



## THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY

UNIVERSITY OF CALIFORNIA BERKELEY, SCHOOL OF LAW

### BerkeleyLaw

UNIVERSITY OF CALIFORNIA

Chief Justice Earl Warren  
Institute on Law and  
Social Policy

Berkeley Law Center for  
Research and Administration  
2850 Telegraph Avenue  
Suite 500  
Berkeley, CA 94705  
Phone: (510) 642-8568  
Fax: (510) 643-7095

[www.warreninstitute.org](http://www.warreninstitute.org)

#### About the Warren Institute

The Chief Justice Earl Warren Institute on Law and Social Policy is a multidisciplinary, collaborative venture to produce research, research-based policy prescriptions and curricular innovation on the most challenging civil rights, education, criminal justice, family and economic security, immigration and healthcare issues facing California and the Nation.

## THINKING CRITICALLY ABOUT REALIGNMENT IN CALIFORNIA

By Rebecca Sullivan Silbert, Senior Legal Policy Associate

Every day brings a new report on realignment. Politicians and pundits proclaim the opportunity for progress, or openly warn of disaster. Some counties are unified in support of or against realignment, others are internally divided, with competing claims and arguments offered by the County Sheriff, the Chief of Probation, the Chief of Police, City government and County government.

This paper lays the groundwork for journalists, community members, advocates and others to think critically about realignment. It is not a comprehensive legal analysis, nor does it cover all aspects of realignment. Rather, it is intended to give individuals who do not normally work in the criminal justice system the background they need to ask the right questions, push for the solutions they think best, and uncover the motivations behind the statements and positions of decision makers in their area.

### THE WAY WE WERE: Criminal Sentencing in California Before Realignment

It is impossible to understand the changes wrought by realignment without first understanding how the system worked before realignment.

Before realignment, individuals convicted of a crime in California could, in general, be sentenced four different ways: straight probation, straight time in county jail, time in county jail followed by a period of probation, or time in state prison followed by a three year term of parole. There were other options and alternatives, but for the most part these were the four options.

Straight probation meant that the individual would be supervised by a probation officer working in the county probation department for a set time, generally three or five years. Probation has rules called terms and conditions. Violating these terms and conditions or being convicted of a new crime could cause the person's probation to be modified or extended, or it could cause the person to be sent to county jail or to state prison. Probation departments are funded by the county, and probation officers are county employees. In general, it is minor crimes for which a sentence of straight probation with no jail could be imposed.

Straight time in county jail meant a sentence of a certain number of days, but less than one year, in jail. County jail is a creature of the county – the cost of incarceration is paid for by the county, in most counties the jails are administered by the county sheriff, and those who work in the county jail are usually county employees and sheriff's deputies. The county sheriff is different from the city Chief of Police and city police officers, who are paid by and responsible for only their city, not for the entire county. In general, a sentence of straight county jail without probation would be given for minor crimes.

A much more common sentence has been a term in county jail followed by a probation “tail.” This meant that the individual would be sentenced to a set time in county jail, but upon release the person would be on probation. County jails are managed by the county sheriff and paid for by the county. Probation supervision is handled by the county probation department and is also paid for by the county. The probation “tail,” which is three years in most California counties, has been considered important for public safety as it allows the county to continue surveillance such as drug testing, and it keeps the person in contact with a probation officer who should be assisting the person as he or she attempts to find employment, obtain housing, and make other positive connections that reduce recidivism. However, budget considerations in many counties mean that probation officers have been supervising as many as 150 people at a time, which can limit their ability to work effectively. Whether or not it is combined with jail time, a person who violates the terms of their probation can have their probation modified and extended, or their probation can be revoked and they can be sentenced to jail or prison. An individual struggling to comply with his or her conditions of probation could receive multiple modifications and extensions, extending their probation term well beyond the originally imposed length.

