The Criminal Justice Conversations Podcast with David Onek

Episode #29: Joan Petersilia, Professor, Standford Law School

(March 07, 2012)

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DAVID ONEK: Welcome to the Criminal Justice Conversations Podcast, a coproduction of Berkeley Law School and the Berkeley School of Journalism. I’m your host, David Onek. Criminal Justice Conversations, recorded in the Berkeley School of Journalism studios, features in depth interviews with a wide range of criminal justice leaders: law enforcement officials, policymakers, advocates, service providers, academics and others. The program gets behind the sound bites that far too often dominate the public dialog about criminal justice to have detailed, nuanced conversations about criminal justice policy.

Today’s guest is Stanford law professor Joan Petersilia. Petersilia is the faculty co-director of the Stanford Criminal Justice Center. Before coming to Stanford she was a professor of criminology, law and society in the School of Social Ecology at the University of California Irvine, where she directed the
Center for Evidence-based Corrections. Petersilia served as a special advisor to Governor Arnold Schwarzenegger and chaired his rehabilitation strike team. She is a former director of the criminal justice program at the Rand Corporation and the former president of the American Society of Criminology. Petersilia is the author of 11 books about crime and public policy. She joins us on the Stanford campus this morning, where we have taken the show on the road for this episode. Joan Petersilia, welcome to the program.

JOAN PETERSILIA: I’m delighted to be here, David.

ONEK: We’re going to devote this episode to talking about California’s historic criminal justice realignment, the biggest change in criminal justice in California since I started working in this field 20 years ago. Can you provide some background about what realignment is and what it changes?

PETERSILIA: Well, I think as you state California realignment is the biggest change in sentencing and corrections that we’ve ever seen in our lifetimes and probably since the 1950s. Realignment basically the responsibility for convicted criminals. It takes a fair amount of the prison population,
basically when it’s all done about a third of the prison population, and realigns them to county jails and county probation officers. So the realignment basically shifts the responsibility for a very large number of current prisoners back to the county and back to probation.

ONEK: And when people talk about those prisoners that are coming back to the counties the terms that’s often used is non non non. Can you explain what that means to people?

PETERSILIA: So the non non non means non-violent, non-serious and non-sex offenders. If you fall into those non non non categories you will no longer go to prison in the state of California. Jail will be the most severe sanction you face.

ONEK: Now counties have enormous discretion under realignment. The realignment funding from the state comes with no strings attached other than that it must be spent on this non non non population. How much of this money the county can spend on incarceration versus probation supervision versus community programs is left entirely to counties. What are the pros and cons of this approach?
PETERSILIA: I think that’s one of the most interesting things that we as citizens are going to face. Each county will have, as you mention, a pot of money, basically a check, which is based on the number of prisoners they sent to prison prior to 2011. So they get a check and in many instances it’s quite a large amount of money. There will be $1.2 billion spread across California’s 58 counties for the next two years. So counties get a check and they basically have wide discretion about who to spend it on, what programs to spend it on. They can expand jail capacity. They can just do bricks and mortars if they want. They can expand drug treatment, mental health court, treatment courts. They can hire new staff. They can expand probation officers. They can expand sheriff deputies. So I think what makes realignment so interesting from our point is that it puts the onus back on the counties to make decisions about how they wish to punish their local convicted offenders. And we’re going to see 58 experiments and counties are going to basically interpret the non non non non and some of them I think will continue to treat those people quite harshly. Others are going to see this as an opportunity to invest in treatment programs that they always felt would work better for this population.

ONEK: A lot of the focus on realignment has been on reducing
the state prison population. But realignment is also going
to lead to enormous changes in county jails. One example,
jails previously held sentence offenders for a maximum of one
year and then just needed to focus on long term rehabilitation
programming. Now they may hold inmates for much longer periods
of time and will need to develop this type of programming with
relatively limited resources. Can you talk about this challenge
and other challenges that sheriffs face in running their jails
under realignment?

PETERSILIA: Well, it is going to be a huge impact on county
jails. Currently in California 23 jail systems are already
under order to not expand their prison population. But now
they’re going to be getting tens of thousands of new prisoners,
let’s say in Los Angeles County, which is one of the counties
that is in fact facing a court order already to expand prison
capacity. Now they’ve got a huge population that can’t go
back to prison. So how do you punish that population? If you
want them to get taken off the street for incarceration and
rehabilitation your only option is the jail. So we in fact
today, the Santa Barbara County reported that they sentenced
a local man conviction of drug possession to 23 years in the
county jail. Sacramento County has come out with extremely
long sentences as well. So in that instance how do you handle a person that is facing a ten to 20-year sentence in a local jail which was really designed for persons serving less than a year? So the jail is going to face not only overcrowding as you sentence more felons into jail than people who are pre-trial and lower risk and are going to come out the other end, but also the type of structure you’re going to need and the kinds of programs and the kind of security that you’re going to need when higher risk populations are serving longer terms in local custody.

