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Moving California Corrections from an Offense- to Risk-Based System

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This paper will discuss recent California policies designed, in large part, to reduce the large numbers of persons incarcerated in state prison. The most common policies are based on the nature of the offender's offense rather than offender's risk. This paper will further discuss a number of recent policies based on both approaches, describe their impact on incarceration rates and crime and discuss how well they are received by system actors and the observers of the policies.

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Much has been written recently about mass incarceration in the United States, including the causes and consequences for those under its supervision, as well as their families and communities.¹ In the late 1970s and early 1980s, the United States set out on a path of incarceration that resulted in one in one hundred adults behind bars.² In 2009, at the height of the US prison population, over 1.6 million prisoners were under the jurisdiction of state or federal correctional authorities.³ The tide has begun to change somewhat. From 2009 to 2014, the total prison population has declined by over 500,000.⁴ Some of this may be due to recent difficult financial times as many states tightened their belts as a result of the great recession. States have tried a number of policy options recently to reduce the use of incarceration.⁵ A recent study of prison closings reported that between 2007–2008 and 2012–2013, states experienced a loss of over 19,000 beds with the closing of 148 facilities.⁶ California plays a particularly large role in the nation’s prison population, accounting for approximately 10% of the overall state prison population.⁷ This article uses California as a case example of the different approaches used to address crowding, focusing on considerations of conviction offense and offender risk in different policy decisions the state has made.⁸ This article takes advantage of the unique position that the University of California, Irvine (UCI) Center for Evidence-Based Corrections has had in the implementation and evaluation of risk-based policies within the California Department of Corrections and Rehabilitation.

1. See NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (Jeremy Travis et al. eds., 2014), for an extensive analysis of the increase in incarceration in the United States. This edited volume contains chapters by experts on a number of topics ranging from crime rates, experiences of incarceration, consequences for health and mental health, families and communities, etc.

2. PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008* (2008).

3. E. ANN CARSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 248955, *PRISONERS IN 2014* (2015).

4. *Id.*

5. PEW CHARITABLE TRS., *31 STATES REFORM CRIMINAL JUSTICE POLICIES THROUGH JUSTICE REINVESTMENT* (2016), http://www.pewtrusts.org/~media/assets/2016/12/33_states_reform_criminal_justice_policies_through_justice_reinvestment.pdf [<https://perma.cc/L3AG-V8XC>].

6. Susan Turner et al., *A National Picture of Prison Downsizing Strategies*, 10 *VICTIMS AND OFFENDERS* 355, 401 (2015).

7. *Id.*

8. This paper focuses on the more “public” changes that have been made to reduce the prison population. There are many other administrative changes to the institutional population that CDCR has made (e.g., credits).

I. BACKGROUND OF CALIFORNIA CORRECTIONS

A. Traditional Sentencing is Offense Based

California has undergone major changes related to its prison system over the past several decades, many of them related to sentencing policy changes.⁹ During the first part of the twentieth century, California, as many other states, utilized indeterminate sentencing for criminal offenses.¹⁰ Indeterminate sentencing is based on the premise that offenders can be rehabilitated and reflected the more progressive attitudes of the time. Under indeterminate sentencing structures, sanctions for offenses carry a potential range of time to spend in prison. Judges sentence an offender to a range of prison time (often with a minimum required) and it is up to a parole board to determine whether an offender is ready for release back into the community.¹¹ In this sentencing model, the parole board wields the most power.¹² In 1977, California moved away from indeterminate sentencing except for the most serious offenses and adopted determinate sentencing legislation, which set specific terms for offenses.¹³ A base term, with low, medium and upper sentence length options were established for all felonies (except those that could receive the death penalty of life in prison). Enhancements for specific conduct, such as carrying a weapon or bodily injury, can add to the time imposed. Determinate sentencing became popular in the late 1970s during a time of great concern about equity and fairness in sentencing and a belief that more standardized sentences could help remedy these issues.¹⁴ What is most instructive for this paper is that with determinate sentencing, sentence length and time spent in prison is overwhelmingly determined by the offense itself, rather than other factors about the inmate (such as participation in treatment, behavior in prison, risk to the community once released, etc.).

Starting about the time determinate sentencing legislation was adopted, California, along with other states started experiencing rapid increases in their prison populations. These increases were the result of America's "get tough on crime" appetite incorporating a number of criminal justice policies that contributed to the massive growth in incarceration: mandatory minimum laws; harsher penalties

9. Petersilia notes that the California Legislature enacted over 1,000 crime bills between 1984 and 1991. See JOAN PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS: SUMMARY (2006).

10. Phillip E. Johnson & Sheldon L. Messinger, *California's Determinate Sentencing Statute: History and Issues*, 1 DETERMINATE SENT'G 13 (1978).

11. *Id.*

12. See Kevin R. Reitz, *The Traditional Indeterminate Sentencing Model*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 270 (Joan Petersilia & Kevin R. Reitz eds., 2012).

13. See Johnson & Messinger, *supra* note 10 (noting determinate sentencing was ushered in under the Uniform Determinate Sentencing Act of 1976).

14. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING (2002).

for drug offenses; longer sentences for violent offenses; and high failure rates for persons on parole.¹⁵

By 2006, California's prison population had topped 171,000, the largest in the nation and one characterized by conditions that were unsafe for staff and inmates.¹⁶ "Churning" parole failures were a large component of the population increase—more than two-thirds of parolees failed either due to violations or new arrests and were returned to prison, often for very short time periods.¹⁷ In October 2006, then Governor Schwarzenegger proclaimed that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding" and authorized the transfer of tens of thousands of California inmates to out-of-state facilities.¹⁸ Actions over the succeeding 10 years can be seen as various attempts to trim California's heavy use of incarceration at the state level.

B. California's Expert Panel Report

In 2007, the California Department of Corrections and Rehabilitation (CDCR) assembled an expert panel of practitioners and researchers to complete an assessment of California's rehabilitation programming for adults.¹⁹ This panel was also tasked with providing recommendations to improve the rehabilitative programming in the department.²⁰ At first glance, this may appear to be unrelated to population pressures; however, rehabilitation programming is designed to improve the odds that released offenders will succeed in the community and to reduce the chances they return to prison.²¹ For this reason, rehabilitation is an important leverage option, although perhaps not as direct as other mechanism—such as changes to admissions policies—to reduce prison populations.

15. NAT'L RESEARCH COUNCIL, *supra* note 1; *see also* Michael Tonry, *Sentencing in America: 1975–2025*, 42 CRIME AND JUSTICE 141 (2013).

16. *See Monthly Total Population Report Archive*, CAL. DEP'T CORRECTIONS & REHABILITATION, https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.html [https://web.archive.org/web/20171219032307/https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.html] (last visited Dec. 19, 2017).

17. EXPERT PANEL ON ADULT OFFENDER & RECIDIVISM REDUCTION PROGRAMMING, CAL. DEPT. OF CORR. & REHAB., REPORT TO THE CALIFORNIA STATE LEGISLATURE: A ROADMAP FOR EFFECTIVE OFFENDER PROGRAMMING IN CALIFORNIA (2007).

18. *Prison Overcrowding State of Emergency Proclamation*, OFF. GOVERNOR EDMUND G. BROWN JR., <https://www.gov.ca.gov/news.php?id=4278> [<https://web.archive.org/web/20171223060307/https://www.gov.ca.gov/news.php?id=4278>] (last visited Dec. 23, 2017).

19. *See* EXPERT PANEL ON ADULT OFFENDER & RECIDIVISM REDUCTION PROGRAMMING, *supra* note 16.

20. *Id.*

21. It is also instructive that in 2005, the California Department of Corrections added the word "Rehabilitation" to its name. *See* OPEC Staff, *A Decade Ago, a New Name Affirmed Mission of CDCR*, INSIDE CDCR (Aug. 28, 2015), <http://www.insidecdcr.ca.gov/2015/08/a-decade-ago-a-new-name-affirmed-mission-of-cdcr/> [<https://perma.cc/9TF4-KVA3>], for the CDCR news announcement on its name change.

