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Integrating Evidence-Based Practices into Judicial Sentencing in the Wake of Realignment's Split Sentencing

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COMMENT

INTEGRATING EVIDENCE-BASED
PRACTICES INTO JUDICIAL
SENTENCING IN THE WAKE OF
REALIGNMENT’S SPLIT
SENTENCING

CAMILLE FRAUSTO*

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INTRODUCTION

In 1997, Marciano Plata fell while working in a kitchen and injured his right knee, back, and head.¹ Mr. Plata, an inmate at Calipatria State Prison, sought out a Medical Technical Assistant (“MTA”), who denied him treatment and did not refer him to a physician.² Mr. Plata continued to ask for medical care, but his requests went unanswered until he fell a second time at work as his right knee buckled.³ After this second fall, an X-ray was taken of his knee but he still did not receive treatment and was forced to continue working despite dizzy spells and headaches.⁴ Mr. Plata then fell a third time and needed to be taken to the infirmary by his coworkers in a wheelchair, where he again was denied treatment.⁵

It was not until October of 1999, a full two years after his initial fall, that Mr. Plata was able to receive knee surgery at a community hospital.⁶ After his hospital discharge and upon his return to prison, Mr. Plata had to walk back to his housing unit without any assistance, which caused him severe pain and inflammation.⁷ He received no follow-up care and no physical therapy after his surgery, even after he informed the MTAs that he needed care.⁸

These were the facts as stated in Mr. Plata’s class action complaint filed in 2001, where he was joined by several others alleging neglectful medical services while incarcerated.⁹ Mr. Plata’s civil rights class action complaint was brought against the Governor of California and officials affiliated with the Department of Corrections, asserting that the inadequate medical care they received while incarcerated was a violation of the prohibition against cruel and unusual punishment guaranteed by the Constitution.¹⁰ Plata’s case was eventually joined with the civil rights class action suit filed in 1991 on behalf of Ralph Coleman and other similarly situated inmates with severe mental illness that alleged inadequate mental health care was a violation of the Eighth Amendment.¹¹ These combined cases eventually made their way to the United States

¹ Complaint Class Action at 2-3, Plata v. Davis, No. 3:01-cv-01351-TEH, (N.D. Cal. Apr. 4, 2001) available at <https://www.clearinghouse.net/chDocs/public/PC-CA-0018-0088.pdf>.

² *Id.*

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ Margo Schlanger, Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics, 48 HARV. C.R.-C.L. L. REV. 165, 173 (2013).

Supreme Court in 2011 as *Brown v. Plata*¹² and brought criminal justice reform into the national spotlight.

California has struggled with a bloated and inefficient criminal justice system since the mid-1970s, when the prison population increased by 750%.¹³ Though there are perhaps many driving forces behind this rapid increase, at least partially responsible is the Three Strikes Law, which changed sentencing procedures to target repeat offenders by automatically applying a 25-years-to-life indeterminate sentence for a third felony offense.¹⁴ The Three Strikes Law passed in 1994 and was intended to catch murderers, rapists, and child molesters and keep them off the streets before they could commit more serious crimes; instead, many low-risk offenders were sentenced to 25-to-life for minor, nonviolent crimes.¹⁵ The effects of these automatic sentencing procedures are evident in the prison populations: when measured in December of 2004, 26% of the prison population was serving time under the Three Strikes Law.¹⁶

The focus of California's criminal justice system on harsh, strict punishment as a form of deterrence corresponds to alarmingly high inmate populations in prison.¹⁷ Instead of actually deterring crime, statistics show high rates of recidivism,¹⁸ as resources are spent to maintain prisons as opposed to rehabilitation programs that help inmates reintegrate into the community and a crime-free lifestyle.¹⁹ In 2011, the year of *Brown v. Plata*, California had a recidivism rate of 57.8%, exceeding the national average of 43.3%.²⁰ California also struggled to meet the finan-

¹² *Brown v. Plata*, 563 U.S. 493 (2011).

¹³ The Editorial Board, Editorial, *California's Continuing Prison Crisis*, N.Y. TIMES (Aug. 10, 2013), <http://www.nytimes.com/2013/08/11/opinion/sunday/californias-continuing-prison-crisis.html>.

¹⁴ Brian Brown & Greg Jolivet, *A Primer: Three Strikes – The Impact After More Than a Decade*, LEGIS. ANALYST'S OFFICE (Oct. 2005), http://www.lao.ca.gov/2005/3_strikes/3_strikes_10_2005.htm.

¹⁵ Brent Staples, *California Horror Stories and the 3-Strikes Law*, N.Y. TIMES (Nov. 24, 2012), <http://www.nytimes.com/2012/11/25/opinion/sunday/california-horror-stories-and-the-3-strikes-law.html>.

¹⁶ Brown & Jolivet, *supra* note 14.

¹⁷ *See id.*

¹⁸ Recidivism is a term to refer to when an offender commits a new crime that results in either "rearrest, reconviction or return to prison with or without a new sentence." *Recidivism*, NAT'L INST. OF JUST., <https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx> (last visited Mar. 19, 2017).

