed programming under supervision in the community while they are still under the custody of the sheriff's department. The program will be described in further detail in the Post-Sentence Alternative Supervision section of this chapter, and it should be studied as a possible example of best practices with the AB 109 population. Santa Clara County has also created a Reentry Resource Center available to all ex-offenders that assists with the transition back to society by providing SSI, food stamps, and job training. Although the county has significant resources, the sheriff's department does not currently have sufficient funds to expand the CASU program beyond the AB 109 population. It is hoped that future funding formulas will allow them to offer these successful programs to the greater population.

## **Los Angeles County**

Since October 2011, all eyes have been on Los Angeles County. One-third of the state prison population in California comes from Los Angeles County—if Realignment were to fail in Los Angeles County, it would fail for California.

Prior to Realignment, Los Angeles County's jails were already strained. Los Angeles County has been under a federally imposed population cap since the 1980s. Although their facilities contain roughly 21,000 beds, due to the economic downturn, they only had staffed capacity to house 15,600 inmates in October 2011. Chief Alexander Yim of the Los Angeles County Sheriff's Department Correctional Services Division noted that, in 2004, when he came to the LASD, the more serious sentenced inmates were serving only 25% of their sentence before release; less serious inmates were serving only 10% of their sentence.

In the months leading up to Realignment, Los Angeles County braced for the PRCS population. Probation was given resources to absorb the coming influx, and the police geared up for increased activity. Perhaps because of the sheer number of PRCS inmates that were projected to come back to Los Angeles County—some 11,000 over the first year—the 1170(h) population that would be sentenced to county jail was more or less an afterthought. That is, until two or three weeks prior to Realignment, when the population forecasts predicted that after the initial surge, the PRCS population would



diminish to zero whereas the 1170(h) population would increase until it plateaued, providing a constant flow into the jail system.

By March 2013, the Los Angeles County jail population had leveled at roughly 18,500 inmates, including 5,700 1170(h) inmates. As expected, the 1170(h) population has largely stabilized. The total bed capacity is higher due to increased staffing paid for with Realignment funds, but the number remains artificial since Los Angeles County is still forced to early release a significant number of its inmates. Local inmates—those that traditionally served sentences locally in the county jail—are the primary release valve of the jail. As of late November 2012, non-1170(h) local inmates serving sentences for more serious offenses serve 65% of their sentence; male inmates serving time for less serious offenses serve 20% of their sentence, whereas females serve only 10%.<sup>5</sup> The 1170(h) population, on the other hand, serves 100% of their time after the state-mandated one-for-one custody credits.<sup>6</sup> Although some inmates have received shockingly enormous sentences—one as long as 42 years (21 with good time credits)—such lengthy sentences are very rare.

Los Angeles County is one of a handful of counties developing community-based treatment programs for the 1170(h) population, both to reduce recidivism and to relieve capacity pressures in the jail. The local inmate population that remains in the jail is generally too high risk to remove from custody, but the 1170(h) population includes many low and medium-risk inmates that could benefit from community-based programming. The Sheriff's Department is seeking funding and support for the county to expand contractual authority to run treatment beds in the community for 1170(h) inmates that serve a portion of their time in custody and successfully complete in-custody programming. This is effectively the sheriff's way of working around judges' reluctance to issue split sentences in Los Angeles County (only 4% of sentences were split last year). Thus, with this community-based treatment proposal, the sheriffs are essentially creating their own split sentence program. The program has yet to begin, but Chief Yim was optimistic it would start soon, and expressed a desire to eventually extend the program to the local population as well as 1170(h) inmates.

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<sup>5</sup> "Public Safety Realignment Implementation Update-Year 1 Report." Los Angeles County Countywide Criminal Justice Coordination Committee (2012).  
<http://ccjcc.lacounty.gov/LinkClick.aspx?fileticket=9NmIyYnCdS%3D&tabid=602>.

<sup>6</sup> In practice, this means they serve 50% of their actual sentence, because they are receiving four days for every two days served in custody. But this is not the same as being released early. 1170(h) inmates have technically served their entire sentence when they complete a sentence as a result of applying custody credits awarded pursuant to the California Penal Code. On the other hand, inmates that are released early are released at the discretion of the sheriff authorized by a federal consent decree, regardless of how much time the inmates have served or have left to serve.

In part to bolster judges' and district attorneys' confidence in the sheriff's decisions to send inmates to treatment beds in the community, the Sheriff's Department has acquired the COMPAS risk assessment tool and is in the process of adopting it for early release decisions. Until now, the decision to early release an inmate in Los Angeles County has been entirely based on the inmate's current offense of incarceration. An inmate's prior history or behavior while incarcerated might have determined his classification within the jail, but had no bearing on the decision of whether to release the inmate early. The COMPAS tool will provide a more comprehensive assessment of an inmate's risk of recidivism.

Los Angeles County has offered in-custody, education-based incarceration programs for years, but Realignment has allowed them to expand their offerings to include GED testing on-site, and they have increased enrollment from 1,000 in October 2011 to several thousand today.<sup>7</sup> Chief Yim noted that the jail has immediately seen a reduction in inmate violence as a result of increased programming—a shift that has turned him into a true believer of the efficacy of rehabilitative programs.

Nine years ago you couldn't have convinced me to be interested [in programs.] But I've been involved with it enough, I've gone myself and experienced the transformation these folks go through.... When you're talking about the long-term goal of reducing recidivism, I don't think sixty to seventy percent is a passing grade. I think we need to do it differently, and I think AB 109 ...has provided us with an opportunity to ...change how we incarcerate.

In addition to expanding in-custody programming, Los Angeles County is constructing a new, on-site reentry center that will include a Federally Qualified Health Center (FQHC), pharmacy, drop-off mental health assessments, and a serve as a base for other service providers to prepare inmates to succeed when they are released.<sup>8</sup>

Unlike other overcrowded counties, Los Angeles County has made very limited use of electronic monitoring for pretrial and sentenced populations. Indeed, it appears, at least for the moment, the Sheriff's Department has refrained from targeting the pretrial population as a potential area for reducing pressure on jail capacity.

Overall, although it is too soon to know its long-term impact, Realignment has led to what appears to be a net positive result in the Los Angeles County Jail. Los Angeles County had already developed pre-release programming prior to Realignment, but the

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<sup>7</sup> Choate, Brant, Los Angeles County Sheriff's Department. "Maximizing Education Reaching Individual Transformation—MERIT." <http://lawenforcementtoday.com/tag/los-angeles-county-sheriff%E2%80%99s-department/>.

<sup>8</sup> "Community Transition Unit is here to help while in Custody and after your release!" Los Angeles County Sheriff's Department. <http://shq.lasdnews.net/pages/PageDetail.aspx?id=965>.

pressures of the 1170(h) population and Realignment dollars allowed Los Angeles County to expand existing programs, shift towards reentry and reducing recidivism, and provided the catalyst for creating a risk assessment-based early release policy. According to Chief Yim, the county is moving in the right direction. “[T]here’s going to be a lot of good news coming out of Los Angeles County this year.” Los Angeles County Sheriff Leroy Baca was one of the most positive about Realignment’s impact on county jail systems, saying:

Realignment is an opportunity to be more inventive with incarceration. We can deliver jail programs that improve offender reentry and reduce recidivism. I think education-based incarceration is the most promising aspect of Realignment. We now have 7,000 inmates going to school every day in the L.A. jail. Realignment is providing funding to expand our jail education programs.

## **Population Shift and Jail Capacity**

Before proceeding to a more general discussion of the qualitative changes in the county jail population post-Realignment, it is useful to define what is meant by “capacity.” Capacity is the number of inmates the jail can hold given its resources and given the classification of each inmate. A medium or maximum-security inmate cannot be housed in a minimum-security area, even if there is a surplus of minimum-security beds. Gang members must be separated from members of rival gangs, and offenders often require protective custody because of prior threats or acts of violence while incarcerated. Thus, a county may have 5,000 beds, but it will reach full capacity for certain classifications long before it houses 5,000 inmates.

Classifications can impose a significant burden on a jail’s resources. Some presentence inmates in Riverside County are bused 60-70 miles each way to the courthouse because there is no capacity for their classification level in nearby facilities. Orange County described the very process of classifying and housing inmates as a “Rubik’s cube” that the sheriffs are required to solve for every offender no matter how long they will remain in the jail. Consequently, flash incarceration— often for periods of ten days or less— requires a significant investment of resources for a very short turnaround.

Finally, it should be noted that seasonal fluctuations in the crime rate make it difficult to fully isolate the effect of AB 109 on jail population trends, or to accurately predict the future influx of AB 109 inmates. Sheriff Beliveau explained that, in Santa Clara County, the jail population tends to peak in the summertime, slows in the fall, and then spikes after the holidays when the courts return from vacation. When they are not

overcrowded, jails generally attempt to maintain a 5-10% vacancy rate to absorb these periodic fluctuations.<sup>9</sup>

**Realignment's effect on jail populations has varied significantly across counties. While some counties experienced little or no change, many were already at reduced capacity as a result of the economic downturn and struggled to absorb additional inmates. Capacity constraints were exacerbated by the fact that the CDCR initially underestimated the realigned population.**

There are, at a minimum, two distinct stories of Realignment: those counties that were at capacity prior to Realignment, and those that were not. Alameda County, Santa Clara County, and San Francisco County have easily absorbed AB 109 inmates—one year into Realignment, Santa Clara County's jail population was actually lower than one year before Realignment. By contrast, for Fresno County, Realignment was like pouring water into a glass that was already full. Five years of economic downturn and budget cuts preceded Realignment. They had closed floors and, in some cases, entire facilities, forcing them to early release increasingly serious offenders. When AB 109 passed, Fresno County reopened over 800 beds and filled them in less than a month.

Similarly, Riverside County has been at or near capacity and releasing inmates since 1993 and under a federal injunction that orders the sheriff to release inmates when the jails reach 90% capacity. In preparation for AB 109, using county funds, they expanded their facilities by 600 beds to bring their population to 85% capacity. By January 2012, only three months after the start of Realignment, Riverside County had returned to 90% and restarted early releases. The county has 3,906 beds in five facilities; together they were forced to early release over 6,800 inmates in 2012. It is important to note that counties like Fresno County and Riverside County were at or near capacity prior to Realignment; when new beds fill quickly it is not necessarily or even primarily resulting from the influx of AB 109 inmates. As in Fresno County, it may be more indicative of a pre-existing demand for jail space. The more direct, short-term impact of AB 109 is that, in counties that have reached capacity, each time a judge sentences an inmate to jail under 1170(h), the sheriff may have to release one or more inmates considered lower risk. As more AB 109 inmates are sentenced, increasingly high-risk inmates are being released.

Fresno County and Riverside County may be among the most stressed, but Realignment came at a difficult time for many counties. Los Angeles County had 20,000 inmates prior to the economic crisis; in 2011 they had reduced to 15,000—the maximum capacity their

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<sup>9</sup> "Do the Crime, Do the Time? Maybe not, in California." California State Sheriffs' Association (June 2006). [http://www.calsheriffs.org/Documents/do\\_the\\_crime,\\_do\\_the\\_time.pdf](http://www.calsheriffs.org/Documents/do_the_crime,_do_the_time.pdf).

staff could manage.<sup>10</sup> Orange County had stopped hiring deputy sheriffs and closed down multiple sections of jails and an entire women’s jail. Los Angeles, Orange, Fresno and Riverside Counties have all used AB 109 funds to reopen facilities and have essentially expanded their actual staffed capacity to near pre-economic crisis levels. Orange County reopened the women’s jail and the other sections that had previously been closed, but their hiring freeze left them spread thin on staffing. Making matters worse, Orange County reported that there had been some miscommunication as to whether the jails would receive parolees through AB 109. Consequently, Orange County was in the middle of refurbishing a jail when they had to scramble to accommodate the parolee population, many of whom required protective custody.

As discussed, many sheriffs reported receiving a significantly larger realigned population than initially projected by the California Department of Corrections and Rehabilitation (CDCR), forcing them to scramble to find beds by combing through their sentenced population for inmates suitable for early release or electronic monitoring. Although some counties are still struggling to predict the impact of AB 109, Los Angeles County reports that their realigned populations have mostly stabilized. Similarly, in Orange County, the parolee population has since stabilized at around 300 inmates, and the feeling in the Sheriff’s office is that they have more or less found their footing with regard to AB 109. As the N3 population has momentarily plateaued around 700—they have found the population tends to rise, stagnate, then rise again—Orange County is approaching a crucial moment. Unlike many of the “stressed” counties, Orange County has yet to reach capacity and has not been forced to release any inmates early, but they have a small, ever decreasing margin to work with and may well find themselves at capacity in the near future.

**Sheriffs have had to prepare to house offenders for longer terms—some as long as 42 years—but lengthy sentences are rare. Nearly all realigned sentences have been under three years.**

County jails were designed to house all inmates until they receive their sentence. Short-term inmates sentenced to one year or less would remain in the jail and long-term inmates would move on to state prison. Since AB 109, primarily through the use of enhancements, some offenders have received staggeringly long sentences to be served in county jail. Riverside, Fresno and Orange Counties have all seen sentences of more than ten years. Offenders have been sentenced to as many as 22 years in Santa Barbara County and 42 years in Los Angeles County jails. Such sentences, however, are notably rare. Los

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<sup>10</sup> Phone interview with Mark Delgado, *Los Angeles County Countywide Criminal Justice Coordination Committee* (December 19, 2012).

Angeles County reports that approximately 98% of 1170(h) inmates had less than 2.5 years left to serve after receiving their sentence. Similarly, Santa Clara County reports that their 1170(h) sentences have generally been two to five years, with very few receiving five.

It should be noted that some jails are used to housing inmates for a number of years.

Although county jails have never been designed to be used as long-term housing, it is something [Los Angeles County] does on a regular basis. Inmates with complex or multiple cases, quite often, remain in our custody for 5-7 years while their cases move through the judicial system. We also currently house sex offenders under Civil Commitments, several of whom have been in our custody for more than 10 years.<sup>11</sup>

Although it is too early to estimate the full effect, increasing numbers of long-term sentences may eventually lead to capacity issues. Even Alameda County, currently a non-stressed county with over one thousand available beds, projects to be at or near capacity in two years due to an estimated increase of twenty-five AB 109 inmates per month. The average stay in the jail is currently thirty-four days, but beds are being filled for significantly longer periods of time— as long as seven years— as more offenders are sentenced to Alameda County under 1170(h).

**Sheriffs disagree as to whether Realignment has resulted in a more violent jail population.**

One of the questions that received the most varied responses was “How, if at all, has the AB 109 population changed the nature of the jail population?”, and, in particular, “Are the jails noticeably more dangerous?” Alameda, Santa Clara, and Riverside Counties all held the view that it comes down to classification and the capacity to handle that classification, not the type of sentence. Indeed, none of the counties interviewed segregate based on the type of sentence. Each inmate is housed according to the classification he receives when he enters the sheriff’s custody. Thus, an offender who is flash incarcerated for 10 days may be double-bunked with an 1170(h) inmate serving a 25-year sentence if they share the same security classification. At the moment, no county reported segregating pre- and post-sentenced populations, though some are exploring options for doing so.

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<sup>11</sup> “Public Safety Realignment Custody Implementation Plan.” Los Angeles County Sheriff’s Department (2011) at 4.

Once an inmate is classified, it does not matter whether they were 1170(h) or flash incarceration— a “triple-non” inmate sentenced to 25 years on drug enhancements could be significantly less criminally sophisticated than an offender serving a short stint for parole revocation. However, nearly every county added that “triple-nons are triple-non for a reason”— the 1170(h) inmates, by definition, are not an especially serious or violent cohort. And even if sheriffs do receive criminally sophisticated inmates as result of Realignment, the counties stressed that they are used to housing every level of inmate presentence, from the most minor misdemeanors to defendants on trial for murder. Realignment has not significantly altered the type of inmates that pass through the jail; it has altered whether or not those inmates stay in the jail post sentence.

By contrast, Los Angeles and Fresno Counties reported that the 1170(h) population is high-risk and requires more mental healthcare than initially anticipated. But according to Fresno County, parole revocations have been by far the most dangerous AB 109 population. Under AB 109, parolees who violate the terms of their parole return to jail instead of prison if their most recent offense was a triple-non, regardless of their prior history. Sheriff Mims reports that parolees are “pretty dangerous people” who bring a prison mentality to the jail, and that her unsworn deputies are unequipped to handle such a hardened, sophisticated population.

Orange County reported a marked increase in contraband and gang activity in the jail since Realignment began. It is too early to pinpoint the origin of the shift, but their hypothesis is that the nature of flash incarceration, rather than the sophistication of the AB 109 population, accounts for the increase. They believe offenders are intentionally getting flash incarcerated to enter the jail, deliver contraband and connect with gang members, knowing that they will be released in a number of days.

While some sheriffs are satisfied with the funding formula, others feel it does not adequately account for lost contracts with the CDCR, or for the long-term medical and mental healthcare of the realigned population.

### **Counties Lost Contracts with the CDCR, Struggle with Funding Shortfall**

Some counties that contracted to house CDCR inmates prior to Realignment report a net loss in funding as a result of Realignment. Prior to AB 109, the CDCR contracted with Alameda County to house 700 state prison inmates for \$77 per day per inmate, to the tune of \$19.7 million per year. With the passage of AB 109, the state no longer required Alameda County’s services and they lost the contract. In an instant, Alameda County lost

nearly \$20 million in revenue and only gained \$18 million in AB 109 funds, while continuing to receive inmates through AB 109 that would have previously been under the purview of the CDCR. To date, they have received far fewer AB 109 inmates—159 triple-non and 247 PRCS and parole revocations—than the 700 previously housed through the contract.

Lassen County, covering 4,720 square miles with a population just under 35,000, may have little in common with Alameda County, but they too lost significant contracts with the CDCR as a result of Realignment. Lassen County had a 156-bed local jail and a Community Correctional Facility in the same building that housed an additional 160 state inmates. Three months before Realignment, the state canceled Lassen County's contract, resulting in a massive funding shortfall. The Lassen County Sheriff's Department lost \$2.2 million per year and received about \$385 million in AB 109 funds 2011-2012. They had to cut 22 positions and round up \$1 million in general funds just to keep the jail running. Since the dormitories that used to house CDCR contract inmates have been closed, Sheriff Growdon has had to segregate inmates by classification solely within a 156-bed facility, and sometimes there is no workable solution. In early March, Lassen County had 36 females in custody, yet they only had housing for 20. So they moved the most serious male offenders out of their segregated space and placed them into a dorm with lower-level offenders. Sheriff Growdon worried about exposing low-level offenders to more sophisticated inmates, but he had no choice.

Sheriff Growdon wants to focus on programming, but he does not have the money. Lassen County's jail is twenty years old, and Realignment came at a time when the jail already required major renovation to safely house the inmates they already had. He estimates the jail requires \$3-4 million in repairs and renovations, but he does not know where that money will come from now that the state contract is gone. Sheriff Growdon took over in January 2011. Before that, he said, his predecessors were focused on warehousing people and provided very few services to inmates. Sheriff Growdon has been trying to create more programs—including vocational and behavioral health programs new with Realignment—but there is little he can do with so many other essential expenses.

## **The Cost of Long-term Medical and Mental Healthcare Provision**

Inadequate mental and medical healthcare in California's prisons was the catalyst for Realignment. In measuring the success of AB 109, it is crucial to examine the level of healthcare that inmates receive in the county jails, lest they repeat the failures of the state.



Many counties, even those that were comparatively well off, were unprepared for the medical and mental healthcare costs of Realignment. Prior to Realignment, county jails generally lacked the infrastructure to house long-term inmates with significant healthcare needs. While AB 109 funds allowed counties to expand pre-existing treatment programs and increase mental health beds, with a few exceptions, the funding has been insufficient to meet the increased demand for medical and mental health services post-Realignment. According to Santa Barbara County Sheriff Bill Brown, the funding formula was based on the marginal cost of each inmate and did not sufficiently account for the fixed costs of constructing medical infrastructure where none existed before. Prior to Realignment, counties were used to triaging medical care. Former San Benito County Sheriff Curtis Hill gave the example that, if an inmate had a hernia prior to AB 109, the jail's medical staff might have given him a compression bandage and advised him to seek treatment on the outside post release. Now that the inmate may be in the jail's custody for a number of years, the jail will have to provide the full treatment to the inmate.

Most jails do not have the infrastructure to treat sick inmates in-house. Some, like Santa Barbara County, are currently constructing medical facilities with AB 900 funds; others are too small to maintain a full medical center. Thus, counties that cannot treat the inmate in-house will have to find a specialist on the outside to confirm the diagnosis and treat the inmate. In smaller, rural counties, the closest specialist willing to treat inmates may be hours away, yet the jail will have to utilize its resources to transport the inmate to receive treatment. Inmates in the 156-bed Lassen County jail are taken to a small hospital in nearby Susanville for general medical care. If they require more serious medical attention, the Sheriff has to fly them to Reno, Nevada. Sheriff Growdon did note that Lassen County's mental healthcare has improved since Realignment, primarily because of a new director of behavioral health. However, Sheriff Ryan in rural Amador County noted that, for the severely mentally ill who require hospitalization, finding mental health treatment beds outside of the jail has been a significant challenge. He said it often takes his deputies months to find an open mental health bed.

If counties are unable to provide adequate healthcare, they can expect to see a significant increase in litigation costs. Not only did the funding formula overlook the full cost of healthcare for counties that did not have pre-existing medical infrastructure, it overlooked the litigation costs incurred when those same counties inevitably fail to provide adequate healthcare.

Ultimately, because of actual medical and litigation costs, the marginal cost of treating a mentally or medically ill inmate in a small county is likely higher than treating him in the prison or in a larger county with a pre-existing medical infrastructure. Future iterations of the funding formula should take this into consideration. Additionally, smaller counties are considering creating shared medical facilities for multiple county jail systems

to allow them to share the fixed cost, but this is very much a dream for the future. It does not solve the problem for the inmate in Colusa County with special needs today.

Although, for some counties, AB 109 was implemented too quickly given the lack of medical infrastructure in the jails, every county we interviewed has used AB 109 funds to expand pre-existing mental and medical healthcare programs to at least partially meet the increased demand for services. Santa Barbara and Riverside Counties are currently constructing facilities designed to provide medical care to long-term populations. San Francisco County and Alameda County were already providing long-term healthcare to inmates; Alameda County provided healthcare to CDCR contract inmates that stayed in the county jail for their prison term. One potential benefit of Realignment, provided counties have the proper medical infrastructure, is that they will be able to provide continuous, long-term care for the inmate pre- and post-sentence. Francesca Anello, at the County Mental Health Department in Los Angeles County noted that “[i]t used to be that we saw people short term ...[s]o was difficult to get them hooked up in the community if they’re going in and out so quickly. And so we’d miss an opportunity ...to work with them long-term.”<sup>12</sup> Long-term medical care at the county level may ultimately be more successful than the state, but counties will need the resources and the infrastructure to do it.

## Population Management

Sheriffs believe that, if properly funded, they can incarcerate and rehabilitate more effectively than the state. Counties without capacity issues have been able to use AB 109 funds to develop in-custody programs targeted to reduce recidivism. Stressed counties have been less able to devote resources to programming.

### In-Custody Programming

Counties that had capacity to spare prior to AB 109 have been able to use their AB 109 funds to develop new in-custody programs and expand the scope of existing programs. Santa Clara County already offered evidence-based life skills programs ranging from substance abuse treatment to GED, and has used AB 109 funds to expand into programming focused on reentry. Alameda County has held a reentry expo every six months for the last two years that brings in partners from community-based organizations

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<sup>12</sup> “In L.A. Prison Realignment, a New Focus on Mental Health.” *The California Report* (August 21, 2012). <http://www.californiareport.org/archive/R201208210850/a>.

as well as state and county agencies to start preparing inmates for life on the outside. Since 1999, Alameda County has implemented a successful program called MOMS (Maximizing Opportunities for Mothers to Succeed) that connects incarcerated mothers with their children while still in custody. The program is focused on helping mothers and children plan for reentry, and includes a partnership with the Oakland Housing Authority to provide transitional housing to recently released mothers and their families. But even these comparatively well-off counties are not able to offer their programs to every inmate who could benefit from them. Santa Clara County's new MOMS reentry program, paid for with AB 109 funds, is only available to 1170(h) inmates, and mothers who wish to participate in MOMS will first have to make their way up the waitlist. Despite these constraints, Sheriff Ahern believes that, properly funded, the county has the programming and capacity to handle the AB 109 population better than the state. Already, Alameda County has been able to expand its programming as a result of Realignment. Alameda County had in-custody programs in place prior to AB 109, but they were previously unable to offer them to CDCR contract inmates. With AB 109 funding, the county now offers programming to all inmates.

Stressed counties have been so far too preoccupied with capacity issues to invest significant resources into in-custody programming. Riverside County has developed a substance abuse program in Banning with a 75% success rate, but the program remains small and they lack the capacity to expand it beyond that location. Moreover, increased usage of early release is making it difficult to enroll eligible inmates in existing programs. In-custody programs are often only available for low-level inmates—the same inmates that have likely already been early released due to capacity constraints. As AB 109 forces jails to release higher level offenders, sheriffs will need to develop programs targeted to medium level inmates, since they may be the lowest level in custody. The second issue is a derivative of the first. The low-level inmates that would qualify for programming know that they are also first in line to be early released; absent further incentive to program, some sheriffs report that inmates often choose to forgo programming and wait for early release without program officers looking over their shoulder. Sheriff Mims reported that, in Fresno County, inmates will not participate in GED or substance abuse programming unless they are court-ordered to do so.

If Realignment is to fulfill its stated goal of reducing recidivism, offenders must be incentivized to participate in evidence-based, in-custody programs. Santa Clara County has devised such a model by requiring inmates to successfully complete in-custody programming before they are eligible to return to the community via alternative supervision. Los Angeles County is exploring implementing a similar program. Using in-custody programs to funnel inmates into reentry programs is the ideal practice, but it requires that the inmate knows he will not be released free and clear if he forgoes

programming and remains in the jail. As long as inmates know early release is likely— or for some inmates, inevitable— there may be little incentive to participate in a program.

**Realignment has forced much needed inter-departmental collaboration and reevaluation of the criminal justice system. Sheriffs are working more closely with probation, law enforcement, district attorneys, public defenders and judges to reduce recidivism and reserve jail space for those who pose a danger to society.**

Every sheriff reported increased collaboration among county actors in the criminal justice system. In spite of Fresno County’s capacity issues, Sheriff Mims sees Realignment as a catalyst for refocusing the criminal justice system to reduce recidivism. The Riverside County Sheriff’s Department reports increased collaboration with other county actors as a result of Realignment, particularly with probation. Prior to AB 109, the pretrial population constituted 77% of Riverside County’s jails. As part of the AB 109 plan, probation and the courts have expanded pretrial diversion programs to bring the pretrial jail population down to 68%, and the Sheriff’s Department reports that number is decreasing daily. Perhaps in response to overcrowding, Riverside County’s judges are issuing split sentences at a much higher rate than most counties. Four-hundred of the inmates currently in custody are serving split sentences— a little over 60% of the sentenced population—and over the last three months, 80% of sentences in Riverside County have been split. However, it should be noted that many sheriffs reported that judges in their counties have been reluctant to issue split sentences.

Some counties reported that the Community Corrections Partnership (CCP) fostered greater collaboration. According to Sheriff Growdon, the CCP brought the district attorney and the sheriff together in Lassen County. The DA previously spoke against electronic monitoring; now he and the sheriff have come to an agreement to utilize the Ohio Risk Assessment System tool to determine eligibility for post-sentence electronic monitoring. And although the DA was opposed to specialty courts in the past, the CCP is now considering creating mental health, drug, and veteran services courts.

In Amador County, Sheriff Ryan reports that Realignment has led to increased collaboration with the Department of Health and Human Services (HHS). HHS has started a new Moral Recognition Therapy program outside of the jail, as well as a Sober Living Environment with beds for three realigned inmates post-release.

Santa Clara County is proof of the benefits of long-term, inter-departmental collaboration. In response to capacity issues in the early nineties, Santa Clara County organized a jail population task force comprised of judges, the district attorney, public

defender, and pretrial services to reassess bail schedules and open jail beds. Now, with a total population of 3,720 on January 21, 2013,<sup>13</sup> Santa Clara County has over 5,000 beds available. Largely free of capacity constraints, Santa Clara County has focused their resources on evidence-based life skills programs (e.g., drug, anger management, and GED) and they been able to use AB 109 funds to expand programming to prepare inmates for reentry. Sheriff Beliveau places much of Santa Clara County's success on inter-departmental collaboration. "When it came to Realignment, a lot of ...silos disappeared and everyone was working together.... You get cooperation anytime you open up a door at another department."

Although not every aspect of Santa Clara County will be applicable in other areas, it may be a helpful example of best practices in high resource counties, and its inter-departmental collaborative culture may be a useful model for counties that are for the first time starting to band together as a result of Realignment and capacity pressures.

## **Jail Crowding Release Valves**

For stressed counties and counties that project to be at capacity in the future, the Sheriff's release valves are crucial tools for relieving pressure on the jails and reserving space for those who pose the greatest risk to public safety. The following is an analysis of the options available to sheriffs for managing jail capacity post-AB 109.

**Sheriffs have created and greatly expanded pretrial and post-sentence alternative supervision programs aimed at freeing jail space and reducing recidivism.**

## **Pretrial Home Detention**

Stressed counties seeking to reduce capacity pressure would do well to start with alternative supervision programs for their pretrial population. From the beginning of 2010 to the start of Realignment, the share of individuals in jail in California who were not sentenced was remarkably stable at around 70%, and was notably higher than the national average of 60%.<sup>14</sup> But the composition of individuals in jail began to change immediately after Realignment began. The share of jail inmates who had been sentenced to a term in custody grew significantly from 29% in the months immediately before Realignment began to 37% during the same period one year later. But as Lawrence

<sup>13</sup> See "Daily Jail Population Statistics." Santa Clara County.  
<http://www.sccgov.org/sites/doc/Administration/Pages/About-Us.aspx>.

<sup>14</sup> Lawrence, Sarah. "Managing Jail Populations to Enhance Public Safety: Assessing and Managing Risk in the Post-Realignment Era." *Stanford Criminal Justice Center* (June 2013).  
<https://www.law.stanford.edu/sites/default/files/child-page/440504/doc/slspublic/Paper%20on%20jail%20mgmt%20July%202013.pdf>. at 7.

notes, behind the state average of 63% lies tremendous variation across California counties, ranging from a low of 42% of the jail population in Lassen County being non-sentenced to a high of 84% in Merced County.<sup>15</sup>

Some of our interviewees suggested that high county bail schedules are filling California's jails with unsentenced inmates, not necessarily because they pose a risk to public safety, but because they cannot afford to pay bail. Counties could reduce the pretrial population in the jails by reforming the bail system, increasing pretrial diversion, and creating pretrial alternative supervision programs under the purview of the sheriff. The first two, while crucial to reserve jail space for those who pose a flight risk or threaten public safety, are not the subject of this chapter since they are outside of the sheriff's authority. However, it is worth noting that probation and the courts can relieve significant pressure on the jails by expanding pretrial diversion programs. In Riverside County, as part of the original AB 109 CCP plan, the courts increased their pretrial ankle bracelet program from 500 to 2,000, bringing the pretrial population down from 77% to 68% of the jail, and Riverside County reports that the pretrial population continues to decrease daily.

AB 109 included a provision allowing the sheriffs to create home detention programs for pretrial inmates in lieu of bail. Fresno, Orange and Los Angeles Counties have all implemented or are in the process of implementing programs in which the sheriff conducts an initial risk assessment of the inmate, and if the inmate is eligible, he may be released on electronic monitoring. At present, Orange County is only utilizing the program for pretrial misdemeanors, but may have to expand to pretrial felons once their population exceeds capacity.

### **Alternative Supervision for Sentenced Inmates**

When AB 109 was enacted, the legislature ostensibly gave the sheriffs multiple tools to handle the influx of sentenced inmates in counties that were at or near capacity. One such tool was to develop electronic monitoring programs for inmates in lieu of confinement to county jail. Prior to Realignment, California Penal Code §1203.016 allowed the county board of supervisors to authorize the sheriff to implement voluntary electronic monitoring programs; AB 109 amended the statute to include *involuntary* placement in alternative custody. The implication was that sheriffs would be able to remove inmates from custody and voluntarily or forcibly place them on electronic monitoring.

There has been some confusion as to whether the amended California Penal Code still requires sheriffs to obtain the consent of inmates when placing them on involuntary

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<sup>15</sup> Ibid. at 8.

electronic monitoring, and thus does not permit sheriffs to force inmates into the program,<sup>16</sup> and whether inmates released on the sheriff's electronic monitoring program receive the same one-for-one custody credits as they would accrue in jail. The Riverside County Sheriff's Department has interpreted the statute to require the inmate's consent even for involuntarily electronic monitoring, and they have found it difficult to obtain consent because the department interprets the statute as only allowing straight time on the sheriff's electronic monitoring program, whereas inmates will receive one-for-one custody credits if they remain in jail. Riverside County's interpretation of the law may be partially correct, as *People v. Anaya*, 158 Cal.App.4th 608 (2007), held that conduct credits could not be granted to inmates released on electronic monitoring under §1203.016. However, *Anaya* was a case involving presentence, voluntary participation; the involuntary program did not yet exist. Denying a sentenced inmate conduct credits when he is *involuntarily* removed from custody and placed on electronic monitoring may form the basis for an equal protection claim,<sup>17</sup> but has yet to be argued in the courts. Furthermore, overcrowded counties like Riverside County may avoid the *Anaya* issue altogether by placing inmates on electronic monitoring pursuant to California Penal Code §1203.017(a), which provides that,

Upon determination by the correctional administrator that conditions in a jail facility warrant the necessity of releasing sentenced misdemeanor inmates prior to them serving the full amount of a given sentence due to lack of jail space, the board of supervisors ...may authorize the correctional administrator to offer a program under which inmates committed to a county jail ...*may be required to participate in an involuntary home detention program*, which shall include electronic monitoring, during their sentence in lieu of confinement in the county jail.... Under this program, one day of participation shall be in lieu of one day of incarceration. *Participants in the program shall receive any sentence reduction credits that they would have received had they served their sentences in a county correctional facility.* (emphasis added)

Thus, not only does there appear to be a statutory basis for involuntarily committing inmates to electronic monitoring in counties at or under capacity, but there is a basis for awarding custody credits equal to those accrued in jail to inmates involuntarily placed on electronic monitoring as a result of overcrowding pursuant to 1203.017(a), as well as a

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<sup>16</sup> See also, "Public Safety Realignment Custody Implementation Plan." Los Angeles County Sheriff's Department (2011) at 9. ("If involuntary, inmate must sign document that they will comply"). However, the plain language of the statute appears to allow sheriffs to force inmates into the program without their consent. See *California Penal Code §1203.016*. It reads, "[f]or involuntary participation, the inmate shall be informed in writing that he or she shall comply, with the [program's] rules ...."

<sup>17</sup> Couzens, J. Richard and Tricia A. Bigelow. "Felony Sentencing After Realignment." *Felony Sentencing Reporter* 25 (2013).

viable argument for narrowing *Anaya's* scope and awarding custody credits equal to those accrued in custody to those *involuntarily* placed on electronic monitoring pursuant to 1203.016.

Despite these issues, Riverside County continues to expand their electronic monitoring program post-AB 109. It used to be that courts would sentence offenders to the jail and the sheriff would run a risk assessment to see if they would qualify for electronic monitoring. Now, capacity issues are forcing the Riverside County Sheriff's Department to comb through the list of long-term inmates and attempt to persuade them to enter the program. However, Riverside County has encountered multiple obstacles to implementing such a program in a stressed county. First, inmates have to meet the criteria for alternative supervision. In stressed counties, lower-level offenders are prime candidates for early release. Thus, the same offenders who would have qualified for alternative supervision have either already been released, or they know they will be released, and prefer to wait in jail until they are released without a supervisory tail. Second, the problem of overcrowding may undercut any alternative supervision or work release program, since, unless the sheriff is able to release enough inmates to reduce capacity below the population cap, there is no credible threat of re-incarceration upon failure to comply with the terms of alternative supervision.

Particularly in counties where judges have been reluctant to issue split sentences, Santa Clara County, Los Angeles County, and others have used their broad release authority to create their own community treatment programs that resemble split sentences, but remain under the purview of the Sheriff's Department. Under these programs, rather than early releasing inmates free and clear, sheriffs are conditioning release on the successful completion of in-custody programming, and placing the inmate in community treatment programs supervised by the Sheriff's Department.

Santa Clara County's Correctional Alternative Supervision Unit (CASU) has shown that community treatment programs can be quite successful when the threat of incarceration ("the hammer") is credible. To be considered for the program, an inmate must be sentenced under 1170(h) and must have successfully completed an in-custody program. A program manager will review the inmate's performance history, classification division, in-custody behavior, gang affiliations and any other elements that might be of concern when sending him back into the community, and the CASU sergeant will review the inmate's file for suitability in the alternative custody program. Before releasing the inmate, CASU deputies will go into the community and prepare the inmate's natural systems of social support. Deputies frequently build such strong relationships with the offender's family that relatives and hosts self-report issues to deputies. Once the inmate is accepted to CASU, they are placed either on house arrest, or they live in a Temporary Housing Unit (THU) or a Sober Living Environment (SLE), and they can participate in



job training, go back to school, work, or attend classes through the Reentry Corrections Program run by the Sheriff's Department. Unlike many electronic monitoring programs, the Santa Clara County Sheriff's Department has full-time, sworn deputies monitoring offenders in the program at a ratio of 1 to 15 (compared to 1 to 25 for probation). They test inmates for drugs three or four times per week; if there are any issues, they will bring them back into custody for ten or thirty days and enroll them in another in-custody program, with the possibility of being released again on CASU if they are successful. Santa Clara County has established contracts with Salvation Army, Catholic Charities and Vida Nueva to monitor the inmates in THUs and SLEs. As of November, 110 inmates have gone through the program and only five have committed new crimes.