The Expert Panel Report concluded with a series of recommendations, including:

- reduce overcrowding;
- enact legislation to improve use of incentives for programming and positive offender behavior;
- select and utilize a risk assessment tool to assess risk of reoffending;
- determine rehabilitation programming based on criminogenic and other needs;
- use case plans to monitor offender performance;
- deliver a core set of programs that cover six specified areas;
- develop a measurement system for process and outcome measures;
- develop and strengthen formal relationships with community groups ensure parole and community programs target needs of moderate and high-risk offenders; assist returning offenders with housing, substance abuse, employment and reduce community risk factors;
- develop the community as a protective factor for returning offenders; and
- develop structured guidelines to respond to technical violations based on offender risk and seriousness of the violation.²²

In addition to the list of recommendations, the Expert Panel Report developed the California Logic Model, an eight-stage graphic representation of the process for assessing offenders for risk and criminogenic needs, delivering programs, measuring success, prepping offenders for reentry, providing reintegrative services, and follow-up.²³ The initial step of the model requires offender risk assessment as a first step to determine provision of rehabilitation programming. In the logic model, programming is targeted for the moderate and higher risk offender, with the low-risk offender removed from participation. Limiting correctional programming to higher risk offenders, while counterintuitive to some, is derived from research on effective programming principles.²⁴ Since the 1990s, a number of researchers have been examining factors of successful rehabilitative programming.²⁵ One of the key findings is that programs are most effective with higher risk offenders (at least in terms of recidivism reduction).²⁶ Providing rehabilitative programming to lower risk offenders has been shown to be counter-productive—often increasing recidivism.²⁷ The California Logic Model has

22. See EXPERT PANEL ON ADULT OFFENDER RECIDIVISM REDUCTION PROGRAMMING, *supra* note 16, at viii–xiv.

23. *Id.* at 20.

24. *Id.*

25. DON A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (5th ed. 2010); see also Don A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 *CRIMINOLOGY* 369 (1990).

26. ANDREWS & BONTA, *supra* note 25.

27. *Id.*

remained a benchmark for measuring progress in rehabilitation efforts by the CDCR since it was introduced. In its yearly report, the California Rehabilitation Oversight Board considers progress in each of the domains.²⁸

C. Policy Options 2006 to 2011 to Affect California's Prison Population

Between the Governor's proclamation in 2006 and 2011, California attempted a number of measures to reduce its prison population. Population levers may be divided (grossly) into three kinds of efforts—those at the “front end” of the system, those at the “back end,” and those affecting the prison population. For example, “front end” policy options include changing the types of offenses or offenders who receive a prison sentence. “Back end” changes can be achieved by changing how parole violators are handled. Changes to the institutional population can include changes in the use of good or gain time earned, sentence length, parole release changes, transferring inmates out of state, etc.

For the first few years after the 2006 Governor's proclamation, several options were tried that collectively did not reduce the prison population greatly. Assembly Bill 900, known as the “Public Safety and Offender Rehabilitation Services Act of 2007,” contained language to add over 50,000 beds, using a combination of out-of-state transfers, medical beds, beds in existing and secure reentry facilities as well as county jails.²⁹ Fifty million dollars was targeted for rehabilitative initiatives for CDCR to expand academic substance abuse and other services.³⁰ A California Legislative Analyst report two years later noted that the additional beds were slow to be added due difficulties in citing some of the reentry facilities in local communities, as well as slow starts in the CDCR's own infill construction projects at existing facilities.³¹

In 2009, California Senate Bill 678, “The California Community Corrections Performance Incentives Act of 2009,” provided county incentives to reduce the use of prison as a sanction for probation violators, and thus help reduce the state prison population. Under this bill, local county community corrections partnerships were to be established, headed by the Chief Probation Officer in each county to support evidence-based probation supervision practices.³² Estimates show that

28. See *California Rehabilitation Oversight Board (C-ROB)*, OFF. INSPECTOR GEN., <http://www.oig.ca.gov/pages/c-rob.php#> [https://perma.cc/NN2M-EWWT] (last visited Feb. 9, 2018), for semiannual and annual reports prepared by C-ROB.

29. See NANCY PAULUS, LEGISLATIVE ANALYST'S OFFICE, A STATUS REPORT: IMPLEMENTING AB 900'S PRISON CONSTRUCTION AND REHABILITATION INITIATIVES 1 (2009), http://www.lao.ca.gov/2009/crim/ab900/ab900_051409.pdf [https://perma.cc/F9X9-6G2M].

30. *Id.*

31. See MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, A STATUS REPORT: REDUCING PRISON OVERCROWDING IN CALIFORNIA 5–6 (2011), http://www.lao.ca.gov/reports/2011/crim/overcrowding_080511.pdf [https://perma.cc/AB6M-D24G].

32. See CAL. ADMIN. OFFICE OF THE COURTS, SB678 YEAR 1 REPORT: IMPLEMENTATION OF THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVE ACT (2011), www.courts.ca.gov/documents/SB678-Year-1-Report-FINAL.pdf [https://perma.cc/CPK2-EE9B].

approximately 6,000 offenders were diverted from prison in the first year; 9,500 in the second year.³³

Subsequent to this, in 2010, Senate Bill x3-18 contained a laundry list of policy options, reflecting all three mechanisms discussed above to reduce populations (although some not stated explicitly), including:

- earned credits in prison and jail;
- non-revocable parole;
- changing felony property crime limits;
- probation revocation reduction incentives;
- reentry courts; and
- parole violation decision making instrument.

The expectation was that the prison population would be reduced by about 6,500 over the course of a year.³⁴ Earned credits reflect a rehabilitative focus toward reductions in sentence length. Legislation allowed offenders to earn up to six weeks per year off their sentence for completion of certain rehabilitative programs.³⁵ The effort to change property limits foreshadowed Proposition 47, which was passed in 2014. Under SB x3-18, some grand theft felony crimes' monetary limits were increased to \$950 from \$400, but the monetary limits for basic grant theft were not changed.³⁶ Reentry courts, which provided highly-structured treatment for parolees, were to be used as an alternative to returning parolees to prison.³⁷ These types of “specialty” courts have been popular since the 1980s, with the introduction of drug courts.³⁸ In these courts, participants generally have a much more “hands-on” experience, with more direct contact with the court (judge) and a focus on rehabilitation as opposed to punishment.³⁹ I discuss in greater detail below the implementation of non-revocable parole (NRP) as well as the parole violation decision making instrument—two policies that considered, perhaps for the first time, offender risk in changes that would affect prison population crowding. However, with all these legislative changes, one might categorize them as a modest

33. *Id.*; see also CAL. ADMIN. OFFICE OF THE COURTS, SB 678 YEAR 2 REPORT: IMPLEMENTATION OF THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT OF 2009 (2012), www.courts.ca.gov/documents/SB678-Year-2-report.pdf [https://perma.cc/H5WX-GVTG].

34. See OPEC Staff, *CDCR Implements Public Safety Reforms to Parole Supervision, Expanded Incentive Credits for Inmates*, INSIDE CDCR (Jan. 25, 2010), <http://www.insidecdcr.ca.gov/2010/01/cdcr-implements-public-safety-reforms-to-parole-supervision-expanded-incentive-credits-for-inmates/> [https://perma.cc/PH9J-FFAC].

