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Realignment: A View From the Trenches

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REALIGNMENT: A VIEW FROM THE TRENCHES

Hon. Philip H. Pennypacker & Alyssa Thompson*

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INTRODUCTION

On October 1, 2011, California's Criminal Justice Realignment Act became law. It was designed to solve many of the State of California's ills.¹ Of primary concern was cutting costs for the budget-strapped state prison system.² Additionally, the State needed to reduce its prison population because the Supreme Court of the United States found that California's prison overcrowding prevented adequate medical care for inmates and therefore violated the United States Constitution.³

The Realignment Act requires ongoing efforts to effectuate its intended purposes.⁴ The Realignment strategy turns primarily on the location of the incarceration of certain inmates.⁵ Realignment also transfers substantial post-conviction custodial and supervision responsibilities to the jurisdiction that sentenced the inmate, whereas in the past the State accepted all felon convicts into state prison.⁶ Hypothetically, Realignment thereby realizes adequate cost savings and compliance with the order to reduce population.⁷

Data presented in this article will demonstrate that Realignment has not yet been implemented to its desired effect.⁸ Data will also show that Realignment is being implemented inconsistently across the state.⁹ While the reason for these deficiencies is not specifically known, this article explores how the habits and thought process of court

1. BARRY KRISBERG & ELEANOR TAYLOR-NICHOLSON, REALIGNMENT: A BOLD NEW ERA IN CALIFORNIA CORRECTIONS 2 (Sept. 2011), available at http://www.law.berkeley.edu/files/REALIGNMENT_FINAL9.28.11.pdf.

2. *Id.* at 3.

3. *Brown v. Plata*, 131 S. Ct. 1910, 1933 (2011), *stay denied*, 134 S. Ct. 1 (2013).

4. The Legislature continued to enact provisions in "clean up" legislation since the original AB 109. *See, e.g.*, A.B. 117, 2011–2012 Sess. (2011).

5. CAL. PENAL CODE § 1170(h) (2011).

6. Fact Sheet, Cal. Dep't of Corr. & Rehab., 2011 Public Safety Realignment (Dec. 19, 2013), available at <http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf> [hereinafter Fact Sheet].

7. *Id.*

8. *See infra* Figure 1 and associated text.

9. *See infra* Figure 2 and associated text.

officers are roadblocks to successful programmatic execution.¹⁰ These challenges emanate both from a thirty-year period of cultural development regarding punishment and also from the role of parties in the criminal justice system.¹¹ Much of the information and insight presented in this article on the plea bargaining and sentencing processes was obtained by the judge-author through his experience as a judicial officer and previously as a criminal defense attorney. The Honorable Philip H. Pennypacker has presided over criminal cases for ten years on the bench of the Superior Court of California, County of Santa Clara. He was the supervising judge of the Criminal Division when the Realignment Act was passed. Before that, he practiced criminal law for thirty-one years.

The first section of this article will explain Realignment, its history, and its purposes, including cost-savings and population reduction. Data will show how the population of California's prisons has changed in the past few years, thanks to Realignment. Additionally, some important facets of Realignment will be introduced in this section, specifically post-release community supervision, split sentencing, and re-entry services.

The second section of this article will discuss plea bargaining, the vehicle through which most criminal convictions occur. The plea bargaining process has some fundamental features that work against Realignment's goals. Data will demonstrate the inconsistency with which split sentencing is implemented statewide, perhaps due to these inherent features.

The topic of the third section is evidence-based sentencing practices, which is a relatively new philosophy that was included by the Legislature as a tenet of Realignment. The practices are to be used by courts both in

10. See *infra* Parts III.A–III.B.

11. See *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 1004 (E.D. & N.D. Cal. 2009).

initial sentencings and in revocation hearings for any form post-conviction supervision (commonly thought of as parole and probation).¹² Transitioning to new principals may be difficult to both bench officers and attorneys involved in the system.¹³ Similar to the situation with plea bargaining, the pre-existing sentencing culture is somewhat incompatible with the use of evidence-based practices.¹⁴

In the fourth section, the authors review the above-mentioned challenges in the specific context of supervision revocation.

Finally, the paper offers suggestions and conclusions regarding how and whether the State can reach the goals established in conjunction with Realignment.

I. THE HISTORY BEHIND REALIGNMENT

The impetus for enacting the Criminal Justice Realignment Act of 2011 boils down to two concurrent problems facing the State, both the result of significant prison overcrowding. California's thirty-three in-state, adult prison facilities were designed to accommodate approximately 80,000 individuals.¹⁵ By 2006, the population in these thirty-three facilities had grown to 163,500 inmates, an astonishing 202% of design capacity.¹⁶

Economics and constitutional concerns required California to reduce its prison population. The massive prison overcrowding put significant strain on California's budget, forcing the Governor's Office and the Legislature to take action.¹⁷ Both branches recognized that with the reduction of prison population, a natural diminution of

12. CAL. PENAL CODE § 17.5(a)(4).

13. See *infra* Part III.A.

14. See *infra* Part III.C.

15. *Court-Ordered Targets for CDCR Inmate Population Reduction*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/realignment/3jp-chart.html> [hereinafter *Court-Ordered Targets*].

16. *Id.*

17. *Coleman*, 922 F. Supp. 2d at 912 (this opinion combines the separately brought actions of *Coleman v. Brown* and *Plata v. Brown*).

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economic support would follow. Simultaneously, pending federal cases against the State regarding its prison system had taken on gargantuan proportions.¹⁸ To resolve both issues at the same time, the California Legislature passed the Realignment Act.

A. The Federal Cases

Initially, two separate cases were filed in federal court in Sacramento challenging conditions in the California State Prison System.¹⁹ The first case, *Coleman v. Brown*, was filed in 1990 and challenged the treatment of prisoners with mental disorders.²⁰ A second case, *Plata v. Brown*, filed in 2001, concerned the availability of adequate medical care.²¹ Common between both cases were independent reviews pointing to the fact that overcrowding caused increased chances of infection and other health problems, and exacerbated issues of the mentally ill.²² Overcrowding strained the attention health care professionals could give to people in need.²³ When left to neglect, all conditions worsened.²⁴ Each case went along on its own for several years until the Chief Judge of the Ninth Circuit consolidated *Coleman* and *Plata* so that three-judge panel could commence a hearing and manage the oversight of orders to remediate the overcrowding.²⁵

In their briefs for the consolidated case, the plaintiffs argued that harmful overcrowding conditions violated the Constitution's prohibition against cruel and unusual punishment. The plaintiffs presented overwhelming evidence that overcrowding was causing avoidable medical and mental

18. *Id.* at 888.

19. *Id.*

20. *Id.* at 897–98.

21. *Id.* at 890–92 (describing the claim brought by plaintiffs in *Plata v. Brown*).

22. *See id.* at 887, 909.

23. *Id.* at 909.

24. *Id.* at 895.

25. *Coleman v. Brown*, 922 F. Supp. 2d 1004 (E.D. Cal. 2013).

health issues.²⁶ The judges agreed and found that the system was on the verge of collapse or implosion.²⁷ Because of the overcrowding, systematic institutional incompetence prevailed in the attention to both medical and mental health issues.²⁸ Solutions implemented while the cases were pending were inadequate due to the flood of prisoners coming into the system, and the miniscule flow of those leaving.²⁹ Those solutions included building new health facilities that directly addressed medical and mental health issues, as well as placing inmates out of state.³⁰

Ultimately, the three-judge panel ordered the California Department of Corrections and Rehabilitation (CDCR) to reduce the population of its thirty-three prison facilities to 110,000 inmates (still 137.5% of design capacity) by June 27, 2013.³¹ This level of reduction required the State to disgorge between 38,000 and 46,000 prisoners or face contempt. No direction was imposed on the state on how to meet this goal; rather, the court deferred to the State's best judgment.³²

The consolidated cases eventually found their way to the Supreme Court of the United States under the name *Brown v. Plata*, where Justice Anthony Kennedy, writing for the majority, took on two difficult issues.³³ The first was the reach of the Prison Litigation Reform Act of 1995.³⁴ This act was designed to truncate prison litigation stemming from any prison housing condition.³⁵ Under the act, findings regarding the systematic nature of the alleged violations are necessary, and rulings must meet the "clear and convincing" evidence

26. *Coleman*, 922 F. Supp. 2d at 950.

27. *Plata*, 131 S. Ct. at 1927–28.

28. *See Coleman*, 922 F. Supp. 2d at 963.

29. *Id.* at 914–16.

30. *Id.* at 903–04, 958–59.

31. *Id.* at 1003.

32. *Id.* at 1003–04.

33. *Plata*, 131 S. Ct. 1910.

34. 18 U.S.C. § 3626 (1997).

35. *See William C. Collins, Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 667 (2004).

standard.³⁶ Further, the Act requires that intermediate steps should be explored and tried before an order as drastic as reduction is entered. After receiving fourteen days of expert testimony, reports from receivers and monitors, and actual case histories, the Court held that the Eighth Amendment of the Constitution barring cruel and unusual punishment was an important ingredient in evaluating the claims under this Act.³⁷

The second issue was the order of the three-judge court, which Justice Kennedy affirmed with little difficulty since the lower court's record was replete with instances of failed medical attention, suicides, and squalid, unlivable conditions.³⁸ Justice Kennedy's opinion is stocked with examples, pictures, and anecdotal information proven at the trial court level.³⁹ Thus, the burden of fashioning a remedy fell back on the shoulders of the State.⁴⁰

B. The Economic Status of the State of California

While the federal cases were pending, California was on the verge of an economic meltdown, much like the rest of the country.⁴¹ Income to the State of California had fallen, services were in question, and the structure of the State's financial well-being was in doubt.⁴² Furthermore, even without an economic crisis, the costs of incarceration were and still are staggering.⁴³ Each prisoner costs the state of California, on average, \$45,006 per year.⁴⁴ Reducing the

36. *Plata*, 131 S. Ct. at 1929; 18 U.S.C. § 3626(a)(3)(E).

37. *Plata*, 131 S. Ct. at 1929.

38. *Id.* at 1949.

39. *Id.* at 1935, 1949–50.

40. *Id.* at 1947.

