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Rethinking the State-Local Relationship: Corrections

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Summary

California is pursuing historic changes to its adult corrections system. In the past, convicted felons went to state prison. Beginning in October 2011, lower level felons—those convicted of nonserious, nonviolent, nonsexual crimes—will serve their time in county jail. In the past, state parole officers oversaw felons released from state prison. After October, county officials will take over this responsibility, again for lower level felons. In the past, parole violators were sent back to state prison. In the future, almost all parole violators will be sent to county jail—for much shorter periods—or managed under a variety of alternative sanction programs.

These changes are motivated in part by a federal ruling, recently upheld by the U.S. Supreme Court, which ordered that California reduce its prison population by roughly 30,000 prisoners within two years. This order came at a time when the state had been struggling with significant budget shortfalls for several years. The increasing cost of adult corrections had become conspicuous, with spending in this area increasing from 4 percent of the state’s general fund budget in 1984–85 to over 10 percent in 2008–09.

Shifting some key correctional responsibilities from the state to the counties helps to address both legal and budgetary issues. However, it remains to be seen whether California can comply with legally defined timelines for shifting its prison population—or if it can negotiate an alternative schedule. Similarly, the long-term effects of these changes on the state budget and public safety are as yet unknown.

Counties will receive state money for taking on their new responsibilities—around \$1 billion a year after the changes have been fully phased in. Initially, Governor Jerry Brown proposed that these payments be constitutionally guaranteed, but the legislature did not agree. The administration is likely to seek voter approval of such a guarantee on the November 2012 ballot.

Despite these arrangements, funding remains one area of concern—among many—for counties. It is uncertain whether there will be enough money from the state for counties to implement and manage the upcoming changes. Moreover, counties will be expected to do many things differently than the state has done in the past. Key areas of change include:

- Jail time and early release. Jail time for low-level offenders is likely to be shorter than prison time would have been, since the state is only providing enough money for counties to keep these offenders locked up for relatively short stays.
- Alternative sanctions. Sheriffs will need to rely on a considerable range of alternative sanctions to hold prisoners, including home detention monitored with GPS ankle bracelets, day reporting centers, intensive probation, and drug and alcohol treatment.
- Post-release community supervision. County-managed supervision of ex-offenders will not last as long as state-supervised parole. There is considerably less likelihood that re-offenders will return to prison.
- Coordination of social services. Ideally, counties will use their social service programs in conjunction with community supervision in ways that help offenders find more constructive life paths and work to reduce the state’s high rate of recidivism.

These changes will put counties on a steep learning curve. They will require a conscious plan along with support from the county board of supervisors, the sheriff, and social service managers, as well as financial

backing and incentives. Over the long term, corrections realignment may also include the need for new facilities.

California is on the verge of a vast experiment. To keep track of how well it goes, it is critical that the state fund careful, ongoing evaluation. The state and counties must collect genuinely useful data and evaluate the right questions. Best practices should be identified. The following areas will require close examination:

- Crime rates. What are the effects on crime? If the effects vary from county to county, can we identify why?
- Financing. Does state money cover county costs? Why do some counties do better than others?
- Rehabilitation. Are counties better than the state at lowering recidivism?
- Equity. How varied is the treatment of low-level offenders across counties? What should the standards be and how can they be measured?

County officials implementing corrections realignment will do so under considerable public scrutiny and perhaps skepticism. The state's role in terms of oversight and budgeting will continue to evolve. Over time, successful corrections realignment will require good faith adaptation to changing circumstance and program experiences—in addition to adequate funding in both the short and long term.

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Introduction

California is changing the way it manages its adult prisons and jails more comprehensively than at any time since statehood. The legislature has passed and Governor Jerry Brown has signed legislation (AB 109) to send roughly 30,000 prisoners to county jail rather than state prison. It makes counties responsible for supervising roughly 60,000 offenders released from state prisons after serving their sentences—offenders who would have been supervised by state parole officers in the past. It also makes it more difficult to return parolees to incarceration, and generally sends them to county jail rather than state prison if they are returned. These changes begin to take effect on October 1, 2011.¹

The state will pay counties for undertaking these new responsibilities. Legislation enacted in June 2011 sends revenue from slightly over one cent of the state's portion of the sales tax rate to local governments to pay for a broad range of "public safety" realignments.² This revenue comes to approximately \$5.1 billion.³ The legislation also sets aside about \$450 million of the revenue from the state's vehicle license fee. About \$367 million of this money will go to counties to pay for their new corrections responsibilities in 2011–12. That amount will increase to slightly over \$1 billion in 2013–14, when the transfer of inmates and parolees will be nearly complete.

The governor's January 2011 budget proposal used additional taxes and fees to pay these costs, but the legislature proved unwilling to provide the two-thirds vote needed for approval. So instead, the funding comes from redirection of existing state revenues, without additional tax or fee revenue. The Department of Finance (DOF) reports that the administration will seek voter approval of another similar package of tax and fee increases, as well as constitutional guarantees that realignment funding will not disappear in the future, on the November 2012 ballot.⁴

Enactment of policy changes this large and this quickly is unusual in California. But these changes, first proposed in the governor's budget of January 2011, were largely enacted into law by early April, with the funding arrangements adopted by June 30. They happened so quickly because of the confluence of at least five phenomena:

1. California has experienced traumatic budget shortfalls for several years. Although driven by revenue declines and caseload increases overall, the increasing cost of running the state prison and parole system has been conspicuous. As a share of the state's budget, corrections spending increased from 4 percent in 1984–85 to over 10 percent in 2008–09.⁵
2. A federal three-judge panel had ruled in 2009 that crowding in California's prisons was a primary cause of constitutionally inadequate health care. It held this violated the U.S. Constitution's 8th

¹ The legislation involves other changes as well, such as changing the definitions of a number of crimes, changing the conditions governing use of electronic monitoring of offenders, requiring local governments to develop a plan for implementing corrections realignment, and changing rules governing good-time credits.

² The sales tax includes the state's 5 percent "general fund" rate, an additional 1 percent that goes to local governments for public safety and a 1991 realignment, an additional .25 percent pledged to repay state "Economic Recovery Bonds," and an additional 1 percent that goes to local governments. A temporary 1 percent additional rate expired at the end of June 2011. Slightly over 1 percent of the state's 5 percent rate (that is, about 20 percent of the revenue from the 5 percent rate) will go to local governments to pay the major part of the cost of 2011's public safety realignment.

³ Statutes of California, 2011, Chapter 40, AB 118.

⁴ California Department of Finance, "Enacted Budget, Summary/Veto Message Package—6/30/11."

⁵ Legislative Analyst's Office, "Policy Brief: Prisons vs. University Proposal Would Unwisely Lock Up Budget Flexibility," January 26, 2010, pp. 1-2.

Amendment, which prohibits cruel and unusual punishment and ordered California to reduce its prison population by roughly 30,000 prisoners within two years. The U.S. Supreme Court upheld this order in May 2011. California's prisons therefore need to offload prisoners quickly, with minimum perceived and actual risk to public safety.

3. The notion of budgetary realignment has gained favor in California in recent years. Derived from President Reagan's devolution proposals, the state version favors shifting authority, responsibility, and money for many programs from state agencies to counties and sometimes cities or local districts. Applied to corrections, this concept supports shifting prisoners and money from the state to the counties. It suggests that counties could do a better job helping prisoners become noncriminal citizens at lower costs to taxpayers.
4. California temporarily increased its vehicle license fee in 2009 and earmarked a portion for local police, sheriffs, probation, district attorneys, and closely related purposes. This increase was enacted with an expiration date of June 30, 2011. Local law enforcement, already facing funding cuts and staff reductions throughout the state, would have experienced an additional loss of close to \$500 million statewide if this fee revenue were not replaced somehow. Although not directly related to corrections realignment, this funding termination focused the attention of local law enforcement officials on seeking constructive compromise with the state.
5. In November 2010, California's voters changed the vote required for the legislature to approve the budget from two-thirds to a simple majority.⁶ This change allowed the Democrat-controlled legislature to approve the funding changes needed to allow corrections realignment to go forward without Republican votes. Without this change, it might have been difficult to find the two-thirds vote needed to appropriate the money to fund corrections realignment.