Orange County's alternative supervision program is somewhere between Santa Clara County's and Riverside County's. They have recently received approval from the board of supervisors to implement an involuntary electronic monitoring program for sentenced misdemeanors. Unlike Riverside County, under the involuntary program, they plan to award one-for-one custody credits as if the inmate were still behind bars.<sup>18</sup> They may eventually expand into the AB 109 population as they approach full capacity. Additionally, Orange County is currently designing a residential reentry program. Like Santa Clara County's CASU program, inmates will qualify by completing in-custody programming, and sheriff's deputies will monitor the released inmates 24/7.

**Although AB 109 provided for the possibility of contracting to send inmates to the CDCR, other counties, and fire camps, few have been able to do so.**

In theory, AB 109 allows for counties to contract with the California Department of Corrections and Rehabilitation (CDCR) or other counties to house their inmates.<sup>19</sup> Although Riverside, Fresno and Santa Barbara Counties are exploring options to house their inmates in other facilities, so far such contracts have generally proved to be prohibitively expensive. Furthermore, counties that are at capacity require additional medium and maximum-security long-term beds— they have either early released or can easily house their minimum-security inmates— but most of the space available in non-stressed counties is rated for minimum-security inmates. Amador County is the only county in this study that has successfully contracted with other counties to house Amador County's sentenced inmates. Sheriff Ryan has contracted for eight beds in El Dorado County and is in discussion with others.

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<sup>18</sup> Santa Clara County's CASU program also results in one-for-one custody credit.

<sup>19</sup> See California Penal Code §4115.55.

Although fire camps were initially presented as an attractive alternative custody program that could relieve pressure in the jails and benefit the state, Riverside County reports that they have been unable to send offenders because the program has stringent eligibility requirements and will only take minimum security inmates. The state has allotted Riverside County 280 beds in the fire camp, but because of early releases, Sheriff Thetford does not believe there are 280 inmates left in Riverside County's jails who meet the criteria. At the time of this writing, with the exception of Amador County, none of the stressed counties interviewed have successfully contracted to send their inmates to the CDCR, another county or fire camps, and none of the non-stressed counties have found it economically feasible to contract to house inmates from other counties.

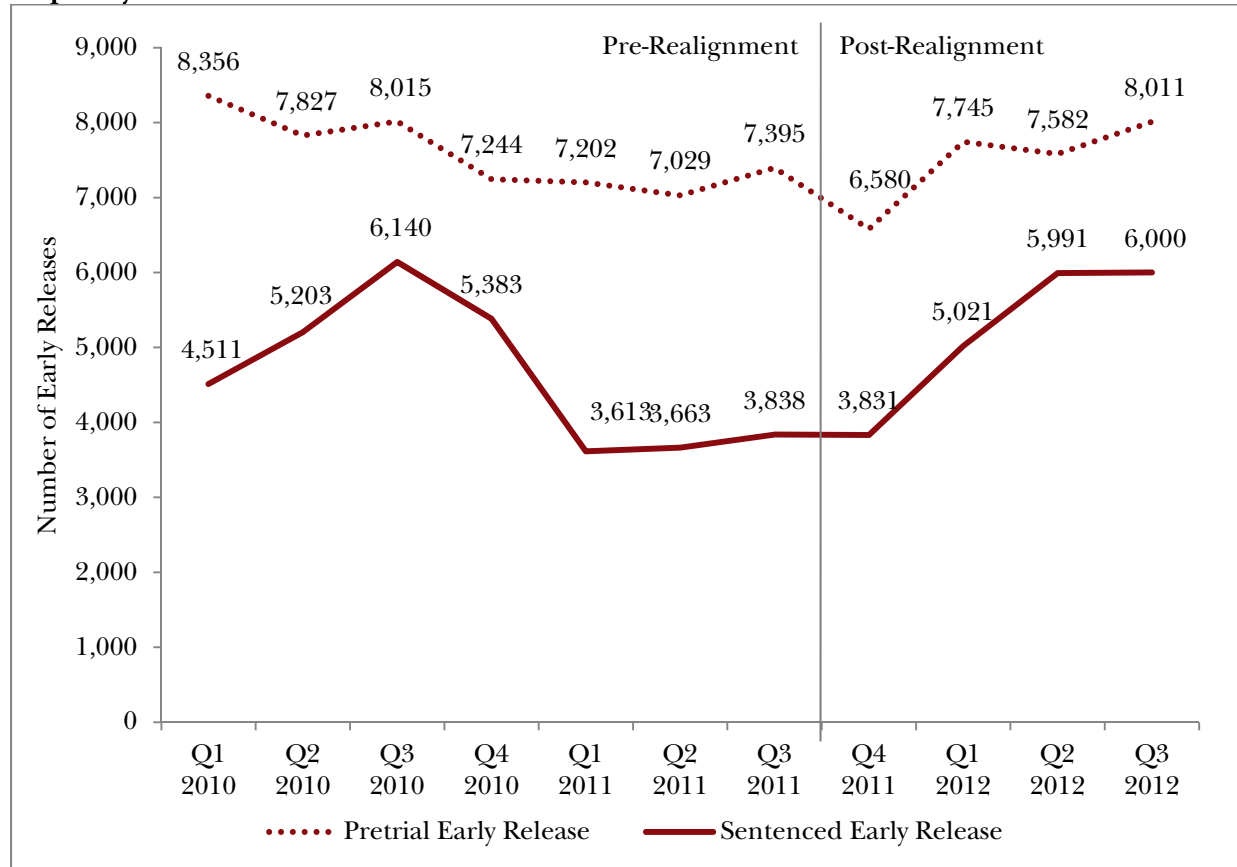
**As a result of Realignment, early releases have increased in some counties. Sheriffs have had to release offenders of increasingly serious offenses earlier in their sentences.**

Early release, either on limited supervision or, more likely, with no supervision, is the sheriff's last resort. To avoid overcrowding, the sheriffs of Fresno, Riverside, Santa Barbara, and Los Angeles Counties are all under federal consent decrees that require them to release inmates when the jail population reaches a certain threshold. Releasing inmates early is not new with Realignment. However, as a result of Realignment, sheriffs have had to release more inmates earlier in their sentences, and report having to release offenders with increasingly serious offenses. Between July and September 2012, counties reported releasing 6,000 sentenced offenders and 8,011 presentenced defendants early each month (see Figure 10). The number of monthly early releases of presentenced individuals has slightly increased since the start of Realignment (up 8%) but the number of monthly early releases for sentenced individuals has increased by a remarkable 56% in one year.<sup>20</sup>

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<sup>20</sup> Lawrence, Sarah. "Managing Jail Populations to Enhance Public Safety: Assessing and Managing Risk in the Post-Realignment Era." *Stanford Criminal Justice Center* (June 2013). <https://www.law.stanford.edu/sites/default/files/child-page/440504/doc/slspublic/Paper%20on%20jail%20gmt%20July%202013.pdf>. at 11.

**Figure 10: Monthly Early Releases from California Jails Due to Lack of Housing Capacity**



*Source: Board of State and Community Corrections, Jail Profile Survey*

Santa Barbara and Riverside Counties use the COMPAS system, along with information available in the jail’s records, to determine which inmates are eligible for early release. Riverside noted that, when they first started releasing, they began with minor misdemeanors. But in 2012, they were forced to early release more than 6,800 inmates—nearly 1.75 times their jail capacity—and now nearly every misdemeanor offender has been released. Both counties emphasized the importance of looking beyond the current offense to determine eligibility for release. Sheriff Bill Brown of Santa Barbara County mentioned one example of a gang member arrested on a warrant for an outstanding drunk driving charge in 2006. Soon after the offender was released early, he committed murder while high on methamphetamines.

Using proper risk assessments, some level of early release may be necessary in stressed counties, particularly if the county has been historically over-incarcerating for low-level crimes. However, as long-term, higher-need inmates fill capacity in jails that are already stretched thin, sheriffs fear that higher-level inmates will need to be released and

Realignment will pose a threat to public safety. Ultimately, counties with capacity issues will have to relieve pressure on the jails to the point that they no longer early release offenders that would otherwise benefit from evidence-based programs and alternative custody. Some sheriffs report that early release has removed “the hammer” of incarceration and crippled the system from the moment the offender weighs the consequences of committing the offense to the moment he forgoes alternative custody and other programming because he knows he will be early released if he stays in jail. Counties must relieve pressure on the jails through increased collaboration with probation and the courts to further divert the pretrial population, expanded pretrial alternative custody programs within the Sheriff’s Department for those who were not diverted at sentencing, and increased usage of split sentences.

**Jail capacity in California continues to expand.**

Jail crowding should lessen over the next several years, as the legislature provided counties with another stream of funding to expand jail capacity. In 2007, the California Legislature passed AB 900, providing \$1.2 billion in lease revenue bonds to build more jail cells in two phases. AB 900 was amended in 2012 after AB 109 passed, making it easier for counties to access this construction money, although to date no new jail has been built.<sup>21</sup> By June 2013, 21 of California’s 58 counties had received funding for county jail construction, which when completed will add an additional 10,811 jail beds.<sup>22</sup> Counties anticipate it will take three to five years to build new jails, but the redesign of existing capacity will happen over the next year or so. Only a few counties such as Glenn, San Francisco, and Santa Cruz Counties, have decided not to expand their jails.

Several sheriffs say that they plan to these new funds to not only expand jail capacity, but also build a different type of jail that has space for more programming with a eye towards reentry planning. Santa Barbara County Sheriff Bill Brown, for example, is building a new \$80 million state-funded jail in Santa Maria. But instead of building a traditional brick and mortar jail, he is using this as an opportunity to rethink how the physical space can be better used to foster offender reentry. Having visited jails across the nation, 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. Over time, added jail capacity and better in-custody programming might ease

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<sup>21</sup> Branan, Brad. “Years after California OK’d \$1.2 billion for new jails, not one has yet been completed.” *The Sacramento Bee* (August 30, 2013). <http://www.sacbee.com/2013/08/30/5693654/years-after-california-okd-12.html>.

<sup>22</sup> “AB 900 Jail Construction Financing Program Board of State and Community Corrections Project Status Update—Phases I and II.” Board of State and Community Corrections (2013).

the sheriff's challenges, but that is in the future, and the immediate jail crowding concerns are not trivial.

# Chapter 6: Public Defenders<sup>1</sup>

The importance of studying Realignment (AB 109) from the public defender’s vantage point cannot be overemphasized. By changing the California’s Penal Code, Realignment changed how criminal cases are litigated in state courts. More than any other institutional actor, public defenders understand the practical effect of these changes on the population most affected—the defendants. By virtue of their close proximity to defendants, public defenders are best positioned to report on defendants’ concerns, treatment, well-being, and preferences. And, given the amount of time that public defenders spend in litigation, they can provide important insight into how Realignment has changed the very structure of the court system itself.

In interviewing public defenders, we either spoke with the county’s elected Public Defender or a designee (typically an assistant or deputy public defender focused on Realignment implementation). Interview content varied depending on the particular interests or expertise of the subject, but each focused on the major research questions listed in Appendix B. Broadly, we investigated how Realignment has changed the way that public defenders represent their clients.

## Findings

Public Defenders view Realignment as a hard-won victory after decades of advocacy.

When the Determinate Sentencing Law was enacted in 1977, “the legislation declared the purpose of incarceration to be punishment.”<sup>2</sup> Realignment turns away from this model of criminal justice. The legislative findings and declarations in California Penal Code §17.5 articulate a broader vision for criminal justice by:

- Reaffirming California’s commitment to reducing recidivism;
- Declaring that building more prisons is not sustainable and will not result in improved public safety;
- Stating that California must reinvest its criminal justice resources to support community-based correction programs; and
- Asserting that community-based punishment and evidence-based practices will improve public safety and facilitate offenders’ reintegration back into society.

<sup>1</sup> Findings in this chapter were drawn from reports written by John Butler, Mariam Hinds, and Matt Owens.

<sup>2</sup> Dansky, Kara. “Understanding California Sentencing.” *University of San Francisco Law Review* 43, no. 1 (2008): 67.

Public defenders view these amendments as a hard-won victory after decades of advocacy. Public defenders have long campaigned for improved treatment, enhanced services, alternatives to incarceration, and a rehabilitation-focused crime policy agenda. One public defender told us that Realignment has forced judges, prosecutors, sheriffs, and probation “to become aware of other alternatives in the criminal justice system.” Another public defender reported that the mood in the county is “much more rehabilitation” and “the pendulum...sw[ung] back to rehabilitation [of the 1960s].” Yet another public defender believed that Realignment allows for “the recognition that basically maybe there are...more intelligent ways to deal with [defendants] other than to lock them up ...the recognition that basically this is where the governor is going, this is what the federal courts have said, this is what has happened in the law.” For all of these reasons, Realignment represents a victory for which public defenders strenuously and continuously advocated.

**Public defenders feel responsible for ensuring Realignment’s success through education and advocacy.**

As discussed in the previous section, public defenders view Realignment as a victory after decades of advocacy. Consequently, public defenders feel a certain amount of responsibility for ensuring Realignment’s success. Whether through trainings, briefs, or participation in the Community Corrections Partnerships, public defenders are using Realignment’s statewide reforms to improve the criminal justice system. Although these efforts have been met with varying success, public defenders across all counties are united by a strong sense that they are the guardians of Realignment.

One particularly salient example of this advocacy is educating the court about Realignment’s rehabilitative programs and sentencing alternatives. Public defenders report that many judges are unaware of these aspects of Realignment. In order to address this lack of knowledge, public defenders are using their clients’ cases to “educate the court”: “[T]here is an awful lot of understanding that [judges and district attorneys] get from [public defenders] by virtue of simply seeing the different lawyers come in with the same arguments. After a while it’s like learning a new language.” In addition to education through court appearances, public defenders prepare briefs that identify the importance of evidence-based practices and the state’s reasons for undertaking

Realignment.<sup>3</sup> Interviewees remain hopeful that, over time, judges will begin to understand the importance of these programs.

Of the counties interviewed, Santa Clara County has used this tactic to the greatest success. Santa Clara County has an abnormally high number of diversion programs and probation programs. The sheer number of alternatives to jail enables the public defender to “educate” by making a case for a particular program that would be better suited to their client’s needs.<sup>4</sup> That is, public defenders argue that “allowing access to Realignment’s innovative programs...actually enhance[es] public safety” by increasing the likelihood of rehabilitation. The office conducts trainings on how to assemble a sentencing package that best explains the defendant’s need for evidence-based programs. More than any other county interviewed, Santa Clara County has assumed the role of educator, hoping to advance the use of rehabilitative services.

**Although many judges have been reluctant to grant split sentences, public defenders expect that the percentage of split sentences will increase in most counties.**

In addition to reclassifying nearly 500 felonies as 1170(h) offenses, Realignment introduced a new sentencing scheme for these felonies—the “split sentence.” Under §1170(h)(5)(B) of the California Penal Code, judges may now “suspend execution of a concluding portion” of a sentence. §1170(h)(5)(B) is permissive, not mandatory; judges are under no obligation to use their discretion. If the judge does so, the defendant must serve part of his sentence in county jail and part of his sentence under “mandatory supervision.” Probation is tasked with overseeing the defendant’s mandatory supervision, but is not authorized to release the defendant early “except by court order.” Judges have significant leeway to tailor a split sentence to the needs of a particular defendant; that is, judges may impose any distribution of incarceration and supervision as they see appropriate. Even so, the discretion granted to judges is not unbounded: The total duration of the defendant’s blended sentence—incarceration and mandatory supervision—may not fall short of the minimum sentence, and may not exceed the maximum possible sentence.

As we discuss later and show in Figure 11, counties vary significantly in their use of split sentencing. There are many possible explanations for the variability of split sentences across counties. First, and most significant, is institutional inertia: “People who have been doing things the way they’ve been doing them for 20 years don’t want to change

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<sup>3</sup> Telephone Interview with Public Defender, *Santa Clara County Office of the Public Defender* (November 8, 2012).

<sup>4</sup> *Ibid.*



overnight....[T]hat is ....why we haven't gotten as many split sentences." Second, many judges are concerned about the split sentences themselves; they think that split sentences are "a waste of money and resources." For example, in Solano County, only 8% of sentences are split sentences. When asked why this is the case, a Solano County Public Defender explained that judges "don't think any services are out there for the probationers." Third, some judges believe that split sentences encroach on their authority. That is, they want to ensure that defendants to "do the time" and aren't willing to sacrifice jail time for participation in rehabilitative programs. Finally, a number of judges simply lack knowledge about split sentences and the programs available under mandatory supervision.

Split sentences are essential to Realignment's success. They assist with jail population management and divert offenders into rehabilitative programs. Most public defenders we spoke with held out hope that split sentences would become the norm over time, as is already the case in Riverside County. As jails start to overcrowd, and rehabilitation success stories begin to emerge, public defenders expect that split sentences will be granted with increased frequency in most counties.

**Public defenders have adapted to Realignment by implementing training programs and engaging in cross-collaboration and information sharing.**

All offices interviewed had conducted some form of training program to prepare their attorneys for Realignment. Most of these trainings focused on analysis of the law; counties spent little time training their attorneys on strategy for leveraging Realignment programs and reforms. This focus might change, however, as public defenders become more comfortable with the new rules. As one public defender from Santa Clara County put it, "we spent a lot of time figuring out what this law meant, how to apply it...now that we're getting used to it and people are figuring out their defined roles, we can start the process of undergoing philosophical changes."

Of the counties interviewed, Santa Clara County had the most extensive training program, spending an estimated 2,000 attorney hours on preparation for Realignment. Trainings were mostly conducted in-house, although attorneys also participated in external trainings hosted by the probation department. To better understand the shifting criminal justice landscape after Realignment, Santa Clara County also hired an on-staff researcher.

Our interviewees reported some cross-collaboration and information sharing between public defender offices. Through statewide training programs, public defenders are

developing a unified statutory interpretation of AB 109. For example, Sacramento County participated in several out-of-county trainings, hosted for public defenders in the Bay Area. Additionally, many counties have relied on Garrick Byers, a Senior Defense Attorney in Fresno County's Office of the Public Defender who is regarded as an expert on Realignment. Mr. Byers drafted a white paper on Realignment that was distributed widely, and has hosted trainings in a number of different counties.

**The Community Corrections Partnerships have improved communication and collaboration between institutional actors, though public defenders report that implementation has posed difficulties.**

Overall, the CCPs have greatly expanded communication between institutional actors. Even where public defenders felt that they didn't have a voice on the CCP, they praised CCP meetings as a useful source of information on other institutional actors. Most public defenders have found the CCP to be a valuable use of their time and an opportunity to advocate for the use of evidence-based programs. Fresno County, for example, has historically eschewed rehabilitative programming, and its original CCP plan focused on increasing jail capacity. The public defender has since observed a number of positive developments through the CCP. First, the CCP has shied away from expanding jail capacity and has begun to put more money into programming. Second, the CCP has formed partnerships with area universities to study the impact of evidence-based programs. Third, and most startling, the sheriff has begun to mimic the earlier talking points of the public defender. At CCP meetings, the sheriff has advocated for programs and services, arguing that public safety depends on reducing recidivism.

Solano County is the one outlier. This might be explained by the absence of jail overcrowding—without the pressure of jail overcrowding, institutional actors have little incentive to reform their way of doing business. The public defender is almost always outvoted at meetings of the Solano County CCP, with the social service organizations being their only ally.<sup>5</sup> Solano County is currently building a Day Reporting Center, which could change the dynamic between the various actors. At the moment, however, there is little collaboration in Solano County.

One concern voiced by public defenders is that CCP decisions might not be filtering down to other actors, especially judges. Though each institutional actor is represented in the CCP, the individual actors are responsible for ensuring that CCP decisions are adhered to by their respective departments. As one public defender complained,

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<sup>5</sup> Telephone Interview with Public Defender, *Solano County Public Defender* (October 26, 2012).

“sometimes what we’re doing at the management level isn’t transferred down to the people who actually have to do it, and those are the people behind the bench.”<sup>6</sup> Still, there has been progress, however slow. As another public defender explained, “you’re not going to flip the switch and have everybody be happy about this.”<sup>7</sup>

**Realignment has altered public defenders’ relationships with sheriffs, probation, and clients.**

Realignment ushered in sweeping reforms to the criminal justice system. These reforms, in turn, have altered the relationships between the public defender and other actors in the system. In particular, our interviewees reported that relationships with sheriffs, probation, and clients have changed significantly.

## **Relationships with Sheriffs**

On the whole, the relationship between public defenders and sheriffs has improved since Realignment. To manage jail populations, many sheriffs have begun to focus on reducing recidivism; in general, sheriffs are more open to diverting offenders from county jail. Public defenders, in turn, are beginning to find common ground with sheriffs over rehabilitation programs and evidence-based practices for reducing recidivism. In some counties, such as Santa Barbara County, this change preceded Realignment. In most counties, however, public defenders report that this development is new, and is likely motivated by jail overcrowding.

As evidence of this trend, public defenders point to meetings of the CCP. Public defenders report that sheriffs have begun to speak in their language—that is, sheriffs have become vocal advocates for rehabilitation programs. In the words of long-time public defender, “[F]or us to hear Deputy Sheriffs and Probation officers talking about what one of *our* clients *needs* to succeed....We’ve never heard that kind of stuff before, I’ve been here for 22 years, never heard of it.”

While the general trend is positive, one county fell outside of this pattern. Public defenders in Sacramento County reported that their sheriff still wants to “lock them up and put them away....They want funding to create a new jail, to increase the size of the jail, to increase the number of beds, to hire more of theirs.”

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<sup>6</sup> Ibid.

<sup>7</sup> Telephone Interview with Public Defender, *Santa Clara County Office of the Public Defender* (November 9, 2012).

## **Relationships with Probation**

Public defenders report that their relationships with probation departments have improved after Realignment. Interestingly, this finding extends to Sacramento County despite the fact that the sheriff maintains a “tough on crime” attitude. A Sacramento County Public Defender explained, “Now the probation department, because of funding...cuts they are looking for basically more of the evidence-based practices to be implemented because it would bring back some of the people who have been cut.” Thus, financial incentives have encouraged the Sacramento County probation department to embrace (or at least superficially embrace) rehabilitation and treatment.

While the heads public defender offices generally reported improved relationships with probation offices, the picture may be more complicated. In our interviews, we observed a disconnect between heads of public defender offices and line attorneys. Perhaps because they interact with probation during CCP meetings, and thus have a sense for probation’s long-term policy goals, head public defenders are generally positively disposed towards probation. They describe progressive probation chiefs who “identified that our clients need housing, and jobs, and substance abuse help, and mental health help, and partnered with the right community organization and other department heads to...get that going.” However, line attorneys and clients are more skeptical of probation’s new policies: “[T]raditionally our county probation has not been the client’s friend....Our probation department has been very quick to violate people...So when we tell them that there’s been a change in probation...they look at us like we’ve been smoking crack.” This skepticism may dissipate overtime as probation demonstrates commitment to treating and helping clients.

## **Relationships with Clients**

Realignment has altered the relationship between public defenders and their clients in two ways. First, although Realignment hasn’t changed how public defenders advise their clients, it has increased the amount of information that must be explained to and evaluated by the client. For instance, public defenders must explain the difference between prison-eligible and county jail-eligible offenses. Public defenders must also explain what happens when the defendant is released from incarceration; that is to say, for a defendant to evaluate his options, he must understand the differences between parole, mandatory supervised release, PRCS, and probation.

Second, some public defenders have reported increased contact with their clients. In part, this is due to proximity: Many clients who would have served prison sentences are now housed in county jails. Additionally, the shift to county jails has forced public

defenders to assume greater responsibility for the administrative aspects of their client’s confinement. For example, public defenders have fielded calls related inadequate medical care provided in certain jails—a responsibility that previously fell to state prisons. Finally, because sheriffs are releasing offenders early with greater frequency, public defenders have been representing offenders in a greater number of violation hearings. This not only increases the amount of client contact, but also the public defenders’ caseloads:

I think the...hardest part has been, for us, the amount of cases. Our caseload has just doubled because now we have all the violations. It’s been tough.

People are definitely picking up more cases when they get released. I mean, on average, on a day, I probably have three or four guys with anywhere between five and eight cases. And that’s just because they keep getting released, and reoffended, and released, and reoffended. What we have seen come up is a very, very big increase in the violation of mandatory supervision....That is where the caseload is in the public defender’s office because when they are violated those cases come back to us and they have increased.

**In general, public defenders have not observed changes in prosecutorial behavior after Realignment.**

In our interviews with public defenders, we explored whether prosecutorial behavior had changed after Realignment. In particular, we predicted that prosecutors might react to the creation of county jail offenses by engaging in charge inflation. Based on reports from public defenders, prosecutorial behavior and decision-making appears to vary by county, with a majority of district attorneys not overcharging in reaction to Realignment. Though district attorneys do not necessarily support or advocate for Realignment, in general they do not actively undermine Realignment in their charging decisions.

One exception to this general trend is Fresno County. Public defenders believe that, if anything, Realignment has intensified “tough on crime” tactics. One public defender explained, “I think that AB 109 gives the District Attorney’s office an excuse as to why they are doing what they are doing. Rather than say...we’re just tough on crime, or we just don’t want to plea bargain, now we’re doing it to get the county money, we’re doing it to put people in prison instead of the county jail, to get them out of your community.” This behavior is consistent with Fresno County’s historical “tough on crime” agenda. It is also consistent with Fresno County’s funding allocations: only 6% of AB 109 funding was

dedicated to programs and services, whereas 67% of the funding went to law enforcement.

Fresno County sharply contrasts with Sacramento County, where prosecutors are offering probation more frequently post-Realignment. This behavior appears to be motivated by two factors. First, according to public defenders, they are cognizant of the resource constraints within the county jails—Sacramento County’s jails are operating at 100.27% of rated capacity. A Sacramento County Public Defender speculated that, “Intuitively [prosecutors] recognize...[if the client is] still here in the county jail ...he’s consuming our resources,...we’re housing and feeding him and are taking some of the sentence back.” By offering defendants probation, the county does not absorb the costs of housing and feeding those defendants in county jail.

Second, prosecutors might be opting for probation to ensure continued supervision after an offender is released from custody. Under Realignment, a client who serves a straight jail sentence for an 1170(h) felony is released without supervision. Prosecutors are inclined to keep some form of a tail on a client because then “you’ve got search and seizure [and] you’ve got more of a leash on the guy to be able to control him in the future.” A sentence that includes a period of probation accomplishes this goal.

**Public defenders believe that, on balance, Realignment has benefited defendants, but disagree over whether defendants have gained a plea bargaining advantage.**

This section explores whether, after Realignment, public defenders have gained an advantage in plea bargaining situations. The results are unclear. Most public defenders felt that Realignment had benefited their clients; no public defenders reported a decrease in plea bargaining power after Realignment. But many interviewees hesitated to declare that a decisive bargaining advantage had been achieved. At the outset, we predicted that four factors might improve the public defender’s bargaining position after Realignment: the legislation’s criminal justice paradigm shift; the creation of so-called “county jail felonies”; the introduction of new alternatives to incarceration, as well as enhanced conduct credits; and jail overcrowding. Our findings for each of these factors are considered below in turn.

## **Criminal Justice Paradigm Shift**

Realignment is more than a collection of amendments to California’s Penal Code. It is a paradigm shift; a new approach—some might say philosophy—of criminal justice. The

Determinate Sentencing Law of 1976 explicitly declared “the purpose of incarceration to be punishment.”<sup>8</sup> Realignment swings the pendulum in the opposite direction, encouraging rehabilitation through local community control and the use of evidence-based practices. One public defender described the enormity of this change as such: “You’re coming from a twenty year swing of some of the most draconian, punitive mentalities that the country has ever seen, let alone the State of California.”<sup>9</sup>

Public defenders have leveraged this new paradigm to the benefit of their clients in plea bargaining situations. A Sacramento County Public Defender explained:

[T]here is a certain sentiment now to basically look at people differently. To a certain extent it allows for the humanization of these people [their clients] and the recognition that basically maybe there are smarter and more intelligent ways to deal with them other than to lock them up.... [T]his is where the governor is going, this is what the federal courts have said, this is what has happened in the law. It’s here. It’s here to stay.

By appealing to this sentiment during plea bargaining, public defenders have been able to advocate for incorporating or even substituting rehabilitative services for a county jail sentence.

## **The Creation of County Jail Felonies**

The foundation of Realignment is the creation of a set of felony offenses served in county jail rather than state prison. These so-called “county jail felonies” were brought into being by amendment to §1170(h) of the California Penal Code, which provides, “a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.”

Realignment removes the possibility of state prison for nearly 500 felonies. This change has strengthened the position of public defenders in bargaining situations. As one public defender explained in a report published before Realignment took effect, “plenty of clients...have never been to prison and they don’t want to go, so they’ll take an offer no matter how crappy it may be just to keep themselves out of prison.”<sup>10</sup> Before

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<sup>8</sup> Dansky, Kara. “Understanding California Sentencing.” *University of San Francisco Law Review* 43, no. 1 (2008): 67..

<sup>9</sup> Telephone Interview with Public Defender, *Santa Clara County Office of the Public Defender* (November 9, 2012).

<sup>10</sup> Freedman, Malaina and Craig Menchin. “Realignment's Impact on the Public Defender and District Attorney: A Tale of 5 Counties.” *Stanford Criminal Justice Center* (2012): 47. [http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Freedman\\_Menchin.pdf](http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Freedman_Menchin.pdf).

Realignment, prosecutors could frequently obtain guilty pleas by agreeing to forego state prison sanctions; after Realignment, prosecutors no longer have this bargaining chip.

Santa Clara County expressed a strong belief that county jail felonies have improved the public defender's bargaining position:

I would say anytime you expand sentencing options that don't send the person to state prison...your bargaining power increases on the defense side....[A]ll of my career, a big part of the fight has been, is this going to be local or is he going to state prison? With the AB 109 ...this person is going to stay here. And that's a big deal for a lot people. So it allows us to get more of what our clients are interested in. And I think that's an advantage for the defense.<sup>11</sup>

The attorney then elaborated, "Prior to Realignment, if your client committed a certain crime and you wanted, for example, to keep your client local...and you didn't want a prison sentence, and you know the prosecutor wants additional time, sometimes we waived [pretrial conduct] credits."<sup>12</sup> Sacramento County expressed a similar sentiment. In Sacramento County, bargaining dynamics have changed "simply because [defendants] are not eligible to go to state prison."

Public defenders in two counties, Fresno and Santa Barbara Counties, reported that prosecutors have responded to this shift in plea bargaining by inflating charges. An attorney in the Fresno County Public Defender's Office told us that "[a] lot of times the DA will...trump you by adding additional charges." Another attorney we spoke with explained, "[T]hey don't want to offer anything because [the defendants] are going to get out anyways [because of early release]...there's a lot more fighting ...charges that they can't necessarily prove." Similarly, an attorney we spoke with in Santa Barbara County explained that it "balances out." That is, "[F]or every chip that you think you have, you can have a DA looking for strikes."

## **New Alternatives to Incarceration and Enhanced Conduct Credits**

Public defenders tell us that Realignment also "added extra tools to [a public defender's] toolbox" during the plea bargaining process. Clients have additional entitlements under Realignment that they can now bargain away to receive more favorable terms. These entitlements come in one of two forms. First, the legislation created new alternatives to incarceration. As one Santa Clara County Public Defender put it, "We used to have two

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<sup>11</sup> Telephone Interview with Public Defender, *Santa Clara County Office of the Public Defender* (November 9, 2012).

<sup>12</sup> *Ibid.*



levels of supervision or accounting: probation and parole. Now we have five. We have regular probation, mandatory supervision on split sentences, we have PRCS, we have parole, and we have this other thing called CASU [Community Alternative Supervision Unit].” Consequently, public defenders have more options when proposing or countering a proposal during plea bargaining with a district attorney.

Realignment also added smaller, more piecemeal entitlements. As one public defender explained, “Under Realignment, our clients might have a right to certain benefits or enhanced credits for Realignment, or access to certain types of programs or the big thing is that our clients might have access to supervised early release. When you’re bargaining for settlement, those are things that your client can give up and waive for a specific offer.” Overall, it seems that Realignment took away the district attorneys’ hammer—the threat of seeking a prison term—and gave the public defenders and clients several wrenches, screwdrivers, and other smaller tools that, collectively, carry significant weight.

One particularly important bargaining chip is “conduct credits.” Realignment increased the number of conduct credits that may be earned from six days for every four days served to four days for every two days served. The increase applies to all 1170(h) offenses, as well as to revocations of parole and Post-Release Community Supervision. Conduct credits may be earned for any time served in jail, including pretrial detention.<sup>13</sup>

Enhanced conduct credits advantage public defenders in plea negotiations for two reasons. First, enhanced conduct credits make the defendant’s threat of going to trial more credible. As the projected amount of time served decreases, so too does the risk of losing at trial. Second, because defendants receive conduct credits for pretrial detention, these credits may serve as a bargaining chip in plea negotiations. For example, defendants might agree to waive these credits in exchange for certain charges being dropped. Enhanced credits increase the size of this bargaining chip, and thus strengthen the public defender’s bargaining position.

## **Jail overcrowding**

At the outset, we predicted that jail overcrowding would advantage public defenders in bargaining situations. Interestingly, jail overcrowding was almost universally dismissed as a bargaining advantage. This result was surprising, particularly since a recent Vera Institute study found that resource constraints can lead prosecutors “to dispose of cases

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<sup>13</sup> Storton, Kathryn B. and Lisa R. Rodriguez, California District Attorneys Association. “Prosecutors’ Analysis of the 2011 Criminal Justice Realignment.” (2011). <http://www.cpoc.org/assets/Realignment/cdaarealignguide.pdf>. at 22.

in ways they would not otherwise have if adequate resources were available.”<sup>14</sup> The discrepancy might be explained by the type of resource constraint at issue. In the Vera Institute study, the resource constraints at issue directly impeded the prosecutor’s ability to bring cases: lack of courtroom access and insufficient personnel. Jail overcrowding, on the other hand, in no way bars prosecution of a case. Consequently, it’s possible that prosecutors are bringing cases without regard for management of the jail population.

**Realignment has shortened the presentencing process and brought risk assessment tools into question.**

In addition to altering plea bargaining dynamics, Realignment has shortened the length of time between disposition and sentencing. Whether because of increased caseloads, or the greater number of options available for plea bargaining, public defenders observe that the presentencing process is moving more quickly. So long as offenders aren’t simply cycling through the system at a greater rate, this development can be seen as an improvement. However, by some public defenders’ estimation, rapid cycling is precisely what is occurring.

Another effect on the presentencing process is that Realignment has brought risk assessment tools into question. Many public defenders are dissatisfied with the risk assessment tools used by pretrial services and probation, which “look[] like an instrument that a probation officer without any mental health training could [use to] practically identify someone as a psychopath.”<sup>15</sup> In Fresno County, for example, the public defenders are partnering with a local university to investigate the efficacy of the Status Risk Offender Needs Guide (STRONG). They question the utility of STRONG given that it is not a clinical assessment, which “dives deeper into what really needs to be done to address the risk needs of this population.”

**Although public defenders have not observed increased violence in jails, they report other significant problems, which will be exacerbated by overcrowding.**

Conditions in the county jails may be the dark side of Realignment. Almost universally, public defenders reported that their clients receiving long-term sentences preferred prison to jail. This preference is most likely due to the inadequate recreation, health

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<sup>14</sup> Frederick, Bruce and Don Stemen. “The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making. *Vera Institute of Justice* (2012) at 88.

<sup>15</sup> Telephone Interview with Public Defender, *Solano County Public Defender* (October 26, 2012).

care, and mental health care facilities in most jails. Public defenders expect that conditions will further deteriorate as more jails become overcrowded.

The one positive condition reported by public defenders is that violence in the jails has not increased. In Solano County, the sheriff reports increased violence, but offenders have not. The public defender speculated that this discrepancy suggests that violence has increased against corrections officers rather than the general jail population.

Putting aside violence in the jails, public defenders paint a bleak picture of the conditions under which the clients are serving their sentences. Jails do not have exercise yards, and thus lack the recreational opportunities of prisons. Furthermore, public defenders are “see[ing] some pretty egregious issues with healthcare.” While the *Plata* litigation was intended to improve healthcare conditions for state prisoners, Realignment has left counties ill-equipped to deal with the health concerns of a new inmate population. Inmates have experienced significant delays between a request for services and when those services are actually rendered. Moreover, inmates with chronic conditions have experienced unwillingness or inability to provide needed medication. A Solano County Public Defender described a particularly troubling situation:

[T]he family came to our front desk very upset. [The] family said he [the client] had lost 45 pounds in the past month. So my lawyer went to see him and was absolutely shocked at his condition. [H]e said he had a toothache and they gave him some antibiotics which apparently made him sick. He started vomiting and pooping blood. And he told them that and they said well, keep taking the antibiotics. And it came to the point where he couldn’t eat anything but crushed pineapple. And he lost 45 pounds.... They never took him to the hospital.<sup>16</sup>

In order to get the client medical attention, the public defender was forced to submit an emergency request to the court. And it is not only severe medical conditions that are going untreated; public defenders have seen simple requests for eyeglasses go unfulfilled for up to three months.

Offenders with mental illnesses are faring no better. Public defenders unanimously agreed that mental health is a significant problem, not only in terms of inadequate mental health services in jails, but also the county’s overall administration of mental health services in the community. Whether in jail or under community supervision, mentally ill offenders are not receiving needed medications and treatment. Many public defenders believe the current situation echoes the deinstitutionalization of mental health facilities in the 1980’s. As one Solano County Public Defender explained, “[T]he big problem that we have in the state now is that the jails have become the new psych

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<sup>16</sup> Ibid.

facilities.” A Riverside County Public Defender described the problems he encounters with his clients with mental illnesses as follows:

I think the problem with Realignment is that I think now there are so many clients who have no places to go. The suicide rate is very high because we’ve had issues where they get released and they don’t have their meds; they get released and they say ‘Oh, you’re on probation.’ They are homeless. There is no place for them to go. They get released and there is maybe one treatment center. ‘Well, take a bus.’ They don’t have a car. They don’t have any money for a bus.<sup>17</sup>

In other words, offenders with mental illnesses are left to fend for themselves. Once released, they do not have access to their medication or basic services that would keep them stable. Often this leads to a cycle whereby offenders are placed in the jails, provided services, stabilized, released, and reoffend again.