41. Taylor Chase-Wagniere, Note, *The Perfect Storm: Brown v. Plata and California's Financial Crisis*, 22 CAL. REV. L. & SOC. JUST. 345, 358–59 (2013).

42. *See id.*

43. *See id.* at 359.

44. CAL. DEPT OF CORR. & REHAB., CORRECTIONS: YEAR AT A GLANCE 10 (Fall 2011), available at http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf. This figure has been adjusted upward based on information from the Department of Finance. Joan Petersilia, *Voices from the*

population by 40,000 inmates (per the above-mentioned court order) thus saves the state upwards of \$1.8 billion annually. Additionally, the Legislature had attempted an intermediate solution of stemming the flow of new prisoners by way of offering subvention monies to the counties in SB 678, and the report generated by the Administrative Office of the Courts indicated that the costs of incarceration had gone up 300% since 1990-2012. Leaving aside the costs of education and other comparative services, the taxpayers have not been getting a value-added return on their tax dollar investment.⁴⁵

The fiscal condition of the State did not go unnoticed in the federal cases. Indeed, Justice Kennedy noted in his opinion:

“The court cannot ignore the political and fiscal reality behind this case. California’s Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is not reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall.”⁴⁶

California’s longstanding aggressive incarceration policy only exacerbated the budget problem. In the thirty years preceding these cases, the State of California built an unprecedented number of prisons to keep pace with a growing inmate population, spurred by Legislative enactments which required the placement of people in prison with no consideration for probation.⁴⁷ Moreover, various initiatives had been passed by the voters which increased prison

Field: How California Stakeholders View Criminal Justice Realignment 41 (Stanford Crim. Just. Ctr., Working Paper 2013), available at <http://www.law.stanford.edu/publications/voices-from-the-field-how-california-stakeholders-view-public-safety-realignment>.

45. See generally CHRISTIAN HENRICHSON & RUTH DELANY, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* (2012), available at http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf.

46. *Plata*, 131 S. Ct. at 1939.

47. Andrew M. Ducart, *Go Directly to Jail: How Misaligned Subsidies Undermine California’s Prisoner Realignment Goal and What is Possible to Maximize the Law’s Potential*, 44 MCGEORGE L. REV. 481, 486–87 (2013).

sentences, such at the “Three Strikes and You Are Out” law, which carried a minimum sentence on the Third Strike of twenty-five years to life, even for a new, non-violent, non-serious offense.⁴⁸

Furthermore, as noted in the *Plata* decision, once released, the parole agents were in a process of incarcerating a high number of parole violators, which in turn, cost the state money either to house the person in prison, or on separate, very expensive contracts with local county jails.⁴⁹ For example, contracts with both Sacramento and Alameda counties were in excess of \$15 million per year.⁵⁰ Prisoners returned on parole violations had very few services to provide a safety net to them, and because of their cultural, institutional, and criminal outlook, few had an incentive to become involved in any services offered by the California Department of Corrections and Rehabilitation.⁵¹

C. The Initial Experiment: S.B. 678

While the litigation in *Plata* was pending, the Legislature enacted Senate Bill (S.B.) 678 otherwise known as the California Corrections Performance Incentives Act of 2009.⁵² The goal of this legislation was to reduce prison population and save money in the State’s General Fund.⁵³ Without compromising public safety, incentives (in the form of economic assistance to the counties) were to be passed on to counties who had shown a reduction in the number of state prison commitments from a base year.⁵⁴ The specific target was to reduce the number of persons committed to prison for probation violations.⁵⁵ Funds secured from S.B. 678 went to

48. CAL. PENAL CODE §§ 667(b)–(i), 1170.12.

49. *Plata*, 131 S. Ct. at 1943.

50. Petersilia, *Voices from the Field*, *supra* note 44, at 95–96.

51. *Plata*, 131 S. Ct. at 1943, 1954.

52. California Corrections Performance Incentives Act of 2009, S.B. 678, 2009–2010 Leg., Reg. Sess. (Cal. 2009).

53. *Id.*

54. *Id.*

55. *Id.*

hiring more probation officers to more closely monitor clients, securing of risk/needs assessment instruments, contracting for cognitive behavior therapy programs, and training on the new methods to be utilized in the system.⁵⁶

County-level probation departments were to adopt and implement programs, derived from evidence-based practices, which assessed individuals in terms of “risks” and “needs” and placed them in programs accordingly with the end goal of reducing both prison commitments and recidivism.⁵⁷ Evidence-based practices, which will be explained more thoroughly in the third section of this article, are defined statutorily as “supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole or post-release supervision.”⁵⁸

In a report issued in April 2013, the Administrative Office of the Courts noted both successes and failures of this Act.⁵⁹ It noted that the first three-year cycle of the program saved the State approximately \$500,000,000.⁶⁰ Counties received approximately \$130,000,000 in re-investment money.⁶¹ The report did note, however, that not all of the probation departments had enacted evidence-based practices.⁶² Further, the amount of money needed to fully implement the process was lacking in certain areas.⁶³

In 2009, this was a bold experiment advanced by persons who had studied this area of corrections and public policy.⁶⁴

56. ADMIN. OFFICE OF THE COURTS, REPORT ON THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT OF 2009 16 (2013), available at http://www.bscc.ca.gov/download.php?f=/AOC_SB-678-April-2013.pdf [hereinafter REPORT].

57. *Id.*

58. CAL. PENAL CODE § 1229(d).

59. *See generally* REPORT, *supra* note 56.

60. *Id.* at 1.

61. *Id.*

62. *Id.* at 14.

63. *Id.* at 38.

64. Jessica Feinstein, *Reforming Adult Felony Probation to Ease Prison Overcrowding: An Overview of S.B. 678*, 14 CHAP. L. REV. 375, 396 (2011).

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The stark financial issues facing continued growth of a prison population were not lost on the drafters of this legislation.⁶⁵ The most shocking figure was that during the twenty-year period, from 1991 to the date of enactment, the original prison budget of \$9.8 billion and had grown at a rate of 300%.⁶⁶ Such drastic inflation of the budget required serious innovation on behalf of the legislators.⁶⁷

D. Stage Set for the Criminal Realignment Act

With the fiscal crisis and federal cases coming to a head, and a functional but inadequate preliminary solution in S.B. 678, the Legislature drafted the Criminal Realignment Act as a grand scheme to solve many problems and provide overall improvement the state system of incarceration.

II. WHAT IS REALIGNMENT?

The Criminal Justice Realignment Act of 2011 created a number of structural changes to the face of the criminal justice system, yet the act was passed with little formal input from criminal justice participants.⁶⁸ The Legislature provided adequate time for local agencies to prepare for the changes associated with Realignment.⁶⁹ Unfortunately, the Realignment Act has failed thus far to reduce prison population sufficiently to comply with the court order.⁷⁰

A. The Structure of Realignment

The Legislature expressed the overarching principals of Realignment via findings in California Penal Code sections

65. *Id.* at 397–98.

66. *Id.* at 397.

67. *Id.*

68. Steven Thomas Fazzi, *A Primer on the 2011 Correction Realignment: Why California Placed Felons under County Control*, 44 MCGEORGE L. REV. 423, 427–28 (2013); Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 184 (2013) (noting that the only parties excluded from meetings regarding the Act were prisoners and prisoner advocates).

69. Stats. 2011, c. 15.

70. See Fact Sheet, *supra* note 6, at 1.

17.5 and 3450. An overview of those findings is critical to understanding of the direction of the Act. In these findings, the Legislature recommitted itself to reducing recidivism and protecting public safety.⁷¹ The Legislature found that building more prisons has not guaranteed a safer state.⁷² Also, the Legislature highlighted “low-level” felony offenders for housing in the county of their conviction.⁷³ Furthermore, the Legislature agreed to “reinvest” in counties for their commitment to the program.⁷⁴ The Legislature likewise required the establishment of a Community Corrections Partnership in each county to oversee and structurally implement the goals of Realignment locally.⁷⁵ Finally, the Legislature required the use of evidence-based practices in furthering the reintegration of the convicted felons back into society.⁷⁶ Thus, the Realignment Act encompassed several important features which each deserve their own discussion.

1. *Accumulation of Legislation*

Firstly, after the Act was passed it was vetted by criminal justice practitioners and was found to have several drafting problems.⁷⁷ Those were addressed immediately with emergency legislation passed by the Legislature (AB 116, AB 117, ABX 117, and SB 1023).⁷⁸ This “clean-up” legislation made the Act more understandable and internally consistent.⁷⁹

71. CAL. PENAL CODE § 17.5(a)(1).

72. *Id.* § 17.5(a)(3).

73. *Id.* § 17.5(a)(5).

74. *Id.* § 17.5(a)(7).

75. *Id.* §§ 17.5(a)(6), 1230(b)(2).

76. *Id.* §§ 17.5(a)(5), 3450.

77. Petersilia, *Voices from the Field*, *supra* note 44, at 15.

78. *Id.* at 36.

79. For example, the original legislation omitted the method and procedure for the revocation of mandatory supervision. CAL. PENAL CODE § 1170(h)(5)(B). The “clean up” legislation remedied this, and was resolved ultimately in S.B. 1023. S.B. 1023, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

2. *Local Custody for Low-Level Offenders*

The Realignment Act ordered “low level” felony offenders to be housed locally by counties, as opposed to traditionally sending the offenders to state prison at the State’s expense.⁸⁰ Realignment excluded from its reach three groups of inmates: (1) persons with a present or prior conviction of a violent or serious offenses (Penal Code Sections 667.5(c) and 1192.7(c)); (2) persons subject to offenses—either presently or in the past—where registration under Penal Code Section 290 was required (commonly known as “sex offender registration”); and (3) persons who have committed aggravated white collar offenses under Penal Code Section 186.11.⁸¹ Under Realignment, these three groups of persons still serve their sentence in State prison.⁸²

However, approximately 500 felony offenses exist outside the three groups listed above, and have been deemed to be within the scope of “low-level” offenders.⁸³ Most of the low-level offenses have a potential sentence of sixteen months, two years, or three years in state prison.⁸⁴ There are some deviations to that scheme, but by and large, this is the group targeted by the Legislature.⁸⁵ These low-level offenders historically served their time in state prison, but Realignment transferred the burden of their care and incarceration back to the county where they were sentenced.⁸⁶ The burden is significant, and the State’s original projections placed an additional 25,469 inmates plus 29,549 post-release community supervisees on counties statewide.⁸⁷ Under

80. CAL. PENAL CODE § 17.5(a)(5).

81. *Id.* §§ 17.5(a)(5), 1170(h)(3).

