

Little Hoover Commission
Outline of Testimony, June 25, 2013
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Key Summary Points:

- AB 109 has both uncovered and caused factors in the size and nature of the incarcerated population in California that may merit legislative attention.
- The shift in responsibility for incarceration from state prisons to county jails may not produce a significant overall reduction in the size and cost of the incarceration population
- The mandate that AB 109 has given to counties, both de jure and de facto, has led to a return to a form of indeterminate sentencing in California, and may lead to county disparities of the sort that the Determinate Sentencing Law was designed, in part, to reduce.
- The life parole population, an area of left untouched by AB 109 and the *Plata* litigation, remains ripe for reconsideration as the State addresses the size, cost, and efficacy of prison incarceration.

Some Tentative Conclusions:

1. AB 109 and Plata: The State of the Incarcerated Population. While the 3-judge court in *Plata* remains adamant that the State has not adequately complied with the order to reduce prison overcrowding, Realignment nevertheless has substantially helped the State in coming closer to the demands of the *Plata* injunction. The prison population is way down, and prison health care and prisoner safety have improved.

¹ The Stanford Criminal Justice Center (SCJC) is a research and policy institute at Stanford Law School. It conducts nonpartisan research on criminal justice practices and reforms, disseminating its studies to government officials and the public to better inform policy in the areas of law enforcement, adjudication, sentencing, and corrections. Using private foundation and federal DOJ funding, SCJC has now undertaken a comprehensive review of the effects of AB 109, through in-depth interviews with and formal questionnaire survey of officials, as well as statistical analyses of criminal justice outcome data and relevant sociological and economic data.

Of course, there remains the possibility of a zero-sum effect, to the extent that AB 109 was designed to solve the *Plata* problem, rather than address a wider over-incarceration concern in the State. Tentative early figures suggest that the inevitable rise in the jail population has not quite matched the reduction in the prison population, but predictions for how the balance will change in the next few years are very hazardous. Counties vary tremendously right now in their state of jail crowding (many counties were under their own court-ordered population caps). Counties also vary widely in terms of how creative they are being in terms of generating reentry programs or linking the jails to mental health and social service agencies.

Thus, even if the State ultimately satisfies *Plata*, the taxpayers of California may end up paying for almost as much incarceration as they had earlier. They may end up paying even more, for several reasons. For example, while in theory jail incarceration could be cheaper than prison, if the jails have to ensure medical care to the same degree as the prisons must under *Plata*, they may face greater costs because of lack of medical infrastructure and economies of scale.

Second, the shift of prisoners from prison to counties may be unstable. Where counties face cost and crowding problems, some prosecutors and judges may exercise discretion in charging and sentencing to redirect some defendants from triple-non felonies to prison felonies and thereby in effect “re-redirect” offenders to prison.

A key area of concern is exceptionally long triple-non sentences. Many county officials who are otherwise working diligently to comply with AB 109 argue that sentences over a certain length, say three years, should not be served in the county jails, which are not well-suited simply to deal with such lengthy incarcerations. Such a legislative change may be a very sensible one, but it could lead to a rise in prison admissions.

2. The new indeterminacy: Many county officials, but most notably the sheriffs, now have enhanced de jure and de facto discretion over incarceration decisions. Sheriffs have authority to modify custody through house arrest, GPS controls, etc, and they have at least implicit authority to flat-out release jail inmates because of overcrowding. Such releases may produce interactive effects with prosecutors and judges, but the data are slim so far in terms of whether the courts and prosecutors are modifying their own decision-making to account for the likelihood that misdemeanor or AB 109 convicts may not serve their full jail sentences. This shift back toward indeterminacy may be sound in terms of penal philosophy or policy, but has not been the result of serious and coherent legislative debate. Rather, it has been the result of small and under-examined institutional changes.

3. Split Sentences. Another source of “de facto indeterminacy”—and a well-documented source of variation in juridical sentences (and prosecutorial recommendations thereof) is the use of AB

109 split sentences. Counties vary radically in their use of split sentences. For AB 109 convicts, the rate ranging from roughly 80 percent to roughly zero. A major factor in the differences seems to be how much faith prosecutors and judges have in the quality of supervision in their counties. But there is also a lot of strategizing among the parties with respect to split sentencing. In some situations, defendants prefer straight sentences because they don't want to be surprised at all, and some even gamble that an ostensibly long straight sentence will be terminated by the sheriff anyway. The Legislature might be well advised to examine split sentencing to see if some clearer guidelines or mentoring might avoid the unintended consequence of wide variation.