Finally, Realignment significantly increased the size of many county jail populations—by over 200%, in some counties—and has resulted in jail overcrowding. Public defenders expect overcrowding to exacerbate problems already observed with jail conditions. Indeed, some interviewees predicted another wave of litigation around jail overcrowding and inadequate provision of healthcare.

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<sup>17</sup> Telephone Interview with Public Defender, *Riverside County Law Offices of the Public Defender* (January 18, 2013).

# Chapter 7: District Attorneys<sup>1</sup>

District attorneys have long had great power and discretion in determining criminal justice outcomes, and have emerged in recent decades as the preeminent actor in the system.<sup>2</sup> Because they enjoy broad discretion, touching nearly every stage of the adjudication and corrections process, California district attorneys have the potential to make or break Realignment (AB 109) as a solution to prison crowding and high rates of recidivism. Unlike probation departments and sheriff-run county jails, prosecutors already interacted with the full gambit of felony offenders. While caseloads have not changed as dramatically for prosecutors, their options and the incentives guiding their choices have. District attorneys in California are the primary gatekeepers of the corrections system, determining through office policies, charging decisions, and sentencing recommendations which offenders enter the criminal justice system and how they are treated within it. Prosecutors are also held politically accountable for public safety, perhaps making them natural opponents to sentencing alternatives that may lessen incapacitation or deterrence of offenders. Even with prison off the table as a sanction for many felonies, prosecutorial discretion remains a powerful policy-influencing force. The large-scale success or failure of Realignment will depend on the degree to which district attorneys embrace or resist incarceration alternatives. If prosecutors insist on pursuing incarceration as the primary response to crime, counties will likely fall victim to the same overcrowding that has overwhelmed the state prison system. Indeed, many counties already face jail crowding and, in some cases, are subject to federal orders limiting their jail capacity.

## Factors Affecting Prosecutor Decision-Making

A recent study by the Vera Institute of Justice explores some of the factors influencing prosecutorial discretion and their implications for shaping adjudication outcomes. They found that at all stages of the adjudication process prosecutorial discretion is influenced by external factors.<sup>3</sup> Office-wide and unit-specific policies often govern decision-making, calling for prosecutors to “decline certain cases at screening, charge cases in a particular way, and offer specific criteria in plea offers.”<sup>4</sup> Availability of resources, both internal and

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<sup>1</sup> This chapter was drafted by Corrine Keel, drawing on materials from reports she wrote with Marisa Landin and Lindsey Warp.

<sup>2</sup> Misner, Robert L. “Recasting Prosecutorial Discretion.” *The Journal of Criminal Law and Criminology* 86, no. 3 (1996): 717-777, 718.

<sup>3</sup> Frederick, Bruce and Don Stemen. “The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making.” *Vera Institute of Justice* (2012) at 71.

<sup>4</sup> *Ibid.* at 80.

external, can also influence the path a prosecutor chooses to take on a particular case. There simply are not enough hours in the day, courtrooms in the jurisdiction, or dollars in state coffers available to give each case the same treatment. Established relationships with other key parties in the criminal justice system (judges, public defenders, etc.) impact prosecutors' decisions based on their assessments of these parties' norms, expectations, and past behavior.

## Charging Decisions

“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”<sup>5</sup> The decision whether to charge a crime is the broadest discretionary power prosecutors have.<sup>6</sup> Prosecutors consider many factors in deciding whether to file charges in a given case. According to the Vera Institute, prosecutors ask two primary questions: *Can I prove the case?* and *Should I prove the case?*<sup>7</sup> This first question goes to issues of proof and sufficiency of evidence, while the latter frequently turns on factors such as offense severity and criminal history.<sup>8</sup>

Not only does the prosecutor choose whether to prosecute a crime, but he also chooses *how* to prosecute, i.e. how many charges to file, what kind of charges to file, and whether to pursue sentencing enhancements. The California Penal Code criminalizes a broad range of acts with many overlapping provisions. In his 1995 article, “Recasting Prosecutorial Discretion,” Robert Misner points to the breadth of crime definition as a major source of prosecutorial power. He writes that, “[b]y choosing to create a large number of crimes, and by defining those crimes with the breadth proposed by the Model Penal Code, legislatures make it impossible to enforce all criminal statutes, and, at the same time, make it possible for a single act to be charged under many overlapping provisions.”<sup>9</sup> Thus, the DA has discretion to choose not only what crimes, but also how many crimes, to charge. Prosecutors differ in how they approach the decision of how many charges to file. Some only file charges they believe the defendant should plead

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<sup>5</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>6</sup> Vorenberg, James. “Narrowing the Discretion of Criminal Justice Officials.” *Duke Law Journal* 4 (1976): 651-697.; see Moore, Shelby A. Dickerson. “Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion-Knowing There Will Be Consequences for Crossing the Line.” *Louisiana Law Review* 60 (2000): 371-404, 379, exploring arguments for and against such unbridled discretion.

<sup>7</sup> Frederick, Bruce and Don Stemen. “The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making.” *Vera Institute of Justice* (2012) at 59.

<sup>8</sup> *Ibid.* at 177.

<sup>9</sup> Misner, Robert L. “Recasting Prosecutorial Discretion.” *The Journal of Criminal Law and Criminology* 86, no. 3 (1996): 717-777, 745.

guilty to, others only file charges they believe the defendant would be plead guilty to, and a third group files all the charges available regardless of expected pleas.<sup>10</sup> Whether a prosecutor prefers to “negotiate up” or “negotiate down” in plea negotiations also impacts the number of charges filed at the outset.<sup>11</sup>

Prosecutors also have broad discretion in determining the charging status of “wobblers” in a particular case. Wobblers are crimes that can be classified as either felonies or misdemeanors under the law. California Penal Code §17(b) provides prosecutors with the discretion to reduce wobblers (which by default are classified as felonies) from felonies to misdemeanors.<sup>12</sup> In making the decision between charging a felony or a misdemeanor, prosecutors consider factors such as severity of crime, eligibility for probation, and prior record.<sup>13</sup> In addition to these factors, a study conducted at Stanford University found a correlation between charging practices and “liberalism” in a county, finding that California counties with a larger percent of the population who voted for Obama in 2008 have prosecutors that tend to charge such discretionary cases as misdemeanors.<sup>14</sup> Interviewees in the study also cited resource constraints as an important factor to consider, but the quantitative analysis did not reveal a direct or linear link between resource availability and wobbler charging decisions.

Finally, California prosecutors have opportunity to utilize their discretion by alleging the applicable sentence enhancements, such as strike offenses in the “Three Strikes” context, which will impact sentencing in the event of conviction. Prosecutors can also lessen charges to avoid imposition of the mandatory sentencing enhancement when they see fit. They also have “wide latitude to dismiss or ‘strike’ a prior offense in the interest of justice.”<sup>15</sup> In fact, Walsh finds that 92% of District Attorney Offices in California<sup>16</sup> have

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<sup>10</sup> Frederick, Bruce and Don Stemen. “The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making.” *Vera Institute of Justice* (2012) at 177.

<sup>11</sup> *Ibid.* at 178.

<sup>12</sup> California Penal Code §17(b) (2011).

<sup>13</sup> Berwick, Megan, Rachel Lindenberg, and Julia Van Roo. “Wobblers & Criminal Justice in California: A Study into Prosecutorial Discretion.” *Public Policy Practicum, Stanford University* (2010): xi. <http://ips.stanford.edu/sites/default/files/shared/DA%20Discretion%20Final%20Report.pdf>.

<sup>14</sup> *Ibid.*

<sup>15</sup> Freedman, Malaina and Craig Menchin. “Realignment's Impact on the Public Defender and District Attorney: A Tale of 5 Counties.” *Stanford Criminal Justice Center* (2012): 47. [http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Freedman\\_Menchin.pdf](http://www.law.stanford.edu/sites/default/files/child-page/183091/doc/slspublic/Freedman_Menchin.pdf).

<sup>16</sup> Walsh, Jennifer Edwards. “In Furtherance of Justice: The Effect of Discretion on the Implementation of California's Three Strikes Law.” Claremont Graduate University (unpublished manuscript, 1999). The study included a survey of District Attorney Offices in 25 of the 58 California counties (accounting for over 75% of the state's total share of three-strike convictions).

used their discretion to drop a strike in a three-strike case, citing the trivial nature of the offense and/or remoteness of the criminal history as factors relevant to the decision.<sup>17</sup>

## Bail

Though the bail decision ultimately falls to the judge, prosecutors may recommend bail amounts or the denial of bail altogether. This recommendation has significant sway over the final determination of whether a defendant will be released on bail or kept in jail before the trial. In addition to this direct influence, a prosecutor can impact the ultimate bail determination through his initial charging decision if the charge itself suggests that the offender might present a risk to the safety of the community.<sup>18</sup> In California, many counties set local bail schedules that dictate the amount of bail and limit the ability of the prosecutor to suggest departure.

## Plea Bargaining

The criminal justice system is dependent on the use of plea bargaining as a tool to manage caseloads due to the high incidence of reported crime and limited time and prosecutorial resources. Over 90% of criminal convictions come from negotiated pleas.<sup>19</sup> In managing their caseload, prosecutors have full discretion over whether to charge a case, dismiss it, or offer a plea.<sup>20</sup> While many view plea agreements as collaborative negotiations between two adverse parties, usually only the prosecutor may initiate this process, and he may end it at any time.<sup>21</sup> As discussed above, a prosecutor's discretion over the plea process is closely tied to his discretion over the initial charging decision. While it is considered unethical to charge someone with an offense for which there is absolutely no factual basis in hopes of encouraging a plea,<sup>22</sup> few other rules of professional conduct constraint the prosecutor's ability to "exacerbate the defendant's fear of the trial penalty by utilizing an 'overcharging' strategy."<sup>23</sup> Further, nothing prevents a prosecutor from charging offenses that would be difficult to prove in trial, but

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<sup>17</sup> Ibid.

<sup>18</sup> See *U.S. v. Salerno*, 481 U.S. 739 (1987).

<sup>19</sup> "The Basics of a Plea Bargain." Nolo Law for All. <http://www.nolo.com/legal-encyclopedia/the-basics-plea-bargain.html>.

<sup>20</sup> Vorenberg, James. "Narrowing the Discretion of Criminal Justice Officials." *Duke Law Journal* 4 (1976): 651-697, 670.

<sup>21</sup> Note, however, that a judge can still decide not to accept a plea deal.

<sup>22</sup> "Model Rules of Professional Conduct ("Model Rules") Rule 3.8(a)." American Bar Association. The Model Rules provide that "[t]he prosecutor in a criminal case shall...refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

<sup>23</sup> Meares, Tracey L. "Reward for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives." *Fordham Law Review* 64 (1995-1996): 868.



still might result in a guilty plea.<sup>24</sup> The plea bargaining process is also tied to discretion regarding sentence recommendations. While sentencing is technically within the province of the judiciary, prosecutors often draft plea agreements to include sentence recommendations that judges tend to follow.<sup>25</sup> While prosecutors have great power over the plea bargaining process, the Vera Institute found that there is disagreement over the factors that prosecutors should consider in preparing their strategy. Some interviewees in the study thought that plea-bargaining should focus on the expected sentence, while others thought it should focus on the most serious charge, and still others on the total number of charges. There was also disagreement amongst prosecutors over whether plea offers should include sentencing recommendations or be left to the judge.

## Sentencing

Due to changes California's sentencing scheme in the 1970's, prosecutors also have great influence and discretion over sentencing even when there is no plea agreement. In 1976, California passed its Determinate Sentencing Law, one goal and result of which was to limit judicial discretion over sentencing decisions and increase uniformity in sentencing across the state.<sup>26</sup> This change, along with mandatory minimum sentencing, had the consequence of shifting significant discretion over sentencing to the prosecutor. Even though judges retain the final authority to impose a sentence, a prosecutor can greatly influence (if not absolutely determine) an offender's final sentence through his initial charging decision, as the "charging decision determines the range of sentences available to the court."<sup>27</sup> For example, a prosecutor can choose to prosecute a robbery that involved a weapon as a "robbery" or an "armed robbery." If charged as an "armed robbery," the judge is essentially forced to sentence the defendant according to the legislative-mandated minimum sentence requirements for an armed crime.<sup>28</sup> Thus, while they are not authorized to impose sentences directly, prosecutors in California have tremendous influence over the final sentence imposed under California's current sentencing laws.

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<sup>24</sup> Ibid.

<sup>25</sup> Frederick, Bruce and Don Stemen. "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making." *Vera Institute of Justice* (2012).

<sup>26</sup> Edelman, Peter B. "Institutionalizing Dispute Resolution Alternatives." *The Justice System Journal* 9, no. 2 (1984): 134-150.

<sup>27</sup> "Race and Prosecutorial Discretion." The Leadership Conference.  
<http://www.civilrights.org/publications/justice-on-trial/prosecutorial.html>.

<sup>28</sup> Misner, Robert L. "Recasting Prosecutorial Discretion." *The Journal of Criminal Law and Criminology* 86, no. 3 (1996): 717-777. at 748.

## Internalization of Costs

The Vera Institute study found that the lack of resources is a major challenge for prosecutors. Resource constraints impact everything from staffing levels and technology platforms, to investigative resources and courtroom availability, and impact decisions to charge, dismiss, and settle cases. Prior to Realignment, California district attorneys enjoyed broad discretion to charge felonies and recommend lengthy prison terms with limited fiscal consequences, because prisons were paid for with state funds. With the cost of incarceration externalized, prosecutors did not need to “directly consider the availability of prison space or prison resources when making charging, bargaining, or sentencing decisions.”<sup>29</sup> As a result, prosecutors were incentivized to prosecute to the fullest, and had little pressure to create guidelines, alternatives to incarceration, or crime prevention programs.<sup>30</sup> Elected district attorneys could run on a “tough on crime” platform without having to explain how their policies would impact the county budget or resources, because the correctional costs from local prosecutions were largely passed on to the state. Under Realignment, only certain felonies and offenders with particular priors are eligible for a state prison term, so prosecutors face a new reality where the cost of incarcerating many more offenders is internalized by his county.

A 2012 study in Israel examined the consequences of shifting the responsibility of one actor’s actions to another actor (i.e. externalizing the consequences).<sup>31</sup> The study examined an organizational reform that shifted the responsibility of housing arrestees in Israel from the police to a separate prison authority, finding that the cost-externalizing shift led to an 11% increase in the number of police arrests. This study illustrates the concept that externalization of consequences can result in broader, unbridled use of power and discretion. Long before Realignment, Robert Misner, concerned with the criminal justice system’s “failure to force [prosecutors] to face the full cost of prosecutorial decisions” (i.e. the externalization of costs), proposed a method by which the consequences of prosecutorial decision-making could be internalized. He envisioned a system where available state prison resources would be allocated to each prosecutor for use during the next year.<sup>32</sup> The prosecutor would then be responsible for crafting law enforcement policy that could be supported by the resources given. If the prosecutor used fewer resources, the savings would go to the county; if he used more resources than allocated, the county must provide its own funds to make up the difference. While different from Realignment in design, Misner’s vision contemplates a similar regime that

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<sup>29</sup> Ibid. at 720.

<sup>30</sup> Ibid.

<sup>31</sup> Ater, Itai, Yehonatan Givati, and Oren Rigbi. “Organizational Structure, Police Activity and Crime.” (2012).

<sup>32</sup> Misner, Robert L. “Recasting Prosecutorial Discretion.” *The Journal of Criminal Law and Criminology* 86, no. 3 (1996): 717-777, 719.

forces counties to internalize the consequences of prosecutors' decisions. Realignment implements the kind of cost internalization Misner suggests, but does so on the front end of the budgeting process instead of applying retroactive accounting.

## Findings

District attorneys express cautious optimism for Realignment's success, but remain concerned about diminished public safety.

Nearly everyone we interviewed characterized his or her attitude toward Realignment as one of "cautious optimism." While most of our interviewees applauded the *spirit* of Realignment, including the expansion of local control and treatment options for offenders, all of our subjects worry about a possible rise in crime and decline in public safety. Our interviewees worry about the impotence of prosecutors under the new regime compared to the pre-Realignment status quo. District attorneys are left with a "shrinking hammer" due to lesser sanctions (i.e. no threat of prison for many felony offenses), "double time" conduct credits for jail inmates, and the lack of mandatory post-release supervision for realigned offenders serving straight sentences. Realigned felons serve less time behind bars and may be released from county lockup without supervision, whereas prior to Realignment with prison available for all felony offenses, inmates served the majority of their sentences, and prisoners served a mandatory three-year term of parole.<sup>33</sup> Without the threat of prison and parole, prosecutors enjoy a less powerful bargaining position, which they fear may translate into a lesser deterrent effect against realigned drug and property crimes.

Some resistance to Realignment may be evidenced by reports that, despite increases in jail populations, district attorney offices are continuing to recommend the same length of sentence as they did pre-Realignment. Many offices, especially those in counties with overcrowded jails, such as Sacramento and Santa Barbara Counties, have expressed frustration with early releases. Since the implementation of Realignment, the sheriff in Santa Barbara County is releasing misdemeanants earlier. Santa Barbara County's District Attorney, Joyce Dudley, expressed deep concern about public safety and the negative effect on deterrence. She recognizes that her office's job is to prosecute cases and the sheriff's job is to decide who to let out once the jail becomes crowded. Anecdotally, she believes that there has been an increase in thefts as a result, but is not

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<sup>33</sup> Silbert, Rebecca Sullivan. "Thinking Critically about Realignment in California." *The Chief Justice Earl Warren Institute of Law & Social Policy* (2012): 2.

sure the magnitude of the increase. She is particularly worried about the potential rise in home invasion robberies given that drug users released early seek money to feed their habits. Many of our interviewees predict and (anecdotally) observe a rise in crime under Realignment.

Regardless of whether they face jail crowding that leads to early inmate release, our interviewees observe that the “revolving door” of the state prison system is replicated with realigned felons at the local level—only with shorter exposures to incarceration. As a result, they note that the “churning” or “cycling” of offenders through the system has sped up. Deputy District Attorney Jennifer Contini, who, due to budget shortfalls, files some charges for the section she leads in Orange County told us, “I can’t provide numbers, but I can tell you anecdotally, every week I file at least a couple cases where I just filed on this guy within the last three weeks.” Without the option of sending supervision violators to prison, or even to jail for very long, some hope programming can be used as a tool to slow the cycling process. But several interviewees pointed out lingering uncertainties about the effects of Realignment. “Come back and see me in a few years,” was a common refrain. Despite their concerns and lingering uncertainty, our interviewees all expressed a willingness to work within the framework of Realignment faithfully. Though some are jaded about the prospects of treatment improving outcomes on a large scale, they also expressed hopefulness that at least some offenders would be helped by rehabilitative sentencing options.

**Prosecutors blame legislative defects for some implementation problems.**

Many prosecutors are frustrated by perceived defects or “holes” in Realignment legislation, which have created barriers to effective implementation. Contentiousness around the substance of the law is exacerbated by the speed of enactment and implementation without meaningful consultation of district attorneys. Another point of resentment is perceived dishonesty about the purpose of Realignment. Though legislators expressly state that Realignment “is not intended to relieve state prison crowding,” our interviewees found this explanation disingenuous given the timing of the legislation relative to the U.S. Supreme Court’s ruling in *Brown v. Plata*.

## **Post-Release Supervision**

The lack of routine post-release supervision was a central concern for many of the prosecutors interviewed. Los Angeles County Deputy DA Kraig St. Pierre, for one, called for corrective legislation. He disapproves of shortening the period of incarceration to

gain a period of supervision over offenders, which prosecutors must do (by utilizing split sentences) to impose a “tail” under Realignment. A deputy district attorney from Sacramento County echoed this frustration, citing the provision as a way for the legislature to force split sentencing on the counties. In addition to lengthening the overall period of correctional control, post-release supervision serves other practical purposes, such as service delivery and restitution collection. These are discussed in more detail below in terms of the utility of split sentences.

## **Long-Term Jail Sentences**

Many of our interviewees called for reform in dealing with realigned felons serving lengthy sentences in county jail. Jails are designed for exposures of incarceration up to one year and most lack the appropriate amenities, including medical and recreational facilities, to accommodate long-term incarceration. Realigned felonies carry longer sentences than misdemeanors and are subject to enhancements that may add up to sentences of a decade or more. In Los Angeles County one inmate has been sentenced to 42 years in county jail. District Attorney Paul Zellerbach of Riverside County collaborated with State Senator Bill Emerson on legislation proposed during the 2011-2012 legislative session to cap jail commitments at three years, with longer sentences to be served in prison, regardless of the nature of the crime.<sup>34</sup> The bill died in the Senate Public Safety Committee, but Zellerbach is determined to reintroduce the legislation. Assistant District Attorney Karen Meredith of Alameda County also advocates legislation to limit jail sentences, but suggests doing so by diverting drug offenders subject to weight clause enhancements to prison, citing this group as a major source of excessive jail terms. The longest jail sentence imposed in Riverside County to date is 12 years and two months. Alameda County is operating under an informal, self-imposed limit of four-year jail terms, though the total period of correctional may be longer with the imposition of a split sentence that includes mandatory supervision.

**District attorneys embrace increased collaboration with other system actors under Realignment.**

Our interviewees praised the legislative mandate for the Community Corrections Partnership (CCP) and its impact on county decision-making nearly universally. Across counties, interviewees reported that, because of the CCP planning process, communication and collaboration between the agencies represented have increased and

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<sup>34</sup> California State Senate. SB 1441. (2012).

improved. Most reported that relationships were already collegial and productive, but now the various actors are even more collaborative. Santa Barbara County's District Attorney, Joyce Dudley, said of her existing relationships with other department heads, "[w]e are all friends; we all grew up together, essentially, in the criminal justice system." According to District Attorney Dudley, the group usually agrees on the best course of action for the county, but when they do disagree, they're "comfortable to do that." Dudley concluded, "I see more of them in meetings, but, aside from that, it hasn't changed the dynamic."

Assistant District Attorney Karen Meredith of Alameda County and others pointed out that, aside from more collaboration in general, the CCP structure is different because it gets management involved in regular conversations about criminal justice strategies, not just the "line-level" attorneys and officers who interact regularly. Meredith sits in on the CCP Executive Sessions in her county along with the District Attorney, Nancy O'Malley. She remarked,

I think it's been interesting to see the executives all kind of working together to make a plan. Normally, the executives set the policy and the mid-level managers create the plan....That's an interesting dynamic and I think it has created both increased collaboration and [conversation] about particular issues where they might not have been doing so much of the minutia detail. And I think that's a good collaboration. I also think there are some tensions that develop over monies ...and control over the whole process....I see both. I see increased collaboration, but I also see some tension.

While everyone valued increased communication and collaboration as an asset in Realignment implementation, Riverside County Assistant District Attorney Creg Datig made a finer point. He emphasized cooperation, not just as a positive development, but as an *essential* component of his county's success under Realignment. Riverside County is under a federally mandated jail cap, a stricture that has complicated implementation, as the sheriff is forced to release inmates from the jail on a nearly daily basis. Datig said:

[Riverside County] has really made an effort to work collaboratively on Realignment implementation, if for no other reason than, if we didn't work collaboratively, the system would, to a certain extent, crash and burn.... So it's almost like whether we like it or not—we do say that we like it, I mean, I think that it's been a positive thing—but whether we like it or not we would have crashed and burned if we didn't work together.

Communication and collaboration have expanded even beyond the scope of the CCP Executive Committee, in the form of cross-department committees, working groups, and

regular inter-departmental meetings. For example, Riverside County's CCP has established a number of working groups on various aspects of Realignment, including budgeting and Post-Release Community Supervision (PRCS) revocation hearings, that "provide a collaborative atmosphere to work out the nuts and bolts of implementation." Santa Clara County's CCP has also set up cross-department working groups. Assistant District Attorney David Howe serves on Santa Clara County's Court Process Group, which develops and revises county procedures related to Realignment; other groups focus on emerging topics under Realignment, like data management. Los Angeles County Deputy District Attorney Kraig St. Pierre serves on his county's Legal Work Group, which is responsible for making many day-to-day Realignment implementation decisions. Kern County has not created working groups, but convened an interdepartmental committee to allocate Realignment grant funds to local treatment programs. David Howe observed that, between the various Realignment groups and the discussion of the policy's impacts in other contexts, "there's almost a constant dialogue going" about Realignment.

Prosecutors also reach across county lines to seek and share information with counterparts to varying degrees. One important course of cross-county collaboration was the "Prosecutor's Analysis of the 2011 Criminal Justice Realignment," an early report sponsored by California District Attorneys Association that attempts to demystify AB 109 and subsequent amendments to Realignment from a prosecutor's perspective. The document is available in electronic form and is updated periodically to reflect legislative changes. The efforts of the authors, Kathryn Storton and Lisa Rodriguez, prosecutors in Santa Clara and San Diego Counties respectively, were cited and applauded in almost every interview. Others have reached out informally to friends in other offices to discuss issues around Realignment. At the time of our interview with Sacramento County's Realignment-focused prosecutor, he was planning visits to Santa Clara and San Diego Counties to observe their reentry courts in preparation for establishing a reentry court in Sacramento County. Conferences on Realignment have provided another venue for cross-county dialogue. However, none of the counties we interviewed had any regular or systematic method for utilizing information from other counties. Neither does the State facilitate such information sharing since one of the compromises in Realignment legislation is the lack of mandated assessment of the counties. This highlights the need for outside researchers to step in and capture data that might otherwise be missed so that future policy planning can be informed by outcome measurement.

While collaboration between departments has increased dramatically during the early planning and implementation process, it's uncertain whether it will continue to the same extent as counties move beyond a state of triage and settle into new practices. Still, the ability to collaborate locally may enhance agility in the system, allowing for course



correction under changing conditions and making local policy-making an attractive solution to systemic problems.

**The internalization of costs may affect prosecutorial discretion in marginal cases.**

As expected, our interviewees reported increased awareness of, and sensitivity to, county resource constraints under Realignment. The biggest changes under Realignment are local incarceration and supervision of would-be prison inmates and parolees. Thus, the bulk of Realignment funds went to sheriff's and probation departments. Prosecutors and other adjudicatory actors, i.e. public defenders and judges, also expend additional resources in staffing due to the expanded PRCS/mandatory supervision revocation process and a moderate increase in filings. But, district attorney's offices have experienced only marginal operational cost increases under Realignment, compared with sizeable expansion in the "correctional costs" of jails and the probation department. However, public safety concerns contribute to an increased sensitivity amongst prosecutors to county resource constraints on the whole. This is especially true in those counties where jail crowding is already extant or pending.

In terms of managing correctional costs, the crucial "wobbling point" has shifted from the cutoff between misdemeanors and felonies (which were automatically "prison eligible" before Realignment, though not all felons served prison time) to the cutoff between realigned crimes and the serious, violent, and sex crimes that are still prison eligible. Though many of our interviewees reported no change to charging practices post-Realignment, some counties have made changes to their practices at the margins. Interestingly, the internalization of costs incentivizes both leniency (i.e. not charging some crimes) and severity (i.e. "charging up" to a prison eligible offense) to avoid the cost of housing and/or treating offenders. In some cases the underlying charges may not be augmented to call for a prison term, instead prosecutors have incentive to discover and allege facts that make the offender eligible to serve his sentence in prison.

## **Fewer Charges Filed for Low-Level Crimes**

Since the enactment of Realignment, district attorney's offices in some counties are filing fewer charges for low-level crimes. In Sacramento County, a county under a court-ordered jail cap, this practice is a response to resources constraints, whereas in Santa Clara County this change is an initiative undertaken in the "spirit of Realignment." Both have the effect of freeing jail beds for more serious offenders. The Sacramento County district attorney's office declines to prosecute certain theft and low level drug possession



cases because Realignment has left the county without the resources to sanction these offenders. For example, prosecutors no longer file charges pursuant to California Health & Safety Code §11550 (under the influence of a controlled substance) and California Health & Safety Code §11364 (possession of narcotics paraphernalia). Additionally the Sacramento County office declines to file charges for drug possession cases in which the alleged narcotic quantity is less than 0.2 grams, ten times more than the prior charging threshold of .02 grams.<sup>35</sup>

In Santa Clara County, the district attorney's office often refrains from charging certain misdemeanor crimes such as petty theft, possession of stolen property, vandalism, and trespass. Instead it channels these cases into its Pre-Filing Diversion Program. In the "spirit of Realignment," the office initiated this program in 2011 as an effort to divert deserving offenders away from traditional prosecution. If an offender qualifies for this program (essentially he must have a minimal criminal history), the office refers the case to a private program vendor who contacts the offender. If he agrees to participate, he pays a program fee and restitution, performs community service and attends rehabilitative classes administered by this private vendor. If the offender successfully completes the program, the office will not file criminal charges. The district attorney's office in Alameda County also files fewer charges for certain realigned property and drug offenses, not because of prosecutorial discretion, but because Oakland Police Department makes fewer arrests under its own resource constraints. Though that budget shortage is not readily attributable to Realignment, background budget constraints may impact local law enforcement in the facing more ex-offenders and supervisees in the community.

## **"Charging Up" to Prison Eligible Offenses**

Because of the local internalization of incarceration costs, we expected some prosecutors to "charge around" Realignment when possible, i.e. elect to charge prison eligible offenses whenever overlapping statutes provided the opportunity to do so. A deputy district attorney from Sacramento County acknowledged his office charges around Realignment whenever the option is available. He provided two examples in which his office would charge around Realignment. If a suspect were arrested for possession of methamphetamine and possession of a loaded gun, his office would charge the offender under California Health & Safety Code §11370.1 (possession of a controlled substance and a loaded optical firearm) instead of under California Penal Code §12022(a) (commission of a felony while armed). If convicted of the former, the offender would

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<sup>35</sup> A Sacramento County Deputy DA noted that this increase to 0.2 grams is also in part attributable to budget cuts before the enactment of Realignment.

serve his custody time in prison, whereas if found guilty of the latter, he would go to jail. For realigned white-collar crimes, his office scours the defendant's record and the facts of the case for a second felony in order to impose a white-collar crime enhancement under California Penal Code §186.11, which makes the case prison eligible under California Penal Code §1170(h)(3). He cited several reasons for his office's "charge around" policy, including: local jail crowding, the desire to deflect the incarceration costs to the state, disapproval of early jail releases (in jail, triple-non offenders can receive half time credits, whereas in prison offenders likely will serve approximately a larger portion of their sentences), and the lack of uniform periods of supervision under California Penal Code §1170(h)(5) sentencing.

The prosecutors from Orange and Riverside Counties stated they do not intentionally "charge around" Realignment, but do examine cases more closely, scrutinizing them for factors like serious prior convictions or facts in the present case that might make it eligible, for prison commitment case. In Riverside County, Chief Deputy Coffee noted that his office inspects cases in greater detail to ensure that it files the appropriate charges based on the evidence. In particular, prosecutors look for evidence making a case prison eligible and if it finds this evidence, the office will not hesitate to adjust charges as the case evolves through the system. District attorney's offices now have an additional step of informing the court and defense counsel if the case is not California Penal Code §1170(h) eligible. When asked about this process, Solano County prosecutors pointed out that such allegations were unnecessary prior to Realignment when any felony offense could be prison eligible and that taking time to examine these factors does not necessarily mean that they are "overcharging."

## **Some Counties Report No Change in Charging Practices**

Interviewees from counties without jail crowding indicated that their charging practices have not changed appreciably under Realignment. Their opinions differ as to whether jail crowding might or should affect charging where it is an issue. When asked whether the availability of jail beds allowed his office to maintain the status quo in charging decisions, Assistant District Attorney David Howe from Santa Clara County rejected the idea that crowding should ever impact charges. He noted, "grand theft doesn't become robbery just because we want to see a person in prison and thereafter on parole." He stressed that his office seeks to contribute to uniformity of charging practices across counties and to avoid varying "standards of ethical and professional ...discharging of duties." Solano County prosecutors echoed a similar attitude toward altering charging practices post-Realignment. Solano County's District Attorney, Donald duBain, said his

office has never charged a third strike just because it could and in a similar manner will not alter charges beyond what it can prove. Assistant District Attorney Karen Meredith from Alameda County acknowledged that jail overcrowding might drive charging decisions but, because her county does not have that problem, decisions in her office are not so affected.

Kern, Orange, Riverside, and Santa Barbara Counties all face jail overcrowding; yet, according to our interviewees, have not altered their charging practices as a result of Realignment. As discussed above, interviewees from Orange and Riverside Counties explained they are applying heightened scrutiny to realigned cases to discover circumstances that make offenders prison eligible, and thus have modified their charging procedures to some degree, but indicated they are not “charging around” Realignment. Interestingly, despite jail overcrowding, District Attorney Dudley from Santa Barbara indicated her office applies no extra layer of scrutiny. This deviation from Orange and Riverside Counties could be explained by the difference in absolute jail population, with Santa Barbara County being a significantly smaller county. Prosecutors from Orange, Riverside, and Santa Barbara Counties indicated they favor split sentencing as a mechanism to alleviate the influx of local offenders on the jails instead of altered charging practices.

## **Longer Plea Offers**

Realignment’s impact on plea offers varies by county and may be dictated by resource local constraints. In Orange County, some prosecutors may make less lenient offers to prison eligible offenders than they would have in the past. Deputy DA Contini said prior to Realignment, her office would sometimes offer offenders who were on the cusp of being sent to prison a “bullet” (a year in jail). Now, given the realities of overcrowding at the jail, they are more reluctant to make that type of offer. Additionally, she is less likely to strike a strike in a case or allow a strike-eligible offender to plead guilty to a non-strike offense because that means the defendants will be released more quickly and back on the office caseloads by way of PRCS and parole violations.

## **Background Budget Shortfalls**

Some the current resource constraints reflect cuts made prior to Realignment, diminishing county capacity to deal with realigned offenders and PRCS populations at the outset of implementation. Realignment funds may be perpetually insufficient because the existing resource gap is larger than the one created by AB 109. One example of a preexisting budget deficiency is in the Mental Health Court in Sacramento

County, which could be an asset in managing realigned offenders, but was already crippled by past budget cuts. Even in relatively affluent Santa Clara County, Assistant District Attorney David Howe revealed that some planned projects and office functions have taken a backseat to Realignment due to strained resources. District Attorney Donald du Bain of Solano County says that Realignment funding for his office has been sufficient to expand internal functions, allowing them to hire three new staff members, a paralegal, a legal secretary, and an attorney, all dedicated to working realigned cases. On the other hand, du Bain says of the overall funding situation in his county, “there’s not nearly enough funding to accommodate all the needs we have for this population.” The increased costs he cites include incarceration, supervision, treatment, medical needs, and, lawsuits. Some counties already face law suits over poor jail conditions, a problem that can only be expected to grow as more would-be prison inmates are diverted to serve out sentences locally.

**Prosecutors have lost some of their power in plea negotiations.**

Power and preferences among prosecutors and defendants have shifted somewhat due to Realignment. This has the potential to impact plea-bargaining, but because individual actors have different goals, there is not one consistent identifiable trend in how this change occurs. For example, Sacramento County prosecutors prefer a prison sentence even if the sentence imposed is shorter. Prosecutors in Orange and Santa Clara Counties prefer to resolve prison-eligible quickly to free county jail beds those defendants fill prior to sentencing. In general, it appears that removing the threat of prison for many felony offenses has weakened the district attorney’s bargaining position, but they still remain quite powerful in negotiations.

## **Shifting Incentives**

In some instances, changes in available sanctions under Realignment have the perverse effect of making rehabilitative programs less appealing to defendants. In the adversarial system, each side ostensibly tries to maximize benefit to their “client.” To a district attorney that means more time in custody or under supervision, i.e. maximizing control, while a public defender’s goals are naturally reversed. If a case is going to settle in a guilty plea, the defense attorney has an obligation to negotiate for a lesser sanction for the client when possible. Under Realignment, a defendant might prefer a straight sentence over a split sentence or jail time over a rehabilitative program. Even if a split sentence offers less time behind bars, attorney and client might see any post-release “tail” as a negative outcome, threatening more time behind bars. Before Realignment, the

offer of probation or programming in lieu of a prison term was obviously less punitive. Today double time credits, unsupervised release from straight jail terms, and crowding that sometimes leads to early release combine to make the choices less clear. Under these circumstances, a drug treatment program could be far more burdensome than a short stay in jail.

Assistant District Attorney Karen Meredith of Alameda County points out that defendants accused of “lesser” felonies were eager to serve their time locally or on probation to avoid prison in the past. Now, with no threat of prison and the promise of double time credits in jail, realigned felons may opt for straight time, even if it means they suffer a longer term of incarceration. This way they avoid a tail and may spend less time under correctional control. Deputy District Attorney Jennifer Contini of Orange County pointed out the irony of this role reversal, saying “you can only [rehabilitate] if you have some kind of [ ] program...but it’s hard to get our public defenders to do it, they are against split sentencing, which is ironic.” She says she teases the public defenders that they are “drinking the juice that this is a good [way to rehabilitate] ...and then I’m trying to give it to [them] and [they] won’t take it.” On the other hand, Ron Coffee of Riverside County reports that, rather take advantage of jail crowding by opting for straight time, the local defense bar welcomes split sentences. Riverside County District Attorney Zellerbach has also been a major advocate for split (or blended) sentences.