82. *Id.* § 1170(h)(3).

83. J. RICHARD COUZENS, FELONY SENTENCING AFTER REALIGNMENT 94 (2013), available at http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf.

84. CAL. PENAL CODE § 1170(h)(1).

85. For example, a crime in furtherance of a street gang is not automatically a state prison offense. *Id.* § 182.5.

86. Fact Sheet, *supra* note 6, at 1.

87. *Funding and Projected Inmate Caseload*, CALREALIGNMENT.ORG (2012), <http://calrealignment.org/county-implementation.html>.

California law, there is a status enhancement carrying a one-year consecutive sentence for any person who had served a prior prison term. The Realignment Act modified this provision so that serving time for one of these 500 felony offenses in a local jail still counts as a “prison prior” for purposes of a one-year status enhancement under California Penal Code section 667.5(b)(1) on future convictions.⁸⁸ In short, the Realignment Act changed the location where the sentence is served, but not the ultimate stigma of the offense.

3. *Split Sentencing*

One of the innovative features of Realignment gives the sentencing court discretion in determining how the sentence is served.⁸⁹ Penal Code Sections 1170(h)(5)(A) and 1170(h)(5)(B) permit a low-level sentence to be served in one of two fashions. The first option is to commit the person to the county jail for the entire term of the sentence.⁹⁰ If that is done, Realignment provides no period of parole after the service of the term (contrary to the pre-Realignment system).⁹¹ The second option is to “split” or “blend” the sentence, so that part of the time is served in custody, and part of the time is a period of “mandatory supervision” which has conditions similar to a probation sentence and is administered by the local probation office.⁹²

Split sentencing is valuable because it allows probation to connect early with individuals in the system.⁹³ Instead of sitting in jail, people on supervision receive case management services to help them re-enter the community with a greater chance of success (maintaining public safety and reducing recidivism).⁹⁴

88. CAL. PENAL CODE § 667.5(d).

89. *Id.* § 1170(h)(5)(A)–(B).

90. *Id.* § 1170(h)(5)(A).

91. COUZENS, *supra* note 83, at 10.

92. CAL. PENAL CODE § 1170(h)(5)(B).

93. COUZENS, *supra* note 83, at 11.

94. Ducart, *supra* note 47, at 493.

Despite the benefits of split sentencing, the data does not demonstrate sufficient employment of this new sentencing opportunity. Of all the felony sentences pronounced since Realignment's inception, approximately fifty percent of them were served locally and therefore also eligible to be split between custody and mandatory supervision⁹⁵ (See *Figure 1, below*). However, of all of those felony sentences served locally, as of June 2012, only 26% of them (statewide) were split to include mandatory supervision.⁹⁶ Application of split sentencing is erratic at best. (See *Figure 2*). For example, eligible sentences in Stanislaus County are split 86% of the time⁹⁷ whereas eligible sentences in Los Angeles County⁹⁸ are split only 6% of the time.⁹⁹ Unfortunately, a slow rate of adoption appears to be the norm; of California's fifty-eight counties, only approximately sixteen maintain more than fifty individuals on mandatory supervision at any given time.¹⁰⁰

95. MIKE MALES, ONE YEAR INTO REALIGNMENT: PROGRESS STALLS, STRONGER INCENTIVES NEEDED 2 (2012), available at <http://www.cjca.org/news/5997>; *Split Sentencing Dashboard*, CHIEF PROB. OFFICERS OF CAL. (2012), <http://www.cpoc.org/assets/Realignment/splitsentencedashboard.swf> [hereinafter *Split Sentencing Dashboard*].

96. *Split Sentencing Dashboard*, *supra* note 95.

97. However, Stanislaus County sends more offenders per capita to prison than the state average and sends more nonviolent offenders to prison than most other counties; 60% of the inmates it sends to prison are nonviolent, suggesting that the remaining convicts left in their custody are lower-level offenders than in other counties. MALES, *supra* note 95; *Split Sentencing Dashboard*, *supra* note 95.

98. *Split Sentencing Dashboard*, *supra* note 95.

99. In fact, in June 2012, Los Angeles County had only eighteen people actively on Mandatory Supervision. *Id.*

100. *County Realignment Dashboard*, CHIEF PROB. OFFICERS OF CAL. (2013), http://www.cpoc.org/assets/Realignment/dashboard_county.swf.

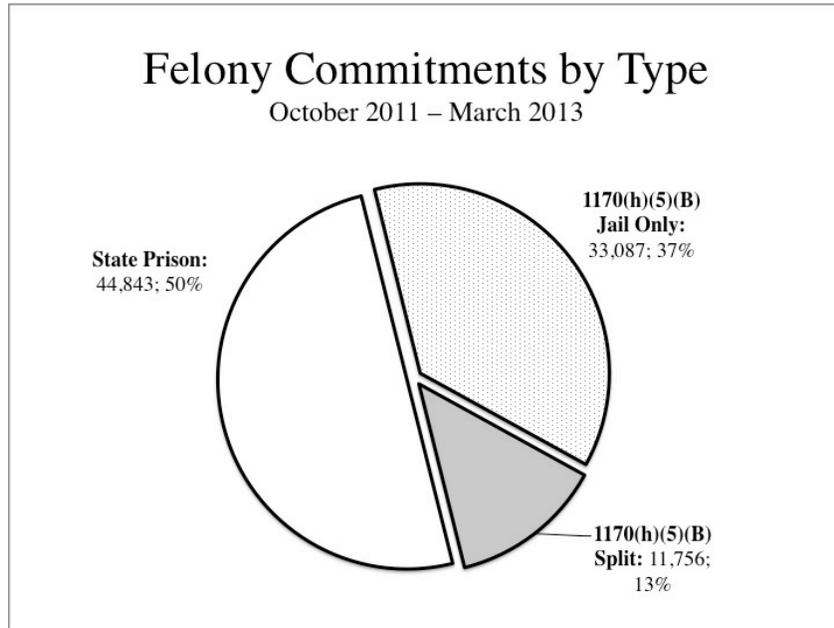


Figure 1¹⁰¹

101. MALES, *supra* note 95; *Realignment Dashboard*, CHIEF PROB. OFFICERS OF CAL. (2013), <http://www.cpoc.org/assets/Realignment/dashboard.swf> [hereinafter *Realignment Dashboard*].

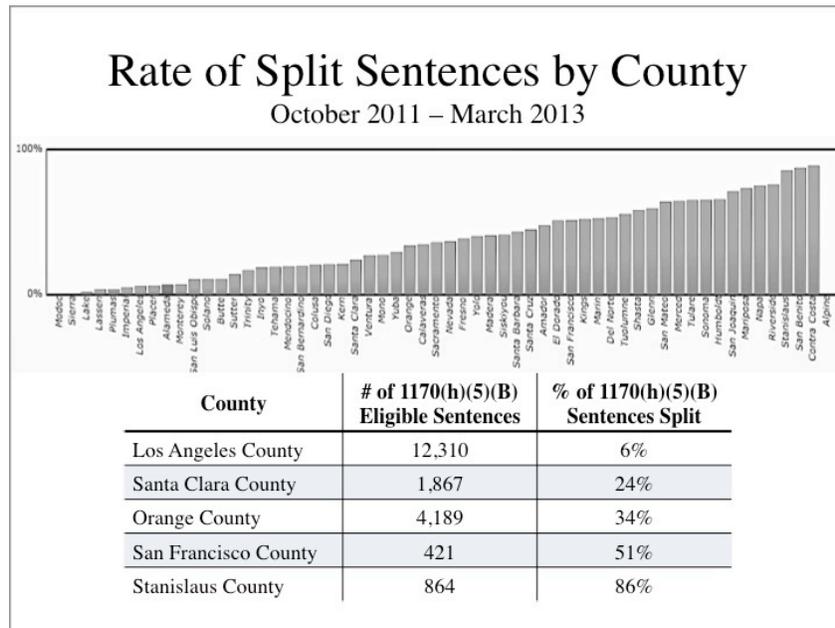


Figure 2¹⁰²

4. *Post-Release Community Supervision (PRCS) and Parole*

The Realignment Act also restructured the entire concept of parole. There were several significant changes. First, those serving time for low-level offenses, who were or would be released from a prison sentence on the date of the Act’s inception, were then and are now placed on post-release community supervision (PRCS) instead of parole.¹⁰³ PRCS and parole are similar in the way that they are both supervised, out-of-custody agreements with requirements and restrictions on the released person.¹⁰⁴ However, PRCS is administered through the local probation departments whereas parole is administered by the State by the Department of Parole Administration.¹⁰⁵ Any revocation of

102. *Split Sentencing Dashboard*, *supra* note 95.
 103. COUZENS, *supra* note 83, at 56.
 104. CAL. PENAL CODE § 3541.
 105. *Post-Release (County Level) Supervision*, CAL. DEP’T OF CORR. & REHAB. (2013), <http://www.cdcr.ca.gov/realignment/Post-Release-Community->

this status was to be handled by the Superior Courts.¹⁰⁶

Second, as a delayed aspect of Realignment, on July 1, 2013, the entire parole revocation process shifted from a State administrative agency to the local Superior Courts.¹⁰⁷ Several classes of individuals remained subject to parole supervision. These persons were ones who had been convicted of a violent or serious offense, a three-strike offense, a special category of sex offender and the Mentally Disordered Offenders.¹⁰⁸

Accordingly, the processes of revocation for paroled and PRCS individuals are new areas for local court systems. The resulting added caseload for counties is significant. In the first year following Realignment, the state released 36,329 individuals on PCRS.¹⁰⁹ Sixty-four percent have been able to complete PRCS successfully with no returns to custody, meaning that approximately one in three individuals on PRCS will violate their terms and need to be dealt with by counties.¹¹⁰ Additionally, approximately ten percent of individuals on PRCS so far have warrants for failure to appear.¹¹¹

The impact of the new caseloads on the superior courts, probation departments and jails is significant. Superior courts had to appoint hearing officers to adjudicate the revocations.¹¹² Calendars and staffing for the calendars had to be accomplished. Coordination with the county jails had to be maintained. Protocols for the delivery of the petitions had to be approved between the agencies. Probation had to hire, train, and establish new units designed to manage “high risk” offenders. Parole divisions within the state had to gear up to do hearings in a courtroom setting rather than by

Supervision.html.