ONEK: So how do you think counties should handle these dilemmas that you’re enumerating?

PETERSILIA: Well, the good side of realignment is that it’s going to face, every county is going to be faced with the decision, how much do they want to punish offenders who represent different risks? I think a rough guess is that we have over-incarcerated probably 15% to 20% in California, both at the jail and the prison. So I think that realignment will force us to stop being so harsh on very low level, first level offenders, who are annoying, they continue to come back in the system, but they don’t represent high risk. That’s the positive side of realignment. It’s going to force counties
to pay for the punishment options they really want. And that’s going to force us to rethink harsh punishment for lower level of felons. It’s going to force counties to beef up, if they can, if they choose this direction, to beef up their treatment opportunities and their treatment services. I know many counties, particularly in Northern California, are using their funds to expand the contracts of programs that they have a lot of faith in. So day reporting centers are expanding across California. Specialty treatment courts, mental health courts, veterans courts, a lot those counties are using their realignment funds to expand those options. Housing, I think we’re going to see a little bit of housing expanded, although I think it’s the most difficult thing to expand. It’s the most expensive but it’s also kind of most important when you think about success for re-entry.

So I think we’re going to see counties going in very different directions. I think the sheriffs become a huge player. The sheriffs now, because of these orders, actually have the legal authority to release people. So for example that case I just spoke of, where you’ve sentenced the person in Santa Barbara to 23 years, that may or may not stick. Because when that offender goes up to the county jail in Santa Barbara the Santa Barbara
sheriff has to make the decision about whether or not he can stay, given his overcrowding situation. So the sheriff has been a big winner in realignment. They will decide whether or not the sentences really can be in fact imposed given the local capacity and there will be pressure on the sheriffs to expand that capacity.

ONEK: That is the situation in the local jails. Let’s turn back to the state prisons for a minute where we’re going to have a situation that the non non nons leave the prison, a smaller group of more serious, hard core offenders will remain. What is that going to mean for our state prison system?

PETERSILIA: Well, you know, in fact that is the real promise to me of realignment. We should be reserving jail for the most serious. And that’s really what realignment does. It realigns everybody who doesn’t deserve prison out of prison, simply put. So what will be remaining is exactly what most people want prisons to be used for. They are expensive. We know that they are probably not going to be getting many services. So we want to reserve that for the most dangerous. That is in fact what is going to happen. We are going to have a population in about five years of about 135,000 if projections are correct. So we
will reduce our prison population from today’s population of about 160,000. We’ll bring it down about 30,000. But those that will be remaining will be much more hard core. We will have more lengthy sentences. They’ll be growing old in prison, which has implications for the cost. It currently costs us about $53,000 a year per prisoner. That cost will go up. So we’re going to get a sicker, more elderly population on the one hand. But it will probably also be in other ways a more dangerous population. Gang-involved, much more serious violence potential. So we will see a hardening of the prison population and a lengthening of the time served there.

ONEK: And basically we will be imprisoning at the state level the people who need to be imprisoned at the state level and not imprisoning folks who would be better served at the local level in their communities.

PETERSILIA: Yes. And that was in fact the promise around realignment. That’s what sold it to the legislature. That we have over-incarcerated. It’s breaking the state budget. So let’s get back to the original purposes of prison which was to house the most dangerous people convicted in the state. And if realignment works, five years out that’s what we should have.
ONEK: Now anytime you make a change of this magnitude there are going to be unintended consequences that could not have been foreseen even with the most careful planning. What is the biggest surprise so far in the early days of realignment?

PETERSILIA: I think to me how fast it has happened at the state level. I don’t think anybody, we are only three or four months into realignment. I mean, realignment started October 1. So we are just, I think everybody’s been surprised at the shedding of state prison inmates. Of course, the Supreme Court is watching and we’ve promised the court that we will shed them fast. But I don’t think anybody really believed that within three months we would actually end up average population we’re down 10,000 prisoners in just three months. So I think that’s a surprise, how fast it is rolling out and how fast CDCR has been able to return prisoners. More importantly what’s really accounting for downsizing in the prison population so quickly is that issue we haven’t really talked about today, which I think, one is who can’t go to prison on a new conviction, but the real decline in the population is being caused by can’t go back to prison when they fail on a parole violation.
ONEK: Why don’t you talk about that? Because that is a way that California really differed from the country pre-realignment. Talk about the way things were and how realignment changes that.