¹⁹ Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 331 (2014); *see* Marisa Lagos, *California Spending Billions to Build New Prisons*, SFGATE (Aug. 14, 2011), <https://www.sfgate.com/politics/article/California-spending-billions-to-build-new-prisons-2335352.php>.

²⁰ Petersilia, *supra* note 19, at 332.

cial needs of the prison system, spending an estimated \$51,889 annually per inmate—65% more than the U.S. average.²¹

From September 2011 to March 2015, the California prison population decreased from 160,700 to 131,200.²² With this reduction, California's prison population was at 136.1% of facility capacity.²³ The main mechanism behind this reduction was correctional reform legislation known as the Public Safety Realignment Act ("Realignment"), which was passed in 2011 in the wake of a federal court order from *Brown v. Plata* to reduce overcrowding in California prisons.²⁴

Realignment implemented changes at various stages in the criminal justice system, from sentencing to community supervision.²⁵ The legislation's main goal was to promote rehabilitation, rather than straight incarceration, in an effort to curb recidivism rates and keep inmate populations low.²⁶ It sought to accomplish this goal by shifting certain offenders to local county custody where the counties can provide community-based treatments and evidence-based practices.²⁷ One of the Realignment changes created split sentences for certain offenders, where part of a sentence will be spent in incarceration and the other part in mandatory community supervision.²⁸ Split sentencing was initially discretionary but was made mandatory in 2015 after data showed inconsistent application of split sentencing across the state, with some counties splitting sentences 86% of the time compared to others at 6%.²⁹

Part of the inconsistency in the utilization of split sentencing was due to judges' confusion about how to determine the length and conditions of supervision, since judges typically applied a "cookie-cutter method of sentencing."³⁰ However, making split sentencing mandatory has not eliminated this confusion and the legislature has not provided guidance about how to define supervision, merely using the broad language "evidence-based practices."³¹ When judges wield the power to determine the fate of the defendants in their courtroom and have the

²¹ *Id.*

²² Magnus Lofstrom & Steven Raphael, *Realignment, Incarceration, and Crime Trends in California*, PUB. POL'Y INST. OF CAL. (May 2015), http://www.ppic.org/content/pubs/report/R_515_MLR.pdf.

²³ *Id.*

²⁴ Hon. Philip H. Pennypacker & Alyssa Thompson, *Realignment: A View from the Trenches*, 53 SANTA CLARA L. REV. 991, 1002 (2013).

²⁵ Assem. B. 109, 2011-2012 Cal. Assem., Reg. Sess. (Cal. 2011).

²⁶ CAL. PENAL CODE § 17.5 (2011).

²⁷ *Id.*

²⁸ CAL. PENAL CODE § 1170(h)(5)(A-B) (2017).

²⁹ Pennypacker & Thompson, *supra* at note 24, at 1005.

³⁰ *Id.* at 1015.

³¹ *See* CAL. PENAL CODE § 17.5.

responsibility to safeguard the public, they should be given every possible tool to make fair and just decisions. The lack of guidance in statutory language highlights the opportunity to utilize social science and psychology research to help judges use evidence-based practices. The Risk Needs Responsivity (“RNR”) model is an evidence-based theory for risk assessment that has been proven effective in reducing recidivism by determining the needs of criminal offenders that can be targeted by treatment.³² It is the position of this Comment that the information from an RNR assessment should be an essential and required part of the judicial process for determining the length and conditions of split sentencing.

Part I of this comment discusses the Supreme Court cases that led to the passage of the Realignment Act, along with a review of some of the major reform changes. Part I also highlights the gaps in creating a fair and consistent process across counties for managing the effects of Realignment. Part II discusses split sentencing and some of the issues it was designed to address as well as investigating how judges have reacted to and used split sentencing. Part III introduces the RNR model of risk assessments and argues why it should be a mandatory aspect in split sentencing procedures. Part IV shows how recidivism and incarceration rates have changed in San Francisco County as a result of incorporating RNR assessments into judicial split sentencing decisions.

I. *BROWN V. PLATA*: A CONSTITUTIONAL MANDATE TO REDUCE OVERCROWDING PUT RECIDIVISM AND REHABILITATION AT THE CENTER OF CALIFORNIA’S REFORM.

California’s overcrowded prisons were brought to federal attention in 2011, when the cases of *Coleman v. Brown* and *Plata v. Brown* were consolidated and granted review by the United States Supreme Court.³³ *Coleman* was a certified class action suit brought by California inmates with serious mental illnesses, alleging that the pervasive overcrowding within the California prisons resulted in a failure to provide even minimal necessary mental health care.³⁴ Inadequate suicide prevention, assessment, and treatment contributed to a suicide rate 80% higher than the national average.³⁵ *Plata* was similar to *Coleman* but was brought by inmates with serious medical illnesses claiming deficient medical care.³⁶

³² D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* 334 (4th ed. 2006).

³³ *Brown v. Plata*, 563 U.S. 493, 499 (2011).

³⁴ *Id.* at 500-03.

³⁵ *Id.* at 504.

