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COMMENT

PUTTING TEETH INTO A.B. 109: WHY CALIFORNIA'S HISTORIC PUBLIC SAFETY REALIGNMENT ACT SHOULD REQUIRE REENTRY PROGRAMMING

KATHLEEN NYE FLYNN*

Reentry processes fail for several reasons—inadequate programming, inadequate resources, punitive approaches, and mixed messages to all sorts of stakeholders. The confusing and conflicting messages of current programming merely serve to delegitimize the reentry process (and correctional programming), and to contribute to the cynicism that society does not desire for offenders to succeed.

—FAYE S. TAXMAN¹

INTRODUCTION

In April 2011, Governor Jerry Brown orchestrated the most significant change to California's prison system in the state's recent history:² the passage of the Public Safety Realignment Act of 2011, also

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¹Faye S. Taxman, *The Cattle Call of Reentry, Not All Processes Are Equal*, 10 CRIMINOLOGY & PUB. POL'Y 925, 934-35 (2011).

²For example, the California Department of Corrections and Rehabilitation calls it "historic" and the "cornerstone of California's solution for reducing the number of inmates" in the

known by its primary bill, Assembly Bill 109.³ The Act, which took effect in October 2011, set out to transfer an estimated fifty thousand people from state supervision to the control of county probation and sheriffs' departments.⁴ Another estimated thirty thousand people who would otherwise have been sentenced to state prison will reside in county jails.⁵ The result is that county jails now serve more inmates, and the State is relying more than ever on local social-service providers to help former inmates reenter mainstream society.⁶ Realignment has dramatically impacted county government and courts, people in prison and those being released into parole, as well as local communities.⁷ Overall, it is vastly transforming the role of probation by encouraging

State's prisons. *Public Safety Realignment*, CAL. DEP'T CORRECTIONS & REHABILITATION, www.cdcr.ca.gov/realignment (last visited Mar. 17, 2012).

³ A.B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011). In accordance with local practice, this Comment will use the abbreviation "A.B." to cite California Assembly Bills. Although the prison realignment is most often referred to as "A.B. 109" by local officials and the media, realignment encompasses various bills, including modifying bill A.B. 117, 2011 Leg., Comm. on Budget (Cal. 2011); A.B. 118, 2011 Leg., Comm. on Budget (Cal. 2011); S.B. 89, 2013 Comm. on Budget and Fiscal Review (Cal. 2013).

⁴ DEAN MISZCZYNSKI, PUB. POLICY INST. OF CAL., CORRECTIONS REALIGNMENT: ONE YEAR LATER 6 (Aug. 2012), available at www.ppic.org/content/pubs/report/R_812DMR.pdf.

⁵ *Id.* To clarify, in California, probation and parole both involve supervision of criminal offenders in the counties of which they were residents prior to committing their crimes. However, parole specifically refers to felony offenders who were sentenced to state prison and who have been released to state officials after completing a portion of their state-prison sentences. Meanwhile, probation occurs only on a county level and is a sentencing option for offenders who have committed either misdemeanors or felonies. Probation officers are responsible for connecting offenders with other stakeholders in the system, such as law enforcement, the courts, community-based organizations, mental health departments, substance abuse clinics, and the community. See MARCUS NIETO, CAL. RESEARCH BUREAU, THE CHANGING ROLE OF PROBATION IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 7 (1996), available at www.library.ca.gov/crb/96/06/96006.pdf.

⁶ See generally CAL. STATE ASS'N OF COUNTIES ET AL., 2011 PUBLIC SAFETY REALIGNMENT, KEY PROVISIONS IN AB 109/AB 117: ADULT OFFENDERS POPULATION TRANSFERS TO COUNTIES (2011), available at [www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107_forensics/csac-cssa-cpoc_2011_public_safety_realignment_key_provisions_\(7-22-11\).pdf](http://www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107_forensics/csac-cssa-cpoc_2011_public_safety_realignment_key_provisions_(7-22-11).pdf) [hereinafter KEY PROVISIONS]. See also CAL. PENAL CODE § 17.5(a)(6) (Westlaw 2013) ("Community-based corrections programs require a partnership between local public safety entities and the county to provide and expand the use of community-based punishment for low-level offender populations."). The specific changes created by realignment are discussed *infra* Part I.D.

⁷ See generally KEY PROVISIONS, *supra* note 6, for an overview of how realignment affects county governments, courts, parolees, and communities. The legislation also involves changing the definitions of a number of crimes, enabling counties to make more use of electronic monitoring of offenders, and changing rules governing good-time credits. While the legislation has many components that impact jails, the district attorneys' and public defenders' offices, sentencing limits, good behavior credits, adult protective services, child welfare programs, adult proactive services, and juvenile justice, this Comment will primarily outline its effect on county probation departments' rehabilitation efforts.

counties to focus on rehabilitation and lowered recidivism.⁸ However, despite the sweeping changes that realignment generated and its grandiose goals of reducing recidivism through rehabilitation, it does not require that counties put forward the resources, supervision, and funding necessary to make lasting, systemic changes to how incarcerated people reintegrate back into society.⁹ Without sufficient state directives and resources counties may not establish the rehabilitation services needed to reduce recidivism.¹⁰

The need for reentry reform in the state is clear from the numbers: at its height in 2005, the state parole recidivism rate reached 67.5%—meaning that nearly seven out of ten people who left prison returned within three years after release.¹¹ Recidivism rates were high on the county level as well: nearly 40% of people on probation returned to jail, and many of those people wound up in state prison.¹² This recidivism, in

⁸ MISCZYNSKI, *supra* note 4, at 7; *see also* MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, 2011 REALIGNMENT: ADDRESSING ISSUES TO PROMOTE ITS LONG-TERM SUCCESS 1 (Aug. 19, 2011), *available at* www.lao.ca.gov/reports/2011/stadm/realignment/realignment_081911.pdf (“The 2011 realignment legislation is complex and wide sweeping.”).

⁹ *See* ALLEN HOPPER ET AL., ACLU OF N. CAL., COMMUNITY SAFETY, COMMUNITY SOLUTIONS: IMPLEMENTING AB 109: ENHANCING PUBLIC MONEY AND WISELY ALLOCATING JAIL SPACE 5 (Aug. 2011), *available at* www.aclunc.org/issues/criminal_justice/asset_upload_file459_10684.pdf (explaining that the intent of realignment is for counties to “focus on non-incarceration alternatives” because counties “will not have the resources” to either build new jail beds or contract their new jail population back to the State (which is one of the options built into A.B. 109 legislation)).

¹⁰ ALLEN HOPPER ET AL., ACLU OF N. CAL., PUBLIC SAFETY REALIGNMENT, CALIFORNIA AT THE CROSSROADS 12 (Mar. 2012), *available at* www.aclunc.org/docs/criminal_justice/public_safety_realignment_california_at_a_crossroads.pdf. For the purposes of this Comment, “reentry” and “rehabilitative services” as part of a probationary sentence refer broadly to such programs as housing services (including short- and long-term accommodations), employment services, vocational training, substance abuse programs, mental health services, expungement programs, educational programs, and family-strengthening programs. These are addressed broadly, as populations will have different needs and require different types of services, and programs can vary. Many of these programs are mentioned in A.B. 117 but are not made mandatory. *See* Cal. A.B. 117, discussed at length *infra* Part III.

¹¹ CAL. DEP’T OF CORR. & REHAB., 2012 OUTCOME EVALUATION REPORT 13 fig.1 (Oct. 2012), *available at* www.cdcr.ca.gov/adult_research_branch/Research_Documents/ARB_FY_0708_Recidivism_Report_10.23.12.pdf (the recidivism rate is measured based on a parolee’s return to prison within three years of release). *But see* PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR TO AMERICA’S PRISONS 17 (Apr. 2011), *available at* www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revoving_Door_America_Prisons%20.pdf (explaining that 40% of California’s recidivism is due to parolees violating parole, as opposed to committing new crimes, partly due to the fact that most parolees must remain on parole for three years).

¹² LEGISLATIVE ANALYST’S OFFICE, ACHIEVING BETTER OUTCOMES FOR ADULT PROBATION, fig.10 (May 29, 2009), *available at* www.lao.ca.gov/2009/crim/Probation/probation_052909.aspx.

part, resulted in a population crisis within California's prisons: at their peak, prisons were at 200% of capacity.¹³ A system designed to hold just under 80,000 people had a population more than twice that.¹⁴ This crisis came to a head in *Brown v. Plata*, in which the U.S. Supreme Court held that overcrowding in California's prisons amounted to cruel and unusual punishment.¹⁵ The Court upheld the lower court's order requiring California to reduce its prison population to 137% of design capacity by the end of 2013.¹⁶ Before the Court had even rendered its verdict, Governor Brown responded by drafting realignment measures.¹⁷

While A.B. 109's ink was still drying, many of California's fifty-eight counties began to create realignment plans, following guidelines set by statute, in order to prepare for its hasty implementation.¹⁸ The Act suggested that counties include strategies to reduce recidivism through reentry programs, but because the State did not make these efforts mandatory, there has been no guarantee that any particular county will put the necessary resources toward these services.¹⁹ Indeed, a recent

¹³ *Brown v. Plata*, 131 S. Ct. 1910, 1923-24 (2011).

¹⁴ *Id.*

¹⁵ For a detailed account of the litigation process that culminated in the Supreme Court's decision, see Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 178 (2013).

¹⁶ *Plata*, 131 S. Ct. at 1945, 1947. The original deadline for reducing the population to 137.5% of capacity was June 2013, but the three-judge panel overseeing the State's progress gave a six-month extension until the end of 2013. Bob Egelko, *Extension Given To Cut Prison Population*, S.F. CHRON., Jan. 30, 2013, available at www.sfgate.com/news/article/Extension-given-to-cut-prison-population-4237201.php.

¹⁷ Schlanger, *supra* note 15, at 184.

¹⁸ Counties were required to adopt realignment plans by Oct. 1, 2011. A.B. 109 mandated the formation of an Executive Committee within each county's Community Corrections Partnership, a governing body each county created under a 2009 statute, S.B. 678. CAL. PENAL CODE §§1228-1233.8 (Westlaw 2012). Each county's realignment plan was created by the Executive Committee, which is composed of the district attorney, the public defender, the presiding judge, the police chief, a public-health or social-services director, and the probation chief. Each county's board of supervisors was required to approve the plan. KEY PROVISIONS, *supra* note 6, at 4. News media across the state reported on the creation of these plans. See, e.g., Julie Small, *California Counties To Take Responsibility for Low-Level Felons*, S. CAL. PUB. RADIO (Sept. 22, 2011), www.scpr.org/news/2011/09/22/29010/california-counties-prepare-take-responsibility-lo/ (quoting Jerry Powers, Chief Probation Officer for Stanislaus County: "Up and down the state talking to my colleagues, there's a lot of planning going on and a lot of discussion with sheriffs, and courts and community-based organizations, and Oct. 1 it's coming—we don't have a choice. We will take care of it. And come Oct. 1 we'll be ready to go.").

