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Go Directly to Jail: How Misaligned Subsidies Undermine California's Prisoner Realignment Goals and What Is Possible to Maximize the Law's Potential

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Go Directly to Jail: How Misaligned Subsidies Undermine California's Prisoner Realignment Goals and What Is Possible to Maximize the Law's Potential

Andrew M. Ducart*

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I. INTRODUCTION

California’s prison system is the largest of any state.¹ As of the end of May 2011, the California Department of Corrections and Rehabilitation (CDCR) housed roughly 147,000 adult inmates within its institutions,² which exceeds their designed holding capacity by 175 percent.³ The system as a whole was designed to hold approximately 84,000 inmates.⁴ Over the past several decades, California’s prison population has increased dramatically.⁵ Some commentators attribute much of this expansion to the adoption of pro-punishment sentencing policies that have done little to further public safety or reduce recidivism but instead have racked up costs and decreased safety and access to necessary services within the prisons themselves.⁶

Through a series of class-action lawsuits brought by CDCR inmates challenging the constitutionality of the prison system’s medical and mental healthcare, the federal courts took notice of California’s overcrowded prisons and state lawmakers’ unwillingness to address them.⁷ After making their way through

1. Sara Mayeux, *Mass Incarceration: Breaking Down the Data by State*, PRISON L. BLOG (July 13, 2010, 6:37 AM), <http://prisonlaw.wordpress.com/2010/07/13/mass-incarceration-breaking-down-the-data-by-state/> (on file with the *McGeorge Law Review*).

2. DATA ANALYSIS UNIT, CAL. DEP’T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT MAY 31, 2011, at 1 (2011), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1105.pdf (on file with the *McGeorge Law Review*).

3. *Id.*

4. *Id.*

5. See LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT 17 (2007), available at <http://www.lhc.ca.gov/studies/185/Report185.pdf> (on file with the *McGeorge Law Review*) (“[F]rom 1980 to 2006, the inmate population surged more than 600 percent, adding an average of 5,500 inmates a year.”).

6. See *id.* at 17–21. The Commission found that the sentencing policies employed in California since 1980 led to a six-hundred percent increase in those incarcerated in state, which “threatens safety of prison staff and inmates and obstructs the efficient delivery of services needed to prepare inmates for parole and prevent recidivism.” *Id.* at 17–18. Additionally, the study showed that, during the same period, the CDCR’s budget has expanded from about four percent of California’s budget to about eight percent, from about \$1 billion to \$9 billion per year. *Id.* at 21; see also Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California’s Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 917 (2004) (calling California’s sentencing laws “a Byzantine sentencing scheme without a coherent penal philosophy”).

7. See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *4 (E.D. Cal. Aug. 4, 2009) (“Although California’s existing prison system serves neither the public nor the inmates

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the federal courts, the cases reached the United States Supreme Court in consolidated form.⁸

In *Brown v. Plata*, the Court affirmed a lower court's declaration that California's prison-healthcare system was so inadequate in meeting the needs of inmates that it violated the Eighth Amendment's guarantee against cruel and unusual punishment.⁹ A divided Court found the primary cause of the system's inadequacy to be the extreme overcrowding of inmates.¹⁰ It also held that given California's current bleak fiscal outlook, the only feasible way of remedying the constitutional violation was to cut the incarcerated population drastically.¹¹ In affirming the order of a special three-judge panel convened under the Prison Litigation Reform Act (PLRA),¹² the Court stated that California must reduce its prison population to no more than 137.5% of capacity within the next two years, a reduction of between 38,000–46,000 prisoners.¹³ This mandate, along with California's budgetary woes,¹⁴ has "dragged the state's political class into a long delayed reckoning with [the] fatally flawed penal system."¹⁵

California's plan to meet the Court's mandate came in the form of AB 109, dubbed "the 2011 Realignment Legislation addressing public safety" (Realignment).¹⁶ Proclaimed as the biggest change to California's criminal law since the passage of Determinate Sentencing in 1978,¹⁷ Realignment seeks to reduce California's high recidivism rates¹⁸ and institutional costs, through

well, the state has for years been unable or unwilling to implement the reforms necessary to reverse its continuing deterioration.").

8. *Brown v. Plata*, 131 S. Ct. 1910 (2011). The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

9. *Plata*, 131 S. Ct. at 1947.

10. *Id.*

11. *Id.*

12. 18 U.S.C. § 3626 (2006).

13. *Plata*, 131 S. Ct. at 1928.

14. See *The 2011–12 Budget: California's Fiscal Outlook*, CAL. LEGIS. ANALYST'S OFF. (Nov. 10, 2010), http://www.lao.ca.gov/reports/2010/bud/fiscal_outlook/fiscal_outlook_2010.aspx#chap1 (on file with the *McGeorge Law Review*) (stating California's budget deficit of about \$20 billion will persist for the next several years).

15. Jonathan Simon, *California Penal Policy: Realignment and Beyond*, BERKELEY BLOG (Oct. 11, 2011), <http://blogs.berkeley.edu/2011/10/11/california-penal-policy-realignment-and-beyond/> (on file with the *McGeorge Law Review*).

16. AB 109, 2011 Leg., 2011–2012 Sess. (Cal. 2011). In addition to AB 109, Realignment is comprised of several other bills, including AB 116, AB 117, AB 118, and AB 94. See GARRICK BYERS, REALIGNMENT 15–16 (2011), available at <http://www.claraweb.us/wp-content/uploads/2011/12/California-Public-Safety-Realignment-Analysis-by-Garrick-Byers-December-19-2011-Edition-3.pdf> (on file with the *McGeorge Law Review*) (detailing what bills comprise Realignment's reforms).

17. Robert Weisberg, *California's De Facto Sentencing Commissions*, 64 STAN. L. REV. ONLINE 1 (2011), <http://www.stanfordlawreview.org/online/californias-de-facto-sentencing-commissions> (on file with the *McGeorge Law Review*).

18. See OFFICE OF RESEARCH, CAL. DEP'T OF CORR. & REHAB., 2010 CDCR ADULT INSTITUTIONS OUTCOME EVALUATION REPORT 3 (2010), available at http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY0506_Outcome_Evaluation_Report.pdf (on file with the *McGeorge Law Review*).

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“realigning” the State’s incarceration practices by focusing on localized punishment for many offenders.¹⁹ The main feature of Realignment is to redefine sentencing for many low-level felonies, or “non-non-nons,”²⁰ by having offenders carry out their sentences in local county jails instead of state prisons.²¹ Additional major changes include increased sentence-reduction credits for county jail inmates and an overhaul of the State’s parole system, shifting would-be parolees to post-release supervision within their own counties.²² Additionally, Realignment requires each of the State’s fifty-eight counties to set up a Community Corrections Partnership (CCP) to create a plan for the county to meet Realignment’s new demands,²³ effectively creating fifty-eight separate de facto sentencing commissions.²⁴

Many see Realignment’s plan as a step in the right direction for California,²⁵ including the Supreme Court, which alluded to the law’s passage in *Plata*.²⁶ However, others claim that the plan will create a massive public safety hazard for the State’s counties.²⁷ Regardless, the true issue is whether this new, untested

Review) (reporting that, during the fiscal year of 2005–2006, 67.5% of all inmates released by CDCR returned to prison within three years).

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

20. A “non-non-non felony” is the informal moniker given to felonies sentenced with jail time because the legislature considers them to be non-serious, non-violent, and non-PC-290 registerable crimes. BYERS, *supra* note 16, at 11.

21. PENAL § 1170(h)(2); see also BYERS, *supra* note 16 (detailing the changes AB 109 makes to California’s sentencing scheme).

22. PENAL § 3451.

23. *Id.* § 1230(b)(1).

24. Weisberg, *supra* note 17, at 6.

25. See Nick Wilson, *Jail Realignment Could Mean Less Recidivism, Expert Says*, SAN LUIS OBISPO TRIB. (Oct. 18, 2011), <http://www.sanluisobispo.com/2011/10/17/1800391/jail-realignment-could-mean-less.html> (on file with the *McGeorge Law Review*) (stating that Realignment could lead to recidivism reduction); Jonathan Shapiro, Op-Ed, *L.A.’s Prison Realignment Opportunity*, L.A. TIMES (Oct. 12, 2011), <http://articles.latimes.com/2011/oct/12/opinion/la-oe-1012-shapiro-realignment-20111012> (on file with the *McGeorge Law Review*) (“If done right, realignment could revolutionize and repair the incarceration-only policies that have led to both the nation’s highest costs per inmate and the nation’s highest state recidivism rate.”).

26. *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (“The State has already made significant progress toward reducing its prison population, including reforms that will result in shifting ‘thousands’ of prisoners to county jails.”).

27. See Kevin Yamamura, *Jerry Brown’s Prison Plan Under Fire from Republicans, Democrats Alike*, SACRAMENTO BEE (Oct. 16, 2011), http://www.sacbee.com/2011/10/16/3983172/jerry-browns-prison-plan-under.html#mi_rss=Top%20Stories (on file with the *McGeorge Law Review*) (restating the opinions held by some high-ranking county officials that Realignment will undoubtedly lead to more crime); Michael D. Antonovich, *AB 109 Is Set to Bankrupt Counties, Jeopardize Citizens*, DAILY NEWS L.A. (June 26, 2011), http://www.dailynews.com/opinions/ci_18371169 (on file with the *McGeorge Law Review*) (arguing that shifting the correctional burden onto the counties will lead to overcrowded jails, increased county costs, and an overall reduction in public safety).

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plan will solve California's penal woes and stand as a model system for community-centric corrections for other states. This Comment argues that Realignment will create challenges for California's counties, but the State can lessen the impact of those challenges if the legislature implements (1) financial incentives that encourage alternatives to jail time and (2) a statewide uniform actuarial risk assessment tool that is standardized enough to create consistency in sentencing, but flexible enough to meet the needs of the individual counties.

Part II examines the federal courts' action and California's inaction leading up to the *Plata* decision, as well as the decision itself. Part III analyzes the changes to California's penal law made by Realignment. This Part describes the provisions in the new law that will likely prove most successful in achieving California's goals. Part IV analyzes some of the challenges that California's counties will face in their attempt to implement Realignment's current formulation. Lastly, Part V discusses how the State can shift its incentive structure to guide counties towards increasing the use of proven non-incarceration interventions. In addition, this Part advocates for the development of a uniform actuarial risk instrument that judges and other county officials would be required to use in making sentencing decisions. In developing the instrument's contents, this Comment looks to Virginia, the first state to implement such an instrument,²⁸ as well as other factors that are specific to counties with certain population characteristics.

II. FORCING CHANGE: FEDERAL COURT ACTION SPURRED BY STATE INACTION

Realignment did not simply appear out of the ether; rather, its reforms to California's penal law are a response to over thirty years of prior sentencing law and a series of federal civil rights cases brought by California prisoners.²⁹ In this Part, this Comment explains some of the history behind California's sentencing regime leading up to the enactment of Realignment, how that regime led to a swell in prison population, and the federal litigation that forced California lawmakers to address the prison population boom.