## **Potential Increase in Trials**

A budding concern in some district attorney’s offices is the possibility for an increase in trials, which would consume more office and county resources. In Riverside County, Chief Deputy Coffee noted that more felony drug offenders that will be sentenced pursuant to §1170(h) are opting to take their cases to trial. His colleague, Assistant District Attorney Datig further elaborated that low-level property and drug offenders have a growing awareness that there is no room in jail for them and thus have little to lose by pushing their cases to trial. In Santa Clara County there has also been an apparent increase in trials since the enactment of Realignment. While jails in Santa Clara County are not overcrowded, offenders with realigned crimes may be pushing their cases to trial knowing they will not go to prison if they lose. In Los Angeles County, Deputy District Attorney Kraig St. Pierre predicts the release of more pretrial detainees will make defendants more likely to push a case to trial, knowing they can wait out the result at home. At this time, we lack the data to compare pre and post-Realignment trial statistics, but several interviewees opined that lower stakes in sentencing make some defendants more willing to risk a trial verdict.

## Contemplating Charging Realigned Felonies as Misdemeanors

Orange County Deputy District Attorney Contini and her colleagues have discussed the reality that, post-Realignment, they could potentially achieve more control over a defendant, and thereby protect the public and collect restitution more effectively, by charging certain crimes as misdemeanors rather than felonies. She gave the example of using this technique with a defendant who has a string of five commercial burglaries and no strike. This offender is not prison eligible. If her office charges felonies, then the offender faces custody exposure of five years and eight months. Realistically, her office will never get this maximum time, and would likely offer a four-year split sentence (two years jail time and two years on mandatory supervision). Given halftime credits, the offender would likely do a year in jail before being released. If her office charges these burglaries as misdemeanors, her office would may be able to get two years in custody (again, one year in real time), but could seek three years of formal probation. This longer probation term extends the period of correctional control and facilitates restitution collection and monitoring the offender. Contini noted that while felony charges have always been thought of as more severe, after the enactment of Realignment the punishment for misdemeanors could actually be harsher.

**Realignment has spurred a general shift toward rehabilitation in sentencing preferences.**

The high degree of autonomy counties have to plan and spend for Realignment sets the stage for local tension between a program-oriented approach (i.e. expanding probation funding), on one hand, and a system more reliant on incarceration (i.e. expanding sheriff's department funding), on the other. The district attorney's office doesn't gain a major funding windfall either way, yet prosecutors have a stake in these negotiations because the public holds them accountable for public safety. Deputy District Attorney Ron Coffee of Riverside County says that, though incarceration alternatives are a must due to jail crowding, funding negotiations in his county are impacted by "turf wars between the Sheriff's Department and other partners in the criminal justice system ... [and whether they're] willing to give something up in terms of their financial resources to support alternative sentencing." Realignment's sentencing structure has influenced the dialogue among prosecutors regarding the purpose of sentencing. Although our interviewees mostly reported that they recommend the same sentence lengths since the passage of Realignment, the new sentencing scheme affected their preferences for *how* offenders serve their sentences, leaving room for the expanded use of split sentences and felony probation. While prosecutors maintain a law enforcement role, each county



studied has made at least subtle shifts toward a more rehabilitative model of corrections, through these and other practices.

While county practices are diverse, there is general shift away from simple incarceration (straight sentences) toward alternative models of supervision and programming. In general, we found that counties already utilizing programming have an incentive to continue to use and expand programs—both to avoid or relieve jail crowding and to decrease recidivism—within the population of realigned felons. In counties where jail crowding is already an issue, there is an incentive to increase supervision and programming because the early release of “straight term” offenders now results in no supervision, or “tail,” at all—even when offenders are released early. In many counties, it’s not a question of whether felons will be on the street, it is a question of whether they will they be watched, served, or left to their own devices.

## **Programming Emerging and Expanding**

Overall, counties are moving toward more rehabilitative sentencing structures (i.e. the use of supervision, services, and programming) and away from retribution and incapacitation in the form of incarceration alone. But counties are not changing character overnight. In each county we studied there are at least subtle signals of a policy shift. Alameda County and, to a lesser extent, Santa Clara County were already dedicated to serving, rather than just punishing, offenders prior to Realignment. These counties have continued or expanded their use of programming. Two emergent programs in Alameda County are the Corrective Intervention Program and the Initiating Mentor Program, which create possibilities for defendants to receive more lenient treatment. The Corrective Intervention Program seeks to keep offenders, particularly young offenders with no criminal record accused of less serious crimes (such as selling marijuana) out of the system. Prosecutors will bring in qualifying offenders to their office, admonish them and then drop charges. Under the Initiating Mentor Program (which as a result of Realignment has expanded from only being in the Oakland offices, to other offices as well), allows certain low level offenders charged with realigned crimes to go through programming, which if successfully completed, can result in their case being dismissed. Orange County already had some rehabilitative programming, including a successful Drug Court, and is pushing for split sentences, hoping supervision will have a rehabilitative effect. Riverside County was not particularly program-oriented before, but has established treatment programs and strongly favors split sentences, though our interviewees in Riverside County acknowledge that programs are not yet fully developed. In Sacramento County program spending is low, but they have installed a “Realignment-specific” district attorney position to develop a reentry court and investigate treatment options.

When evaluating office-level policy changes under Realignment, it is important to remember that implementation is still in its relatively early stages. Though increased reliance on programming is subtle at this stage, over time more new offenders and supervisees will come under local control and may threaten to overwhelm county capacity, even in the best-resourced jurisdictions. Without incarceration alternatives, all fifty-eight counties in California might suffer miniature versions of the state prison crowding crisis. Solano County DA, Donald du Bain, foreshadowed this possibility when we interviewed him in his Fairfield office. At this time, his county does not face jail crowding. In fact, they have empty cellblocks they have been able to reopen to accommodate realigned offenders, as well as a new jail under construction. They have traditionally relied on incarceration as the primary sanction for criminal conduct in the county and continue to do so under Realignment. In the course of our interview with du Bain, he invited two assistant district attorneys, in charge of Realignment and charging respectively, and the chief deputy district attorney into his office to join our conversation. Even as the other attorneys reported that there had not been, and would not be, major changes to sanctions in Solano County, du Bain chimed in with a caveat. He acknowledged that, though his county has not faced a jail-crowding problem yet, “the time will come when [it] will.” He went on to say,

I’m hopeful that, well before that, we’ll have these day reporting centers up and running and we will start taking more advantage of split sentences. Some judges ...have not expressed any interest ...so far in split sentences, but that can change, especially when the courts find out that the jail is getting crowded.... If they don’t start imposing sentences that allow for the jail to release inmates on mandatory supervision, then the sheriff’s [department] is going to get to [release them] on its own.

This anticipated shift in Solano County foreshadows the position of counties currently assigning mostly straight sentences. Unless there is a dramatic drop in crime or a major expansion of jail capacity, they will eventually have to adjust their sentencing structure or face the same fate as the state prison system—overcrowding and litigation.

## **Increase in Felony Probation**

Prosecutors from Sacramento, Santa Barbara and Riverside Counties commented that they are increasingly relying on traditional probation per California Penal Code §1170(h)(4). Santa Barbara County DA Dudley indicated that Realignment has made felony probation sentences more attractive to prosecutors because the 3-5 year probation period is often longer than supervision of split sentences. A Deputy DA in Sacramento County echoed this reasoning indicated that since Realignment the number of felony

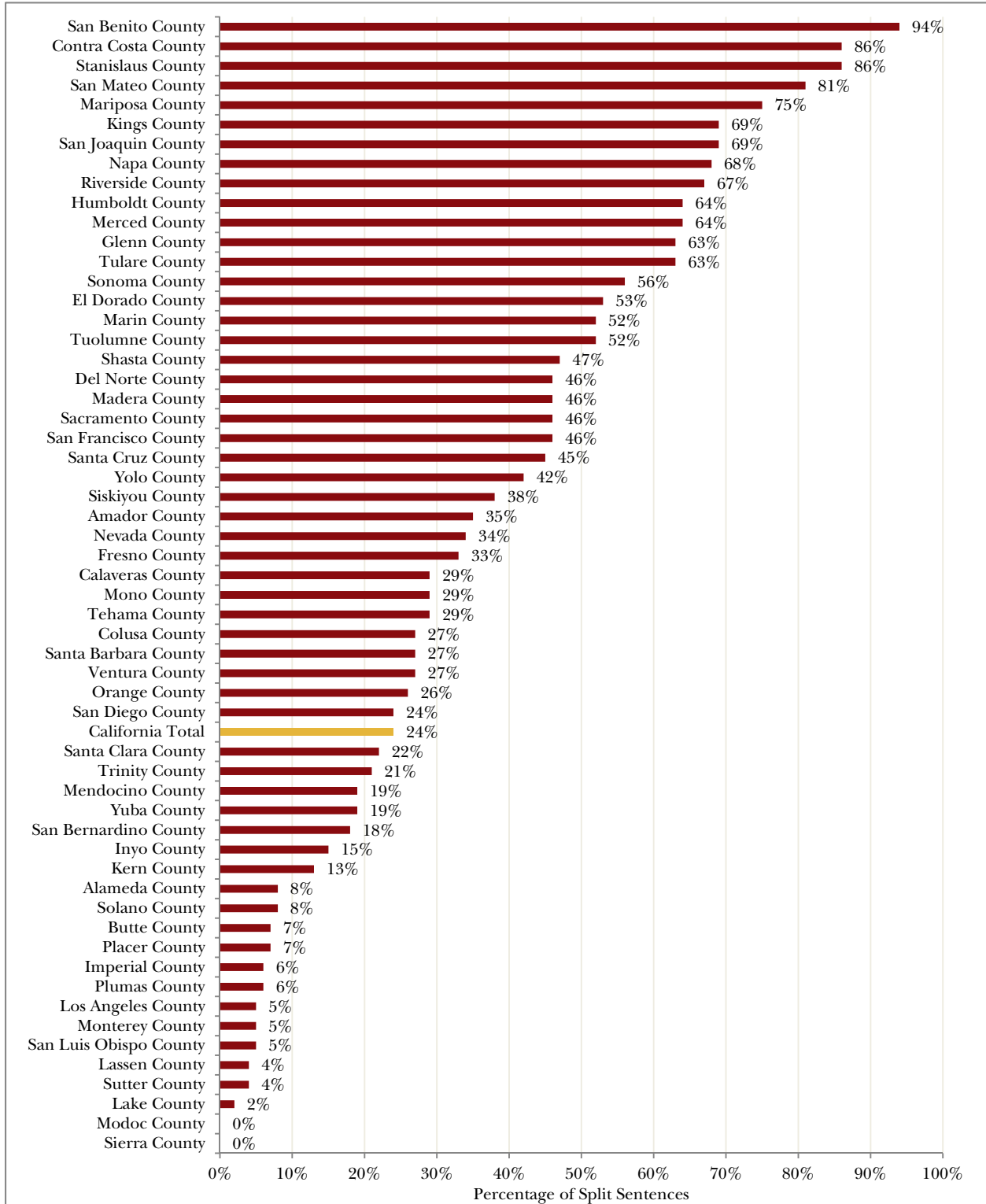


probationers has increased. Interviewees from Riverside County indicated that since Realignment it has become more conscious of limited jail space and thus relied more heavily on traditional probation for misdemeanors. It does not seem to advocate for increased felony probations, but rather the judges in Riverside County are likely to use probation to resolve cases due to an increasing number of felony drug offenders who are choosing to take their cases to trial.

**Split sentencing appeals to prosecutors as a means to increase the scope of correctional control of realigned felons in several ways.**

Over the first year of Realignment, just 24% of county felony sentences to local jail terms were split sentences. This equates to approximately 7,000 sentences (compared to 22,000 straight jail time sentences). However, this state-level rate is somewhat skewed given that the largest California counties are using split sentences at almost half the rate of the remaining counties. In the ten largest counties in California, 20% of felony sentences were split, compared to 40% in the remaining 48 California counties. Since Realignment began, the use of split sentences has varied tremendously across counties, ranging from a high of 94% of local sentences in San Benito County to zero split sentences in Sierra and Modoc Counties (Figure 11).

Figure 11: Share of jail sentences that are split sentences by county, October 2011-September 2012



Source: Sarah Lawrence, *Managing Jail Populations to Enhance Public Safety: Assessing and Managing Risk in the Post-Realignment Era*, June 2013.

At least some offenders in all our sampled counties have received split sentencing. The range of split sentences imposed in counties in our sample ranges from just 5% (Los Angeles County) up to 60% in (Riverside County). Our interviewees gave diverse responses explaining when and why they preferred split sentences and, in some cases, why their offices refrained from imposing split sentences regularly. This section elaborates on the various reasons prosecutors gave for seeking split terms of incarceration and mandatory supervision. Interviewees from all counties see post-release supervision as a central purpose of split sentences. Supervision offers opportunities to detect new crime, including the ability to conduct warrantless searches and seizures of supervisees. Our interviewee from Sacramento County was the only one to identify supervision as the sole purpose of split sentences. He noted that attorneys in his offices and judges are “not believers in rehab.” In Sacramento County approximately 45% of jail sentences are split, but the reason for this high percentage is apparently explained by the desire for post-release supervision alone. With no routine supervision following straight sentences counties are forced to use split sentencing if they desire supervision. There is further concern in Sacramento County that the period of supervision available under split sentences is often not enough for offenders to complete programs, thus defeating a major purported purpose of split sentencing. Many offices have other motivations for imposing split sentences in addition to post-release supervision; these are discussed in more detail below.

### **Addressing Jail Overcrowding**

Some counties use split sentencing or are contemplating using split sentencing to address jail overcrowding. Orange, Riverside and Santa Barbara Counties have used it in direct response to jail overcrowding. Santa Barbara County District Attorney Dudley indicated that all her attorneys are aware of the implications of recommending a straight versus a split sentence as a measure to reduce crowding. Solano County District Attorney du Bain indicated that because his county currently does not have jail overcrowding, his office has not had to face a decision regarding whether to start changing sentencing practices to accommodate the jail capacity. He indicated when the time for population management comes, which will be soon, he hopes his office can start taking advantage of split sentencing. In Solano County approximately 40% of the jail population consists of realigned felony offenders (not including the revoked PRCS population) and the triple-non population is steadily growing.<sup>36</sup> Pre-Realignment the average time spent in Solano County jails was nineteen days; that period had stretched to thirty-one months at the time

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<sup>36</sup> Interview with Donald du Bain, *Solano County District Attorney's Office in Fairfield* (November 16, 2012).

of our interview. Santa Clara County prosecutor David Howe agrees that split sentences could be a future tool to help control incarceration rates.

## **Program and Service Delivery**

District attorney's offices that are more receptive to rehabilitation use split sentences to encourage offenders to participate in programming and take advantage of services. Prosecutors in Alameda, Orange, Riverside, Santa Barbara, Santa Clara, and Solano Counties are amenable, although to differing degrees, to forwarding the rehabilitative focus of Realignment through split sentencing. Out of the nine counties studied, Riverside County has the most significant percentage of realigned felons who have received of split sentences. The fact that 60% of realigned felons in Riverside County are serving a split sentence is largely attributed to District Attorney Paul Zellerbach's firm commitment to the success of Realignment. Chief Deputy Coffee explained that Zellerbach's first priority is to public safety, and since the legislature has decided public safety requires rehabilitative programs, District Attorney Zellerbach feels it is his duty to enforce this decision and has done so in part by being supportive of split sentencing and treatment programs.

Prosecutors from Santa Barbara and Santa Clara Counties said their support for split sentencing reflects their county's overall endorsement of programming. Assistant District Attorney Howe from Santa Clara County noted his county is better able to deliver services to offenders on mandatory supervision than to those in jail. Positive relationships and confidence in other stakeholders serve to enhance prosecutorial support of split sentencing. Chief Deputy Coffee highlighted the role of public defenders recommending appropriate programming for defendants, while District Attorney Dudley praised the Santa Barbara County probation department for taking an active role in ensuring that offenders participate in the right programs so that they do not reoffend. Dudley further applauded the judicial support for programming in her county, indicating that whenever her office recommends split sentences, the judges grant them. Deputy District Attorney Contini of Orange County is primarily interested in split sentences for public safety purposes, as a way to monitor and control offender behavior, but she sees split sentences as serving the secondary goal of providing services for those who want to take advantage of them.

The availability of programming influences prosecutors' interest in recommending split sentences. Assistant District Attorney Howe would like to see an increase in split sentencing in Santa Clara County, but says that would depend on resource availability. Despite Santa Clara County's relatively strong programming, his office is still cognizant of resource limitations and recommends sentences relative to needs in other cases. Chief

Deputy Coffee in Riverside County says in order for his office to rely more heavily on split sentences, the county must develop more viable programming. In Solano County, where just 8% of realigned offenders have received split sentences, District Attorney du Bain is reluctant to rely on split sentencing because day reporting centers that will provide services to offenders on supervision are not yet up and running. Interestingly, the percentage of realigned felons that have received split sentences in Alameda County, a county abounding in and supportive of programming, is the same as in Solano County. Assistant District Attorney Meredith explained that this low percentage is attributable to technical difficulties. Currently the county computer system cannot track when an offender is out of jail and on mandatory supervision. Therefore, law enforcement on the street will not know whether an offender is on supervision. As soon as the county overcomes these difficulties, her office plans to start increasing its split sentence recommendations.

Finally, district attorney's offices take the potential effectiveness of programming into account in deciding whether to recommend splits. Once the Solano County day reporting centers mentioned above are operating, District Attorney du Bain says split sentences recommendations will depend on the likelihood of rehabilitation and whether appropriate services exist for an offender. He also noted that his office will watch out for defendants trying to game the system. Santa Clara County Assistant District Attorney Howe expressed a desire to increase split sentences as his office learns how to maximize the utility of these sentences. Santa Barbara County District Attorney Dudley underscored this point stating she is particularly interested in using more effective risk assessment tools to support their sentencing recommendations.

## **Collecting Victim Restitution**

There appears to be a trend of countries using split sentences as a way to collect victim restitution. AB 109 did not originally include a provision allowing countries to collect restitution for triple-non offenders.<sup>37</sup> Prosecutors from Alameda and Los Angeles Counties both mentioned that their offices worked on legislation, now in effect, which allows the sheriff (or designated person) to take money off local inmates' books to pay toward restitution. Unlike prison, offenders housing in jails usually do not have the opportunity to work and earn wages. By giving an offender a split sentence, restitution can be collected while the offender is on mandatory supervision and, potentially, working. Assistant District Attorney Howe in Santa Clara County cites split sentencing as a way to increase restitution collection. However, some victims in Santa Clara County are

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<sup>37</sup> Spencer, Jessica and Joan Petersilia. "Voices From the Field: California Victims' Rights in a Post-Realignment World." *Federal Sentencing Reporter* 25 (2013).

pushing back against split sentences (and Realignment in general) because offenders are released earlier. Interviewees from Alameda, Orange, Riverside, and Santa Barbara Counties also echo victim restitution collection as an important purpose of split sentencing.

**Parole, PRCS, and probation revocation proceedings are less efficient, demanding more office resources, but yielding lesser sanctions for violators.**

Realignment creates a larger role for district attorneys in supervision revocations than they had in the past. Now prosecutors play an adversarial role in revocation proceedings for technical violations, whereas before they would have only been involved in the context of filing new charges where a violation constituted a new offense. Another change is the sanction for revocation. Revocation of PRCS carries a maximum stint of 180 days to be served at the county jail, but because inmates in jails receive double time credits under Realignment, the actual exposure time is typically 90 days and, due to crowding, sometimes much less. This “shrinking hammer” removes much of the leverage prosecutors and probation officers had to entice compliance with supervision terms. Prosecutors are now spending more resources on the revocation process, but getting less out of it, in terms of sanctions. Some counties are reacting by focusing efforts on charging and trying new crimes in lieu of revocation when possible. Prosecutors also rely on probation to apply intermediate sanctions and avoid hearings when possible.

The district attorney’s newly defined role in “prosecuting” revocation hearings increases staffing demand. Besides the need for an attorney to review the files and participate in the hearings, there is an uptick in clerical work that accompanies the process. There are separate docket numbers for each revocation case and additional filings to be made by the parties. Several counties we spoke with have used Realignment funds to fill gaps created by this new process. Santa Clara County had to augment their court calendar with two new weekly sessions just for revocations. Los Angeles County created a dedicated PRCS/Parole position, now filled by Deputy DA Kraig St. Pierre, just to coordinate the voluminous hearing schedule. In Solano County, a dedicated Realignment prosecutor is focused both on revocations and new cases under Realignment; Solano County also hired a paralegal and a legal secretary to support the additional paperwork Realignment cases create. Riverside County has a dedicated revocation attorney, as does Alameda County. When asked about their planned response to the influx of parole revocations in July 2013, most said they are planning but, just as with the initial roll out of AB 109, they can’t fully predict the impact of changes that lie

ahead. This is certainly an area to watch for future impacts on district attorney resources, attitudes, and strategies.

**Data collection challenges prevent prosecutors from measuring outcomes under Realignment**

The state has not imposed any method for tracking or evaluating county outcomes under Realignment. Without a statewide data tracking system or defined measure of success, counties face a two-fold information vacuum. First they lack the technical support to “count” the output data related to prisoner tracking and recidivism. Second, without a data capture or standard metrics, they miss opportunities to evaluate new policies. The move away from one statewide to many local systems for housing and supervising offenders also forced a move from one centralized tracking system to many local ones, and left counties without the tools to track things like offender supervision status. Those counties that are tracking Realignment data have been doing so on “patch” systems that do not connect with other counties or a state system. Holes in these data systems create logistical problems with the implementation of Realignment. For example, police may not be able to tell whether someone they detain is on supervision, or a district attorney may not be able to find a defendant’s out-of-county record easily.

Patchy data systems combined with the lack of consensus on how to define or measure recidivism both contribute to a large-scale evaluation problem. What’s more, even with 58 intact and functioning data systems across the counties, counties would lack the ability to compare success across counties. These data collection problems exacerbate and complicate one another, leaving communities without effective tools to track, measure, or compare outcomes under Realignment. This void undermines the utilitarian approach of Realignment because counties cannot readily evaluate their own practices or borrow best practices from others. San Francisco County DA George Gascón has initiated a cutting-edge data collection effort within his office that he calls DA Stat. He hopes to track demographics, crime categories, punishment and reoffense rates of defendants coming through his office. He believes that over time, his database will reveal how defendants are processed through his office and which programs have reduced recidivism.<sup>38</sup> If other counties followed Gascón’s lead, they would be creating a database useful for evaluating how AB 109 impacted DA operations and outcomes.

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<sup>38</sup> Shahani, Aarti. “SF’s Gascón Pushes For Data-Driven Approach in Tracking Offenders...and Prosecutors.” *KQED News* (May 1, 2013). <http://blogs.kqed.org/newsfix/2013/04/30/sf-district-attorney-big-data-is-overdue/>.

# Chapter 8: Judges<sup>1</sup>

“What we had before was failing and had failed. I’m certainly hopeful that [realignment] will succeed. There are a number of challenges to it – the most significant is that there are limited resources at this time to make the change. Given the fact that the old system was failing, is this better than that? Well, we’re going to give it a try.”

- Judge Richard Loftus, Santa Clara County

Trial judges are ideally the gatekeepers of California’s correctional resources. Judges interpret the law, assess the evidence presented, manage the settlement conferences, approve plea bargains, and preside over jury trials. America has an adversarial system of justice, with legal cases being contests between opposing sides. The judge is to remain above the fray, providing an independent, impartial assessment of the facts and the application of the law to those facts. This role can become compromised when a public policy seeks to alter judicial behavior without a complete overhaul of the governing law. When asked how judges are responding to the new realities created by the Public Safety Realignment Act (AB 109), most of the judges we interviewed said they tried to disregard jail capacity in imposing sentence. Los Angeles County Judge Charlaine Olmedo stated, “[Judges] sentence according to the law, and if the sheriff chooses to release people early, they do what they do.” She emphasized that judges only consider the statutory factors that are meant to be considered—ignoring others like the county’s jail capacity. She remarked, “We just follow the law as it is.” Los Angeles County Presiding Judge David Wesley agreed, and noted that monitoring jail capacity was an “executive branch function.” Solano County Presiding Judge Paul Beeman echoed this sentiment and said,

Look, I’m the judge. I’m supposed to figure out what happened here, and what’s the appropriate sentence, and I’m going to make it. The money part of it, and how these people are housed, or what kind of treatment they receive is the probation department’s and the county’s responsibility—the sheriff’s responsibility and not the court’s.... The judges in Solano County are doing their job according to the law. Period. I can tell you 1000% [jail capacity] is not influencing sentencing decisions. Realignment is the county’s problem and not the court’s problem. [The judges] are there to make the appropriate sentence and move on.

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<sup>1</sup> Kevin Jason, Rachel McDaniel, and Alyssa Weis contributed to this chapter.



In imposing a sentence, the judge is responsible for selecting an outcome that best balances the competing goals of criminal sentencing: retribution, incapacitation, deterrence, and rehabilitation. In theory, the judge should have many tools at his or her disposal and resource constraints should not figure into criminal sentencing. But Realignment challenges that theoretical archetype in a number of ways. Judges' sentencing options of prison versus jail are significantly constrained currently, as over 500 felonies have now been designated by statute as ineligible for a prison sentence. Even when judges impose a jail sentence, that decision is further impacted due to jail crowding and the ability of the sheriff to reduce that sentence after it has been imposed. And if a probationer or parolee violates the terms and conditions of parole or probation post-AB 109, the judge's choices are limited further. This applies to not only the length of the maximum sentence that can be imposed (180 days) and where it must be served (local jail), but the offender also is automatically discharged at the end of one year if the offender has no violations. In combination, these aspects of Realignment have the cumulative impact of reducing the judge's very important discretionary role in felony sentencing.

It wasn't supposed to play out this way. Realignment was designed to put the judge front and center. As discussed, the overarching goal of AB 109 was to enhance and provide funding for evidence-based rehabilitation programs. One of the core principles of evidence-based programming is to combine treatment *and* court monitoring, and AB 109 ensured that combination would be encouraged. Under Realignment, judges have the important new sentencing option of "split sentences," which is an initial period of jail custody followed by an intensive treatment program or probation supervision. They also have the new option of "flash incarceration," immediate periods of jail time between one and ten days. In a practical sense, judges were to be active case managers and partners in the delivery of appropriate treatment and custody sanctions—much like the model of a drug court judge. And in some counties, this ideal has occurred. But due to a number of unforeseen issues arising from incomplete or vague components of AB 109, split sentencing is not being implemented as frequently as hoped in many counties. Counties that are able to successfully implement a variety of sentencing options are usually those counties with adequate jail space to assure that the initial part of the split sentencing (the jail portion) is served in full, and that their probation and community treatment providers have the necessary resources to provide adequate services and monitoring. In those counties, judges are using Realignment as a means to expand drug and mental health courts and further the goals of collaborative, problem-solving courts. But in the most impacted counties, judges told us that their role and authority had decreased because of Realignment. As mentioned earlier, other judges resist getting actively involved in local crime policy, believing the judiciary should remain more neutral regarding sentencing matters.

Media outlets have given a great deal of attention to the jails that have become overcrowded since Realignment started, but the critical impact on the courts and the judiciary has gone unstudied and unaddressed. Our interviews with judges throughout California revealed a mostly dissatisfied group of stakeholders. It wasn't that they didn't believe in the *concept* of Realignment, but most felt its current unintended consequences were further eroding justice and public safety in their counties. Their frustration centered on their inability to feel confident that a sentence imposed in court would actually "stick." In addition, judges took on a major new role on July 1, 2013—the sentencing of all parole and probation technical violators. Many complained about the added workload at a time when court funding had gone through a decade of financial cutbacks.

## Findings

### Judges Doing More with Less

Realignment assigns many new tasks to California's superior courts, which were already suffering years of funding cutbacks.

The vast majority of felony cases in California begin in one of the 58 superior courts, located in each of the state's 58 counties. Court facilities exist in more than 350 locations, and judges hear both civil and criminal cases, as well as family, probate, and juvenile cases. Each year, California court filings equal almost 9.5 million cases, and result in 8.4 million court dispositions.<sup>2</sup> California has a unified court system, wherein the State provides the majority of its funding. Since the recession of 2008, California's trial courts have suffered severe budget cuts, which have required them to shut down some courtrooms permanently, shift certain types of court filings to an e-file system, and reduce court staff and the hours they work.<sup>3</sup>

Not only do the judges have the additional workload for the AB 109 clients but they have also taken on responsibility for parole and probation violation cases, discussed in more

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<sup>2</sup> "Annual Court Statistics." The Judicial Branch of California Courts. (2012). <http://www.courts.ca.gov/19733.htm>.

<sup>3</sup> Robert, Amanda. "California courts continue cuts, closures." *Legal Newline Legal Journal* (June 17, 2013). <http://legalnewline.com/issues/tort-reform/242312-california-courts-continue-cuts-closures.>; Stock, Stephen. "California Superior Courts in Crisis." *NBC Bay Area* (July 24, 2013). <http://www.nbcbayarea.com/news/local/California-Superior-Courts-in-Crisis-216668081.html>.

detail below. And in November 2012 voters approved Proposition 36, which modified the state's three strikes law. The measure allows existing incarcerated offenders with three strikes to petition the courts for a reduced sentence if the underlying offense for their third strike was non-serious and non-violent. It is estimated that about 3,000 prisoners will now ask judges to review their files for resentencing.<sup>4</sup>

Nearly all California criminal justice agencies have experienced recent budget declines, but the courts' budget reductions and how these budget shortfalls influence Realignment have gone unnoticed. Without judges, commissioners, administrative personnel, and courtrooms, it is unclear how the judiciary is supposed to take on the expanded duties now required of them. Perhaps more so than any other stakeholder, there is a need for extensive training on the intricacies of the new and very complex AB 109 law.

## **The Pressure to Use Split Sentencing**

Under AB 109, judges have to decide how to sentence the newly convicted N3s or 1170h cases. The ideal for rehabilitation is split sentencing but for complicated reasons, judges often prefer straight jail time without a post-custody "tail."

In general, the sentencing courts now have two felony sentencing options under AB 109:

1. Order a full term of imprisonment in the county jail up to the maximum possible term. If a defendant is sentenced to serve the full term of imprisonment in county jail, upon release, the defendant will not be supervised or have any conditions or other type of parole supervision ("straight term"); or
2. Impose a sentence which is a combination of a term of imprisonment in county jail and mandatory supervision, but the two periods cannot together exceed the maximum possible sentence. Upon release to mandatory supervision, a defendant will be supervised by the probation department under the same terms, conditions, and procedures of formal probation for the unserved portion of the sentence ("split sentencing").

Probation prefers that the court sentence defendants to the second option above—a split sentence, a combination of imprisonment and mandatory supervision. This would

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<sup>4</sup> Leonard, Jack and Maura Dolan. "Softer 3-strikes law has defense lawyers preparing case reviews." *Los Angeles Times* (November 8, 2012). <http://articles.latimes.com/2012/nov/08/local/la-me-three-strikes-20121108>.

require an inmate to serve jail time and then be placed on probation where the released inmate could be monitored and helped with their reentry.

Some judges are firmly in favor of split sentencing, and their county's practices reflect those preferences. A good example is Sacramento County, where 46% of their sentences were split sentences from October 2011 to June 2012 (See Figure 11). Sacramento County Judge Lawrence Brown said, "Split sentencing is a creature of Realignment. It was created so as to allow a period of supervision on release of the defendant from county jail prison." Judge Brown believes that a split sentence should be used because "post release supervision gives an offender incentive to behave themselves and gives law enforcement the tools of search and seizure and gets an extra set of eyes watching over them" while also helping to enforce the payment of victim restitution and fines.

How does Judge Brown determine where the split between custody and probation should be? "I move the number up to get it back to where it would have been," he says. By getting both parties to agree to a higher term under correctional control than what the person would have gotten had they gone to prison alone, he splits the term.

In an example, Judge Brown describes a defendant convicted of auto theft with a lengthy record, but no strike prior conviction. Assume it were pre-AB 109 and assume the judge denied probation and sentenced the defendant to state prison for the low term of 16 months (minus 50% credit, thereby serving an actual eight months). On release from prison, the defendant would have been on parole for up to three years and if he violated parole he could go back to prison for up to one year.

To illustrate some of the risks of Realignment, Judge Brown explains how things have changed with AB 109. Now, if the judge denies probation and sentences the defendant to low-term 16 months county jail prison, after serving his actual eight months (having received 50% credits), there would be *no* supervision and thus no chance of being reincarcerated. This is because AB 109 does not provide for parole for county jail prison inmates. To address this limitation, Judge Brown explains that judges can create some period of supervision on the defendant's release, by insisting that the defendant receive a middle term of 24 months or an upper term of 36 months. However, any time above the 16 months will be suspended so as to create the period of mandatory supervision. Thus, if the defendant agrees to the middle term of 24 months, it would 16 months jail with eight months mandatory supervision. The defendant's exposure on mandatory supervision is however much time is left on his supervision, i.e. the clock starts counting the day he gets out. Assuming he violates mandatory supervision on his very first day out, he could go back to jail for the eight months. Judge Brown concludes that with this maneuvering, the 24-month sentence can look longer on paper without functionally being so.

However, even if judges are in favor of a split sentences, defendants often aren't, and won't agree to a plea bargain containing that sentence. Defendants talk to one another, and judges reported that defendants will no longer accept a plea with a sentence that includes probation as a "tail." Additionally, defendants familiar with their local criminal justice system often realize that if they don't agree to a split sentence, they will serve just a small portion of their jail term due to overcrowded conditions. Since about 95% of all criminal cases are disposed of by a guilty plea, the prosecution and defense work to gain an acceptable agreement. The court needs the plea-agreement to avoid the time and expense of a trial. For the defendant, the plea usually boils down to jail time. And since jail time is being significantly discounted in overcrowded jails, the defendant ironically pushes more frequently now for straight term sentencing, without mandatory supervision after release. Of course, the judge doesn't have to agree to a plea agreement, but as a practical matter, judges typically go along with the prosecution's plea deals.

Of all the counties interviewed in this report, Los Angeles County had the lowest percentage of split sentences administered. As of June 2012, the county average was at 5%. Judge David Wesley explained that while the district attorneys in northern counties believe in split sentencing, the Los Angeles County district attorney often opposes the practice and argues against it. Judge Wesley hypothesized that if a prosecutor walked into court and asked for more split sentences, there would be more split sentences. When asked about the sentiment among the judges of Los Angeles County, Judge Wesley emphasized that he could not speak for the county's judicial officers. In his personal opinion, however, he expressed that he disfavors split sentences because most of those who qualify for it are not first time offenders. Instead, they are people who the courts have unsuccessfully tried to rehabilitate with programs in the past. He stressed that he did not send an offender to prison on a drug charge to be a "tough guy," and that he had often sent an offender to prison on the condition that they participate in drug education programs while incarcerated because the offender would refuse to do it locally. Since Realignment has prohibited judges from sending certain offenders to state prison he believes that a split sentence is akin to letting an offender out early to reward them for not being successful in any of the state's other attempts to rehabilitate him or her.

Judge Wesley feels like he has no good reason to use a split sentence, especially given the opposition by the district attorney. He expressed that the police department wants split sentences because they want a "tail" for the offenders. While a split sentence does offer a means for monitoring offenders, Judge Wesley explained that the problem with split sentencing is the manner in which a violator of the supervision could only be threatened with serving the remainder of the supervised time in jail. In other words, if the offender violates in the third month of a four-month mandatory supervision term, he can only be punished with roughly one month of jail. This differs from probation where an offender

diverted from prison is threatened with serving a hefty period if he violates. If the violation occurs towards the end of the probationary period, the elapsed time does not factor into the subsequent sentence. Judge Wesley believes that the mandatory supervision component of split sentences has diminished effects because of this difference. Without this coercive aspect, it is difficult to alter the behavior of ex-offenders.

It is also clear that judicial use of split sentencing is heavily influenced by how much faith the judges have in their local probation departments to deliver on programming. Judge Wesley feels that the Governor's Office implemented Realignment backwards since the local programs were not yet established at the time the offenders were shifted to the county level. "They should have had all of the programs set up before they started releasing people to us because we don't have all the programs to deal with all of these people. It's like Proposition 36 because [just like then] we didn't have the resources to make it work." (Proposition 36, the Substance Abuse and Crime Prevention Act of 2000).

Similarly, Solano County Judge Paul Beeman stated that he and his colleagues were unlikely to rely on split sentencing more extensively until the probation department assures them that they have treatment programs or services to provide to offenders eligible for a split sentence. When asked about the possible use of split sentences as a tool to address jail overcrowding, Judge Beeman was adamant that the judges' behavior would not be affected by the conditions of the jails until the judges were convinced that there were good, meritorious programs being run for the purposes of split sentencing. He conceded that he foresees the Solano County judges making modifications to their sentencing procedures when the treatment programs are running so that the procedures fit in with what probation and the sheriffs are doing.

While Judge Beeman maintained that the current status of the jails were not influencing sentencing decisions, other judges cited jail overcrowding as a major reason behind disfavoring split sentences. These judges no longer felt confident that the jail portion of the sentence will actually be served since sheriffs often have to release inmates in order to keep below their court-ordered capacity cap. If the offenders are released early, and required to complete the rest of their sentence on probation supervision, probation may also be too overwhelmed to provide sufficient monitoring or treatment. In that scenario, the offender essentially received a "get out of jail free" card.

Navigating this complicated system now means that judges have to know much more, often on a daily basis, about the capacity constraints in their local jails and the programs offered by probation. Judges have to then determine what type of sentence will likely actually be served and *delivered*, as opposed to what type of sentence to *impose*. Judges often voiced frustration at the slippage that now occurs between *imposition of sentence*

and *sentence actually served*, saying that it was unpredictable, undermined their authority, and reduced public safety.

Some judges suggested changing AB 109 to permit a new option, which would be a mandatory county jail sentence, which could not be reduced by the sheriff, followed by a mandatory post-jail community supervision term “tail” of their choosing, perhaps years. But that is unlikely to happen, given the jail crowding conditions developing in most counties and Realignment’s purpose of diminishing California’s overreliance on incarceration and supervision.