106. CAL. PENAL CODE § 3450 *et seq.*

107. *Id.* § 3000.08.

108. *Id.*

109. *Realignment Dashboard*, *supra* note 101.

110. *Id.*

111. *Id.*

112. CAL. GOV. CODE § 71622.5.

administrative hearings. County jails had to experience and still experience an expansion of the capacities in the local jurisdictions.

5. *Evidence-Based Practices*

According to the mandate of the Realignment Act, evidence-based practices are essential to, and required in, the sentencing and supervision revocation processes.¹¹³ An entire subsequent section of this article is dedicated to explaining, in a summary fashion, evidence-based practices. However, to think about them simply, consider that judges, lawyers, and probation departments take into account many more facts and assumptions about a defendant during the sentencing process in order to decide the appropriate sentence (and also whether to subsequently revoke parole or PRCS). Evidence-based practices are a new approach to gathering and analyzing this information, backed by research, with the promise of better results so that more fitting outcomes can be guaranteed.¹¹⁴ Sentences produced through this method are more individualized, which is valuable because research has shown that the nature of the defendant makes a difference as to whether a particular sentence will help a convicted person reform and recover or actually make him worse.¹¹⁵

6. *Custody Credits*

Finally, the entire method of awarding custody credits, both at the county jail and state prison level was changed.¹¹⁶ Certain violent offenders are not subject to this process under California Penal Code Section 2933.1. Those offenders

113. CAL. PENAL CODE §§ 17.5(a)(5), 3450(b)(8).

114. Paul Gendreau et al., *A Meta-analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575, 575 (1996).

115. *Id.* at 575, 588, 591.

116. The California Penal Code awards actual custody day toward the ultimate sentence. CAL. PENAL CODE § 2900.5. The Legislature has tinkered with California Penal Code section 4019 for years. This section provides that the inmate “earns” “good time-work time” in excess of the actual days spent in custody.

receive only a fifteen percent reduction of their sentences for “good time-work time”.¹¹⁷ However, most offenders now receive credits that translate to the following: for every two days served, the offender receives an additional two days of credit.¹¹⁸ For example, if a low level offender has actually been in custody for ten days, he has earned twenty days of credit toward his sentence. This method of advancing credits was addressed in the *Plata* decision and was made a part of the Realignment Act in order to reduce overcrowding.¹¹⁹

B. Population Reduction Data

Realignment has been in motion for two years as of the writing of this article. While significant changes to the criminal justice system are visible, Realignment has not yet attained its goals.¹²⁰

Even before the Act became law, counties anticipatorily modified their sentencing practices and reduced the number of convicts they sent to prison.¹²¹ Then, in the first eight months after Realignment, the prison population decreased steadily.¹²² Between October 2011 and March 2012, felony commitments to state prison dropped 41% as all counties implemented the new practices.¹²³ Prison commitments dropped by 66% for females and 38% for males.¹²⁴ Offenders between the ages of 35 and 39 were 50% less likely to be sent

117. *Id.* § 2933.1.

118. *Id.* § 4019.

119. *Plata*, 131 S. Ct. at 1943.

120. California failed to sufficiently reduce its prison population by the June 2013 deadline. *See Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 949 (E.D. & N.D. Cal. 2009). Furthermore, it is too early to measure recidivism, which is generally analyzed in a three-year term.

121. Ducart, *supra* note 47, at 506–07.

122. *Monthly Population Report Archive*, CAL. DEP'T OF CORR. & REHAB. (2011 & 2012), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.html [hereinafter *Monthly Population Reports*].

123. MIKE MALES, UPDATE: EIGHT MONTHS INTO REALIGNMENT: DRAMATIC REDUCTIONS IN CALIFORNIA PRISONERS 1 (2012), http://www.cdcr.ca.gov/Reports/docs/External-Reports/Realignment_update_June_19_2012.pdf [hereinafter MALES, UPDATE].

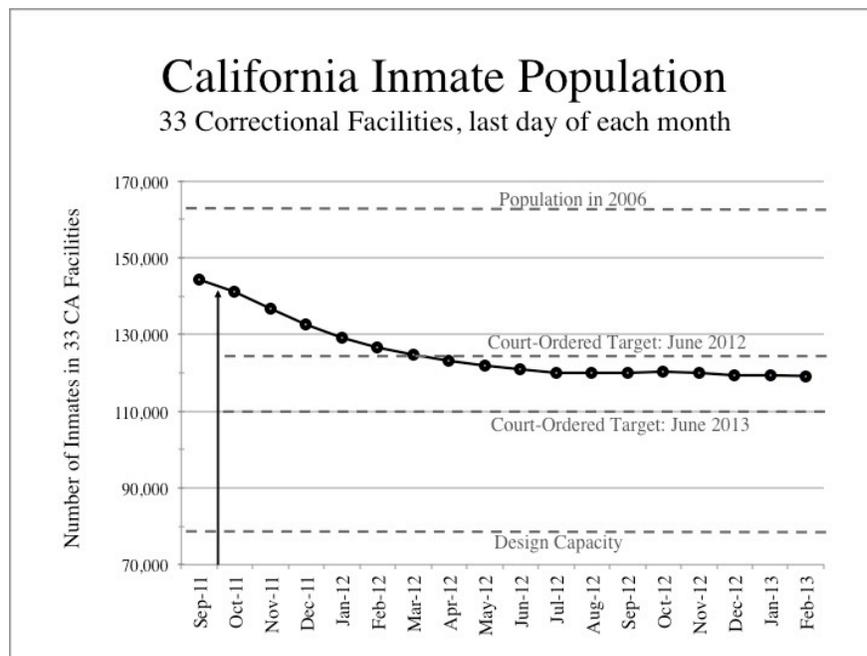
124. *Id.* at 2.

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to prison.¹²⁵ Prison commitments for property and drug crimes dropped 60% and 70% respectively.¹²⁶ Six months after Realignment began, seven major California counties had reduced their prison commitments by 50% or more.¹²⁷



*Figure 3*¹²⁸

As of July 31, 2013, the population in the thirty-three state prison facilities of concern was 119,624.¹²⁹ See *Figure 3*. Despite a promising start, the state failed to comply with the June 2013 population target of 110,000.¹³⁰ The problem began with an unexplainable population plateau in July 2012.¹³¹ New felon admissions increased at that point

125. *Id.* at 4.

126. *Id.*

127. Counties: Santa Barbara, Santa Clara, Kings, Tulare, San Mateo, Ventura, and San Bernardino. *Id.* at 5–6.

128. *Monthly Population Reports*, *supra* note 122.

129. *Court-Ordered Targets*, *supra* note 15.

130. *Id.*

131. *Id.*

roughly 3%.¹³² Sentences for simple possession of drugs (other than marijuana), motor vehicle theft, and burglary were suddenly and mysteriously more frequent, and primarily responsible for the increase.¹³³ The increase was concentrated in three large counties: Sacramento, San Bernardino, and Kings, which were responsible for half of the growth.¹³⁴ As of yet, there is no known reason for the increase. However, the net result is that after nearly two years of the Realignment Act, prison commitments have fallen only 36%.¹³⁵

III. APPLICATION OF EVIDENCE-BASED PRACTICES

A primary challenge in the implementation of the Realignment Act is the requirement that courts and probation departments utilize evidence-based practices in the sentencing of low-level offenders.¹³⁶ The challenge derives in large part from the fact that evidence-based practices are a new method of addressing sentencing, the application of which requires some training and re-learning by the professionals involved.¹³⁷

A. *What are Evidence-Based Practices?*

When a defendant is sentenced, and when a decision needs to be made on whether to revoke the defendant's supervision, the courts and probation departments use what they know about the defendant to arrive at what seems to be the most appropriate outcome.¹³⁸ Until recently, the traditional analysis used to make these decisions was

132. MALES, UPDATE, *supra* note 123, at 3–5.

133. *Id.* at 4.

134. *Id.*

135. *Id.* at 2.

136. Ducart, *supra* note 47, at 506; Roger K. Warren, *Evidence-based Sentencing: The Application of Principles of Evidence-based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 628 (2009).

137. Ducart, *supra* note 47, at 509–12 (discussing the need to identify the appropriate factors for a given type of offender and the accurate weight assigned to said factor for a particular community).

138. Feinstein, *supra* note 64, at 402; Warren, *supra* note 136, at 627.

untested and unproven.¹³⁹

Evidence-based practices are the result of research demonstrating that the best methods of analysis for determining the most fitting outcome for a particular convict consider both the nature and needs of the specific defendant, and the requirement for public safety.¹⁴⁰ The result is a more individualized sentence than what occurred previously, and one in which the defendant has a better chance of successful treatment, if amenable.¹⁴¹

Evidence-based practices give structure to sentencing and revocation decisions by assessing defendants in three primary areas: (1) risk of reoffending; (2) prognostic risks, which are risks that predict a poorer outcome for a specific defendant in a standard rehabilitation program; and (3) criminogenic needs, which refer to clinical disorders and functional impairments of the defendant that should be addressed to reduce the risk of further offending.¹⁴² Once these factors are assessed, most offenders can be categorized into one of four groups: High Risk / High Needs, High Risk / Low Needs, Low Risk / High Needs, or Low Risk / Low Needs.¹⁴³ Each category has specific modalities of treatments to be applied, some of which are completely counter-intuitive to the analysis previously employed by courts.¹⁴⁴ For example, a Low Risk / Low Needs offender may be a casual abuser of substances, not an addict, and have no prior record. Under the pre-existing system, this person would be ordered to complete an intense drug treatment program, simply

139. See Ducart, *supra* note 47, at 509–12.

140. Warren, *supra* note 136, at 598, 622–23.

141. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 270–71 (2008).