¹⁹ See, e.g., MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE THE 2012-13 BUDGET: THE 2011 REALIGNMENT OF ADULT OFFENDERS—AN UPDATE 9-10 (Feb. 22, 2012) [hereinafter 2012-2013 BUDGET], available at www.cdcr.ca.gov/Reports/docs/External-Reports/2011-realignment-of-adult-offenders-022212.pdf (providing a breakdown on how county plans have specified funding allocations); see also KEY PROVISIONS, *supra* note 6, at 3 ("Supervision and case plans are not

study that reviewed the impact of realignment one year after implementation found that counties have spent only 12% of their realignment funding on community agencies that provide rehabilitation services.²⁰ Realignment recognizes that the treatment of newly released inmates greatly contributes to reducing recidivism. However, a policy with these intentions must mandate that counties provide rehabilitation programs to people exiting incarceration. Otherwise, prison reform to the extent the State intended—and the U.S. Supreme Court demanded—will not succeed.

Part I of this Comment provides a history of probation reform policies in California and an overview of realignment and its preceding litigation, with a focus on components that relate to rehabilitation in post-release. Part II explores how *Plata* laid the groundwork for California's current focus on reform and demonstrates how realignment hinges on changing the role of probation, slowing recidivism, and improving rehabilitation opportunities. Part III argues that the State should provide mandatory guidelines for county rehabilitation efforts as part of realignment. Finally, Part IV recommends statutory language that would make rehabilitative programming for probationers a mandatory component of the regulations moving forward.

I. THE LONG ROAD TO THE PRISON REALIGNMENT ACT OF 2011

The road to California's most recent attempt at prison realignment has been long and vexing, marked by failed attempts at reducing the population of state prisons and by funding and sentencing systems that have only increased the number of people that counties send to prisons.²¹ An examination of California's most recent prison crisis requires a brief review of the state's history of probation reform, starting in 1965 with the Probation Subsidy Act and culminating with *Brown v. Plata*, which resulted in the Supreme Court mandating that the State reduce its prison population.²² This litigation led to the Community Corrections Performance Incentive Act of 2009 (CCPI), also known as S.B. 678²³—

specified in [the] statute.”); *List of County Plans*, CALREALIGNMENT.ORG, www.calrealignment.org/county-implementation/list-of-county-plans.html (last visited May 21, 2013).

²⁰ Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, 5 CAL. J. POL. & POL'Y 266, 275 (2013).

²¹ See generally Roger K. Warren, *Probation Reform in California: Senate Bill 678*, 22 FED. SENT'G REP. 186 (Feb. 2010), available at www.courts.ca.gov/documents/probate-sb678.pdf.

²² *Id.*; see also *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

²³ S.B. 678, 2009-2010 Leg., Reg. Sess. (Cal. 2009), adding CAL. PENAL CODE §§ 1228-1233.8 (Westlaw 2012).

the State's initial attempt at responding to the recent litigation—and the Realignment Act of 2011, which mandated for the first time in the State's history that a high percentage of low-level felons be transferred to county control.²⁴

A. CALIFORNIA'S PROBATION POLICY HISTORY

California is one of two states in the nation that leaves the responsibility for probation to each of its individual fifty-eight counties, providing almost no cohesive statewide guidance.²⁵ With the exception of available state grants, counties rely primarily on local funding for what can be very extensive probation departments.²⁶ This leads to tremendous disparity in the way counties sentence people, whom they send to prison or jail, who is released on probation, and what happens when that probation is revoked.²⁷ Indeed, a recent study compared two similar-sized counties with similar crime rates, finding that one county imprisoned new felons at a rate of more than three times the other and put more than twice the number of people into prison per year than the other.²⁸

California has made multiple attempts to encourage counties to retain offenders in county control rather than in state prison, beginning in

²⁴ A.B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011).

²⁵ See, e.g., Warren, *supra* note 21, at 186 (“California is one of only two states in the nation that does not provide an ongoing stream of funding to support adult probation services. California is also among a dwindling number of states that have no state system of community corrections.”).

²⁶ LEGISLATIVE ANALYST'S OFFICE, *supra* note 12. Counties receive on average two thirds of the funding for probation departments locally, and one fourth from the State. Other funding comes from fees that probationers pay to receive certain rehabilitation services, as well as the federal government. The LAO estimates that in 2007 county probation departments “spent a total of about \$2 billion for adult and juvenile supervision as well as juvenile detention facilities.” *Id.* at 6. However, the amount of state funding has since increased, with the implementation of S.B. 678 in 2009, which provides incentive funding for counties that limit the number of people they send to prison. See Cal. S.B. 678. This will be examined *infra* Part IV.

²⁷ DEAN MISCZYNSKI, PUB. POLICY INST. OF CAL., RETHINKING THE STATE-LOCAL RELATIONSHIP: CORRECTIONS 25 (Aug. 2011), available at www.ppic.org/content/pubs/report/R_811DMR.pdf (“There are differences in the way counties charge and prosecute crimes, in the amount of jail time prisoners serve, and in the amount of rehabilitative programming they receive. Realignment increases the class of prisoners affected, applies these differences to prisoners serving longer sentences, and, importantly, increases the discretion that counties have to manage their prisoners.”).

²⁸ The study involved Alameda and San Bernardino Counties. A ten-year average of county data showed that both counties had similarly sized populations and similar amounts of reported violent crime and property crime. However, San Bernardino County sent “more than three times as many ‘new felons’ to prison each year.” W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should*, 28 GA. ST. U. L. REV. 987, 994 (2012).

earnest with the California Probation Subsidy Act of 1965.²⁹ This Act grew from the notion that in order to keep prison populations low, rehabilitation of the offenders had to occur within the community.³⁰ The Act provided counties with \$4,000 for each person diverted from state prison, altogether redirecting 45,000 offenders from state prison to county supervision.³¹ However, the Act was replaced in 1978 for reasons including the fact that the \$4,000 funding rate was never increased to account for inflation and consequently failed to continue to motivate counties to retain their own offenders;³² in addition, as California's sentencing policies grew increasingly strict,³³ and courts began dispensing more and more felony sentences, the State could not keep up with the cost of the increasing offender population.³⁴ Critics faulted the Act for incentivizing counties to keep dangerous offenders in the community and for lacking performance measurements with which to track the success of the programs.³⁵ Most importantly, counties never installed the types of rehabilitation services, such as halfway houses and day service centers, that could truly reduce recidivism rates.³⁶

The next significant effort toward reform took place in the 1990s, beginning with the Community-Based Punishment Act of 1994.³⁷ Although the intent was to provide continuous funding for probation programs, a sufficient funding stream never emerged.³⁸ The State attempted several grant programs in the 1990s, but those programs failed as well.³⁹ Simultaneously, the State enacted increasingly tougher sentencing policies, such as the "Three Strikes and You're Out" laws

²⁹ NIETO, *supra* note 5, at 8.

³⁰ STANFORD CRIMINAL JUSTICE CTR., STATE/COUNTY CRIMINAL JUSTICE PARTNERSHIPS IN CALIFORNIA: AN ABBREVIATED HISTORY 1-2 (2007), available at <http://www.pew.org/uploaded/Files/CA%20State-County%20Partnerships%20paper.pdf>.

³¹ *Id.*

³² *Id.* at 2.

³³ Three factors contributed most significantly to the rise in the prison population: determinate sentencing, passed in 1976; the enactment of the "Three Strikes, You're Out" law in 1994; and changes in local law enforcement and the prosecution of first-time felons, mostly occurring between 1987 and 2007. For a brief background on these laws and policy shifts, see CAL. BUDGET PROJECT, STEADY CLIMB: STATE CORRECTIONS SPENDING IN CALIFORNIA 8 (Sept. 2011), available at www.cbp.org/pdfs/2011/110914_Corrections_Spending_BB.pdf.

³⁴ NIETO, *supra* note 5, at 9.

³⁵ Warren, *supra* note 21, at 190.

³⁶ NIETO, *supra* note 5, at 9.

³⁷ CAL. PENAL CODE §§ 8050-8093 (Westlaw 2013).

³⁸ Jessica Feinstein, *Reforming Adult Felony Probation To Ease Prison Overcrowding: An Overview of California S.B. 678*, 14 CHAPMAN L. REV. 375, 387-88 (2011).

³⁹ *Id.* at 388.

passed by the Legislature and by voters in 1994.⁴⁰ Stricter sentencing resulted in second- and third-strikers becoming one quarter of the state prison population.⁴¹ Courts began to sentence so many people to prison that a felony arrest in 2007 “was almost twice as likely to result in a prison sentence” than it was twenty years prior.⁴² By 2007, the prison population was severely strained: designed to cage only about 80,000 people, it held approximately 172,000.⁴³

B. *BROWN V. PLATA* AND ITS PRECEDING LITIGATION

In *Brown v. Plata*, California prisoners sued the State over prison conditions that they claimed violated their Eighth Amendment rights.⁴⁴ Nearly two decades of litigation preceded the case, beginning with *Coleman v. Wilson*, in which incarcerated persons with mental illness sued the State for not providing adequate care.⁴⁵ In 1995, a district court issued a series of remedies to improve the situation, to be overseen by a special master.⁴⁶ Twelve years later, the special master reported that the prison mental health system had actually worsened.⁴⁷ In 2001, in *Plata v. Brown*, a class of prisoners with serious medical conditions sued the State over Eighth Amendment violations, asserting that the lack of adequate prison medical care constituted cruel and unusual punishment.⁴⁸ Four years after approving injunctive relief for the plaintiffs, the district court found that the prison system’s medical care was still “resulting in an ‘unconscionable’ degree of suffering and death.”⁴⁹ The district court

⁴⁰ Specifically, in 2010 state prisons housed 34,365 second-strikers and 8,667 third-strikers, which totaled more than a quarter of all inmates. CAL. BUDGET PROJECT, *supra* note 33, at 8; *see also* CAL. PENAL CODE § 667(b)–(j) (Westlaw 2013) (“Three Strikes” law enacted by Legislature); CAL. PENAL CODE § 1170.12 (Westlaw 2013) (“Three Strikes” law enacted by electorate).

⁴¹ *Id.*; *see also* DEP’T OF CORR. & REHAB., PRISON CENSUS DATA AS OF DECEMBER 31, 2010 (Feb. 2011), tbl.1., *available at* www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/Census/CENSUSd1012.pdf.