The fourth sentencing option prior to realignment has been state prison. The distinction between county jail and state prison is incredibly important. County jail is a function of the county – unless the county pays for space in an out-of-county facility, individuals sentenced to county jail serve their time in their home county, in a facility administered and paid for by the county, and potentially closer to family and community. State prisons, on the other hand, are paid for and run by the state. Prisons are administered by the California Department of Corrections and Rehabilitation (CDCR), and are located throughout the state. A person sentenced to state prison could go to any of the California state prisons depending on factors such as the nature of their crime, their history and their needs. Employees in a state prison are paid by the state, not by the county. They are employees of the State of California regardless of the particular prison in which they work.<sup>1</sup>

---

<sup>1</sup> CDCR does use some “private prisons,” which are prisons run by private companies. The state pays the company to provide the services of incarceration and inmate management. Individuals serving time in one of these facilities are state prison inmates, but the employees in private prisons are not state employees. Employees of state-run prisons are generally members of the prison guards’ union, while employees of private prisons are generally not union members.

Three facts about California’s pre-existing criminal justice system are key to understanding realignment. First, the distinction between county jail and state prison was premised on the idea that more serious offenders with longer sentences would be separate from less serious offenders with shorter sentences. Before realignment, a person could not be sentenced to county jail for more than one year. The longest sentence that could legally be imposed in county jail was 365 days, and sentences longer than one year had to be served in state prison regardless of the nature of the crime. Since county jails were set up for shorter-term sentences, they traditionally have not offered as many educational or drug treatment programs as prisons, they generally have less outdoor and visiting space than state prisons, and they often do not have medical facilities capable of managing serious or long term medical conditions.

Second, before realignment every person released from state prison had a mandatory three year term of parole. Parole and probation are different. Parole is similar to probation, in that the individual is supervised and can be returned to custody for violating the terms and conditions of his or her parole or for committing a new crime. However, parole agents are not probation officers. Parole agents are state employees supervising individuals released from prison. Up until realignment, probation officers were county employees supervising people released from county jail. Parole agents have traditionally enjoyed stronger law enforcement powers than probation officers and it has traditionally been easier for parole agents to return a parolee to custody. Also, probation is county-managed and probation officers work throughout a particular county, while parole is organized by region, and a parole agent’s region may extend beyond a county’s border.

Finally, because parole is a state function, the cost of a parolee’s return to custody on a violation has been a state cost. If the person was arrested or detained on a parole violation, the state paid for the incarceration even if the person was sitting in a county jail rather than a state-run prison. In those instances, the state reimbursed the county for the cost of incarcerating the violator. The cost of a probationer’s return to custody, however, had been a county cost if the probationer was sent to county jail, but a state cost if the probationer was sent to state prison. Prior to realignment, a probationer who violated his probation terms could have been sentenced to either state prison or to county jail.

## BURSTING AT THE SEAMS: California's Overcrowded State Prisons

Almost everyone in California knows that our state prison system is overcrowded. The overcrowded conditions, and the resulting inability of the state to provide adequate medical care in those overcrowded prisons, were the basis of the lawsuit that resulted in the United States Supreme Court ruling in *Brown v. Plata*. Note that the Supreme Court order requiring that California reduce its prison population applies to state prisons only; the case was not about county jails. California's counties, however, are just as obligated to abide by the United States Constitution as the State is.

There are numerous historical reasons for California's overcrowded prisons. Experts debate which reasons are most responsible, but for purposes of this paper we will focus only on four.

First, the length of sentences imposed has increased over time. This is so because basic sentences have increased (i.e., a crime that used to call for a sentence of one year was amended to call for a 2, 4 or 6 year sentence), but also because legislators have added ways to increase a sentence (i.e., a crime that calls for a 2, 4 or 6 year sentence can be increased because of prior convictions or other enhancements). California's Three Strikes law plays an especially large role in requiring extremely long sentences for individuals who used to serve much less time. Longer sentences have had two effects: (1) more people had to go to state prison instead of county jail because the law required that their sentences be longer than one year, and (2) more people in prison were staying longer than they used to. If you continue to add new people, but the ones already there aren't leaving, you end up with overcrowded prisons.