PETERSILIA: Yes. And I think, you know, it’s hard to understand how dramatic the changes are with realignment if you don’t understand pre-realignment, as you said. California was unique. It was the only state in the country where every prisoner released from prison went on a mandatory three-year post-prison parole supervision. Prisoners used to call this doing life on the installment plan because once you were on parole you basically never could discharge, because the requirements of going in to drug tests, to report, to pay all your fees, etc. were so onerous that most parolees didn’t comply. Whether or not they continued. So they didn’t get services but got a fair amount of surveillance. Two-thirds of all parolees failed. Two-thirds of all who failed went back to prison.

In the year before realignment about 60% of everybody coming into prison was a parole failure. That door is now shut. You cannot go back to prison for a technical, meaning non-new crime,
violation anymore. That means that just in the first two, three months of realignment you’ve got hundreds and hundreds of people who used to go back to prison for parole violators who can no longer go back. And that’s what’s driving down the numbers so quickly.

ONEK: And from talking to folks on the county level, it also seems that the state underestimated how many of those there would be and the counties now are having to deal with that influx. But the funding formula was based on their receiving few probation parole violations at the local level. So I think there’s definitely some frustration at the county level.

PETERSILIA: Well, you know, the state shouldn’t have been surprised. This is one of the things that we have serious research on. I know myself because I did this research, where we documented and estimated the number of parolees that would not return if this legislation was passed. What you’re now going to see in some of the unintended and unanswered questions that we’re going to see in the next couple of years is that the truth of the matter is all these parole violators weren’t necessarily only involved in technical conditions. That’s really a misstate of what some parolees were involved with. So
what happened in California is they often were committing new crimes but the easy way back to prison was in fact to simply violate them for a parole violation. You got a mandatory one-year term for that. D.A.s and prosecutors didn’t have to put on a new case. Basically there was much less standard of proof. So you got through this revolving door very quickly, very easily and didn’t involve a lot of resources from the court system. That’s the easy route that California took.

Now what prosecutors are going to have to do is they’re going to have to prove the new crime. So one of the unanswered questions about realignment is how often is that going to occur? If they decide that in fact those parole violators, if they decide to actually prosecute them for new criminal offences, then we’re seeing kind of a short-term lull in terms of the prison commitments but in about another six months to a year we’re going to see an increase in that because those parole violators will now be convicted of new crimes and they’ll actually serve longer on average than they would have with the one-year max for a parole violation. I hope that’s not too confusing for your listeners, but the truth is that decision now that is in the hands of prosecutors about whether or not to file a new crime also is incredibly unknown. If they choose to file a lot of new
crimes when they didn’t in the past then the lull in the prison population that we’re seeing now would reverse.

ONEK: And that would also affect the statistics, if we’re tracking how many convictions a year and what influence it had that could kind of artificially pump up the convictions and make it seem like there’s more crime going on when really it’s the same thing, it’s just being treated differently by the system.

PETERSILIA: Yes. A very astute point, because the way in which we’re going to have to eventually assess whether or not this whole realignment experiment, and make no doubt, it is a major experiment, has worked is we’ll look at things like recidivism rates. Re-arrests, re-convictions, re-imprisonment. And in some ways you can imagine those just going up and so the whole, just because people change their behavior, not because the criminal did anything different but the prosecutors and judges started changing the way in which they behaved, which drove up those recidivism measures and ultimately we say the whole thing failed.

ONEK: That leads right into my next question which is how do we judge whether this succeeded or not? There’s so much riding
on this. There are folks who desperately want it to succeed, to see it as a needed change. There are others who are dead set against it and are hoping it’s going to fail or looking for evidence that it’s already failing. How are we going to define and measure success for realignment?

PETERSILIA: We know from our research community how we should be measuring success. I think it would be a grave mistake to simply look at the criminal justice outcomes, like we do just recidivism rates, like we just spoke about arrests, convictions. Because so much of that has to do with the combination of the offender’s behavior and the system choices about how to respond to that behavior. It’s not clean, if you will. The combination of how offenders behaved and how those communities behaved and how the system reacted. So we get this messy thing about did it work or not? What we really need to do is measure more than criminal justice outcomes. We need to track a cohort of offenders that is sentenced to these different regimes. So counties that were treatment-oriented before the realignment and used their realignment dollars to buttress and expand treatment. Counties that were surveillance before and they’re going to use their money to expand jail capacity and put everybody on electronic monitoring and GPS. Counties that in fact are
going to use this opportunity to do things different. They were treatment before but now given the severity of the people they’re going to be doing surveillance. Then finally the one that’s really designed to be the success story, people that were surveillance-oriented before and use realignment as an opportunity to re-invest in treatment.