Although nearly uniformly described as a realignment, these changes to California's correctional system are more than that. To reduce crowding and costs throughout the jail and prison system, this year's legislation, together with related bills enacted since 2009, reduce the time a prisoner will actually spend in prison (through increased sentence reductions for good behavior), reduce the likelihood of a return to prison for parole violations, increase the likelihood of forms of punishment short of incarceration, and increase the likelihood of early release for at least some prisoners. These changes reflect a long-dormant reality—that tough sentencing laws require money for adequate prisons and jails, more money than California has been willing to raise or spend.

California's Previous Experience with Corrections Reform

California has some experience with realigning corrections programs. An important example is the California Probation Subsidy Act, which was in effect from 1965 through 1978. Under this law, the state calculated the number of convicted felons who were likely to have been punished with jail time and county probation instead of being sent to state prison, based on each county's historical record. It paid counties \$4,000 for each additional convicted felon kept under county jurisdiction above this rate. This reduced state prison costs and overcrowding. The program was effective in that state prison admissions declined by 20 percent by 1970. However, state costs for this program increased rapidly with rising crime rates at the time.

⁶ Proposition 25 on California's November 2010 ballot, which amended Article IV, Sec. 12(d) of the California Constitution.

Counties complained that funding (which stayed at \$4,000 per case) did not cover rapidly inflating program costs. Reformers complained that counties were not providing increased rehabilitative services. Sheriffs complained that keeping these offenders in the community increased local crime.

This program is instructive. Perhaps most important is that long-term realignment success requires good-faith adaption to changing circumstances and program experiences—in addition to adequate funding in both the short and long term.

Report Overview

This report offers background for this adult corrections realignment effort, briefly describes these complex changes, reviews how they may work out from the perspective of the state and the counties, and identifies important next steps, in terms of implementation and evaluation.⁷

⁷Although analogous changes have been made concerning juvenile incarceration, they are not described here. A brief summary is available in Legislative Analyst's Office, "Overview of the Division of Juvenile Facilities," November 4, 2010.

Background

State Prisons

California operates 33 adult prisons, 42 incarceration camps, and 13 Community Correctional Facilities. Camps are lower security facilities, usually in rural areas, for lower level offenders. Community Correctional Facilities are run by cities or counties, house parole violators and low security inmates, and typically provide more educational and rehabilitative programming than prisons.⁸ California also has about 10,000 prisoners under contract arrangements in other states. Altogether, California's state correctional department manages around 160,000 prisoners. The state plans to spend \$9.8 billion and authorize 62,000 employees to run these facilities in 2011–12.

The state prison population grew rapidly during the 1990s and fluctuated without a clear trend in the 2000s (Figure 1). Many reasons have been advanced for California's prison population growth, including tough-on-crime laws starting in the 1970s, many of which included mandatory sentences for particular crimes; the shift to determinate sentencing in 1977; the war on drugs; voter-approved initiatives, notably including the state's three strikes law; a high prison recidivism rate; and California's sheer growth in population.⁹ The increase was enabled by a boom in prison construction from 1984 through 1990, when the number of state prisons increased from 12 to 33.

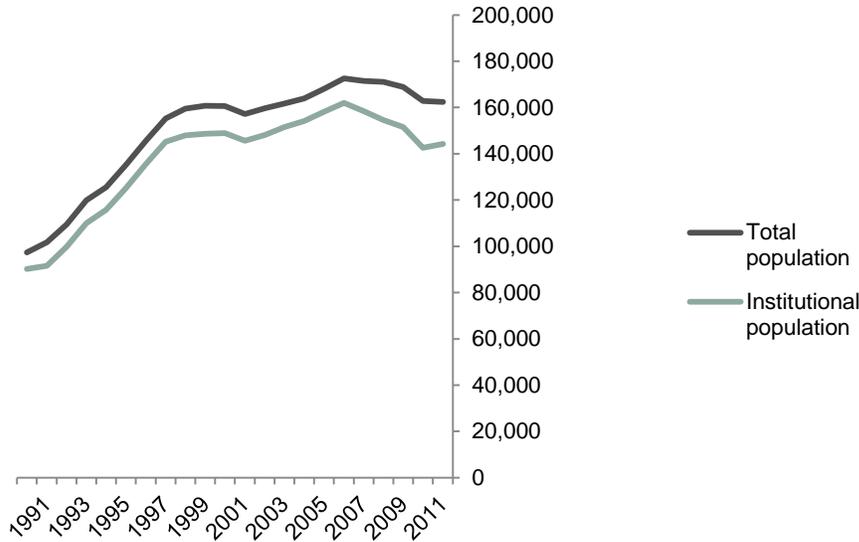
Notably, the increase cannot be explained by crime rates, which have been falling more or less steadily in California and the nation since around 1980.¹⁰ However, it may be that crime rates fell in part because so many offenders were locked up and off the streets. There is debate about this.

⁸ Community Correctional Facilities were authorized by SB 1591 in 1987.

⁹ Before determinate sentencing, convicted offenders could be kept in prison until prison officials and the courts decided that the offender was rehabilitated. Determinate sentencing specified a range of years that would be the sentence for each crime. For example, the sentence might be two years, four years, or six years. The judge in charge of sentencing was supposed to use the middle number of years unless he or she found that compelling circumstances warranted a longer or shorter term. When the offender had served the specified term, less any earned time-credits, the prisoner was released to parole, regardless of whether there was any reason to believe the offender had been rehabilitated.

¹⁰ Legislative Analyst's Office, "California's Criminal Justice System: A Primer," January 2007, p. 16.

FIGURE 1
California's prison population grew rapidly in the 1990s



SOURCE: Compiled from "Monthly Total Population Reports," California Department of Corrections and Rehabilitation (www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.asp).
NOTE: The figure shows the total population incarcerated under the authority of the California Department of Corrections and Rehabilitation. It also shows the number of people within its institutional prisons (as opposed to camps, out-of-state prisons, and other arrangements) because this is the population subject to court order reductions, as further explained below.

The state's prisons are crowded. The usual measure of overcrowding used by the state's Department of Corrections and Rehabilitation (CDCR) is the inmate population of a prison as a percentage of its "design capacity." Design capacity means "one inmate per cell, single-level bunks in dormitories, and no beds in spaces not designed for housing." At their population peak in 2006, California's prisons were operating at slightly over 200 percent of design capacity, or 162,735 prisoners.

California was sued in federal court for providing inadequate mental health care (*Coleman v. Brown*, originally filed in 1990) and medical care (*Plata v. Brown*, originally filed in 2001) in its prisons. Federal judges were persuaded that the shortcomings violated the 8th Amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. The courts appointed a "Special Master" to oversee mental health care and a "Receiver" to improve medical care. Both reported little progress. In 2007, a three-judge panel was appointed, which held that improvements in both mental health and medical care would be unlikely because of excessive crowding in the state's prisons.¹¹ In August 2009, the panel ordered California to reduce the population in its institutional prisons (the order did not apply to camps and other facilities) to 137.5 percent of their design capacity.¹² This order was appealed to the U.S. Supreme Court, which upheld it in May 2011.

This conclusion was not altogether a surprise to the state, which had been working on reducing its prison population in anticipation of such a ruling. Since the design capacity of California's institutional prisons is

¹¹ The connection between crowding and health care became especially important as a result of the federal Prison Litigation Reform Act of 1995. It was intended to restrict litigation against prison operations and attempted to clarify that court orders releasing prisoners should be a last resort used only under conditions which it specified. The three-judge panel used it as a roadmap to issue its prisoner release order, and the Supreme Court agreed.

¹² This oddly precise standard resulted when one expert advised the court that the prisons could improve health care if prison population was reduced to 145 percent of capacity and another recommended 130 percent. The court split the difference, precisely.

79,858 prisoners, the goal is to get to 137.5 percent of that, or 109,805 prisoners. California took several steps in its attempt to reach this goal, the most important of which were:

- SBX3 18 (2009) reduced the time offenders spend in state prison by increasing good-time credits. It also changed the thresholds used to determine if a crime is a felony or misdemeanor, for example by raising the breakpoint for theft from \$400 to \$950. In addition, it created a class of parolees who could not be returned to prison for technical parole violations.
- SB 678 (2009) created financial incentives for counties to reduce the number of felony probationers sent to state prison.¹³ If fewer than expected felony probationers are sent to state prison, the county gets half the money the state saved.
- The state sent about 10,000 inmates to prison in other states. The out-of-state prison population increased from 230 in December 2006 to 10,391 in January 2011.
- AB 900 (2007) authorized \$7.6 billion in new bonds for new prisons and jails, \$6.4 billion of which was for prisons, including for medical and mental health treatment facilities.