A. *The Catalyst: Thirty Years of New Sentencing Laws*

For most of the twentieth century, California employed an "indeterminate" sentencing scheme, a system that sentenced most offenders for a very broad term, such as one year to life, with a parole board periodically reviewing inmates to

28. See generally BRIAN J. OSTROM ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE-STAGE EVALUATION (2002), available at http://www.vcsc.virginia.gov/risk_off_rpt.pdf (on file with the *McGeorge Law Review*) (discussing the development of the risk assessment instrument in Virginia).

29. See *infra* Part II.A–C (detailing the historical and legal background of Realignment's enactment).

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determine whether they are sufficiently rehabilitated to reintegrate into society.³⁰ In 1977, California reversed this sentencing scheme when it enacted its determinate sentencing law,³¹ paralleling similar developments occurring across the nation.³² Under determinate sentencing, the penological purpose behind incarceration shifted from rehabilitation to punishment.³³ California's determinate sentencing law operates by providing three different possible time periods for incarceration that a convicted person can face: a lower, middle, or upper term.³⁴ As enacted in 1977,³⁵ the law required a judge to sentence a convicted offender to the middle term unless the judge found aggravating or mitigating circumstances, which would lead to an upper- or lower-term sentence, respectively.³⁶ The law's principal drafter acknowledged that "only future experience can provide any definitive answers" as to whether incarceration rates would rise.³⁷

Now, after thirty years of "future experience," we know definitively that incarceration rates have increased exponentially.³⁸ Many blame determinate sentencing, at least in part, for the prison population explosion over the past several decades—an expansion from around 20,000 inmates before the law's passage to about 160,000 as of late 2011.³⁹ Governor Jerry Brown, who advocated for and signed the determinate sentencing law, now acknowledges it as

30. Sara Mayeux, *California Sentencing Law: What a Long, Strange Trip It's Been*, PRISON L. BLOG (Feb. 9, 2010, 7:28 PM), <http://prisonlaw.wordpress.com/2010/02/09/california-sentencing-law-what-a-long-strange-trip-its-been/> [hereinafter *California Sentencing Law*] (on file with the *McGeorge Law Review*).

31. *Id.*

32. See PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 39 (1991) (stating that all fifty states and the District of Columbia enacted or considered enacting legislation between the mid-1970s and mid-1980s to replace their old sentencing schemes with determinate sentencing).

33. See CAL. PENAL CODE § 1170(a)(1) (West Supp. 2012) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment.").

34. *California Sentencing Law*, *supra* at note 30.

35. The U.S. Supreme Court declared a portion of the 1977 version of the law unconstitutional under the Sixth Amendment in 2007. *Cunningham v. California*, 549 U.S. 270 (2007). In *Cunningham*, the Court held that judge-made factual determinations regarding sentence-elevating aggravating factors violate a defendant's right to trial by jury. *Id.* at 274. California has since amended its determinate sentencing law to place such determinations in the hands of the jury, but determinations of mitigating factors by the judge and the three-tier term system from the 1977 law are still in place. PENAL § 1170(a)(3).

36. April Kestell Cassou & Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5, 23 (1978).

37. *Id.* at 30.

38. See JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 62 (2006), available at <http://ucicorrections.seweb.uci.edu/pdf/UnderstandingCorrectionsPetersilia20061.pdf> (on file with the *McGeorge Law Review*) (stating that California's prison population began to drastically rise after the passage of the determinate sentencing legislation); *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *20 (E.D. Cal. Aug. 4, 2009) ("The expansive growth of the prison population in California is due, in part, to the state's adoption of determinate sentencing in the 1970s . . .").

39. PETERSILIA, *supra* note 38, at 62; see also Elliot Currie, "Realigning" Criminal Justice in California: Real Reform, or Shifting the Deck Chairs?, DISSENT.ORG (Oct. 31, 2011), <http://www.dissentmagazine.org/online.php?id=554> (on file with the *McGeorge Law Review*) (stating that that increased sentence terms, in addition to the "Three Strikes" law, led to the dramatic increase in population).

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“an abysmal failure . . . [creating] a scandalous merry-go-round of crime [that has] . . . saddled California with parolees who are ill prepared for release.”⁴⁰ The requirement that all ex-felons be placed on parole resulted in many being sent back to prison for minor violations.⁴¹ This created a game of “catch and release” that retained a population of minor repeat offenders while new offenders further added to the prison population.⁴² Determinate sentencing, and various laws passed pursuant to it, played a role in the extreme prison population rise, resulting in high recidivism rates and a “revolving door” for many offenders.⁴³

Since the enactment of determinate sentencing, the California Legislature has passed a large number of crime bills, enacted in response to media stories about sensational crimes, imposing sentence enhancements that lead to more convictions and longer sentences.⁴⁴ This trend, along with the passage of the “Three Strikes” law in 1994 (under which more than one-quarter of all of California’s incarcerated are currently serving extended or life sentences),⁴⁵ constitutes the legal backdrop to the increasing population that paved the road to the *Plata* litigation and California’s eventual reaction in the form of Realignment.⁴⁶

B. The Road to Plata: Coleman v. Schwarzenegger as a Federal Reaction to a Swelling Prison Population

Within two decades of the implementation of determinate sentencing, the federal courts began to hear Eighth Amendment claims filed by California inmates regarding the declining institutional conditions as a result of the increase in prison population.⁴⁷ Initiating their case in 1990, the class of inmate plaintiffs in *Coleman* claimed that the mental health services within CDCR’s facilities were so inadequate that they violated the Eighth Amendment’s ban on cruel and unusual punishment.⁴⁸ In 2001, another set of plaintiffs raised a similar claim in *Plata* with respect to the CDCR’s ability to administer general medical care to

40. PETERSILIA, *supra* note 38, at 61 (alterations in original).

41. *Id.*

42. *Id.* at 71.

43. *See id.* at 61–64 (explaining that a determinate sentence gives inmates little incentive to rehabilitate themselves while incarcerated, thus leading to high recidivism rates).

44. *Id.* at 61–62.

45. CAL. BUDGET PROJECT, STEADY CLIMB: STATE CORRECTIONS SPENDING IN CALIFORNIA 8 (2011), available at http://www.cbp.org/pdfs/2011/110914_Corrections_Spending_BB.pdf (on file with the *McGeorge Law Review*).

46. *See Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *19–20 (E.D. Cal. Aug. 4, 2009) (explaining which of California’s penal policies, including determinate sentencing, have led to the rise in prison population that formed the basis for the plaintiffs’ Eighth Amendment claim).

47. *E.g.*, *Coleman v. Wilson*, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995).

48. *Id.*

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the inmate population.⁴⁹ In both cases, the courts granted injunctive relief requiring the CDCR to take remedial measures to bring its inmate health services up to Eighth Amendment standards.⁵⁰ In *Coleman*, the court appointed a special master to oversee compliance with the order,⁵¹ while *Plata* ended in settlement with the CDCR stipulating to bring its medical care up to Eighth Amendment standards.⁵²

While some minor improvements occurred in the years following each of these cases, the federal courts still found that California's prison-healthcare system fell short of constitutional standards.⁵³ This led to the court appointing a federal receiver in *Plata* to "provide leadership and executive management of the California prison medical health care delivery system,"⁵⁴ and the court issuing over seventy court orders in *Coleman* regarding the progress of the remedial measures.⁵⁵ Despite the federal oversight and the CDCR's continued efforts towards compliance, by the time *Coleman* and *Plata* were consolidated under the PLRA,⁵⁶ the federal court found that the continued severe overcrowding of California's prisons rendered achieving constitutional compliance unattainable without a more drastic order.⁵⁷

In *Coleman v. Schwarzenegger*, the special three-judge court made an unprecedented order for the reduction of the inmate population from almost 190 percent of designed capacity to 135.7 percent within two years.⁵⁸ The court determined that the primary reason behind the constitutional deficiencies in care was the extensive overcrowding in the CDCR's adult facilities.⁵⁹ The court found

49. *Plata v. Davis*, 329 F.3d 1101, 1104 (9th Cir. 2003) (describing the claim made by the plaintiffs in the initial *Plata* class action).

50. *Coleman*, 912 F. Supp. at 1324; *Plata*, 329 F.3d at 1104.

51. *Coleman*, 912 F. Supp. at 1324.

52. Order Adopting Class Action Stipulation as Fair, Reasonable and Adequate at 3, *Plata v. Davis*, No. C-01-1351 TEH (N.D. Cal. June 20, 2002).

53. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *3-19 (E.D. Cal. Aug. 4, 2009) (chronicling the procedural history of both *Plata* and *Coleman*).

54. *Id.* at *11 (citation omitted).

55. *See id.* at *15 (stating that the orders were directed towards specific issues such as having adequate beds, space, and staff available for those inmates at the higher levels of the mental health care delivery system).

56. In 2007, the plaintiffs in both class actions brought motions to convene a three-judge panel pursuant to the PLRA that would consider whether a more drastic "prisoner release order" should be made by the courts in order to remedy the violations. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2007 WL 2122657, *6 (N.D. Cal. July 23, 2007); *Coleman v. Schwarzenegger*, No. CIV-90-0520 LKK JFM P, 2007 WL 2122636, *30-31 (E.D. Cal. July 23, 2007). Under the PLRA, a special three-judge court may convene and order a mandatory reduction of prison population when a court has previously entered into an order for less intrusive relief and the defendant has had a reasonable amount of time to comply with the previous orders, but has yet to do so. 18 U.S.C. § 3626(a)(3)(A) (2006).

57. *Coleman*, 2009 WL 2430820, at *2 ("[O]vercrowding in California's prisons render[s] the efforts of the courts, the *Coleman* Special Master, and the *Plata* Receiver utterly insufficient.").

58. *Id.* at *116.

59. *Id.* at *2.

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that the only feasible remedy was a population reduction,⁶⁰ which satisfied the prerequisites for such an order under the PLRA.⁶¹ Additionally, the court recognized that the overcrowding led to an environment where “high-risk inmates do not rehabilitate and low-risk inmates learn new criminal behavior,” thus leading to a high recidivism rate and a public threat of prisoners leaving incarceration as greater threats to society than when they had first entered.⁶² It also found that population reduction would be feasible through means that would not adversely affect public safety and the criminal justice system.⁶³ The court suggested population-reduction measures including: the expansion of the use of good time credits for early release and evidence-based rehabilitative programs; diversion of technical parole violators and low risk and short-term offenders to county jails and other local programs instead of prisons; and other sentencing reforms.⁶⁴ Although some of these suggested reforms would make their way into the Realignment legislation,⁶⁵ California initially resisted this order by appealing to the U.S. Supreme Court.⁶⁶

C. The Tipping Point: Brown v. Plata

During oral arguments in *Plata*, Justice Kennedy, responding to arguments made by the attorney for California, stated, “the problem . . . is that at some point the court has to say: You’ve been given enough time; the constitutional violation still persists, as the State itself acknowledges.”⁶⁷ The tenor of this statement pervades Justice Kennedy’s majority opinion upholding the three-judge court’s reduction order.⁶⁸ The opinion highlights the urgency and persistence of the constitutional violations created within California’s prisons due to overcrowding by using a multitude of shocking anecdotes from the factual record.⁶⁹ To emphasize the effect of overcrowding on the healthcare violations, Justice

60. *Id.*

61. See *supra* note 56 and accompanying text (describing the requirements under the PLRA for a court to issue a release order).