⁴² CAL. BUDGET PROJECT, *supra* note 33, at 8 (quoting 2009-2010 LEGISLATIVE ANALYST’S OFFICE, BUDGET ANALYSIS SERIES: JUDICIAL AND CRIMINAL JUSTICE, at CJ-13 (Jan. 30, 2009)).

⁴³ *Id.* at 2, 5.

⁴⁴ *Brown v. Plata*, 131 S. Ct. 1910, 1926 (2011). The Eighth Amendment protects citizens from cruel and unusual punishment. U.S. CONST. amend. VIII. Plaintiffs in *Plata* argued that the State violated their Eighth Amendment rights by denying access to health care and adequate protection in prisons.

⁴⁵ *Coleman v. Wilson*, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995).

⁴⁶ *Plata*, 131 S. Ct. at 1926.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1927.

appointed a receiver, who, over the following three years, monitored the prison medical system.⁵⁰

Finally, by 2007, the *Brown* and *Coleman* cases were combined and brought before a three-judge district court convened by the Court of Appeals for the Ninth Circuit.⁵¹ Throughout two weeks in 2009, the three-judge court heard alarming testimony about the status of the prison medical system.⁵² In the end, the court found that overcrowding resulted in strained medical and mental health facilities, over-burdened staff, and violent and unsanitary conditions:⁵³ “Until the problem of overcrowding is overcome,” the court concluded, “it will be impossible to provide constitutionally compliant care to California’s prison population.”⁵⁴ The court ordered the State to reduce its prison population to 137.5% of design-capacity within two years.⁵⁵ The State appealed, and the United States Supreme Court granted certiorari.⁵⁶

In May 2011, the Supreme Court upheld the three-judge district court’s ruling that population reduction provided the only remedy to the Eighth Amendment violations.⁵⁷ It affirmed the order that the California Department of Corrections and Rehabilitation (CDCR) reduce its prison population to 137.5% of the prison system’s design capacity—a reduction of about 33,000 prisoners—by 2013.⁵⁸ Other potential solutions, such as hiring new staff, transferring prisoners to other states or building new facilities, were ruled out as impossible, given the State’s resources.⁵⁹

C. LEGISLATIVE ACTION DURING THE *PLATA* LITIGATION—A PRECURSOR TO A.B. 109

During the three-judge district court’s proceedings, California passed S.B. 678 in an effort to reduce the flow of felony probationers to state prison.⁶⁰ Much like the California Probation Subsidy Act of 1965,

⁵⁰ *Id.*

⁵¹ *Id.* at 1927-28. The convening of a three-judge panel was required under the federal Prison Litigation Reform Act. *See* 18 U.S.C.A. § 3626(a)(3) (Westlaw 2013).

⁵² *Plata*, 131 S. Ct. at 1927-28.

⁵³ *Id.* at 1932.

⁵⁴ *Id.*

⁵⁵ *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 THE, 2010 WL 99000, at *3 (E.D. Cal. Jan. 12, 2010); *see Schlanger*, *supra* note 15, at 180.

⁵⁶ *Plata*, 131 S. Ct. at 1930.

⁵⁷ *Id.* at 1947.

⁵⁸ *Id.* at 1945, 1947.

⁵⁹ *Id.* at 1937-39.

⁶⁰ S.B. 678, 2009-2010 Leg., Reg. Sess. (Cal. 2009).

S.B. 678 provides incentive funding to counties that keep probationers from being sent to prison.⁶¹ “Top-tier counties”—those that reduce the number of people they send to prison by more than 50% of an established baseline—receive higher funding awards.⁶² The California Administrative Office of the Courts oversees county progress.⁶³ Funding began in December 2010,⁶⁴ and the federal Edward Byrne Memorial Justice Assistance Grant program, provided through the American Recovery and Reinvestment Act of 2009, seeded an initial funding pot of \$45 million to be distributed among the fifty-eight counties.⁶⁵

Under S.B. 678, counties are required to spend their incentive funds to create community corrections practices and programs for adult felony probationers.⁶⁶ Counties began to develop risks-and-needs assessments to determine the levels of supervision probationers required, and to create alternatives to incarceration such as electronic monitoring and evidence-based programs for rehabilitation services.⁶⁷ Some counties also hired additional probation officers and created assessment strategies for probationers and pilot programs to expand evidence-based services.⁶⁸

In 2010, counties saw the rate of probation failures drop from 7.9% to 6.1%.⁶⁹ That year, the counties diverted an average daily population of 6,000 felony probationers from going to prison, with no major impact on local crime, saving the State \$179 million in reduced prison incarceration costs.⁷⁰ These savings were used in part to fund the counties for the following year (fiscal year 2011-2012), dividing \$87.5 million among the counties.⁷¹ In 2011, again, probation failures dropped: probation departments diverted an estimated 9,500 people from state prison, and the rate of probation failure fell to 5.4%.⁷² The rate

⁶¹ ADMIN. OFFICE OF THE COURTS, SB678 YEAR 1 REPORT, IMPLEMENTATION OF THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVE ACT 2 (June 8, 2011), available at www.courts.ca.gov/documents/SB678-Year-1-Report-FINAL.pdf.

⁶² *Id.* County annual probation revocation rates are compared to a baseline established by overall county averages from 2006 to 2008.

⁶³ Warren, *supra* note 21, at 189.

⁶⁴ ADMIN. OFFICE OF THE COURTS, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ CAL. PENAL CODE § 1230(b)(3) (Westlaw 2013).

⁶⁷ CAL. PENAL CODE § 1230(b)(3)(A)–(D) (Westlaw 2013).

⁶⁸ Feinstein, *supra* note 38, at 406-07.

⁶⁹ ADMIN. OFFICE OF THE COURTS, *supra* note 61, at 3.

⁷⁰ *Id.*

⁷¹ *Id.*; see also VERA INST. OF JUSTICE, SUMMARY OF PERFORMANCE INCENTIVE FUNDING INITIATIVES, available at www.vera.org/files/pif-implementation-chart.pdf.

⁷² ADMIN. OFFICE OF THE COURTS, SB 678 YEAR 2 REPORT, IMPLEMENTATION OF THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT OF 2009, at 2 (July 2012), available at www.courts.ca.gov/documents/SB678-Year-2-report.pdf.

continued to decline in 2012, and that year the State distributed \$136.3 million to probation departments after it saved an estimated \$536.6 million over three years due to the reduction in probationers being sent to state prison.⁷³ The Department of Finance calculated incentive grants by multiplying the number of prisoners the counties were able to divert from prison by about \$36,000—the average amount the State spent that year incarcerating and supervising each person who had his or her probation revoked.⁷⁴

D. AB 109: THE PRISON REALIGNMENT ACT OF 2011

As the Supreme Court deliberated *Brown v. Plata*, California began preparing for a decision that would require rapid reduction in its prison population.⁷⁵ While S.B. 678 was successful, it was not having the immediate effect on the prison population necessary for the State to meet the lower court's decree that was under review by the Supreme Court.⁷⁶ By January 2011, Governor Brown had produced a draft of A.B. 109,⁷⁷ and counties began to hear whispers of what was to come: the transfer of thousands of state prisoners to county control.⁷⁸

One of realignment's most dramatic features is that it requires people sentenced with low-level felonies to be held in county jails rather than state prisons.⁷⁹ This means that jails see an increase of people serving longer sentences for more significant crimes.⁸⁰ In addition to an increase in new felony offenders, jails also now hold many state parolees

⁷³ ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., REPORT ON THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT OF 2009, FINDINGS FROM THE S.B. 678 PROGRAM 14 (Apr. 2013), available at www.courts.ca.gov/documents/lr-SB-678-April-2013.pdf.

⁷⁴ ADMIN. OFFICE OF THE COURTS, *supra* note 61, at 2.

⁷⁵ Schlanger, *supra* note 15, at 184.

⁷⁶ In 2011 under S.B. 678, an average daily population of approximately 9,500 people were diverted from going to prison. ADMIN. OFFICE OF THE COURTS, *supra* note 73, at 12 n.35. While impressive, this was not reducing the prison population as dramatically as necessary.

⁷⁷ See generally LEGISLATIVE ANALYST'S OFFICE, GOVERNOR'S REALIGNMENT PLAN—CRIMINAL JUSTICE (Jan. 25, 2011), available at www.lao.ca.gov/handouts/crimjust/2011/CJ_Realignment_Plan_01_25_11.pdf.

⁷⁸ See, e.g., Editorial, *Get Ready, California, Here Come the Inmates*, L.A. TIMES, Aug. 30, 2011, available at articles.latimes.com/2011/aug/30/realestate/la-ed-re-entry-20110830.

⁷⁹ Felons who will be placed into county custody are those who are non-violent, non-serious, and non-sex offenders (also known as "the three nons"), based on the crimes that they have committed, as defined by the Penal Code. CAL. PENAL CODE § 1170(h) (Westlaw 2013); see also KEY PROVISIONS, *supra* note 6, at 2.

⁸⁰ A "felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of [Penal Code] Section 1170." CAL. PENAL CODE § 17(a) (Westlaw 2013).

who violated the terms of their release.⁸¹ Prior to realignment, people on state parole who violated the terms of their release, such as by failing to report to a parole officer, would be sent back to prison.⁸² People on parole who committed new crimes would also be sent back to prison.⁸³ Now, most of these people, with few exceptions, are sent to county jail.⁸⁴

This has increased jail populations in some counties by hundreds of offenders per month.⁸⁵ In order to manage this increasing population, realignment urges counties to use alternatives to incarceration such as flash incarceration, split sentences, electronic monitoring, and home detention.⁸⁶ Sheriffs' departments and sentencing judges have discretion as to whether low-level felons convicted in county court will be put in jail or released into mandatory supervision through split sentencing,⁸⁷ which can include alternative sanctions such as work release or electronic monitoring.⁸⁸ Felons who remain under state parole return to the county of their last residence continuing to report to state officials and to utilize state funding.⁸⁹

Another major impact of A.B. 109 is that many state inmates who would have been released on parole under the supervision of state-funded parole officers and programming, are now released into a new county-run system called "Post-Release Community Supervision" (PRCS).⁹⁰

⁸¹ State parolees supervised by either county or state agents will be sent to jail for parole revocations, except for individuals who were released from prison after serving indeterminate life sentences. TAYLOR, *supra* note 19, at 8.

⁸² In 2010, the total number of adult prison parolees who returned to prison because of violating their release terms was 77,510. DEP'T OF CORR. & REHAB., RATE OF FELON PAROLEES RETURNED TO CALIFORNIA PRISONS CALENDAR YEAR 2010, at 1 tbl.1 (Mar. 2011), *available at* www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/PVRET2/PVRET2d2010.pdf.