The net result of these and other changes is that the population in California's institutional prisons—as opposed to those in camps, community facilities, or out of state—had declined to 144,237 prisoners by the end of June 2011, from a peak of 162,000 in 2006. The state needs a further reduction of 34,433 prisoners by June 27, 2013, to satisfy the federal court order.¹⁴

That number could increase if more people are sent to state prison or if the state elects to send fewer prisoners to other states, or for other reasons. It could decrease if the state builds more prisons or converts no-longer-needed juvenile facilities or camps to house remaining adult prisoners. These options would take time.

The Status of County Jails

County jails have followed a path similar to state prisons and many are crowded today. California has 480 adult jails, although many of these are at city police stations or at short-term holding facilities near courts for prisoners on trial. Longer-term jails held a daily average of 73,846 prisoners in the first half of 2010, down from a high of 83,184 in 2007. Seventy-one percent of these prisoners were waiting for a court to determine their fate, and the rest were serving their sentence in jail. "Board-rated capacity," the county jail equivalent to design capacity for state prisons, was 75,728 beds as of 2007.

Overall, county jails are crowded.¹⁵ In 2007, 15 counties were subject to court-ordered population ceilings and required to release inmates early when the cap was reached.¹⁶ About 60 percent of all jailed prisoners were in these counties. In 2010, about 13,000 inmates were released early each month because of these population caps. About two-thirds were in jail waiting for a court to decide their future. However, there is variation among counties; some have extra space.

This level of crowding occurs despite considerable jail construction. From 1980 through 1988, California voters approved a series of general obligation bond programs to fund jail construction, among other things.

¹³ An offender convicted of a felony can be sentenced to probation for up to five years, instead of to state prison. If he fails to satisfy the terms of probation, he can be sent to state prison.

¹⁴ Three-Judge Court, "Order Requiring Interim Reports," June 30, 2011.

¹⁵ California State Sheriffs' Association, "Do the Crime, Do the Time? Maybe Not, In California" June 2006.

¹⁶ The counties are Los Angeles, San Bernardino, San Diego, Riverside, Fresno, Kern, Tulare, San Joaquin, Stanislaus, Santa Barbara, Merced, Placer, Butte, Yolo, and El Dorado. California Department of Corrections and Rehabilitation, Corrections Standards Authority, "2010 Legislative Report: Local Corrections in California," p. 12, Figure 1.

Together with county matching funds and a modest amount of federal money, these programs increased jail capacity from 32,000 beds in 1980 to about 76,000 beds in 2007.

More recently, the legislature and governor included \$1.2 billion in state lease-revenue bonds for the jail construction and related work described in the 2007 legislation above (AB 900).¹⁷ As of November 2009, the state had conditionally granted \$617 million of these funds to 11 counties for projects that would produce 5,489 new beds.¹⁸ However, several counties elected to defer these projects until economic conditions improve. As of March 2011, five counties are reported to be proceeding with projects to produce 2,942 new jail beds at a cost of \$486 million, or \$165,194 per bed.¹⁹ If the entire \$1.2 billion were used to fund jail construction at this level, it would produce 7,264 total new beds. That would bring the total amount of board-rated jail space in California to about 83,000 beds. This will not be enough to satisfy the demand for jail space coming from counties themselves, let alone accommodating the additional prisoners arriving because of realignment.

Once a locality has a new jail, it must pay staff and other operating costs. This can be a considerable burden, especially in times of widespread government cutbacks. Los Angeles famously left empty its new Metropolitan Detention Center (a city jail operated by the Los Angeles Police Department) for approximately a year and a half because it lacked funding for staff to operate the facility. It is now open. Many localities have less dramatic but ongoing difficulty paying for jail operations.

Parole and Probation

Until 2009, almost all offenders had to serve a period on parole after time in state prison.²⁰ Parolees had to report to a state parole agent when they returned to their communities and were subject to rules (such as no guns, no association with gang members), drug tests and other inspections, and searches without search warrants. Parolees could be returned to state prison for violating the rules of their parole, such as failing a drug test. They could also be returned to prison for up to one year if found to have been involved in new criminal activity by an administrative panel. Or they could be tried by a court and sentenced for the new crime, earning a new prison term. In California, about two-thirds of released prisoners are returned to state prison within three years, a troublingly high recidivism rate.²¹

An important change was made to these arrangements in 2009.²² New legislation declared that nonserious, nonviolent, nonsexual offenders who also met several other conditions would be released to “nonrevocable parole.” That meant they could not be returned to prison by their parole agent or the parole board, although they could still be arrested and convicted by a court for committing a new crime. CDCR estimates that there were 22,000 nonrevocable parolees in the middle of 2010, and it projects that number to decline to around

¹⁷ “Lease-revenue bonds” are bonds secured and paid by the payments the state makes to lease the facility. They are not subject to the state constitution’s requirement that debt be approved by popular vote.

¹⁸ California Corrections Standards Authority, “AB 900 Phase I Jail Construction Awards,” November 19, 2009.

¹⁹ California Department of Corrections and Rehabilitation, “AB 900 Construction Update” (fact sheet, March 17, 2011).

²⁰ The term of parole is nominally three years for most crimes, although it can be longer for more serious crimes. The term can be lengthened somewhat for repeated violation of parole conditions. However, the law also provides that if the parolee can avoid violations for a year, it can be shortened (in the case of a three year nominal term) to thirteen months. See California Penal Code Section 3001.

²¹ California Department of Corrections and Rehabilitation, “2010 Adult Institutions Outcome Evaluation Report,” October, 2010, at www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY0506_Outcome_Evaluation_Report.pdf. Since this counts only offenders returned to state prison and does not count prisoners who go to jail, federal prison, or prison in another state, it may understate reality.

²² Statutes of California, Chapter 28, AB3X 18, 2009, which, among other things, added Section 3000.03 to the Penal Code.

9,000 by 2015.²³ More serious offenders are still subject to parole as before, but punishment for any parole violations is now to be guided by an evidence-based computer model.²⁴

Those convicted of lesser crimes, insufficient to earn time in state prison, can be sentenced to up to a year in a county jail. Alternatively, they can be released on county probation or placed on probation after a jail term. Offenders convicted of a felony and therefore candidates for state prison may also be placed on probation by a court. Currently, almost three-quarters of felony offenders are put on probation rather than being sent to state prison.²⁵ Neither realignment nor the 2009 legislation materially changed these possibilities.

Probation is similar to parole, but has somewhat different legal principles and rules. Counties run probation, while the state runs parole. In addition, people on probation mostly have less serious criminal histories than parolees, and probation violators are returned to county jail not to state prison. In the 2009–10 fiscal year, about 323,000 people were on probation in California, with 249,000 for felony convictions. About 190,000 of the people on probation were on “banked” probation, meaning that they received only minimal supervision. Probation officers report that 96,000 of these people would be subject to more rigorous probation if they had staffing to do the work.²⁶

²³ California Department of Corrections and Rehabilitation, “2010 Adult Population Projections, 2010–2015,” Spring 2010.

²⁴ This model is called a Parole Violation Decision Making Instrument and is required by SBX3 18, in California Penal Code Section 3015.

²⁵ Legislative Analyst’s Office, “Achieving Better Outcomes for Adult Probation,” May 2009.

²⁶ Chief Probation Officers of California, Data Reports from the 2009–2010 FY CPOC Program Survey, “Adult Probation Information—Banked, Monitored, and Administratively Supervised.”

Central Legal Provisions of Corrections Realignment

Governor Jerry Brown's initial corrections realignment proposal had two basic parts: changes to the laws governing criminal sentencing and parole, and a set of funding arrangements. The first part was largely approved by the legislature and signed by the governor in April. This legislation is known as AB 109, and corrections realignment may well be known by that bill number for years to come, so it is worth keeping in mind. Some of the details in AB 109 were changed in bills adopted along with the budget. The budget also included funding needed to carry out AB 109. These funding arrangements are fairly complex (key details are discussed below).

Low-Level Felons Go to County Jail

AB 109 changes California's sentencing laws so that those who would have gone to state prison under prior law will instead serve their time in county jail.²⁷ The broad idea is that these are people who have been convicted of "nonserious, nonviolent, nonsexual" crimes (they have become known as "non-non-nons," or, among the seriously wonky, as "non-cubes") and who are therefore sufficiently manageable and low risk that they can be safely held in county jail and managed by county sheriffs.²⁸

The law will take effect on October 1, 2011. Those convicted before that date go to state prison. Those convicted after that date, and who meet the non-non-non criteria, go to county jail. One concern is that county jail space is, for the most part, not built or staffed to the same security standards required for "harder core" criminals.