62. *Coleman*, 2009 WL 2430820, at *86–87.

63. *Id.* at *88.

64. *Id.* at *87–99.

65. See BYERS, *supra* note 16, at 13–20 (explaining the changes Realignment makes, including expanding the use of “good time” credits and the diversion of parole violators to short-term incarceration in county jails).

66. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

67. Transcript of Oral Argument at 16, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (No. 09–1233).

68. E.g., *Plata*, 131 S. Ct. at 1930 (“Both were given ample time to succeed. When the three-judge court was convened, 12 years had passed since the appointment of the *Coleman* Special Master, and 5 years had passed since the approval of the *Plata* consent decree. The State does not claim that either order achieved a remedy.”).

69. See *id.* at 1924 (“A psychiatric expert reported observing an inmate who had been held in . . . a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had ‘no place to put him.’”).

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Kennedy included photos in the opinion depicting the cramped living conditions present in several California prisons.⁷⁰

In rejecting the argument that the lower court did not give California enough time for its prior remedial measures to show results, the Court recognized that, without a nudge from the federal judiciary towards more drastic and inventive efforts, the State's previous measures would not remedy the constitutional violations within a reasonable timeframe.⁷¹ However, realizing the complexity of conducting such a large population reduction safely, as well as the sensitive federalism issue,⁷² the Court gave state officials discretion in how to meet the mandate.⁷³ Additionally, the Court stated that the mandate's timeline and terms are open to modification if the State showed that such a modification would be necessary or desirable.⁷⁴ These terms of the order, as one commentator puts it, "nudge[s] the state toward sustainable change while balancing the need for time to devise orderly, considered reforms to mitigate safety concerns."⁷⁵

III. CALIFORNIA'S SOLUTION: THE LEGISLATURE'S PLAN FOR "REALIGNMENT"

With the passage of AB 109 on April 4, 2011, California began its attempt to reform its unsustainable and constitutionally infirm sentencing structure by making a series of largely unprecedented changes to California's penal laws.⁷⁶ This Part discusses several of the major changes Realignment makes to California's sentencing scheme and explains why several of these changes will contribute to Realignment's chance at becoming a model scheme for community-centric corrections.

Most of the reforms to California's sentencing structure made by Realignment went into operation on October 1, 2011.⁷⁷ Realignment has three related goals: cutting the recidivism rate, reducing costs, and improving public

70. *See id.* at 1949–50 (depicting inmate living arrangements at several institutions, with groups of inmates living almost on top of one another).

71. *See id.* at 1931 ("The *Coleman* and *Plata* courts had a solid basis to doubt that additional efforts to build new facilities and hire new staff would achieve a remedy. Indeed, although 5 years have now passed since the appointment of the *Plata* Receiver and approval of the revised plan of action in *Coleman*, there is no indication that the constitutional violations have been cured.").

72. *See Valdivia v. Schwarzenegger*, 599 F.3d 985, 995 (9th Cir. 2010) ("[U]nless a state law is found to violate a federal law, or unless the Injunction is found necessary to remedy a constitutional violation, federalism principles require the reconciliation of the state law and federal injunction. . . . [T]he scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only.").

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

74. *Id.* at 1947.

75. Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 620 (2012).

76. AB 109, 2011 Leg., 2011–2012 Sess. (Cal. 2011).

77. BYERS, *supra* note 16, at 13.

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safety.⁷⁸ The legislative purpose behind the reforms is not to reduce the prison population;⁷⁹ however, in pursuing its goals through the changes it makes to the law, Realignment will lead to some reduction.⁸⁰ California's legislature acknowledges this inevitability by admitting that the prior correctional policy centered on incarceration, increased spending, and prison construction does not work because the result was an unsustainable increase in the prison population.⁸¹ The passage of AB 109, the main body of Realignment's legislation, occurred just prior to the U.S. Supreme Court's ruling in *Plata* and incorporates several of the changes suggested by the *Coleman* court, making it clear that the pending *Plata* decision and the continued pressure from the lower federal courts played a role in Realignment's formulation.⁸²

A. *Realignment's Major Changes to California's Penal Law*

1. *The Creation of County Jail Felonies*

The biggest alteration Realignment makes to California's sentencing structure is the creation of county jail felonies.⁸³ Prior to Realignment, all felony offenses required serving incarceration in prison, including low-level offenses requiring only one year or more of confinement.⁸⁴ By rebranding the majority of non-violent and other low-level felony offenses as county jail felonies, violators of these crimes now serve all or part of their sentences in a jail in the county in which they are convicted.⁸⁵ During sentencing, judges have the discretion to sentence those convicted of county jail felonies to jail with no post-release supervision or to spend only part of their time in jail and the remainder under the supervision of a county probation officer.⁸⁶ Determinate sentencing's triad of possible term times still applies to most county jail felonies, including any that do not state a mandatory term time in the statute for the underlying offense.⁸⁷

78. CAL. PENAL CODE § 17.5 (West Supp. 2012).

79. *Id.* § 17.5(b).

80. See CAL. DEP'T OF CORR. & REHAB., FACT SHEET: 2011 PUBLIC SAFETY REALIGNMENT 1 (2011), available at <http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf> (on file with the *McGeorge Law Review*) (stating that Realignment is the cornerstone of California's effort to reduce its prison population).

81. PENAL § 17.5(a)(1)–(5).

82. See Letter from Edmund G. Brown, Governor, Cal. State, to the Members of the Cal. State Assembly (Apr. 4, 2011) (on file with the *McGeorge Law Review*) (stating that Governor Brown signed AB 109 into law, in part, because the new law will reverse the aggravation of prison crowding created by the prior sentencing regime).

83. PENAL § 17(a); *id.* § 1170(h).

84. *Burr v. Immigration & Naturalization Serv.*, 350 F.2d 87, 90 (9th Cir. 1965) (“[A] felony in California ‘is a crime punishable by a state prison sentence’”).

85. PENAL § 1170(h)(5).

86. *Id.*

87. *Id.* § 1170(h)(1) (“[A] felony punishable [as a county jail felony] where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or

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The legislature's reasoning behind the shift in the location of incarceration is that "[r]ealign[ment of] low-level felony offenders . . . will improve public safety outcomes among adult felons and facilitate their reintegration back into society."⁸⁸ Although the full effect of Realignment's changes are not expected to be completely realized until 2015, some within California's government credit the diversion of low-level inmates for the roughly 7,000 prison inmate reduction experienced two months after Realignment's implementation.⁸⁹ This development contributes to the optimism that Realignment will be sufficient to meet the *Plata* mandate,⁹⁰ in addition to meeting its other goals.

2. *The Placement of Most of Those Released from Prison on Post-Release Community Supervision Instead of Parole*

Under Realignment, certain felonies are exempt from being carried out in county jail; instead, they are required to be served in prison, just as they would have under California's prior sentencing scheme.⁹¹ These "state prison felonies" include crimes the legislature deems serious, violent, or sex offenses requiring registration under California Penal Code section 290.⁹² Additionally, anyone who commits any of the almost eighty other offenses that do not fall into the above categories, or who has prior convictions for any of the above offenses, is required to serve time in prison instead of jail.⁹³

Though little has changed under Realignment regarding time spent in prison for these crimes, what has changed is what happens to many of those imprisoned for these crimes when they are released.⁹⁴ Under Realignment's Postrelease Community Supervision Act, all released prisoners with a conviction offense not requiring parole under Penal Code section 3451(b) are subject to Postrelease

three years.").

88. *Id.* § 17.5(a)(5).

89. CAL. DEP'T OF CORR. & REHAB., CORRECTIONS YEAR AT A GLANCE FALL 2011, at 5–6 (2011), available at http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf [hereinafter CDCR YEAR AT A GLANCE] (on file with the *McGeorge Law Review*).

90. *See id.* at 5 (stating that CDCR expects to meet its one-year inmate population reduction benchmark of 155 percent design capacity, putting it in line with meeting the *Plata* Court's mandate).

91. PENAL § 1170(h)(3).

92. BYERS, *supra* note 16, at 19 ("[P]ersons released from prison who are not required to be on parole, are released on up to three years of Postrelease Community Supervision (PRCS).").

93. *See id.* at 137–40 (listing all the statutes for felonies that do not fall into the serious, violent, or PC-290 registerable categories, but still require prison time). Examples of such crimes include: the manufacture of methamphetamine or phencyclidine in a structure where a child under sixteen years of age is present; a public official aiding and abetting another in the commission of voter fraud; and driving with a willful or wanton disregard for the safety of others while fleeing from a pursuing police officer. *See id.*

94. *Id.* at 17, 19.

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Community Supervision (PCRS) for up to three years.⁹⁵ PCRS is similar to parole in that felons must adhere to release conditions during the required period.⁹⁶

However, there are several major differences. The first is the agency in charge of overseeing released felons.⁹⁷ Under PCRS, the board of supervisors for each county is required to designate a local agency⁹⁸ to handle “supervision policies, procedures, programs, and practices.”⁹⁹ Unlike parole, the CDCR has no jurisdiction over those released to PCRS.¹⁰⁰ Another difference is that a county cannot send offenders back to prison if they violate a condition of PCRS.¹⁰¹ Once the designated agency revokes a felon’s PCRS, it can impose a maximum punishment of jail time of up to 180 days.¹⁰² Alternatively, it can impose various forms of lesser “community-based punishment.”¹⁰³ The legislature expects that the creation of PCRS will reduce the recidivism rate and increase public safety.¹⁰⁴ The PCRS portion of Realignment affirms this belief in stating that the old system of “[reincarcerating] parolees for technical violations do[es] not result in increased public safety.”¹⁰⁵ With more than half of all inmate admissions into CDCR prisons in 2010 being parole violators returned to custody,¹⁰⁶ the PCRS aspects of Realignment’s reform will also likely lead to a marked decrease in the prison population as many would-be parole offenders under the old system are dealt with locally.

3. *The Increased Use of Good Behavior Time Credits*

An additional change to California’s sentencing law is that almost everyone sentenced to county jail, for either a county jail felony or a PCRS violation, shall receive credit for four days of sentence time served for every two actual days of time spent in conformity with the jail’s rules and regulations.¹⁰⁷ Under this provision, many eligible inmates will have their sentence times cut in half, as long as they do not behave poorly while incarcerated.¹⁰⁸ This expands

95. PENAL § 3451.

96. *Id.* § 3453.

97. BYERS, *supra* note 16, at 19 (“Persons on (PCRS) are supervised by a designated county agency . . .”).

98. All counties have designated their probation departments to serve this function. *Id.* at 22.

99. PENAL § 3451(a).

100. *Id.* § 3457.

101. *Id.* § 3458.

102. *Id.* § 3455(c).

103. *Id.* § 3450(b)(8) (listing some examples of approved methods of “community-based punishment”). See Part III.A.4, *infra*, for further discussion regarding community-based punishments.

104. PENAL § 3450(b)(1)–(5).

105. *Id.* § 3450(b)(3).