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. RYAN S. KING & JILL PASQUARELLA, *THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE* 14 (2009); see also Shannon M. Carey, Juliette R. Mackin & Michael W. Finigan, *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*, VIII DRUG CT. REV. 6, 24, 33 (2012) (citing participant exposure to the judge, sparing use of jail as a sanction, and habilitation services as three best practices in drug courts for positive outcomes).

package. However, from mid-summer 2006 to mid-summer of 2011, CDCR's prison population had dropped from 171,000 to 152,000.⁴⁰

II. HOW CALIFORNIA INCORPORATED "RISK" INTO DECISION MAKING

A. Development of the California Static Risk Assessment (CSRA) Tool

It was also during these years, 2006 to 2011, that the CDCR began to incorporate the concept of offender risk in decision making at an agency-wide level. As noted earlier, the 2007 Expert Panel Report recommended as the first step of the California Logic Model, offenders were to receive a risk assessment.⁴¹ Prior to the Expert Panel Report, the CDCR had adopted the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) in 2005 for parole, but it has not been adopted departmentwide. The COMPAS tool has a number of scales, including risk scales to predict the likelihood of four different measures of recidivism (violence, recidivism, flight, and non-compliance).⁴² In addition, the COMPAS contained "needs" scales measuring 18 different areas (e.g., criminal peers, family criminality, residential instability, social isolation).⁴³ The COMPAS is administered individually to offenders, gathering information from self-report and official records to create a profile of an inmate's risk and needs.⁴⁴

In late 2007, CDCR discussions centered on adopting a tool that would focus specifically on offender risk as a "plug in" or replacement for the risk scales used in the COMPAS tool to ensure that risk of recidivism could be calculated for *all* CDCR offenders—both inmates and parolees. The Washington State Institute for Public Policy's (WSIPP) static risk tool was chosen as a model for California.⁴⁵ This tool was selected for several reasons. First, it contains only static measures. At the time,

40. An additional 9,600 inmates were out-of-state, per Gov. Schwarzenegger's Declaration.

41. EXPERT PANEL ON ADULT OFFENDER & RECIDIVISM REDUCTION PROGRAMMING, *supra* note 17, at 21.

42. *Id.* at 22.

43. JEFFREY LIN, CTR. FOR EVIDENCE-BASED CORR., PAROLEE NEEDS IN CALIFORNIA: A DESCRIPTIVE ANALYSIS OF 2006 COMPAS DATA 4-5 (2007), <http://ucicorrections.seweb.uci.edu/files/2013/06/Parolee-Needs-in-California-A-Descriptive-Analysis-of-2006-COMPAS-Data.pdf> [<https://perma.cc/PL9L-YMG7>] (noting that evaluations of the COMPAS tool in California have been mixed; a 2007 evaluation on the psychometric properties of the COMPAS by Skeem and Louden found limitations in interrater reliability, predictive utility and construct validity); *see also* JENNIFER L. SKEEM & JENNIFER ENO LOUDEN, CTR. FOR PUB. POLICY RESEARCH, ASSESSMENT OF EVIDENCE ON THE QUALITY OF THE CORRECTIONAL OFFENDER MANAGEMENT PROFILING FOR ALTERNATIVE SANCTIONS (COMPAS) 28 (2007), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.732.5843&rep=rep1&type=pdf> [<https://perma.cc/8M68-573C>].

44. EXPERT PANEL ON ADULT OFFENDER & RECIDIVISM REDUCTION PROGRAMMING, *supra* note 17, at 22 (explaining what COMPAS is in the context of a recommendation that addresses the internal causes of California's rehabilitation programming problems).

45. ROBERT BARNOSKI & ELIZABETH DRAKE, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON'S OFFENDER ACCOUNTABILITY ACT: DEPARTMENT OF CORRECTIONS' STATIC RISK INSTRUMENT 1 (2008) http://www.wsipp.wa.gov/ReportFile/977/Wsipp_Washingtons-Offender-Accountability-Act-Department-of-Corrections-Static-Risk-Instrument_Full-Report-Updated-October-2008.pdf [<https://perma.cc/77XA-UAGB>].

data systems utilized by CRCR did not record dynamic factors for all offenders, thus it was not possible for CDCR to include such factors as educational attainment or substance abuse, which are often included in risk scales.⁴⁶ In addition, CDCR officials determined that the California offender population was similar to the Washington Department of Corrections offender population and that a tool developed on Washington offenders should result in a valid instrument for the California system.

This tool had the advantages of being automated, and thus reliably calculated, and as accurate as other more time intensive risk assessment tools available.⁴⁷ The risk tool consisted of twenty-six items, including offender gender, age, four juvenile criminal history items and twenty from an offender's adult criminal history. Although generally viewed as less "advanced" than risk tools that use both static and dynamic factors, researchers in Washington State had found that the static tool performed as well as the LSI-R, a tool that included both static and dynamic factors.⁴⁸ The actual development of the tool was done by the UCI Center for Evidence-Based Corrections, in collaboration with the Office of Research at the CDCR. The tool was created in a very short time period. Work began in fall 2007 and the initial tool was completed by early 2008.

The CDCR tool, named the California Static Risk Assessment, utilizes automated criminal history records from the California Department of Justice. Conceptually, the tool counts prior convictions in the same adult twenty felony and misdemeanor categories as did the Washington State tool (e.g., murder/manslaughter, property, drug) in an offender's criminal history, weighs the counts to produce a score on each of three subscales defined as: (1) violent felony; (2) property violent; and (3) any felony which is used to predict conviction during three years after release to the community.⁴⁹ During development, the CDCR determined that conviction would be the most appropriate recidivism measure to consider.⁵⁰ Offenders are then assigned to one of five risk levels depending upon their scores on the three subscales using a hierarchical process. Those offenders with the highest violence subscale scores are considered "high-risk-violent." For the

46. PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, OFFENDER RISK & NEEDS ASSESSMENT INSTRUMENTS: A PRIMER FOR COURTS (2014), http://www.ncsc.org/~media/microsites/files/csi/bja%20rna%20final%20report_combined%20files%208-22-14.ashx [<https://perma.cc/C9PM-7UEX>].

47. *Id.* at A-61.

48. *Id.* at A-59.

49. *Id.* at A-61 through 62.

50. There is no universally accepted measure of recidivism. Recently California's Board of State and Community Corrections was tasked with developing a standardized measure of recidivism for the state. The effort was led by the California Bureau of State and Community Corrections (BSCC), which consulted with a number of justice system stakeholders. The group finally voted 8 to 2 in favor of a single definition based on convictions over a three-year period, but hedged their recommendations with the addition of supplemental measures. *See* Press Release, Cal. Bd. of State & Cmty. Corr., BSCC Committee Releases Recidivism Definition (Sept. 25, 1998), <http://www.bscc.ca.gov/downloads/Recidivism%20Defintion%20Press%20Release.pdf> [<https://perma.cc/3447-3DYR>].

remaining offenders, those with a high property/violent score are classified as “high-risk-property.” The remaining three groups—high-risk drugs, moderate and low-risk offenders—are then assigned in a sorting process based on their scores on the “any felony” subscale.⁵¹ Over 100,000 releases from the CDCR in 2002-2003 were used in developing the tool.⁵² Using standard practices, the development process included a construction and validation phase, in which findings from a randomly sampled half of the release cohort are then tested on the second half. The tool’s accuracy, as measured by a common metric, “Area Under the Curve,” is in line with other instruments in the field, yielding moderately predictive results.⁵³ As is the case with prediction instruments, recidivism rates are calculated based on a group averages. Thus, recidivism rates may not accurately predict recidivism for a particular individual. Some individuals who are predicted to have a high probability of recidivism, may in reality not commit crimes (i.e., false positives); some individuals predicted to be low-risk end up offending (i.e., false negatives).

The resulting CSRA instrument automatically calculates risk of recidivism scores for approximately 95% of all CDCR offenders using the scoring algorithm and criminal history records.⁵⁴ A manual computation is necessary for offenders with all or portions of their criminal histories still in non-automated formats. Figure 1 shows the risk assessment groups and the risk of recidivism for each of the five groups. What is noticeable across the different groups are the high levels of recidivism, even for the low-risk group. In other words, even though the group is called “low,” it is by no means “no risk.”