Second, definitions have changed over time so that more crimes are considered serious and violent under the California Penal Code.<sup>2</sup> An individual convicted of a crime that is defined as serious or violent goes to state prison, not county jail. As more crimes have been defined by the Legislature as "serious" or "violent," more people have been required to go to state prison instead of county jail.

Third, cuts in county level services have meant that many individuals, particularly those with substance abuse and mental health problems, have been unable to overcome their addictions, obtain treatment, find employment, and find housing. These individuals often return to crime. In general, these are not individuals who engage in serious or violent conduct (either as

<sup>2</sup> California Penal Code Sections 667.5(c), 1192.7(c).

those words are understood colloquially or as defined in the Penal Code), but rather individuals who cannot or will not stop what they are doing. Up until realignment it was the practice in many counties to send individuals to prison if they were unable to stay out of custody after receiving multiple chances for county jail and probation, in the hopes that the state prison system could absorb some of the high costs of monitoring and treating these individuals. This practice added to the numbers of people in state prison, particularly the numbers of non-serious, non-violent state prison inmates.

Finally, in California (unlike in most other states), everyone coming out of prison was on mandatory parole, and many of them were unable to comply with the terms of their release. In 2006, for example, 64% of those admitted to state prison were parole violators.<sup>3</sup> Parolees could return to custody for a new arrest and allegation of a new crime, of course, but they could also be returned for a host of lesser violations such as failing a drug test or failing to keep in contact with a parole agent. Huge numbers of parole violators in California have traditionally cycled in and out of state prison for short stays, ranging from a few days to weeks to months. These individuals have taken a lot of bed space within the state prison system, leading to an inability to appropriately serve both the violators and those actually serving longer prison terms.

## REALIGNMENT 1-2-3: What Changed?

Realignment has changed many things in the criminal justice system. This paper focuses on the three changes that may have the biggest impact.<sup>4</sup>

### 1. Some Offenders Will Be Sent To County Jail Instead of State Prison

#### a) 1107(h) County Jail for the "non-non-nons"

All four sentencing options that pre-existed realignment still exist. An individual convicted of a crime can still be sentenced to straight probation, straight time in county jail, county jail with probation, or state prison. Now, however, some people who

<sup>3</sup> Grattet, Ryken, Joan Petersilia and Jeffrey Lin, "Parole Violations and Revocations in California," October 2008; <https://www.ncjrs.gov/pdffiles1/nij/grants/224521.pdf>.

<sup>4</sup> This paper refers throughout to "realignment." The new law is often also referred to as "AB 109" although there were additional laws added after AB 109 that clarified and refined realignment before it took effect on October 1, 2011.

would have gone to state prison will now go to county jail *even if their sentence is longer than one year*. Under realignment, individuals convicted of non-serious, non-violent, non-sexual crimes will now serve their time in county jail instead of prison no matter how long the sentence is, so long as they do not have any serious or violent prior convictions.<sup>5</sup> There is no upward limit or maximum sentence that can be imposed; the sentence will be served in county jail no matter how long it is.

These sentences are sometimes referred to as “1170(h)” sentences because 1170(h) is the number of the statute affecting these cases. Individuals eligible for 1170(h) sentences are also sometimes referred to as “non-non-nons.” If a person is convicted of a crime that is serious, violent or sexual, or if the person has a prior conviction that is serious or violent, or if the person meets any of the exceptions specified in the law (like domestic violence), he or she is not eligible to receive an 1170(h) sentence in the county jail. Instead, he or she must serve their time in a state prison just as they would have before realignment.

Sentence *length* is not changed by realignment. If the sentence imposed by the judge before realignment would have been three years, the sentence after realignment will be three years. Realignment changes only the physical place in which the person will be incarcerated.