106. CDCR YEAR AT A GLANCE, *supra* note 89, at 16.

107. PENAL § 4019.

108. BYERS, *supra* note 16, at 79.

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California's prior conduct credit law of counting every four actual days of incarceration as six.¹⁰⁹

The court in *Coleman* suggested such an expansion in conduct credits as a way California could reduce its prison population.¹¹⁰ The court found there to be sufficient evidence that moderate sentence reduction tools such as conduct credits do not increase recidivism rates or decrease public safety.¹¹¹ The legislature has followed the *Coleman* court's recommendation by offering expanded credits to those in county jails.¹¹² This extension of credits may not lead to a noticeable decrease in prison population compared to other Realignment provisions because it does not expand good time credits for state prison inmates.¹¹³ However, it does reduce the confinement time of most county jail felons, which helps relieve the burden on county jail facilities that Realignment otherwise creates through its increased dependence on their use.¹¹⁴

4. *An Increased Focus on Incarceration Alternatives and Other "Community-Based Punishments"*

One of Realignment's most significant advances is its series of suggested practices. Several sections of the law contain a list of "community-based punishments."¹¹⁵ These punishments consist of "evidence-based correctional sanctions and programming encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity."¹¹⁶ Among the examples of such practices are home detention and monitoring, "mandatory random drug testing," work release programs, "substance abuse treatment programs," and "restorative justice programs such as . . . victim-offender reconciliation."¹¹⁷ Under Realignment, counties are encouraged to integrate these and other similar programs into their sentencing options for low-level and PCRS offenders.¹¹⁸ In fact, counties can use home detention to punish those convicted of county jail felonies in lieu of jail time, with each day spent under house arrest counting as a

109. *Id.*

110. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *89 (E.D. Cal. Aug. 4, 2009).

111. *Id.* at *89–90.

112. PENAL § 4019.

113. *See id.* § 4019(a) (applying conduct credits to various places of incarceration, including jails, but not prisons). *But see* BYERS, *supra* note 16, at 82 (suggesting that Penal Code section 4019 applies conduct credits to nonviolent prison felony offenders when spending time in jail while waiting to be sent to prison).

114. *See* BYERS, *supra* note 16, at 18 (stating that Realignment's amendment to California Penal Code section 4019 will allow for almost all offenders under the statute to receive fifty-percent of their sentence credit through good time credits).

115. PENAL § 17.5(a)(8); *id.* § 3450(b)(8).

116. *Id.* § 17.5(a)(8).

117. *Id.*

118. *Id.* § 17.5(a)(6); *id.* § 3450(b)(6).

day of incarceration towards the sentence.¹¹⁹ Additionally, counties can impose other forms of community-based punishment for low-level crimes and as intermediate sanctions for PCRS offenders.¹²⁰

Prior to Realignment, several counties, most notably San Francisco County, employed several of these alternative, non-incarceration-based punishments with great success.¹²¹ In 2010, San Francisco County contributed a far smaller percentage of inmates to the state prison population than any similar-sized county.¹²² Additionally, “[t]he city’s larger than average decline in crime during the past decade indicates local non-incarceration and alternative policies for non-serious offenders are effective.”¹²³ By giving counties latitude to use alternative punishment programs empirically proven to work, Realignment gives counties the tools they need to meet the legislature’s goals.¹²⁴

B. What Realignment Gets Right: The Use and Promotion of Proven Recidivism and Cost-Reduction Techniques

The changes brought by Realignment benefit California’s sentencing regime by giving justice officials more tools in handling most felony offenders.¹²⁵ By diverting those with low-level felony convictions or post-release technical violations away from state prison, California’s lawmakers recognize the undesirability of sentencing laws that treat all felony offenders alike by sending them all to the same institutions.¹²⁶ In the years leading up to Realignment, many experts decried California’s prisons as “crime schools,” where low-level offenders, forced to commingle with more serious offenders, came back into society more dangerous and more likely to reoffend.¹²⁷ By separating low-level offenders from the higher-risk inmate population, California mitigates this

119. *Id.* § 1203.016.

120. *Id.* § 17.5(a)(8); *id.* § 3450(b)(8).

121. See CTR. ON JUVENILE & CRIMINAL JUSTICE, AB 109: CRIMINAL JUSTICE REALIGNMENT & REFORM 7 (2011), available at http://www.cjcr.org/files/AB_109_Reform_Conference_Handout.pdf (on file with the *McGeorge Law Review*) (stating that counties that serve their low-level offenders locally, in part through the use of alternatives to imprisonment, save the state nearly \$750 million per year).

122. CDCR YEAR AT A GLANCE, *supra* note 89, at 18 (stating that San Francisco County contributed 0.9 percent to the prison population, while Sacramento and Fresno Counties respectively contributed 4.7 and 2.9 percent).

123. CTR. ON JUVENILE & CRIMINAL JUSTICE, *supra* note 121, at 3.

124. See *supra* text accompanying note 78.

125. See *supra* Part III.A (discussing the flexibility in sentencing under Realignment).

126. See CAL. PENAL CODE § 17.5(a)(3) (West Supp. 2012) (“Criminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety.”).

127. See *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *86 (E.D. Cal. Aug. 4, 2009) (restating the testimony of several criminology experts claiming California’s overcrowded prisons to be “criminogenic”).

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problem by cutting off a known contributor to recidivism.¹²⁸ This change will contribute to Realignment's goals of reducing recidivism and increasing public safety, while also leading to a decrease in prison population.¹²⁹

The expansion of earned time credits for county jail inmates will contribute to the goal of cost reduction without leading to a decrease in public safety.¹³⁰ Some experts state that "a moderate reduction in an inmate's length of stay in [confinement will] not affect the deterrence value of imprisonment."¹³¹ A study of several states found that the use of good time credits does not lead to an increase in recidivism.¹³² Several states actually saw recidivism *drop* after implementation.¹³³ By releasing low-risk offenders earlier, the states "reduce[d] the[ir] corrections budget burden . . . allow[ing] funds saved to be invested in programs that reduce recidivism and help build safe communities."¹³⁴ California's counties should expect similar savings, thus giving them more resources to implement the community-based punishments encouraged by the legislature.

The largest factor in Realignment's potential success lies in the sentencing flexibility given to county justice officials through the promotion of community-based punishment alternatives.¹³⁵ The legislature has given counties "unprecedented discretion in deciding how to best invest [their] realignment [funds]," encouraging them to provide empirically proven programs for low-risk offenders.¹³⁶ Counties are not required to use any of these programs; however, placing this discretion in their hands improves chances of success, as studies show "that there is no 'one-size-fits-all' solution to crime."¹³⁷ By encouraging the use of sentencing options beyond incarceration, Realignment lays the groundwork for a sentencing system that may meet the State's goals of recidivism and cost reduction, while maintaining public safety.

128. See PENAL § 17.5(a)(5) (stating that this change "will improve public safety outcomes among adult felons and facilitate their reintegration back into society").

129. See *Brown v. Plata*, 131 S. Ct. 1910, 1943–44 (2011) (stating that Realignment's reduction of prisoners through the shift of low-level offenders to county custody supports conclusion that "the prison population can be reduced in a manner calculated to avoid an undue negative effect on public safety").

130. ALLISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS 4 (2009), available at http://www.ncsl.org/documents/cj/Earned_time_report.pdf (on file with the *McGeorge Law Review*).

131. *Coleman*, 2009 WL 2430820, at *89.

132. LAWRENCE, *supra* note 130, at 3.

133. *Id.* at 1.

134. *Id.* at 4.

135. Roger K. Warren, *Viewpoints: Realignment Can Boost Public Safety*, SACRAMENTO BEE (Nov. 13, 2011), <http://www.courts.ca.gov/partners/documents/realignmentpublicsafety.pdf> (on file with the *McGeorge Law Review*).

136. *Id.*

137. *Id.*

IV. THE CHALLENGES AHEAD: WHAT STANDS IN THE WAY OF A SUCCESSFUL IMPLEMENTATION OF REALIGNMENT

A number of the changes Realignment makes to California's sentencing scheme will achieve the legislature's goals of reductions in cost, incarceration, and recidivism.¹³⁸ However, as formulated, Realignment also creates several challenges that the counties must overcome to better facilitate the achievement of the new law's goals. This Part discusses some of these challenges. Part A discusses the challenge associated with the unprecedented shift of inmates from state to local supervision and how Realignment's current financing scheme exacerbates this challenge. Part B discusses the political challenges created by the method Realignment uses to delegate decision-making to the counties.

A. *From Overcrowded Prisons to Overcrowded Jails*

Although untested, Realignment stands a far better chance of achieving the goals of cost and recidivism reduction than the prior system, which sent all felony offenders and parole offenders to prison, and drove up costs and recidivism rates.¹³⁹ Early reports suggest that Realignment is reducing the State's prison population in time to meet the court mandate.¹⁴⁰ However, this new system of punishment may create new problems as California incorporates it into the current legal and political framework.¹⁴¹ Chief among the concerns is that Realignment will shift many of the current problems associated with overcrowding from California state prisons to county jails, which are far less equipped to handle such an influx.¹⁴² Many counties do not have enough jail beds

138. See *supra* Part III (discussing how several of Realignment's changes, such as the use of county jail felonies and encouragement of alternatives to incarceration, will fulfill the legislature's stated goals).

139. *Id.*

140. See Rina Palta, *California's Prison Population Drops*, KALW NEWS (Jan. 4, 2012, 11:45 AM), <http://informant.kalwnews.org/2012/01/californias-prison-population-drops> (on file with the *McGeorge Law Review*) (reporting that, since its implementation, Realignment has reduced prison population by about 8,000 inmates, nearly hitting the reduction goal for the end of 2011 that will keep the State on track in meeting the court mandate).

141. See Melissa Corker, *AB 109 Brings New Inmates and New Challenges to County Jail*, SACRAMENTO PRESS (Sept. 28, 2011, 6:45 PM), http://www.sacramento.com/headline/58003/AB_109_brings_new_inmates_and_new_challenges_to_county_jail (on file with the *McGeorge Law Review*) (stating that counties are not being provided with enough funding in order to properly carry out Realignment's changes to the law and that the savings from Realignment will not reach the local level before the influx of inmates will).

142. See David Greenwald, *Advocates Express Concern that County AB 109 Plan Lacks Funding for Mental Health Services*, YOLO JUDICIAL WATCH (Oct. 26, 2011, 6:48 AM), http://davisvanguard.org/index.php?option=com_content&view=article&id=4791:advocates-express-concern-that-county-ab-109-plan-lacks-funding-for-mental-health-services&Itemid=100 (on file with the *McGeorge Law Review*) (reporting on the lack of Realignment funding allocated to adequately maintain mental health care services for mentally ill jail inmates in Yolo County); Corker, *supra* note 141 (reporting that there is no room in Sacramento County's jails or enough money to accommodate Realignment's initial influx of inmates).