³⁶ *Id.* at 507.

The lower court had found that, on average, one prisoner died unnecessarily every six or seven days due to the deficiencies in medical services.³⁷

The Court found that the failure to provide even a basic level of care to prisoners with severe mental and medical illnesses constituted cruel and unusual punishment and a violation of the Eighth Amendment.³⁸ The extreme overcrowding within the California prison system was the primary cause of the gross deficiencies in care for inmates.³⁹ By the time these cases reached the Supreme Court, California prisons were operating at over 200% of their design capacity, and there were not enough beds or employees to manage the immense numbers of inmates within the prison walls.⁴⁰ As part of its holding, the Court upheld the decision of the three-judge court specially convened by the United States District Courts for California.⁴¹ The three-judge court required a reduction of the inmate population to within only 137.5% of design capacity.⁴² The 137.5% number was determined based on expert witness testimony that a 130% population cap would allow prisons to provide necessary services to inmates, along with testimony from an independent review panel that stated 145% was the maximum capacity permissible.⁴³

The Court affirmed the three-judge order that gave California two years to fix the problem, and determined that this deadline was sufficient and realistic to fix this constitutional violation.⁴⁴ The Court also permitted the state to seek an extension, if needed, from the lower federal courts.⁴⁵ California eventually did seek an additional two year extension, receiving a final deadline of February 28, 2016.⁴⁶

California was on notice that it needed to reduce prison populations since 2009, the date of the original three-judge court ruling.⁴⁷ Assembly Bill 109 (“AB 109”) was enacted by the legislature in April of 2011, one month before the Supreme Court issued its opinion.⁴⁸ This comprehensive legislation reformed over 200 sections of California code in order to

³⁷ *Id.* at 507-08.

³⁸ *Id.* at 545.

³⁹ *Id.* at 502.

⁴⁰ *Id.*

⁴¹ *Id.* at 540-41. Under the Prison Litigation Reform Act, only a specially convened three-judge court can issue an order limiting a prison population. *Id.* at 512. The plaintiffs in the *Coleman* and *Plata* cases both requested a three-judge court review the case because they believed that a reduction in prison populations was the only way to reduce the overcrowding problems. *Id.* at 509.

⁴² *Id.* at 540-41.

⁴³ *Id.* at 539-41.

⁴⁴ *Id.* at 541-42.

⁴⁵ *Id.* at 541-44.

⁴⁶ *Petersilia*, *supra* note 19, at 334.

⁴⁷ *Plata*, 563 U.S. at 542.

⁴⁸ Assemb. B. 109, 2011-2012 Cal. Assemb., Reg. Sess. (Cal. 2011).

address overcrowding in prisons.⁴⁹ The three-judge court ruling and the Supreme Court holding did not mandate how California was to solve the issue of overcrowding within the two-year period, which granted the legislature great discretion in finding a solution that would also ensure public safety.⁵⁰ The main mechanism California chose operated by shifting certain felony offenders from state prisons to local county custody, where they would be incarcerated in local jails⁵¹ or put under post-release community supervision (“PRCS”).⁵² The legislation only applied to what are colloquially known as “non-non-non” felony offenders, meaning those convicted of non-violent, non-serious, and non-sexual offenses.⁵³ Shifting these inmates to local control would enhance the delivery of services and treatment due to greater coordination between community services and county jails.⁵⁴ By staying in their communities, offenders could remain in contact with their families and sources of social support, which can buffer against repeat offending.⁵⁵

Within the first few years of Realignment, the population numbers in local jails went from the 70,000-72,500 range up to 82,681 inmates, an increase of 15%.⁵⁶ Critics of Realignment questioned whether county facilities were equipped to handle the influx of transitioned inmates.⁵⁷ The critics feared that transferring thousands of offenders to county control would recreate the same constitutional violations of overcrowding at the county jail level.⁵⁸ Data showed that these concerns were exaggerated, since local jail populations only increased by one per every three offenders released from prison.⁵⁹ Furthermore, the passage of Proposition 47 in 2014, which reduced several drug possession felonies to misdemean-

⁴⁹ *Id.*

⁵⁰ *Plata*, 563 U.S. at 538, 543.

⁵¹ Jails are county-run facilities and are under the jurisdiction of the county sheriff. They are typically for inmates serving sentences of less than a year or for those awaiting trial. Prisons are state-run facilities operated by the California Department of Corrections and Rehabilitation to house those inmates serving sentences longer than a year for more serious crimes. Matthew Green, *California's Prison Realignment Explained*, KQED (Aug 17, 2012) <https://ww2.kqed.org/lowdown/2012/08/17/californias-prison-realignment-explained/>.

⁵² Barbara Owen & Alan Mobley, *Realignment in California: Policy and Research Implications*, 13 W. CRIMINOLOGY REV. 46, 47 (2012).

⁵³ All other felony offenders would remain under the purview of prisons. *Id.*

⁵⁴ Petersilia, *supra* note 19, at 334-35.

⁵⁵ *Id.* at 334, 350.