We need to track people who go into all those county different approaches and look at more than recidivism. We need to look at do they get jobs? Are they in stable housing? Do they have family support? Are they engaged with faith-based mentorship? And all those kind of what we call soft outcomes, in addition to the criminal justice outcomes. But unfortunately none of that is going to get done.

ONEK: Well, let me ask you about that because AB109, which created realignment, did not provide any funding specifically for research and analysis. You compare that to the federal government where in the big stimulus package that the Obama administration pushed they were able to get a research set aside that went to the federal Office of Justice programs and we had Roy Robertson, the head of that office, on this program and he talked about that. So they’re saying if we’re spending these
billions on the stimulus we want to know what’s working and what’s not working. Here in California with the budget crisis we’re facing that did not happen. So where does that leave a researcher like you to try to figure out what the results of realignment are?

PETERSILIA: It’s so disheartening I can hardly voice it to you, to be honest with you. It goes against every other trend in every other state and as you said, the federal government. But it also goes against California’s recent history. When we did Prop 36 we set aside 5% for a state evaluation. When we did the challenge grant for high risk youth we set aside 5%. Every other major initiative in modern history in California has had a set aside that if you’re going to spend all of this money to do things differently somebody should be accountable and report back to the legislature about how well it worked. Realignment, which is arguably much more money, we’re investing much more than in these previous initiatives, and yet isn’t it rather odd that we didn’t set aside any money for evaluation? Now the back story is that that was part of the negotiations. That if in fact the state was going to turn all of this over to the counties the counties basically said let us do it, we don’t want to have to report back to you, we don’t want a lot of new
reports that we’ve got to do. We’ve got enough trouble. We don’t want to have to set up new data collection systems. So the back story is that it’s part of the negotiations. All of the research dollars, and often research sounds academic-y, but let’s talk about transparency in government and funding. Where is the money going, who do they spend it on is in fact never going to be given back to the legislature. And make no mistake, one year from now people are going to be wanting to know what happened with that money and people are going to be arguing that we should have invested more in jails or more in treatment or more in this or more in that and there will be absolutely no data where the legislature could look and say this worked, this didn’t. Let’s beef up this, let’s cut back that. So I certainly am trying to advocate as best I can as a private citizen for rethinking, set aside some money, even if it would be 1 or 2 or 3% at least, to try to in fact track some of the money.

ONEK: And along those lines, you pulled together a group of researchers and practitioners recently here in an effort to discuss this issue and to try to at least track the efforts that are being done kind of piecemeal around the state, because counties can spend their money however they want and some of
them are putting bits of that money into research, although there isn’t any over-arching sense of how we’re going to look at that in the state.

But I want to ask you about that because I was there and the room was completely packed, with researchers, but many many practitioners. I think there are very few academics who could call a meeting and have all these practitioners show up. And I think that is because over the years you have worked in collaboration with practitioners very closely. I think a lot of people at law schools and universities are hesitant to do that, because they are worried that somehow their work would be tainted. I would argue that what’s the purpose of doing the work if you’re not translating it for practitioners and putting it into use? So I was wondering if you could talk about that a little bit and whether you have felt pressure from other academics not to engage at the level you do. I’m hoping people can look at you as an example of someone who’s maintained their credibility as an academic while also working closely with practitioners.

PETERSILIA: To me it makes no sense to conduct a research project without partnerships and those partnerships for me
have to inform the data design. They also have to inform every step. How do I choose my measures? What’s important? How are we going to collect data? I could just go on and on. It just seems to me that if you’re going to conduct useful research, versus just knowledge building for the academic and scholarly community, if you want to conduct policy research you have to engage policy makers and practitioners. And perhaps it comes from my training, which comes from 20 years at the Rand Corporation, which was a very different environment than academia. At Rand that was the hallmark. They only produced one thing, which was policy research, and every policy project involved both the user community at the ground level, so the boots on the ground kind of people, but also the policy makers that would have to think about whether or not to fund and think about it in kind of a meta-way, the policy implications. To me right now more than ever we need, and this will maybe offend my academic colleagues, less academic research and more policy-oriented research. There is so much need for the kinds of things that we could produce if we were collaborating successfully. Particularly here in California. I don’t think I need to go anywhere else for the rest of my life [LAUGHTER] because this is such an important environment and the stakes are so high, financially, fiscally and in the lives of people that
are moving through these system and communities, and victims. Every issue that we care about in terms of the law is going to roll itself out here in California over the next year or two. So my hope is that regardless of whether or not we are funded that we all roll up our sleeves and figure out how in our environments we can get together and study what will be happening.