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to hold the projected influx of new inmates.¹⁴³ While Realignment allows counties to authorize their correctional administrators to offer alternative punishments,¹⁴⁴ many counties are using their Realignment funding to build more jail space.¹⁴⁵

Shortly after the passage of AB 109, California's legislature amended a 2007 bill that provides over seven-billion dollars in state funding for the construction of new prisons and jails¹⁴⁶ to make the construction money more accessible to counties for building new jail space.¹⁴⁷ The amendment reduces the percentage of the construction costs that a county must pay out of its own funds from twenty-five percent to ten percent, or less for some smaller counties.¹⁴⁸ Additionally, it gives preference to funding jail space development in counties that traditionally have committed the largest number of offenders to prison.¹⁴⁹ Taken together, these provisions give counties an incentive to return to the pre-Realignment, pro-incarceration policies that led to the prison overpopulation problem in the first place.¹⁵⁰ State funding currently available to the counties for implementing their Realignment strategies may not continue in the future.¹⁵¹ Nonetheless, the extra funding for building jails has given CCPs the incentive to build more jail cells, rather than using funding for proven alternatives.¹⁵²

This funding formula also penalizes those counties that choose to use their funds to implement alternatives to incarceration over jail expansion by withholding potential funding for these programs.¹⁵³ In doing so, it harms Realignment's dual goals of cost and recidivism reduction by penalizing counties

143. See Toni McAllister, *Early Release Possible for Inmates as Local Jails Fill*, LAKE ELSINORE-WILDOMAR PATCH (Jan. 7, 2012), <http://lakeelsinore-wildomar.patch.com/articles/early-release-possible-for-inmates-as-local-jails-fill> (on file with the *McGeorge Law Review*) (quoting the Sheriff's Department as stating that they will be unable to retain all of the incoming inmates because it does not have enough jail beds).

144. CAL. PENAL CODE § 1203.016 (West Supp. 2012).

145. See Emily Harris, Op-Ed, *Is Realignment an Opportunity? If so, Let's Not Waste It on Building Costly Jail Beds*, CAPITOL WEEKLY (Nov. 23, 2011), <http://www.capitolweekly.net/article.php?xid=105peby61sh96gg> (on file with the *McGeorge Law Review*) (reporting that thirty-four of California's fifty-eight counties indicate plans for jail space expansions, while only a few counties, such as San Francisco, have decided not to expand their jails).

146. AB 900, 2007 Leg., 2007–2008 Sess. (Cal. 2007).

147. AB 94, 2011 Leg., 2011–2012 Sess. (Cal. 2011).

148. *Id.*

149. *Id.*

150. See Harris, *supra* note 145 (arguing that the appropriation of Realignment funding in such a way will do little more than perpetuate the cycle of offenders in California's penal system, and will do so at a heavy financial cost to the State).

151. See CONTRA COSTA CNTY., 2011 CRIMINAL JUSTICE REALIGNMENT FACT SHEET (2011), available at http://www.furtherthework.com/CoCo_Realignment_Fact_Sheet.pdf (on file with the *McGeorge Law Review*) (stating that adequate state revenue streams to the counties, though promised, are not yet guaranteed).

152. See Harris, *supra* note 145 ("34 of California's 58 counties have indicated plans for expensive jail expansions to date, while leaving programs and services as an 'unaffordable' afterthought.").

153. *Id.*; Palta, *supra* note 140.

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that decide to implement proven crime-reducing punishment alternatives that save the State hundreds of millions of dollars every year.¹⁵⁴

Even assuming there will be sufficient funding to build enough extra jail space to hold the influx of new inmates, the earliest date any of this jail expansion is set to occur is mid-2013,¹⁵⁵ around the time California must meet its full court-ordered population reduction.¹⁵⁶ With the state-backed financial incentives leading many of the most crime-heavy counties to build more jail space that will not be ready soon enough,¹⁵⁷ the inevitable result is an influx of inmates for whom there is no space.¹⁵⁸ This reality may encourage counties to resort to jail-population reduction techniques, such as releasing more arraigned offenders on their own recognizance, rather than relying on bail.¹⁵⁹ However, with a large portion of state funding supporting counties in incarcerating county jail felons, local justice officials have little incentive to use community-based sentencing alternatives, thus encouraging the legacy of mass incarceration that has proven itself untenable.¹⁶⁰

154. See CTR. ON JUVENILE & CRIMINAL JUSTICE, *supra* note 121, at 7 (stating that “self-reliant” counties that have the lowest incarceration rates and employ the most incarceration alternatives, most notably San Francisco and Contra Costa counties, save California approximately \$746 million dollars per year by serving their offenders locally).

155. CAL. DEP’T OF CORR. & REHAB., AB 900 CONSTRUCTION UPDATE 6 (2011), available at <http://www.cdcr.ca.gov/FPCM/docs/AB-900-Construction-Update-Fact-Sheet.pdf> (on file with the *McGeorge Law Review*) (listing all the active jail construction programs under AB 900 funding).

156. The Court’s order states that California must meet the reduction to 137.5 percent design capacity by June 27, 2013. *2011 Public Safety Realignment: The Cornerstone of California’s Solution to Reduce Overcrowding, Costs, and Recidivism*, CAL. DEP’T OF CORR. & REHAB., <http://www.cdcr.ca.gov/realignment/index.html> (last visited Jan. 6, 2012) (on file with the *McGeorge Law Review*).

157. Harris, *supra* note 145 (stating that almost all of the 34 counties seeking to expand their jail space are vying for the state funds available under the amended AB 900 allotment).

158. See Scott Weber, *Counties Getting More State Prisoners than Expected*, NBC L.A. (Nov. 16, 2011, 5:57 PM), <http://www.nbclosangeles.com/news/local/Counties-Getting-More-State-Prisoners-Than-Expected-134001758.html> (on file with the *McGeorge Law Review*) (reporting that many counties are receiving higher influxes of inmates than expected and, at this rate, the jails in Orange and Riverside counties will be full by early 2012).

159. W. DAVID BALL, *TOUGH ON CRIME (ON THE STATE’S DIME): HOW VIOLENT CRIME DOES NOT DRIVE CALIFORNIA COUNTIES’ INCARCERATION RATES—AND WHY IT SHOULD* 53, 76 (2012), available at <http://digitalcommons.law.scu.edu/facpubs/162> (on file with the *McGeorge Law Review*).

160. See Rina Palta, *California Invests Millions in New Jails to Deal with Overcrowding*, KALW NEWS, (Nov. 9, 2011, 5:32 PM), http://kalwnews.org/audio/2011/11/09/california-invests-millions-new-jails-deal-overcrowding_1438449.html [hereinafter *California Invests Millions in New Jails*] (on file with the *McGeorge Law Review*) (arguing that state funding exclusively for jail construction will continue California’s legacy of mass incarceration, potentially leading to as many as fifty-eight *Plata-Coleman* cases).

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B. A Built-In Opportunity for Local Politics to Undermine the Legislature's Goals

The Realignment legislation gives local justice officials discretion in handling the offenders who fall under their purview.¹⁶¹ This can prove to be a double-edged sword. On the one hand, a county may tailor how it handles offenders through evidence-based programs that fit the needs of the community.¹⁶² However, county officials can also use this discretion to perpetuate California's pattern of incarceration by locking up many county jail-eligible offenders instead of investing in programs that would better benefit offenders and the community as a whole.¹⁶³

High-ranking officials in several counties claim that Realignment's shift to community-centric corrections will do little more than lead to a crime wave across the state.¹⁶⁴ Under Realignment, many of these officials are members of the CCP executive committees, assigned to devise their counties' plans for implementing the new law.¹⁶⁵ Upon creation of a plan, Realignment requires a committee to present it to the county board of supervisors for approval.¹⁶⁶ But because a four-fifths vote by the board is required to halt the plan's implementation,¹⁶⁷ it is difficult for opponents to defeat these plans.

Publicly elected county officials hold the majority of the positions on the CCP executive committees and the entirety of every county board.¹⁶⁸ A county's residents control the outcomes of these elections; candidates for offices such as district attorney, sheriff, and superior court judge have no need to campaign statewide.¹⁶⁹ Overall, a majority of California voters see the prisoner release order and California's Realignment plan as a major political issue.¹⁷⁰ A Field Poll

161. See CAL. PENAL CODE § 1203.016 (West Supp. 2012) (authorizing counties to commit county jail felons to home detention, electronic monitoring, and other alternatives in lieu of jail time).

162. See Marissa Lagos, *Counties Dilemma: How to Use Funds for Inmates*, S.F. CHRON. (Dec. 5, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/12/05/MNDF1M6CVP.DTL> (on file with the *McGeorge Law Review*) (reporting that several Bay Area counties are using their funding to send low-level offenders to rehabilitation programs with much success).

163. *Id.*

164. See, e.g., Shapiro, *supra* note 25 (reporting that Los Angeles's District Attorney and Sheriff both predict a crime wave to occur in their county because of Realignment).

165. A county's CCP executive committee must consist of the chief probation officer, a chief of police, the Sheriff, the District Attorney, the Public Defender, the Presiding Judge of the superior court, and one other department representative. PENAL § 1230.1(b).

166. *Id.* § 1230.1(c).

167. *Id.*

168. See, e.g., CAL. CONST. art. XI, § 1(b) (declaring that all counties are to have an elected sheriff, district attorney, and governing body).

169. BALL, *supra* note 159, at 7–8.

170. MARK DICAMILLO & MERVIN FIELD, VOTERS CONSIDER SUPREME COURT'S RULING THAT CALIFORNIA REDUCE ITS PRISON POPULATION SERIOUS 1 (2011), available at <http://www.field.com/fieldpollonline/subscribers/RIs2376.pdf> (on file with the *McGeorge Law Review*). In this non-partisan Field Poll survey, the authors find that seventy-nine percent of polled California voters consider the U.S. Supreme Court's

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survey of California voters finds that a slight majority of California voters favor Realignment's major changes.¹⁷¹ The Poll finds that, while sixty percent of Democrats support the plan, Republican voters overall believe that Realignment is a bad idea, with nearly half opposing it and only thirty-eight percent in favor.¹⁷² This suggests that in counties that are majority Republican, and counties that are close to 50/50 in their political makeup, are more likely to vote for local officials who oppose Realignment's changes and are likely to ignore community-based punishments.¹⁷³ Additionally, voters are concerned with the budgetary issues associated with Realignment, with many opposed to the increased use of county funds to pay for it.¹⁷⁴

Moreover, sensationalist news stories—reporting almost daily on the early release of sex offenders and other alleged injustices created because of Realignment's sentencing changes—may increase voters' concerns about public safety.¹⁷⁵ In fact, officials in some counties are already using the issue as a campaign platform, telling voters that Realignment will place their communities' safety in jeopardy.¹⁷⁶

The public perception of Realignment in many counties revolves around the issues of public safety and county finances.¹⁷⁷ Because state financial incentives are freeing up large amounts of money exclusively for counties to build new

mandate to have a serious impact and that fifty-one percent of voters support the Realignment plan, while thirty-seven percent oppose it. *Id.*

171. *Id.* at 2.

172. *Id.*

173. See *California Invests Millions in New Jails*, *supra* note 160 (stating that Realignment has not been well received in many parts of the state and that Republican elected officials from these counties are trying to exert political pressure on the issue by claiming that Realignment's changes will lead to the early release of violent felons).

174. DICAMELO & FIELD, *supra* note 170, at 4 (reporting that fifty-nine percent of California voters are against raising new taxes to fund counties' extra costs in handling the inmate transfer).