⁵⁶ As measured from September 2011 to September 2014. Magnus Lofstrom & Brandon Martin, *Public Safety Realignment: Impacts So Far*, PUB. POL'Y INST. OF CAL. (Sept. 2015), http://www.ppic.org/content/pubs/report/R_915MLR.pdf.

⁵⁷ Andrew Ducart, Comment, *Go Directly to Jail: How Misaligned Subsidies Undermine California's Prisoner Realignment Goals and What is Possible to Maximize the Law's Potential*, 44 MCGEORGE L. REV. 481, 497 (2013).

⁵⁸ *Id.*

⁵⁹ Lofstrom & Martin, *supra* note 56.

ors,⁶⁰ led to an additional decrease of around 10,000 inmates from jail incarceration.⁶¹ The result was that California prison populations were in compliance with the federal mandate prior to the February 2016 deadline, without producing overcrowded jail populations.⁶²

Critics and the public also feared there would be increased crime rates as convicted felons were released back into the community.⁶³ The data coming out post-Realignment shows that there have been no statistically significant increases in violent offenses, and that violent offenses actually fell in 2013 by 6.4%.⁶⁴ The data did show an increase in property crimes in 2012, particularly for auto thefts, but these declined the following year and the differences were not statistically significant⁶⁵ compared to what was seen in other states.⁶⁶ A few conclusions can be drawn from these statistics. First, the fact that violent crimes did not increase demonstrates that certain felony offenders can be reintegrated into the community without being a threat to public safety, which was one of the concerns of the Supreme Court in *Brown v. Plata* for mandating a prison reduction.⁶⁷ Second, these statistics could indicate that placing inmates in community custody can be effective at connecting them with services aimed at reducing recidivism.⁶⁸ These conclusions illustrate that incarceration as a one-size-fits-all approach to punishment may not be the most effective approach when it comes to low-risk offenders.

California also sought to reduce the burden on counties by providing state-level funding to the 58 counties; the only requirement for receiving the funds was the creation of a Community Corrections Partnership

⁶⁰ CAL. DEP'T OF CORR. AND REHAB., What You Need to Know About Proposition 47, <http://www.cdcr.ca.gov/news/prop47.html> (last visited Sept. 24, 2017).

⁶¹ Lofstrom & Martin, *supra* note 56.

⁶² Magnus Lofstrom & Steven Raphael, *Realignment, Incarceration, and Crime Trends in California*, PUB. POL'Y INST. OF CAL. (May 2015), http://www.ppic.org/content/pubs/report/R_515_MLR.pdf.

⁶³ Rina Palta, *California Prison Reform Didn't Cause Crime Increase, Study Finds*, 89.3 KPCC (Feb. 18, 2016), <http://www.scpr.org/news/2016/02/18/57729/study-cas-prison-reform-didnt-cause-crime-increase/>.

⁶⁴ Lofstrom & Raphael, *supra* note 62.

⁶⁵ Statistical significance is a scientific calculation to determine whether the results found were due to chance or whether they were from identified factors. Amy Gallo, *A Refresher on Statistical Significance*, HARVARD BUS. REV. (Feb. 16, 2016), <https://hbr.org/2016/02/a-refresher-on-statistical-significance>.

⁶⁶ Lofstrom & Raphael, *supra* note 62.

⁶⁷ *Brown v. Plata*, 563 U.S. 493, 534 (2011). When discussing the potential impacts of an order requiring adjustment of incarceration and criminal justice policy, the Court stated that public safety must be taken into account, particularly when releasing prisoners prior to the termination of their sentence. Referring to these prisoners, the Court stated "some number can be expected to commit further crimes upon release."

⁶⁸ Lofstrom & Raphael, *supra* note 62.

(“CCP”).⁶⁹ Each CCP consists of the presiding judge of the superior court, a county supervisor, the district attorney, the public defender, the sheriff, the chief of police, a representative of victim interests, and the heads of county departments providing community services.⁷⁰

The role of the CCP is to facilitate the goals of AB 109 at the county level, but the unbridled discretion given to the counties in how to accomplish those goals led to very inconsistent spending, meaning there were 58 different programs and changes enacted in the wake of AB 109.⁷¹ Though allocating discretion and funds to the counties was designed to account for local differences between counties, there should not be local differences in sentencing procedures when all counties are committed to the same goal: decreasing incarceration and improving rehabilitation through evidence-based practices. Judges have always had immense discretion to determine criminal sentences, even despite mandatory minimum sentences for certain crimes.⁷² The introduction of split sentencing, as described in the next section, made further impacts on judicial discretion by creating a presumption in favor of split sentences. With split sentencing to be enacted state-wide, CCPs became inadequate to ensure that split sentence lengths and conditions were determined in a uniform and consistent format given a lack of guidance for the 58 different CCP programs. Thus, the onus is on judges to enact consistent sentencing procedures.