## **Adjusting to New Responsibilities: The Handling of Technical Violations**

Judges are now responsible for probation, PRCS, and parole violation hearings, and the maximum sentence that can be imposed for technical violations is six months county jail. Judges often don’t have the intermediate sanctions to impose for technical violations (either treatment or custody).

If changes in their initial sentencing decisions (the N3s) weren’t challenging enough, as of July 1, 2013, judges are now responsible for sanctioning *all* offenders for technical violations, regardless of the criminal status of the offender at the time of the violation. A technical violation is when the offender fails to do something that he has been ordered to do as part of their community supervision. Common technical violations include leaving the county or state without prior approval, failure to attend or complete a drug or alcohol program, testing positive for alcohol or drugs, associating with gangs, cutting off electronic monitoring bracelets, and failure to report to the probation/parole officer.

Judges now decide sanctions for the following groups of offenders:

- (1) Offenders sentenced to probation;
- (2) Offenders currently on probation for their N3 crime;
- (3) Former prisoners realigned to counties on PRCS; and
- (4) High-risk parolees supervised by state parole.

Prior to Realignment, judges only were responsible for offenders sentenced to probation. Each of these populations has historically required tens of thousands of parole and probation violation hearings each year. Grattet et al., found that the the California Department of Corrections and Rehabilitation’s (CDCR) parole commissioners held

more than 20,000 parole revocation hearings in 2007.<sup>5</sup> County judges must now conduct all of these hearings. Governor Brown has increased the overall court budget 7% in 2013-2014 in recognition of their expanded responsibilities.

Complicating the additional workload is a reduction in the severity of the sanction that can be imposed if a technical violation is found to have occurred. One of the most dramatic changes that AB 109 contained was the prohibition against returning *any* offender to prison for a technical violation. The *only* exception to this is for prisoners released after serving a “life with the possibility of parole” sentence. No one can be sent to prison post-AB 109 unless they are *convicted* of a serious, violent, or sex crime. Period. Judges must choose a *local county* sanction from the menu of intermediate sanctions that the county has available for probation, PRCS, and parole violators. And of course, as discussed above, if the jails are crowded, the jail custody option is non-existent. Sheriffs will prioritize new felony N3 convictions over technical violations. Without jail custody as a realistic sanction, judges are often unable to deter offenders or compel them to attend treatment, pay restitution, or remain in their approved legal residence. Flash incarceration (e.g., short jail terms of 10 days) is another AB 109 option to accommodate the need to quickly incarcerate a failing offender, and in some counties (with adequate jail space), judges were using this option.

If judges want to identify other sanction options, they have to become much more familiar with their local treatment programs, and monitor them for daily bed space, openings, and criteria for acceptance. The judge will have to be much more than simply the *imposer* of sentences; he or she will be the *manager* of treatment. If they don’t become actively involved in the community’s treatment and sanctioning options, they are in essence, left with no options to sanction technical violators. Of course, if there are no programs *in* the community to become familiar with, the judge has virtually nothing to impose to show the court’s disdain for violating behavior—or intervene when there are indications an offender is at risk of committing a new crime. When asked about the plan for handling technical violations, Judge Beeman of Solano County expressed uncertainty and stated that at the time of the interview he was waiting for the Administrative Office of the Courts to take the lead and provide guidance on what judges will have to do in their new role. Judge Gary D. Hoff of Fresno County echoed this uncertainty when asked about this population who is no longer eligible to be sent back to prison. “I’m not sure what we’re going to do with these people.”

Some counties are assigning a single judge and courtroom to the revocation hearings. Alameda County decided to utilize a judge with an ancillary assignment on Fridays to

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<sup>5</sup> Grattet, Ryken, Joan Petersilia, and Jeffrey Lin. “Parole Violations and Revocations in California.” (2008). <https://www.ncjrs.gov/pdffiles1/nij/grants/224521.pdf>.



hear the parole violations and to begin hearing the PRCS violations that the regular judges had been handling previously. According to a judge in the county, the services for those on parole will be similar to those available to offenders under PRCS, with programs related to job training, alcohol abuse, mental health, and others areas. This judge compared the expanded role regarding parole violators to the new responsibilities associated with the PRCS population, where it took a few months to have the programs established for those released.

In Sacramento County, policies regarding parole revocation are being discussed in a Parole Revocation Work Group, where the participants include Judge Lawrence Brown, the District Attorney, the Public Defender, Probation, the Sheriff, and State Parole. Sacramento County has had success with flash incarceration on the violators of PRCS, and the work group hopes that Parole can use this tool in a similar fashion with the parolees. At the time of the interview, Parole had been very receptive to modeling upcoming parole revocation hearings on how the PRCS violations were being handled and the next step was focused on logistical issues, like incorporating these hearings into the judicial calendar.

In Fresno County, AB 109 funds enabled the courthouse to hire a hearing officer to hear PRCS violations. At the time of the interview, the county had not yet done that and instead assimilated PRCS hearings into their current calendar configuration. Meanwhile, a retired judge will be doing PRCS revocation hearings in Santa Clara County. There, the hearing is aimed at informing the individuals re-entering society of their obligations to report to probation, giving a mental health test, and connecting them with the local housing authority, counseling, job training, and other services. This also aims to help the person re-entering society to have an ongoing relationship with their probation officer and, instead of acting out flash incarceration, as was the previous practice, the hearing is the preliminary step to preventing someone from coming back into custody.

## **AB 109 and Collaborative Courts**

The collaborative court model represents the ideal for implementing this new treatment plus surveillance judicial model, but resource constraints limit its full implementation in most counties.

Many judges were in favor of Realignment as they hoped it would continue the progress California had made in recent years in “collaborative” or “problem-solving courts” to resolve cases involving addictive behavior, mental health, homelessness, and other

specialized issues. Collaborative courts are distinguished by the following elements: problem solving focus, team approach, integration of social and treatment services, and judicial supervision of the treatment process. A key feature of the model is a proactive role for the judge inside and outside the courtroom, and direct interaction between defendants and judge. In order for the problem-solving model to work, judges must have time to supervise both the sanction and the quality of the rehabilitation services.

California was instrumental in the national movement towards problem-solving courts, and prior to AB 109, California was home to approximately 250 collaborative justice courts, including domestic violence courts, drug courts, DUI Courts, veterans court, mental health courts, reentry courts. Some judges felt that the workload and new paperwork involved with Realignment threatened the progress California was making in these alternatives to incarceration. Other judges felt that Realignment created the opportunity for a systematic way to reorient some of the courts to a rehabilitation focus. It injected funding into counties, allowing for an expansion and strengthening of courts, while also creating room to test the model in different settings.

Research has demonstrated that, if implemented properly, problem-solving courts can reduce recidivism, improve coordination among justice agencies, and increase trust in the justice system. But despite evidence of effectiveness, such courts can be expensive and limited in the short-run. The average adult drug court, for example, enrolls only 40 participants per year—a small fraction of the drug-involved offenders who might benefit from them. Of course the hope is that these activities have the longer-term prospect of reducing recidivism. Limited resources have presented a constant challenge for those attempting to take courts to scale. Collaborative courts will likely provide pilot testing of whether this successful model can now work for a more serious clientele. The court-involved model deserves close scrutiny because it is one of the most successful models that exists for bringing together all of the elements of evidence-based practices.

But in order for the collaborative court model to work, judges have to have legal leverage; they have to be able to impose a sentence when a participant violates a rule. The most effective drug courts, for example, typically allow more relapses before putting someone in custody, but they have to ultimately have the threat of custody to convince some offenders to stay the course—or importantly, to incarcerate offenders who are at high-risk of new crime. They also need that lengthy “tail” discussed above. As Judge Stephen Manley, a Santa Clara County judge and drug court pioneer, put it: “If they want us to use evidence-based programs to change the model from punishment to rehabilitation, we need more time.” When asked how long would be ideal, he said “at least one year for serious drug offenders.”

Of course, treatment capacity is another key area of concern, particularly for substance abuse treatment. Judge Manley continually stressed the need for residential substance abuse treatment, which is far more expensive and difficult to site in local neighborhoods, than outpatient services. Housing for the mentally ill is also particularly problematic. In every county, there was a serious mismatch between the need for services and capacity in programs.

The lack of more time post-custody (split sentencing) not only impedes the effectiveness to monitor treatment and impose sanctions, it limits the ability of the court to protect victims and collect court-ordered restitution. Of course, as discussed above, the judge can *impose* the split sentencing, but whether that sentence actually gets served or not is now often up to the discretion of the sheriff. Some believe the AB 109 legislation, combined with the growing authority of the sheriff, has undermined the authority of the judge and the court.

## **Sentencing, Jail Crowding, and Loss of Judicial Authority**

Sheriff are exercising more authority on time served, and shortened jail terms are encouraging felons to plea-bargain for straight time. The authority of judges is being undermined, as sentence severity is influenced more by system capacity than justice concerns.

While the judge imposes the final sentence, the actual sentence served is now more a function of jail capacity. Because of the aggressive jail release policy of the sheriff in Fresno County, Judge Gary Hoff expressed distress and concern about how his role of exacting justice in a timely manner is now potentially undermined. “When I sentence someone I have no confidence that they’re going to do the time in custody.” With these releases of low-risk offenders, judges of Fresno County are seeing offenders who have been arrested nine, ten, or eleven times, yet have never made it to an arraignment. The offenders were the first to adapt to the new circumstances and they have not hesitated to take advantage of the fact that they may be released without even posting bail. This has the opposite effect of deterrence, and is a major concern of the Fresno County Superior Court.

Funding is an especially difficult issue for Fresno County. Judge Hoff stated there was not enough money to buy more beds to relieve jail pressure, nor was there enough money to fund risk assessment tools needed for programs. “There’s not enough money to fund

either independently and certainly not enough to do both.” Generally, Judge Hoff feels that the quick and sudden change of Realignment “has really made a mess of our criminal justice system.” The legislation was implemented too fast and the counties were not given sufficient notice. The bill was poorly drafted, did not anticipate certain situations, assumed things that did not come to pass, and left certain things unclear such as what the time credits were and how they were applicable. While Judge Hoff believes that the goal of AB 109 presents a great opportunity to reassess the criminal justice system, he said, “We don’t have the resources to get the desired results.”

As previously discussed, crowding in county jails is an increasingly serious issue, and jail overcrowding often means that the court-imposed sentence does not stick as the sheriff has to “kick” cases out in order to stay below the court ordered jail cap. This isn’t necessarily a new phenomenon in some jails (e.g., Los Angeles County), but the “discount” between imposed- and served- sentences has increased.

The growing importance of sheriffs to criminal sentencing was continually mentioned in our interviews. Most opined that the discounts would grow over the next few years, as the new N3s felons and parole/PRCS/probation violations were sentenced locally. Over time, as the new jails are built and unused portions of the jail are reopened, jail terms should “hold” and the deep discounts on length of sentences should decrease. But jail capacity will not significantly expand for at least five years, as jail construction typically takes at least that long for completion.

San Diego Union Tribune columnist Don Thompson wrote about the issue with the headline: “Overcrowding in many county jails is forcing local sheriff to assume the role traditionally held by judges.” He notes that not only are judges influencing how long convicts will serve but also who should get out on bail. He writes:

[The situation] is forcing sheriffs in many counties to make executive decisions on releasing detainees early to ease crowding in their own lockups. The criminal justice system is built on the concept that independent and impartial judges will decide who will be detained and for how long, but sheriffs are, by necessity, usurping that role. The trend raises serious questions about due process and the separation of powers.<sup>6</sup>

The Little Hoover Commission, a non-partisan state organization, sent a letter to Gov. Brown highlighting the issue. It reads:

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<sup>6</sup> Thompson, Don. “Agency: Realignment law undermines role of judges.” *San Diego Union Tribune* (May 30, 2013). <http://www.utsandiego.com/news/2013/May/30/agency-realignment-law-undermines-role-of-judges/>.

Current jail overcrowding ... has forced sheriffs of the executive branch into the untenable position of making decisions traditionally made by members of the judicial branch of government. This unintended consequence of overcrowding threatens to make California's criminal justice system less reliable, less transparent, and less accountable.<sup>7</sup>

Sheriffs in 17 counties told the Little Hoover Commission they routinely release parole violators and offenders who have been sentenced to jail terms by judges, using their own authority to ease jail crowding. Fresno County's sheriff said she frees 40 to 60 offenders each day. Assembly Minority Leader Connie Conway, R-Tulare, said in a statement that, "Law enforcement is being tasked with responsibilities outside of their jurisdiction which is unconstitutional and interferes with their primary mission of keeping our communities safe."

Here is how it happens. The judge sentences an offender to 16 months, but with half time, he is to be in jail for a minimum of eight months. But due to crowding, he gets placed on the sheriff's electronic monitoring program, where he also earns half time credit. So, the 16-month jail term turns out to be eight months on home confinement. And may be significantly less. In essence a 16-month jail sentence turns out to be no time behind bars.

Of course the sheriff has always had the ability to release inmates to keep the population down, and in overcrowded jails this has been occurring for years. But the difference since the implementation of Realignment is twofold: the discounts are applying to a much more serious population, and if they violate their home confinement or early release—no matter how many times they do so—by law they can't go back to prison. The most severe sanction they face is jail, where the "reduced" sentencing process starts all over again.

Inmates are starting to manipulate the system of sentencing AB 109 introduced as well. Judge Wesley said that inmates in their jails now know the ins and outs of the system and their informal networks with other inmates means that most are opting to serve the maximum term under the new Realignment sentencing guidelines because they know they will be released much earlier and not have to be supervised upon their release. As offenders hear about the bargains and how "imposed" time translates into "served" time, they aren't willing to take a plea bargain that includes the split sentence (mandatory supervision option).

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<sup>7</sup> "Letter on bail to Governor and Members of the Legislature." Little Hoover Commission. (2013). <http://www.lhc.ca.gov/studies/216/Report216.pdf>.

## A Concern for Victims Post-AB 109

Due to shorter imposed sentences and automatic probation discharge if the felon incurs no new arrests, victim restitution and other victim-centered issues are not fully addressed.

Although the focus of AB 109 is clearly on what to do with offenders, it is important to note that Realignment significantly impacts crime victims. Victims' rights and safety is a significant concern that has, for the most part, gone unmentioned in Realignment discussions. Despite their centrality, victims were pretty much left out in the cold in terms of planning for Realignment. They were not represented in major policy negotiations when Realignment was being designed and the local Community Corrections Partnership ("CCP") is not required to provide a voting seat to victims. Victims' rights to notification, safety, and a place of primacy in custody determinations were unaccounted for in the law's original form, and there is no clear sign that they are soon to be re-engaged. In short, in a rush to protect the constitutional rights of offenders, the rights and needs of victims appear to have been cast aside.<sup>8</sup>

Realignment's impact on crime victims is multifaceted. More felons may be granted early release due to jail overcrowding, and these early releases may increase the risk of citizens becoming crime victims. On the other hand, if counties divert offenders to more effective treatment and work programs, reducing recidivism, overall victimization rates will decline.

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

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<sup>8</sup> Spencer, Jessica and Joan Petersilia. "Voices From the Field: California Victims' Rights in a Post-Realignment World." *Federal Sentencing Reporter* 25 (2013).

Marsy's Law added a public safety bail provision to the California State Constitution (Art. I, §28(f)(3)), which requires that the protection of the public and the safety of the victim be the primary considerations when setting bail or own recognizance release.

Importantly, Marsy's Law requires that the safety of the victim, the victim's family, and the general public be considered before any parole or other post-judgment release decision is made. It is not clear how Realignment is preserving and enforcing these victim rights. What does seem clear is that the consequences of AB 109 on victim's rights have not been fully considered. The Crime Victims Action Alliance formally opposed AB 109 and sent a strong opposition letter to the Governor asking him to veto it.<sup>9</sup> Fearing that it will negatively affect public safety, some victim lobbyist groups like Crime Victims United of California have uniformly disapproved of AB 109 and called for its repeal.<sup>10</sup>

Realignment may also reduce the ability of victim's to collect restitution. Under the former system, victims would get their restitution payments through the parole system, and failure to make those payments was considered a violation of parole. Prisoners subject to longer periods of incarceration were required to work during their incarceration, and the CDCR had the power to garnish any wages earned and put it toward a restitution order that may have been in place. However, offenders sent to PRCS instead of parole can be discharged from supervision at six months (half the minimum length of time under the old parole system). When offenders are discharged from PRCS, there is no administrative body responsible for monitoring restitution payments. Victims often have little recourse to collect court ordered restitution under Realignment. In addition, local authorities or the sheriff are now more responsible for collecting crime victim restitution payments, but given their workload, it often doesn't happen. As Kelly Keenan, Chief Assistant District Attorney in Fresno County, told the *California Lawyer*, "That's a major problem. We're struggling with it." For the present, he says, crime victims may have to go after restitution themselves in civil court.<sup>11</sup> The CDCR tracks restitution orders for inmates in state prisons, collecting even after they are released on parole. But it's more difficult to track someone who serves a three-year jail sentence and then leaves with no supervision or probation program.

Judge Lawrence Brown, a long time victim advocate, uses split sentencing to enhance victim restitution orders. Judge Brown is relying on split sentences "to create supervision to get that restitution as a condition" and effectively have a "hammer hanging over them" to pay victims. But he thinks the policy needs to be updated to make restitution

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<sup>9</sup> "Letter to Governor Brown to Oppose Assembly Bill 109." Crime Victims Action Alliance. (April 4, 2011).

<sup>10</sup> "AB 109-Public Safety Realignment." Crime Victims Action Alliance. [http://www.cvactionalliance.com/ab-109-public-safety-realignment.](http://www.cvactionalliance.com/ab-109-public-safety-realignment;); "The Dangers of AB 109/Prison Realignment." Crime Victims United of California. <http://www.crimevictimsunited.com/lawsuit>.

<sup>11</sup> MacLean, Pamela A. "Prison Realignment: Now What?" *California Lawyer* (August 2012). <http://www.callawyer.com/Clstory.cfm?eid=923950>.

payments and the monitoring of these payments a mandatory part of the Realignment scheme and not an oversight. Judge Brown explains that the initial language in AB 109 created a loophole for victims to collect restitution. After AB 109 was passed, the legislature had to amend California Penal Code §1202.45 to authorize that an equal amount of mandatory restitution be imposed and stayed pending successful completion of Post-Release Community Supervision or Mandatory Supervision, as the law has traditionally mandated for parole and probation revocations.

Realignment has also seriously diminished the extent of notice given to crime victims, mostly because it is not at all clear who is responsible for providing that notification and when. Realignment created several new types of custodial sentences (e.g., electronic monitoring, day reporting centers), and no one has yet determined which of those sentences require notice to the victim under Marsy's Law. 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>12</sup> Local police chiefs are also apprehensive because under state parole supervision, there was a statewide database for checking criminals' status on the street. There is no similar statewide system for offenders on county probation. County jails and probation usually lack these structures, and so now an AB 109 offender could be released into the community without the victim being made aware of the release.

In some counties there are no processes to communicate with victims when the actual sentence of the offender is determined. Thus, victims often have no way of knowing whether the offender will be sentenced to county jail or state prison, the length of the sentence, and whether they will be under any form of supervision when they are released. This is all of grave concern to victims—and a violation of rights under Marsy's Law. Such legal conflicts could result in significant litigation challenging various applications of Realignment. Additional administrative staff and resources could be required if prosecutors have to notify victims so that they have the opportunity to be heard at all stages of court processing. Such notifications will likely require additional court appearances, increasing prosecutor, defense, and judicial resources. If they fail to provide opportunities for victim and witness input, Realignment may indeed conflict with existing law and the State Constitution.

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<sup>12</sup> "Request for Victim Services (CDCR 1707)." California Department of Corrections and Rehabilitation. [http://www.cdcr.ca.gov/Victim\\_Services/application.html](http://www.cdcr.ca.gov/Victim_Services/application.html).



# Chapter 9: Probation<sup>1</sup>

“Realignment isn't just about reducing prison populations, it is also about better equipping offenders to avoid reoffending. Those of us who have worked in county probation know that realignment is working, which is why the Chief Probation Officers of California have always been among Realignment's most vigorous champions. But we also know that the full effects of Realignment will take many years to realize – perhaps 5 to 7 years – and we need to be patient and give Realignment a chance to work. Ultimately, we believe that Realignment will lead to a better future in which crime, incarceration and recidivism can all be reduced.”

- Linda Penner, Board of State and Community Corrections

Probation occupies Realignment's (AB 109) center stage. In fact, the success of Realignment hinges largely on the performance of probation—and in many ways the future of California probation hinges on the success of Realignment. As the California Administrative Office of the Courts observed,

Probation occupies a unique and central position in the local and state justice structure. It serves as a linchpin of the criminal and juvenile justice systems and is the one justice system partner that regularly collaborates with all stakeholders as an offender moves through the system. Probation connects the many diverse stakeholders, including law enforcement; the courts; prosecutors; defense attorneys; community-based organizations; mental health, drug and alcohol, and other service providers; the community; the victim; and the probationer.<sup>2</sup>

Probation's central role was recognized by the legislature in designating the Chief Probation Officer in each county to chair the Community Corrections Partnership (CCP), and all of California's 58 counties designated the probation department as the lead agency for AB 109 program implementation. Part of that motivation was political, since probation chiefs, unlike other major county stakeholders, are not elected and are seen as less politically vulnerable. But probation is also the only county justice agency whose primary mission is rehabilitation, and Realignment gives California's probation system an opportunity to test whether, with increased funding, it can reduce recidivism through evidence-based programming.

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<sup>1</sup> Camden Vilkin, Alex Miller and Meredith Wall contributed to this chapter.

<sup>2</sup> “Probation Services Task Force Final Report.” Administrative Office of the Courts and California State Association of Counties (2003). <http://www.courts.ca.gov/documents/fullReport.pdf>. at 39.

# California Probation System Pre-Realignment

## Probation Chronically Underfunded

Probation has always supervised about two-thirds of all persons under correctional supervision in California, but has never received resources commensurate with these responsibilities. There were about 315,000 adults on probation in California in 2010 prior to Realignment, compared with about 162,000 people in state prisons. The Legislative Analyst reported that California probation departments spent about \$1,250 per year per offender, compared to \$47,000 for each prisoner.<sup>3</sup>

California's underfunding of probation is not unusual when compared to national standards. According to a study by the Pew Center on the States, for every dollar spent on prisons, the U.S. spends just six cents on probation and parole.<sup>4</sup> But California is unique in terms of its funding structure for probation. A comprehensive review of California's probation system by California's Administrative Office of the Courts (AOC) in 2009 found that only California and Indiana failed to provide a stable or continuous revenue stream for local probation services. This study found that, on average, California probation departments received about two-thirds of their total funding from county rather than state revenues. Probation departments received just one-fourth of their funding from the state. The remaining funds came from the federal government and from other sources, including fees charged to probationers to help support supervision and administrative costs.<sup>5</sup> Over half of all the nearly 2,000 agencies that administer adult probation services across the county are operated at the state level (26 states),<sup>6</sup> others have unified systems which integrate state- and local- supervision, but only in California and Indiana is adult probation the sole responsibility of local government.

California's probation funding was especially hard-hit in 1978 with the passage of Proposition 13, the People's Initiative to Limit Property Taxation. Proposition 13 reduced the property tax revenues collected by local governments, which, in turn, reduced the overall level of resources that counties had available to fund criminal justice

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<sup>3</sup> "Achieving Better Outcomes For Adult Probation." Legislative Analyst's Office. (2009). [http://www.lao.ca.gov/2009/crim/Probation/probation\\_052909.aspx](http://www.lao.ca.gov/2009/crim/Probation/probation_052909.aspx).

<sup>4</sup> "One in 31: The Long Reach of American Corrections." The Pew Center on the States. (2009). [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2009/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf). In the U.S., over 4.3 million adults—roughly twice the number of people in prison or jail—are under the supervision of some form of probation, making it far-and-away the most frequently used sanction.

<sup>5</sup> "Achieving Better Outcomes For Adult Probation." Legislative Analyst's Office (2009). [http://www.lao.ca.gov/2009/crim/Probation/probation\\_052909.aspx](http://www.lao.ca.gov/2009/crim/Probation/probation_052909.aspx).

<sup>6</sup> Nieto, Marcus, California State Library California Research Bureau. "The Changing Role of Probation in California's Criminal Justice System." (1996). <http://www.library.ca.gov/crb/96/06/96006.pdf>.

and other programs. Prior to the passage of Proposition 13, property tax revenue totaled 28% of state and local general revenue; in the 18 months following Proposition 13, it was reduced to less than 15%.<sup>7</sup> While Proposition 13 impacted all county agencies, a RAND study concluded: “Probation departments emerged from Proposition 13 in a much debilitated condition. They had the largest rate of decrease of any criminal justice agency in 1979, and by 1980 were still lagging far behind.”<sup>8</sup>

In 1988, the Classroom Instructional Improvement and Accountability Act (Proposition 98), reduced probation funding even further. Proposition 98 mandated minimum state spending of approximately 40% of general fund spending on K-12 education. The impact on county services was severe, since the state now guaranteed an annual increase in education spending and funded it by transferring property tax revenue from city and county governments to schools. When the housing crisis hit, resulting in drastic reductions in property values, overall tax revenues declined and Prop 98 had guaranteed that a fixed (and growing) share of the declining funds went to education.

Proposition 13 and 98 caused increasingly less funding to be given to probation, while, simultaneously, the state legislature passed stricter laws that sentenced a greater proportion of adult felons to probation (and prison) for longer periods of time. For the past thirty-five years, California probation agencies have faced the untenable position of being asked to do more with less.

## **The Two Faces of Probation: Surveillance and Services**

Probation has always had dual responsibilities. They are to:

- Provide supervision and control to reduce the likelihood of recidivism while the offender is serving his/her sentence in the community (the “surveillance” function), and
- Provide assistance and services to the probationer to encourage noncriminal behavior (the “rehabilitation” function).

Probation was originally designed to focus on rehabilitation. But over the years, as the public’s mood and resources have shifted, so has probation’s role and identity.<sup>9</sup> Moreover, since each of California’s 58 counties operates its own probation department,

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<sup>7</sup> Chaiken, Jan M. et al., The RAND Corporation. “The Impact of Fiscal Limitation on California's Criminal Justice System.” (1981). <https://www.ncjrs.gov/pdffiles1/Digitization/90064NCJRS.pdf>.

<sup>8</sup> Ibid. at 39.

<sup>9</sup> Petersilia, Joan. “Probation in the United States.” *Crime & Justice* 22 (1997): 149-200.

with an absence of statewide standards in most core program areas counties have developed services and programs that best fit local needs.

And with reduced staff and the number of clients increasing, probation's common response has been to allow supervision caseloads to rise. Probation supervision is generally regarded as a non-mandated program, which are often the first to be cut. The law says that a county has to supervise probationers, but it does not say to what extent they have to supervise. That's the catch: When times get tough, probation caseloads can increase to whatever level is affordable. The California Probation Officers Association recommends a standard ratio of 25 to 50 offenders to 1 probation officer. There are no legal standards in California or the nation for what the ratio for probation officer to offenders should be. In California, individual counties determine the ratio.

Take, for example, the Los Angeles County Probation Department, the largest probation department in the world. Since the mid-1970s, county officials have continually cut their budgets as the number of persons granted probation and the number of required presentence investigations has grown.<sup>10</sup> As a result, serious offenders were often assigned to 100-plus caseloads, where meetings occur at most once a month and employment or treatment progress was seldom monitored. An increasing number of offenders were assigned to "banked" caseloads—which can be as high as 500-1,000:1—and as long as no new arrests occurred, offenders were discharged at the end of a set time period. By 1995, 66% of all probationers in Los Angeles County were supervised on "automated" or banked caseloads. Los Angeles County was not alone. The same disconnect between need for services and commensurate funding could be said about any large county in California.

Probation agencies continued to pay less attention to supervising probationers and focused more on functions that were required by other parts of the system, like providing presentence reports for judges. The rehabilitation function of probation was deemphasized. Reduced funding and the ensuing loss of positions forced departments to scale back their front-end prevention and rehabilitation activities, leaving time only for the public-protection aspect of probation services such as monitoring and surveillance. This is the "baseline" where most California probation agencies were at the time Realignment was implemented in October 2011.

But we have been here before, and our collective memories are short. The situation described above is not new and it is not unique to California. Policymakers and program planners have been trying to infuse probation and community supervision with funding and new models since the mid-1980s. As California embarks on its Realignment

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<sup>10</sup> Ibid.

experiment, it is prudent to revisit the evidence of our last major community supervision experiment. It was motivated by the exact same situation as is motivating California's Realignment experiment: prison crowding, court intervention, and the promise of a better way.

## **Lessons Learned from California's Previous Experiment With Intermediate Sanctions**

While the word "Realignment" is new when applied to corrections, just fifteen years ago California and the nation were essentially implementing Realignment's key tenants with the use of intermediate sanctions.

Beginning in the 1980s, horrendous prison crowding in southern state prisons, economic woes, and a court ruling spurred unusual experiments. When federal courts ordered states to build new facilities or find some other way to punish offenders, the southern states began experimenting with alternative sanctions. Georgia developed an intensive supervision program (ISP) for probationers; the program yielded some evidence that it reduced recidivism rates and also appeared to save the state the cost of building two new prisons. This pilot project was given intense and positive coverage by major media and, by the mid-1990s, virtually every state had passed some kind of legislation for intermediate sanctions. These experiments—eventually funded as a national demonstration project by the U.S. Department of Justice—are collectively referred to as the Intensive Supervision Probation/Parole Demonstration Project (ISP).<sup>11</sup>

Probation and parole departments across the country implemented a variety of ISP programs, including reduced high-risk caseloads, day reporting centers, and electronic monitoring. The hope was that some offenders who normally would have been bound for prison could be diverted from expensive prison cells to these intensive programs that could supervise them and offer support services.

In theory, the model being tested was to increase funding for community supervision, enabling probation agencies to focus on higher-risk probationers with enhanced services in the hopes of reducing recidivism and prison commitments. An influential book published at the time, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*, argued that the reason prisons were so crowded in the U.S. was the fact that judges faced a polarized choice between prison and probation, with a

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<sup>11</sup> Petersilia, Joan. "A Decade of Experimenting With Intermediate Sanctions: What Have We Learned?" Perspectives on Crime and Justice-1997-1998 Lecture Series, Volume II, National Institute of Justice, Washington D.C. (1998).

near vacuum of punishment options between these extremes.<sup>12</sup> The book, written by two of the nation's leading criminologists, argued for a more graduated sanction system that relied upon a range of sentences, including fines, community service, house arrest, intensive probation, and electronic monitoring. A more rational system that matched offender's risk and needs was essential to reducing the nation's growing prison-crowding crisis.

By the time the ISP experiment ended in 1995, a decade after it began, we knew a great deal about the implementation and impacts of such prison diversion efforts. Results from an extensive study that used random assignment to evaluate the effects of ISP at 14 sites in nine states demonstrated that increased surveillance had no impact on rearrest rates when compared to regular supervision or incarceration. Three California counties—Contra Costa, Ventura, and Los Angeles Counties—participated in the national ISP demonstration and their results were consistent with these findings.<sup>13</sup> In fact, ISPs were associated with higher rates of incarceration due to increased detection of technical violations. This latter finding suggested that surveillance-oriented ISPs were ineffective—both from a cost and public safety perspective—because they do not reduce the incidence of new crimes but do increase the likelihood that offenders will be returned to jail or prison on technical violations.

But there was an additional important and tantalizing finding—consistent across all the evaluations regardless of program designs—that points to the importance of combining surveillance and drug treatment program participation. In Ventura County, offenders who participated in treatment, community services, and employment programs—prosocial activities—had recidivism rates 10% to 20% below those who did not participate in such additional activities.

As Petersilia wrote in 1999:

The empirical evidence regarding intermediate sanctions is divisive: without a rehabilitation component, reductions in recidivism are elusive...However, programs that provided treatment and additional services obtained some reductions in recidivism particularly for high-risk offenders, and drug offenders more specifically.<sup>14</sup>

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<sup>12</sup> Morris, Norval and Michael Tonry. *Between prison and probation : intermediate punishments in a rational sentencing system*. edited by Michael H. Tonry, New York: Oxford University Press (1990).

<sup>13</sup> Petersilia, Joan and Susan Turner. "An Evaluation of Intensive Probation in California." *The Journal of Criminal Law and Criminology* 82, no. 3 (1991): 610-658.

<sup>14</sup> Petersilia, Joan. "A Decade of Experimenting With Intermediate Sanctions: What Have We Learned?" *Perspectives on Crime and Justice-1997-1998 Lecture Series, Volume II*, National Institute of Justice, Washington D.C. (1998) at 24.

Researchers found similar results in many other states, and a recent meta-analysis of 175 evaluations of ISPs concluded that the combination of surveillance and treatment is associated with 10% reduced recidivism.<sup>15</sup> This research indicated that ISPs were more effective when structured in accordance with the principles of effective rehabilitation, combining treatment and rehabilitation programming with intensive monitoring.

Case studies of what programs were actually implemented in the ISP experiment were revealing. Counties were allowed to customize their services and surveillance options. Jurisdictions adopted those bells and whistles they wanted and those they could afford, so that a wide variety of programs were implemented. As such, the name “ISP” really had no commonly agreed upon definition. But when we looked back at exactly what got delivered in the name of ISP, we found one common denominator: more surveillance than treatment was implemented across the board. Electronic monitoring and drug testing were the two most common features. Since drug offenders were the most common ISP participants, the results were predictable: more drug testing meant more uncovered violations, which ultimately meant more returns to custody. The main result was that offenders who violated court conditions by using drugs, for example, were identified more quickly and sent into custody more often.

Close surveillance uncovered more technical violations. Whenever this happened, many ISP managers took punitive action—often revocation to prison or jail—to maintain the program’s credibility in the eyes of the judiciary and the community. Programs that were started primarily to save money and avoid the costs of incarceration often cost their counties more over the long term. Despite the good intentions of probation agencies, ISPs were associated with “net widening,” or a greater number of probationers being returned to custody than would have been the case without the ISP intervention.

Probation staff, in retrospect, noted that the ISP funding had been insufficient to provide the intensive types of treatment serious drug offenders needed. The additional funding primarily was used to hire probation staff to supervise the smaller ISP caseloads. These additional personnel were then rather easily (and cheaply) able to implement non-personnel intensive activities, such as drug testing or placing someone on electronic monitoring. Even when the probation department had the intention of contracting with community service providers, the government contracting procedures proved so cumbersome such that many programs were so delayed—in many cases, being funded just as the demonstration project was ending. Probationers would or could not wait months on waiting lists in order to get into a drug treatment program. This lack of treatment slots resulted in continued drug use and a high violation rate. Without drug

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<sup>15</sup> Gendreau, Paul, Tracy Little, and Claire Goggin. “A meta-analysis of the predictors of adult offender recidivism: What works!” *Criminology* 34, no. 4 (1996): 575-608.



treatment programs and probation's commitment to public safety, they ended up violating a lot of probationers who might have succeeded if they had effective treatments. Despite all the good intentions, probation had overpromised and under-delivered.

Within a decade, ISPs went from being "the future of American corrections," as one probation officer enthused in *The Washington Post* in 1985, to what seemed to be a failed social experiment. Most of the programs were dismantled by the late 1990s. Some advocates of the prison buildup pronounced that alternatives to prison had been tried and did not work.

## **Applying Prior Intermediate Sanctions' Findings to Current Realignment Experiment**

If we forget these important lessons, we are bound to repeat them. The population targeted for Realignment is the same as was targeted by the prior ISP demonstration—higher-risk probationers and parolees. The motivation for the demonstration was also exactly the same: overcrowded prisons, threatened court intervention, and the promise of reduced recidivism and cost savings through better and more rehabilitation. But the take-away lesson from the prior ISP experiment is that without a well-designed and well-funded treatment component (particularly for substance abuse)—Realignments' goals will remain elusive. The upshot will likely be that, while the returns to prison for technical violations have been stopped by AB 109 law, decisionmakers will be pressured to impose some violation response, and jail commitments will increase (particularly until jail capacity has been expended). If counties don't have access to intermediate sanction programs that they have faith in, we will likely reproduce the findings of the ISP experiment, just at the local level.

In the end, policymakers will again wring their hands about the failure of probation to deliver rehabilitation, but the real story will be once again that "rehabilitation" was in name only, and that the programs implemented were never of the intensity and quality that research studies have shown are necessary to reduce recidivism.

It is within this historical context that probation is once again being asked to do the nearly impossible. It is no accident that the Chief Probation Officer is the chair of the CCP—the engine of change for each county under Realignment. Probation is the most natural leader within each county to coordinate community-based punishments. The Chief of Probation for Sacramento County, Don Meyer, was president of the Chief Probation Officers of California (CPOC) in 2009. In his opinion, CPOC's "fingerprints are all over AB 109. We clearly worked with the Department of Finance, the Governor, the state Sheriff's Association, and the DA's association" in shaping Realignment.



Consequently, we've been the silent partners of the criminal justice system. Now we're out in front."