175. See, e.g., Jim Shultz, *6 Freed Despite Sex Crimes*, REDDING.COM (Oct. 13, 2011, 11:46 PM), <http://www.redding.com/news/2011/oct/13/6-freed-despite-sex-crimes/> (on file with the *McGeorge Law Review*) (reporting that six sex offenders who violated parole terms were quickly released from jail under Realignment and that such light punishment could be "a harbinger of dire things to come"); *Public Safety Realignment Plan Causing Early Release of Criminals*, CENTRAL COAST NEWS (Nov. 16, 2011, 6:28 PM), <http://www.kionrightnow.com/story/16055120/public-safety-realignment-plan-causing-early-release-of-inmates> (on file with the *McGeorge Law Review*) (reporting that Kern County, in one week, released over fifty parole violators early, including thieves); Joe Matthews, *Lindsay Lohan: Beneficiary of California's Dysfunction*, NBC L.A. (Nov. 8, 2011, 12:48 PM), <http://www.nbclosangeles.com/blogs/prop-zero/Lindsay-Lohan-Gov-Jerry-Brown-Realignment-133356448.html> (on file with the *McGeorge Law Review*) (reporting that, because of Realignment, Lindsay Lohan spent only five hours in jail instead of the thirty days she was sentenced to).

176. See, e.g., Toni McAllister, *Early Release Possible for Inmates as Local Jails Fill*, LAKE ELSINORE-WILDOMAR PATCH (Jan. 7, 2012), <http://lakeelsinore-wildomar.patch.com/articles/early-release-possible-for-inmates-as-local-jails-fill> (on file with the *McGeorge Law Review*) (reporting that, when announcing his bid for a Riverside County supervisor seat, State Assemblyman Kevin Jefferies decried AB 109 as harmful to public safety).

177. DICAMELO & FIELD, *supra* note 170, at 1–2, 4.

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jails,¹⁷⁸ the option of making jail construction and further incarceration of offenders a central part of a county's Realignment plan becomes an attractive option for CCP and county board members looking for reelection.¹⁷⁹ The promise of new jail space, mostly funded by the State, also appeals to local voters. With such incentives in place, instead of utilizing Realignment's changes to implement proven recidivism-reducing programs, many counties may continue on the path of mass incarceration, this time using jails instead of prisons.¹⁸⁰ Realignment provides many of the tools for California's counties to remedy the state's problems with high recidivism and criminal justice spending.¹⁸¹ However, to maximize potential to achieve California's penological goals, Realignment will need state-backed incentives that encourage counties to pursue proven incarceration alternatives for incoming offenders.¹⁸² Realignment's current financial and political incentives encourage a focus on incarceration, leading to county policies that do little to decrease California's recidivism problem and the high costs associated with incarceration.¹⁸³

V. A SIMPLE FIX: A DIFFERENT FINANCIAL INCENTIVE STRUCTURE AND AN ACTUARIAL RISK/NEEDS INSTRUMENT

Although Realignment's current method of delegating funding and decision-making to the counties in some ways frustrates the main thrust of the law,¹⁸⁴ a couple of minor changes and additions to California's sentencing law and policy could reduce the impact of these burdens. This Part suggests minor reforms, made at little-to-no cost to the State, furthering Realignment's stated goals of cutting the recidivism rate, reducing costs, and improving public safety.¹⁸⁵

Realignment's creation of CCPs in each county to implement its sentencing plan essentially creates fifty-eight separate sentencing commissions in

178. See *supra* Part IV.A (discussing the state funding available to counties for jail construction).

179. See *California Invests Millions in New Jails*, *supra* note 160 (explaining that Republican party plans on a platform of "attacking the governor for what they say is threatening public safety and dumping the responsibility for prison overcrowding on the counties").

180. See MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, CAN CALIFORNIA COUNTY JAILS ABSORB LOW-LEVEL STATE PRISONERS? 4-5 (2011), available at http://www.cjcf.org/files/Can_California_County_Jails_Absorb_Low-Level_State_Prisoners.pdf (on file with the *McGeorge Law Review*) (stating that many low-level offenders respond better to community treatment and supervision programs compared to incarceration).

181. See *supra* Part III.B (discussing the potential benefits Realignment's changes have over California's prior sentencing law).

182. See *supra* text accompanying note 78.

183. See *How Much Does It Cost to Incarcerate an Inmate in Prison?*, CAL. LEGIS. ANALYST'S OFF., http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3 (last visited Mar. 23, 2012) (on file with the *McGeorge Law Review*) ("[In 2009], [i]t cost an average of about \$47,000 per year to incarcerate an inmate in prison in California.").

184. See *supra* Part IV (highlighting the inherent issues of having fifty-eight individual CCPs).

185. CAL. PENAL CODE § 17.5 (West Supp. 2012).

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California.¹⁸⁶ The problem with this is the non-uniformity that it creates amongst the counties.¹⁸⁷ Some CCPs use Realignment's financial incentives by funding jail development, while others are trying to integrate further community-based sentencing options.¹⁸⁸ Counties integrating these alternatives subsidize those who chose to develop jails, by saving the State money and not pursuing AB 900 jail development funds.¹⁸⁹ The problem that perpetuates this situation is that subsidies are not available for counties that choose to invest further in proven evidence-based practices and programs with respect to county jail felons.¹⁹⁰ However, a shift in how the state allocates the currently available criminal justice funding to the counties can ameliorate this problem.

A. *A Change in the Distribution of State Subsidies*

California's largest subsidy to counties for implementing Realignment focuses exclusively on creating more space for costly incarceration.¹⁹¹ With the state giving counties discretion in which programs and services to place their criminal justice dollars behind, the State should reevaluate its current distribution of the limited subsidy money for the counties with the goal of favoring programs proven to reduce crime and costs.¹⁹² A redistribution plan needs to encourage counties to use programs that show measurable outcomes in reaching this goal.¹⁹³ The State could do this by increasing the state funds available to successful counties and by reducing the required proportion of contributions that those counties must pay out of their own funds.¹⁹⁴

In determining how to distribute funds to encourage counties to invest in proven sentencing alternatives for low-level offenders, the State could model its structure on California's 2009 Community Corrections Performance Incentives Act (Act).¹⁹⁵ The Act "provides state funding to county probation departments to fund local evidence-based probation supervision practices for the purpose of

186. Weisberg, *supra* note 17, at 6.

187. *Id.* ("California could have had just one [sentencing commission], and it could have made that commission a responsible and well-coordinated branch of state government. Perhaps recklessly, it chose this other path.")

188. *See supra* note 145 and accompanying text.

189. *See* CTR. ON JUVENILE & CRIMINAL JUSTICE, *supra* note 121, at 1 ("[L]ocally self-reliant counties have been penalized in the funding formula for allocation of realignment money and will have to develop new innovative ways to expand their existing programs to encompass this new population; while state-dependent counties are faced with a pivotal decision—to embrace best practices or perpetuate the mistakes of a broken prison system at a local level.")

190. Warren, *supra* note 135.

191. CAL. GOV'T CODE §§ 15820.911, 15820.917 (West Supp. 2012).

192. Warren, *supra* note 135.

193. BALL, *supra* note 159, at 71.

194. *Id.*

195. CAL. PENAL CODE § 1228 (West Supp. 2012).

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reducing recidivism and revocations among felony probationers.”¹⁹⁶ Under the Act, the State grants subsidy funds to counties based on a county’s performance in reducing felony-probationer failure rates.¹⁹⁷ Subsidy funds for a given county are calculated by determining an estimated number of probationers successfully prevented from being sent to prison multiplied by either forty or forty-five percent of the costs to the State in sending a probationer to prison.¹⁹⁸ The Act also provides additional performance-based grants to counties that reduce their probationer failure rates, giving those counties an extra five percent of the funds the state saves as a result.¹⁹⁹

In its first year, this subsidy program has “resulted in a 23 percent reduction in prison commitments [among felony-probationers], saving the state almost \$180 million in state corrections costs.”²⁰⁰ During the first year, the State only invested \$45 million to achieve this result.²⁰¹ These savings make the program self-sustaining.²⁰² For the second year, the state reinvested nearly \$90 million of the savings to further the gains already made.²⁰³ Through these savings and lowered failure rates, this program has made great strides towards achieving the legislature’s Realignment goals in the probation arena.²⁰⁴ In fact, many CCPs have begun focusing on alternative evidence-based practices in handling probationers in an attempt to increase performance-based funding under the Act.²⁰⁵

Setting up a subsidy plan similar to the 2009 Act encourages county agencies to develop practices and programs that are the most effective for their particular communities.²⁰⁶ Additionally, the Act does not penalize those counties that use their funds to experiment with innovative probation practices and policies and fail to achieve their expected results.²⁰⁷ The largest part of its grant payment is

196. Warren, *supra* note 135.

197. PENAL § 1233.4.

198. *Id.* § 1233.3.

199. *Id.* § 1233.4.

200. Warren, *supra* note 135; *see also* CAL. ADMIN. OFFICE OF THE COURTS, SB 678 YEAR 1 REPORT 3 (2011) (listing the yearly probation failure rates since 2006, showing a 23% decline).

201. CAL. ADMIN. OFFICE OF THE COURTS, *supra* note 200, at 2.

202. *See id.* at 1–3 (stating that the state will redistribute about half of the savings to the successful counties to continue their proven probation practices).

203. EDMUND G. BROWN JR., 2011–12 CALIFORNIA STATE BUDGET 36 (2011), *available at* <http://www.ebudget.ca.gov/pdf/Enacted/BudgetSummary/CorrectionsandRehabilitation.pdf> (on file with the *McGeorge Law Review*).

204. *See supra* text accompanying note 78 (stating the major goals the legislature hopes to achieve through Realignment).

205. *See, e.g.*, DEL NORTE CNTY., 2011 PUBLIC SAFETY REALIGNMENT 6–11 (2011) (stating all the evidence-based measures Del Norte County’s probation department is utilizing to reduce probationer failure rates).

206. *See* CAL. PENAL CODE § 1233.4(d) (West Supp. 2012) (granting extra funding to those counties that are able to reduce their probation failure rates to less than half of the statewide average in a given year).

207. *Id.* § 1233.3.

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based on the gains the county made, regardless of how small.²⁰⁸ If the State were to implement a similar incentive structure to encourage counties to use alternative sentencing practices for county jail-eligible felons and those on PCRS, CCPs will be more likely to choose to develop further proven alternatives to incarceration in their implementation plans. As a result, there will likely be a drop in the statewide recidivism rate and offender management costs.