The total number of 1170(h) inmates in a particular county’s jail will depend on many things, including the plea bargaining practices of the DA and Public Defender (e.g., whether defendants are pleading guilty to serious or violent crimes that require state prison, or whether deals are made that keep them in county jail). More interesting than the total number of 1170(h) inmates, however, is the relative increase in each county’s jail population. In some counties individuals convicted of non-serious, non-violent, non-sexual crimes, and who had no serious or violent prior convictions, were unlikely to be sentenced to state prison even before realignment. In those counties the increase in county jail population is expected to be smaller because the county was already keeping its “non-non-nons” in the county. In other counties, individuals convicted of “non-non-non” offenses who did not have a serious or violent prior were routinely sentenced to state prison before realignment. In those counties the increase in county jail populations is expected to be much higher

---

<sup>5</sup> There are a few other exceptions that preclude a county jail sentence. Domestic violence convictions, for example (Penal Code 273.5), are not legally defined as serious or violent unless there was great bodily injury, but individuals convicted of domestic violence are not eligible for 1170(h) county jail sentences and must still do their time in state prison.

because the counties now have to keep those individuals in county jail.

## b) Split Sentences

Sentence lengths under California’s penal code were not changed by realignment – a crime that would have resulted in a 5 year sentence in 2005 will still call for a 5 year sentence in 2012. Sentences have not been shortened.

However, because of realignment, judges now have an option in 1170(h) cases (that is, in non-serious, non-violent, non-sexual cases where the defendant has no serious or violent priors), to impose what are called “split sentences.” In a split sentence, the judge orders that a sentence that is, for example, 5 years, but then orders that the defendant serve some portion of the time in county jail and the remainder in the community under mandatory supervision. The nature of the split is unrestricted – the judge can order anything from one day in custody and the remainder on mandatory supervision, to all custody except for one day on mandatory supervision.

Mandatory supervision is similar to probation, but can include additional monitoring conditions such as a residential treatment program, electronic monitoring or GPS, or home detention. Whether or not the judge orders additional conditions, the person will be supervised by the probation department for the entire length of the mandatory supervision period and any failure to comply with terms and conditions ordered by the judge or imposed by the probation officer could result in the person being sent back to custody. Split sentences are not required under realignment, and if a particular judge does not want to impose them, she does not have to. Indeed, some county District Attorneys have expressed an opposition to split sentences because they reduce the amount of time the offender spends in jail, and it is possible that some judges would be reluctant to impose a split sentence over the DA’s objection.

Two key pressures may lead to more split sentences even if there are objections:

First, although the state is compensating California’s counties for the cost of housing the 1170(h) population, the amount of money coming from the state to the counties is less than the cost to the counties of incarcerating every 1170(h) defendant for the full potential length of his or her sentence. Unless counties dip into their own coffers, they will not have sufficient funds to sentence every “non-non-non” to the same length of time as they did before realignment. Alternatives to incarceration such as treatment and

home detention with GPS are less expensive than incarceration, and in some situations can be as effective as incarceration. It is a goal of realignment that counties will utilize more of these alternatives for their non-serious, non-violent, non-sex cases.

Second, realignment as currently drafted contains no provision for a probation “tail” following the defendant’s time in custody. Before realignment, a “non-non-non” serving any amount of time in state prison would be released to the community with a mandatory three year term of parole supervision, and a “non-non-non” serving time in county jail would likely have a probation “tail.” Now, a “non-non-non” must go to county jail instead of state prison, but if the judge does not split the sentence there will be no supervision following the individual’s release from custody. Until realignment is amended, the only way to provide for post-release supervision in 1170(h) cases is for the judge to reduce the incarceration portion of the sentence and replace it with a period of mandatory supervision.<sup>6</sup>

## 2. Some Offenders Released From State Prison Will Be On Post Release Community Supervision Instead of Parole

Much of the initial confusion around realignment arose from a perception that communities would be inundated by offenders being released early from state prison. In fact, as noted earlier, no one is going to be released early from state prison under realignment. There is no provision in realignment that permits or encourages the state prison system to release anyone early. Under realignment, individuals being released from state prison will be released at the same time they would have been released before realignment.