II. RISK/NEEDS ASSESSMENTS CAN HELP JUDGES DESIGN THE LENGTH AND CONDITIONS OF SPLIT SENTENCES TO REDUCE RECIDIVISM.

The introduction of split sentencing as a sentencing option may help manage the number of inmates within county jails, but will not be effective at reducing recidivism unless judges are able to create individualized sentences addressing the unique needs of each convicted offender. The AB 109 legislation amended California’s Determinate Sentencing law to include “split sentences” as an option when sentencing “non-non-non” offenders.⁷³ A split sentence is when an offender’s sentence will be comprised of a period of incarceration in a county jail, followed by a period of time in mandatory supervision within the community, as designated by the county court judge.⁷⁴ Mandatory supervision is not probation, and

⁶⁹ CAL. PENAL CODE § 1230(b)(1) (2015).

⁷⁰ CAL. PENAL CODE § 1230 (b)(2)(A)-(M) (2015).

⁷¹ Petersilia, *supra* note 19.

⁷² CAL. PENAL CODE § 12-13.

⁷³ CAL. PENAL CODE § 1170(h)(5)(A) (2011); *see* Owen & Mobley, *supra* note 52, at 47.

⁷⁴ CAL. PENAL CODE § 1170(h)(5)(A) (2018).

is, in fact, a determination made during the sentencing phase by the judge, not by probation officers.⁷⁵

In the 2011 version of the statute, judges were given discretion to decide whether to impose a period of straight incarceration or to assign a split sentence.⁷⁶ This judicial discretion led to large disparities between counties in the imposition of split sentences.⁷⁷ For example, Los Angeles County assigned split sentences in only 3% of cases compared to Contra Costa County that assigned split sentences to 92% of cases.⁷⁸ Given the reluctance of some judges to impose split sentences, Governor Jerry Brown sought an amendment to AB 109 to strongly encourage judges to impose split sentences.⁷⁹ Section 1170(h)(5)(A) of the Penal Code was revised to show a presumption in favor of a split sentence for all those sentenced after January 1, 2015.⁸⁰ The change in sentencing stated that a judge *shall* assign a split sentence, except for when the interests of justice weigh against its imposition,⁸¹ which means that a judge must provide a reason on the record for why he or she assigned straight incarceration instead of a split sentence.⁸² However, the statutory language did not provide information as to what could be considered interests of justice to weigh against assigning a split sentence.

The Judicial Council of California attempted to fill in the gaps left by the statute.⁸³ The Judicial Council created Rule 4.415, effective January 1, 2015, in an effort to meaningfully implement the California legislature's intent.⁸⁴ Rule 4.415 included the following non-exclusive set of criteria that could be used for deciding whether denying mandatory supervision is in the interests of justice: (1) custody exposure available after the imposition of presentence custody credits; (2) defendant status on any mandatory supervision, probation, parole, or post-release community

⁷⁵ J. Richard Couzens et al., *Criminal Justice Realignment Frequently Asked Questions*, CAL. CTS.: THE JUD. BRANCH OF CAL. (Apr. 2014), http://www.courts.ca.gov/partners/documents/cjr_faq.pdf.

⁷⁶ CAL. PENAL CODE § 1170(h)(5)(A) (2011).

⁷⁷ James Austin, *Regulating California's Prison Population: The Use of Sticks and Carrots*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 96-97 tbl.2 (2016) (using data from September 2014).

⁷⁸ *Id.*

⁷⁹ CAL. BUDGET PROJECT, *Governor's Budget Proposal Prioritizes Paying Down Debt and Saving for a Rainy Day, Takes Only a Modest Step Toward Reinvesting in California's Future* (Jan. 13, 2014), http://calbudgetcenter.org/wp-content/uploads/140110_January_Budget_Release.pdf.

⁸⁰ CAL. PENAL CODE § 1170(h)(5)(A) (2016).

⁸¹ *Id.*

⁸² CAL. CT. R. 4.415(d).

⁸³ The Judicial Council is a policymaking panel of judges that seek to create impartial and consistent standards for judges to follow across the vast state of California. *Judicial Council*, CAL. CTS.: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/policyadmin-jc.htm> (last visited Oct. 12, 2017).

⁸⁴ CAL. CT. R. 4.415(b).

supervision; (3) specific factors indicating a lack of need for treatment or supervision upon release; and (4) the nature, seriousness, or circumstances of the case and the defendant's past performance with supervision.⁸⁵ By having a set of factors for judges to consider when denying a split sentence, judges may be less likely to let personal philosophies regarding proper forms of punishment influence their sentencing. For example, a judge may hold personal beliefs that the best way to prevent an inmate from recommitting future crimes is through incarceration, and thus be less likely to impose a split sentence. With a list of criteria to guide this judge's sentencing, the judge may have difficulty refusing to impose a split sentence.