51. *See id.*

52. *See id.*

53. James Hess & Susan Turner, *Accuracy of Risk Assessment in Corrections Populations Management: Where is the Value Added*, in HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 93-113 (Faye S. Taxman ed., 2016); SUSAN TURNER ET AL., UNIV. OF CAL. IRVINE CTR. FOR EVIDENCE-BASED CORR., DEVELOPMENT OF THE CALIFORNIA STATIC RISK ASSESSMENT INSTRUMENT (CSRA) (2009), <http://ucicorrections.seweb.uci.edu/files/2009/11/CSRA-Working-Paper.pdf> [<https://perma.cc/NNK7-WRSB>].

54. For those offenders with manual rap sheets, this is calculated by hand.

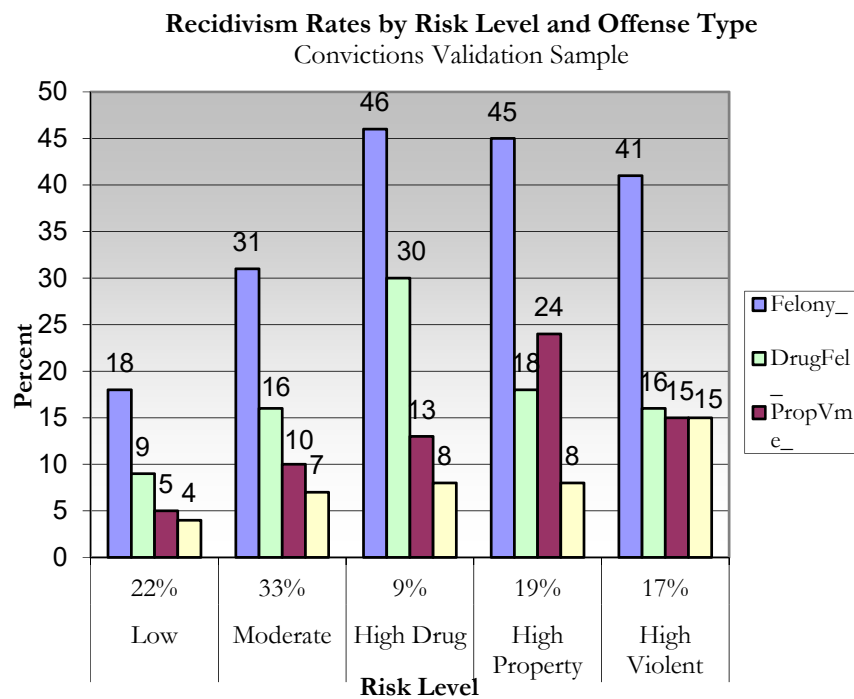


Figure 1

B. Use of Risk in Parole Violation Decision Making Instrument

As the prison population soared in California, it was obvious that a large part of the growth was due to parole revocations to prison. In 2005, approximately two-thirds of parolees had their parole revoked within three years after release and were reincarcerated in CDCR.⁵⁵ Revocations were used to handle not only what is referred to as “technical” violations—those of the terms and conditions that are not in themselves criminal behavior, such as failure to report—but also to serve as an alternative to courts for processing criminal behavior. In fact, a report to the Little Hoover Commission (LHC) by Jeremy Travis indicates that the largest share of technical parole violations were for criminal behaviors.⁵⁶ Several years before, another LHC report indicated that prison was being used too frequently as a sanction for violators, contrasted with other states which would use drug treatment or intermediate sanctions for violations.⁵⁷ There was also the perception at the time that parole agents were not consistent in applying sanctions for parole violations.

55. Ryan Fischer, *Are California's Recidivism Rates Really the Highest in the Nation? It Depends on What Measure of Recidivism You Use*, 1 BULLETIN 1, 1–2 (2005).

56. JEREMY TRAVIS, THE URBAN INST., PAROLE IN CALIFORNIA 1980-2000: IMPLICATIONS FOR REFORM 9 (2003).

57. LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES, EXECUTIVE SUMMARY xii–xiii (2003).

The CDCR engaged in planning processes to implement a parole violation decision making instrument, even before it was required by SBx-13, in an attempt to reduce the use of prison as a sanction for violations and to encourage more consistent applications of responses to violations.⁵⁸ The use of decision-making matrices for parole responses was not new. The Salient Factor Score had been created decades earlier for use in parole decision making.⁵⁹ More recently, the state of Ohio implemented a decision-making tool in 2005 and found the initiative revealed that the guidelines resulted in significantly-reduced use of revocations and revocation hearings and sentences to local jails.⁶⁰ At its core, the PVDMI combines two scales—risk of recidivism (defined by the CSRA risk group) and severity of the current violation, along with escalation for sex offenders—for recommended responses to violations. During the planning process at the CDCR, the implementation team categorized parole violations into one of four categories based on seriousness, as defined by the length of time of return to custody for the violation. The PVDMI does not tailor the response type to the violation type, for example, if a parolee commits a drug violation, and it does not specifically recommend drug treatment or a sanction related to drug use. It does, however, include a broad menu of options for the Least Intensive (e.g., verbal reprimand, behavioral contract) and Moderately Intensive (e.g., increased urinalysis testing, referral to a variety of program options) sanctions so that parole agents can choose an appropriate sanction within a set of options based on the violation and the parolee.⁶¹ According to the tool, low-risk parolees with low-severity violations would receive the least intrusive responses, while high-risk parolees with high-severity violations would be sanctioned with a revocation and return to prison.⁶²

When a parole agent entered a parolee's name into PVDMI database, an offender's CSRA score would automatically populate on the tool; the recommended decision box was then displayed. Officers could "override" or "underwrite" the tool's recommendation if they cited certain stabilizing (e.g., employment, job stability) or destabilizing factors (e.g., chronic pattern of violations under supervision, escalating drug or alcohol addiction).⁶³

58. MADELINE M. CARTER & LEILAH GILLIGAN, *THE DEVELOPMENT OF THE CALIFORNIA PAROLE VIOLATIONS DECISION MAKING INSTRUMENT (PVDMI): FINAL REPORT* (2009); see also RYKEN GRATTET ET AL., NAT'L INST. OF JUSTICE, *PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA* (2008), <http://ucicorrections.seweb.uci.edu/files/2013/06/Parole-Violations-and-Revocations-in-California.pdf> [<https://perma.cc/LV7J-7KQ7>].

59. Peter Hoffman & Sheldon Adelberg, *The Salient Factor Score: A Nontechnical Overview*, 44 FED. PROB. 44–52 (1980).

60. BRIAN MARTIN & STEVE VAN DINE, NAT'L INST. OF JUSTICE, *EXAMINING THE IMPACT OF OHIO'S PROGRESSIVE SANCTION GRID: FINAL REPORT* xi (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/224317.pdf> [<https://perma.cc/U6DV-RT26>].

61. Susan Turner et al., *Evaluation of the California Parole Violation Decision-Making Instrument (PVDMI)*, 35 J. CRIME & JUST. 269, 272 (2012).

62. *Id.*

63. *Id.*

The UCI Center of Evidence-Based Corrections conducted a process and outcome evaluation of the pilot test of the PVDMI.⁶⁴ Of particular interest was how well parole agents in the field would begin to use and incorporate the use of an actuarial tool in their decision-making, which had historically been based on their personal “gut” experiences.⁶⁵

Findings from the study were not particularly positive. An examination of whether parole agents used the recommended sanctions, based on the offender’s risk and severity of behavior, revealed a substantial number of instances in which the agents did not follow the tool’s recommended decision. It appeared that agents did not follow the tool about a third of the time, often citing a lack of treatment options available locally. For example, we found a number of instances in which agents chose to revoke a parolee when the tool recommended a less severe sanction. When we examined reasons for escalating the tool’s recommended option, the two most frequent destabilizing factors that were selected were that the “chronic pattern of violations under supervision” and “violation is directly related to either the current commitment offense behavior or a pattern of previous criminal behavior.” This, despite the fact that the CSRA was precisely developed to summarize the risk inherent in the parolee’s criminal record, suggested the agents did not believe the tool accurately captured criminal behavior.⁶⁶ Disappointingly, the tool did not appear to reduce the use of revocation as a sanction for parolee misbehavior, perhaps the result of the use of underrides and overrides.