Realignment brings only one change: before realignment, everyone released from state prison was placed on state parole and supervised by the parole department. Now, some offenders released from state prison will be released on state parole (just as before), while others will be released on “PRCS,” or “Post Release Community Supervision.” PRCS, unlike parole, will be administered and paid for by the county probation department.

In order to be eligible for PRCS instead of parole, the offender must be in prison for a non-serious, non-

violent, non-sexual crime.<sup>7</sup> This is not the same as the condition for an 1170(h) sentence in county jail instead of state prison – in order to be eligible for an 1170(h) county jail sentence the person must be a “non-non-non,” *and* they must not have any serious or violent prior convictions. When determining eligibility for PRCS supervision, however, only the current crime of conviction matters. So long as the current conviction is non-serious, non-violent, and non-sexual, regardless of prior convictions, the person will be released on PRCS.

In many ways PRCS is similar to parole. There are a few key differences, however. First, parole was (and is) a state function incorporated into the state budget. PRCS supervision will be managed and paid for by the county, not the state. Some of the money coming from the state to the counties under realignment is intended to compensate county probation departments for the increased costs associated with supervising more individuals than they were supervising before, since they are now supervising probationers and PRCS individuals.

Second, parole was (and is) regionally managed, whereas PRCS will be handled by the county probation department. In urban and denser communities this may not make a difference because the parole region is likely similar to or the same as the county boundary. In larger rural areas, however, a parole agency may have covered an area larger than the county, resulting in more distant supervision.

Third, individuals on PRCS will be supervised for less time than individuals on traditional parole. Parole was virtually always a three-year term, and could last longer than three years if the offender was unable to comply with the conditions and had their parole extended. In addition, a parole violation could result in incarceration of up to a year, and time in custody did not count towards the three years. PRCS, in contrast, can terminate after six months if the offender is doing well, *must* terminate after one year if the offender is doing well, and terminates automatically after three years regardless of how well the offender has complied with the terms and conditions. Moreover, sentences for PRCS violations are limited to 180 days in custody. For these reasons the number of individuals on PRCS at any given time is expected to be lower than the number of individuals that used to be on parole. Since fewer individuals will be under supervision at any given time (due to shorter supervision terms), there will likely be

<sup>6</sup> It is widely expected that this gap will be remedied in “clean up” legislation drafted in 2012.

<sup>7</sup> As with the 1170(h) cases, some additional exceptions were added in the realignment legislation. High-risk sex offenders and mentally ill individuals, for example, will continue to be on traditional parole instead of PRCS. Starting in 2013, however, virtually all state prison releasees will be on PRCS instead of parole.

fewer people in custody for violating their supervision as well.

### 3. Parole Violators Will Be In County Jail Instead of State Prison

Previously, individuals violating their parole could be returned to custody on the violation for anywhere from a few days up to 12 months. Custody could be in state prison or in county jail, but would always be paid for by the state. A parole violation could be a dirty drug test, failure to report when ordered, failure to live where ordered, a new arrest, or any number of other transgressions. Oftentimes an individual on parole would be arrested for a new crime, and the matter would be resolved as a parole violation with the new charges dropped. For these reasons, before realignment the California state prison system on any given day would be filled with thousands of parole violators, many of whom were there for only short periods of time.

Under realignment, many individuals who would have been on parole are now on PRCS. Even those still on parole, however, are affected by realignment, as custody time for parole violations in most cases is now limited to 180 days, and incarceration is limited to county jail (paid for by the county), not state prison. By forcing parole violators to remain in county custody, the state avoids the costs incurred when parole violators cycled through state prison for short term.

#### Early Release From County Jail

Although much has been said about the threat of criminals being released early because of realignment, realignment did not create early release.

Even before realignment, county sheriffs throughout California could release low risk, misdemeanor or minimum security inmates from county jail onto home detention or electronic monitoring, if necessary because of jail overcrowding.<sup>8</sup> The release could occur before the completion of the sentence ordered by the court, as California's penal code grants early release authority to county sheriffs regardless of the sentence imposed by the judge so long as the county jail is overcrowded.