Another concern is the concept of "nonserious" crimes that are nevertheless felonies. These crimes include a variety of offenses that would strike many civilians as far from trivial. The most substantial adjustments made to the proposal included in the governor's January budget involved whittling down the list of crimes considered "nonserious." Among the offenses no longer making the nonserious list are "assault resulting in death of a child under eight," "unlawfully causing a fire that causes an inhabited structure to burn," and "solicitation for murder." Bills enacted along with the budget pulled additional crimes from the nonserious list.²⁹

The DOF estimates that these changes will result in the equivalent of 6,760 full-time prisoners going to county jail instead of state prison in the first full year of program operation, and 25,651 full-time prisoners in 2015 after it has fully phased in.³⁰ The full-time prisoner concept (the technically correct but less understandable phrase is Average Daily Population) is useful for budget purposes but may not be fully illuminating. A full-time prisoner means that a person is in a cell 365 days a year—this can mean the same person for the entire 365 days, a different person each day, or any combination thereof.

For example, suppose new prisoners arrive at a jail in a steady stream over a year, so 1,040 prisoners arrive in January and an additional 1,040 in February (so 2,080 are on hand), and so forth. By December then, 12,480

²⁷ California Penal Code, Section 1170(h), which is referenced in sections defining particular crimes.

²⁸ The non-non-non criteria apply to the offense for which the offender was most recently serving time, and also to prior convictions.

²⁹ California Statutes of 2011, Chapter 39, AB 117.

³⁰ California Department of Finance, "Proposed Realignment—Local Cost Summary & Assumption Statements," 2011.

“new” prisoners would be in the jail. That would work out to 6,760 full-time prisoners for the year. Of course, not all the prisoners may be held in the jail by December; some may be held using such alternative sanctions as home monitoring with GPS devices, while others may have been released. The actual flow of new prisoners may be higher or lower, although probably not wildly. Whatever the exact number, they will all be a new responsibility of the sheriff.

An important element of AB 109 is that counties will handle these prisoners differently than the state has up until now. Under current law, they would all go to state prison for a substantial part of their sentenced time. Under AB 109, prisoners with “short-term” sentences of less than three years will be funded for an average of six months in jail, and prisoners with sentences of more than three years will be funded for an average 20 months.³¹ Counties would be encouraged to use alternative sanctions, such as day reporting centers, home detention with GPS monitoring, intensive probation, and other options less costly than lock-up time. These methods have been used with some reported success, but not on the scale envisioned by the administration’s plan, or with the swiftness. AB 109 gives counties new authority to use these options.

Parole Violators Go to County Jail

Before AB 109, inmates released from state prison spent time, usually a maximum of three years and a minimum of 13 months, in state-supervised parole. If they violated the rules of their parole, or committed a new crime, they could be arrested on order of their parole officer and sent back to prison by the Board of Parole Hearings. They usually returned to prison for a short stay of a few months.

AB 109 will send almost all parole violators (not just non-non-non parole violators) to county jail instead of state prison. This action will take effect on July 1, 2013.³² The law also expects that counties will not simply lock up these offenders as the state did, but will use alternative sanctions and county social service programs to manage them. After the 2013 start date, a court’s approval will be required to send a parole violator to jail for more than a so-called “flash incarceration” period of 10 days. Even the court will be limited to ordering a maximum jail sentence of 180 days.

Currently, about 11 percent of the population in state prison is there because they were returned from parole by board order. However, more than 40 percent of admissions to the prison system each year are in this category. They are a comparatively small part of the prison population because they turn over so quickly. Recall that the legislature took a step toward reducing this return flow in 2009 by creating a class of low-level offenders who could not be returned to prison by board action.³³

The DOF estimates that about 3,260 full-time prisoners will go to county jail in the first year after this provision takes effect. After three years, this number is projected to grow only slightly, to 3,525. It should decline after that, because fewer prisoners will be placed on parole (see next section). However, the actual number of offenders involved may be much higher. For example, if each prisoner stayed only one month, as recommended by the DOF, 42,400 individuals could be involved.

³¹ Most prisoners earn good-time credits that allow them to serve considerably less than their sentenced time. For example, the standard sentence for burglary in the second degree (commonly shoplifting) is 24 months, while the average time served is 17 months. The standard sentence for receiving stolen property is 24 months, while the average time served is 15.9 months. It would be helpful to know the actual time served for non-non-non prisoners sentenced to less or more than three years, but this information is not available. The amount of jail time funded by the Department of Finance plan appears to be substantially less than time served under previous arrangements.

³² California Penal Code, Section 3000.08.

³³ SBX3 18.

Note that AB 109 sends separate streams of new prisoners—low-level felons and most parole violators—to county jail. The total number of additional county prisoners will be the sum of the two, but not until the provision regarding parolees takes effect. According to the DOF, county jails will see 6,760 new full-time prisoners in the first year that AB 109 takes effect and 29,176 after full phase-in. The number of prisoners and parole/community supervision cases expected to go to each county after full implementation of AB 109 are shown in Table 1.

TABLE 1
AB 109 will increase the caseload in counties across the state

California's estimated prisoners and community supervision cases after full phase-in of AB 109, by county		
	Total prisoners (full-time equivalent)	Total community supervision cases (full-time equivalent)
Alameda	267	1,896
Alpine	2	0
Amador	53	78
Butte	268	381
Calaveras	21	47
Colusa	23	26
Contra Costa	104	754
Del Norte	11	48
El Dorado	68	208
Fresno	518	2,003
Glenn	28	42
Humboldt	137	235
Imperial	90	198
Inyo	15	34
Kern	1,019	1,990
Kings	321	425
Lake	73	175
Lassen	32	55
Los Angeles	8,342	19,382
Madera	111	281
Marin	66	115
Mariposa	13	36
Mendocino	75	111
Merced	171	471
Modoc	2	12
Mono	3	11
Monterey	308	646
Napa	70	148
Nevada	23	47
Orange	1,464	3,543
Placer	251	295

Plumas	9	19
Riverside	1,601	3,478
Sacramento	895	2,417
San Benito	52	49
San Bernardino	2,301	5,084
San Diego	1,821	4,198
San Francisco	164	898
San Joaquin	450	1,367
San Luis Obispo	140	299
San Mateo	208	737
Santa Barbara	294	655
Santa Clara	693	2,291
Santa Cruz	78	183
Shasta	326	403
Sierra	1	3
Siskiyou	34	57
Solano	278	699
Sonoma	231	396
Stanislaus	540	848
Sutter	103	209
Tehama	154	100
Trinity	9	18
Tulare	520	925
Tuolumne	47	74
Ventura	380	871
Yolo	277	383
Yuba	94	195
Grand total	25,649	60,549

SOURCE: California Department of Finance, "Proposed Realignment—Local Cost Summary & Assumption Statements," 2011.

NOTE: The numbers show full time equivalent prisoners or supervision cases after full implementation of corrections realignment, expected in 2014–15.

Parole Becomes Post-Release Community Supervision for Low-Level Felons

AB 109 also changes the parole system. Recall that most offenders released from state prison have been supervised by a state parole agent, usually for thirteen months to three years. Since 2009, low-level offenders have been placed on nonrevocable parole. Realignment changes all this by creating the Post-Release Community Supervision (PCS) program and making it a local responsibility.³⁴ Several classes of offenders will fall under the purview of this program, including nonserious, nonviolent offenders, and non-high-risk

³⁴ California Penal Code Section 3450 et seq.

sex offenders. The program will not include those who are second or third strikers or those being treated by the Department of Mental Health.³⁵

The law outlines a process localities should go through to organize their PCS program. It proposes that the program manage offenders in a way quite different from the state's approach. Instead of relying primarily on one sanction—return to prison—to punish parole violations, PCS can use a range of options listed in the statute. These include flash incarceration, home detention with GPS monitoring, restorative justice programs emphasizing victim restitution, work and education programs, drug treatment, and community-based residential programs, among others. Flash incarceration will be limited to either seven or ten days and will replace months in prison as the most severe administrative sanction.³⁶ If a county decides that a more severe sanction is needed, it will need approval from a court-appointed hearing officer. The law is quite explicit that return to state prison is not an option.³⁷

The DOF estimates that the full-time equivalent of 24,863 people who would have been on state parole will instead go to PCS in the first year of AB 109 implementation.³⁸ This number is projected to increase to 46,538 people in 2012–13 and then taper off to 29,550 by 2014–15. The decline will occur because felons sent to county jail will not be eligible for parole because they never went to state prison in the first place. However, they are likely to go to county supervision and add to county workloads. The DOF estimates that there will be 31,000 offenders in this category under county supervision by 2014–15.