When judges do not have a legitimate reason to deny split sentencing, the language of Penal Code section 1170(h)(5)(A) states that the period of time assigned for mandatory supervision shall be within the discretion of the court.⁸⁶ This language created a new realm of decisions for judges to make at the county level regarding both the length and conditions of mandatory supervision. The difficulty in shifting this responsibility to judges is that judges most often have not had the training or specialized knowledge needed to determine what conditions would be most beneficial for offenders when out in the community. To help judges make these types of decisions, the Judicial Council included criteria within Rule 4.415 that could affect the length and conditions of mandatory supervision.⁸⁷ There are nine conditions that judges could consider:

- (1) Availability of appropriate community corrections programs;
- (2) Victim restitution including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution;
- (3) Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody;
- (4) Public safety, including protection of any victims and witnesses;
- (5) Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole;
- (6) The balance of custody exposure after imposition of presentence custody credits;
- (7) Consideration of the statutory accrual of post-sentence custody credits for mandatory supervision under section 1170(h)(5)(B) and sentences served in county jail . . .

⁸⁵ *Id.*

⁸⁶ CAL. PENAL CODE § 1170(h)(5)(A) (2018).

⁸⁷ CAL. CT. R. 4.415(c).

- (8) The defendant's specific needs and risk factors identified by a validated risk/needs assessment, if available; and
- (9) The likely effect of extended imprisonment on the defendant and any dependents.⁸⁸

Out of the nine different conditions a court can consider in the imposition of a sentence, factors one, three, and eight are the only conditions that take into account available treatment opportunities as part of supervision and how they can be tailored to a specific offender. Even then, these conditions are still discretionary and need not be taken into account by judges, even though legislative findings codified in the Penal Code state that “standardized risk and needs assessments” have been proven to lead to significantly reduced recidivism.⁸⁹

Besides the factors above, the judges may rely on the presentence report generated by the probation department. Currently, the probation department is required to make a presentence investigation report for felony convictions where a defendant is eligible for probation⁹⁰ and for defendants that are eligible for a county jail sentence under section 1170(h).⁹¹ The California Rule of Court 4.411.5, created by the Judicial Council, details the 12 different components that should be included in a presentence report.⁹² Amidst all the required elements is factor number eight, which states that information from a relevant risks/needs assessment should be included, *if such an assessment is performed*.⁹³ Essentially, this language is the same as that included in Rule 4.415—it does not mandate that a risk/needs assessment be done—it simply states that the information should be included if available.

The fact that the probation officer need only include a risk/needs assessment if it is available and that the judge need not consider the risk/needs assessment results, even if included, could undermine the goals of Realignment. Realignment and its subsequent legislation sought to incorporate strategies into the criminal justice system that have been demonstrated to reduce recidivism and keep offenders from crowding the California corrections system.⁹⁴ The Judicial Council should amend the Rules of Court to make a validated risk/needs assessment mandatory in the presentence investigation so it is available to judges at the time of

⁸⁸ *Id.*

⁸⁹ CAL. PENAL CODE § 17.7(a) (2018).

⁹⁰ CAL. PENAL CODE § 1203(b)(1) (2018).

⁹¹ CAL. CT. R. 4.411.

⁹² CAL. CT. R. 4.411.5(a)(1)-(12).

⁹³ CAL. CT. R. 4.411.5(a)(8).

⁹⁴ CAL. PENAL CODE § 17.5 (2018).

sentencing, and it should be mandatory for a judge to consider the results in his or her determinations.

III. THE RNR MODEL IS NECESSARY FOR SPLIT SENTENCING TO BE EFFECTIVE AT REDUCING RECIDIVISM.

The Risk Needs Responsivity (“RNR”) model of risk assessment⁹⁵ should be adopted as a mandatory part of presentence investigations that judges must use to make an individualized assessment of a particular offender. Factor eight from Rule 4.415 discusses using a validated⁹⁶ risk/needs assessment to identify a defendant’s specific needs and risk factors as a way for judges to determine the length and conditions of mandatory supervision.⁹⁷ The RNR model was formulated by Donald Andrews and James Bonta, criminology researchers from Canada.⁹⁸ It is a method of evaluating the risk level of a specific offender, by taking into account what the authors term unique criminogenic needs, and tailoring services to address those needs.⁹⁹

A. THE SCIENCE BEHIND RNR ASSESSMENTS.

The RNR model is composed of three principles: the risk principle, the criminogenic needs principle, and the responsivity principle.¹⁰⁰ The risk principle helps to determine who to treat, and postulates that when there is a finite amount of resources, the most services should be targeted to those who are the highest risk, meaning those most likely to reoffend.¹⁰¹ The criminogenic needs principle states that offenders have both noncriminogenic and criminogenic needs.¹⁰² Criminogenic needs are those correlated with criminal behavior; therefore, they should produce the greatest reductions in recidivism when addressed by services.¹⁰³

⁹⁵ It is important to note that, even though there are different types of risk that can be assigned to an offender, in this Comment, risk refers to the risk that an offender will reoffend.

⁹⁶ An assessment is valid if it actually measures what it is intended to measure, and not some other factor. *Standardized Tests: Test Validity*, UC DAVIS, http://psc.dss.ucdavis.edu/sommerb/sommerdemo/stantests/test_val.htm (last visited Feb. 24, 2018). An assessment is reliable if it can measure the same concept regardless of who administers it or through repeated administration. *Standardized Tests: Test Reliability*, UC DAVIS, http://psc.dss.ucdavis.edu/sommerb/sommerdemo/stantests/test_rel.htm (last visited Feb. 24, 2018).