Although realignment did not create early release, it did expand the sheriff's power so that county

<sup>8</sup> California Penal Code 1203.016; 1203.017.

sheriffs can now release of a greater category of inmates onto electronic monitoring or home confinement. Realignment expanded the discretionary power of the county sheriff so that the sheriff can legally release inmates even if they are not minimum security, low risk, or serving time on a misdemeanor, so long as the county jail is overcrowded. Those released early would still have to be on home detention or electronic monitoring, just as before realignment, and they would be supervised by the probation department.

Although the law is now applicable to a broader category of inmates, it may not be 1170(h) individuals who would be released in an overcrowding situation. County jails hold many different kinds of inmates – anyone awaiting trial who cannot afford bail or anyone who was not granted bail, for example, will be in county jail. Indeed, in some counties the jails are more than half full with pretrial detainees (that is, those who cannot afford bail or for whom bail has not been granted). Counties with overcrowded jails have options to consider before early release of 1170(h) offenders – more defendants awaiting trial, for example, could be released on house arrest with GPS, or more misdemeanor defendants could be sentenced to house arrest, community service and treatment programs. Taking advantage of these options would significantly reduce population pressures on the county jail and make early release of more serious offenders less likely.

### PLATA V. BROWN AND THE (POSSIBLE) MYTH OF REALIGNMENT AS A SOLUTION TO OVERCROWDING

It has repeatedly been said that realignment was enacted in response to the United States Supreme Court's Order in *Plata v. Brown*, the prison overcrowding case. In fact, realignment has been a topic of discussion in our state government for at least the past five years, before the Supreme Court's Order. A version of realignment was on the table and in the works well before the *Plata* decision. It was the Supreme Court's *Plata* decision, however, that provided the political impetus for this version of realignment to be signed into legislation at this point in time.

More importantly, despite political claims to the contrary, realignment alone may not solve California's overcrowding problem. Imagine that the California state prison system (that is, the state prisons run by CDCR, not the county jails run by each county) is

represented by a full bathtub. The spigot is on, flowing full force into the tub, and the drain is open, allowing water to drain, but the tub remains completely full to the brim. Realignment should slow the spigot by diverting some people (the 1170(h) population and parole violators) to county jail instead of state prison. But this is on a going forward basis only. So the water flowing into the tub is slowed, but the tub remains overly full, and the drain continues to drain at the same rate. Over time, a slowed spigot will leave the tub less full. But this is may not happen on the short timeframe ordered by the Supreme Court in *Plata*.<sup>9</sup>

## SHOW ME THE MONEY: Likely Sources of Future Political Conflict

As with all things political, many of the battles over realignment are at their core about money. Although the state is providing money to the counties to compensate them for some of the expected costs associated with realignment, the money is coming to the counties unrestricted beyond the fact that it must be used for realignment related expenses such as incarcerating 1170(h) offenders, providing community services to offenders, and supervising PRCS individuals. Distribution of funds within each county will differ depending on the political needs of the area, as will the ways in which county agencies like the sheriff and the probation department allocate their portion. This means that each county will have different political battles and resolutions. We can expect, however, some overlapping themes. For example:

- Counties are now financially responsible for housing and monitoring the “non-non-nons,” an expense formerly carried by the state whenever these individuals were sentenced to state prison. Although the state is providing the counties with money as part of realignment, the state is not providing enough money to incarcerate every “non-non-non” in county jail for the same amount of time as they otherwise would have been incarcerated in state prison. Counties must either incarcerate “non-non-nons” for less time, or use some of their own money to pay for incarceration expenses. County officials with a political inclination toward longer periods of incarceration will likely speak against realignment, since they do not want to use their scarce resources to pay for something that the state used to pay for.
- If a particular county chooses to send all their “non-non-nons” to county jail rather than to utilize

shorter custodial sentences or split sentences, the county’s incarceration costs will be extremely high and its jails will fill to capacity. Because in most counties the jail is administered and staffed by the county sheriff, it will be the sheriff who feels the financial and administrative brunt of these policy decisions. It may be the sheriff who speaks out most loudly against realignment as a result of these pressures.