In developing a subsidy program, the State could expand the permitted uses under its current prison construction subsidy to include funding for the implementation of the legislature's listed "community-based punishments"²⁰⁹ and other evidence-based sentencing practices. Like under the 2009 Act, the State could base its appropriation of the performance-based funds to a given county by determining a county's "failure rate," those offenders who reoffend or violate their PCRS conditions, and judging it against the statewide average.²¹⁰ Based on this rate, the State could determine the amount of money that a county is saving the state and give back a percentage.²¹¹ Additionally, the State could provide some of these savings to less-successful counties by offering subsidy funds for the implementation of specific evidence-based sentencing practices that a county is not currently adopting.²¹² About \$125 million is already available in unneeded prison construction money under AB 900 to act as part of a seed fund for such a subsidy program.²¹³

The State would need to frame the subsidy in terms of money saved on inmate costs for counties in order to build counties' political will to not only pass such a program through the legislature, but also for them to be more willing to participate in it.²¹⁴ This tactic proved successful for the 2009 Act, which passed unanimously.²¹⁵ However, the semi-voluntary nature of such a subsidy program does not guarantee that it will persuade all CCPs to seek the state funding for using alternative sentencing practices; they may simply continue to seek funding for jail expansion, believing that continuing to incarcerate low-level offenders is the most effective way to promote public safety.²¹⁶ Therefore, in order to make

208. *Id.*

209. *Id.* § 17.5(a)(8).

210. *Id.* § 1233.

211. *See id.* § 1233.3 (setting out a tiered program where a county that saves the state money is entitled to a payment by the state based on a certain percentage of the funds the county saves the state in a given year).

212. The State already provides similar funding to high achieving counties under the 2009 Act for the specific purpose of bolstering evidence-based probation practices designed to reduce recidivism. *Id.* § 1233.4(c).

213. EDMUND G. BROWN JR., 2012-13 CALIFORNIA GOVERNOR'S BUDGET SUMMARY 127 (2011), available at <http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf> (on file with the *McGeorge Law Review*).

214. BALL, *supra* note 159, at 76.

215. Warren, *supra* note 135.

216. *See California Prison Reduction Plans Are an 'Unfunded Mandate,' Says Police Chief Beck*, HUFFINGTON POST L.A. (Oct. 10, 2011, 3:10 PM), <http://www.huffingtonpost.com/2011/10/04/california->

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sure counties are more disposed to pursue the subsidy in an effective manner, the State needs to guide them to the conclusion that jail time is not always an effective solution to meeting the goal of handling low-level offenders in a socially productive and cost-effective manner.

B. Adoption of an Actuarial Risk Assessment Instrument in Sentencing of Lower-Level Offenders

One way to guide county officials towards corrections practices that best meet Realignment's three goals of public safety, recidivism reduction, and cost reduction, would be to mandate statewide use of a risk/needs assessment (RNA) instrument at sentencing. A judge can use an RNA instrument to help determine the appropriate sentence for an individual low-level offender based on determinations premised on three key principles: the risk the offender poses to the public, the offender's needs, and the probability that the offender will benefit from a particular punishment or program.²¹⁷ An effective RNA instrument would account for personal characteristics empirically proven to have a bearing on the offender's likelihood to reoffend.²¹⁸ Additionally, it would look at those attributes and determine whether incarceration or a community-based sentencing alternative would better serve the offender and the community.²¹⁹

The probation departments in several California counties have already successfully used such an instrument in handling offenders on probation or PCRS.²²⁰ However, such an assessment system would not be effective for making sentencing determinations by a court, as there are more interests at play that are not present in other criminal justice decisions.²²¹ "Each state and local jurisdiction

prison-reduction_n_994500.html (on file with the *McGeorge Law Review*) ("[L.A. Police] Chief Beck called the state's prison reduction plan an 'unfunded mandate' that would result in longer emergency response times and unsafe communities for Angelenos, as he would have to divert 150 police officers to probation duties instead of street patrol.").

217. PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING 4–8 (2011), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx> (on file with the *McGeorge Law Review*).

218. See *id.* at 5 (stating some personal attributes that have proven to be indicative of an offender's propensity to reoffend).

219. *Id.* at 6 ("[An RNA instrument] assess[es] an offender's risk of reoffending, matching supervision and treatment to the offender's risk level, and targeting the offender's criminogenic needs or dynamic risk factors with the social learning and cognitive-behavioral programs most likely to effect change in the offender's behavior given specific offender characteristics.").

220. See, e.g., S.F. CNTY. COMMUNITY CORR. P'SHIP, CITY & COUNTY OF SAN FRANCISCO PUBLIC SAFETY REALIGNMENT & POST RELEASE CMTY. SUPERVISION 2011 IMPLEMENTATION PLAN 15–16 (2011) (describing the risk/needs assessment that the probation department must undertake); DEL NORTE CNTY., *supra* note 205, at 7 (stating that the use of a risk/needs assessment instrument has helped to reduce probationer failure rates, leading to a performance-based subsidy of \$169,047 from the state for this small county).

221. CASEY ET AL., *supra* note 217, at 1 ("The use of RNA information at sentencing is somewhat more complex than for other criminal justice decisions because the sentencing decision has multiple purposes—

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will [need to] determine its own best path.”²²² Nevertheless, without a mandatory uniform assessment instrument in place for all county jail-eligible offenders, different counties will continue to vary widely in achieving recidivism reduction, with the poorer performing counties costing the rest of the state millions.²²³

Employing an RNA instrument would reduce recidivism and costs by helping guide criminal justice officials towards the most effective outcome for each individual offender.²²⁴ However, what offender characteristics would an effective instrument take into account? Looking to Virginia, the first state to implement RNA into sentencing determinations, is informative in figuring out which factors are effective.²²⁵

1. Determining Risk: Virginia’s Actuarial Assessment Instrument

In 2002, Virginia implemented a risk-based sentencing evaluation system that requires trial courts to use a risk assessment report when evaluating nonviolent offenders to determine the appropriate sentence.²²⁶ The Virginia risk assessment instrument relies on several statistically relevant factors to “develop[] profiles, or composites, based on overall group outcomes.”²²⁷ The instrument creates a profile of an offender based on individual characteristics to determine whether they fall into a “high-risk” category, to determine whether they are more likely to reoffend.²²⁸ A judge can then use the “recommendation” that the data gives to aid in making a sentencing determination.²²⁹

Among the factors considered by a Virginia state court in determining the appropriate sentence are an offender’s age, prior criminal history, educational level, marriage status, employment status, gender, and the nature of and facts surrounding the current conviction.²³⁰ The court gives a certain weight to each factor in its determination, with some factors such as age, gender, criminal history, and the nature of the current offense, weighing more heavily.²³¹ Based on the overall score, the instrument places an offender into a categorical grouping; for example, those placed into a particular group being statistically as likely to

punishment, incapacitation, rehabilitation, specific deterrence, general deterrence, and restitution . . .”).

222. *Id.* at 37.

223. CTR. ON JUVENILE & CRIMINAL JUSTICE, *supra* note 121, at 7.

224. *See generally* CASEY ET AL., *supra* note 217, at 7–8 (explaining how using RNA criteria at sentencing aids in making a sentencing conclusion that will lead to the most effective outcome for the offender and the community).

225. OSTROM ET AL., *supra* note 28, at 113.

226. *See generally id.* (describing Virginia’s risk assessment instrument).

227. *Id.* at 23.

228. *Id.*

229. *Id.* at 27.

230. *Id.*

231. *Id.*

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reoffend as others are within the same group.²³² This instrument has proven successful. Within the past decade, Virginia's prison population has shrunk drastically because of the increased use of shorter sentences and alternatives to incarceration, leaving newly built prisons empty of inmates.²³³

The use of statistically determinative factors of risk similar to those in Virginia's instrument could prove useful in California as a complement to the subsidy discussed above. It would assist those in charge of local sentencing by showing them an offender's likely risk to the community, aiding judges and other justice officials in realizing that incarceration for some low-level offenders might not prove to be the most socially productive or cost-effective method of intervention.²³⁴

However, there is some backlash regarding Virginia's use of certain criteria, such as age and gender, in imposing differing penalties for different persons convicted of the same offense.²³⁵ There are claims that certain factors may violate equal protection,²³⁶ however, courts have yet to address this potential issue, likely because the State has enough of a compelling interest in public safety.²³⁷ Since experts generally consider these factors highly relevant to determining the risk that an offender will reoffend,²³⁸ the state may justify their use on public safety grounds.²³⁹

Nevertheless, there are more pressing flaws in Virginia's instrument: judges use it only to assess an offender's risk to public safety and it does not recommend specific alternative punishments.²⁴⁰ Limiting such an instrument only to the functions that Virginia uses it for would prove problematic to California because Virginia did not design it to assess the needs of individual offenders, thus

232. *Id.* at 29.

233. Lawrence Hammack, *New \$105M Va. Prison Remains Empty*, ROANOKE TIMES (Jan. 3, 2011), <http://hamptonroads.com/2011/01/new-105m-va-prison-remains-empty?cid=ltst> (on file with the *McGeorge Law Review*).

234. *See* Warren, *supra* note 135 (stating that the use of a validated risk assessment tool is more accurate in determining the actual risk that an individual offender poses, and their needs, than unguided discretion alone).

235. Emily Bazelon, *Sentencing by the Numbers*, N.Y. TIMES (Jan. 2, 2005), available at <http://www.nytimes.com/2005/01/02/magazine/02IDEA.html?pagewanted=1> (on file with the *McGeorge Law Review*).

236. *Id.* *See generally* BRIAN NETTER, USING GROUP STATISTICS TO SENTENCE INDIVIDUAL CRIMINALS: AN ETHICAL AND STATISTICAL CRITIQUE OF THE VIRGINIA RISK ASSESSMENT PROGRAM (2006), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1008&context=y1sspps_papers (on file with the *McGeorge Law Review*) (arguing that several of Virginia's assessment factors should not be used at sentencing based on ethical grounds).

237. Bazelon, *supra* note 235.

238. *See* OSTROM ET AL., *supra* note 28, at 27 (listing age, gender, and marital status as the top factors in considering the risk a low-level offender poses under the Virginia risk assessment instrument).

239. *See* John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 430-32 (2006) (claiming that, under the U.S. Supreme Court's current jurisprudential framework for equal protection claims, the use of gender, age, and other non-race-based factors are permissible for risk assessment purposes).

240. CASEY ET AL., *supra* note 217, at 9.

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reducing its effectiveness in addressing recidivism.²⁴¹ Moreover, Virginia has a far smaller population than California and its recidivism rate is historically far smaller, staying constant at about twenty-nine percent,²⁴² which indicates that such a single purpose instrument might be inadequate for California's more dire situation.

A determination "that [an offender is] 'high risk' does not necessarily translate to 'need to incarcerate.'"²⁴³ A judge should use an RNA instrument to aid in the determination, not supplant it, and the court should consider other factors beyond static risk factors in determining what type of punishment will result in the most favorable outcome for both the offender and the community.²⁴⁴ In order to create an instrument suitable to California's needs, the legislature must necessarily consider other factors incorporating the needs of the individual low-level offender and the county's capacity to handle such an offender within the community.²⁴⁵

C. Beyond Risk: Determining Low-Level Offenders' Needs in Specific Communities

The factors identified in Virginia's assessment instrument serve as a helpful "baseline" for the creation of an instrument that meets California's goals because they are statistically proven to determine the likelihood that an offender will reoffend, regardless of geographic location or circumstances.²⁴⁶ However, there is no "one-size-fits-all" assessment instrument that will best evaluate any given offender in any given community.²⁴⁷ In fact, one of the most important determinations for a jurisdiction to make in choosing which factors to incorporate into an assessment instrument is what its overall penological goals are, thus allowing it to determine how the instrument will play a role in meeting those goals.²⁴⁸ Through Realignment's changes, California's legislature has already stated the goals of reducing recidivism, reducing costs, and improving public

241. *Id.*

242. BARON BLAKELY ET AL., VA. DEP'T OF CRIMINAL JUSTICE SERVS., INTERIM EVALUATION REPORT ON THE VIRGINIA PRISON REENTRY PROGRAMS 4 (2007), available at <http://www.dcjs.virginia.gov/research/documents/prisonerentryinterim.pdf> (on file with the *McGeorge Law Review*).