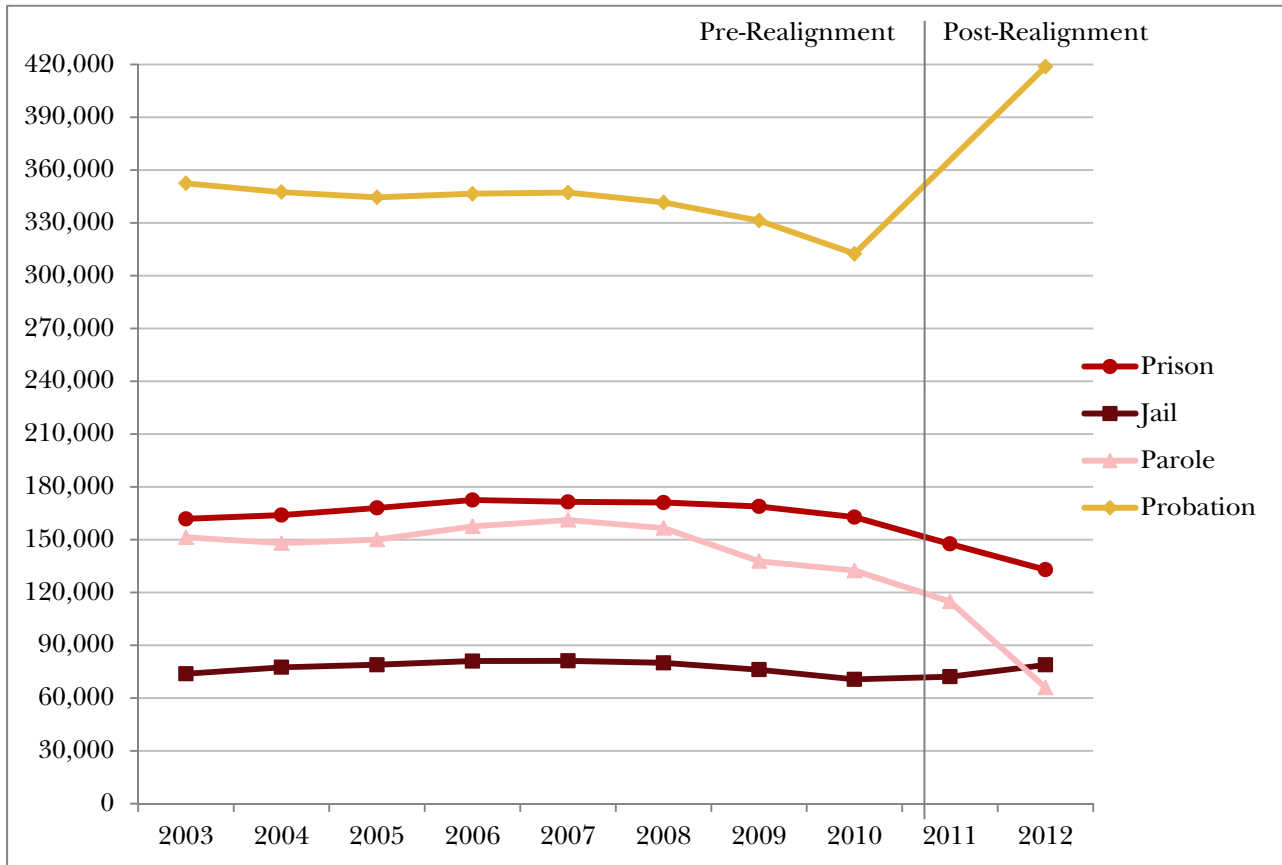
Yes, probation has gotten what they asked for. But can they deliver? If history is any guide, they have a very tough road ahead. They have a more difficult task ahead than in previous demonstration programs—Realignment asks them to handle a higher risk population than was targeted in the previous ISP experiments. But they are also being given more money to do the job, the research-base is more advanced, and, most importantly, this is a *countywide* initiative rather than the *probation-only* initiative of the past. How they are adapting is the focus of our interviews.

## Findings

**Probation is struggling to supervise far more felons than anticipated; future projections are unclear.**

When Realignment went into effect, California's 58 probation agencies were told to expect about 13,473 new felons and about 27,907 new parolees in the first nine months of Realignment (or about 41,000 new probationers over that nine month period). In fact, they received 22,016 new felons and 30,041 new parolees in that time period (or 52,000 new probationers, 26% more than they expected). By the end of 2012, California's adult probation population had skyrocketed from 311,692 in 2010 to 416,414 in 2012, an increase of over 100,000 probationers (or 34% growth in just two years). This growth rate is far beyond anything experienced in any other part of the corrections system, and the sheer numbers alone created management and supervision challenges for probation agencies.

Figure 12: California’s Correctional Populations, 2004-2012



**Sources and Notes:** All population numbers are for December of the years listed. Prison and parole population numbers are from the CDCR Monthly population reports. Jail population numbers are from the BSCC Jail Profile Survey. Probation population numbers through 2010 are from the California Attorney General’s Crime Profiles; probation population data from 2011 was left out because it was unclear if it included or did not include 1170(h) and PRCS probation populations. Probation population for 2012 is from the CPOC probation survey. For more information about the correctional control populations, see Quan, Lisa, Sara Abarbanel, and Debbie Mukamal. "Decarceration through Realignment: Changes in the Correctional System in California, 2004-2012." *Stanford Criminal Justice Center* (forthcoming, 2013).

But it is important to understand probation’s growth in context—both relative to other parts of the justice system and other states. As Sarah Lawrence found, California’s growth rate between 1980-2010 was lower than the average of other states for probation and jail populations and higher than average of other states for prison and parole populations.<sup>16</sup> Over this thirty-year period, California’s prison population increased by 572%, the parole population increased by 708%, while the probation population increased by just 94%. California’s per capita measures of criminal justice populations also shows that California

<sup>16</sup> Lawrence, Sarah. "California in Context: How Does California's Criminal Justice System Compare to Other States?" *The Chief Justice Earl Warren Institute of Law and Social Policy* (2012). [http://www.law.berkeley.edu/files/bcej/CA\\_in\\_Context\\_Policy\\_Brief\\_Sept\\_2012\\_Final.pdf](http://www.law.berkeley.edu/files/bcej/CA_in_Context_Policy_Brief_Sept_2012_Final.pdf).

was below the national average for probationers per capita, and higher than the national average per capita parolees. She concludes: “Said another way, criminal justice populations in California under the jurisdiction of state government grew significantly faster relative to other states, while criminal justice populations under the jurisdiction of county government grew at lower rates relative to the experiences of other states.” Of course this imbalance between county and state corrections led to the desire to shift some operations back to the counties, hence Realignment.

California probation agencies were provided with state funds to carry out the additional offender management responsibilities those offenders would entail. State leaders provided \$850 million to California’s 58 counties in 2011 and an additional \$1 billion for the 2012-2013 fiscal year. Realignment allocations for 2013-2014 increased about 15%, so the state is now spending more than about \$1.2 billion a year on Realignment. At over \$1 billion a year, California’s experiment with community corrections is, by far, the biggest investment California (and the nation) has ever made to see whether investing in community programs can reduce prison commitments. Of course, not all of the funds (only 25%) were allocated to probation, as we discussed earlier.

The increase in probation populations appears to have stabilized, and officials speculate that this stabilization is likely caused by the more frequent and quicker discharge policies under AB 109. Offenders are frequently discharged from supervision at six months and one year (rather than prior to AB 109, 18 months and 3 years) if they have no new violations. Both probation and parole have also begun to look more closely at who was on their supervision roster, and discharge from supervision those who had absconded many years ago, were being jointly supervised by both probation and parole, were jointly supervised in several counties, and even offenders who were still listed on rosters but were deceased.

**More probationers score high-risk on recidivism prediction tools, and have serious untreated needs.**

While probation welcomed the resources, they came with a very big string attached: Two new offender populations would be coming under their supervision. The first population is composed of newly convicted lower-level felons (N3s), and our interviews suggest that probation officials are confident that their enhanced services will assist in reducing this population’s recidivism. Many officials told us that this was exactly the kind of moderate-to high-risk population that more intensive services were designed for, and had those services existed in the past, the current crime might have been avoided. These newly convicted felony offenders are known to local officials, and since they can’t have a prior

serious or violent prior crime, they are as a group seen as less serious than those coming out on PRCS, all of whom have just served a prison term (the average term in California prisons is about 28 months). In resource poor communities, probation officials often had no programs to send offenders to for treatment, and so used jail as an option to remove them from the streets, when good treatment might have made a difference. Our interviewees suggest that while many offenders had participated in (and often failed) previous programs, Realignment funding now allowed them to expand or extend these programs—providing another “intermediate sanction” (e.g., day reporting centers) that was more intensive and appropriate than previous offerings. There was virtually universal enthusiasm from probation regarding their ability to work productively with the N3s or 1170(h) population.

Some of our interviewees urged caution, however, noting that these offenders were likely to have already been given a chance at programming, and their new arrest and conviction shows that they may not be interested in treatment. This opinion was often voiced from counties that had a larger array of programming options pre-AB 109. Sometimes these officials thought that the offender needed a “time out” (i.e., short jail term) to get motivated to program, and that split sentencing and flash incarceration were useful tools in that realm.

But the second population—those former parolees now assigned to probation—represents a much more challenging task, and one for which many probation departments felt ill-prepared and under-resourced. The Post Release Community Supervision (PRCS) category is higher risk and higher-need. As noted earlier, the California Department of Corrections and Rehabilitation (CDCR) is required to classify offenders only by their present commitment offense. In other words, a person with a history of violence or serious crime, but has a less serious current conviction, qualifies for local probation supervision pursuant to AB 109. In fact, the biggest point of controversy with AB 109—across the board—is the fact that released prisoners are now reassigned to county-probation *regardless* of their prior criminal record. Assignment to PRCS is determined only by the current prison conviction offenses regardless of prior record, mental health status, or in-prison behavior. Based upon the CDCR’s statistics, parolees released from prison have a 67.5% chance of returning to prison in the first year of their release, so this is indeed a high-risk group for probation to supervise. Petersilia found that a large percentage of California prisoners have served six or more prior criminal sentences (29%) and nearly 50% had served three or more prior sentences.<sup>17</sup>

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<sup>17</sup> Petersilia, Joan. “Understanding California Corrections.” (2006).  
[http://www.prisonpolicy.org/scans/carc/understand\\_ca\\_corrections.pdf](http://www.prisonpolicy.org/scans/carc/understand_ca_corrections.pdf).

The inclusion of these former parolees into local probation caseloads is accounting for the higher-than-expected risk level of the realigned populations. The CDCR's research division is tracking the characteristics of prisoners being realigned to county probation/PRCS versus those being retained on state parole. Their data reveal that in the first year after Realignment passed, prisoners sent to PRCS were *more* likely to have a "high" California Static Risk Assessment (CSRA) score than those retained by the state on parole: 55% of PRCS offenders scored "high" risk compared with 44% of those retained on state parole.<sup>18</sup>

In the first year of Realignment, Los Angeles County probation received 11,136 offenders released from state prison and assigned to Los Angeles County probation. Of those who reported to probation for assessment, 59% were classified as high risk, 40% as medium risk and only 1% as low risk.<sup>19</sup> The department originally projected that 50% of the offenders coming out of state prison would be classified on the CDCR's risk assessment tool as high risk.

San Bernardino County reported similarly statistics showing that 58% of the offenders they received during the first 18 months of AB 109 scored "high risk," and of the 4,828 PRCS offenders that had been released to probation, fully 1,515 (32%) of them had a *prior* conviction for a violent or serious offense.<sup>20</sup> Not only did San Bernardino County receive 26% more total offenders than they were told to expect, their risk level was far more serious.<sup>21</sup>

It is critically important to remember that those identified as "low" and "medium" risk prisoners using California's risk assessment tool have historically had high recidivism rates. A recent study by the CDCR tracked the cohort of prisoners released in 2007-2008 for three years. By the end of the three years, 41% of prisoners classified as "low risk" and 57% of those classified as "medium risk" were returned to a California prison. While these recidivism rates were lower than for prisoners classified as "high risk" (who had a 74% return-to-prison rate within three years), most would not consider an average 50% return-to-prison rate "low risk." It is better thought of as *lower* risk (and it is important to recall that this figure represents a return to a California prison, not re-arrest, return to jail, or return to another state or federal prison). Susan Turner at the University of California, Irvine, who developed California's risk assessment tool, reported that 10% of

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<sup>18</sup> Seale, Lee. "A Preliminary Examination of Public Safety Realignment CDCR Institution and State Parole/PRCS Data." Association for Criminal Justice Research (California) 76th Semi-Annual Meeting (2012). <http://www.acjrca.org/images/ppf12/1seale.pptx>.

<sup>19</sup> Sewell, Abby. "L.A. County seeing high-risk offenders entering its probation system." *Los Angeles Times* (November 30, 2012). <http://articles.latimes.com/2012/nov/30/local/la-me-realignment-20121130>.

<sup>20</sup> "AB 109 Public Safety Realignment Act: 18-month Overview." San Bernardino County Community Corrections Partnership (2013).

<sup>21</sup> *Ibid.* at 4.

those classified as “low risk” and 21% of those classified as “moderate risk” were rearrested for a violent felony within three years of release.<sup>22</sup> So, regardless of how one slices the data, California counties are dealing with a risky offender population. The challenge in California’s Realignment experiment is whether evidence-based alternatives—which for the most part have been tested on lower risk populations—can work here.

Reintegrating former prisoners is further complicated by the fact that they now possess a prior prison record, which carries its own social stigma and limits their ability to get housing, employment, and the other types of social support needed. And prison is thought to be criminogenic, meaning that offenders who have been there are likely to have been made worse by the experience, initiating or strengthening gang ties, suffering psychological and physical impairments, and severing ties with community and family members needed for reentry success. Research also shows that rehabilitation programming needs to be provided immediately upon release, as many parolees return to crime very quickly without assistance. For all of these reasons, probation officials voiced their concerns, not that they couldn’t *ever* deal with this population effectively, but rather that a phased-in approach would have been more prudent.

As we have repeatedly stated, not all counties are similarly impacted. Sadly however, those counties *least* able to handle the influx of sex offenders, the mentally ill, and higher-risk offenders (often with gang ties) are the counties that getting a disproportionate number of these offenders back. The economic situation in many California counties has forced the reduction of mental health clinics and other social services, as well as having to lay off law enforcement officers. Realignment certainly infuses much needed funding to these hard-hit counties, but probation wonders whether it will be enough.

Without exception, all stakeholders interviewed in this study said that the population that showed up at probation’s door was more serious than the state had led them to believe. Partly because Realignment passed through the legislature so quickly, many were unaware of the details. Realignment was pitched as a money-saving measure for the state that would transfer low-level offenders to less costly county supervision. Of course, the devil was in the details. Probation officials said that not only did the overall number of probationers increase due to their responsibility for two new classes of offenders, but the

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<sup>22</sup> “2012 Outcome Evaluation Report.” California Department of Corrections and Rehabilitation (October 2012).

[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); For data on re-arrests and reconvictions, by crime type and risk level, see Turner, Susan UC Irvine Center for Evidence-Based Corrections. “California Static Risk Assessment (CSRA).” [www.acjrca.org/ppt08/2.pvdmturner.ppt](http://www.acjrca.org/ppt08/2.pvdmturner.ppt).

seriousness of the new probationers increased as well. Newly-assigned probationers had more lengthy and serious prior criminal records, more of them had been convicted of sex offenses, and a greater number had diagnosed mental illnesses than probation had originally thought.

There is simply no denying that the task for probation is more challenging than ever before in its history—and much more difficult than in the prior ISP demonstration projects tackled. Despite these challenges, probation remains cautiously optimistic about their ability to work with these offenders in the community, particularly if they continue to receive the necessary funding.

**Sex offenders and offenders with mental illnesses are particularly costly and challenging for probation agents.**

For those not following the details of AB 109 closely, it appeared that serious, violent and sex offenders would remain under state supervision. AB 109 specifies that state parole will continue to supervise offenders released from prison whose *current* commitment offense is a serious<sup>23</sup> or violent felony as defined by California Penal Code §1192.7(c) or §667.5(c).<sup>24</sup> Additionally, all high-risk sex offenders,<sup>25</sup> offenders convicted of a third strike, or persons classified as a Mentally Disordered Offender also report to parole.

However, for sex offenders to remain on state parole post-Realignment, they must be classified as *high* risk. To classify as high risk, California uses the Static-99R, a well regarded actuarial assessment instrument that estimates the probability of sexual recidivism. The Static-99R is administered by the CDCR for all offenders convicted of a current registrable sex offense. This assessment is administered in an interview setting by probation/parole officers, correctional case managers, and mental health professionals.<sup>26</sup> This instrument classifies an offender's risk level for a new sex offense as either low, moderate-low, moderate-high, or high. Offenders that score moderate-high (4-5) or high (6+) are classified as high-risk, are supervised by parole agents after release from prison, and monitored with GPS technology. County probation officers supervise all low and moderate-low risk sex offenders. High-risk sex offenders have between a 21% and 38%

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<sup>23</sup> California Penal Code §1192.7. All code sections refer to the California Penal Code.

<sup>24</sup> California Penal Code §667.5(c).

<sup>25</sup> California Penal Code §290.

<sup>26</sup> Gies, Stephen V. et al. "Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program Final Report " (2012).  
<https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf>.

chance of re-offending, while non-high-risk offenders have between a 4% and 19% chance of re-offending.<sup>27</sup>

Parole therefore supervises sex offenders released from prison with a *high-risk* determination or sex offenders on parole for a serious or violent commitment offense. As of August 29, 2011, parole supervised 9,912 sex offenders. Slightly over 2,000 of these parolees were considered high-risk.<sup>28</sup> So, it is estimated that parole will continue to supervise just about 20% of all sex offenders being released from prison, but probation officers were supervise the low and moderate risk sex offenders (about 80%) being released.

And, if state supervised sex offenders (the high risk) violate their technical parole conditions, they too (like all other revoked offenders) must be handled with county (not state) sanctions. Prison is no longer allowed for sex offenders monitored by *either* the state (high-risk) or monitored by the counties (low- and medium-risk) who violate conditions of supervision. This parole revocation process shifted dramatically with AB 109; *all* technical violations of parole, which used to be served in state prison, are now served in county jail. Technical parole violations now trigger a maximum six-month term in county jail, as opposed to the pre-Realignment one-year prison sentence.

A similar misunderstanding is occurring in the handling of persons with mental illness. AB 109 dictates that persons classified as a Mentally Disordered Offender (MDO) must be released to parole and as a condition of their parole, they must receive treatment either through the Department of Mental Health or through the Conditional Release Program (CONREP). Being classified by the CDCR as a “Mentally Disordered Offender” has a very specific meaning. The Board of Parole Hearings can classify an individual as an MDO and impose mental health treatment as a condition of parole when it finds that the parolee meets the following criteria: (1) the prisoner has a severe mental disorder, (2) the prisoner used force or violence or caused serious bodily injury in one of the prisoner's commitment crimes, (3) the severe mental disorder was one of the causes of or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison, (4) the prisoner's severe mental disorder was not in remission or cannot be kept in remission without treatment, (5) the prisoner had been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release, and (6) as a result of the severe mental disorder, the prisoner represents a substantial danger of physical harm to others.

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.



The CDCR found that 30% of the N3s and PRCS clients have mental health problems (e.g., schizophrenia, bipolar disorder, severe depression).<sup>29</sup> A comprehensive RAND report on health care needs of prisoners returning home, reports an even higher figure. That study found that 55% of California inmates report recent mental health problems and 58% reported drug abuse or dependence problems.<sup>30</sup> And with the new revocation process, even high-risk sex offenders and those with mental illness who violate parole conditions must get sent back to the county for treatment and sanctioning. They cannot be returned to state prison. Only prisoners who were released after serving life terms or three strikes sentences can be punished with prison revocation if they commit a technical violation. This is an important often-missed point: While the initial post-prison supervision for high risk sex offenders and those with serious mental health issues is still handled by state parole agents, any violation of that parole is now handled by county judges, county jail, and county probation supervision. Again, this adds to a higher-risk offender population being under the supervision of county courts and probation officials.

In 2013, Senator Ted Lieu D-Torrance became particularly concerned with a facet of the violation procedure: The number of sex offenders who were cutting off their electronic monitoring devices and facing no consequences. As of March 2013, California supervised 9,582 sex offenders on electronic bracelets, and if an active parolee violates a condition of his curfew, leaves an inclusion zone, enters an exclusion zone or tampers with his device, the officer is notified and some sanction should be implemented.<sup>31</sup> Citing an “alarming increase of parolees monitored by GPS” removing or disabling these devices over the last few years, which is a parole violation, California State Senator Ted W. Lieu introduced *Senate Bill 57: Electronic Monitoring: Removing or Disabling GPS Device: Offense* (SB 57) on January 7, 2013.<sup>32</sup> As the law currently stands, a parole violation triggers a maximum 180 days in county jail—but the penalty is not mandatory and violators often serve far less time due to good time credits and overcrowded jails.

In explaining the need for Senate Bill 57, Lieu said that “[a]n increasing number of California parolees are cutting off their GPS monitoring devices because they’re

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<sup>29</sup> “Realignment Report: A One-year Examination of Offenders Released from State Prison in the First Six Months of Public Safety Realignment.” California Department of Corrections and Rehabilitation (2013). [http://www.cdcr.ca.gov/Realignment/docs/Realignment%206%20Month%20Report%20Final\\_5%2016%2013%20v1.pdf](http://www.cdcr.ca.gov/Realignment/docs/Realignment%206%20Month%20Report%20Final_5%2016%2013%20v1.pdf).

<sup>30</sup> Davis, Lois M. et al., The RAND Corporation. “Understanding the Public Health Implications of Prisoner Reentry in California.” (2011). [http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND\\_MG1165.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1165.pdf).

<sup>31</sup> “Sex Offender Information Overview.” California Department of Corrections and Rehabilitation. [http://www.cdcr.ca.gov/Parole/Sex\\_Offender\\_Facts/index.html](http://www.cdcr.ca.gov/Parole/Sex_Offender_Facts/index.html).

<sup>32</sup> *Sen. Ted W. Lieu's statement on parolee arrested for murder after cutting off GPS-monitoring bracelet.* California State Senate (March 1, 2013).

convinced little will happen to them.” He continues, “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>33</sup> Since amended, the current form of the bill provides for specific penalties if a person who is required to register as a sex offender and who is subject to parole supervision removes or disables an electronic GPS or other monitoring device affixed as a condition of parole. For the first violation, parole shall be revoked and the parolee shall be incarcerated in county jail for 180 days. The individual would not be entitled to earn any time credits and will be required to serve all 180 days in actual custody. For the second violation, parole shall be revoked and the parolee shall be incarcerated in county jail for 365 days. Again, the individual will receive no time credits and must spend all 365 days in actual custody. And for the third violation, the parolee shall be guilty of a felony, punishable by imprisonment in the state prison for 16 months, two years or three years. And for any sex offender released from state prison after serving a term for a third or subsequent violation of these provisions, he will be released on parole as a sex offender.<sup>34</sup>

“When sex offenders know that there are little or no repercussions for cutting off their GPS monitoring devices, it’s time to strengthen the deterrent,” Lieu said after the legislation passed the Senate Floor. “Real deterrents for sex offenders drastically reduce the likelihood they will commit another crime.” Sex offenders have significantly higher recidivism rates when they are not being monitored, Lieu explains. SB 57 will give these sex offenders second thoughts about roaming free while on parole.”<sup>35</sup> He also asserts that “[b]y making this crime a new felony under threat of returning dangerous parolees to prison, we send the message that parolees can no longer cut off their ankle bracelets with little or no consequence.”<sup>36</sup> On April 30, 2013, SB 57 received enough votes for passage out of the Senate Public Safety Committee, where it was amended to narrow the scope to sex offender parolees, rather than all parolees. The bill is now being considered by the Senate Appropriations Committee.

Offenders with histories of sex offenses and mental health issues not only are high risk and high need, they are more costly to supervise. Such offenders present higher public

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<sup>33</sup> “Press Release: Sen. Ted W. Lieu introduces plan making it a felony for parolees to cut off GPS-aided ankle bracelets.” (January 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>34</sup> California State Senate. Electronic Monitoring: Removing or Disabling GPS Device: Offense SB 57. (2013).

<sup>35</sup> “Press Release: Sen. Lieu’s legislation a major deterrent for paroled sex offenders.” (May 28, 2013). <http://sd28.senate.ca.gov/news/2013-05-28-sen-lieu-s-legislation-major-deterrent-paroled-sex-offenders>.

<sup>36</sup> “Press Release: New data supports Sen. Ted W. Lieu’s legislation to crackdown on parolees who remove GPS-ankle bracelets.” (February 11, 2013). <http://sd28.senate.ca.gov/news/2013-02-11-new-data-supports-sen-ted-w-lieu-s-legislation-crackdown-parolees-who-remove-gps-ank>.

safety issues, are harder to place in residential housing and programming, and consume a higher than average level of resources. A common complaint heard during our probation interviews was that the Department of Finance (DOF) based its formula on the “average” offender—but these offenders are not “average” and just as they cost the State more than the current \$50,000 average to house, so too will they cost the counties more than the average “\$25,000” per inmate that the DOF formula provides. Counties believe that the formula should be weighted by a more detailed assessment of the risks and needs each offender represents, not simply on the overall number of offenders returning to the county.

**The short implementation timeline exacerbated probation’s challenges in hiring staff and securing rehabilitation programming, particularly in service poor counties. Highest-need offenders may have been less likely to receive appropriate services in the first year post-Realignment. The situation is improving.**

All interviewed stakeholders lamented the short timeframe for AB 109 implementation. This timeframe had the greatest impact on probation services, as these services need to match an offender’s risk and need profile with appropriate local programming.

There were four practical problems with the quick implementation: only in rare instances did probation have an opportunity to assess offenders prior to the probationer’s initial “check-in,” the number of staff was insufficient to complete necessary assessments, and once assessments were completed (usually within a month), the appropriate services were not yet in place to serve the clients. Moreover, many departments’ risk assessment tools had not yet been purchased or sufficient staff trained on how to administer it.

But by October 1, 2011, AB 109 funding had been allocated and offenders started arriving at probation’s door. Counties had to assemble their CCPs, set up accounts and procedures to receive state funds, and create a new system to support Realignment. This initial phase often took several months.

The following provides an account of Los Angeles County Chief Probation Officer Jerry Powers’ experience with Realignment’s timeline:

I would have preferred to have a much larger or longer period before this started, but this was essentially cooked and presented to us in about a 90-day period, so if you’re going to bring in a thousand new offenders a month, that’s going to take additional resources, from probation staff to support staff to mental health staff, staff, substance abuse treatment providers, and all of that. You can’t simply do that within a 90-day period. Realistically, it takes a year to get up to speed for any

type of a program. Certainly something this large of a magnitude, it's going to take at least a year to ramp up and start providing the services that you want to provide.<sup>37</sup>

The same sentiment was echoed by virtually all of our interviewees. Chief Taylor of Santa Barbara County labeled the short time frame “the biggest challenge to date.” Chief Hake described two troublesome aspects of Realignment in Riverside County, the first of which was the short timeline (the second had to do with basing PRCS eligibility on the current commitment offense). When asked what he would have done differently with Realignment, Solano County’s Chief Hansen responded that it just “came too quickly.”

The quick pace of Realignment’s implementation has been a significant challenge for hiring new staff given county government structure, which often includes a lengthy hiring process of advertising, posting, interviewing, checking references, and giving preference based on seniority.

The same delays were evident in contracting for services, particularly with agencies that were not already part of the county governance structure (such as community based organizations) or agencies that did not already have a contract with probation (such as electronic monitoring companies). The short timeframe, coupled with the challenges of navigating county contracting requirements, meant that any established vendors had a competitive advantage for securing Realignment dollars. Several probation officers mentioned that this was problematic given that these were the same providers failing to decrease the currently high recidivism rates. The same providers doling out the same programs and services are not likely to reduce recidivism, but new vendors and programs struggled to secure county contracts.

Sacramento County was challenged by this phenomenon when trying to contract with community-based organizations, particularly non-profits and faith based groups. An editorial in the *Sacramento Bee* alleged self-interest as the root of this problem:

The “deciders” on how counties divide up Realignment funds are the probation chief, a chief of police, the sheriff, the district attorney, the public defender, the presiding judge of the Superior Court and one department representative from either social services, mental health or alcohol and substance abuse programs...With this structure, no one should be surprised that the plan “deemed to be accepted” by Sacramento County supervisors on Oct[ober] 16 allocated 69%

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<sup>37</sup> “With Realignment, Influx of Offenders Tests L.A. County : Interview of Jerry Powers.” *The California Report* (December 11, 2012). <http://www.californiareport.org/archive/R201212110850/b>.

of funds to the sheriff and 29% to the probation department—and not a dime to successful community-based organizations. This is unacceptable.<sup>38</sup>

Given strict county governance, probation departments often needed six to nine months to finalize contracts. The process was cumbersome and time consuming and involved issuing requests for proposals (RFP), assessing the applicants' quality and performance, choosing contractors and negotiating terms. Before the RFP could be issued, the probation department would have had to predict what services were needed—yet, as noted above, probation did not have adequate time to properly assess their client' needs prior to writing the RFPs.

Several officers also mentioned a lack of infrastructure and administrative staff necessary to monitor the quality of service providers and to ensure that probation functions properly. Instead, the pressure to bring staff and services online quickly meant that probation departments gave preference to in-house staff and services, often at the expense of quality. But when the level of programming is insufficient, treatment falls to the wayside and surveillance comes to the forefront. If history is any lesson, surveillance without treatment uncovers more technical violations and leads to more offenders returning to custody.

For residential treatment programs, the quick implementation process made service delivery even more difficult, if not impossible. Residential programs, such as housing or drug treatment, require conditional use permits to operate in neighborhoods. These permits require a lengthy and bureaucratic process. Day reporting centers—where offenders report daily but do not stay overnight—have the same challenge. Community outcry against the residential programs or day reporting centers can stall or foreclose both the possibility of a conditional use permit and a probation department's desire to expand residential rehabilitation programs.

Establishing rehabilitative programs has always been challenging, but the more serious nature of the realigned clients on probation, particularly violent and sex offenders, has further complicated this effort. Communities often restrict residential programs to non-violent offenders, precluding those offenders with the greatest need for these services. Ironically, because contracts for higher need inmates (e.g., sex offenders, residential drug treatment) are more difficult to secure, probation staff are seeing offenders with the lowest needs get services quicker than those with the highest needs.

In sum, most probation departments' staffing levels and treatment options were inadequate following Realignment's implementation. This is particularly unfortunate

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<sup>38</sup> "Editorial: Flaws in prison realignment need to be fixed." *The Sacramento Bee* (November 5, 2012). <http://www.sacbee.com/2012/11/05/4960488/flaws-in-prison-realignment-need.html>.

given that a large proportion of parolees who return to prison fail in the first weeks and months after release. As a National Research Council study on the topic concluded: “Given these data, it is difficult to overstate the importance for parolees and their communities of access to both supportive and transitional reentry services in those first days, weeks, and months out of prison.”<sup>39</sup> Realignment left a gap in supervision and treatment for many of these offenders.

Those counties and offenders with the greatest need for programs and services have felt these deficiencies most acutely. In resource-rich counties—counties that had historically developed a fuller spectrum of intermediate sanction programs for offenders—the existing contracts could simply expand capacity. For example, Santa Barbara County had two Day Reporting Centers that were operational prior to AB 109’s implementation. Those centers were expanded resulting in a rather seamless process of incorporating the new AB 109 clients into services and programs. As a result, Santa Barbara County had a rather seamless process of incorporating new AB 109 clients into the probation system. Similarly, Santa Clara County, long known for historically investing in a full array of therapeutic courts (for the mentally ill, veterans, substance abusers), had already worked closely with community-based organizations and could simply expand treatment slots.

On the other hand, the challenge was much greater for counties with fewer resources and a weak historical commitment to funding community treatment. Even though Realignment set up statewide rules and mandates, the counties were required to implement them, and each county has a distinct social and economic profile. California’s wealthy dot the coastal counties and northern California. But California also had the highest percent of any state population living below the poverty line. A new supplemental measure released last year by the U.S. Census Bureau puts California at the top of the list with a poverty rate of 23%. Amongst California’s counties, the highest poverty rates are in the Central Valley and other agricultural regions. In Merced, Fresno, Kern, Tulare, and Imperial Counties, more than a quarter of the households have incomes below the poverty line.<sup>40</sup> In fact, three of the five most impoverished metropolitan areas in the nation are in the Central Valley. The poverty rate, combined with the housing crisis—which decreased taxes for government services—has led a number of counties and cities to seek bankruptcy protection for its budget shortfalls. Stockton (the largest U.S. county to ever file bankruptcy), San Bernardino, and several other cities in Los Angeles, Fresno, and Alameda Counties are now listed among the nation’s most fiscally troubled cities.

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<sup>39</sup> “Parole, Desistance from Crime, and Community Integration.” National Research Council Committee on Community Supervision and Desistance from Crime (2007).

<sup>40</sup> Weintraub, Daniel. “California is richest, poorest state.” *California Health Report* (May 27, 2013). <http://www.healthycal.org/archives/12177>.

These individualized and varied fiscal pressures heavily influenced Realignment’s implementation in the different counties, particularly in the first year. In the years leading up to Realignment, poorer counties had often cut social services, the exact kinds of services probation departments needed to assist realigned offenders. Many probation and police officers had lost their jobs in counties that decreased its workforce to address budget crises. Realignment gave counties the funds and opportunity to hire back these valued staff. These circumstances help explain why Realignment budget allocations included very few treatment contracts (except in wealthier counties with existing contractors) and mostly staff hiring (especially in the poorer communities).

This funding pattern may have been necessary in order to assess and monitor offenders, but it will not prove sufficient in the long run if quality treatment is not secured. Of course, the problem is compounded in more economically stressed communities—few treatment providers exist in communities that do not historically invest in treatment. Treatment providers have often had to shut their doors due to lack of funding. Many have moved to wealthier communities. So even when funding became available, there was a dearth of local providers to work with.

The lack of sufficient implementation time also meant that counties often did not have time to assess programs established on evidence-based practices or, once funded, to monitor the quality of services being delivered. Chief Meyer explains that the biggest roadblock has been ensuring the proper use of evidence-based practices by the community-based organizations. Probation must make requests for proposals, or “RFPs,” for the community-based organizations, provide for oversight and accountability, and, in certain cases, train the community-based organization—all of which takes time. According to Chief Meyer, the process was taking four times longer than the department had anticipated. For all of its programs, says Santa Barbara County Chief Taylor, “If we’re paying for services, and it’s being contracted through probation, we want it to be an evidence-based curriculum.”

The urgency to solve the state’s prison crowding crisis created an unrealistic timeline, and failed to recognize the county context in which services were to be identified and delivered to criminal offenders. As Los Angeles County Chief Jerry Powers observed:

None of us in local government asked to take this program on, but I think the pragmatists among us who said, “well, the alternative was that the Supreme Court say, ‘state prisons, open your doors and let out 30,000 individuals and get in

compliance.” So, given the potential alternatives out there, I think this is probably the best of the worst.<sup>41</sup>

Good policy would have dictated either a phased-in approach for AB 109 or pilot programs in several smaller counties. As Angela Hawkins, a researcher studying Realignment, observed, “California thinks small, and acts big.” She, like many others, believes the state should have piloted Realignment before implementing the policy on a statewide basis.

But almost two years into Realignment, most of the probation officials we interviewed believe these pressures are now easing. The demand for offender programming is beginning to bring good treatment providers into the harder hit California counties, a necessity for reducing recidivism offender recidivism rates.

**Despite challenges, virtually all probation departments are moving to evidence-based principles and practices. Risk assessment tools now nearly universally used in California probation agencies.**

An assessment that measures an offender’s risk of reoffending and need factors is foundational to the placement in and success of “evidence-based” practices. Correctional assessments that measure an offender’s needs and risk of reoffending can be likened to an intake exam when you go to the hospital. It is designed to provide the necessary information to aid professionals in the treatment and management of one’s care. Essentially, correctional risk/needs assessments provide the management tool to identify what services an offender needs and what risks he poses to the community. Virtually all risk assessment tools include a semi-structured thirty-minute interview with the client and a review of the criminal record, ideally completed by a probation officer.

Once information on criminal history, alcohol/drug abuse and employment history is collected, a computer program provides a recommended probation classification level. This classification level is produced by on an algorithm (mathematical formula) based on scientific research on other offenders. It identifies the offender’s probability of recidivism and areas in need of services or surveillance. The most widely used assessments are computerized and have several accompanying materials, including tools for probation management, recording progress, and determining eligibility for supervision discharge. Using these actuarial tools has been associated with reduced recidivism.

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<sup>41</sup> “With Realignment, Influx of Offenders Tests L.A. County: Interview of Jerry Powers.” *The California Report* (December 11, 2012). <http://www.californiareport.org/archive/R201212110850/b>.