The tool also appeared to garner resistance from agents on other levels. We found that agents tried to second guess the tool. Agents report that they had a sanction in mind before entering the data into the automated tool. If the tool “did not agree” with their feelings about the appropriateness of a sanction, they would use stabilizing or destabilizing factors to bring the final recommendation into line with their preferred sanction. The resistance from line officers in California is not unique. Steiner and colleagues found that parole officers in Ohio expressed dissatisfaction with the tool on a number of dimensions, including whether the tool assisted in decision making.⁶⁷

C. Use of Risk in Non-Revocable Parole

Another policy change contained in SBx-18 was the use of non-revocable parole (NRP). This policy was developed based on the risk, need, and responsivity (RNR) literature, which recommends that resources be targeted to the higher risk individuals and not those at lower risk of recidivism. In fact, studies have shown

64. *Id.*; AMY MURPHY & SUSAN TURNER, UNIV. OF CAL. IRVINE CTR. FOR EVIDENCE-BASED CORR., PAROLE VIOLATION DECISION-MAKING INSTRUMENT (PVDMI) PROCESS EVALUATION (2009), <http://ucicorrections.seweb.uci.edu/files/2013/06/PVDMI.pdf> [<https://perma.cc/372N-9UR2>].

65. Turner et al., *supra* note 61.

66. See MURPHEY et al., *supra* note 64.

67. Benjamin Steiner et al., *Understanding Parole Officers’ Responses to Sanctioning Reform*, 57 CRIME & DELINQ. 222 (2011).

that intensive resources targeted at the lower risk can result in worse outcomes.⁶⁸ Under non-revocable parole, “lower level” offenders would be placed on a form of summary parole when released from prison. Non-revocable parolees would not be subject to the usual terms and conditions of parole, which often resulted in revocations and contributed to the “churning” prison population. They would however, be subject to search and seizure, a component of the program that was a concession to law enforcements concern that without some kind of “hook,” public safety would be compromised. With fewer resources dedicated to the lower level parolees, parole would be able to focus more intensive resources on the offenders to improve their chances of successful reentry into the community.

Eligibility for non-revocable parole included the following:

- No serious offenses;
- No violent offenses;
- No violent sex offense or sex offender;
- No validated prison gang member;
- No prison disciplinary incidents;
- Low- or moderate-risk to recidivate; and
- Parolee did not refuse to sign paperwork for participation.⁶⁹

In considering the factors above, risk is only one of a number of factors for NRP eligibility. The first four may be described as “high stakes” offenders—those serious and violent offenders, as well as sex offenders that the public and policy makers consider more serious than, say property or drug offenders. Given the restrictive nature of the criteria, it was expected that perhaps 10% of the parole population would be eligible.⁷⁰

The NRP had a difficult, if short, lifespan. Victims’ rights groups, law enforcement and district attorneys were against the policy and the media engendered fear in the public. Perhaps one of the most unfortunate aspects of the rollout was the flawed implementation that snagged the CSRA risk assessment tool in a heated debate and ultimate investigation by the California Inspector General. For accurate risk-prediction estimates, the automated scoring protocol for the CSRA requires that the offender’s criminal history record be complete. A number of the criminal history records used as input to the tool were incomplete due to some of old prior record history being stored in manual, as opposed to automated records. State staff had not known this was the case. As a result, inmates were

68. Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-risk Offenders*, 2004 TOPICS COMMUNITY CORRECTIONS 3.

69. See *Division of Adult Parole Operations: Non-Revocable Parole*, CAL. DEP’T. CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/parole/non_revocable_parole/index.html [https://web.archive.org/web/20170224074752/http://www.cdcr.ca.gov/parole/non_revocable_parole/index.html] (last visited Feb. 24, 2017).

70. Susan Turner, *Predicting Risk: Who Knew It Was Such a Risky Business?*, in ENVISIONING CRIMINOLOGY: RESEARCHERS ON RESEARCH AS A PROCESS OF DISCOVERY 205 (Michael D. Maltz & Stephen K. Rice eds., 2015).

erroneously determined as eligible and released onto NRP before the CDCR could correctly rescore the offenders and return parolees to their proper supervision.⁷¹ Newspaper articles criticized the Department and tool as being “too dangerous,” noted crimes committed by these offenders, and sharply criticized the CSRA accuracy based on an Inspector General Report that was deeply flawed.⁷²

One of the most frustrating aspects of the NRP rollout from a researcher’s point of view was the apparent misunderstanding about what a risk assessment tool—any risk assessment tool—can accomplish. In a meeting with the state legislator who called for the Office of the Inspector General (IG) investigation, the legislator commented that he was very supportive of risk assessment tools, as long as they were 100% accurate.⁷³ Ironically, no evaluation of the actual impact of the NRP on public safety was ever completed in order to learn whether the NRP summary parole was more harmful to public safety than traditional parole. California missed this opportunity to add to current knowledge about parole supervision, on which there is no strong evidence that parole supervision has *any* impact on offender outcomes.⁷⁴ Public Safety Realignment Act (AB 109), enacted in October 2011, essentially phased out NRP, as lower level offenders parole releases were subject to post-release supervision by local counties.

III. HOW CALIFORNIA DID NOT INCORPORATE “RISK” INTO DECISION MAKING

A. Public Safety Realignment (AB 109)

As California prisons continued to face takeover by the federal government for crowded conditions, the state enacted legislation in 2011 (AB 109 and trailer bills) collectively known as Public Safety Realignment (“Realignment”). The analysis here focuses on how the legislation dealt with the selection of offenders placed under the responsibility of local county corrections in an effort to bring the California prison population to 137.5% of design capacity.⁷⁵

71. *Id.*

72. *See* STATE OF CAL. OFFICE OF THE INSPECTOR GEN., SPECIAL REPORT: CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION’S IMPLEMENTATION OF THE NON-REVOCABLE PAROLE PROGRAM (May 2011), <https://www.oig.ca.gov/media/reports/ARCHIVE/BOI/Special%20Report%20California%20Department%20of%20Corrections%20and%20Rehabilitations%20Implementation%20of%20the%20Non-Revocable%20Parole%20Program.pdf> [<https://perma.cc/W7Y7-P5JW>]. An assessment of the IG report is contained in Turner, *supra* note 70. *See also* Ted W. Lieu, Editorial, *California Prisons: ‘Non-Revocable Parole’ is Too Dangerous*, L.A. TIMES (June 10, 2011), <http://articles.latimes.com/2011/jun/10/opinion/la-oe-lieu-nrp-20110610> [<https://perma.cc/8LMQ-6KJE>].

73. *See* Turner, *supra* note 70.

74. AMY L. SOLOMON ET AL., URBAN INST., DOES PAROLE WORK? ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES (2005), <https://www.urban.org/sites/default/files/publication/51536/311156-Does-Parole-Work-.PDF> [<https://perma.cc/7TWS-ECL8>].