⁸³ *Id.* In 2010, the total number of adult prison parolees who returned to prison because they were convicted of new crimes while on parole was 17,193.

⁸⁴ These parolees will serve a revocation period of up to 180 days in county jail but will return to state parole or prison if they have remaining parole time. CAL. PENAL CODE § 3000.08 (Westlaw 2013).

⁸⁵ See *Public Safety Realignment*, CAL. DEP'T CORRECTIONS & REHABILITATION, www.cdcr.ca.gov/realignment/index.html, for the most updated information on how many people are being transferred from state to county control.

⁸⁶ CAL. PENAL CODE § 3454(b)-(c) (Westlaw 2012). Split sentencing enables a judge to sentence a felon to both jail and community supervision. Flash incarceration is a brief sentence in jail of up to ten days, used for felons who violate the terms of their community supervision. TAYLOR, *supra* note 19, at 60.

⁸⁷ CAL. PENAL CODE § 1170(h)(5)(B) (Westlaw 2012).

⁸⁸ CAL. PENAL CODE § 1203.016(a) (Westlaw 2012).

⁸⁹ CAL. PENAL CODE § 3000.08 (Westlaw 2013).

⁹⁰ CAL. PENAL CODE § 3451(a) (Westlaw 2013) (state inmates shall "upon release from prison and for a period not exceeding three years immediately following release, be subject to community supervision provided by a county agency designated by each county's board of

Specifically, any state prisoner who committed a low-level crime will be released into county control instead of being monitored by the State.⁹¹ Every offender eligible for PRCS must enter into a PRCS agreement as a condition of his or her release from prison.⁹² Each county's PRCS system is in charge of supervising and providing rehabilitative programming.⁹³ Adult probation departments are now authorized to connect this population with housing, rehabilitation, and training services.⁹⁴ Altogether, realignment envisions a dramatic transformation in how probation departments handle their populations.⁹⁵

Realignment initially provided approximately \$450 million to be divided among the counties in fiscal year 2011-12 to implement realignment strategies.⁹⁶ In fiscal year 2012-2013, this increased to \$850 million, and for fiscal year 2013-2014 the State allocated more than \$1 billion to the counties.⁹⁷ Proposition 30, which voters passed in November 2012, increased income and sales taxes, in part to guarantee funding for realignment.⁹⁸

supervisors which is consistent with evidence-based practices, including, but not limited to, supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under postrelease supervision.”).

⁹¹ This group will not include anyone in state prison currently serving a term for a violent offense, who has committed a third strike pursuant to California's "Three Strikes, You're Out" law, or who is considered a Mentally Disordered Offender. See KEY PROVISIONS, *supra* note 6, at 3. Note, however, that this threshold only takes into account the offender's most recent crime. An offender who committed a violent crime in the past and, for example, is back in prison due to a technical violation of parole will still be considered eligible for PRCS. A PRCS offender is eligible for discharge at six months.

⁹² CAL. PENAL CODE § 3452 (Westlaw 2012).

⁹³ KEY PROVISIONS, *supra* note 6, at 3.

⁹⁴ CAL. PENAL CODE § 17.5(a)(8) (Westlaw 2012).

⁹⁵ To be clear, the reentry services that are discussed in this Comment should be offered to both the PRCS population and those "three non" felons who are now released into mandatory supervision under A.B. 109.

⁹⁶ Some counties criticized A.B. 109 for what they call a fiscally penalizing policy of awarding less realignment funding to counties that have fewer people in state prison. Counties received more money if the State estimated that more parolees would be returned to them. Therefore, counties that had already succeeded in diverting people from prison (and were therefore most likely already getting more S.B. 678 funding), or that had lower crime rates, received less start-up funding for A.B. 109. This funding rubric has since been revised. Petersilia & Snyder, *supra* note 20, at 272-73.

⁹⁷ *Funding of Realignment*, CAL. DEP'T CORRECTIONS & REHABILITATION, available at www.cdcr.ca.gov/realignment/Funding-Realignment.html (last visited May 22, 2013).

⁹⁸ Petersilia & Snyder, *supra* note 20, at 8-9.

II. AB 109 AND *PLATA* CALL ON COUNTIES TO VASTLY ALTER THE ROLE OF PROBATION, TO SLOW RECIDIVISM, AND TO IMPROVE REHABILITATION

Both realignment measures and *Plata* call on counties to focus on recidivism, so much so that many officials have come away with the impression that reentry and rehabilitation services are necessary for realignment's success. For example, in a memo to counties, Paul McIntosh, Executive Director of the California State Association of Counties, stated: "Clearly the successful implementation of realignment will require a significant paradigm shift in our public safety communities. The successful model will not be an incarceration model, but one that seeks to divert and rehabilitate citizens, returning them to be productive members of our community."⁹⁹ This impression stems from explicit language about rehabilitation and reentry programs in realignment's legislative language, as well as from the Supreme Court's discussion in *Brown v. Plata*.¹⁰⁰ Indeed, both the Supreme Court and the state legislation highlight holistic remedies to prison population reduction that focus more on the means—systemic reform of probation—than on the ends.¹⁰¹

A. THE SUPREME COURT'S BROAD REMEDY INCLUDED REDUCING RECIDIVISM THROUGH REENTRY SERVICES

The Supreme Court laid the groundwork for California to refocus its corrections system on reducing recidivism through rehabilitation. The opinion, authored by Justice Anthony Kennedy, observed that the State's prison system as a whole is troubled, going so far as to say that all incarcerated persons are the system's "next potential victims."¹⁰² In assigning a remedy as broad as reducing the population of the State's prison system, the Court created an order that will impact all prisoners in California who "are at risk so long as the State continues to provide inadequate care."¹⁰³ Not only did the Court conclude that reducing

⁹⁹ Memorandum from Paul McIntosh, Exec. Dir., Cal. State Ass'n of Counties, to County Supervisors and County Administrative Officers (July 12, 2011).

¹⁰⁰ See, e.g., CAL. PENAL CODE § 17.5(a)(4)-(5) (Westlaw 2012); *Brown v. Plata*, 131 S. Ct. 1910, 1943 (2011).

¹⁰¹ CAL. PENAL CODE § 17.5(a)(4)-(5) (Westlaw 2012).

¹⁰² *Plata*, 131 S. Ct. at 1940. In fact, as the Court acknowledged, reducing the prison population does not directly relate to creating a better care system for offenders. The reasoning behind the remedy hinges on the assumption that prison officials will provide better care if there are fewer prisoners. *Id.*

¹⁰³ *Id.*

overcrowding was a narrow enough remedy to pass constitutional muster,¹⁰⁴ but it also celebrated the option as a means of addressing other systemic problems: “Reducing overcrowding will also have positive effects beyond facilitating timely and adequate access to medical care, including reducing the incidence of prison violence and ameliorating unsafe living conditions.”¹⁰⁵

After establishing that a population reduction was the only option for the State, and that the remedy could affect the prison population in its entirety, Justice Kennedy elaborated on the alternative remedies that would reduce the population of prisoners without impacting public safety.¹⁰⁶ Under the federal Prison Litigation Reform Act, a court must give substantial weight to public safety concerns when considering population reduction orders.¹⁰⁷ The district court accepted the plaintiffs’ argument that the State could reduce its prison population while maintaining public safety through such means as using community correctional programs and rehabilitative programming, and the Supreme Court accepted these findings as fact.¹⁰⁸ Justice Kennedy took note of the incarceration alternatives the district court had discussed, specifically that the State could employ methods such as “[d]iverting low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring,” as well as “punishing technical parole violations through community-based programs.”¹⁰⁹

This language demonstrates the Supreme Court’s recognition that California needs to utilize alternatives to incarceration, including community-based programming, in order for a population reduction order to be safe and feasible. Had the Court’s remedy mandated reducing the population of prisons without addressing the underlying causes of overpopulation, it would have appeared both unrealistic and flippant—a call to release thousands of prisoners without a system to help them reenter mainstream society. However, the Court made alternatives to incarceration a component of its remedy by recognizing

¹⁰⁴ *Id.* at 1929.

¹⁰⁵ *Id.* at 1939.

¹⁰⁶ *Id.* at 1942-43.

¹⁰⁷ 18 U.S.C.A § 3626(a)(1)(A) (Westlaw 2013).

¹⁰⁸ *Plata*, 131 S. Ct. 1910, 1954 (J. Scalia, dissenting). Justice Scalia took particular issue with this in his dissent.

¹⁰⁹ *Id.* at 1943 (majority opinion). Specifically, the Court stated that the “State now sends large numbers of persons to prison for violating a technical term or condition of their parole, and it could reduce the prison population by punishing technical parole violations through community-based programs. This last measure would be particularly beneficial as it would reduce crowding in the reception centers, which are especially hard hit by overcrowding.” *Id.*

that without such measures, its mandate could lead to a public safety risk.¹¹⁰

B. REALIGNMENT'S FOCUS ON REHABILITATION'S ROLE IN ENDING RECIDIVISM

Realignment expanded on the Court's concept of creating holistic and wide-ranging solutions. The language of A.B. 109's modifying bill, A.B. 117, focuses on ending recidivism largely through community-based corrections programs.¹¹¹ The legislation explicitly declares that California "must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices" in order to best address public safety issues.¹¹²

A.B. 117 seeks to mitigate public safety risks by tasking counties with creating programs that facilitate low-level felony offenders' "reintegration back into society."¹¹³ The legislation states that funding may be utilized to provide more intensive probation supervision and expand the availability of evidence-based rehabilitation programs "including, but not limited to, drug and alcohol treatment, mental health treatment, anger management, cognitive behavior programs, and job training and employment services"¹¹⁴ and "evaluating the effectiveness of rehabilitation and supervision programs and ensuring program fidelity."¹¹⁵ It includes several suggestions for more holistic treatment strategies, such as community-based residential programs that offer drug and alcohol treatment, literacy training, employment counseling, and mental health treatment. It also provides explicit examples of programs such as mother-infant care programs and day reporting centers.¹¹⁶

By strongly encouraging counties to apply recidivism-reducing practices to the PRCS population that encompass "a range of custodial and noncustodial responses to criminal or noncompliant offender

¹¹⁰ *Id.*

¹¹¹ A.B. 117, 2011-2012 Leg., Reg. Sess. (Cal. 2011-2012), amending CAL. PENAL CODE § 17.5 (Westlaw 2012).

¹¹² CAL. PENAL CODE § 17.5(a)(4) (Westlaw 2012).

¹¹³ CAL. PENAL CODE § 17.5(a)(5) (Westlaw 2012) ("Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society.").

¹¹⁴ CAL. PENAL CODE § 1230(b)(3)(D) (Westlaw 2012).