142. Douglas Marlowe, *Evidence Based Analysis for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs*, 1 CHAPMAN J. CRIM. JUST. 167, 179–81 (2009).

143. *Id.* at 184–200.

144. *Id.* at 199. Research shows that low risk, low need offenders may respond most effectively to the threat of severe punishment because they are not familiar with punishment and will work to prevent this outcome. *Id.*

because that is what the courts were used to doing, had done in the past, and—without further education—would continue to do in the future.¹⁴⁵ According to evidence-based practices she would not do well in a residential treatment program because she would be exposed to heavy users or addicts, who tend to have influence over casual users.¹⁴⁶

Much of the research behind evidence-based practices stems from studies done on persons involved with substance abuse.¹⁴⁷ Over the past two decades, drug courts, diversion programs, and other methods of addressing the specific needs of drug abusers have been established nationwide, providing abundant relevant data from which helpful conclusions were drawn.¹⁴⁸ Since at least 80% of incarcerated persons have substance abuse issues that generally go unaddressed, data regarding the apposite resources for drug abusers is an appropriate baseline for research on criminal sentencing in general.¹⁴⁹

B. Why are Evidence-Based Practices Critical to Realignment?

A profound and meaningful amount of research has gone into studying this methodology.¹⁵⁰ What comes through clearly from the scientific research is that when the assessment is correctly done, and the programmatic steps are taken, both public safety and reduced recidivism are realized.¹⁵¹ Many offenders sentenced under traditional

145. This is based on the judge-author's professional experience.

146. Marlowe, *supra* note 142, at 198–99.

147. *Id.* at 198–200.

148. See generally Richard S. Gebelein, *Delaware Leads the Nation: Rehabilitation in a Law and Order Society; A System Responds to Punitive Rhetoric*, 7 DEL. L. REV. 1, 1–22 (2004) (discussing the rise in drug offender focused programs despite rhetoric suggesting no support for rehabilitation). See also Marlowe, *supra* note 142, at 170–76.

149. Marlowe, *supra* note 142, at 167, 168 n.4.

150. For example, visit the California Courts' website, which features a variety of studies and practice guides on the topic of evidence-based practices as applied to the criminal justice system. *Evidence-Based Practice*, CAL. COURTS, <http://www.courts.ca.gov/5285.htm>.

151. PEW CTR. ON THE STATES, RISK/NEEDS ASSESSMENT 101: SCIENCE REVEALS NEW TOOLS TO MANAGE OFFENDERS 4 (Sept. 2011), available at

models are caught in the revolving door of the criminal justice system. Evidence-based practices seek to discover the source of the offender's behavior, and through cognitive behavior treatment, address the issue so that the offender has less of a probability to return to the system.¹⁵² While safety and reduction of recidivism are at the heart of the Realignment Act, perhaps an even more appealing benefit is that the overall financial costs to the entire criminal justice system are reduced because resources can now be more strategically applied.

However, for evidence-base practices to be successful, a commitment is required from all partners in the criminal justice system (including police departments, probation departments, social services, judges, and lawyers).¹⁵³ Furthermore, the evidence-based thought process must start at arrest and be maintained through the completion of post-incarceration release.¹⁵⁴ The old, cookie-cutter method of sentencing must be replaced by individualized sentencing.

C. Intricacies and Challenges of Implementing Evidence-Based Practices

Several aspects of the evidence-based practices method prove a difficult adjustment for persons well settled in the old ways.¹⁵⁵ First, the language used in the entire assessment process is foreign and, in some cases, counter-intuitive to many participants in the criminal justice system, including judges in particular. For example, a person with numerous substance abuse arrests and mental health issues may be assessed into the "High Risk" category.¹⁵⁶ A judicial officer would not instinctively place a "High Risk" offender on

http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_Risk_Assessment_brief.pdf.

152. *Id.* at 3.

153. *Id.* at 5.

154. *Id.*

155. *Id.*

156. Marlowe, *supra* note 142, at 184.

probation or mandatory supervision because of the negative and serious public safety connotation of the label. Yet, the evidence-based practices demonstrate such supervision may be the best solution.¹⁵⁷ Therefore, the process of educating and training judicial officers on the language used by the system is essential.

Second, judicial reluctance to enter into this method of sentencing is apparent. As recognized by Judge Michael Marcus of Oregon, many judges believe that defendants coming into their courts should be punished—“just deserts”¹⁵⁸ meted out and court processes closed—and what follows later is between the defendant and the post-conviction supervision authority.¹⁵⁹ Such separation is now proven to be disadvantageous.¹⁶⁰ Instead, research shows that many offenders require some form of judicial intervention as a part of the rehabilitation program.¹⁶¹ Periodic reviews, status reports and instant incarceration are needed in some of the quadrants.¹⁶² Accordingly, the resistance to continued judicial involvement must be overcome.

Third, there is institutional bias against the application of evidence-based practices.¹⁶³ This bias is not localized to any one part of the criminal justice system, and extends to judges and attorneys. It is easy to see evidence-based practices as a scheme that coddles criminals, and prosecutors, by and large, have little, if any, interest in a system that is known for such a thing.¹⁶⁴ Prosecutors may be more concerned about evenly outcomes among similarly charged

157. *Id.* at 185.

158. Judge Michael Marcus, *Conversations on Evidence-Based Sentencing*, 1 CHAPMAN J. CRIM. JUST. 61, 95–98 (2009). “Just deserts” describes a reason for increasing a sentence simply because of the need to do so and without cognizance of the individualized needs of a defendant, the cost of incarceration, and lack of reality as to what will happen thereafter.

159. *Id.*

160. *See id.*

161. *Id.*

162. *Id.* at 184.

163. Petersilia, *Voices from the Field*, *supra* note 44, at 9.

164. *Id.* at 131–32.

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defendants, than trying to individualize outcomes, which would be more consistent with evidence-based practices.¹⁶⁵ This type of “cookie cutter” plea bargaining runs counter to the need to assess and implement a rehabilitative program consistent with the assessment. Defense attorneys resist the system because its cornerstone is garnering as much reliable and validated information from the defendant as possible at an early stage of the proceedings.¹⁶⁶ Such disclosure of personal information is counter to the adversarial nature of the work done by defense attorneys; very few would ever allow clients to freely, openly, and truthfully discuss details of drug abuse, social circles, and family situations.¹⁶⁷ This type of information is critical in the assessment process but normally would be stymied, absent a protective order.¹⁶⁸

Finally, the duration of sentences typical of the low-level offenders targeted by Realignment is not entirely compatible with what evidence-based practices proscribe for successful treatment. For example, consider the following hypothetical: a defendant is charged with possession of methamphetamine under section 11377a of the California Health and Safety Code, and has three prison priors. The greatest of three possible sentence durations for this offense is three years, the others being sixteen months and two years.¹⁶⁹ The prison priors, under section 667.5(b) of the California Penal Code add one year each.¹⁷⁰ The maximum total sentence therefore is six years in county jail.¹⁷¹ If the court engaged in settlement discussions, a typical offer (before Realignment) would be either sixteen months or two years, with an

165. *Id.* at 128, 139.

166. This is based on the judge-author’s professional experience.

167. This is based on the judge-author’s professional experience.

168. This is based on the judge-author’s professional experience.

169. CAL. HEALTH & SAFETY CODE § 11377(a); CAL. PENAL CODE § 1170(h).

170. CAL. PENAL CODE § 667.5(b).

171. The greatest possible sentence for the possession of methamphetamine under these circumstances is three years, plus a one-year enhancement each for the three prior prison sentences, equaling a total of six years.

assumed three years of parole.¹⁷² Since Realignment, this offender would be released after the sixteen months or two years with no tailing supervision whatsoever.¹⁷³ The court could have split the sentence—granting eight months in custody and eight months on mandatory supervision—but the eight-month period of supervision falls short of the minimum of two years that Dr. Marlowe suggests is needed to address a defendant’s addiction.¹⁷⁴ If the hypothetical was modified to have the court impose one year in custody and two on mandatory supervision, the defense attorney would be demanding that the sixteen months of straight time go into effect and would likely not suggest to the client to take the offer.¹⁷⁵ This case would therefore, likely be at an impasse. If the court was dedicated to “moving cases”¹⁷⁶, the court might accede to the defense request (a shorter term, but less beneficial to the defendant in the long run) in order to resolve the matter.¹⁷⁷

The success of the Realignment Act is entwined with the effective use of evidence-based practices.¹⁷⁸ For the process of evidence-based practices to take full effect, the justice partners must consistently apply the process. The objectives of Realignment will not be achieved if any link of the chain is broken or non-existent. This failure will lead to an increase in crime and a continual spinning of the revolving door of the criminal justice system. Realignment only stands a chance if all branches of the criminal justice system are educated in its objectives and supporting methodologies. The reality that the

172. This is based on the judge-author’s professional experience.

173. COUZENS, *supra* note 83, at 10.

174. Douglas Marlowe, Presentation at the Cow County Institute: Targeting Dispositions by Risks and Need (Jun. 20, 2012).

175. This is based on the judge-author’s professional experience.

176. *People v. Clancey*, 299 P.3d 131, 136 (2013).

177. *Id.*

178. See J. RICHARD COUZENS, EVIDENCE BASED PRACTICES: REDUCING RECIDIVISM TO INCREASE PUBLIC SAFETY: A COOPERATIVE EFFORT BY COURTS AND PROBATION 3 (2011), available at <http://www.courts.ca.gov/documents/EVIDENCE-BASED-PRACTICES-Summary-6-27-11.pdf>.

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State of California is no longer involved in low-level offender incarceration is what may force local jurisdictions and agencies to comply. Since the defendants are local, community jurisdictions must adapt to the reality which has been created for them.

IV. PLEA BARGAINING IN THE REALIGNMENT ERA

Plea bargaining is an inextricable part of the criminal justice system. The term “plea bargaining” describes a method of promoting settlement of cases without going through a trial.¹⁷⁹ “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.”¹⁸⁰ As those involved in the system realize, there are bargains that determine to which counts a defendant is admitting culpability, and bargains which control the sentence to be imposed. Plea bargains often lead the parties and the courts into a blurred area between the duties of the executive branch (to charge the defendant) and judiciary (to sentence the defendant).¹⁸¹ The central thesis of this section of the article is that plea bargaining, as the courts and attorneys have come to practice it, must be changed when the case involves a low-level offender in order to comply with evidence based practices. Traditional plea bargaining rests almost exclusively on the shoulders of the attorneys, the court, the defendant(s), and the victims.¹⁸² To implement the will of the Legislature in the Realignment Act, evidence based practices must be included at the plea bargaining stage of the proceedings.