ONEK: Now there’s another huge change that is happening in California that we haven’t talked about yet but we’ve talked about a lot on this program, which is the realignment of the Division of Juvenile Justice. We went from having approximately 10,000 youth at the state level down to just approximately 1,000 youth now. Hardly anyone talks about that. Crime has not increased. We’ve realigned the juvenile system. So I guess there are two questions there. One is how can this be a road map for what we’re about to do on the adult side? Two is a big debate as you know now is whether that realignment should be completely at DJJ, the Division of Juvenile Justice. The governor has proposed completely eliminating the Division of Juvenile Justice and having all juvenile offenders handled at the county level. Some advocates are very strongly in support of that. Interestingly, some other long time advocates say
hey, wait a minute, that is really going too far. We want the vast majority of the kids at the county level but there is this very small group who are best handled at the state level. And many local law enforcement officials feel the same way as well because they are worried about handling these extremely serious offenders with high needs. So there’s a big debate going on right now. I was wondering what your take on it was.

PETERSILIA: Well, if you think about. The first question is, what are the lessons learned and the takeaway from the DJJ downsizing, which is as you say dramatic? I think the takeaway first of all is scale. We had 12,000 and now we have 1,200. So the population that gets realigned to the counties is fewer people, which allowed it I think to happen more successfully. But I also think that everybody is kind of in agreement that treatment should be the goal for young people. So we have a kind of common sense that we don’t want to lose these young people and delivering services locally is the best way to do that. There is I think a greater commonality. So I think that helped get the local services for kids realigned.

I think the second part is harder. 1,200 kids, but they’re not really kids because they’re really young adults. And in two
other states, we can think about New York, 16, 17 and 18 are already handled in the adult system. So the question that is now up for California policy makers is do we realign more back to the counties those 1,200? Do we want to put them into the adult system, where they might be a middle range? You know, we might create youth prisons as several states have done. Or we might do like New York and just lower the age of jurisdiction. There are all kinds of policy things that we could now do with that population, which is a very, very hardened, hard core population. The hardest thing probably to do with that population is to do what we’re doing on the adult side, any more realignment. If they’re the hardest of the hard core, then we already have done for the youth side what we’re hoping to do for the adult side. Where do those 1,200 kids go? If we send them back to their counties will the services be there in some of these smaller counties that may be getting four or five of these kids? I guess I worry a lot about. And I actually think the state system, it’s way too expensive, it’s unsustainable, I think about $220,000 per kid. That’s outrageous. The downsizing has meant that the cost per kid has gone up. We can’t sustain that, so we’re going to do something different, I think next year. There’s a lot of policy debate about what that should be. Maybe we should have regional youth facilities.
I don’t know the answer but I guess I do feel strongly that we can’t simply realign those 1,200 like we’ve done with the 10,000 that preceded them. I think they’re in kind different, more serious. I think the mental health needs of that population are probably so severe that they need a serious, concentrated program.

ONEK: So this has been a great conversation. The last question would be, as we look at realignment over the next year what are some of the key things we should be looking for?

PETERSILIA: Well, I think we’ve got to look at what happens to local jails, as we’ve talked about. I think we’ve got to look at whether or not the culture of probation changes significantly, such that we no longer have a probation rehabilitation-type program at the county level. The difference between probation and parole historically has been culture. The culture of probation is designed to deliver rehabilitation. The culture of parole was designed historically to deliver surveillance. As we morph kind of probation into handling more serious people, will we have any adult services, any agency that is designed around rehabilitation for adult offenders? So I think watching probation is very important. I think
watching how D.A.s charge is very important. I think what we’re forgetting about is watching, you know, victims. How are victims going to really respond when so many offenders are now back in the community in their midst? I was just reviewing the first 50 cases that are coming back to one of our counties and about 15 of the 50 cases had restraining orders, domestic violence restraining orders. So we’ve got to think about how to protect victims when in fact nobody is, they’re not on any tail. Meaning there is no formal supervision, which many parolees no longer will be. So we’ve got to think about as we downsize what are the other unintended consequences that we have not prepared for? So I think about children a lot. I think about victims. I think about community health. I think about kind of the broken windows kind of things, will people be homeless? So I think, as I said, all that we can really emphasize is this is an experiment of the hugest making for California and it will be interesting to see what comes next, what a couple of years bring.

ONEK: Joan Petersilia, thanks so much for joining us.

PETERSILIA: My pleasure.
ONEK: Please tune in next time when we’ll be joined by San Francisco Chief Adult Probation Officer, Wendy Still.

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