¹¹⁵ CAL. PENAL CODE § 1230(b)(3)(E) (Westlaw 2012).

¹¹⁶ CAL. PENAL CODE § 17.5(a)(8)(H)-(K) (Westlaw 2012).

activity,”¹¹⁷ the Legislature has demonstrated that it expects counties to manage their PRCS populations—as well as the large population that courts will be sentencing to probation instead of prison—in a way that both stems the flow of people back into jails and addresses public safety issues. Otherwise, the county jails will suffer the same fate as the State’s prisons: overpopulation and the potential violation of inmates’ rights.¹¹⁸

III. WITHOUT REQUIREMENTS FOR COUNTIES’ REHABILITATION EFFORTS, COUNTIES WILL NOT ESTABLISH THE TYPE OF PROBATION SERVICES NEEDED TO FULFILL THE INTENT OF THE LEGISLATION AND THE SUPREME COURT

By relying on counties to develop post-release rehabilitation systems for those on mandatory supervision or in PRCS without specifying funding and program-development requirements, realignment sets up a system destined to fail. Without legislative mandates regarding what types of programs, if any, to provide, counties are responding to realignment in very different ways, with many choosing to forgo investing in substantial reentry services, which, as will be demonstrated below, are a primary tool in reducing recidivism.¹¹⁹

A. REALIGNMENT PROVIDES MINIMAL GUIDANCE FOR HOW COUNTIES SHOULD FACILITATE REENTRY AND REHABILITATION SERVICES, WHICH ARE VITAL TO REDUCING RECIDIVISM

The State provided minimal specifications for how counties should spend funding apportionments.¹²⁰ These specifications came in two forms: specific funding accounts earmarked for particular entities, and a list of suggested programs counties could incorporate into their probation departments.¹²¹ The initial funding for counties’ first year of realignment

¹¹⁷ CAL. PENAL CODE § 17.5(a)(8) (Westlaw 2012).

¹¹⁸ Jails are already grappling with overcrowding. The Prison Law Office recently filed a suit against Fresno County for failing to provide mental health care to prisoners. Additionally, many jails are under court-enforced population caps. See Schlanger, *supra* note 15, at 212-213 for a thorough discussion of realignment’s impact on jail populations. See also MISCZYNSKI, *supra* note 4, at 13 (“[C]ounties are clearly not in a position to both incarcerate all of the inmates they managed prior to realignment and all of the realigned offenders.”).

¹¹⁹ See, e.g., TAYLOR, *supra* note 19, at 9-10.

¹²⁰ See *id.* for a breakdown of the total realignment package.

¹²¹ See, e.g., EXEC. COMM. OF THE SANTA CRUZ CNTY. CMTY. CORR. P’SHP, SANTA CRUZ COUNTY PUBLIC SAFETY REALIGNMENT AND POST RELEASE COMMUNITY SUPERVISION 2011 IMPLEMENTATION PLAN 6 (Oct. 4, 2011), available at www.calrealignment.org/component/docman/doc_download/69-santa-cruz-county-plan.html?Itemid, for an example of how counties received their initial state funding allotment.

was distributed by the State in four separate accounts.¹²² One funding stream was allocated for purposes that included increasing the number of jail beds, hiring additional jail security, creating alternatives to incarceration, such as increased use of electronic monitoring supplies and probation officers, and channeling more resources into existing and new rehabilitation programs.¹²³ The three other streams of funding were reserved for the district attorney and public defenders' offices, one-time start-up costs, and planning grants.¹²⁴ Therefore, while the State indicated to counties that some funds were indeed intended to go toward rehabilitative and reentry services, it did not specify a particular spending rubric, and thus counties could elect to spend the majority of PRCS program funds on augmenting their incarceration facilities.¹²⁵

Reentry and rehabilitative programs have proven to be highly effective tools for reducing recidivism. The Legislative Analyst's Office (LAO) highlighted that in order to minimize recidivism and reduce crime, offenders require treatment and assistance programs "such as drug treatment, mental health counseling, employment assistance and anger management."¹²⁶ Research has shown that offenders in community supervision are more likely to be successful while on probation if they are provided effective, evidence-based¹²⁷ treatment and assistance programs (i.e., those that are continually monitored and have a proven record of success).¹²⁸ Not only are these programs better for

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Memorandum from Paul McIntosh, CSAC Exec. Dir., on Allocation/Caseload Information on AB 109/AB117 (Criminal Justice Realignment), to Chairs, Cnty. Bds. of Supervisors, Cnty. Admin. Officers 1 (July 8, 2011), available at [www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107_forensics/csac_memo_re_allocation-caseload_info_on_ab_109_\(7-8-11\).pdf](http://www.cmhda.org/go/portals/0/cmhda%20files/committees/forensics/1107_forensics/csac_memo_re_allocation-caseload_info_on_ab_109_(7-8-11).pdf).

¹²⁵ *Id.*

¹²⁶ See generally LEGISLATIVE ANALYST'S OFFICE, *supra* note 12.

¹²⁷ One study found that "[t]he implementation of evidence-based practices results in an average decrease in future crime of between 10 percent and 20 percent, whereas programs that are not evidence-based tend to see no decrease and even a slight increase in future crime. Interventions that follow all evidence-based practices can achieve recidivism reductions of 30 percent. Many state statutes and administrative regulations specify that certain correctional services and programs must be evidence-based." PUB. SAFETY PERFORMANCE PROJECT, PEW CTR. ON THE STATES, POLICY FRAMEWORK TO STRENGTHEN COMMUNITY CORRECTIONS ch. 1, at 6 (Dec. 15, 2008), available at www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/PolicyFramework.pdf (footnotes omitted).

¹²⁸ JOHN ROMAN & AARON CHALFIN, JUSTICE POLICY CTR., DOES IT PAY TO INVEST IN REENTRY PROGRAMS FOR JAIL INMATES? 1 (June 2006), available at www.urban.org/projects/reentry-roundtable/upload/roman_chalfin.pdf (finding "that reentry programs for jail-based inmates produce benefits large enough to offset the cost of the investment with only a modest reduction in crime"). In an effort to contain the scope of this Comment, data and studies on the vast

probationers, but they can also be less expensive than incarceration.¹²⁹ Moreover, better probation practices can improve public safety by providing people exiting jail with opportunities and healing that decrease their motivation to commit future crimes.¹³⁰

Realignment modifies the Penal Code to provide suggestions for PRCS programs but does not go so far as to make any specific components of rehabilitation efforts by counties mandatory.¹³¹ Instead, it only suggests rehabilitation and reentry programming possibilities.¹³² For example, A.B. 117 merely suggests that the community-based punishment (which includes reentry services) “*may* be provided by local public safety entities directly or through community-based public or private correctional service providers.”¹³³

A.B. 117 modifies another section of the Penal Code to mandate that funds “*shall* be used to provide supervision and rehabilitative services for adult felony offenders subject to probation, and *shall* be spent on evidence-based community corrections practices and programs.”¹³⁴ While the use of “*shall*” indicates that counties are required to spend at least *some* funding on community programs, the legislation then states that the programs “*may*” include expanding evidence-based risk and needs assessments, electronic monitoring, mandatory community service, home detention, day reporting, restorative justice programs, work furlough programs, and incarceration in county jail for up to ninety days.¹³⁵ The Legislature left out any additional guidance that would guarantee that counties focus more on treatment than on monitoring. The reentry services that A.B. 117 lists—such as job training programs, employment services, and alcohol treatment—are all purely suggestive, and the law does not provide counties with

benefit of rehabilitative and reentry programs for people exiting incarceration will be omitted. For further reading on this issue, see Joan Petersilia, *What Works in Prisoner Reentry—Reviewing and Questioning the Evidence*, 68 FED. PROBATION 4 (2004), and JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGE OF PRISONER REENTRY (2005).

¹²⁹ Petersilia, *supra* note 128, at 7.

¹³⁰ BILL ANALYSIS, ASSEMBLY COMM. ON PUB. SAFETY, SB 678 2 (June 16, 2009), available at www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_678_cfa_20090619_104915_asm_comm.html. A.B. 117 states that public safety will be improved by “[r]ealigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs,” essentially by better facilitating an incarcerated person’s “reintegration back into society.” CAL. PENAL CODE § 17.5(a)(5) (Westlaw 2012).

¹³¹ See generally KEY PROVISIONS, *supra* note 6.

¹³² See, e.g., CAL. PENAL CODE § 17.5(a)(8) (Westlaw 2012).

¹³³ *Id.* (emphasis added).

¹³⁴ CAL. PENAL CODE § 1230(b)(3) (Westlaw 2012) (emphasis added).

¹³⁵ CAL. PENAL CODE § 1230(b)(3)(A)-(B) (Westlaw 2012).

minimal requirements, performance measurements, or accountability models to ensure these techniques are being implemented properly.¹³⁶

Much like as in the California Probation Subsidy Act of 1965 and S.B. 678, none of these suggested programming efforts are enforceable requirements.¹³⁷ But realignment goes further than previous legislation by making mandatory sentencing changes and forcing counties to take on new offenders and to create a new probationary system.¹³⁸ S.B. 678 required funds to be spent on community practices and programs, but it did not mandate that counties keep felons in their control. A.B. 109, on the other hand, mandates that counties retain a large portion of felons, but it does not put detailed requirements on how counties spend their funds. While the previous legislations used the “carrot” of funding incentives to encourage counties to participate in programming, realignment only provides a “stick,” with dangerous ramifications if counties are unsuccessful at keeping PRCS and probation populations from returning to jail.

B. MANY COUNTIES’ PROBATIONARY SYSTEMS LACK THE INFRASTRUCTURE AND THE MOTIVATION NEEDED TO CREATE THE NECESSARY REHABILITATIVE SERVICES

California has some of the worst probation failure rates in the country—probationers are 10% less likely than the national average to successfully complete their probationary periods.¹³⁹ In 2007, prior to any of the current probation reform acts, around 20,000 of the nearly 47,000 new admissions to state prison were felony offenders who were committed to state prison after failing probation supervision.¹⁴⁰ Some counties return probationers to prison at a rate as high as 12% to 16%.¹⁴¹ In part, this is an effort to relieve strapped probation departments: a study by the LAO showed that probation officers frequently recommend that repeat probation violators be sent to prison because probation departments “often lack sufficient resources to properly supervise and

¹³⁶ For a discussion of performance measurements and accountability recommendations, see TAYLOR, *supra* note 8, at 16-17.

¹³⁷ See, e.g., CAL. PENAL CODE § 1230(b)(3) (Westlaw 2012).

¹³⁸ See generally KEY PROVISIONS, *supra* note 6.

¹³⁹ Warren, *supra* note 21, at 187.