4. PRCS Revocation. A major issue soon to be addressed will be the institutional costs, especially to the judiciary, of the PRCS revocation hearings that will begin occurring in the Superior Courts this year. Judges are gearing up for an expected increase in their workloads and are receiving training in the new legal regime, but this is an area of great anxiety. A major concern is that if the courts and jails become overwhelmed by these revocation offenders, the Legislature will be under pressure to re-shift revocations back to state parole officers and revoked offenders back to the prisons.

5. The Lifer Population: Roughly 30,000 offenders currently serving sentences in state prison are “lifers”—sentenced to life with the possibility of parole. Of these about three-fourths are “term-to-life” inmates convicted of murder, rape, kidnapping, and other major violent crimes, and about one fourth are three-strikers. This is a larger lifer share of the state prison population than is found in any other state. Attention given to the effects of mandatory parole on the overcrowding in California has tended to detract attention from the legacy of indeterminate life parole sentencing – which survived the passage of the Determinate Sentencing Law. Moreover, the legal and political levers that may be necessary to reduce this population are lacking. The severity of the crimes which have led to this high number make it politically risky to suggest earlier release, even though it is statistically clear beyond any doubt that the recidivism rate of released lifers is minuscule.

The release process for lifers is very complex, involving Board of Parole Hearings procedures that have received little public scrutiny, and discretionary power in the Governor to affirm recommendations for release has varied widely among administrations and has been exercised, arguably, with too much caution. It has largely been left to the courts to address potential due process problems in parole release, but such court intervention is limited to egregious cases and cannot supply any systematic approach to this population. Moreover, recent legislation has complicated the lifer parole process in ways that have reduced the likelihood of release. Most notably, inmates face great risk in even applying for release, because denial may drastically extend the time before they may reapply. Moreover, under a rarely noted feature of California

law, even when parole commissioners recommend release of a lifer, they may retroactively recalculate and extend the “base term” of the prisoner and thus delay release.

A fuller examination of these issues can be found in a Stanford Criminal Justice Center Report.² Clearly, legislative reexamination of lifer parole should be part of a comprehensive approach to the continuing problems of incarceration in California.

6. Recidivism and Crime Rates. The greatest uncertainty has to do with possibility of near-term and long-term rates of serious or violent crime in California, and the possible consequent effect on future prison and jail populations. The news is full of anecdotal reports of rises in crime rates in various locales, often ascribed to triage decisions by overwhelmed local police and prosecutors to ignore low-level property crimes. While long-term prison incarceration probably has less recidivism-reducing effect than politicians and the public generally believe, the significant and often unplanned shortening of sentences under various components of AB 109 might lead to increases in offending in some crime categories. One useful tool to at least address if not resolve this concern would be a better scheme for measuring and analyzing recidivism rates in the state. Unfortunately, the state of data collection and data sharing among agencies and levels of government is very poor in California. Even more fundamentally, public officials lack any consistent, consensus definition of recidivism, although discussions are now taking place between the Attorney General’s office and some county prosecutors devise such a definition. The combination of sensible uniform definition and better data collection will help the State deal with and understand any future risk of upticks in incarceration due to changes in crime rates. Such mechanisms are of course, a key function of the sentencing commissions in other states. Thus, the Little Hoover Commission’s earlier studies of the virtues of a state sentencing commission for California have new salience in light of the future uncertainties caused by AB 109.

7. The Future of Financing. Obviously, AB 109 has required a massive shift of funds from the State to the counties, to reflect the shift in the burdens of incarceration. This is a complex subject but one key concern is that of internalization. One prospective virtue of AB 109 was that if counties (and cities) had to bear some greater share of the costs of incarceration, they would internalize those costs and benefits – that is, they would make more sensible decisions about arrests, charges, and sentences when they could not off-load the costs on the state. On the other

² Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California. http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf

hand, the first round of AB 109 financing somewhat over compensated those counties that had been major “contributors” to the state prisons. This formula, while superficially logical, created the moral hazard of reinforcing cost externalization. The formula has since changed, but a comprehensive legislative review of AB 109 financing would help ensure that the prisons do not yet again become dumping sites for excessive charging and sentencing in some counties.