179. California was one of the first states to judicially recognize the utility of plea bargaining, and has developed case law in support of plea bargaining, with limitations. *See People v. West*, 3 Cal. 3d 595, 604 (1970).

180. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

181. This is based on the judge-author’s professional experience.

182. *See Frye*, 132 S. Ct. at 1407.

Plea bargaining is essential to the survival of the criminal justice system.¹⁸³ Recently, scrutiny from the Supreme Court of the United States has generated more attention to the details of the plea bargaining system.¹⁸⁴ For example, the Court, in two recent cases explored the competence of counsel required at the time of the plea bargaining process.¹⁸⁵ In the cases of *Missouri v. Frye* and *Lafler v. Cooper*, the majority focused on the necessity of plea bargaining and having counsel competently performing the duties of a dedicated attorney actively counseling the accused on the correct law and the consequences of the actions involved in the process.¹⁸⁶ The Court in *Frye*, pointed out that ninety-seven percent of the federal cases filed and ninety-four percent of all state court cases filed settle by way of pleas of guilty or no contest.¹⁸⁷

In California, the statistics derived from a recent study by John Greacen and Fredrick Miller of ten representative counties, point to a similar statistic.¹⁸⁸ The study also shows that the decisions to enter a plea of guilty or no contest is made quite early in the proceedings on a felony, and often before a witness is even called into the courtroom.¹⁸⁹ According to the study, felony cases settled at or before the preliminary examination at a rate of over eighty percent.¹⁹⁰

The courts in California are furthermore interested in and have scrutinized the plea bargaining process in terms of

183. *See id.*

184. *See generally* *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012); *Frye*, 132 S. Ct. at 1408.

185. *Lafler*, 132 S. Ct. at 1391 (holding that defendant suffered prejudice from counsel's incompetent advice to reject a plea bargain); *Frye*, 132 S. Ct. at 1408 (holding that defense counsel's failure to communicate the prosecutor's written plea offer to defendant satisfies requirement to show ineffective assistance).

186. *Lafler*, 132 S. Ct. at 1397; *Frye*, 132 S. Ct. at 1407–08.

187. *Frye*, 132 S. Ct. at 1407.

188. JOHN GREACEN & FREDERICK MILLER, *TRIAL CERTAINTY STUDY IN FELONY CASES*, ADMINISTRATIVE OFFICE OF THE COURTS (2012). Available by mail through the Administrative Office of the Courts.

189. *Id.* at 20.

190. *Id.*

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the role a judicial officer can play.¹⁹¹ In the case of *People v. Clancey*,¹⁹² the Supreme Court explored the limits of judicial intervention into the plea bargaining process. In that case, the trial judge had given an “offer” or “indicated sentence” over the objection of the district attorney that included the dismissing of a strike prior, and a “top-bottom” of five years.¹⁹³ Moreover, the judge took into account the fact that the defendant was entering an early disposition and this was a discounted amount of time.¹⁹⁴ Finally, the judge promised that if he could not abide by the “indicated” sentence at the time of sentencing, the defendant would have the right to withdraw his plea.¹⁹⁵

There are several limits on what a judicial officer can do in terms of resolution of cases.¹⁹⁶ First, the trial courts must be restrained in the initial discussions, and allow counsel to resolve the matter on their own.¹⁹⁷ Second, the court must have and seek available information so that the judge will be making statements grounded in solid reasons.¹⁹⁸ Third, courts can “indicate” a sentence that must be consistent with what the court would give the defendant if the case had gone to trial.¹⁹⁹ Fourth, the court cannot make any inducement for the defendant to accept the indicated sentence.²⁰⁰ Finally, the court cannot bargain with the defendant and extend the opportunity to withdraw the plea if the court cannot accept the disposition.²⁰¹

191. *See generally* *People v. Clancey*, 299 P.3d 131 (2012).

192. *Id.*

193. *Id.* at 134.

194. *Id.*

195. *Id.* at 136.

196. *See generally id.*; FED. R. CRIM. P. 11.

197. The Federal Rules of Criminal Procedure forbids judges from engaging in plea bargaining discussions. FED. R. CRIM. P. 11(c).

198. *Clancey*, 299 P.3d at 138. *See also* FED. R. CRIM. P. 11 advisory committee’s note.

199. *Clancey*, 299 P.3d at 138–39.

200. *Id.*

201. *Id.*

As seen in *Clancey*, the court and the attorneys generally become involved in a dialogue.²⁰² That dialogue usually takes the form of the court asking if any offers have been made, and, if so, what they are.²⁰³ In many instances that will be the substance of the discussion because the offer is acceptable and a disposition is taken.²⁰⁴ In more complex cases, discussions can go on to include counter-offers by the defense, interventions by the court to keep the discussions on track, and may even take the form of the discussions involved in *Clancey*.²⁰⁵ On a felony case, the central points of contention are usually the questions of: whether the person will be going to prison; if so, for what amount of time; or, if not, for how many months (days) in county jail.²⁰⁶ If a “deal” is struck, it is frequently memorialized in the record as a “top-bottom” offer of so many years in prison or months in county jail.²⁰⁷ The entire process can go forward between the attorneys, and then, if the process is close to failing, the court can intervene and give an indicated sentence to a defendant who pleads guilty or no contest to all allegations.²⁰⁸ This process is called “pleading to the sheet” and the result is that the court will impose the “indicated” sentence. The reason is that the executive branch has control of charging. The judiciary has control of the sentencing.²⁰⁹ The court should not become involved in dismissing charges that it has not brought.²¹⁰ With these broad features noted, the plea bargaining system, as practiced, does not support implementation of the Realignment Act in that ignores evidence based practices.

202. *Id.* at 135.

203. Based on the judge-author’s professional experience.

204. Based on the judge-author’s professional experience.

205. *Clancey*, 299 P.3d 131 at 135–36 and based on the judge-author’s professional experience.

206. Based on the judge-author’s professional experience.

207. Based on the judge-author’s professional experience.

208. *See generally Clancey*, 299 P.3d 131.

209. *People v. Tenorio*, 473 P.2d 993 (1970).

210. *Id.* at 94

First, attorneys and judges have had difficulty in shifting their perceptions of what the punishment is for a person subject to the Realignment Act. By that, it is meant that under the pre-Realignment law, if a person entered a plea of guilty or no contest to an offense that was punishable by state prison, that period of time was done in prison and followed by parole for three years.²¹¹ Terms under the old law were understandable, and there was a measure of control over the defendant on release.²¹² The parole term was never calculated into the final equation at the plea bargaining session because it was going to be another agency's issue.²¹³ Now, the terms under Penal Code Section 1170(h) can be a straight county jail sentence, or split, or blended.²¹⁴ Most judicial officers and prosecutors think only in terms of the custody time.²¹⁵ They are used to offering and processing cases on straight numbers with little regard to the community supervision aspects of the ultimate sentence.²¹⁶ For example, on a violation of burglary in the second degree, where the defendant had been to prison two times, the triad on the principal charge is 16 months, two years, or three years in state prison.²¹⁷ The prison prior adds one year each.²¹⁸ Therefore, the maximum sentence is five years (three for the principal, plus one year each for two prison priors).²¹⁹ Prosecutors and judicial officers are used to dealing with an offer, at an early stage of the proceedings, of

211. Petersilia, *Voices From the Field*, *supra* note 44, at 39; ROBERT WEISBERG & LISA T. QUAN, ASSESSING JUDICIAL SENTENCING PREFERENCES AFTER PUBLIC SAFETY REALIGNMENT: A SURVEY OF CALIFORNIA JUDGES 7 (2013), available at <http://www.law.stanford.edu/organizations/programs-and-centers/stanford-criminal-justice-center-sjc/california-realignment>.

212. Petersilia, *Voices from the Field*, *supra* note 44, at 30.

213. This is based on the judge-author's professional experience.

214. Petersilia, *Voices from the Field*, *supra* note 44, at 215.

215. *Id.* at 140–41, 157.

216. *Id.*

217. CAL. PENAL CODE § 461(b).

218. *Id.* § 667.5(b)(1).

219. *Id.* §§ 461(b), 667(b)(1).

16 months or two years.²²⁰ The problem under Realignment is that prosecutors and judges are still making the same type of offers without functionally realizing that there is no parole period.²²¹ The sentence will be done locally in county jail at one-half time, but there is no monitoring done after that term is completed.²²² This phenomena is illustrated by the charts which show a failure to utilize the “split sentence.”²²³

Moreover, the defense, in a situation where there was a straight term of county jail under Penal Code section 1170(h)(5)(A), has no incentive to take an offer that includes a split or blended sentence.²²⁴ An offer which contains no mandatory supervision under the split sentence modality is much more agreeable than one which does because there is no supervision, no probation officer to report, and no potential violation of the supervision.²²⁵ Further, the time that the defendant would do in county jail is done on a half-time basis due to the increase in Penal Code Section 4019.²²⁶

In short, neither side has an incentive or reason to look closely at the mandatory supervision model. The failure to do so is a direct result of the adherence to the older method of plea bargaining.

Second, a problem with this method of plea bargaining is that it completely eviscerates the sound procedure of evidence-based practices. As stated before, this type of process would include an assessment of the defendant. This assessment would be available to both sides. This information would be used to assess the risk and needs of the defendant. A suggested custody component would be usually recommended, and most importantly, the “treatment” component could be suggested well before the actual plea

220. This is based on the judge-author’s professional experience.

221. Petersilia, *Voices from the Field*, *supra* note 44, at 158–59.

222. *Id.* at 155.

223. *See supra* Figure 2.

224. Petersilia, *Voices from the Field*, *supra* note 44, at 140–41.

225. *Id.*

226. *Id.*; CAL. PENAL CODE § 4019.

discussions were commenced. Without this vital component being utilized at the beginning of the process, challenges to Realignment will be present.