¹⁴⁰ BILL ANALYSIS, *supra* note 130.

¹⁴¹ LEGISLATIVE ANALYST’S OFFICE, *supra* note 12, at 30-31.

treat” repeat offenders.¹⁴² The study found that “[t]he consequence of these fiscal incentives is that some offenders who could be safely and successfully supervised at the local level . . . are instead sent to state prison at an even greater cost to taxpayers.”¹⁴³ Essentially, counties pass the buck to the State by sending people to prison.¹⁴⁴

Realignment sought to end this cycle of recidivism by decreasing parole violations and repeat offenses through better reentry systems.¹⁴⁵ However, the lack of existing infrastructure and political will has meant that many counties do not have substantial reentry systems already in place.¹⁴⁶ Moreover, a look at county realignment plans demonstrates that counties often do not have the motivation to use realignment funding in a way that will establish these services. While some counties have focused efforts on programs to reduce probation failure rates, other counties have focused primarily on incarceration.¹⁴⁷

1. *Many Communities and Probation Departments Lack the Infrastructure and Political Will To Create the Necessary Reentry Systems*

Probation departments have long lacked the resources needed to create significant reentry systems.¹⁴⁸ Only 3,000 sworn probation officers monitor the estimated 330,000 adult probationers statewide.¹⁴⁹ Each probation officer oversees between one hundred and two hundred cases a month.¹⁵⁰ Two propositions in the 1970s severely limited

¹⁴² *Id.* at 19. The LAO estimated that about 3,000 probation officers in the state manage 100-200 cases each, which entails ensuring that probationers meet the terms of the release and often involves referring probationers to service programs. *See generally id.* at 3, 8-9.

¹⁴³ *Id.* at 19.

¹⁴⁴ *Id.* at 20; *see also* Feinstein, *supra* note 38, at 377 (“This dearth of funds for adult probation and the inadequate supervision and resources creates an incentive structure adverse to keeping probationers in the community. Probation officers are incentivized to recommend incarceration rather than probation since the state must then bear the financial burden of that offender; moreover, sending a probationer to prison is one less case for their already overburdened loads. Judges are incentivized to revoke probation and sentence someone to state prison for the same reason.”).

¹⁴⁵ *See, e.g.*, CAL. PENAL CODE § 17.5(a)(1)-(8) (Westlaw 2012).

¹⁴⁶ *See generally* Warren, *supra* note 21.

¹⁴⁷ *See* TAYLOR, *supra* note 19, at 9-10.

¹⁴⁸ *See generally* Warren, *supra* note 21.

¹⁴⁹ LEGISLATIVE ANALYST’S OFFICE, *supra* note 12, at 20; PEW CTR. ON THE STATES, THE IMPACT OF CALIFORNIA’S PROBATION PERFORMANCE INCENTIVE FUNDING PROGRAM 1 (Feb. 2012), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Pew_California_probation_brief.pdf.

¹⁵⁰ LEGISLATIVE ANALYST’S OFFICE, *supra* note 12, at 10.

counties' tax revenues, and since then "adult probation services in California have been woefully underfunded."¹⁵¹ Even with S.B. 678 funding, many county probation departments struggle to provide rehabilitative programming to their pre-realignment populations.¹⁵²

Moreover, the idea that probation should provide rehabilitative services came back into vogue only recently.¹⁵³ While the concept of reforming people convicted of crimes was popular in the era of the Probation Subsidy Act of 1965, by the 1980s and 1990s, the focus of probation turned to punishment.¹⁵⁴ A 1995 study found that only 8% of probation departments in the state prioritized rehabilitation and social reintegration, whereas 75% of the departments prioritized enforcing the terms of probation.¹⁵⁵ More recently, the LAO conducted a study of thirty-one counties and found that probation departments often do not make programming available that is proven to help people on probation succeed in mainstream society post-conviction and incarceration.¹⁵⁶ The survey found that while some programs, such as substance abuse treatment and mental illness programs, were ubiquitous, other programs, such as those regarding education, housing, and vocational training, were offered only rarely.¹⁵⁷ Even in counties that have programs already available, other factors, such as limited capacity and low quality, kept many probationers from participating.¹⁵⁸

Communities are often reluctant to support reentry programs,¹⁵⁹ and already some localities have attempted to put the brakes on probation departments' plans to increase community programming or to build new day centers for PRCS populations. In San Bernardino County, the Probation Department is hoping to build a second Day Reporting Center

¹⁵¹ See, e.g., Warren, *supra* note 21, at 186 ("Due to the absence of state funding, as well as the devastating impact of Propositions 4 and 13, adult probation services in California have been woefully underfunded for at least thirty years.").

¹⁵² ADMIN. OFFICE OF THE COURTS, *supra* note 73, at 29; see also ADMIN. OFFICE OF THE COURTS & CAL. STATE ASS'N OF COUNTIES, PROBATION SERVICES TASK. FORCE FINAL REPORT I (2003), available at www.courts.ca.gov/documents/fullReport.pdf.

¹⁵³ Warren, *supra* note 21, at 188.

¹⁵⁴ *Id.* at 187.

¹⁵⁵ NIETO, *supra* note 5, at 18-19.

¹⁵⁶ LEGISLATIVE ANALYST'S OFFICE, *supra* note 12, at 19.

¹⁵⁷ *Id.* at 17.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Megan Kurlychek, *What Is My Left Hand Doing? The Need for Unifying Purpose and Policy in the Criminal Justice System*, 10 CRIMINOLOGY & PUB. POL'Y 909, 914 (2011). In analyzing Montana's early release program, Kurlychek notes that "[f]ear of the offender is transformed from fiction into fact through the enactment of policies that serve to 'protect' the public by restricting opportunities for those with a criminal record. Restrictions range from housing and employment to qualifying for student loans and even the right to vote." *Id.*

in the city of Victorville to provide its PRCS population with services.¹⁶⁰ The Victorville Planning Commission rejected these plans, on the ground that it did not want probationers to be brought into the downtown area.¹⁶¹ The Commission's report said the center would continue the expansion of "less desirable social services in [the] vicinity of the Civic Center."¹⁶² The county Probation Department said that without the facility, several hundred of its PRCS members would not get rehabilitation or reentry services.¹⁶³ The City Council upheld the Planning Commission's decision by a three-to-one vote.¹⁶⁴

The barriers to developing better reentry programs are well illustrated by the difficulty in supplying housing to probationers. An estimated 10% of parolees are homeless, with the number rising to between 30% and 50% in cities like San Francisco and Los Angeles.¹⁶⁵ Studies show that a formerly incarcerated person who is released into a homeless shelter is 7% more likely to abscond from parole after his or her first month out than a person who has stable housing.¹⁶⁶ With housing such as shelters, temporary housing, and permanent supportive housing already at capacity, counties have limited resources to house this new population, and there is little political will to build more housing for a relatively unsympathetic group—the probationers.¹⁶⁷ In San Joaquin County, for instance, 20% of PRCS members were estimated to be returning to the county homeless.¹⁶⁸ While the county's plan acknowledged this, it devoted no funding to the creation of new stable

¹⁶⁰ Beatriz E. Valenzuela, *City, County Butt Heads over Expanding Probation Services*, DAILY PRESS, Feb. 18, 2012, available at <http://www.vvdailynews.com/articles/city-32947-victorville-county.html>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Beatriz E. Valenzuela, *Victorville Denies Probation Expansion Appeal*, DAILY PRESS, Apr. 4, 2012, available at <http://www.vvdailynews.com/articles/victorville-33780-probation-appeal.html>.

¹⁶⁵ BUREAU OF JUSTICE ASSISTANCE, HOMELESSNESS AND PRISONER RE-ENTRY, available at www.reentrypolicy.org/jc_publications/homelessness_prisoner_reentry/Homelessness.pdf (last visited Mar. 24, 2013).

¹⁶⁶ MARTA NELSON, PERRY DEESS & CHARLOTTE ALLEN, VERA INST. OF JUSTICE, THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY 9 (Sept. 1999), available at www.vera.org/sites/default/files/resources/downloads/first_month_out.pdf.

¹⁶⁷ See generally THE FORTUNE SOC'Y, IN OUR BACKYARD: OVERCOMING COMMUNITY RESISTANCE TO REENTRY HOUSING (A NIMBY TOOLKIT) (2011), available at http://www.jjay.cuny.edu/TOOL_KIT_1-NIMBY_FINAL.pdf (discussing the difficulty of implementing reentry housing because of neighborhood opposition).

¹⁶⁸ SAN JOAQUIN CNTY. EXEC. COMM. OF THE CMTY. CORR. P'SHIP, SAN JOAQUIN COUNTY PUBLIC SAFETY REALIGNMENT 2011 IMPLEMENTATION PLAN 39 (Aug. 17, 2011), available at www.calrealign.org/county-implementation/list-of-county-plans.html.

housing.¹⁶⁹ Many counties did not plan to fund any reentry housing and instead allocated much of their state funding from the State to the sheriffs' departments to increase the number of jail beds.¹⁷⁰ Indeed, the ACLU found that the largest twenty-five counties in the state had spent more than \$45 million on expanding jail capacity.¹⁷¹

Without additional funding for increasing these services in the community, these programs will not be able to meet the responsibility of providing for the new PRCS population or to keep this population from recommitting crimes and returning to prison. Forcing counties to spend realignment funding on these programs is the only way to guarantee that these services will be available to the PRCS and probation populations.

2. *Initial Realignment Plans Demonstrate that Probation Departments Are Not Implementing Sufficient Reentry Programming*

There is tremendous disparity in how counties have allocated their realignment funding and efforts.¹⁷² A look at the initial realignment plans created by counties demonstrates how counties have differed in their responses to the minimal requirements of the new PRCS system, with many focusing on jail expansion instead of providing services.¹⁷³

For a positive example, in the first year of realignment San Francisco County received 411 prisoners into its PRCS population, and sentenced 178 people to jail who otherwise would have been sent to prison.¹⁷⁴ The county has long been progressive in its probation strategies.¹⁷⁵ It established a Reentry Council in 2005, which initiated

¹⁶⁹ *Id.*

¹⁷⁰ HOPPER ET AL., *supra* note 10, at 15.

¹⁷¹ *Id.*, The ACLU concluded that “[c]ounties have chosen a path of jail expansion,” finding that twenty-five of the state’s largest counties are expanding jail capacity by more than 7000 beds, as well as expanding corrections staff.