- Many California counties are seeking to build new jail facilities, and are arguing that they need to do so because of realignment. This is not entirely accurate for all these counties – in many of them, decisions about how to manage and house all offenders, including pre-trial detainees, could be made differently and could result in reduced county jail populations. But jail expansion provides jobs and economic support for a community, so realignment may provide the political will to build more jails. Spending more money on jails, however, means spending less money on everything else, from potholes to public health to policing.
- Prior to realignment, some parole violators were sent to prison, while others were sent to county jail but the state reimbursed the county for the cost of housing them. For counties with extra space in their jails, this has been a source of income that they will no longer see. These county budgets may suffer more than others, making adaptation to the changes brought by realignment more difficult.
- Parole offices throughout the state are downsizing as a result of realignment, and will continue to get smaller over the next few years. Many parole agents will lose their jobs. In some counties, the requirements for being a probation officer are different from those for parole agents, so it is not the case that parole agents can easily transfer to the probation department. Many parole officers may be unable to find employment despite the fact that probation departments are expanding. Parole agents and their supporters may speak out against realignment for this reason.
- Probation departments in many counties have been underfunded for years, sometimes because of a belief that probation departments were supervising less serious county jail offenders rather than more serious state prison offenders. This belief (whether true or not), combined with tight financial times, has resulted in probation departments with very high caseloads in many places throughout the State. Particularly in

<sup>9</sup> The “full bathtub” analogy is not original to the author of this paper. It has been used by many others, and is borrowed here without attribution because the original creator is unknown.

counties with fewer established community treatment and rehabilitation options, these high caseloads make realignment daunting for many Chief Probation Officers as they look toward increasing the number of people supervised by their departments.

- California’s realignment funding methodology rewarded counties that sent more people to prison before realignment. The states allocated money to the counties based not on how many crimes or the types of crimes committed in that county, but rather on how many people the county had been sending to state prison in the years before realignment. For this reason, counties that were sending many of their “non-non-nons” to state prison rather than county jail before realignment are receiving more money than counties that were sentencing their “non-non-nons” to county jail or probation. This means that now, under realignment, two counties handling the same number of “non-non-nons,” may be receiving very different amounts of money from the state.
- The issue of parole violators is one that may lead to political turmoil and budget disputes. As of the date of this paper, it appears that the state underestimated the numbers of parole violators that would be going to county jail instead of state prison in most counties. Since funding was based on state estimates, counties with larger than expected numbers of parole violators are feeling financial pressure. They are advocating for greater amounts of money from the state in the future, but they may also have to consider alternate supervision strategies and alternate sentencing options (such as residential treatment programs, and home detention with electronic monitors) for parole violators. The state does not have sufficient money to reimburse the counties for incarceration at the same rates violators were incarcerated in the past, nor does it have the money to continue incarcerating parole violators in state facilities.
- There were thousands of people in California already on parole when realignment went into effect on October 1, 2011. Now, if one of these pre-existing parolees is returned to custody for a violation, and his crime of commitment was a non-serious and non-violent offense, he will be released from custody onto county-funded PRCS, not on state-funded parole. This category of PRCS individuals has been much larger than expected in many counties, but was not fully recognized in State funding calculations. This is an issue that will have to be resolved.

## THOUGHTS FOR THE FUTURE

There are a number of issues to watch on the horizon.