75. *See* Joan Petersilia, *Realigning Corrections, California Style*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 8–13 (2016), for discussions of the background leading up to Realignment, how the legislation is working, and what can be learned from the California experiment. *See also* Brown v. Plata, 563 U.S. 493 (2011); CAL. DEP’T OF CORR. & REHAB., FACT SHEET: 2011 PUBLIC

AB109 targeted reduction in prison population by targeting both front end and back end policy options. Legislation affected the “front end”—prison admissions—by requiring that offenders convicted of non-serious, non-violent, and non-sex felony offenses with no previous serious and violent priors be handled locally. If a prison sentence was imposed, the time would be spent in a local jail, rather than state prison. Jail sentences could consist of “jail only,” or the judge could impose a split sentence in which a jail term was followed by a term of supervision by county probation. The latter were referred to as split sentences; community time would be supervised in the community by probation. The law did not prevent the traditional option of sentencing offenders to felony probation.⁷⁶

The two other large groups targeted by the legislation were “back end.” Historically, virtually all California offenders were placed on parole (often three years), supervised by the CDCR.⁷⁷ Under Realignment, offenders whose current conviction was for a non-serious, non-violent offenses and sex offenders who were not determined to be high-risk by CDCR would no longer be supervised on parole after release.⁷⁸ They would be supervised in the community by local county probation under post-release community supervision (PRCS). The third major group targeted was parole violators. Recall earlier that a large driver of the increase in the California prison population was the “churning” of parole violators in and out of prison, serving approximately four months on average, during which little programming could take place.⁷⁹ Under Realignment, parole violators could no longer be returned to prison—they were to be handled locally by judges and could receive jail terms up to 180 days as a sanction.⁸⁰ In addition, parolees could be subject to a “flash incarceration” of 10 days.⁸¹ Virtually every decision made for eligibility (with the exception of high-risk sex offender exclusion for PRCS) was offense-based. For the front-end sentencing, both prior and current offenses were considered. For PRCS, it was only the current offense; offenders could have any number of prior serious or violent offenses in their background (we return to this point later on). The department’s risk assessment instrument—the CSRA—was not utilized in any way.

Realignment was a massive change in the way California dealt with felony offenders. There was a great deal of angst in all sectors about the impact of the legislation, including cries that crime rates would escalate, victims’ rights groups

SAFETY REALIGNMENT (2013), www.cdcr.ca.gov/realignment/docs/realignment-fact-sheet.pdf [<https://perma.cc/SKV7-F4JU>] [hereinafter PUBLIC SAFETY REALIGNMENT FACT SHEET].

76. A.B. 109, 2011 Leg., Reg. Sess. (Cal. 2011).

77. See PUBLIC SAFETY REALIGNMENT FACT SHEET, *supra* note 75.

78. In addition, offenders who suffered from mental disorders or who were on parole prior to October 1, 2011, were not eligible for PRCS.

79. See EXPERT PANEL ON ADULT OFFENDER & RECIDIVISM & REDUCTION PROGRAMMING, *supra* note 17.

80. Initially, parole handled the violations; as of July 1, 2013, the parole revocation process is handled by the local courts for all but “lifer” offenders on parole. See PUBLIC SAFETY REALIGNMENT FACT SHEET, *supra* note 75.

81. *Id.*

concern about public safety, and local probation's need to ramp up supervision capacity for the new offenders they were to supervise.⁸² Local counties were provided funding, initially based on projections of the numbers of offenders the counties would be responsible for, county population size, and performance under SB678 (described earlier), in a performance-based grant program designed to reduce probation revocations to prison.⁸³ This funding was designed to allow counties a great deal of latitude in how they responded to the increased numbers of offenders; counties varied greatly in the extent to which they designed new dollars for jails or for services.⁸⁴

Although Realignment signaled a massive change in corrections, there was no funding dedicated to determining the implementation and impact of Realignment statewide. However, individual research organizations, stakeholder groups, and counties have helped paint a portrait of how Realignment was implemented and how it impacted California corrections. First, the prison population at the CDCR declined. Between October 2011 and September 2012, the prison population was reduced by over 27,000.⁸⁵ Crime rates did not increase as a result of Realignment, as reflected by an analysis by the Public Policy Institute of California (PPIC), including property crimes, with the exception of an increase in car theft.⁸⁶ Jail populations, as expected, did rise about 14% in October 2014 relative to before Realignment.⁸⁷ An overall assessment of the state incarceration rate showed that it had dropped as a result of Realignment. Stress, however, was placed on local county probation departments, who received many more offenders than initially projected. The Chief Probation Officers of California indicated that in the first year of Realignment, 23,000 more offenders were placed under supervision of the counties

82. See JOAN PETERSILIA, STANFORD CRIMINAL JUSTICE CENTER, VOICES FROM THE FIELD: HOW CALIFORNIA STAKEHOLDERS VIEW PUBLIC SAFETY REALIGNMENT (2014), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/443439/doc/slspublic/Petersilia%20VOICES%20no%20es%20Final%20022814.pdf> [<https://perma.cc/JHH5-ER27>], for findings from a study in which stakeholders from criminal justice agencies were interviewed regarding the implementation and impact of the Realignment.

83. LEGISLATIVE ANALYST'S OFFICE, PUBLIC SAFETY REALIGNMENT FUNDING ALLOCATION (2014), <http://www.lao.ca.gov/handouts/crimjust/2014/Public-Safety-Realignment-051214.pdf> [<https://perma.cc/63MN-45TA>].

84. SARA ABARBANEL ET AL., STANFORD CRIMINAL JUSTICE CTR., REALIGNING THE REVOLVING DOOR: AN ANALYSIS OF CALIFORNIA COUNTIES' AB 109 2011-2012 IMPLEMENTATION PLANS (2013), <https://law.stanford.edu/index.php?webauth-document=child-page/183091/doc/slspublic/Realigning%20the%20Revolving%20Door%20with%20updates%20for%2058%20counties090913.pdf> [<https://perma.cc/T7YY-6B3D>].

85. See Magnus Lofstrom & Brandon Martin, *Public Safety Realignment: Impacts So Far*, PUB. POL'Y INST. CAL. (Sept. 2015), <http://www.ppic.org/publication/public-safety-realignment-impacts-so-far/> [<https://perma.cc/HV8C-77PY>].

86. MAGNUS LOFSTRUM & STEVEN RAPHAEL, PUB. POLICY INST. OF CAL., PUBLIC SAFETY REALIGNMENT AND CRIME RATES IN CALIFORNIA (2013), http://www.ppic.org/content/pubs/report/R_1213MLR.pdf [<https://perma.cc/BBL3-5SGV>].

87. See Magnus Lofstrom & Brandon Martin, *Just the FACTS: California's County Jails*, PUB. POL'Y INST. CAL. (Nov. 2017), <http://www.ppic.org/publication/californias-county-jails/> [<https://perma.cc/KY7P-CXNG>].

as a result of Post Release Community Supervision.⁸⁸ What was interesting was that probation managers indicated that the (supposedly) “lower level” offenders were actually higher risk and presented more challenges than they initially anticipated.⁸⁹

In 2014, Gerlinger and Turner directly addressed the issue of the risk of these “lower level” realigned offenders by examining criminal history backgrounds and recidivism of “proxy” parole and PRCS groups using a release cohort of CDCR offenders.⁹⁰ Using prisoners released from the CDCR in 2005 and 2006, the research team divided offenders into two groups. Offenders who were convicted of a current serious or violent or sex offense, or offenders with mental health conditions, were considered proxy-parolees.⁹¹ All other offenders were considered as proxy-PRCS. The study team found that the “lower level” offenders—the PRCS group—had *higher* re-arrest rates at three years than the proxy-parolees. Approximately 80% of the PRCS group had recidivated, compared with 71% of the proxy-parolees.⁹² The backgrounds of the proxy-PRCS groups were actually quite serious where only 13% were considered low-risk.⁹³ 59% were in the high risk-to-recidivate category.⁹⁴ For the proxy-parole group, over half were in the low- and moderate-risk groups as identified by the CSRA.⁹⁵ Prior records of proxy-PRCS were surprising. 11% had prior serious offenses and 11% had prior violent offenses.⁹⁶ The percent of proxy-PRCS offenders with prior violent or serious offenses was higher for the proxy-PRCS than the proxy-parole group.⁹⁷ Essentially, the “lower level” offenders identified under Realignment were not as “low-risk” as one might think.

B. Proposition 47 Changes Some Drug and Property Felonies to Misdemeanors

In November 2014, California voters passed Proposition 47, the “Safe Neighborhood and Schools Act,” which reduced penalties for certain non-serious

88. *Public Safety Realignment – What is It?*, REALIGNMENT PERSP. (Chief Prob. Officers of Cal., Sacramento, Cal.), Jul. 2012, www.bscc.ca.gov/downloads/epocbrief11.pdf [<https://perma.cc/X6CQ-C2SL>].