243. CASEY ET AL., *supra* note 217, at 21.

244. *Id.* at 14.

245. *See id.* (stating other factors a court should take into account beyond the RNA instrument when determining whether community supervision or other alternative sentencing measures would prove superior to incarceration).

246. *See OSTROM ET AL.*, *supra* note 28, at 27 (listing the risk assessment factors that Virginia's instrument takes into account, many of which are immutable offender characteristics).

247. *See Zachary Dal Pra, In Search of a Risk Instrument*, in TOPICS IN COMMUNITY CORRECTIONS: ASSESSMENT ISSUES FOR MANAGERS 9, 9 (2004), available at http://www.uc.edu/content/dam/uc/ccjr/docs/articles/ticc04_final_complete.pdf (on file with the *McGeorge Law Review*) (stating that even if there were a comprehensive assessment instrument, it would be too complicated to effectively and efficiently employ).

248. *Id.*

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safety.²⁴⁹ An effective RNA instrument would also need to “assesses dynamic factors that can be used to guide treatment decisions and facilitate behavioral change” to determine if a non-incarceration intervention would better serve a county jail-eligible offender,²⁵⁰ the county’s public safety, and costs.

With the right factors and the right amount of weight given to each one, an effective RNA instrument should be able to help a judge determine not only what risk a low-level offender poses, but also what available intervention method will best achieve California’s goals.²⁵¹ One issue, however, in developing a uniform instrument for statewide implementation is the differing needs and resources of each county.²⁵² While certain factors may hold constant from county to county and some sentencing options may be available statewide, not all counties will have the same resources to devote to certain types of offenders.²⁵³ Additionally, some counties may have unique offender populations that local sentencing officials need to take into account to get the most predictive value out of an assessment.²⁵⁴ By creating a separate CCP for each of California’s fifty-eight counties, Realignment gives local policy-makers more say in handling criminal sentencing than ever before.²⁵⁵ California’s RNA instrument should reflect this shift in policy-making power by giving county-level agencies and officials the ability to determine how much weight to give to certain assessment factors and to determine whether to insert additional, county-specific factors into the assessment. Certain risk-needs factors may carry more weight in assessing what type of intervention is right for offenders in one county than they do in other counties.²⁵⁶ “[W]hat works in downtown Los Angeles may not work in Napa Valley.”²⁵⁷

For example, studies show that unemployed persons are more likely to commit low-level offenses and that those who live in communities with high

249. CAL. PENAL CODE § 17.5 (West Supp. 2012).

250. CASEY ET AL., *supra* note 217, at 29.

251. *See id.* at 6 (“[A]ssessing an offender’s risk of reoffending, matching supervision and treatment to the offender’s risk level, and targeting the offender’s criminogenic needs or dynamic risk factors with the . . . programs most likely to effect change in the offender’s behavior given specific offender characteristics . . . is associated with the greatest reduction . . . in the recidivism rate.”).

252. *Id.* at 14 (“Whether an offender is a good candidate for community supervision is a decision each court makes, based in part, on the availability of effective local supervision and treatment resources available to address the offender’s specific risk factors.”).

253. *Id.*

254. *Id.*

255. *See* Weisberg, *supra* note 17, at 6 (“[T]he CCP must be the cost-benefit analyst, information manager, and overall administrator over vast portions of the criminal justice system.”).

256. *See* CASEY ET AL., *supra* note 217, at 30 (“Given the purpose for and potential judicial consequences of using assessment information at sentencing, research must provide evidentiary support that the tool can effectively categorize all types of offenders in the local population on which the instrument will be used into groups with different probabilities of recidivating.”).

257. *Id.* at 32.

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unemployment rates are even more likely to do so.²⁵⁸ California's counties have widely varying unemployment rates.²⁵⁹ Therefore, while an assessment factor based around an offender's employment status may carry a certain amount of weight in determining his likelihood to reoffend in one county, that factor's determinative strength may be entirely different in another.²⁶⁰ Additionally, certain counties have offenders with distinctive needs, such as Shasta County, which has a high rate of substance-abuse offenses.²⁶¹ An RNA instrument should be able to take into account the availability of resources within a particular county to address such an offender in the most effective manner.²⁶²

In order to encourage counties to determine the proper weight to give certain factors in the statewide instrument and what additional, local factors to add, a portion of state subsidy funding for Realignment implementation should be set aside for counties to conduct validation studies. The validation process requires a jurisdiction, such as a county, to test out an RNA instrument on a small sampling of offenders that is representative of the local population to determine its accuracy.²⁶³ By giving county officials the ability to build and try an instrument for themselves, there is a greater chance of engendering trust in local sentencing officials and community members that the instrument is accurate.²⁶⁴ By producing greater community trust in the instrument's accuracy, counties are also more likely to "bolster and expand current evidence-based practices" as well as "develop local community-based treatment resources in areas of need" based off of the data that the instrument's determinations develop.²⁶⁵ Additionally, counties can use this data to help guide how much state and local funding to apply

258. See Steven Raphael & Rudolph Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECON. 259, 271, 280–81 (2001) (stating that a 1 percent drop in the unemployment rate leads to as much as a 2.4 percent decrease in the property crime rate and that areas with high unemployment generally have much higher crime rates).

259. LABOR MKT. INFO. DIV., CAL. EMP'T DEV. DEP'T, MONTHLY LABOR FORCE DATA FOR COUNTIES FEBRUARY 2012 4 (2012), available at http://www.edd.ca.gov/about_edd/pdf/urate201203.pdf (on file with the *McGeorge Law Review*) (reporting the unemployment rate for each county in California, with Colusa County having the highest rate at 27.1 percent and Marin County having the lowest rate at 6.6 percent).

260. See CASEY ET AL., *supra* note 217, at 31 ("[T]he target population(s) on which the [RNA] tool was constructed and previously validated may not be representative of the local population; as a result, the tool may not retain its predictive validity in the new context.').

261. CTR. ON JUVENILE & CRIMINAL JUSTICE, *supra* note 121, at 5.

262. See CASEY ET AL., *supra* note 217, at 14.

The offender's risk 'score,' at the time of sentencing may . . . be a relevant factor but should never be determinative in deciding whether the offender can be safely and effectively supervised in the community Whether an offender is a good candidate for community supervision is a decision each court makes, based in part, on the availability of effective local supervision and treatment resources available to address the offender's specific risk factors.

Id.

263. *Id.* at 29.

264. *Id.* at 31.

265. *Id.*

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towards each available intervention method, helping to determine the most cost-effective and socially productive way to funnel available funds.²⁶⁶

VI. CONCLUSION

The federal courts, through the *Plata* litigation, have applied enough pressure on California lawmakers to the point that the legislature has begun to reform over thirty years of mostly ineffective sentencing laws. The past laws have created high costs, a ballooning prison population, and a statewide recidivism rate of nearly seventy percent.²⁶⁷ Many of the major reforms that Realignment makes to California's sentencing laws constitute a much-needed shift away from sending low-level offenders to expensive incarceration in state prisons, instead creating a newfound focus on punishing such offenders locally.²⁶⁸ These changes will not only lead to further drops in the state's overpopulated prison system, but should also make great strides towards the state's additional goals of cost and recidivism reduction without leading to a drop in public safety.²⁶⁹ What is most likely to prove to be Realignment's greatest reform is its codification of the state's encouragement of the counties to use evidence-based sentencing practices and policies that would steer many low-level offenders away from incarceration in county jails.²⁷⁰

However, merely stating that the state finds certain interventions effective in meeting its goals is not enough to get certain counties to end sentencing practices that focus heavily on incarcerating many low-level offenders.²⁷¹ In bestowing more responsibility and discretion in local governments in handling local offenders, Realignment gives local government officials the ability to largely ignore best practices and continue with incarceration-heavy policies.²⁷² In fact, a large portion of Realignment's subsidy structure creates an incentive for counties to rely heavily on incarceration by expanding the amount of money available for jail construction and making it easier for counties to obtain funding for that purpose.²⁷³ Additionally, the setup of CCPs as the main policy-making bodies for implementing Realignment at the county level creates a lack of uniformity in state-wide sentencing practices, with some counties choosing to implement evidence-based sentencing policies and others opting to rely heavily on jail-based

266. *Id.*

267. *See supra* Part II (detailing the historical and legal background prior to Realignment's enactment).

268. *See supra* Part III (providing a brief summary of Realignment's major changes).

269. *Id.*

270. *See supra* Part III.B (highlighting the potential successes of Realignment's changes).

271. *See supra* Part IV.A.

272. *See supra* Part IV.B (discussing the financial incentives of other legislation, and the lack of financial incentives under Realignment, which tend to undermine the goals of Realignment).

273. *See supra* Part IV.A (discussing the political and financial issues with community-based programs in the place of incarceration).

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interventions.²⁷⁴ The combination of this lack of uniformity with the incentives created by the state subsidy structure costs the state millions of dollars and penalizes counties that have progressive sentencing policies.²⁷⁵

If Realignment's reforms are to serve the State's goals, the uses for which counties can utilize available state funding need to change to include performance-based payments to counties that successfully reduce their costs and recidivism rate.²⁷⁶ There is already an incentive structure in place in California for county probation departments that could act as a model.²⁷⁷ Additionally, to persuade county officials skeptical of the effectiveness of sentencing alternatives that such options are often more effective than jail, the state could mandate statewide use of the uniform actuarial risk-needs assessment instrument in sentencing decisions.²⁷⁸ The State could base its instrument off of a modified version of Virginia's instrument, giving counties the ability to modify the instrument to make it more accurate in determining the best outcomes for those within their local communities.²⁷⁹

California is finally making strides towards a sentencing regime that can reduce crime, costs, and prison population. However, such an unprecedented transition to community-based corrections for a large population of offenders will require much collaboration between the State and its counties and will not be easy.²⁸⁰ As one of the drafters of Determinate Sentencing, the last major overhaul of California's sentencing scheme, said about that law: "only future experience can provide any definitive answers"²⁸¹ on how Realignment's reforms will affect California. However, with these changes, the achievement of Realignment's full potential as a model for effective community-based corrections will be one-step closer to reality.

274. *See supra* Part IV.B (pointing out an inherent problem with CCPs, in that they may ultimately undermine the goals of Realignment).

275. *Id.*

276. *See supra* Part V.A (proposing subsidies to incentivize counties' participation in furthering Realignment's goals).

277. *Id.*

278. *See supra* Part V.B (proposing a RNA similar to Virginia's risk assessment instrument to assist in sentencing under Realignment).

279. *Id.*

280. *See supra* Part IV (highlighting the inherent issues of having fifty-eight individual CCPs).

281. Cassou & Taugher, *supra* note 36, at 30.