- Simply transferring individuals from overcrowded state prisons to overcrowded county jails will likely lead to more lawsuits. Unconstitutional conditions in county jails are no more acceptable than unconstitutional conditions in state prisons, and counties that cannot fulfill their constitutional obligations are likely to be sued. Counties that do not figure out how to provide health care and how to avoid overcrowding will be forced to allocate some of their scarce fiscal resources to defending themselves in court.
- County jails were not built for long term sentences, but with realignment a greater number of individuals will be staying in county jail for much longer than a year. Counties are going to need to figure out how to provide programming, including employment training, education, outdoor space, and visiting for these inmates.
- There will likely be policy disputes about whether realignment is “working,” and there will be no easy answer. State prison populations are dropping, so on that basic level realignment may be called a success. But moving people from prison to jail cannot truly be called a success. Realignment will have to be studied on multiple levels, including reductions in crime rates, better provision of community services and more successful reentry for ex-offenders before conclusions can be reached about the success or failure of realignment. Results may be better or worse for different groups (women vs. men, older vs. younger offenders), and will almost certainly differ county by county.
- The decentralized nature of California’s criminal justice system means that each county’s practices regarding arrest, charging, plea bargaining, and sentencing differ greatly. On top of that, each county’s implementation and financing of realignment is different. In order to determine the true effect of realignment, it will be important to examine counties over time, so that a county before realignment is compared to itself after realignment. This may provide more meaningful data than comparing one county against another.
- Before realignment, individuals charged with a new crime while on parole would often plead guilty to a parole violation, and the new charges would be dropped. However, the maximum time that could be imposed for a parole violation used



to be a year, and under realignment the maximum time that can be imposed for a parole or PRCS violation is 180 days. It is thus a distinct possibility that more individuals on supervision will plead guilty to a new crime rather than to a violation of their supervision, because the district attorney will demand more than 180 days in custody as part of a negotiated resolution. This could result, somewhat perversely, in an apparent increase in the number of new crimes since the number of convictions will rise. A better indicator of change due to realignment would be the number of arrests, not the number of convictions.

- Some District Attorneys in California may begin a practice of “charging up.” “Charging up,” in the context of realignment, means that the District Attorney charges a defendant with a more serious crime requiring a state prison sentence in order to have the defendant sent to state prison instead of county jail. Some crimes are clearly either serious or violent, or not. In other cases, however, district attorneys must make judgment calls about the facts and the evidence before deciding what crime to charge. In a county that is charging up, a district attorney might charge a crime as serious or violent when before realignment he or she might have charged the case differently. If this practice is common, it could result in a lower reduction in state prison commitments than has been expected.
- Somewhat similarly, some public defenders in California may negotiate for a state prison commitment rather than a sentence of county jail with probation. A person coming out of state prison onto PRCS will have his supervision terminated after one year, or at most three years if he is not complying with the terms. A person coming out of county jail onto probation could have his probation extended repeatedly, well beyond three years. There is thus potentially an incentive for defendants to plead to a state prison term rather than to accept a county jail sentence with probation. Just as with charging up, if this practice is common it could result in a lower reduction in state prison commitments than has been expected.
- Preliminary data is showing that many of the “non-nons” have disproportionately high physical and mental health needs, as well as substance abuse problems, lack of employment skills, and lack of education. This is perhaps not surprising – one of the reasons that so many non-serious non-violent individuals had been sentenced to state prison in the past was because those individuals

were unable to desist from criminal behavior. They were going to state prison for more minor crimes (such as repeated thefts and repeated small drug sales) because they continued to commit those crimes, not because they were moving on to more serious and violent crimes. Many of these individuals are unable to desist from crime because of very high health needs (both mental and physical), combined with a lack of education and employment skills. These individuals are now staying in the counties, but providing appropriate services for this high-needs population is going to be expensive. Before realignment, counties could send these individuals away to state prison and have the state prison pay for supervision and services. Counties no longer have that option.

## CONCLUSION

Many in the criminal justice community hailed realignment as a step toward true rehabilitation and supportive reentry after years of increasing reliance on incarceration. However, realignment legislation contains no requirement that counties offer community supervision, treatment, reentry services, or any other alternative. There is no state oversight of realignment funding, and the money is unrestricted beyond the fact that it must be used for realignment-related expenses. The hope of many is that counties will take advantage of this opportunity to explore non-custodial options and community programs that keep people from committing new crimes, thus creating better communities for all Californians. As of the date of this paper, however, nothing in the state legislation stops counties from relying solely on increased jail construction, which would be an opportunity wasted.

*This report was made possible by a generous grant from the Wallace Alexander Gerbode Foundation.*