There are many obstacles present that potentially impede progress.²²⁷ There are also many positive influences that may overcome the impediments. In some jurisdictions, probation officers regularly sit in on plea discussions.²²⁸ There are also concerns that certain Fifth Amendment rights could be compromised, though these can be resolved by certain protective orders which shield the defendant's comments.²²⁹

Finally, the looming shadow of jail overcrowding may cast a pall over the entire process of plea bargaining in the Realignment age.²³⁰ Currently, a number of county jails are subject to "jail caps" from federal courts.²³¹ These caps, as well as self-imposed caps in the more rural counties, have caused a furor with the Realignment process because local officials, rightly or wrongly, have blamed the state for dumping prisoners back on to the county bed space and coffers without adequate funding or resources.²³² The consequence of the "caps" with no funding is that county jails, in some jurisdictions are releasing sentenced prisoners without any supervision.²³³ This throwing up of their hands causes the entire Realignment Act to be viewed with disrespect.

This feature, in turn, may cause a wave of cynicism regarding plea bargaining in this new era. The reason is that many prosecutors and judicial officers see the early release of

227. See generally Petersilia, *Voices from the Fields*, *supra* note 44.

228. For example, Santa Clara County has had probation officers regularly sit in on early disposition calendars for approximately 25 years.

229. The City and County of San Francisco Probation Department collaboratively developed a protective order for this type of in depth interview so that the results would not be admissible in court prior to sentencing. District Attorney, Public Defender and Private counsel have signed off on the protocol implementing this process.

230. Petersilia, *Voices from the Field*, *supra* note 44, at 92–95, 117–18.

231. *Id.* at 134

232. *Id.* at 4.

233. *Id.* at 9.

sentenced prisoners as a violation of their powers, causing the criminal justice system to be held in disrepute.²³⁴ Therefore, because there is no state level option for many convicted felons, and the custody time must be served in a local facility, and that facility is full, others are released to make room for the newly committed or the newly committed are taken in and released within days.²³⁵

V. CHALLENGES OF THE REVOCATION PROCESS

The revocations of post-release community supervision (PRCS) and mandatory supervision are often an overlooked area of the transition into Realignment. Courts have never previously dealt with the issues presented by these revocations because they are new creatures of the Realignment Act. The only comparative experience county courts have is limited to probation violation matters. With the advent of two new methods of community supervision, new challenges emerge.

Realignment requires the use of evidence-based practices for the revocation of both PRCS and mandatory supervision.²³⁶ When there is a technical violation of the release, escalating sanctions are to be utilized, such as a residential program for a substance abuser who has tested dirty, or “flash incarceration” (brief incarceration) if there was a failure to report to the supervision office.²³⁷ When the person being supervised commits a new criminal offense, there is a separate track for the court and probation department to follow and revocation may occur once the errant behavior is documented, in a factual manner, in a petition for revocation.²³⁸ Under the Realignment Act, once a violation is proven in court, the sentencing court has three

234. *Id.* at 131, 158.

235. *Id.* at 78.

236. CAL. PENAL CODE §§ 3453, 17.5.

237. *Id.*

238. Petersilia, *Voices from the Field*, *supra* note 44, at 39–40.

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options to follow:

Modify the conditions of release, including perhaps some additional custody time;

Revoke supervision in its entirety and sentence the defendant to 180 days in county jail (In the case of mandatory supervision, the court maintains the right to impose the balance of the un-served sentence originally imposed.); or

Refer the defendant to a re-entry court, which specializes in helping offenders transition back into society (“re-enter”) successfully while being in compliance with the terms of their supervision.²³⁹

The overall success of the Realignment Act is primarily vested with the flexibility, innovation, and dedication of the local probation departments. Before the Realignment Act actually went into effect, most probation departments planned for action with strategies for handling the new obligations proscribed by the Act.²⁴⁰ The obligations involved the convening of the Community Corrections Partnership, sorting out the members of this planning group, and implementing a plan for the local community consistent with the goals and objectives of the Act.²⁴¹ It also meant a change within the probation departments because, as of October 1, 2011, they would be responsible for the community supervision of those offenders who were released from prison.²⁴² Heretofore, these persons were on parole and an obligation of the state.²⁴³ In lieu of state parole, the “nons” would be supervised by “High Risk Offender” units in the probation department.²⁴⁴ The supervised individuals were

239. *Id.*

240. *Id.* at 196. For example, the Santa Clara County Probation Department assigned deputy probation officers to conference with those to be released on Postrelease Community Supervision in advance of their release, so that they would have a clearer understanding of their obligations and the supervisee assessed to plan the program ahead of the release date, rather than after.

241. CAL. PENAL CODE § 1230(b)(1)–(2).

242. Petersilia, *Voices from the Field*, *supra* note 44, at 39–40.

243. *Id.*

244. *Id.* at 201–02.

the non-violent, non-serious, non-registerable under Penal Code Section 290, and non-aggravated white-collar offenders who would have transitioned to release.²⁴⁵ They are on three-year terms of PRCS.²⁴⁶

To anticipate this process, probation departments, and sheriff offices needed to respond methodically. After garnering a statistical overview of what numbers they were to expect, they started to shift into the programmatic phase which included training probation officers to participate in motivational interviewing, setting up a validated assessment tool, and working to establish cognitive behavioral therapy.²⁴⁷ The sheriff offices, many of whom operate under court-ordered caps on population, braced for the onslaught of new persons into their facilities.²⁴⁸ Generally, there were feelings of great trepidation about the numbers which would be faced.²⁴⁹

Against this backdrop, courts were obligated to institute new procedures for the revocation process. A “hearing officer” needed to be designated.²⁵⁰ New forms, with the assistance of the Judicial Council, were created, along with Rules of Court.²⁵¹ New procedures within individual courts were established so that timely rulings could be had on preliminary revocations.²⁵² New calendars were established

245. *Id.* at 37–39.

246. *Id.*

247. *Id.* at 15.

248. *Id.* at 82.

249. *Id.* at 175–78.

250. CAL. GOV. CODE § 71622.5.

251. CAL. CT. R. 4.540, & 4.541.

252. Revocations of parole, probation, post-release community supervision and mandatory supervision are controlled by California Penal Code section 1203.2. This section provides that the hearings should be held in a “reasonable” amount of time. The concern was that the initial ruling from the federal court in the case of *Valdivia v. Schwarzenegger*, 599 F. 3d 984, 995 (2010) required a strict timeline for the probable cause determination and the hearing dates. In June 2013, Judge Karlton of the Eastern District of California dismissed the action because it lacked standing under the “case or controversy” requirement for federal jurisdiction. The court found that the Realignment Act, and specifically, the provisions of California Penal Code section 1203.2 superseded the initial ruling he had made, which had stringent, specific deadlines for the

so that the violations could be monitored effectively.²⁵³ All of the foregoing was done statewide with an eye towards the money available to the local jurisdictions. Since money was one of the primary factors leading to the Legislative and gubernatorial decision-making on Realignment, and because the Legislature had granted local jurisdictions the pass-through money to support the effort, the process for the division of funds lay in the hands of the Community Correctional Partnership.²⁵⁴ Composition of the CCP was dictated by statute to encompass all of the criminal justice partners, including the presiding judge of the local superior court. Because of ethics opinions and the option included in the statute of having a representative of the judges act as the representative of the courts, most judicial officers declined to participate. Court executives substituted for judicial participation. Implementation of the Realignment Act, therefore, was designed to have fifty-eight different plans based on the local needs of each county. Some counties opted for more jail construction.²⁵⁵ Others innovatively partnered between the sheriff's office and local probation departments to create reentry centers designed to move sentenced prisoners into the treatment mode prior to release with panoply of services designed to meet individual needs based on results from assessments done prior to going into custody.²⁵⁶

The foregoing information is helpful in gaining a full understanding of the processes used for revocation of either PRCS or mandatory supervision. It has become clear that the persons transferred under the Realignment Act are now a community responsibility. The degree to which this has permeated local thinking is an open question.

commencement of hearings on revocation of parole.

253. Petersilia, *Voices from the Field*, *supra* note 44, at 150.

254. CAL. PENAL CODE § 1230(b)(1)–(2).

255. Petersilia, *Voices from the Field*, *supra* note 44, at 164.

256. *Id.* at 197–98.

The first open question is the degree to which the local probation department is committed to the process. Many probation officers seek to supplement the role of law enforcement officers, but also to assure compliance of the supervised person.²⁵⁷ This theory of supervision often places the supervised person in an adversarial position with probation officer. Other probation officers have adopted the wait-and-see approach, which gives the supervised person as much rope needed to hang him or her self. The final group is the probation officer who is an active interventionist, who becomes involved in the plan of rehabilitation.

All of these models of supervision do not bode well for the success of Realignment. While the foregoing may seem simplistic, the judicial perception of each is valid. The reason for the pessimism is that as to the person on Post-Release Community Supervision, they have been institutionalized and are coming out into a world that is markedly different than what they learned inside of the prison. The supervised persons believed that they would have parole agents, who were overworked, and if they violated, they would get a number of months and go about their business.²⁵⁸ The key to re-integrating the offender—particularly after a violation of release—may be judicial intervention by way of review every thirty, sixty, or ninety days to guarantee that the offender is sticking with the rehabilitative program.²⁵⁹

The judicial officer at the arraignment for the violation of post-release community supervision and mandatory supervision has to make critical decisions. This readjustment of the sentencing process will succeed or fail based on the ability of the hearing officer to make critical triage decisions. Some of the daunting factors presented at the hearing are:

257. *Id.* at 196–98.

258. *Id.* at 9–10.

259. Marlowe, *supra* note 142, 183–201.

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- Whether the defendant has relapsed into addict behavior.
- Whether the defendant is suffering from a hitherto undisclosed mental illness, which is now florid.
- Whether the defendant has continued to abuse substances.
- Whether the defendant was committed on an offense that did not include gang affiliations, and now the defendant is with a gang.
- Whether the defendant committed a technical violation.
- Whether the defendant has a new case pending.²⁶⁰

Each of these scenarios presents a challenge to the hearing officer who must address each based on the background, the assessment, and prospects of the defendant.