In total, counties will be expected to be responsible for probation-like supervision of an additional 60,000 people by 2014–15. This is on top of about 360,000 probation cases that the counties currently manage.³⁹

³⁵ Under the 2009 nonrevocable parole law, low-level offenders meant persons not in prison for serious, violent, or certain sexual felonies, and who did not have prior convictions for those levels of crime. Realignment sends a somewhat broader group of prisoners to localities for post-release management, in that prior convictions are ignored.

³⁶ California Penal Code, Section 3450(b)(8)(A), 3453(q), and 3454©.

³⁷ California Penal Code, Section 3458.

³⁸ California Department of Finance, "Proposed Realignment—Local Cost Summary & Assumption Statements," 2011.

³⁹ Chief Probation Officers of California, Data Reports from the 2009–10 FY CPOC Program Survey: Count of All Cases and Number in Specific Crime Categories.

The Funding Plan

The governor initially proposed that funding come from an extension of the vehicle license fee and sales tax surcharges enacted in 2009 and slated to end in June 2011. He also proposed constitutional changes to guarantee that more or less adequate funding would continue into the future. The legislature did not provide the two-thirds vote necessary to approve these funding arrangements. In turn, the governor has proposed putting the constitutional guarantees on the November 2012 ballot for voter approval.

For now, funding arrangements to pay counties for the changes brought about by AB 109 have been approved as part of California's 2011–12 budget. Altogether, these arrangements will pay counties \$370 million for correctional changes in 2011–12, and roughly \$1 billion in 2013–14, after the full transfer of prisoners and parolees takes place.⁴⁰ This legislation includes a table that lists the percentage of this total that will be allocated to each county in 2011–12.⁴¹ These percentages are subject to modification in the future.

The DOF has outlined the thought process used to calculate the overall amounts. These calculations give considerable texture to how corrections realignment might work.⁴² The DOF has suggested funding levels for prisoners and parolees and has estimated the amount of money that would be needed to pay for each of the main elements of AB 109, as follows:

Low-level felons to county jail. The DOF proposes to pay counties \$25,000 per full-time prisoner per year and an additional \$2,275 per prisoner for “treatment, alternative custody, and/or other programming.” Since it now costs the state about \$50,000 per prisoner year, this is a substantial markdown. One reason for this reduction is that costs for incarcerating lower level offenders at the county level are lower than the costs of imprisoning serious offenders in higher security arrangements. An even more important reason is that DOF proposes that counties manage these prisoners in a different manner than the state has done. The state locks them up. The DOF proposes that counties lock them up for shorter periods of time and use lower cost alternative sanctions and community supervision. As described above, actual time served in state prison in pre-realignment times was less than the nominal sentence, especially for lower level offenders. Nevertheless, the jail time built into the Department's financing plan is substantially less than prisoners would have served in state prison before realignment.

Parole violators to county jail. After 2013, nearly all parolees who are reincarcerated because of parole violations will go to county jail instead of state prison. There should be fewer returning parolees because a court order would be needed to send a parolee back to imprisonment for more than 10 days. Currently, the Board of Parole Hearings makes these decisions. The DOF assumes that parolees returned to jail will stay for an average of 30 days, instead of four months as they do now. Counties would be expected to use both short periods of flash incarceration and graduated sanctions to reduce the length of jail stays. The DOF budgets \$25,000 per full-time equivalent jail year and counts only 30 days for each returned parolee.

Released prisoners to post-release community supervision. The state would pay localities the same amount that the state currently spends per parolee, on average, and adds \$2,275 per full-time person for “treatment, alternative custody,” and other costs.

⁴⁰ California Department of Finance, “Enacted Budget, Summary/Veto Message Package—6/30/11.”

⁴¹ Statutes of California 2011, Chapter 40, AB 118. The 2011–12 funding allocation list is in California Government Code Section 30029.

⁴² The cost numbers in this section are from Department of Finance, “Proposed Realignment—Local Cost Summary & Assumption Statements,” 2011.

The DOF's funding model includes money to pay for administration and management and some rehabilitation programming, along with some funding for additional work by district attorneys and public defenders.

Taxes and Constitutional Guarantees

Funding for corrections realignment relies on two distinct sources—the state sales tax and the vehicle license fee. Both levies are a little complicated and worth some detailed explanation. Moreover, they relate to some important, unresolved constitutional issues regarding realignment funding.

The statewide sales tax rate is now 7.25 percent of the amount of each taxable sale (it had been 8.25 percent until the end of June 2011). Many localities levy additional amounts of .5 percent or more, mostly for transportation, so the sales tax rate varies from place to place. The statewide average is about 9.1 percent. The state general fund gets the revenue from 5 percentage points of the state sales tax. The legislature funded public safety realignment by sending slightly over one-fifth of this amount to a special fund earmarked to pay local government realignment costs.

The vehicle license fee is a charge based on each vehicle's estimated value. The rate is .65 percent of each vehicle's value (it had been 1.15 percent until the end of June 2011). The legislature redirected \$450 million of the revenue from the .65 percent rate to the fund used to pay local governments for realignment—including, but not limited to, corrections realignment.

These funding shifts are expected to produce about \$5.6 billion in 2011–12, and to increase to \$6.8 billion in 2014–15. As described above, about \$370 million of this total will go to pay for corrections realignment in 2011–12, increasing to roughly \$1 billion in 2013–14.

All of this revenue will go into a special fund that can only be used to pay local governments for public safety realignment. Because this revenue will not go into the state's general fund, it will not be subject to the Proposition 98 requirement that about 45 percent of state general fund revenues go to schools, although this plan could be subject to legal challenge. After all, revenue from these sources used to go into the state's general fund, used to be spent on similar programs intended to accomplish similar things, and used to be subject to Proposition 98's requirements. If a legal challenge were successful, the state would have to put about 45 percent of the \$5.6 billion (about \$2.52 billion) into public school programs and perhaps find another \$2.52 billion for realignment.

Recall that a major part of the governor's proposal that was not enacted by the legislature was to ask the voters to approve a constitutional amendment guaranteeing continued funding for local government realignment and a few other things. This incomplete part of realignment is important for a couple of reasons:

Funding mechanics. The current dedication of sales tax and vehicle license fee revenue to local governments to pay for realignment could be changed in the future. Only a majority vote of the legislature would be required to make a change, so long as it was made as part of adoption of the state budget. Even if the present legislature and governor are firmly committed to continuing this funding arrangement, there is no guarantee that future legislatures and governors will have the same priorities. Local governments reasonably worry that they might end up with major realigned responsibilities for the long term and money to pay for them for a short term.

The proposed but not approved constitutional amendment would have required the state to continue to pay local governments the amount of money raised each year by one cent of the sales tax and by the

assigned share of the vehicle license fee.⁴³ If the legislature attempted to renege by not appropriating that amount, the constitution would have required the state controller to transfer the money from the state treasury to the realignment fund and to disburse it each month, even without a valid appropriation. This would have been a novel and previously unheard of way to guarantee payment. It might have worked. Certainly, local agencies with realigned responsibilities would sleep better with a guarantee along these lines in the state constitution.

Constitutional issues. The state's constitution says that if the state requires, or mandates, that cities, counties, and other local agencies perform more services, or pay a larger share of the cost of providing already established services, the state must reimburse those local agencies for the resulting cost increases. However, there are several exceptions to this rule. One is that there is no reimbursement requirement if the state changes the definition of a crime. AB 109 and the budget bills that modified it are written so that the provisions that send low-level offenders to county jail instead of to state prison appear to be changes to the definitions of crimes, and thus the state would be exempt from the reimbursement requirement. But this position is hardly foolproof. The sections of AB 109 that increase local responsibility for offenders on parole or post-release community supervision are called mandates by legislative counsel.