89. *See Assessing Risks and Needs of Realigned Populations: Post-Release Community Supervision and Services*, CPOC ISSUE BRIEF (Chief Prob. Officers of Cal., Sacramento, Cal.), Fall 2013, https://www.cpoc.org/sites/main/files/file-attachments/issuebrief4_0.pdf [<https://perma.cc/5AHF-4BMT>]; *see also* SUSAN TURNER ET AL., PUBLIC SAFETY REALIGNMENT IN TWELVE CALIFORNIA COUNTIES (2015), https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR872/RAND_RR872.pdf [<https://perma.cc/4B58-DP9A>].

90. In order not to contaminate expected outcomes of offenders eligible for parole and PRCS with their level of community supervision, we chose to simulate findings from offenders while they were on parole. Thus we could determine their inherent risk separate from type of supervision. *See* Julie Gerlinger & Susan Turner, *California’s Public Safety Realignment: Correctional Policy Based on Stakes Rather than Risk*, 26 CRIM. JUST. POL’Y REV. 805 (2015).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*; *see also* Turner, *supra* note 70.

and non-violent property and drug crimes to misdemeanors. The Act was part of California's continuing effort to reduce the prison population to be in compliance with a three-judge court order requiring CDCR to reduce the prison population to 137.5% of capacity.⁹⁸

The proposition also allowed offenders previously convicted of felonies (who were currently serving time or were on probation for felony convictions) and offenders who had completed probation terms to petition the court for reclassification of their offenses to misdemeanors. State savings from the reduction of these crimes would be spent on mental health and substance, truancy, and drop-out prevention.⁹⁹ Funds from Proposition 47 have yet to be distributed to counties for education and services, however, findings are being generated on the impact of Proposition 47. As predicted, the population at the CDCR fell after Proposition 47. From October 2014 to October 2015, the state prison population dropped from 127,378 to 122,342 (in-state).¹⁰⁰ Analyses by the PPIC estimated that there was an overall decline of 9 % in the jail population, driven by a reduction in persons serving or being held for Proposition 47 offenses.¹⁰¹ Although definitive data are not available regarding the relationship between Proposition 47 and crime, critics maintain that recently-observed increases in violent and property crime are the direct result of Proposition 47. For example, according to the San Francisco Chronicle, San Francisco led the nation in the highest increase in property crimes from 2014 to 2015 (using data from the Federal Bureau of Investigation Uniform Crime Reporting program).¹⁰² The Los Angeles Sheriff, along with other law enforcement officials, maintains that “Proposition 47 has led to more crime while forcing fewer addicts into treatment.”¹⁰³ Although it is difficult to parse the true effects of Proposition 47, given that other causes may be operating, critics believe that without offenders having the “stick” of the justice system to force them into

98. See *Coleman v. Schwarzenegger*, No. Civ. S-90-0520 LKK JFM (E.D. Cal. & N.D. Cal. Oct. 21, 2009); *Plata v. Schwarzenegger*, No. C01-1351 TEH (E.D. Cal. & N.D. Cal. Oct. 21, 2009); Gerlinger & Turner, *supra* note 90.

99. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, THE 2016-17 BUDGET: FISCAL IMPACTS OF PROPOSITION 47 (2016), <http://www.lao.ca.gov/Reports/2016/3352/fiscal-impacts-prop47-021216.pdf> [<https://perma.cc/G6SX-Z37M>].

100. See CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION (2014), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1410.pdf [<https://perma.cc/SV99-KUYU>]; CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION (2015), https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1510.pdf [<https://perma.cc/LDY6-MTCD>].

101. MIA BIRD ET AL., PUB. POLICY INST. OF CAL., HOW HAS PROPOSITION 47 AFFECTED CALIFORNIA'S JAIL POPULATION? (2016), http://www.ppic.org/content/pubs/report/R_316MB3R.pdf [<https://perma.cc/P4GC-P9PT>].

102. Marc Debbault, Opinion, *An Explosion of California Property Crimes—Due to Prop. 47*, S.F. CHRON. (Mar. 18, 2016), <http://www.sfchronicle.com/opinion/openforum/article/An-explosion-of-California-property-crimes-6922062.php> [<https://perma.cc/9E76-RB62>].

103. Cindy Chang et al., *Unintended Consequences of Prop. 47 Pose Challenge for Criminal Justice System*, L.A. TIMES (Nov. 6, 2015, 3:00 AM), <http://www.latimes.com/local/crime/la-me-prop47-anniversary-20151106-story.html> [<https://perma.cc/SR2Z-UC66>].

treatment, offenders will be free to commit crime. An often-cited anecdote is that offenders go into stores with a calculator to determine whether they have shoplifted under \$950, knowing that they will only be arrested for a misdemeanor if they keep the amount of property stolen below this value.¹⁰⁴ Important to the argument regarding offense-based sentencing under Proposition 47 is that, once again, public safety policy was developed without consideration of offender risk to recidivate, and instead relied on the offense committed by an offender. Proposition 47 targets many of the same group of “low level” offenders under Realignment—a group we estimated had higher recidivism rates than serious/violent parolees.

C. Newly Passed Proposition 57 Proposes Early Release for Non-Violent Offenders

In 2016, another proposition was placed on the California ballot, in the continuing effort to bring the prison population under 137.5% design capacity, although the Proposition was not directly marketed to voters as such. “The California Parole for Non-Violent Criminals and Juvenile Court Trial Requirements Initiative” was a combined initiated constitutional amendment and state statute.¹⁰⁵ Certain prison inmates convicted of nonviolent offenses will be eligible for early release, if awarded additional sentencing credits for good behavior and approved educational or rehabilitative accomplishments.¹⁰⁶ Estimates were that 25,000 inmates were potentially eligible for early release and parole.¹⁰⁷ This is the first time the term “early release” has been used to describe state efforts to reduce the prison population in the mix of recent policies. One of the arguments in favor of the proposition was that Proposition 57 would keep “dangerous criminals behind bars, while rehabilitating juvenile and adult inmates and saving tens of millions of taxpayer dollars.”¹⁰⁸ Arguments against Proposition 57 included that the Proposition would allow inmates convicted of a number of violent offenses to be released early, endangering public safety. The vast majority of county district attorneys across the state were against the Proposition, arguing that there is no state definition of non-violent offense; any offense that is not designated as violent under California Penal Code Section 667.5c would be considered non-violent. According to opponents, this would lead the way for a number of violent crimes not under the

104. Eli Saslow, *A ‘Virtual Get-Out-of-Jail-Free Card’: A New California Law to Reduce Prison Crowding Keeps One Addict out of Jail, But Not out of Trouble*, WASH. POST (Oct. 10, 2015), <http://www.washingtonpost.com/sf/national/2015/10/10/prop47/> [https://web.archive.org/web/20180311141357/http://www.washingtonpost.com/sf/national/2015/10/10/prop47/?utm_term=.0f34a1136cf5].

105. Cal. Sec’y of State, *Proposition 57*, CAL. GEN. ELECTION: NOV. 8, 2016, <http://voterguide.sos.ca.gov/en/propositions/57/> [https://web.archive.org/web/20180209222727/http://voterguide.sos.ca.gov/en/propositions/57/] (last visited Feb. 9, 2018).

106. *Id.*

107. *California Proposition 57, Parole for Non-Violent Criminals and Juvenile Court Trial Requirements (2016)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_\(2016\)](https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_(2016)) [https://perma.cc/5P3C-DAYV] (last visited Mar. 18, 2018) [hereinafter *California Proposition 57*].