⁹⁷ CAL. CT. R. 4.415(c)(8).

⁹⁸ D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (5th ed. 2010).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 309.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ For example, antisocial attitudes are a criminogenic need because having these attitudes is correlated with criminal behavior. In contrast, mental health issues are not criminogenic needs be-

Lastly, the responsivity principle states that the treatment employed should be empirically validated and shown to be effective overall; should be adapted to an offender's specific learning style, motivations, and characteristics; and should directly address the offender's unique criminogenic needs.¹⁰⁴ The responsivity principle also states that all treatments for offenders should use cognitive social learning strategies, which means respectful and collaborative working relationships that promote prosocial changes.¹⁰⁵ A proper RNR assessment utilizes all of these principles to help direct treatment in a way that reduces recidivism.

Andrews and Bonta's RNR model identified eight different variables as criminogenic needs because these variables were demonstrated to be related to recidivism: antisocial attitudes, history of antisocial behavior, antisocial personality pattern, antisocial associates, family/marital circumstances, education/employment difficulties, substance abuse, and leisure/recreation activities.¹⁰⁶ The model also acknowledges that these factors can be either risk factors or strengths; for example, no affiliation with antisocial peers or stable familial relationships would be considered strengths.¹⁰⁷ Standardized assessments based on these principles can detect and measure an offender's endorsement of criminogenic needs and whether they are risk or protective factors.

The effects of adhering to an RNR model are pronounced and significant when it comes to recidivism. The research shows that targeting criminogenic needs as opposed to noncriminogenic needs leads to the greatest reductions in recidivism.¹⁰⁸ In 2006, Andrews and Bonta looked at over 374 data sets and found that when treatment targeted a greater number of criminogenic needs over noncriminogenic needs, there were greater positive effects on reducing recidivism.¹⁰⁹ Furthermore, the researchers found that there was a highly statistically significant 0.54 correlation between the positive effects on recidivism and adhering to a principle of targeting criminogenic needs. Thus, the more corrections treatments target criminogenic needs over noncriminogenic needs, the more likely it is that those treatments will lead to reduced recidivism rates.¹¹⁰

cause they do not increase or decrease criminal behavior. Though it is beneficial to address mental health needs, they are not relevant when calculating risk. *Id.*

¹⁰⁴ *Id.* at 310.

¹⁰⁵ James Bonta & D.A. Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, PUB. SAFETY CAN. 5-7 (2007) https://cpoc.memberclicks.net/assets/Realignment/risk_need_2007-06_e.pdf.

¹⁰⁶ ANDREWS & BONTA, *supra* note 98, at 58-60.

¹⁰⁷ *Id.*

¹⁰⁸ ANDREWS & BONTA, *supra* note 32.

¹⁰⁹ *Id.*

¹¹⁰ ANDREWS & BONTA, *supra* note 32, at 334.

There are even more effects when treatment is differentiated for those who are categorized as high risk and low risk.¹¹¹ The risk principles, as mentioned above, states that the most intensive services should be aimed at the highest risk offenders compared to low risk offenders.¹¹² Some evidence even showed that aiming high intensive treatment to low risk offenders was counterproductive and associated with increased rates of reoffending, increasing the recidivism rate from 15% to 32% when compared to low risk offenders receiving only moderate levels of services.¹¹³ At the same time, high risk offenders receiving no treatment had recidivism rates of 51%, but those high-risk offenders that received appropriate intensive levels of treatment had rates at 32%.¹¹⁴ These statistics demonstrate that the RNR model can be successful at reducing recidivism when implemented within corrections systems.

B. RNR ASSESSMENTS WOULD BENEFIT JUDICIAL DECISION-MAKING.

The Realignment Act of the criminal corrections system would highly benefit from making a risk/needs assessment, based on the RNR model, a mandatory part of sentencing for judges that implement split sentencing. A risk/needs assessment is necessary for split sentencing because the inmate populations affected by split sentencing represent a range of risk levels. Realignment transitioned only the “non-non-non” offenders to county jails, thus it can be inferred that the legislature believed the classification based on characteristics of the crime would transition only low risk offenders to jails. Realignment equates risk with violent or serious criminal activity, whereas the RNR model defines risk as the chance of reoffending, violent or not. Thus, the inmates who arrive at the county jails could represent a range of possible risk levels despite being convicted of less violent felonies, with some requiring more intensive levels of treatment than others.¹¹⁵ A report compiled by probation officers assessing the prison inmates to be transitioned to post-release community supervision within the first 15 months of Realignment con-

¹¹¹ Bonta & Andrews, *supra* note 105.

¹¹² *Id.*

¹¹³ *Id.* (citing a study by researchers Bonta, Wallace-Capretta, and Rooney done in 2000 evaluating a Canadian program).

¹¹⁴ James Bonta & D.A Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, PUB. SAFETY CAN. 10 (2007) https://cpoc.memberclicks.net/assets/Realignment/risk_need_2007-06_e.pdf (citing a study by researchers Bonta, Wallace-Capretta, and Rooney done in 2000 evaluating a Canadian program).