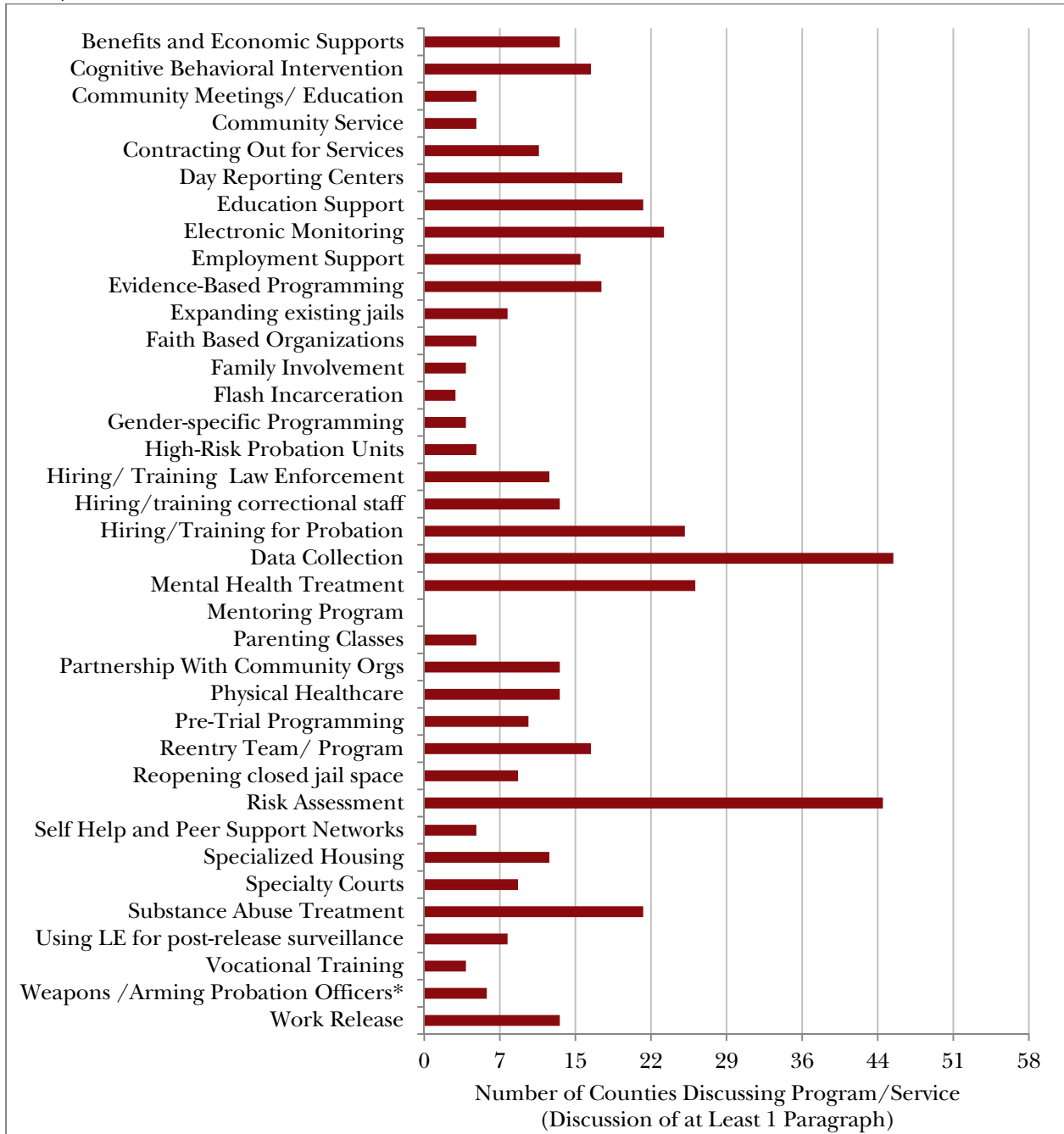
As discussed in Chapter 1, AB 109 strongly recommends that the county use its funding to secure services consistent with evidence-based practices. As such, the first order of business for most probation departments was to purchase an evidence-based risk assessment tool. Many probation departments had already begun the process of purchasing these risk assessment tools, as previous legislation (SB 678 and SB 81) had provided seed money for assessing risk and need of juvenile and adult probationers. Realignment provided counties with an opportunity to extend their risk assessment to adult felons and parolees.

As shown in Figure 13, which summarizes programs counties described in detail (for at least one paragraph) in their 2011-2012 AB 109 CCP plans, 48 out of the 58 spoke about implementing or expanding risk assessment, either purchasing the tool or hiring or training staff to complete the assessments.<sup>42</sup>

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<sup>42</sup> Note that Figure 13 includes AB 109 activities regardless of what agency is receiving the funding.

**Figure 13: Programs and Services Discussed in Depth in AB 109 CCP Plans, First Year, All Counties Combined**



*Note: "Depth" was calculated as a county discussing a particular program or service for at least one paragraph, or if the county spoke in particular detail (i.e. gave the name of a specific community organization with which it planned to work). For more detail, see Abarbanel, Sara, Angela McCray, Kathryn McCann Newhall, and Jessica Snyder "Realigning the Revolving Door: An Analysis of California Counties' AB 109 2011-2012 Implementation Plans." Stanford Criminal Justice Center (2013).*

*\*For Weapons/Arming Probation Officers, if a county mentioned doing this, it was given credit for this graph. This was because talking in depth about either arming probation officers or weapons training is difficult.*

Realignment's success story is the widespread adoption of risk assessment tools, which are not only being used by probation agencies but also by sheriffs to make pretrial decisions. Over time, this development will not only professionalize operations and make criminal justice decision-making more predictable, but it should lead to reduced recidivism and crime. It is another tool in the "Realignment tool belt" to assure that the most dangerous are incarcerated and those who will respond to services are identified and treated.

Counties are using different types of assessments, mostly dictated by historical accident (whether they purchased and provided training on an instrument before or after Realignment). Sacramento County uses the Level of Service/Case Management Inventory (LS/CMI), while Santa Clara County uses the Correctional Assessment and Intervention System (CAIS). While just two years ago Santa Barbara County was just in beginning stages, the county now uses COMPAS. Riverside County used to employ an offense-based classification system, but now also uses COMPAS. Researchers have found that the particular instrument being used is not particularly important because they all record similar data and produce similar recidivism prediction accuracy.

Ideally, the risk assessment process should begin prior to release from prison or jail. For example, Sacramento County is sending officers into prisons to meet with PRCS offenders before their release. The prisons limit each visit to fifteen minutes, so officers often visit with the offender twice. The officer will provide the inmate with literature about the services available under PRCS.

While Santa Clara County initially did the same, the county eventually determined the process to be impractical: The soon-to-be-released inmates are spread throughout the state and, according to Deputy Chief Fletcher, the process drained resources. In addition, because the rate of newly released prisoners not showing up to initial probation appointments has been very low, the visits were not cost-effective. In the future, Santa Clara County may transfer prospective PRCS clients to the local jail for their last thirty days in custody—targeting high risk offenders, such as gang-involved, severely mentally ill, and homeless individuals—in order to make building a relationship easier. In contrast, Chief Hansen of Solano County has never had the ability to send officers into non-local facilities to meet clients before their release. Santa Barbara County also has no current plans to send officers into prisons.

Regardless of whether the assessment is conducted before or after release, the officer must match the recommended protocol with quality services soon after the offender returns to the community. Yet, as discussed above, an officer's ability to send a probationer to the recommended treatment or surveillance program is often impaired or significantly delayed because of implementation challenges.

Although these implementation challenges must be addressed, an upside of Realignment has been California's development of a statewide system of assessing the risk and needs of its *total* adult offender population (the prison system began assessing all prisoners using the COMPAS risk assessment tool in 2009). Probation has historically lacked the means to effectively use data for planning and problem-solving. So if this information was consolidated across the 58 counties, it could provide the first-ever statewide assessment of the seriousness and needs of offenders—across counties, across agencies, and across time. The importance of this achievement should not be overlooked. It could be incorporated by the state Department of Finance in its future Realignment allocations. At a county level, the data could be used by the county Community Corrections Partnerships and the Board of Supervisors to divide state dollars, assuring that the funding allocation matches the needs of each offender population. From a research standpoint, this data provides baseline offender-level information and would allow for a comparison of offenders across counties subjected to different types of programs and services. Eventually, the use of risk assessment tools might be seen not only as an individual-level assessment to match needs with services, but also as a planning tool to appropriately allocate revenue streams to agencies and counties with the greatest needs. This database would also allow California to track its offender profiles over time and could be used as a baseline evaluation tool for assessing Realignment and other policy initiatives.

**Probation agencies are implementing some truly innovative programs. The most promising are collaborations with law enforcement and private corrections.**

With respect to programmatic offerings for offenders, the second year of Realignment looked quite different from the first. Programs delayed by hiring and contracting holdups began accepting clients (e.g., Day Reporting Centers, One-Stop Centers in San Bernardino, San Mateo and Santa Clara Counties). And the third year of Realignment will likely result in many more program offerings. Probation staff across California counties displayed heroic efforts in implementing these programs. In contrast to the ISP experiments of the 1980s, program and surveillance efforts are being supported with significant funding.

Some of the most promising program options being funded are Day Reporting Centers, often described as “one-stop” centers for programs, services, and supervision. Individuals can receive access to educational programs, employment assistance, and tutoring, among other services. But given the high cost of operating a center, they were unlikely to be funded without AB 109 money. In the first year of Realignment, 21 day reporting centers were discussed in depth (at least one paragraph) to be implemented or expanded with

Realignment dollars.<sup>43</sup> Counties with plans to begin or expand day reporting include Humboldt, Tuolumne, Sacramento, Butte, Merced, Kern, Lake, Madera, Napa, Orange, and Yuba Counties. Currently, there is no research-based consensus on the effectiveness of day reporting, as the wide range of services, differences in structure, and eligible participants make it very difficult to draw any broad-based conclusions.

While we have not been able to evaluate these programs yet, we do know that many of them contain some of the core ingredients that have predicted success in other programs: the comprehensive offering of services and cross-agency collaboration.

In many ways, Santa Clara County is a model for other counties. Deputy Chief Karen Fletcher has worked for the department for 23 years, including over seven as Deputy Chief. According to Fletcher, the new population the county is serving is part of a “continuum” that includes clients the county had been serving pre-Realignment. Even though the county is also dealing with more sophisticated offenders, Santa Clara County has succeeded in leveraging AB 109 funding to provide rehabilitative programming for the entire continuum of probationers. The county has also prioritized data collection and maintaining strong, open communication with other stakeholders.

Prior to Realignment, Santa Clara County had already begun implementing evidence-based programming. Realignment expanded the county’s ability to target clients based on their individual risk and criminogenic needs. Originally, offenders relied heavily on referrals to external organizations because the county could not provide services to its clients. Realigned clients, however, now have access to services in-house and the county has the infrastructure to use various intermediate sanctions.

Post-Realignment, Santa Clara County Probation directly supervises and contracts with service providers. The county slowly and deliberately identified those programs that best meet offenders’ needs and encouraged cross-agency collaboration. The Custody Alternative Sentencing Unit is an example of county jail and probation working together to make supervision a “fluid” process. After serving half of a 90-day term, offenders can get released into programming. Similarly, because Santa Clara County does not yet face overcrowding in its jails, probation has been able to rely on intermediate sanctions, including flash incarceration, that give bite to the county’s authority to remonstrate offenders that violate probation conditions.

An important change since Realignment, according to Chief Fletcher, is that the county is now able to pay for substance abuse, mental health, and cognitive behavior treatment services for its clients, whereas before it could only make referrals. The main service hub is the Re-entry Resource Center, which houses many agencies under one roof, including

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<sup>43</sup> Thirty counties at least mentioned Day Reporting Centers in their CCP plan.

probation, the Sheriff, the Department of Alcohol & Drug Services, mental health, social services, and community-based organizations. Community-based organizations compete to serve the population through the county's RFP process, many of which are still "gear[ing] up" to provide services.

In light of such fundamental shifts, the county has approached hiring and training of probation officers cautiously. Those officers supervising the AB 109 population were handpicked from the pre-existing ranks for their experience with difficult caseloads. Moreover, in hiring probation officers, Santa Clara County is now "looking for folks with that balance of social services and criminal justice." The county has also made a significant investment in training officers to use assessment tools properly. Santa Clara County has been able to reduce caseloads of high-risk offenders to 30 and offenders are seen a minimum of three times a month, including at least one time at the offender's residence.

However, security concerns have led the county to choose to arm some probation officers. Currently, 44 of 350 probation officers are armed. County officials say that the choice to arm officers has not privileged applicants with law enforcement backgrounds. Santa Clara County Probation is most concerned with ensuring that staff understand the county's mission to use probation as a platform for rehabilitation, not as another arm of law enforcement.

In addition to addressing offenders' needs, Santa Clara County Probation is also cognizant of victims' concerns arising out of Realignment. Offender restitution accounts for PRCS offenders are still maintained through the state—not the county—which has proved problematic. However, the county created a restitution caseload with around five hundred probationers. Santa Clara County has been vigilant in identifying whether an offender's crimes are associated with a victim and in monitoring whether or not the offender is paying restitution. Though an offender with no probation violations for twelve months should be released, probation can be revoked if the officer can prove that the offender willfully failed to pay restitution.

Another exemplary component of Santa Clara County's model is its dedication to data collection. On a monthly basis, the county provides data to the County Executive, who tracks what referrals have been made, which clients attend treatment, and what barriers prevent clients from attending treatment. Probation and police both rely on databases including the Criminal Justice Information Control (CJIC) and COPLINK, which not only helps to improve communication between local probation and police, but also between counties.

Santa Clara County's successes have not come without significant challenges. Santa Clara County has struggled to expand services beyond the AB 109 population. The county has interpreted the bill to limit the spending of AB 109 funding to that population only. Of the 18,000 individuals on probation in the county, 5,000 are only subject to random drug testing and restitution. Many of these 5,000 offenders are high-risk and would benefit from access to AB 109 programs.

Several other counties were mentioned in interviews as exemplary models of innovative AB 109 implementation. These included San Francisco, San Bernardino, Santa Barbara, Santa Clara, San Mateo, Orange, and San Diego Counties. The San Francisco Adult Probation Department (SFAPD) was awarded the prestigious American Probation and Parole Association's President's Award in 2013 for its significant accomplishments. Their efforts to implement evidence-based corrections post-Realignment are widely respected. These efforts entailed the launch of an 18,000 square foot Reentry Community Assessment and Services Center, a one-stop service center that co-locates SFAPD's probation supervision with wraparound support provided by Leaders in Community Alternatives, Inc. and other vital public and community based partners. The SFAPD also partnered with the Sheriff's Department and the CDCR to return inmates to local jails to receive individualized reentry services, education, parenting, housing, employment, substance abuse treatment and other services 60 days prior to completion of their prison sentence back.

Across the state, adult probation services are implementing pilot projects that, if successful, will pave the way for strengthening community corrections statewide and nationally. Given that Realignment funding is now constitutionally guaranteed, and the California Penal Code requires counties to supervise many offenders at the local level, California should serve as a hotbed for innovative community programs and sanctions. This potential is not only promising for California, but should provide valuable lessons that can assist communities and states searching for feasible prison diversion options.

**Realignment exaggerates the two historical sides of probation: its rehabilitative side and its tough-on-crime side. Arming more probation offices is emerging as a controversial and unresolved issue.**

Probation officers serve two primary roles. They provide supervision, which involves monitoring the probationer's compliance with court ordered conditions, and assist the probationer in successfully dealing with the causes of his criminality. The traditional dual roles have been described in simple terms as part police officer, part social worker. Realignment exaggerates both sides of these roles because AB 109 emphasizes the use of

evidence-based practices aimed at reducing recidivism, while also simultaneously introducing a higher-risk clientele in greater need of monitoring and surveillance.

The balance between rehabilitation and supervision is hard to strike. Chief Meyer of Sacramento County explains his struggle with the current focus on surveillance. “This is not a system that changes quickly,” he explains. “It has taken the better part of eight or nine years to get our agency going in the right direction— that’s all the evidence-based, we call it drinking the evidence-based Kool-Aid.” He explained that probation faces strong outside resistance: “They still—as did I up until a number of years ago—thought that hook ’em, book ’em, jail ’em, tail ’em, nail ’em.... Much of the culture still thinks punishment is the only answer, but they don’t want to pay for it.” As for Sacramento County’s hiring, Meyer does not believe that this rehabilitative shift within probation has affected hiring—in fact, Sacramento County has not made any new hires in three years; all of the hiring has been from a re-hire list of 400 people who were previously laid off.

According to Solano County’s Chief Hansen, the county is just now “changing the way they do business,” and shifting toward the use of evidence-based practices. He believes the transition will take some time; a similar shift took five years in his previous position in the State of Nevada. To aid the process, Chief Hansen is using outside consultants to help nudge the county in a “smart on crime” direction. His current goal is to convince the “middle eighty percent” of employees to broaden their perspectives, as opposed to focusing on 10% who “will run away from change” or the 10% already in support of evidence-based practices. Chief Hansen also stated that is crucial for supervisors to believe in these practices in order for line officers to follow.

According to Santa Barbara County’s Chief Taylor, the county had been incorporating greater rehabilitation efforts before AB 109. But Realignment allowed the department to make quicker and greater headway. Although Chief Taylor believes some probation officers were using motivational interviewing before Realignment, staff are now being properly trained and held accountable in that skill. Moreover, officers have been positively influenced by witnessing a successful transformation of juvenile probation, which coordinates with wrap-around services.

Yet, while probation is working to expand treatment opportunities, the overall higher risk level of probationers has initiated a statewide conversation about whether to arm more probation officers. After all, county probation officers are tasked with supervising former state parolees—and state parole officers are armed because of the high-risk population they supervise. If those offenders are the very same population now supervised by probation, should probation officers also be armed?



California law (AB 1968) authorizes any probation officer or deputy probation officer to carry firearms, but only as determined by the chief probation officer on a case-by-case or unit-by-unit basis. While the vast majority of California probation departments (approximately 80%) arm at least some of their officers,<sup>44</sup> the actual number of officers authorized to carry weapons is much smaller. And of those that were armed pre-Realignment, the majority supervised specialized gang or drug task forces or sex offender compliance teams, not the general probation population.

Arming probation officers not only affects firearms training and ongoing resources, it also can undermine probation's rehabilitative focus. Whether an officer carries a gun can drastically change the relationship between the officer and his client. As a result, some counties have resisted the trend of arming officers.<sup>45</sup> Moreover, the decision to arm probation officers is potentially threatening to the role that probation has traditionally played (and is expected to play) in the criminal justice system. One commentator summarized the tension as follows: "The issue boils down to: Are these people law enforcement officers, or are they traitors and helpers? ...You can't be delivering cognitive behavioral therapy with a gun strapped to your waist. The therapeutic relationship is inhibited and destroyed by someone carrying a gun openly."<sup>46</sup>

Regardless, many counties seem to be adopting the emergent view that firearms are a necessary additional tool for protecting probation officers from the new higher risk offender population.

In the late 1980's, Santa Barbara County became the first probation department in the state to arm its officers—specifically those with specialty caseloads. Ten years later, a greater proportion began to be armed and currently, of the 340 probation staff (including non-officers), 35 officers are armed. The County's policy is that an officer has "to demonstrate that the caseload presents a threat or is high risk." Similarly, about 65 or 70 of over 300 probation officers are armed in Sacramento County—or, essentially all of the officers assigned to adult fieldwork. Officers assigned to high-risk offenders in Santa Clara County (44 of 350) are armed. Chief Hake of Riverside County estimates that once hiring has caught up with the department's needs, 60 of its 300 to 350 officers will be armed.

Los Angeles County recently reported that using the LS/CMI (the most respected risk/need assessment tool), over 65% of realigned probationers were "very high or high risk." The remaining 35% were "medium risk"—there were no low risk realigned

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<sup>44</sup> Senate Committee on Public Safety. *Arming Probation Officers, AB 1968*, 2011-2012 Regular Session, California State Senate (July 3, 2012) at 13.

<sup>45</sup> Alameda, Solano and Contra Costa Counties do not currently arm probation officers. *Ibid.* at 11.

<sup>46</sup> Sá, Karen de. "Santa Clara County seeks to arm some probation officers." *San Jose Mercury News* (January 3, 2010). [http://www.mercurynews.com/ci\\_14298168?nclick\\_check=1](http://www.mercurynews.com/ci_14298168?nclick_check=1).

probationers.<sup>47</sup> As a result, Los Angeles County Chief Probation Officer Jerry Powers is making the unprecedented move of tripling the number of armed probation officers in the county—from 30 to 100. “It is a natural response to an ever increasing number of higher threat individuals and the operations that go along with supervising them,” Powers told the Los Angeles Times.<sup>48</sup>

Although Riverside County intends to arm more probation officers, Chief Hake insists that this decision will not necessarily change the culture of probation. In Riverside County, probation officer training does not include weapons training. From the get go, officers are instructed in “the traditional job of what probation is all about...just because we give you a gun doesn’t mean that our goals in working these individuals [change].” Instead, in order to be armed, officers must meet minimum experience requirements, pass a psychological evaluation, and complete a rigorous arms training. Hake estimates that 60% of his AB 109 caseload officers will eventually be armed.

Similarly, Los Angeles County Deputy Chief Perez stressed that the decision to arm more probation officers does not mean the department is turning away from its traditional role of making sure former inmates stay on the straight and narrow. “Ideally, arming is a precautionary and defensive tool for our officers—particularly given that our officers are expected to work with a dangerous population and, in some circumstances, in areas of L.A. that may not be the safest,” she said.

Of the counties we interviewed, Solano County was the only one not currently arming its officers—although that will likely change in the near future. Solano County’s Chief Hansen is not in favor of officer’s openly carrying weapons because he believes this can undermine an officer’s ability to build trust and understanding. However, he is in favor of arming officers to the extent it is necessary for their safety.

Probation was designed for less serious offenders. Probation staff members work for the county. They often have social-work degrees, they usually aren’t armed, and they are not considered sworn law enforcement officers. Historically, probation is designed to be the “helping” part of the criminal justice system. Yet many probation agencies are now arming more of their officers, and there is more concern for staff safety.

Given many probation departments’ desire to arm more officers, probation departments are looking to recruit laid off parole agents. Parole agents are being laid off in high numbers as a result of Realignment, while probation departments are seeking to hire.

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<sup>47</sup> Perez, Margarita E. “Public Safety Realignment Act of 2011: Presentation to the L.A. County Board of Supervisors.” (2013).

<sup>48</sup> Villacorte, Christina. “Probation arms more of its officers to cope with Realignment.” *Los Angeles Daily News* (June 3, 2013). <http://www.dailynews.com/general-news/20130503/probation-arms-more-of-its-officers-to-cope-with-realignment>.

And because these laid off parole agents have been trained in using weapons and in supervising high-risk offenders, they are ideal candidates for probation officer positions.

But there are serious implications to parole agents simply resettling into probation officer positions. Parole agents are considered law enforcement officers—traditionally, they supervised the most serious criminals. Will former parole agents be able to exchange their “enforcement” hats for “rehabilitation” hats? Will rehabilitation programs suffer?

**While probation programs are expanding, a key component of evidence-based practices is often missing: aftercare enabled by a split sentence.**

As discussed in Chapter 8, judges are not imposing split sentencing as frequently as many county actors had hoped for. This phenomenon not only has public safety implications given that offenders are not being monitored in the community, but it also has implications for the effectiveness of treatment offerings. Because split sentencing is not being used, offenders are not receiving aftercare, those re-integrative services and resources that facilitate reentry into the community. But researchers have consistently concluded that aftercare is necessary to reduce recidivism and should be a core principle in all model correctional programs.

Realignment legislation offered “split sentencing” as a sentencing option to assure that “aftercare” is delivered to offenders in need. The goals of split sentencing and aftercare are to provide a period of formal probation or parole supervision to assist in the transition from jail or prison to the community. Without aftercare or split sentencing, the offender is simply released from custody into the community. So if the court does not include a “split sentence” in its sentencing order (in which county jail felony sentences include a mandatory period of probation supervision), neither probation nor the sheriff can provide their post-release programmatic efforts.

**Probation worries about ignoring those lower-risk probationers not funded by AB 109.**

By design, AB 109 was intended to cause a chain reaction. As recently released offenders shift to probation, probation will be forced to discharge all but the most serious probationers. Sheriffs will be forced to release all but the most serious inmates. The entire system will “realign,” focusing anew on the most serious offenders. This change, and the need to guarantee public safety with scarce county resources, has meant that the bulk of non-AB 109 probationers are now left without programming; either they are low-

risk offenders or counties have no residual funds for non-AB 109 probation populations. Each interviewed county is painfully aware of this reality and hopes to address this deficit with Proposition 30 funds.<sup>49</sup>

Interviewed officers expressed that the justice system virtually ignores low-level probationers. While the “risk principle” of evidence-based practices suggests that the most intensive resources should be applied to offenders who are at the greatest risk for recidivism, deterrence theory suggests that if offenders are ignored, criminal behavior may escalate and sanctions lose their deterrent value.

California policymakers are voicing concerns over this funding distribution. The state currently invests close to \$1 billion a year on AB 109 offenders. If we assume 30% goes towards probation departments—and they invest in employment, education, and housing opportunities for realigned offenders, the state is deploying perhaps \$300 million a year on services—a significant infusion of rehabilitation funding in California’s cash-strapped social services system. Special need offenders *outside* of the AB 109 population—including the mentally ill, developmentally disabled, and first time probationers—who might be on lower-risk caseloads, may not have access to this significant and targeted AB 109 funding.

Also problematic is the fact that people supervised by the criminal justice system only have access to certain programs—e.g., Section 8 housing, job training, substance abuse counseling—because those programs sometimes limited funding and access for non-criminals.<sup>50</sup> The Los Angeles County Housing Authority announced in September 2012 that it would move parolees to the front of the line for limited and much-sought-after Section 8 housing vouchers, which provide rent subsidies to low-income individuals.<sup>51</sup> A mother, whose son is blind with cerebral palsy and intellectual disabilities, wrote to the *San Francisco Chronicle* in an article titled “Would disabled receive better care in prison?”<sup>52</sup> She noted that California programs to support persons with disabilities—including dental, healthcare, housing, work training, counseling—have all been drastically reduced over the last five years to fund those exact programs for prisoners or formerly incarcerated people.

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<sup>49</sup> In November 2012, Proposition 30 was passed by the California electorate ensuring continued funding for AB 109. It is uncertain, however what limitations will constrain how Proposition 30 funds can be expended.

<sup>50</sup> Repke, Laura. “Would disabled receive better care in prison?” *San Francisco Chronicle* (March 31, 2011). <http://www.sfgate.com/opinion/openforum/article/Would-disabled-receive-better-care-in-prison-2376903.php#ixzz1IIIsIR99n>.

<sup>51</sup> “Helping homeless ex-cons.” *Los Angeles Times* (April 18, 2012). <http://articles.latimes.com/2012/apr/18/opinion/la-ed-section8-homeless-lancaster-20120418>.

<sup>52</sup> Repke, Laura. “Would disabled receive better care in prison?” *San Francisco Chronicle* (March 31, 2011). <http://www.sfgate.com/opinion/openforum/article/Would-disabled-receive-better-care-in-prison-2376903.php#ixzz1IIIsIR99n>.

The irony is that we might be ignoring the risky behavior of “regular” probationers, individuals that might have benefited from programming before they committed a serious felony, while spending large sums of money on much higher risk offenders simply because they fall under the triple-non designate group targeted by Realignment legislation. Ideally, we would have enough resources to deliver needed programming to all offenders.

**Probation’s major concern is that they have “lost their hammer.” Because offenders serve little or no time for violations, the deterrent effect and incentive to comply have dissipated.**

The one theme that ran through every interview and runs through every chapter is the belief that Realignment has significantly undercut the ability of justice officials to respond appropriately to new crimes and violations. For probationers, the threat of revocation has lost its teeth because of the six-month cap in county jail. Pre-Realignment, parolees faced a maximum one-year term in prison for violations. Now, former parolees realigned to PRCS now serve a maximum six-month revocation term in county jail (which is often reduced due to good time credits). And given how overcrowded county jails are, the offender may be released immediately under a sheriff’s early release authority.

Agents have lost their most powerful tool for encouraging offenders to comply with conditions of probation, including mandated treatment. Victims complain that officers cannot collect on restitution orders, as previously discussed. The powerful hammer probation officers once carried has shrunk dramatically. However, since officers do not have guaranteed access to jail beds, probation agents might work harder to find intermediate sanctions to respond to violations.

**The ability to track former prisoners across counties has been diminished since no state agency now tracks their whereabouts.**

State parole’ online database, the Law Enforcement Automated Data System (LEADS), provides law enforcement with information about every parolee under supervision. LEADS 2.0, which was released in 2010, is accessible at all times and provides real-time information about the status of parolees. The database provides names, photos, commitment offenses, registration requirements, status and conditions of parole, and tracks discharged parolees for one year after discharge.

Probation, however, has no comparable system. All information about probationers is siloed in the offender's county of residence. This limitation makes successful supervision of these individuals especially difficult when an offender travels outside of his home county. So as more offenders are realigned from the state to the county, law enforcement's ability to track them is severely compromised.

While California had one unified state parole system, it has 58 different county probation systems. Many probation officers noted that this absence of a centralized offender database is a serious public safety threat that must be addressed. The issue of no centralized state offender database (like the older parole LEADS system) is a concern for many of our interviewees. California's Attorney General, Kamala Harris, has begun to look into the issue and plans to pilot test a statewide data system for probationers in 2014.

**Realignment has raised probation's voice—a silent partner no more. Probation has finally found community partners willing to champion their cause. Close collaborations particularly with sheriff.**

Although Realignment has, in many ways, made probation's tasks more difficult, Realignment has also provided probation with a significant and powerful constituency of community partners willing to champion their cause.

Because each county's Community Corrections Partnership allows major agencies to share perspectives and challenges, more cross-agency collaboration is occurring. Virtually every interviewee praised both the community collaborations taking place as a result of Realignment and how these new relationships are resulting in a shared responsibility to provide high quality supervision and services. The effectiveness and sustainability of these community-based initiatives stems from the power to leverage these partnerships, particularly those involving law enforcement officials.

Probation officials are sensing a new countywide responsibility to help offenders living within their community. CCPs are creating partnerships with county officials and non-correctional stakeholders alike, including public and private entities and the faith community. The task of addressing offenders' needs is not just probation's job, but rather the county's duty to do better collectively through a collaborative response. Both common sense and science strongly support the effectiveness of community partnerships for recidivism reduction. As noted in the National Council's report on criminal desistance, informal social support and community involvement are the *only* factors consistently related to desistance outcomes. The community partnerships emerging as a result of the CCP's are increasing such support and community involvement. Ultimately,

the long-term sustainability of this evidence-based program initiative may well rest on the success of these emerging community partnerships.

Probation officials have used these collaborations to reframe the conversation around Realignment. Some law enforcement officials are talking about rehabilitation as a means of communities protecting themselves. These officials are explaining that Realignment is not just about building an offender support network system, but also a community protection strategy. The conversation about services and surveillance has moved away from a focus on helping offenders to one that recognizes the far-reaching benefits to the community as a whole. The message is strongly reinforced by law enforcement support. Changing both the language and the messenger are giving these arguments newfound credibility.

Reframing the conversation and increasing Realignment's potential beneficiaries are likely to increase overall support for Realignment. The CCPs and the strong partnerships developing among and across agencies should make Realignment less vulnerable to political attacks. As public opinion also changes, politicians will become less likely to see political advantage in dismantling probation's hard work and Realignment's many benefits.

# Chapter 10: Conclusions<sup>1</sup>

What is the result of California's great prison experiment? Even after conducting 125 interviews with agencies across California, it remains a challenge to adequately summarize the changes that Realignment (AB 109) has wrought across the state. The responses from our interviewees were very divergent, mostly reflective of the *agency* in which the person worked, rather than the *county* they represented. Overall, probation officials have emerged as the most positive champions of Realignment, eagerly harnessing the additional momentum the legislation has lent their cause. Public defenders are similarly optimistic although they remain somewhat concerned about the longer county jail terms that their clients face and the conditions under which they are served. Conversely, prosecuting attorneys generally regard Realignment quite negatively, actively lamenting the loss of their discretion. With a few exceptions of very involved jurists, judges seem the least vocal about Realignment and often did not express strong feelings towards the legislation one-way or the other. Finally, law enforcement—both front line police and sheriffs—are the most divergent across the state with their opinions being closely tied to their local jail capacity.

## Probation and Community Service Providers

The probation representatives that we interviewed spoke with the most unified voice. They unequivocally felt that Realignment gave them an opportunity to restore balance between the incapacitation and rehabilitation purposes of punishment. The imbalance between these purposes of punishment is reflected in California corrections data: Over the last several decades, California state corrections—associated with incapacitation—has grown (i.e., prison and parole), while county corrections—associated with rehabilitation—has shrunk (i.e., jail and probation). Realignment, at its core, is designed to rectify this imbalance and test whether rehabilitation services provided to lower-level felony offenders can forestall their historically high recidivism rates and prevent the (eventual) return to prison.

Despite their positive outlook, probation officials universally agreed that Realignment was implemented too fast, leaving them scrambling to accommodate a greater number and more serious offender than they had been led to believe. In addition, the dollars were simply insufficient for them to fulfill their mandate. But even in the face of these setbacks, they were pleased that the state was focusing on funding local offender services

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<sup>1</sup> This chapter was drafted by Mariam Hinds.



and relieved that the funding was secured by the California constitution, which gives them several years to implement their plans for providing services and programming.

Community service providers were roughly in agreement with probation practitioners. They were unified in their voices as well, often lamenting California's march to a system that over-invested in prisons and under-invested in the very programs that might have prevented a prison term in the first place. The research concerning how to deliver "evidence-based" programs and effective treatment to criminals has advanced significantly from the days when "nothing worked." Yet, as the scientific data and evidence accumulated telling them *what* to do, the funding and staffing to implement those programs was simultaneously cut. Virtually everyone we spoke to from the non-profit or public health community mentioned that funding for community programs has been reduced significantly over the past decade. Fed up with having the tools to implement effective programs but lacking the funds to do so, both probation and community service providers believe the prison tail has been wagging California's crime control policy for far too long.

Realignment ushers in a new crime control policy agenda and forces the counties to be more self-reliant in handling convicted felons while giving them significant funding to invest in the treatment infrastructure. The legislation furnishes probation practitioners and community service providers with the first opportunity in decades to see whether California can successfully implement programs that science has shown can reduce recidivism. While eagerly rising to this challenge, they also uniformly urge patience, as the full effect of the changes may take years to realize.

## **Public Defenders**

Public defenders were generally supportive of Realignment. Both district attorneys and public defenders agree that Realignment gives defense attorneys more leverage in their negotiations with prosecutors. This additional leverage emerges from two principal changes that Realignment introduced. First, for public defenders and their clients, more options are on the table (i.e. mandatory supervision and split sentences) and, for prosecutors, more things are off the table (i.e. prison). Pre-Realignment, plea bargains were focused almost entirely on how much prison time the offender would serve. Without prison as an option, the discussion now focuses on what programs, surveillance, and length of probation and jail terms the offender is facing. With more non-incarceration options, public defenders' bargaining position has strengthened.

Second, the spirit of Realignment favors the sentences that public defenders are likely to advocate for—those that incorporate and include treatment and service. Although there

is some mention of public safety, the language in the law focuses on rehabilitation, strengthening a public defender's position that a prosecutor should sacrifice jail time for additional programs and services.

While remaining supportive of Realignment, public defenders did express misgivings with the new legislation. One interesting concern that some public defenders expressed was the unwillingness of defendants to accept a plea bargain that might have included a tail. Some public defenders we interviewed felt that even when they thought a term of probation might assist the offender, for example, by making him eligible for programs and services only available to those on formal supervision (e.g., supportive housing), defendants wanted straight jail time instead.

Additionally, public defenders have a growing concern with the conditions that many of their clients face while incarcerated, especially in counties experiencing jail overcrowding. Faced with calls from severely sick clients who are going weeks without treatment, public defenders continue to support Realignment, but urge policymakers not to grow complacent simply because the prison overcrowding problem is "fixed" without considering the emerging crisis in the county jails.

## **Prosecuting Attorneys**

As a group, prosecuting attorneys seemed least supportive of Realignment statewide. The district attorneys, understandably, expressed a real sense of frustration throughout the interviews. Taking prison "off the table" for some very serious, repeat offenders results 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 the final outcome of this tremendous resource expenditure is that the offender may get a very short stint in county jail. Of course, this lack of significant perceived "payoff" not only frustrated district attorneys; police and judges expressed similar misgivings as well.

## **Law Enforcement**

For police officers walking the beats in cities across California, there was little positive to be said about Realignment. Most believed that more criminals were on the streets and that crime was rising as a result. Our interviews took place between November 2012-August 2013, and on July 25, 2013, the California Attorney General's Office released its

Crime in California report, which confirmed their suspicions.<sup>2</sup> The statewide rates (number per 100,000 population) of homicide (up 4%), forcible rape (up 1.3%), robbery (up 3.2%) and aggravated assault (up 2.5%) all increased in 2012 compared to 2011. The same held true for the crimes of burglary (up 5.9%), auto theft (up 13.9%) and larceny (up 5.5%). But several police opined that the level of reported crime might also be an undercount, as some believe that certain communities are under reporting crimes because of a lack of police responsiveness.

While this under reporting makes it difficult to accurately gauge changing crime rates, many police officers believe that auto thefts are a more accurate predictor of property crime and draw conclusions about the crime rate based on the increase in auto thefts. Police departments are responding less to lower level property crimes and, over time, citizens stop reporting those crimes. But with auto theft, because they need a police report to collect on their insurance, they are more consistently reported. Every police officer we interviewed told us that auto thefts were up significantly in their communities. Because they believe that auto thefts are fairly accurately reported, many police officials infer that this increase is reflective of a rising property crime rate. We lack the means of verifying the accuracy of this perception, but it came up consistently.

In addition to coping with the rising crime rate, police now have fewer options to control offenders' behavior. Police have the option, under California law, to take individuals into custody for a 72-hour holding period if they believe that, due to a mental disorder, they are a danger to themselves or others. The law also allows the police to take an individual into custody if they are a danger to themselves or others due to chronic alcoholism. Police can also hold arrestees for up to 72 hours while the prosecutor considers charges. In many instances, front-line police use jail to calm a situation (e.g., domestic violence cases), but due to jail crowding caused by Realignment, these cells are not available for these dry-out purposes. Again, this leaves more offenders in the community without the cooling off period needed to diffuse tense, potentially violent situations. Additionally, because jail time is not going to be frequently imposed, the deterrent value of arrest has diminished. When an arrest is made, the offenders are quickly released, and the police have expended valuable resources and completed a lot of paperwork without a perceived benefit.

To add insult to injury, despite being the frontline responders to criminal activity in the state, police departments were barely consulted before Realignment took effect and still feel as if they are being left out of the major policy conversation. Those involved in crafting the legislation have said that the basic job of the front-line law enforcement officer has not changed post-Realignment. They are still responsible for responding to

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<sup>2</sup> "Crime Data." Office of the Attorney General California Department of Justice. <http://oag.ca.gov/crime>.

crime, identifying and apprehending suspects, and preparing the case for the prosecutor. But police officials say that is short-sighted and that their jobs have changed significantly post-Realignment. Simply put, with more crime reported, there are more crimes to respond to and investigate. Hence more work for the police. But police were not funded with the same formula funding as other agencies. In fact, they were given a one-time funding allocation of \$24 million in FY 2012-2013 (and \$27 million for FY 2013-2014) to be split among all the police agencies in the state. Many wonder if more law enforcement participation in the crafting of Realignment would have resulted in additional funding being granted to police agencies across California.