108. Cal. Sec’y of State, *supra* note 105.

penal code to be eligible for early release.¹⁰⁹ The ballot measure passed with 63.6% of the voters in favor.¹¹⁰

IV. USE OF “RISK” FACES CHALLENGES IN CALIFORNIA

As California has moved to reduce its reliance on incarceration, strongly motivated by the three-judge court order to reduce its prison, key policy changes have centered on the offenses committed by offenders. The movement has generally been articulated as removing lower level offenders from prison (or moving offenses from felonies to misdemeanors) and keeping the higher-level offenders at the state level—either in prison or on parole. The assumption is that these “lower level” offenders – defined by offense are the least serious. In essence, “lower level” has been conflated with lower risk in public discussions. As shown by the analysis of the proxy groups, this assumption is not necessarily correct. Analysis of simulated cohorts under PRCS and parole showed that PRCS offenders actually had higher rates of recidivism than parole.¹¹¹ This may also explain a common observation made by probation staff regarding realigned offenders in a recent RAND evaluation of twelve counties’ experiences under Realignment. Probation representatives “consistently reported risk levels for PRCS and mandatory-supervision (MS) cases as higher than those for routine felony offenders.”¹¹²

Using offense as the primary determinant in sentences and policies reflects sentencing aims of proportionality or “just desserts.” However, using offense-type as proxies for future criminal behavior is also problematic based on research relating to offender specialization. Although there is some evidence that offenders may specialize in the types of offense, a substantial portion may engage in a wide variety of criminal behaviors. The groundbreaking RAND study of over 2,000 male prison and jail inmates in three states identified a number of different offender typologies, based on self-reported crimes and combinations of crimes committed.¹¹³ The most serious group of offenders—those who committed robbery, assault and drug deals at high rates (and also often committed burglaries, thefts and other property crimes at high rates)—could not be identified by official arrest and conviction records alone.¹¹⁴

Using “offense” as the primary driver in recent policies has been problematic for different reasons on at least two of the policies discussed in this article. The California Penal Code defines serious and violent offenses under PC1192.7(c)¹¹⁵ and PC 667.5.¹¹⁶ In both Realignment and Proposition 57, we see the desire to augment serious and violent offenses beyond those specified in the penal code. For

109. *California Proposition 57, supra* note 107.

110. *Id.*

111. Gerlinger & Turner, *supra* note 90, at 816.

112. *Id.*

113. JAN M. CHAIKEN & MARCIA R. CHAIKEN, VARIETIES OF CRIMINAL BEHAVIOR (1982).

114. *Id.*

115. CAL. PENAL CODE § 1192.7(c) (West 2002).

116. CAL. PENAL CODE § 667.5 (West 2014).

example, with Realignment, seventy additional codes were included in the definition of serious and violent.¹¹⁷ As noted above, for Proposition 57, District Attorneys are concerned that there is no definition of non-violent offenses, making offenses which on their surface appear to be “violent” eligible for consideration as nonviolent because they are not in the penal code.

Additionally, the use of risk will require, at least at the state level, continued efforts to change the culture and educate policymakers. As shown by experiences with the PVDMI, parole agents did not think the tool included all the information that they themselves had and felt was important to use.¹¹⁸ Agents felt their clinical experience should outweigh an actuarial tool, despite evidence supporting the relatively poorer performance of pure clinical assessment relative to actuarial tools.¹¹⁹ Although the Risk-Needs-Responsivity approach to offender supervision has been garnering a lot of support across the country over the past twenty years, particularly in the corrections community, changing the mindset of CDCR staff requires effort.¹²⁰ Recent efforts to reform California’s parole model are underway, with new approaches such as the California Parole Supervision and Integration Model (CPSRM), designed to bring evidence-based practices into common use. An outcome evaluation showed that despite agents exhibiting some behaviors consistent with evidence-based supervision, parole outcomes did not differ between treatment groups and comparison groups.¹²¹ Part of the resistance to reform may be related to technology transfer, an issue that has been noted by Taxman and Belenko.¹²²

Whether California should move to a more risk-based system is an open question. The CSRA risk tool is used by the CDCR in a number of operational decisions—programming prioritization, for example. In practice, the Department uses the risk score in conjunction with other information to make decisions—it does not make decisions based on the CSRA score alone. However, California has not been using risk in major reforms to reduce the prison population. Offense type remains the primary factor. However, risk assessment has garnered increased attention in the actual sentencing decision, but there are critics who point to a

117. CAL. CODE REGS. tit. 15, §§ 3042–44, 3490–93, 2449.1–.75 (2016) (regulations amended by Proposition 57). See CAL. DEP’T OF CORR. & REHAB., NOTICE OF CHANGE TO TEXT AS ORIGINALLY PROPOSED (2017), https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2017NCR/17-05/Amendment_Prop_57.pdf [<https://perma.cc/DW2V-JW6Q>], for exact changes to text of regulations.

118. See Hess & Turner, *supra* note 53.

119. *Id.*

120. See DON A. ANDREWS & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT (5th ed. 2010), for the development of the principles and concepts for the Risk-Needs-Responsivity approach.

121. See HELEN BRAITHWAITE ET AL., CALIFORNIA PAROLE SUPERVISION AND REINTEGRATION MODEL (CPSRM) OUTCOME EVALUATION (2013), <http://ucicorrections.seweb.uci.edu/files/2013/11/California-Parole-Supervision-and-Reintegration-Model-CPSRM-outcome-evaluation.pdf> [<https://perma.cc/U93Y-LAGD>].

122. FAYE S. TAXMAN & STEVEN BELENKO, IMPLEMENTING EVIDENCE-BASED PRACTICES IN COMMUNITY CORRECTIONS AND ADDICTION TREATMENT (2012).

number of concerns in the use of risk assessment, particularly at the sentencing stage.¹²³ Former Attorney General Eric Holder criticized the use of risk instruments in sentencing and critics have called the effort misguided and possibly unconstitutional.¹²⁴

Even with the number of major corrections policy initiatives implemented recently (e.g., transferring responsibility of “lower level” offenders to the counties, reducing returns to prison for parole violations, sentencing credits), California’s in-state prison population remains over 124,600.¹²⁵ The state continues to struggle to meet three-judge panel targets. Elsewhere across the country, states are utilizing similar strategies, many of which have not seen major reductions in their prison populations. A review of the experiences of the thirty-one states participating in the PEW Reinvestment Initiative¹²⁶ shows the variety of responses being used around the country that mirror what California is trying. However, focusing on lower level property and drug offenses is probably not sufficient, as prisons contain high percentages of serious and violent offenders. Some observers are calling for more drastic measures—such as wholesale sentencing reform—as the only way to successfully reduce the incarceration population.¹²⁷ In the short term, California policymakers should be more straightforward in discussions about crime policies based on offense. Lower level offenses do not necessarily translate into lower level risk to the public.

123. Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS (Joan Petersilia & Kevin Reitz eds., 2012).

124. Sonja B. Starr, Opinion, *Sentencing, by the Numbers*, N.Y. TIMES (Aug. 14, 2014), http://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html?_r=0.

125. *Weekly Total Population Report Archive*, CAL. DEP’T OF CORR. & REHAB., http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/Weekly_Wednesday_Tpop1a_Archive.html [https://web.archive.org/web/20171219032152/http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/Weekly_Wednesday_Tpop1a_Archive.html] (last visited Dec. 19, 2017).

126. PEW CHARITABLE TRUSTS, FACT SHEET: 33 STATES REFORM CRIMINAL JUSTICE POLICIES THROUGH JUSTICE REINVESTMENT (2016), http://www.pewtrusts.org/~media/assets/2016/12/33_states_reform_criminal_justice_policies_through_justice_reinvestment.pdf [https://perma.cc/L3AG-V8XC].

127. Marisa Lagos, *Advocates See Hope for California Criminal Sentencing Reform in 2016*, KQED NEWS (Jan. 5, 2016), <https://www.kqed.org/news/2016/01/05/is-sentencing-reform-on-horizon/> [https://perma.cc/UP9Q-RH5D].