This messy group of ambiguities is a problem because it could destabilize funding for realignment. For example, if a county could persuade the State Mandates Commission or a court that realignment includes mandates, it could also argue that the money provided by the financing plan was not enough to pay for realignment costs. The state could argue that it had given counties great latitude about how imprisonment and community supervision should be done, and that counties just needed to make it work. A court decision might be needed to settle the matter, with a verdict hard to predict.

The governor's January 2011 budget proposal sought to avoid all this unpleasantness by having the constitution say that nothing about the proposed realignment is a mandate and that no reimbursement is required. It did acknowledge that future changes to realignment that might require counties to provide more services, or accept more categories of offenders, would need to come with additional money.

These constitutional changes were not approved by the legislature. Even if they had been, they would still have needed approval by the voters in a future election before they would take effect—and voter approval is never certain.

⁴³ California Legislature, ACAX1 2 and SCAX1 1, 2011.

Corrections Realignment and the State

The state has three primary motivations for pursuing corrections realignment. The first, and perhaps most pressing, is to respond to orders from both the federal three-judge panel and the U.S. Supreme Court that the state reduce its prison population. The second is to reduce the costs of running the state prison system, or at least to escape from rapid increases in those costs. The third is to attempt to improve the results of the penal system, in the sense of using it to divert more prisoners to a less criminal life path.

This section analyzes these motivations. It also considers two additional issues, both critical to understanding the state's realignment effort. The first is the effect that realignment will have on California's tough-on-crime determinate sentencing system—which is likely to be transformed into a barely recognizable remnant of its former self. The second is the question of statewide equity—a key issue in any realignment effort. In corrections, it relates to likely differences among counties in the implementation of jail time, rehabilitation services, and criminal prosecution.

Implementation Timelines: State and Court-Ordered Plans

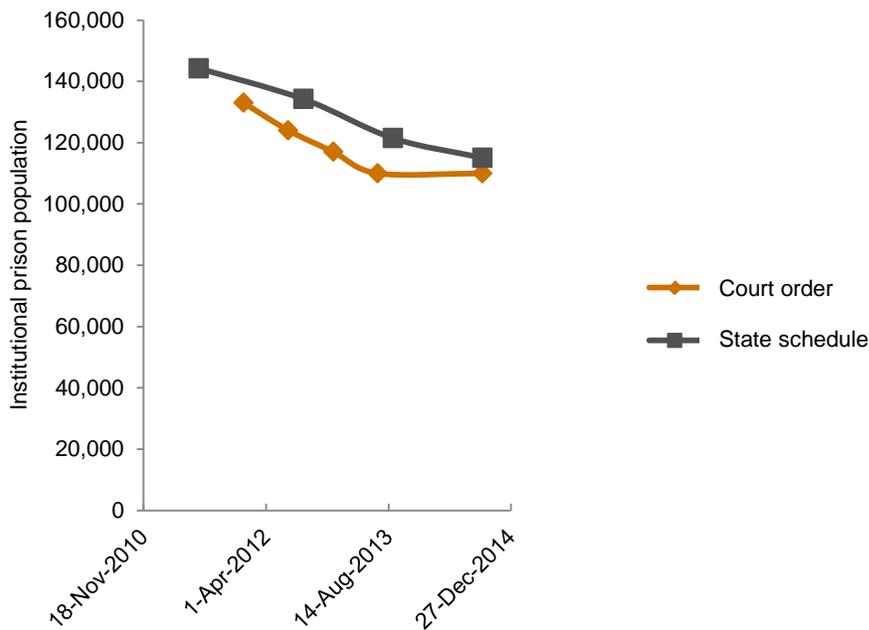
An important purpose of corrections realignment is to take a large step toward satisfying the order of both the three-judge federal panel and the U.S. Supreme Court to reduce the number of prisoners in the state's prisons. Recall that the design capacity of these institutions is 79,858 prisoners and that the judges ordered the state to reduce its prison population to 137.5 percent of design capacity, or 109,805 prisoners. These institutions had 144,237 prisoners as of June 2011, so they need to shed 34,433 inmates. There is a judicially imposed timetable that sets target reductions every six months. The first comes up on December 27, 2011, when the state is to reduce prison numbers to about 133,000 inmates. That means dropping 11,000 prisoners by then. The plan approved by the legislature does not fully meet this goal.

If the legislature's plan goes smoothly, and as predicted by the DOF, it will shift 6,760 full-time prisoners to county jail in the first full year of implementation, which begins October 1, 2011. If the shift is spread out evenly over the year, about 1,690 prisoners may move by the end of December. If there are delays, fewer will shift. But perhaps the plan, enacted and with funding, would be enough to persuade the court to allow the prisoner reduction to track with a timetable based on the DOF estimates rather than the court's timetable.

One complication is that the 6,760 prisoners are low-level, low-security risk inmates, the sort of inmates most likely to be housed in camps rather than in prisons. There are currently about 4,000 low-level inmates housed in camps. If they all go to county jail, the net reduction in the prison population would be only about 2,760. Of course, that might allow CDCR to move somewhat higher-level prisoners to camps, which would also reduce the prison population. But that strategy would mean a significant shift in the way CDCR uses camps and might require some upgrading of security arrangements there. Re-purposing the camps may also require new land use approvals, and possibly environmental evaluation, which could lead to local controversy and delay.

The level of the prison population required by the court order is close to the level that would result in following the DOF schedule after realignment is fully implemented (Figure 2).⁴⁴ The realignment schedule runs roughly 10,000 prisoners high, with the gap narrowing to about 4,000 prisoners by mid-2015. However, if the DOF plan is followed, additional actions will be needed to further reduce prison populations, even if the court would accept this alternative scheduling. One option would be to send even more prisoners to the counties. But that means sending prisoners with somewhat more serious criminal records, and counties have strongly objected to that. It may be that realignment has gone about as far as it can politically go, at least for the moment.

FIGURE 2
State and court-ordered plans to reduce the prison population are similar



The state currently has about 10,000 of its prisoners in contract prison space in other states. These arrangements have faced opposition. If the state were to cancel those contracts (or allow them to expire) and bring 10,000 prisoners home, the DOF realignment reduction schedule would be running about 20,000 behind the judicial order. However, if the state were to send another 10,000 prisoners out of state, together with realignment as envisioned, it would be on schedule. This action would probably be opposed by the prison guards and their union.

It is easy to lose sight of the fact that the motivating cause of the judicial order was not overcrowding itself, but the inadequacy of medical and mental care in the prisons. The judges held, more or less, that crowding was getting in the way of improving health care. But less crowding will not in and of itself improve health care. Improving health care will require construction of new, specialized space (some of which is under way), new personnel, and considerable money. A plausible guess is that the low-level prisoners going to

⁴⁴ The figure does not take account of increases or decreases in prison population that might occur for other reasons. The most recent projections of prison population growth from the Department of Corrections and Rehabilitation suggest increases of a little less than 1,500 over the time period of the figure. Not all of these prisoners would end up in the institutional population covered by the figure.

counties will be comparatively younger and healthier than the more serious offenders with longer sentences that will remain in prison. So state health care obligations may not diminish much. It is possible that the state will comply with the prison population reduction order and still not provide judicially acceptable health care. Where the courts will look for remedies in that case is interesting and entirely speculative.

Cost Reductions

The cost of state prisons increased rapidly in the last decade. As a percentage of the general fund money the state spends on state operations (as opposed to funding it passes on to schools and counties), corrections increased from about 20 percent in 200–04 to almost 27 percent in 2008–09. In dollars, it increased from \$5.4 billion in 2003–04 to almost \$10 billion in 2008–09. CDCR calls attention to the high rate of returning parolees to the prison system as a source of cost increases. Others note the relatively high salaries of prison guards and the amount of overtime they earn.⁴⁵

The administration has not emphasized the cost reduction virtues of prison realignment, nor offered detailed savings projections. The core of the proposal is to send certain prisoners to county jail and to make counties responsible for managing certain parolees. The state will pay for this shift. It proposes to pay \$367 million to fund these new local responsibilities in 2011–12, and roughly \$1 billion by 2014–15. Clearly, there is no net savings on this side of the transaction. So far, realignment is about additional money going out the door.

If corrections realignment is to save money or even break even, it must be because CDCR's budget is reduced by the amount of money going to counties—or more. On this matter the DOF financing plan is vague. The amount proposed for CDCR in the 2011–12 California budget is enough to pay to imprison all of the current prison population, plus a modest increase. It does not reflect the reduction of the 10,020 prisoners who would be sent to counties in the first year, nor the reduction in parole cases. This may be sensible. It was not certain that corrections realignment would happen back in January when the budget was first presented. It was an arguably prudent approach to fully fund the prison system, and then to reduce funding when and if prisoners are actually sent to counties.