¹⁷² See CALREALIGNMENT.ORG for access to the majority of county plans. See also *CURB Realignment Report Card—Second Edition*, CALIFORNIANS UNITED FOR A RESPONSIBLE BUDGET, www.curbprisonspending.org/?p=1391#_edn30 (last visited Mar. 18, 2012). Californians United for a Responsible Budget (CURB), a coalition of forty organizations, created its own county report card on how counties are utilizing alternatives to incarceration. The report card compares the amount of funding counties are spending on community-based reentry services to the amount that counties are spending on new jail beds (primarily through state funding from A.B. 900, which authorized \$7.4 billion in lease revenue bonds to be used for the expansion of prison, reentry centers and jails). See *id.*

¹⁷³ See CALREALIGNMENT.ORG for access to the majority of county plans.

¹⁷⁴ CMTY. CORR. P'SHIP EXEC. COMM., PUBLIC SAFETY REALIGNMENT IN SAN FRANCISCO: THE FIRST 12 MONTHS 8 (Dec. 19, 2012), available at www.sfsheriffs.net/files/SF_PSR.pdf.

¹⁷⁵ In fact, this is one reason why San Francisco County has seen fewer people entering into its PRCS system. Since its existing prison deterrent systems were developed prior to realignment, the County had fewer people in state prison than other counties of similar size. It was already a top-

efforts to bring probationers together with local community programs as well as to create new programs to help probationers enter into the mainstream.¹⁷⁶ San Francisco's initial realignment plan focused on creating a network of positions in the county justice system to help coordinate and connect the PRCS and probation population, including augmenting the county's Reentry Unit in its Public Defender's Office, which is in charge of connecting probationers with services in the community.¹⁷⁷ It also called for creating a "Reentry Division and Pre-Release Team"¹⁷⁸ to create alternative custody options and for establishing a "Care Coordination" entity to assist probationers in navigating the county healthcare systems.¹⁷⁹ The plan highlighted the need to create stable housing, employment help and treatment for those exiting incarceration.¹⁸⁰

Santa Cruz County provides another example of a plan rich with rehabilitation and reentry strategies. Its thirty-three-page plan spent considerable space explaining its emphasis on creating and using evidence-based practices, and on how to continue funding its dozen existing reentry programs.¹⁸¹ The plan explained that its "[f]our key values" include "improving public safety by reducing recidivism; improving accountability to taxpayers by providing cost-effective solutions; protecting the County from costly legal liability related to jail overcrowding; and reducing structural inequalities based on race and poverty."¹⁸² Despite the fact that Santa Cruz County jails were at 125% capacity when realignment began,¹⁸³ it dedicated the entirety of its PRCS/incarceration funds to creating a strong probation department, with no funds put toward building new jail beds.¹⁸⁴ In the first six

tier county under S.B. 678, in recognition of its success in retaining offenders within its local system. EXEC. COMM. OF THE CMTY. CORR. P'SHIP, CITY & COUNTY OF SAN FRANCISCO PUBLIC SAFETY REALIGNMENT & POST RELEASE COMMUNITY SUPERVISION 2011 IMPLEMENTATION PLAN 7 (July 21, 2011), available at www.sfgov3.org/Modules/ShowDocument.aspx?documentid=1035.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ *Id.* at 16 ("Collaborative case planning is the focal point of this active engagement approach involving the offender, his/her family, probation officer, law enforcement and multiple service providers (e.g. housing, employment, vocational training, education, physical health, nutritional supports, behavioral health, and pro-social activities).")

¹⁷⁸ *Id.* at 17-18.

¹⁷⁹ *Id.* at 20.

¹⁸⁰ *Id.* at 15.

¹⁸¹ EXEC. COMM. OF THE SANTA CRUZ CNTY. CMTY. CORR. P'SHIP, *supra* note 121.

¹⁸² *Id.* at 15.

¹⁸³ *Id.* at 26.

¹⁸⁴ *Id.* at 15.

months of realignment, Santa Cruz County saw a 20% decrease in its jail population.¹⁸⁵

Other counties were more circumspect about their reentry programs. Many counties with smaller populations created essentially boilerplate plans that contained only the language suggested by the CDRC and nothing else. For example, Siskiyou County, which expected to have a PRCS population of only twenty-three, created a plan that was just seven pages long and contained little more than a summary of the changes realignment will make across the state, a list of people who would make up its Community Corrections Partnership Executive Committee, and a basic structure for the creation of future plans.¹⁸⁶ Napa County, which also has a small population but expected a 25% increase in its offender population at the start of realignment, created a ten-page plan similar in scope.¹⁸⁷ Neither Siskiyou County's nor Napa County's plan provided more than a brief nod to reentry programs or recidivism-reducing strategies.

Meanwhile, some larger county plans were focused more on increasing their number of jail beds than on augmenting their reentry systems. Kern County, for example, expected its average daily population of offenders to increase by about two thousand under realignment.¹⁸⁸ While its lengthy plan discussed the benefits of its already-existing Day Reporting Center, where probationers can receive mental health and substance abuse treatment, by far the bulk of the county's funding allotment was allocated to ensuring that the PRCS population will be assessed for risk and well-monitored, and to adding jail beds to accommodate 236 more people.¹⁸⁹

¹⁸⁵ *CURB Realignment Report Card—Second Edition*, *supra* note 172.

¹⁸⁶ SISKIYOU COUNTY PUBLIC SAFETY REALIGNMENT AND POST RELEASE COMMUNITY SUPERVISION PRELIMINARY PLAN (Oct. 11, 2011), *available at* www.calrealignment.org/component/docman/doc_download/86-siskiyou-countyplan.html?Itemid.

¹⁸⁷ *See* COUNTY OF NAPA PUBLIC SAFETY REALIGNMENT AND POST RELEASE COMMUNITY SUPERVISION 2011 IMPLEMENTATION PLAN (2011), *available at* www.calrealignment.org/component/docman/doc_download/74-napa-county-plan.html?Itemid.

¹⁸⁸ COUNTY OF KERN PUBLIC SAFETY REALIGNMENT ACT OF 2011 IMPLEMENTATION PLAN 4 (2011), *available at* <http://www.calrealignment.org/county-implementation/list-of-county-plans.html>.

¹⁸⁹ *Id.* at 11. The variety of structure and scope among these plans in some ways is understandable in that it reflects the population needs each county is expecting to confront within this new system. For example, both Riverside and San Joaquin counties dedicate substantial funding toward their mental health departments, in response to indications that the PRCS populations will be returning with mental disorders. Some counties need to initially focus on building and training their probation departments to bring them up to date with current evidence-based practices in reentry systems.

Riverside County had more than 2,000 people released into its PRCS population in its first year. Initially, the county received a total of nearly \$23 million in realignment funding from the State for fiscal year 2011-2012, and the county allocated \$5.8 million of its realignment funding to its probation department while giving more than \$10 million to its Sheriff's Department.¹⁹⁰ While the plan mentioned that the county was interested in building Day Reporting Centers, it provided few details, while many pages of the plan were devoted to inmate monitoring.¹⁹¹ The plan allotted \$4.2 million of realignment funding to go toward the county's Department of Mental Health, and the county estimated that 80% of its PRCS population would have substance-abuse issues and 5% would have severe mental-health problems.¹⁹² Relative to San Francisco and Santa Cruz counties, both Kern and Riverside counties initially focused funding heavily on incarceration.¹⁹³

The LAO surveyed forty-seven county plans and found that 32% of funding in most counties went to probation departments, "primarily for supervision and programs."¹⁹⁴ While this may sound like counties are taking heed of the need to develop reentry and rehabilitative programs, it is unclear how much of this funding has actually been spent on reentry programs. More telling is that the LAO study also found that only 11% of funding was allocated to programs and services provided by other agencies in the community, "such as substance abuse and mental health treatment, housing assistance and employment services."¹⁹⁵ Since most counties did not have strong probation systems already in place when realignment began, the fact that so little is being spent on augmenting the capacity of outside agencies indicates that these resources might not be available to the current PRCS population.¹⁹⁶

¹⁹⁰ COUNTY OF RIVERSIDE PUBLIC SAFETY REALIGNMENT & POST-RELEASE COMMUNITY SUPERVISION FINAL IMPLEMENTATION PLAN 43 (Feb. 7, 2012), available at www.probation.co.riverside.ca.us/pdf/ccpec/Final_Implementation_Plan_February_7_2012.pdf.

¹⁹¹ *Id.* at 7.

¹⁹² *CURB Realignment Report Card—Second Edition*, *supra* note 172.

¹⁹³ *Id.* CURB found that nine of the thirteen counties it reviewed spent more money on jail expansion than on alternatives.

¹⁹⁴ TAYLOR, *supra* note 19, at 9-10.

¹⁹⁵ *Id.* at 10.

¹⁹⁶ The ACLU's report has additional data on how little some counties are putting toward reentry programming:

[T]he Probation Department in Orange County plans to open "several regional adult day reporting centers, as collaborative and evidence-based one-stop delivery sites" to serve 50 supervisees each, but the plan allocates only nine percent of the programming budget to contract with service providers, or one-sixth that of the sheriff's allocation. Kings County's plan acknowledges that "live in drug treatment programs will be essential to help reduce overcrowding in the jail" and that mental health staffing must be increased, but allocates a

In the last year, even without requirements, many counties have been allocating more resources to reintegrating inmates than they had before.¹⁹⁷ For example, in March 2013 Riverside County released an update to its plan.¹⁹⁸ For fiscal year 2012-2013, the State awarded Riverside with more than \$43 million, and, combined with additional funding, the county had \$53 million to spend on its realignment measures.¹⁹⁹ While it spent \$21 million on the Sheriff's Department and just half that on probation, it also allocated \$10 million to the county's Department of Mental Health to go toward services like substance abuse programs and housing.²⁰⁰ The updated plan included more detailed discussion about the rehabilitative needs of the county's PRCS population.²⁰¹ However, making these programs a requirement will give counties the needed push to put more resources into reentry programs and cut through resistance in the community and probation department, and ensure that all counties respond similarly. By creating mandates for how counties should allocate funding to their PRCS populations, as well as the populations of people who will be heading into county-sentenced probation, the Legislature could remedy disparities among counties and make realignment much more likely to succeed in reducing recidivism.

paltry two percent of its total AB 109 programming budget to health, treatment, and other services—less than the allocations made to both the Human Resources and the County Counsel. This is in stark contrast to counties like Alameda, Placer, San Joaquin, Santa Clara, Shasta, and Solano, which allocate anywhere from a quarter to a third to such programming.

HOPPER ET AL., *supra* note 10, at 40.

¹⁹⁷ Local newspapers regularly come out with stories about how counties are attempting new programs for their reentry population. For example, both the tiny counties of Glenn County and Plumas County are now offering education courses to their former inmates, using public and private funding. See, e.g., Debra Moore, *Parolee Reentry Program Gains Momentum*, PLUMAS COUNTY NEWS, Apr. 1, 2013, available at www.plumasnews.com/~plumas6/index.php?option=com_content&view=article&id=10801:parolee-reentry-program-gains-momentum&catid=69:-headline-news&Itemid=6.