Unfortunately, the rise in crime across California cities, according to the police we interviewed, is causing more citizens to question whether their local police are capable of providing public safety. Several mentioned that local businesses were asking them about getting concealed weapons permits to protect themselves. The combination of recent police officer layoffs due to the economic crisis, more offenders on the streets due to Realignment, crime increases, overcrowded jails that continually release arrestees in some counties, and not getting their share of the AB 109 funding means that the police we interviewed were skeptical of Realignment. One Fairfield police officials explained it this way, “You can only sprint so long before things break and you get hurt.”

## **Sheriffs**

California’s sheriffs are responsible for running the county jails and they provided mixed reviews of Realignment. As the county jailer, sheriffs are working more closely with probation departments to develop alternatives to custody so they can keep their jails at a constitutionally acceptable capacity. As jails have become more crowded, and as the need and resources for community alternatives have increased, sheriffs have become more actively involved in providing treatment. In some counties, they are actively engaged in deciding who should remain in custody, who should be released pre- and post-conviction, and what community alternatives and sanctions will be imposed both initially and for a technical violation of probation or parole. Many of them are even running their own work release programs and electronic monitoring programs, very similar to the programs run by probation.

We heard from many sheriffs that the old system wasn’t working well, the revolving door in many communities between jail and prison was not protecting the public, and that a new approach was needed. As such, sheriffs and probation are joining forces to create a fuller menu of appropriate treatment, following the principles of evidence-based practices. Sheriffs seem to understand the connection between community crime and punishment, and we often heard comments such as, “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, the sheriff is often able to create a full continuum of sanctions from fines through jail and onto electronic monitoring and discharge. Some question this expanded role for law enforcement, but others seem to welcome the county-wide response.

But sheriffs are also very concerned about the deterioration of jail conditions as the county jail populations swell in direct proportion to the prison population decline. In interviews with public defenders across the State of California, the one consistent concern was that their clients were suffering in deplorable jailhouse conditions. Clients are not receiving mental or medical healthcare for weeks after seeking treatment. In terms of recreation and programs, there are no exercise yards in the jails. Clients do not get to spend time outside and rarely get exposure to sunshine. They have limited outside contact and there are very few programs available in the jails. Additionally, because of overcrowding, clients may be on lockdown for up to twenty-two hours per day.

These conditions seem startlingly familiar; they closely mirror the conditions that served as the basis for the successful allegation that the prison conditions violated the Eighth Amendment in *Plata*. Have we simply moved the constitutional violations from the state prisons to the county jails? The answer is very likely, yes. Currently, 37 of California's 58 county jails are operating under either a self-imposed (20) or court-ordered (17) population caps. But even despite these measures, the Prison Law Office has already filed class action lawsuits seeking to remedy Eighth Amendment violations in the Fresno County and Riverside County jails. In addition to alleging that they have received inadequate physical, mental, and dental health services, the plaintiffs also contend that they are exposed to preventable violence due to defects in the jail's design, operation, and staffing. Given the success of the *Plata* litigation, a surge of county-level Eighth Amendment suits is likely to emerge. Sheriffs are trying to intervene early and address the conditions in their jails before the courts become involved.

## **Judges**

Perhaps because they are less engaged than other county actors, judges' opinions regarding Realignment varied widely between individuals. Some judges, particularly those with experience in collaborative courts, share probation's positive view. These judges have experience in working with probation and community treatment providers to provide services to offenders with mental health, substance abuse, and domestic violence issues. Results tend to support their beliefs that investing in a more intensive community approach, one which is more patient with relapses and not as quick to incarcerate, holds promise. Both probation and members of the judiciary believe that rehabilitation is not

for everyone, but that there are those who were sent to prison, but could have been helped. Judges are advocating the kinds of collaborative court models that have worked in the past for the newly realigned offenders.

But collaborative courts are expensive, and not all judges are in favor of them. Other judges feel their counties can't afford to spend so much money on such a small part of their caseloads; after all they also handle family court, civil court, and criminal cases are less than 20% of their overall caseload. Setting aside a judge to specifically handle a model that *might* be effective in reducing recidivism seems imprudent. In large counties, where the courtrooms are already being closed due to staff shortages, concentrating resources in this way doesn't seem efficient. In addition, some judges feel that the collaborative court model turns the judge into a social worker, for which he/she has little training, and makes the judge an activist—rather than an impartial—party in the judicial proceedings. And finally, judges might like the collaborative court idea in general, but say their particular county doesn't have the community-based resources to make it work. Given these realities, many judges are less supportive of Realignment.

One concern that many judges shared was the lack of post-custody time and supervision that they can impose on an offender. They worry that they still do not have enough discretion to ensure that criminals are both properly incapacitated and properly monitored when released. Some California judges believe that the limitations of PRCS do not allow enough time to change criminal behavior and reduce recidivism. Those judges are asking for the option to put a parole “tail” on an offender for up to three years, in addition to sentencing. Santa Clara County Superior Court Judge Stephen Manley, who oversees a special courtroom for defendants facing drug addiction and mental illness, explained, “It's really hard to motivate people. If they want us to use evidence-based programs to change the model from punishment to rehabilitation, we need more time.”

Retired Placer County Superior Court Judge J. Richard Couzens, who is considered the leading judicial authority on Realignment, also supports the additional time for monitoring the realigned offenders. However, he is not hopeful that it will be one of the changes that are implemented right away, because of the severe financial constraints of state budget. An increased monitoring period would not only increase probation costs, but it could significantly increase the number of offenders returning to jails when they fail probation. As Judge Couzens explained, “It's a question of how big is the bucket of money and can we cover all the things we think are good ideas.”

Overall, many judges remain hopeful that Realignment will have a positive impact on California's criminal justice system. Santa Cruz County Superior Court Judge Paul Marigonda remarked, “It isn't changing the sentences, but it is changing where and how

they are served, and maybe, hopefully, we can now deal with them in a better way than we have been.”<sup>3</sup>

## Recommendations

Despite the differing attitudes and levels of engagement that counties and agencies display towards Realignment, several recurring concerns and suggested revisions emerged from our interviews. Outlined below, these recommendations symbolize a needed shift from retrospectively lamenting the changes Realignment has introduced towards prospectively considering how all counties and agencies can work to make it successful.

### **Create a statewide tracking database for offenders under supervision in the community.**

Pre-Realignment, law enforcement officers had access to extensive information regarding parolee’s names, addresses, physical characteristics, commitment offenses, and registration requirements via a state parole database known as Parole LEADS (Law Enforcement Automated Data System).<sup>4</sup> Post-Realignment, most offenders who leave prison are no longer on parole (they are now monitored on PRCS) and are, therefore, not entered into the Parole LEADS system. Instead, each county has their own method of tracking offenders released into the community.

The change from state-based to county-based supervision of offenders leaving prisons creates a void of information and data for law enforcement officials on the ground. There is no statewide or cross-county database for tracking offenders on PRCS, mandatory supervision, or probation. Without this information, local law enforcement does not have adequate information to know if a person they encounter on the street is a) entitled to the full range of Fourth Amendment search and seizure protections because they are not under criminal justice supervision or b) a potentially dangerous offender who is under supervision. Consequently, police could potentially conduct searches and seizures of people who are not under supervision—a clear Fourth Amendment violation—simply because they do not have access to a database that tracks offenders on probation or other forms of supervision.

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<sup>3</sup> Boysen, Ryan. “Santa Cruz ‘Smart on Crime’ Panel Looks at Pros and Cons of Adding State Convicts to County Jails.” *Santa Cruz Patch* (November 9, 2011). <http://santacruz.patch.com/groups/politics-and-elections/p/smart-on-crime-panel-looks-at-law-that-adds-new-priso8b4517d429>.

<sup>4</sup> “Parole LEADS.” California Department of Corrections and Rehabilitation. [http://www.cdcr.ca.gov/Parole/Non\\_Revocable\\_Parole/Law\\_Enforcement\\_Resources.html](http://www.cdcr.ca.gov/Parole/Non_Revocable_Parole/Law_Enforcement_Resources.html).

Unless the state intervenes and addresses this gap, it is unlikely that the counties, already struggling to manage the influx of new offenders in their communities, will coordinate with one another in order to develop such a database. For local law enforcement, this is, perhaps, one of the most detrimental aspects of Realignment to their daily operations. Kamala Harris, California's Attorney General, has begun to look into the issue.

## **Allow criminal history to be considered when determining if the county or the state will supervise a parolee.**

An unanticipated consequence of Realignment is that, for state parolees leaving prison, only their *current* conviction offense is considered when determining if they will be placed on PRCS or parole. The offender's criminal history is irrelevant to this determination making it possible for offenders with both serious and violent priors to report to county probation officers. For example, moderate- and low-risk sex offenders—a population that was monitored by parole—are now monitored by probation (only *high* risk sex offenders remain on state parole supervision). Los Angeles County Probation Department has now found itself supervising more violent criminals than ever before—499 “very high risk” and 7,197 “high risk” AB 109 offenders as of March 29, according to the Los Angeles Daily News.<sup>5</sup>

Probation officers, already facing increasing caseloads, are ill equipped to manage such serious and sophisticated offenders. Some counties are resorting to arming their probation officers—a practice that would have been considered highly detrimental to probation's rehabilitation oriented mantra pre-Realignment. Los Angeles County Probation Chief Jerry Powers is moving to more than triple the number of his armed probation officers, from 30 to 100.<sup>6</sup> While this reaction is certainly logical, it is potentially threatening to the role that probation has traditionally played (and is expected to play) in the criminal justice system. One commentator summarized the tension as follows: “The issue boils down to: Are these people law enforcement officers, or are they treaters and helpers? ...You can't be delivering cognitive behavioral therapy with a gun strapped to your waist. The therapeutic relationship is inhibited and destroyed by someone carrying a gun openly.”<sup>7</sup>

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<sup>5</sup> Villacorte, Christina. “Probation arms more of its officers to cope with Realignment.” *Los Angeles Daily News* (June 3, 2013). <http://www.dailynews.com/general-news/20130503/probation-arms-more-of-its-officers-to-cope-with-realignment>.

<sup>6</sup> Ibid.

<sup>7</sup> Sá, Karen de. “Santa Clara County seeks to arm some probation officers.” *San Jose Mercury News* (January 3, 2010). [http://www.mercurynews.com/ci\\_14298168?nclick\\_check=1](http://www.mercurynews.com/ci_14298168?nclick_check=1). (internal quotation marks omitted).



In order to avoid this tension and permit probation to maintain their role in the criminal justice system, Realignment should be revised such that the complete adult and juvenile criminal conviction record is considered when determining if the state or the county will supervise an offender facing imminent release from prison. Those offenders with prior serious or violent convictions in California or elsewhere should be ineligible for county supervision and required to report to parole.

## **Preempt forthcoming litigation based on conditions in the county jails.**

The conditions in the county jails are almost universally regarded as unacceptable and are ripe for litigation. After seeing how effective the *Plata* plaintiffs were, there is no doubt that, once they are satisfied with the conditions in the prisons, civil rights activists will turn around and begin to sue the jails. As discussed, a few California jails are already in litigation regarding jail overcrowding, and more may follow. A Solano County Public Defender commented on the conditions in the jails stating, “I’m sure the sheriff is expecting and I am expecting some lawsuits to come out of all this.”

Both potential plaintiffs and the county defendants (likely the Board of Supervisors) should get a head start on investigating and cataloguing the conditions in the jails so they can either paint a picture depicting the deplorable conditions and egregious issues with healthcare or attempt to explain what actions the counties are taking to address these problems. Waiting until the plaintiffs file discovery demands will not benefit anyone and certainly not the county defendants.

## **County jail sentences should be capped at a maximum of three years.**

County jails were constructed to house inmates for a maximum stay of one year. A consistent concern expressed by our interviewees was for the long-term inmates who, post-Realignment, will be housed in county jails. Serving a five, seven, or ten-year sentence in a county jail will likely deprive an inmate of adequate mental and medical healthcare, treatment and programming services, sufficient recreational time and space, regular visitation, and other benefits and rights that are maintained in state prisons. In order to meet these needs, county jails would need to overhaul, at a minimum, the medical and mental health provision protocols and facilities that they offer. This would require a massive influx of funding that likely outstrips the additional funds that sheriffs have received from Realignment.

Instead, the legislation should be amended to cap county jail sentences at three years. An offender convicted of a §1170(h) offense who is sentenced to serve more than three years should no longer be eligible to serve his sentence in the county jail and should be sent to the state prison.

The unfortunate consequence of implementing such an amendment is that it would slow the decline of California's prison population—the primary motivator behind Realignment to begin with. California is still nearly 9,000 inmates short of complying with the Supreme Court's benchmark without considering "realigning back." However, without finding a solution for addressing the limited resources in the jails, both the state and the counties will find themselves gridlocked in litigation with no additional place to send inmates from overcrowded jails and prisons.

## **Certain repeated, technical violations should warrant a prison sentence.**

Pre-Realignment, technical violations of a parolee's terms of supervision could result in a return to state prison for a maximum of one year. Now, however, violators can only return to county jail for a maximum of six months. In counties where the jails are overcrowded and the sheriffs are exercising their early release authority, technical violators may be one of the first groups to be released to make room for more serious offenders. This cycle of supervision, violation, brief punishment, and release disincentivizes compliance with the terms of an offender's supervision. For example, interviewees reported that sex offenders have begun to cut off their electronic monitors and abscond from supervision knowing that the only consequence will be a brief stint in county jail.

In order to create an incentives structure that encourages compliance with the terms of supervision, certain repeated, technical violations should warrant a prison sentence. For example, cutting off one's electronic monitor should qualify an offender for a return to prison. Without providing probation officers with adequate discretion to manage offenders in the community, chronic noncompliance will adversely affect the efficacy of post-custody supervision.

## **Conclusion**

In the end, these divergent views—across counties, across stakeholder groups—were to be expected. As with any piece of comprehensive legislation, it is impossible to anticipate how a law will play out on the ground after it is enacted. But with Realignment especially,

it seems as if the gears and levers are interacting in unpredictable ways to create some unforeseen results. Moving forward, researchers should continue to investigate the consequences—both positive and negative—of Realignment and policymakers, advocates, and practitioners should systematically address these findings in order to maximize the positive outcomes and minimize the negative outcomes. Regardless of one’s personal position on Realignment, it is clear that this legislation is here to stay. Once consequences have been identified, it behooves everyone—legislators, the public, and offenders—to move past lamenting the changes it introduces, and instead, dedicate ourselves to ensuring that this legislation creates a safer and more effective criminal justice system in the State of California.

# Appendix A: List of Interviewees

## **Alameda County**

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Ahern, Greg	Sheriff
Meredith, Karen	District Attorney, Assistant
Noonan, Mike	Police Chief, Alameda
Smith, Phillip	Former Parole Agent, Oakland Unit 2
Swafford, Millie	Director, Criminal Justice Mental Health Services
Thompson, Trina	Superior Court Judge
Anonymous	Superior Court, Executive Judge

## **Amador County**

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Ryan, Martin	Sheriff
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## **Contra Costa County**

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Peterson, Mark	District Attorney
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## **Fresno County**

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Dyer, Jerry	Police Chief, Fresno
Harbottle, Adrienne	Public Defender's Office
Hoff, Gary	Superior Court, Presiding Judge
Mims, Margaret	Sheriff
Penner, Linda	Former Chief Probation Officer of Fresno County; Current Chair of the Board of State and Community Corrections
Pearcy, Ralph "Gomer"	Parole Administrator
Taniguchi, Kenneth	Public Defender
Willits, Lori	Victim Services

## **Kern County**

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Gonzales, Greg	Lieutenant, Sheriff's Office
Green, Lisa	District Attorney
Moore, Francis	Chief Deputy, Sheriff's Office
Perez, Lupe	Victim Services
Youngblood, Donny	Sheriff

## **Lassen County**

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Growdon, Dean	Sheriff
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## **Los Angeles County**

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Baca, Leroy	Sheriff
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Delgado, Mark	Executive Director, Countywide Criminal Justice Coordination Committee
Fender, David L.	Chief, Custody Services Division, Los Angeles County Sheriff's Department
Lacey, Jackie	District Attorney
McDonald, Terri	Assistant Sheriff, Los Angeles County Sheriff's Department
Olmedo, Charlaine	Superior Court Judge
Powers, Jerry	Chief Probation Officer
Raney, Kim	CA Police Chiefs Association, President; Police Chief, Covina
St. Pierre, Kraig	District Attorney, Deputy in Charge, Parole Revocation Section
Wesley, David	Superior Court, Presiding Judge
Yim, Alexander	Chief of the Los Angeles Sheriff Department, Correctional Services Division
Zuzga, Cynthia	Superior Court Commissioner

**Madera County**

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Medina-Gross, Katherine	Site Coordinator, Madera Community College Center
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**Merced County**

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Ball, Scott	Chief Probation Officer
Pazin, Mark	Sheriff

**Orange County**

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Boston, Gregory	Sheriff Department, Director of Inmate Services, In-Custody Transition Program
Contini, Jennifer	District Attorney, Deputy
Hutchens, Sandra	Sheriff
Kea, Steve	Sheriff Department, Commander
Mejico, Dominic	Sheriff's Department
Trujillo, Lee	Sheriff Department, Assistant Sheriff
Wamsley-Goldsmith, Sheryl	Admin Manager, HCA-Correctional Mental Health

**Riverside County**

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Adams, Stacy	Division Director for Special Projects, Probation Dept
Coffee, Ron	District Attorney, Chief Deputy
Crivello, Lachelle	Victim Services
Datig, Creg	District Attorney, Assistant
Hake, Mark	Chief Probation Officer
Hasler, Karen	Public Defender's Office
Johnson, Deborah	Mental Health, Deputy Director for Forensic Services
Powell, Jim	Promising Programs (PP), AB 109 Clinical Coordinator,

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	DMH
Sniff, Stanley	Sheriff
Thetford, Steven	Sheriff Dept, Asst Sheriff of the Courts Coroners Corrections & Administrative Support
Wengerd, Jerry	Director, Riverside Department of Mental Health
Anonymous	Parole Agent II

**Sacramento County**

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Barroga, Ron	Former Probation Officer, Deputy
Boyd, Chris	Police Chief, Citrus Heights
Brown, Lawrence	Superior Court Judge
Martin, Kerry	Victim Services
Meyer, Don	Chief Probation Officer
Silva, Melinda	Parole Agent I
Smith, Doc	Parole Agent (retired)
Zielenski, Torr	Public Defender's Office
Anonymous	Deputy District Attorney
Anonymous	Parole Administrator, Regional

**San Benito County**

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Hill, Curtis	Former Sheriff of San Benito;;, Acting Executive Director, BSCC
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**San Diego County**

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Goldstein, Earl	Mental Health, Sheriff's Dept Medical & Inmate Services Division (retired)
Lau, Karna	Supervising Probation Officer

**San Francisco County**

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Anderson, Tara	Grants & Policy Manager
Beeman, Maria	Victim Services
Cairns, Joan	Mental Health, Director of Jail Psychiatric Services
Gascón, George	District Attorney
Mirkarimi, Ross	Sheriff
Still, Wendy	Chief Probation Officer

**San Joaquin County**

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Fowler, Jennifer	Program Coordinator, SJC Collaborative Courts
Hood, Jamie	Probation Officer
James, Stephanie	Chief Probation Officer
Jaurequi, Gabriela	Victim Services

**San Mateo County**

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Davis, Ronald                      Police Chief, East Palo Alto

**Santa Barbara County**

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Brown, Bill                      Sheriff  
Dudley, Joyce                  District Attorney  
Heitman, Tanja                Probation Officer  
Montes de Oca,  
Raimundo                      Public Defender  
Riker-Rheinschild,  
Megan                          Victim Services  
Taylor, Beverley              Chief Probation Officer

**Santa Clara County**

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Beliveau, Troy                Sheriff Dept, Captain of Support Services  
Bosel, Max                    Police Capt, Mountain View Police Dept, CA Sex Offender  
   Management Board  
Brewer, Nancy                Public Defender (Retired)  
Caballero, Mariel            Public Defender's Office  
Donovan, Michelle           Parole Agent II, San Jose Unit 5  
Fletcher, Karen              Chief Probation Officer, Deputy  
Gutierrez, Andy              Public Defender's Office  
Harris, Heather              Public Defender's Office  
Herceg, Garry                Director, Santa Clara Pretrial Services  
Howe, David                  District Attorney, Assistant  
Kapp, JJ                        Public Defender's Office  
Loftus, Richard              Superior Court, Presiding Judge  
Manley, Stephen             Superior Court Judge  
O'Neal, Molly                Public Defender  
Pena, Nancy                  Director, Santa Clara Dept of Mental Health  
Seaman, Scott                President, CA Police Chiefs Association; Police Chief, Los  
   Gatos  
Anonymous                    Mental Health, Jail Services

**Solano County**

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Alberg, Jannett                Women's Reentry Achievement Program, Staff Analyst,  
   Health & Social Services  
Beeman, Paul                 Superior Court, Presiding Judge  
Daughterly, John M.        District Attorney, Chief Deputy  
du Bain, Donald              District Attorney  
Hansen, Christopher        Chief Probation Officer  
Howard, Denise               Parole Agent I, Fairfield Unit 2 GPS  
Ignacio, Melissa              District Attorney, Deputy for Realignment  
Nguyen, Mary                District Attorney, Deputy

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Tibbet, Walt	Police Chief, Fairfield
Wold, Carolyn	Victim Services
Anonymous	Public Defender

**Ventura County**

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Deutsch, David	Clinical director of VOICE
Dowler, Tim	Supervising Deputy Probation Officer
Gean, Karen	Coordinator of VOICE

**Additional Experts**

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Cate, Matt	Executive Director, California State Association of Counties; Law and Policy Fellow, Stanford Criminal Justice Center
Florez-DeLyon, Cynthia	Victim Services, CDCR
Salarno, Harriet	Crime Victims United
Selix, Rusty	Executive Director, CA Mental Health Association
Skeem, Jennifer	Professor of Psychology & Social Behavior, UC Irvine
Strnad, Jeff	Professor, Stanford Law School
Ward, Christine	Crime Victims Action Alliance (CVAA)



# Appendix B: Interview Questions

## *General Questions to all Criminal Justice Stakeholders*

- (1) What is your understanding of Realignment?
- (2) What kind of training did you receive on Realignment and your new role? Is it adequate and what resources would be beneficial?
- (3) How do you view Realignment? (Your involvement in the solution, if any?)
- (4) Has your/your agency's behavior changed at all due to Realignment? How and why?
- (5) Have you experienced resource constraints as a result of Realignment?
- (6) What would you have done differently if you had been in charge of crafting Realignment?
- (7) If you could change one thing about the Realignment legislation, what would it be?
- (8) What is the impact on your relationships with other parties in the system (e.g., judges, PDs, sheriffs, law enforcement)? Is there more collaboration between certain parties, more adversity with others?
- (9) What questions haven't we asked you that you think we should have?

## *Probation*

- (1) Relative to the increased burden on probation officers are resources dedicated to Realignment sufficient?
  - a. Were you adequately equipped?
  - b. What additional resources do you wish you had in hindsight?
  - c. What would be helpful going forward?
  - d. In your county how much of that money goes to probation? Other alternatives to incarceration? Programming?
  - e. What is probation's role in the local community corrections partnership?
  - f. What kinds of investment in infrastructure would be necessary to make Realignment work in the long run?
- (2) How would you describe the transition to an expanded—and somewhat changed—role for probation?
  - a. What has been the biggest challenge?
  - b. What has surprised you (what did you not anticipate)?
  - c. What about the pace of transition?
- (3) How is the function of probation as a means of sentencing evolving?
  - a. Is there a trend towards greater dependency on other alternatives to incarceration?
  - b. What forms of monitoring or technologies are increasingly depended on?
  - c. How quickly is the force expanding or are officers handling larger case loads?
- (4) Have you seen a shift in the use of split sentencing?

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- a. To what effect?
- b. Is this beneficial/detrimental to an individual's access to programming or other resources?
- c. Do you predict any influence on recidivism?
- (5) Will the lack of automatic supervision after terms impact recidivism?
  - a. It is important that recently released prisoners have some sort of supervision?
  - b. Or does that just lead to unnecessary "technical" violations?
- (6) What is being done with high risk offenders that otherwise qualify for community alternatives?
  - a. Mentally disordered offenders?
  - b. Drug addicts?
  - c. High risk sex offenders?
  - d. What services are available to this type of probationer?
- (7) What types of intermediate sanctions are being relied upon to avoid the involvement of courts?
  - a. How do you decide?
  - b. Have they been effective? Or do you find yourself still deferring to the courts?
  - c. In what situations is revocation of PRCS used?
- (8) What is and isn't working with regard to Post-Release Community Supervision?
  - a. Are the pre- and post-release packets sufficiently informative to prepare for inmate's release?
  - b. Release into county of last legal residence makes sense?
  - c. Coordination with the CDCR?
- (9) Do you believe the CDCR's share of responsibility for PRCS strikes the right balance?
  - a. In general, how smooth is cooperation with the CDCR?
  - b. What improvements could be made to state-county coordination?
- (10) Could you describe the use of evidence-based practices in your county before and after Realignment?

*Public Defender*

- (1) Has the public defender's analysis in advising clients to take probation or plead to the (§1170(h) or prison) felony changed? In what context?
- (2) Do you opt for county jail with probation even if prison would result in a shorter total period of state supervision?
- (3) Do DA's weigh the impact that their sentencing decisions will have on local resources or jail capacity?
- (4) Have you observed DA's attempting to inflate charges to prison-eligible offenses?
- (5) Are DA's charging around Realignment?
- (6) Have you noticed whether prosecutors are increasingly using PDs as a conduit of information about a particular case?

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- (7) How much communication is there between the PDs and DAs? Is this changing after Realignment?
- (8) How do PDs respond to the different incentives prosecutors face?
- (9) Have plea negotiation dynamics changed under Realignment? How? Does the offender have more/less leverage? In what ways?
- (10) Have PDs gained bargaining power (knowing that DA's must consider jail/prison population under Realignment)?
- (11) Are you always aware of jail crowding pressure under Realignment and does that embolden you to at least purport to ask for trial?
- (12) Will PDs call prosecutors bluffs to go to trial?
- (13) Can you please explain your county's pretrial/presentencing process?
- (14) What has been the historical policy towards bail arguments within the office? Can you give examples of offenses where a PD would typically request low bail? Medium bail? High bail? That the client be ROR'd?
- (15) Are clients being ROR'd more frequently because of Realignment?
- (16) Do PDs ask for lower bail in light of the resource constraints that the county jails are facing?
- (17) Is there any sort of systematic tracking of the number of clients being ROR'd, held in on bail, how much bail, or remanded?
- (18) What information do you give to the new clients about Realignment?
- (19) Do you think that clients prefer jail or prison sentences overall? (Why?)
- (20) Do clients complain of more violence in jails versus prisons?
- (21) Does knowing that they will serve a sentence in jail as opposed to prison change the client's behavior? Perhaps with regard to plea bargaining?
- (22) How often and under what circumstances did you seek a split sentence before Realignment?
- (23) Since Realignment, have you increased (or decreased) the number of split sentences you seek?
- (24) Do PDs worry about their clients having tails when they serve a split sentence?
- (25) Has this changed since clients cannot return to prison for a technical violation?
- (26) Rehabilitation efforts; is the county allocating \$ towards rehabilitation or simply building new jails (i.e. in Solano County, they are building a \$100 million day center)?
- (27) How has Realignment affected clients with mental health problems?
- (28) Are more PDs being hired?
- (29) Community Corrections Partnership
- (30) Are there other people in your county who you think have a good handle on Realignment that we should be interviewing?
- (31) Did you feel well represented (were your interests well represented) in the discussions surrounding Realignment?
- (32) Realignment's effect on immigration and compliance/non-compliance with ICE?

*Sheriff*

- (1) Changing Jail Population (all non-non-nons, PRCS and parole violators (technical violations), longer terms...)
  - a. How has the makeup of the jail population changed since Realignment began? What have you noticed about the population? What has been the largest influx? More/less violent?
    1. higher level of offender, more sophisticated criminals, seasoned prison veterans (parolees)
    2. What was the jail like beforehand? How crowded? What programs were available? What about now?
    3. Is it more dangerous to work there? Why? (how have you dealt with it?)
    4. Has the gang environment changed?
    5. How is the jail changing to accommodate long-term inmates?
    6. Has flash incarceration increased? How does it work? How does that affect your jail management? (do you have a special ward for them?)
  - b. What percent are parole revocations? How was that population changed? What are your options when you receive someone who violated parole?
  - c. Generally— where has your flexibility changed? What were your release valves before— what are they now? Do you feel unrestrained by Realignment? or are your hands tied?
  - d. The CDCR can send state prisoners to jail for last 60 days of their sentence to prepare for PRCS—how often does that happen? What are the terms of that relationship? (SF does it)
  - e. How has the demography of inmates changed?
- (2) Using Realignment Funds—Expansion vs. Rehabilitation/evidence-based program, alternative incarceration
  - a. How have you dealt with the influx and changing population? Expanded the jail? Reorganized the jail? Hired more staff?
  - b. Is the money fully carte blanche
  - c. Rehabilitative programs—evidence-based practices? What do you do to evaluate new inmates? How do you separate them into programs? Have you implemented new programs? What challenges have you faced in doing so?
  - d. Home detention? Electronic monitoring? fire camps or sending inmates elsewhere? Using it? Who are you contracting with to provide it? What offenders do you use it for?
  - e. How much do beds cost in jail? What about community supervision? Sending to fire camps/outsourcing to other jails?
  - f. Community Corrections Partnership—what was the initial plan for implementing Realignment recommended to the county board of supervisors—what was the plan? How closely have the actors followed the initial plan? how did you feel about it? What did you want? If you were to make the plan today, what would it be?

- (3) Medical Care
- a. What programs/treatment do you offer? What challenges have you faced providing medical care?
  - b. Does medical care enter into your decision to release an inmate? pretrial or sentenced?
  - c. How often do you transfer inmates because of medical conditions? Where do you send them?
  - d. Are inmates housed in different areas based on medical conditions?
  - e. California Penal Code §1174.4– what happens to pregnant women with history of substance abuse in county jail? Can they participate in the prison program for pregnant or parenting women with a history of substance abuse?
  - f. Do you contract with the CDCR for clinical services for inmates released with mental health problems?
- (4) Release valves
- a. Early Release programs
    1. How do you decide who to release early? how often do you do it? How do you do it (good time credits)? Have you released any higher risk inmates?
    2. How often are you held to No Early Release Programs (NERP) issued by judges? Do you communicate with judges regarding your early release practices? with law enforcement? DAs? victims?
    3. do you feel political pressure re early release programs? how does that inform your decision?
  - b. pretrial on bail (are they being sent out of the county?, can until July 1, 2015) 70% are pretrial– have you been releasing them on bail? How was your pretrial detention changed with Realignment? How do you decide who to release on bail? How has that decision changed in the last year? What are the consequences?
    1. Place them on electronic monitoring?
    2. What percentage don't show up to court?
    3. What does pretrial bail look like? generally supervised, intensive supervised, own recognizance...? How are your resources for this?
    4. How long do you hold them before you release them?
    5. For those pretrial who remain in jail, are they generally in there for more violent crimes or just can't afford to post bail?
    6. Are you coordinating with courts (DAs) to speed up lower-level cases to get people out of pretrial custody?
  - c. Sending inmates out of the county
    1. (out of state?, to other counties? to prison or state programs (like fire camp) why? why not?)
  - d. Home detention? using it? who are you contracting with to provide it? what offenders do you use it for?
  - e. Work release program?

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- f. What sort of offenders are you releasing? what sort do you think should remain in jail?
  - g. Other reforms you're implementing to alleviate the stress on the jail?
  - h. Any resources to prepare inmates for reentry?
  - i. Any early release options if you're not at full capacity?
  - j. Generally– where has your flexibility changed? What were your release valves before– what are they now? Do you feel unrestrained by Realignment? or are your hands tied?
- (5) Collaboration with other actors
- a. SF transfers low-level state prisoners to jail before discharge date to position them to succeed in PRCS→ same happen in your county?
  - b. What's your relationship with law enforcement? Are they trying to fill beds in the jail? Do you want to fill beds in the jail? What happens when you release someone early– how does law enforcement/DAs/judges respond?
  - c. How do you work with probation regarding split sentences?
  - d. Are you coordinating with courts (DAs) to speed up lower-level cases to get people out of pretrial custody?
  - e. Are you sharing information with sheriffs in other counties?
- (6) Threat of litigation
- a. How does that enter into your decisions?
- (7) Victims' Rights
- a. Do you notify the victim when early release?
  - b. Do you notify victims when you release inmates pretrial?
  - c. When you transfer an inmate to a medical facility?
- (8) Future Concerns
- a. How would sheriffs respond to threat of realigning MORE offenses? (Realignment missed some)– can you take more? Are you at the ideal level? Too many already?

*Victims*

- (1) How well were victim's rights enforced prior to Realignment?
- a. How often did victims want to invoke and utilize their rights?
    - 1. Were there particular types of cases in which victims were more likely to want to be involved or to have their rights considered? If so, what kinds?
    - 2. What rights were most commonly enforced?
      - a. Consideration before bail or release?
      - b. Notification during prosecution?
      - c. Notification of incarceration?
      - d. Restitution?
      - e. Right to be present at trial? At release proceedings?
      - f. Right to speak:
        - 1. When deciding charges?
        - 2. Presentence report?
        - 3. Parole/probation?



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2. Do victims receive notice of the offender's place of incarceration or pending release dates? Escapes?
  3. Are jails still notifying victims of parole hearings and release dates for the offenders who didn't make it to prison?
  - h. What other issues have arisen that are of concern to victims?
  - i. What steps could the state take to alleviate these issues, given that they must reduce the prison population to comply with the court order? What would make the process easier for victims?
    1. Are victims feeling less secure than they were before?
- (3) What is the impact of Realignment on your relationships with other parties in the system?

*District Attorneys*

- (1) General: Big Picture Questions
  - a. How has your office historically responded to resource constraints and increases?
  - b. Has Realignment changed what you feel your constituents/voters want from you? (i.e. what political pressures do you feel now?)
  - c. Are you collecting any data to track what works and doesn't to inform your future plans?
- (2) Specifics: Stages of a Case
  - a. Would crowding in county jails impact your decision on bail recommendations for indigent defendants?
  - b. Impact on charging decisions? (over-charging, charging "around" realigned crimes, not charging at all, not contesting dismissals)
  - c. Exercise: create four charging hypos and ask what the usual charge/sentence would be in their county for those different crimes
  - d. What is the impact on plea negotiations/ plea bargains?
  - e. What is the impact on pursuing strikes?
  - f. What is the impact on likelihood to suggest "split sentences?"
  - g. What is the impact on sentencing recommendations?
  - h. What is the impact on appeals? (In regard to both convictions and sentencing)
  - i. Have you devoted more resources to a particular unit? Focused more on particular types of crimes? (More oversight, etc.)
- (3) Interaction with other parties
  1. Who are your strongest allies in the system?
  - b. Do you think that other parties (judges and PDs, especially) have changed their behavior/strategies because of Realignment? How have you responded to those changes?
    1. Do you feel or anticipate pressure to lower charges and sentencing recommendations for judges out of concern for the budget?



*DRAFT FOR REVIEW AND COMMENTS*

2. Relationship with law enforcement; DA's trying to encourage fewer arrests, etc? Pressure from law enforcement to pursue different types of crimes?
- (4) Misc.
- a. Under what circumstances might you dismiss a charge or an enhancement if it raises the crime to a prison crime, on the assumption that you want to avoid overburdening the prisons?
  - b. Do you feel any kind of responsibility for the future success or failure of Realignment?
  - c. Are you working with sheriffs to speed up low-level cases to get inmates out of pretrial custody?
  - d. Do you still petition for restitution in as many cases as you did before?
  - e. Who is responsible for collecting that restitution, and do they have sufficient infrastructure/mechanisms to do so effectively?
  - f. Do you have a sense of whether victim satisfaction with the justice system has been affected by Realignment?

*Judges*

- (1) Before vs. after Realignment actions
- a. Actions in:
    1. Bail decisions: changed?
    2. sentencing and split sentencing (triads)
      - a. Where the maximum charge is a triple-non, might you raise the sentence (triad plus enhancement) over your pre-alignment choice because you think jail is less onerous than prison, so you're trading "quantity for quality?"
      - b. Conversely, might you lower the sentence out of concern for *jail* overcrowding
      - c. How often are you using or do you expect to use the new split sentence option? And how much faith (more or less now?) do you have in county supervision of parolees, PRSC and split-sentence convicts after Realignment?
    3. technical violations
  - b. Discretion
    1. What is your ability to drop charges?
    2. Under what circumstance might you dismiss a charge or enhancement?
    3. Applying or striking strike charge?
    4. knowledge of Realignment = pressure to exercise discretion?
  - c. Out-of-court actions/ Technicalities
    1. Will you be more or less inclined to encourage plea negotiations?
    2. How might Realignment affect your calendaring? (More trials?)
    3. Is there a change in your relationships with DA? Pressure on them or from them?

(2) Additional questions

- a. How has Realignment affected the extent to which you can consider victim safety when setting bail amounts?
- b. Has the increased jail population made that more difficult?
- c. Pressure from sheriff?
- d. How do you deal with these pressures?
- e. How often did you order restitution before Realignment?
- f. Who was responsible for collecting and dispersing those orders?
- g. How often did you receive complaints about issues getting that restitution?
- h. Has that frequency (victim restitution) changed at all after Realignment?
- i. Who is now responsible for implementing those orders?
- j. Have you noticed any increase in requests for assistance enforcing them since Realignment went into effect?
- k. What do you do with those complaints?
- l. To whom do you refer them for assistance?
- m. Have you noticed any other change in the level of victim participation?
- n. In 2009 California recorded 84,000 parole violations. How do you anticipate managing these parole revocation hearings in July? What factors will affect your decision-making process?
- o. How often do you issue NERP orders? What is your thinking re early release programs? Are sheriffs overusing them? Do you take them into account at sentencing?
- p. How have your bail policies changed? Do you consider jail conditions and potential overcrowding when setting bail? How closely do you work with sheriffs in setting bail and sentencing?

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