Still, given the comparative detail in the plan to send prisoners and parolees to counties, there are only general hints about plans to reduce CDCR's budget as realignment unfolds. The May Revision Summary proposes to reduce “by 25 percent ... state operations positions and associated funding for various departments that will have [public safety] programs realigned to counties beginning in 2011–12.”⁴⁶ The Summary cautions that these reductions will not be fully effective until July 2013. The language feels more nearly aspirational than precise. So at this point, corrections realignment starts out costing the state's taxpayers an additional \$367 million in its first year, with the possibility that this amount will be offset by reductions to CDCR's budget later. Almost certainly CDCR will argue that it needs to retain its positions and budget to meet its federal health care responsibilities, improve rehabilitative programming, and bring staffing up to a proper level.

Spending \$367 million may be a bargain. The leading alternative ways to meet the court order are to build new prison space and to hire more guards, or to release roughly 30,000 prisoners. Each, in its own way, could be more expensive.

⁴⁵ Joan Petersilia, “California's Correctional Paradox of Excess and Deprivation,” *Crime and Justice*, 2008.

⁴⁶ Governor's Budget, May Revision, 2011–12, p. 117.

There are other potential cost risks with corrections realignment. An important one is that it may motivate additional litigation, particularly at the county level. The would-have-been-state prisoners going to counties may invite scrutiny of the medical and health care services provided in jail, as it has in state prison. Another possible complication is liability. State correctional officers and parole officers have legal immunity when performing their official duties. For example, they cannot be sued individually if a prisoner is injured or if an inadequately supervised parolee commits a new crime. But local officials do not have the same level of protection. This could mean controversy about which level of government should properly bear the financial responsibility of corrections realignment litigation.

Better Results

Realignment proponents argue that shifting program authority and funding to local governments will result in better public service. In this case, counties have a far greater stake than the state does in trying to rehabilitate as many of these offenders as possible, because they have to live with them: Those going to county jail are from local communities and are known and have family and friends there. They will almost surely return to those communities after serving their sentences.

Counties also run a variety of programs that support the rehabilitative goal, such as drug and alcohol abuse treatment, mental health treatment, job training, housing, and others. If they use these programs creatively to support rehabilitation, they might be more successful than the state.

This hope needs to be qualified in a number of ways. Perhaps most important is that these programs have limited funding and long client lists already, and prisoners may not naturally rise to top priority in many communities. The likelihood of success would increase if the flow of realignment funds (which are proposed to be controlled by the board of supervisors of each county) send some money to these agencies to help with realigned offenders. It might increase further if this flow of funding was adjusted over time, based on the measured success or failure of each individual program.

Determinate Sentencing

The central theme of corrections realignment is the shift of prisoners, parolees, authority, and money from the state to the counties. But it does more than that. California corrections since the late 1970s has been dominated by determinate sentencing, which gives specific sentences for various crimes, leaving judges and prison managers only limited discretion. Sentences have been increased over time for various crimes, creating the sense, and to some degree the reality, of a tough-on-crime system.

Voters strongly supported this arrangement and approved laws requiring more prison time for criminals, such as the three strikes law. At the same time, they gave pollsters a mixed message: They approved of long prison terms but had little interest in paying the resulting costs. After supporting a series of bond measures through the 1980s, they balked and voted down a 1990 prison construction bond with a 60 percent “no” vote. Lack of money and support for additional prison space put an increasing flow of prisoners into more and more crowded conditions. Money and space for health care and rehabilitation programs disappeared.

In some ways, corrections realignment can be understood as an attempt to find a compromise between the voters’ dilemma and constitutional requirements, upheld by the U.S. Supreme Court, to provide adequate mental health and medical care to prisoners. There is no known cheap way to hold large numbers of people

in prison for long periods of time while satisfying these requirements. Current corrections realignment plans and closely related legislation passed since 2009 whittle costs down by reducing the time each prisoner spends locked up. Legislation in 2009 increased good-time credits, shortening prison stays. It also made it harder to return an offender to prison for a parole violation. AB 109 takes these themes further by making it financially necessary for counties to keep their newly assigned felons in jail for only a fraction of their determinate sentences. This means that counties will need to try many alternatives to lock-up time.

This is an experiment on a large scale. No one can say for certain how it will work out. It may allow offenders to commit more crimes just because they will return to the streets more quickly. It may be that less incarceration time, and therefore less exposure to other criminals, along with more rehabilitative and educational programming and more calibrated sanctions, will lead to reduced crime. Probably some counties will have better experiences than others will. The experiment may be tolerable now, when crime rates are near a 30-year low. Should crime activity begin to increase, corrections realignment may draw more scrutiny.

Reducing actual time in prison or jail is an important part of corrections realignment and related legislation. There may be better ways to accomplish this goal. A proposal that has been made from time to time is to establish a sentencing commission to re-evaluate the sentencing structure in California criminal law.⁴⁷ One objective would be to bring actual time served into line with the proportionate importance or harm done by various crimes. Another objective, in light of the federal court order, might be to bring prison and jail populations down.

The Equity Question

A traditional and traditionally important role of state government has been to maintain baseline standards of equity throughout the state. Wherever California citizens live, they have access to roughly similar educational and social services, main roads, and health care. While geographic variations in these areas persist, there is little question that the direction of the state's involvement has been to reduce regional differences.

Corrections realignment decreases the state's role in incarcerating criminals and increases the latitude of local governments to follow their own policy preferences in this area. It will surely lead to counties treating prisoners differently, and will almost certainly lead to less equity. Differences exist now. 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.

What will equity mean in the case of corrections realignment? It probably does not mean that there will be great differences in the experience prisoners have while they are in jail, at least not greater than before. Jails have long been required to meet state design standards. Across the state, guards are supposed to have similar training and to follow similar protocols for treating prisoners. The courts have been quite willing to rely on the U.S. Constitution's "cruel and unusual punishment" provision to maintain minimum standards.

⁴⁷ American Law Institute, *Model Penal Code: Sentencing*, 2007; Little Hoover Commission, *Solving California's Corrections Crisis: Time is Running Out*, 2007; Joan Petersilia, "California's Correctional Paradox of Excess and Deprivation," *Crime and Justice*, 2008.

Jails have a rather well-defined minimum level of performance, and counties tend not to aspire toward higher hospitality standards.

Instead, differences among counties are most likely to emerge in three ways:

Jail time. Some counties are quite committed to keeping criminals locked up in jail for as much of their sentences as possible. Others will be more receptive to using alternatives such as day reporting and in-home detention with GPS monitoring. Still others will use early release more freely. Two prisoners in two different counties, each convicted of the same crime with the same determinate sentence, might have very different experiences in terms of the length of time they spend in jail.

Rehabilitation services. Realignment supporters argue that counties will do a better job than the state at rehabilitating prisoners. They claim that counties will be better able to build connections between prisoners and potentially helpful people in their communities, including family, educators, potential employers, and social service workers. They argue that counties will employ their social service programs to help inmates and ex-inmates under post-release community supervision get drug and alcohol treatment, education, housing, medical care, and employment. Almost certainly some counties will make a good effort along these lines and others will not. The same two prisoners could have quite different experiences in jail, under post-release community supervision, and, if this kind of help is effective, for life.

Prosecution of crime. District attorneys often have considerable discretion about what charges to file against an arrested person. In some cases, this discretion may lead to “up-charging.” Up-charging means that a suspect is charged with a more serious category of crime than he would have been in the past, before AB 109. It may mean that the suspect, if convicted or if he accepts a plea bargain at the higher level, will go to state prison instead of to county jail (at county expense) because of the higher charge. This would be economically rational if the higher charge will stick. Some counties will probably be more rational in this way than others. Again, two similar felons in two different counties may have very different experiences: One may have the misfortune to be convicted of a more serious crime and to spend time, probably more time, in state prison than his counterpart in another county.

Willingness to accept a greater degree of inequity is part of the genetic structure of realignment. At some point the level of inequity may go too far, sufficient to warrant state standards or to prompt corrective involvement by the courts.