¹⁹⁸ EXEC. COMM. OF THE CMTY CORR. EXEC. P'SHIP., COUNTY OF RIVERSIDE PUBLIC SAFETY REALIGNMENT & POST-RELEASE COMMUNITY SUPERVISION IMPLEMENTATION PLAN UPDATE (Mar. 12, 2013), available at www.probaton.co.riverside.ca.us/pdf/ccpec/County_of_Riverside_Public_Safety_Realignment_&_PRCS_Implementation_Plan_Update_031213.pdf.

¹⁹⁹ *Id.* at 3.

²⁰⁰ *Id.* The county is still heavily focused on incarceration. See, e.g., *Riverside County To Receive \$100 Million for Jail Expansion*, SW. RIVERSIDE NEWS NETWORK (Mar. 8, 2012), www.swrnn.com/2012/03/08/riverside-county-to-receive-100-million-for-jail-expansion/.

²⁰¹ COUNTY OF RIVERSIDE PUBLIC SAFETY REALIGNMENT & POST-RELEASE COMMUNITY SUPERVISION IMPLEMENTATION FINAL PLAN, *supra* note 190, at 30-35. The plan discusses the Probation Department's partnership with the Mental Health Department, the challenges of transporting people to services, and the need to build more reentry housing.

IV. REHABILITATION PROGRAM GUIDELINES SHOULD BE MANDATORY

Reducing the flow to prisons requires more than reducing crime rates—counties must create probation systems that actually function to keep people from returning to prison.²⁰² Realignment should modify the Penal Code to include funding requirements for rehabilitation and reentry services, to realize the intent of the legislation and to ensure that inmates have equal access to available rehabilitative services. The Probationary Subsidy Act of 1965 revealed that counties need more than incentives based on how much they reduce the prison population—they need their success to be measured based on compliance with programming proven to reduce recidivism.²⁰³ S.B. 678 responded to this lesson by requiring counties to spend their funding on evidence-based, recidivism-reducing programs, yet its progress would have been too slow to meet the Court’s population-reduction deadline, and therefore stronger policy was needed.²⁰⁴ While A.B. 109 mandates population reduction in a way that S.B. 678 did not, since it does not provide reentry program incentives *or* mandates, counties may never install the type of programming that will assist people exiting incarceration. Therefore, the legislation should contain stronger program guidelines that counties are required to follow.

One reason the State may not have wanted to force counties to create specific community programming could be the desire to provide counties with the freedom to respond to the incoming PRCS populations as they see fit. For example, the LAO suggests that the State should allot realignment funding in a way that allows this flexibility in programming creation.²⁰⁵ The LAO states that flexibility allows for local innovation and responsiveness to local needs.²⁰⁶ California’s counties span the gamut of income, resources, job availability, education, and probation populations, and the State has often shown interest in allowing local governments to tailor programs to their own specific issues.²⁰⁷ However, allowing the counties to have so much discretion fails to account for the

²⁰² For an overview of this concept, see Ball, *supra* note 28.

²⁰³ Warren, *supra* note 21, at 190.

²⁰⁴ CAL. PENAL CODE § 1230(b) (Westlaw 2013).

²⁰⁵ TAYLOR, *supra* note 8, at 3.

²⁰⁶ *Id.* at 15.

²⁰⁷ For example, the State gave counties much freedom when it realigned its mental health system in 1991. CAL. MENTAL HEALTH DIRS. ASS’N, HISTORY AND FUNDING SOURCES OF CALIFORNIA’S PUBLIC MENTAL HEALTH SYSTEM 1 (July 20, 2006), available at www.mhac.org/pdf/CMHDA_History_Mental_Health_Funding.pdf.

possibility that counties will not have the political will or means to implement these programs.²⁰⁸

One way the Legislature could provide a one-size-fits-all requirement for counties while still allowing local flexibility and control would be to incorporate the following language into A.B. 118 (which provides the specific funding requirements for A.B. 109):

If 10% or more of the PRCS population is returning to the county homeless (as that word is defined by the U.S. Department of Housing and Urban Development), the county SHALL put forward at least [a specified percentage range] of its funding designated for probationary programs toward developing stable, evidence-supported housing programs for the PRCS population.

Or,

If 10% or more of the PRCS population is in need of substance-abuse treatment, then the county SHALL put forward at least [a specified percentage range] of its probationary program funding toward evidenced-based substance abuse programs.

The specified percentage would be based on the average cost of these services per probationer, multiplied by the number of probationers transferring from state control who need services. Of course, as many critics have pointed out, realignment does not require counties to collect data on their realignment population, and thus it will be difficult for counties to know the needs of people in their PRCS systems.²⁰⁹ The proposed legislative language here would either (1) require counties to base their funding allocation on predicted needs, which many counties included in their plans and can be drawn from parolee and county data, or (2) be accompanied by requirements for data collection, which is suggested by the ACLU.²¹⁰

Pew Center on the States offers similar language in recommending that state legislation provide mandatory spending and population requirements for how counties utilize “[e]vidence-based programs to reduce recidivism.”²¹¹ For example, to require counties to provide

²⁰⁸ See, e.g., Kurlychek, *supra* note 159 and accompanying text.

²⁰⁹ See, e.g., HOPPER ET AL., *supra* note 10, at 41.

²¹⁰ *Id.* at 9-10. Specifically, the ACLU recommends that the state mandate standardized collection of data to enable “policy-makers to monitor which policies and programs are working to reduce recidivism and reliance upon incarceration, and to base policy and budget decisions on those findings.” *Id.* at 41.

²¹¹ PUB. SAFETY PERFORMANCE PROJECT, *supra* note 127.

services for probationers, Pew recommends such language as the following:

- (1) The Agency shall adopt policies, rules and regulations that within [four] years of the effective date of this Act result in at least [75%] of supervised individuals being supervised in accordance with evidence-based practices.
- (2) Within [four] years of the effective date of this Act, [75%] of State monies expended on programs *shall* be for programs that are in accordance with evidence-based practices.²¹²

Alternatively, S.B. 678 could be amended to focus its incentive-based funding primarily on rewarding counties for their creation of successful programs and for demonstrating probationers' participation and achievement in the programs.²¹³ With the enactment of A.B. 109, the legislation has been in conflict because S.B. 678 rewards counties with funding based on how many people counties divert from going to prison.²¹⁴ Now that counties will no longer have the option to send many low-level probationers to prison, S.B. 678 will potentially be rewarding counties for retaining offenders that counties have no choice but to keep.²¹⁵ In fact, recently the State has dramatically reduced funding for S.B. 678 to just under \$35 million for the 2013-2014 fiscal year and is amid discussions about revising the funding distribution formula.²¹⁶ Basing the funding incentives on the counties' demonstration of creating and tracking these programs would make S.B. 678 complement A.B. 109 rather than conflict with it.

The Pew Center offers exemplary language that, if integrated into S.B. 678, would have just this effect. Pew's suggested legislative incentive-based probation reform language would mandate that supervision agencies

²¹² *Id.* ch. 1, 1 (emphasis added).

²¹³ In order for this to be most effective, S.B. 678 could be extended to cover the PRCS and Mandatory Supervision populations created by realignment. The Administrative Office of the Courts recommends this. See ADMIN. OFFICE OF THE COURTS, *supra* note 73, at 38.

²¹⁴ TAYLOR, *supra* note 19, at 15.

²¹⁵ TAYLOR, *supra* note 8, at 11 (The "realignment of certain adult offenders from the state to counties will artificially' reduce the future percentage of probationers that counties send to state prison, thereby unintentionally making them eligible for more [S.B. 678] funding. This is because the realignment plan will (1) increase the number of individuals on probation and (2) make certain crimes ineligible for prison sentences."). The new budget formula should be released with the State's 2013-2014 budget.

²¹⁶ ADMIN. OFFICE OF THE COURTS, *supra* note 73, at 15. See also TAYLOR, *supra* note 19, at 15.

set up a system to track and report regularly on key performance measures as defined by the American Correctional Association. The measures are: recidivism, employment, substance use, payment of victim restitution, compliance with “no contact” orders, and the overall performance of supervised individuals as measured by the type of discharge from supervision.²¹⁷

Instead of measuring success primarily based on the number of probationers counties keep from state prison, Pew measures success based on the success of probationers within a county’s reentry system.²¹⁸ For example, Pew suggests that measuring (and then subsequently rewarding) counties’ success based on their creation of substance abuse treatment programs would require counties to report to a state agency the “[n]umber of offender substance abuse tests for which the results were negative in the past 12 months divided by the number of tests administered in the past 12 months.”²¹⁹ S.B. 678 could be amended to include similar language and to broaden its measurements of success to include housing and education access for probationers as well.

It is important that the State provide these funding and program development requirements as soon as possible, as realignment is already well underway, and reentry and rehabilitation services are already needed. The Legislature erred too far on the side of county autonomy and failed to put teeth into the law that would require counties to address the needs of their probation and PRCS populations. For a probationary system as loosely structured as is California’s, if the probation departments are going to be doing more work than ever—essentially bearing the brunt of the State’s prison depopulation efforts—then the State should provide more structure to ensure that the counties are accomplishing the intended goals of the legislation. Adding the suggested guidelines to A.B. 117 would ensure that counties provide at least a minimum of reentry and rehabilitation services to their PRCS and probation populations.

CONCLUSION

If the Legislature was serious about fulfilling its stated intent for realignment and the Supreme Court’s suggestion to reduce population by addressing systemic causes of recidivism through reentry and rehabilitation programs, it should have mandated that counties create

²¹⁷ PUB. SAFETY PERFORMANCE PROJECT, *supra* note 127, ch. 5, at 1.

²¹⁸ *Id.*

²¹⁹ *Id.* ch. 5, at 9.

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reentry programs. Without these funding requirements, it is unlikely that counties will create sufficient reentry systems on their own. Counties have a history of not addressing the needs of their probation population, and their response thus far to realignment have generally focused more on jails than on creating reentry programs. But it is these very programs that could make realignment work—by keeping probationers from returning to jail or prison. Amending realignment to include funding requirements like those suggested above would ensure that state funding for realignment is used to augment these services. Without these guidelines, the rhetoric and statutory language of rehabilitation and probation reform are hollow and myopic. As expressed in the quote that opens this Comment, this type of confusing or contradictory policy—in which rehabilitation is encouraged but not taken seriously enough to enforce—causes the State to appear that it was never interested in the success of those exiting incarceration. Realignment becomes nothing more than merely shuffling people from prison to jail, and ultimately, shuffling the problems that led to realignment in the first place.