There are requirements which probation officers must meet prior to the filing of the formal petition for revocation of either status. Pursuant to California Rules of Court, Rule 4.541, the probation officer is required to spell out in detail why intermediate sanctions have failed and why the petition is necessary. Preceding a petition, the probation officer might place a person in residential treatment for substance abuse offenders, and it might mean moving a defendant into a program of psychological therapy.

After the petition is filed, a defendant has the full panoply of constitutional Due Process rights once the process of revocation is pursued. Once arraigned, few choose to exercise those rights and go to a full hearing on the truth of

260. See CAL. CT. R. 4.541(c)(1)–(4).

the violation. In many jurisdictions, the violation calendar is using a model similar to a drug court.²⁶¹ This collaborative model requires that the probation officer, the district attorney, and the defense counsel meet with the hearing officer prior to the formal court hearing.²⁶² Each defendant is discussed, and decisions are made in terms that are the best decision available at the time.²⁶³ For example, in many situations defendants simply abscond and are not available. Warrants issue and are dealt with at the next hearing after the time period is tolled.²⁶⁴ In others, the defendant may have simply failed a urine test, and a higher degree of rehabilitation is ordered and the defendant is seeking same. For some, the ninety days of incarceration is not a challenge, and they accept it without any further penalty other than reinstatement of the original order of three years of release less the time they have done.

There are many instances where the decision process is not so simple.

First, there is the use of intermediate sanctions. Some jurisdictions are requiring that if there is no new law violation, the probation department must utilize its best efforts to not file a petition and seek reasonable intermediate sanctions.²⁶⁵ A model that was picked up from the HOPE program in Hawaii, is “flash incarceration” (Penal Code Section 3455).²⁶⁶ Judicial intervention in this process is the key.²⁶⁷ Under the California law, no court appearance or

261. Petersilia, *Voices from the Field*, *supra* note 44, at 172–76 (noting the use of intermediate sanctions as a key feature of Realignment. This model requires frequent reviews and is as done in drug courts).

262. *Id.* at 135.

263. This is based on the judge-author’s professional experience.

264. CAL. PENAL CODE § 1203.2(a); Petersilia, *Voices from the Field*, *supra* note 44, at 175.

265. Petersilia, *Voices from the Field*, *supra* note 44, at 173.

266. See generally ANGELA HARKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE, (Dec. 2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

267. See Steve Lopez, *Hawaii Finds Success with Tough-Love Approach to*

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judicial intervention is required.²⁶⁸ A probation officer can handcuff and surrender the defendant to the jail without any judicial finding of any type of violation. While this is the law, the wisdom of this process, on two levels, is questionable. This process sets up an unneeded adversarial relationship which is contrary to the building of a relationship which will foster a decline in recidivism. The perception is that the probation officer is the police officer and there to incarcerate him/her and not to work through any issues. Moreover, and leaving aside the Due Process aspects of incarceration without judicial intervention, the probation departments are missing an opportunity to have a person in a black robe evaluate the sanction while they remain only as a person providing information to the court.

Second, there is the issue of whether intermediate sanctions have really been utilized. Many of the petitions seen by judicial officers are bereft of creativity. Granted, many offenders are completely recalcitrant; however, this Act was designed to compel probation officers to work with and manage an offender population at a local level. The ratio of offender to officer has been scaled back to permit active intervention, yet many petitions fail to point to those kind of solutions to fit the offender's issues. For example, an offender with an extensive history of mental health issues fails to report or take a urine test. Is a proper result a flash incarceration or referring the individual to services with strict monitoring? Judicial officers also have a stake in this: if there is an intermediate sanction short of revocation, should not the judicial officer be involved in reviews?

Third, the sanction to which an accused PRCS violator is exposed does not comport with the common sense and

Repeat Offenders, L.A. TIMES, Dec. 1, 2012, <http://articles.latimes.com/2012/dec/01/local/la-me-1202-lopez-probation-20121202>. See also WASH. DEPT OF CORR., COMMUNITY CORRECTIONS PRACTICES 4-5 (2012), available at http://www.leg.wa.gov/documents/legislature/ReportsToTheLegislature/2012%206204%20Report_d061929d-8b53-4158-9aa6-3db530673e22.pdf.

268. CAL. PENAL CODE § 3455.

experience of many judicial officers. Most judicial officers are used to dealing with probation violations. In that arena, if the accused violator is found in violation, the probation is revoked, and the offender is sentenced to state prison for the term available under the law, which may be very steep. There are, thus, real consequences for the violation.

In the new era of post-Realignment law, the offender who violates PRCS is subject only to six months of custody time, done on a one-half time basis because of the new credit system. For some offenders, ninety days is inconsequential; the defendant knows it, the defense attorney knows it, the court knows it, and the district attorney is too painfully aware of it. This unique situation may require a small amount of history, which is based on anecdotal facts rather than hard facts.

One aspect of the economic issues facing the State of California in the last years leading to Realignment was the amount of money the State was spending for the housing of persons who had violated parole. Not only were some offenders returned to the prison, at the increased costs discussed *infra*, but a majority were housed in local county jails paid by the State per bed used. Excluding the new law violations, violations may have stemmed for the simple failure to report to one's supervising officer, or a dirty drug test. The costs were staggering.

In the new era, the critical feature is the challenge of having criminal justice personnel, judges included, adapt to the fact that violations will occur and the penalty is not that severe for a majority of the offenders. The next step is realizing that the persistent drum beat of assessment—to determine the actual cause of what brings the offender into the system and select the best treatment program—is the key to both public safety and cutting recidivism.

A final challenge in the revocation area is reserved for those alleged to have violated Mandatory Supervision. In the initial Act, no provisions were enacted to account for the

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revocation of Mandatory Supervision. In clean up legislation, all revocation processes, including parole, which became a responsibility of local jurisdictions as of July 1, 2013, are covered by Penal Code Section 1203.2.²⁶⁹ Little, if any, thought has been given to the dynamics of the Mandatory Supervision process. One might wonder if this category is simply a placeholder for the inevitable conclusion that the court should simply grant probation, forego the prison prior that is available and work with the defendant as a probationer. If it is not, a realistic programmatic change needs to be available to all of those in the system. The Legislature may have to explore methods of extending the period of supervision in order to meet the requirement of Evidence Based Practices. More thought and discussion among all of the justice partners is needed to overcome this judicial quandary.

CONCLUSION

One key paradigm emerges from the Realignment: local jurisdictions have to take responsibility, ownership, and care for those who are designated offenders. No longer can counties transport the low level offenders to remote stretches of the state for a designated period of time and then, after that period, fail to integrate them back into society. This legislation, in its long-term reach, aims at keeping the low-level offender in the community under supervision, and to reintegrate the person back into a productive life through programs and treatment, largely geared to address substance abuse, addiction, and mental illness. These key ingredients commonly plague low-level offenders and local programs offer the best resource for success, so long as there are funds and the proper philosophical bent. The twin goals of public safety and reduction of recidivism are the hallmarks, which will be tested and examined both qualitatively and quantitatively.

269. S.B. 1023, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

In many respects, the success or failure of the Realignment Act rests not on the pronouncements of the bench officer, but the day-to-day work done by the justice partners who must deal with enforcing conditions of release, managing re-entry programs, and keeping a conscientious eye on daily bed counts in county jails. The unique structure of the Realignment Act in requiring every county to have the Community Correction Partnership with all justice partners is an investment in shared goals. The collective wisdom of these individuals will determine success.

The cumulative data suggests there are some executional hiccups hindering Realignment's success. Community Corrections Partnerships²⁷⁰ in each county are supposed to carry out countywide Realignment strategies, but many of them fail to delineate specific goals²⁷¹ that would help the various actors involved channel their efforts and make like-minded decisions around evidence-based practices.

Several affirmative solutions are apparent from experience and the available data.

First, judges and attorneys participating in the plea bargaining process on the targeted offenders must re-evaluate their positions in the system. On a strict reading of *Clancey, supra*, courts are required to have as much information as possible before a decision is made to "indicate" a sentence. This is an opportunity to utilize evidence-based practices and obtain an assessment at the front end of the process. It poses a unique opportunity to enforce the will of the Legislature and fashion a resolution that will be more meaningful than pre- Realignment sentences.

270. Community Correction Partnerships (CCPs) include (at least) representatives from the police, the sheriff, the district attorney, the public defender, the superior court, and social services.

271. *Community Correction Partnership Plans*, CAL. BD. OF STATE & CMTY. CORR., <http://www.bscc.ca.gov/board/realignment-resources/community-corrections-partnership-plans> (collecting county CCP plans for fiscal years 2011 through 2014).

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Second, all phases of the criminal justice system must be educated in the background of, use of, and processes involved with the evidence-based practices. While the probation departments and judicial branch have gone to great lengths to educate, continued varied forms of education, done on a continuous basis need to be done with those involved with law enforcement, jail management and, perhaps most importantly, the prosecutors and defense bar. When a system has been operating the same way for over twenty years, any change is difficult. Only through further education will this process become fully vested.

Third, the entire process of mandatory supervision and straight time sentencing under Penal Code Sections 1170(h) needs to be re-examined. The intent was to shift prison time back to the jails. Credit-for-time-served formulas were done in an attempt to cut into the actual amount of days spent in jail, so that overcrowding would be a target for law suits locally. Early release programs by some counties have been the standard. Either the Legislature must provide for some period of time after the sentence on supervision, outside of the term in county jail, or must determine whether local sentences in lieu of state prison should be abolished all together. In other words, the Legislature must determine whether they can order local courts not to send any of the low level offenders to prison ever. The reasoning is simple: to enforce evidence-based practices, time is needed. The split or blended sentence, in most instances, provides inadequate time for this process to take place. It is a hollow promise to both society at large and the offender in particular that recidivism will be reduced without this needed time. A grant of probation, up to five years with a jail sentence offers much greater opportunity to both.

Finally, the state must continue to financially support all of these efforts. One can harken back to promise made in the 1970's regarding the shut down of state mental hospitals and the hope that local programs would do more good. The

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hospitals closed, but so did the state support. This cannot happen when the issue of public safety is at stake. The first years of Realignment disclosed the use of funds for hiring new jail officers, new probation officers and staffing courts. The next years must be dedicated to the use of the funds for the programs.