Corrections Realignment and the Counties

Adult corrections realignment causes local governments anxiety. It entails a fundamental change in one of the oldest and most important functions shared between state and local government. Yet the financing arrangements and especially the constitutional guarantees that were part of the deal to which counties had initially agreed did not happen quite in the way they were initially proposed.

Aside from this understandable overall anxiety, local concern appears to focus on three areas: money, implementation, and effect on crime.

Money

There is concern about the continuity of funds for corrections realignment. As previously discussed, the governor's initial proposal was to fund realignment through a constitutional amendment that would have earmarked corrections realignment funds for counties. The legislature enacted a slightly different plan, in which portions of the state sales tax and vehicle license fees are to fund corrections realignment. Neither source is new revenue. Neither is constitutionally earmarked. On the plus side, these revenue sources are not set to expire after five years. On the down side, they are not backed up with a constitutional requirement that the state pay. But perhaps that guarantee will be approved in a ballot measure in the November 2012 election, mentioned above.

There is also concern about the amount of money proposed for corrections realignment. For felons who will be assigned to jail instead of prison, counties will get \$25,000 per jail year. This is roughly the amount that the state currently pays counties to keep state prisoners in jail and is based on a survey of jail costs.⁴⁸ A more pressing concern is that the DOF model assumes prisoners sentenced to three years or less spend only six months in jail, and those sentenced to over three years spend only 20 months in jail, on average. Similarly, the models assumes parolees re-incarcerated for parole violations will remain in jail only 30 days, and that offenders released on parole will remain on parole for only 18 months. These periods are all shorter than California's current practice, and would require that sheriffs come up with alternative management strategies—quickly. Changes this extensive would be difficult for public agencies anywhere, and they are likely to be complicated by opposition in many communities around the state to anything short of full jail time.

Jail financing may work out somewhat differently in practice. Suppose a sheriff has a full jail and funding to run it. Realignment sends him 100 more prisoners, along with money. If he can keep the board of supervisors from reducing his baseline funding, he may come out ahead. He still has to run a full jail, and he has additional money to spend managing the surplus population outside of jail, which is nearly always cheaper. Alternatively, the board might choose to allocate some of the realignment money to programs that offer drug and alcohol services or mental health services, on the theory that this will help manage the sheriff's caseload. The range of possibilities is quite broad.

⁴⁸ The San Mateo sheriff recently reported that a year of jail time for a male inmate cost \$62,000, more for a female inmate. See Greg Munks, Sheriff, "Jail Overcrowding/Inmate Program and Re-entry Services/Jail Planning," memo to San Mateo County Board of Supervisors Criminal Justice Committee, 2011.

The DOF model calculates a total amount of money available for realigned corrections, and realignment legislation allocates a percentage of this total to each county. This allocation scheme will be subject to renegotiation in coming years.

Implementation

Many of the jails in the state have court ordered population caps. Others are nearly full. A few have some excess capacity. The most basic implementation issue for most counties will be to work out how to manage their additional realigned population. AB 109 directs that the existing Community Corrections Partnership, made up of various law enforcement and other officials in each county, prepare a plan for implementing AB 109 for their county board of supervisors. They will have a range of options:

Early release. Most counties with full jails currently release at least some prisoners early, before they have served their sentences. Counties could expand this practice and either release more prisoners or release them even earlier.

Alternative bail requirements. Over 60 percent of prisoners in jail are waiting for trial or some other judicial determination of their fate. In theory, a judge has determined the flight risk and risk to community safety if the prisoner is released and has set bail as appropriate. A sheriff is required to follow these judicial determinations. Legislation allows sheriffs to require prisoners in this condition to remain confined to home with GPS monitoring. If the county needs to free up jail space for newly arriving realignees beyond what can be accommodated in this way, judges may need to reassess their practices for these prisoners.

Alternative sanctions. Similarly, sheriffs could use a considerable range of alternative sanctions to hold prisoners who have been sentenced. These include house detention with GPS ankle bracelets, day reporting centers, intensive probation, and drug and alcohol treatment. There is a substantial body of experiences with these options. All work—but not for all offenders. Each requires experience, as well as trained and somewhat specialized staffing. Some require buildings or specialized equipment. They may take some time and money to get going. All require careful evaluations and judgment as to which offenders are good candidates for each option and which need to be kept in jail. Sheriffs will need to determine whether incoming realigned felons or prisoners already in jail are promising candidates for these and other options.

Coordination of social services. A theme in realignment thinking is that counties should be able to coordinate the use of their social service programs, such as drug and alcohol abuse, mental health, and housing programs, and perhaps also programs run by other local agencies such as education, in order to produce better results. In this case, that means helping inmates phase out of their criminal careers and begin more constructive ones. Making this happen would require a conscious plan and support from the county board of supervisors, the sheriff, and social service managers, as well as financial backing and incentives. The DOF financing plan includes additional funding specifically for treatment and programming, which arguably includes these kinds of programs. If successful, this could be an important element of managing realigned populations.

Building more facilities. Counties could build additional jail space, although not instantly. Money would be needed. Many sheriffs report needing to do this anyway, even without the population increases that realignment will bring. Several counties have been approved for state grants to help

finance new jail space, as described above. The legislature recently amended this funding program to reduce local match requirements and otherwise make it easier to obtain funding. However, the amount of money authorized will produce only a limited number of additional jail beds. More money may be needed.

Public Safety

Corrections realignment could foster an increase in crime. It, and related legal changes enacted since 2009, will shorten time in prison, make it harder to return a parole violator to prison, and shorten parole-like community supervision. Released offenders have a fairly high likelihood of committing additional crimes after release, and putting them back on the streets sooner might speed up the process. However, if realigned corrections puts offenders under the management of local officials who have a greater stake than state prison employees in their rehabilitation, and if counties coordinate social service and educational programming effectively, the net result might be reduced crime and a reduced flow of offenders to prisons and jails overall. Realignment is an experiment on a large scale to determine which of these outcomes is more nearly correct. It may turn out that the answer is different in different counties with different approaches to carrying out corrections realignment.

Conclusion

The legislature and governor have fundamentally changed the way lower-level felons are punished in California. The DOF described these changes as “vast and historic” and they are right. These changes start with sending low-level felons to county jail instead of state prison, and with counties instead of state parole agents managing paroled low-level offenders. Equally important is the message that counties are to do things differently from past state practice. Low-level offenders are to be locked up for shorter periods. Counties are to use a wide range of alternative sanctions. Post-release community supervision (formerly parole) is to be quicker, with considerably less likelihood of a return to prison. Ideally, counties will use the social services that they also manage in conjunction with this supervision in ways that help offenders find more constructive life paths.

These changes will put counties on a steep learning curve. Corrections realignment does not ask counties to simply do more of what they were doing before—it asks that they do things differently. They will need to learn how to do that safely. Alternative sanctions may be cheaper than jail time and may fit with well-thought-out rehabilitation programming. But it has risks. Prisoners under alternative sanctions may not behave well. Some of them, almost certainly, will commit new crimes. County officials learning to use alternative sanctions on a broader scale will do so under considerable public scrutiny and possibly skepticism.

Some organized assistance to help counties with implementing realignment may be needed. The association of county supervisors, the sheriffs, the probation officers organization, or perhaps some other group could manage this assistance. It will need funding.

Once under way, this vast and historic experiment should be subject to careful evaluation to keep track of how well or badly it is working out. Best, or at least reasonably successful, practices should be identified. In particular, evaluation should include at least the four topics below. Evaluation efforts will also need funding, as well as requirements that necessary data are collected.

1. How will corrections realignment affect crime rates? No one should expect that realigned offenders will commit no new crimes. This population has had a high likelihood of re-offending in the past. A modest reduction in that rate would be a considerable success. If the effect on crime varies from county to county, can we identify why?
2. How are the finances working? Does the state money cover county costs, at least roughly? Or are county budgets being swamped by corrections realignment costs? Can we identify reasons and practices that explain why some counties are doing better than others in this respect?
3. The hope is that counties can do better than the state at rehabilitating offenders. How well will this work out in practice?
4. Realignment will lead to a reduction in the equality or at least sameness with which low-level offenders are treated. It is not obvious what the standards should be or how to measure them. California should attempt to keep track of how corrections realignment affects equity, both because this is a traditional and important state role and because a lawsuit, if not inevitable, is at least possible.

California is poised to make enormous changes to its corrections system. Californians will be living with the results of these changes for years to come. To bolster chances of success, the state and the counties must be prepared to study their experiences and adapt accordingly.

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