¹¹⁵ See CHIEF PROB. OFFICERS OF CAL., *Assessing Risks and Needs of Realigned Populations: Post-Release Community Supervision and Services*, CPOC Issue Brief 2 (Fall 2013), <https://www.cpoc.org/sites/main/files/file-attachments/issuebrief4.pdf>.

firms that the type of crime committed does not equate with risk level.¹¹⁶ The report found that 80% of the offenders assessed were high or moderate risk to reoffend.¹¹⁷

Completing an RNR assessment as part of the presentence investigation will provide the judge with the results at the time of sentencing. Having the results at this point would help guide the judge when making determinations regarding the length and conditions of mandatory supervision. Given that the judge can also consider the availability of community corrections programs as per Rule 4.415,¹¹⁸ judges are in the best position to combine the risk/needs assessment information with the actual services available. Public safety concerns demand that felons released back into the community must not pose a threat to society at large, and placing the responsibility on the judge to make this determination in advance means that judges should have as much information available to them as possible when deciding when mandatory supervision should take place.

IV. SAN FRANCISCO COUNTY DEMONSTRATES THAT INCORPORATING RNR ASSESSMENTS INTO SENTENCING REDUCES RECIDIVISM.

Even before the Realignment Act was passed, San Francisco County was working on improving its criminal corrections system. In 2010, there were 1954 inmates in custody, along with another 6800 offenders on probation, resulting in large caseloads for probation officers.¹¹⁹ In this same year, San Francisco become one of four test counties providing data for the California Risk Assessment Pilot Project (“CalRAPP”).¹²⁰ CalRAPP was initiated by the Judicial Council of California and the Chief Probation Officers of California in order to evaluate how evidence-based practices, in particular risk/needs assessments, can be implemented into felony sentencing.¹²¹ In order to evaluate how risk/needs assessments impacted felony sentencing, CalRAPP provided specialized training and technical assistance to San Francisco County’s courts, probation

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ CAL. CT. R. 4.415(c)(1).

¹¹⁹ Wendy Still, *CalRAPP: Using Evidence Based Practices to Transform Criminal Justice in San Francisco*, JOINT TRAINING PARTNERSHIP, FOURTH ANNUAL CONFERENCE ON PUB. SAFETY REALIGNMENT (Jan. 22-23, 2015), http://www.crj.org/page/-/cjifiles/JTP_06CalRAPP_Jan15.pdf.

¹²⁰ Tara Agnese & Shelley Curran, *The California Risk Assessment Pilot Project: The Use of Risk and Needs Assessment Information in Adult Felony Probation Sentencing and Violation Proceedings*, JUD. COUNCIL OF CAL. 7 (Dec. 2015), <https://assets.documentcloud.org/documents/2840708/CalRAPP-Report-2015.pdf>.

¹²¹ *Id.*

departments, district attorneys, and public defenders.¹²² Part of the training focused on identifying how risk/needs assessment results could align with conditions recommended as part of sentencing.¹²³

San Francisco County started to integrate the COMPAS risk/needs assessment in 2009, when it was used to sort inmates into the appropriate prison institutions.¹²⁴ Starting in the 2010 to 2011 fiscal year, the COMPAS results were included in a comprehensive presentence investigation.¹²⁵ Every offender is administered the COMPAS in a presentence investigation and the offender's unique risks and needs are reported to the sentencing judge.¹²⁶ The judge then uses this information to decide whether a defendant is suitable for community supervision and which conditions best address criminogenic needs.¹²⁷ The presentence report also allows defendants' families and children to provide information to the judge about how the sentence rendered could affect familial relationships,¹²⁸ which is often a protective factor against future recidivism. Thus, San Francisco operates on a risk-based supervision model consistent with RNR, where more intensive supervision and case management is geared toward those that are higher risk.¹²⁹ To ensure that the probation department can adequately supervise the offenders with different levels of risk, there are decreased caseloads for the officers handling higher risk cases and specialized caseloads for those offenders with specialized criminogenic needs.¹³⁰

The results from CalRAPP indicate that utilizing presentence investigation reports at the sentencing phase corresponded to less felony cases being sentenced to prison or jail when comparing San Francisco to counties not involved in CalRAPP.¹³¹ Overall, there appears to be a positive effect on recidivism in San Francisco's inmate population. Comparing 2013 to 2008, there were fewer new arrests or law violations, going from half of felony probationers having an arrest or law violation to one-

¹²² *Id.* at 14-15.

¹²³ *Id.* at 15.

¹²⁴ COMPAS stands for Correctional Offender Management Profiling for Alternative Sanctions. *COMPAS Assessment Tool Launched – Evidence-based rehabilitation for offender success*, CAL. DEP'T OF CORR. AND REHAB. (Apr. 15, 2009), http://www.cdcr.ca.gov/Rehabilitation/docs/FS_COMPAS_Final_4-15-09.pdf.

¹²⁵ *Strategic Plan 2012-2017*, S.F. ADULT PROB. DEP'T, at 13, http://sfgov.org/adultprobation/sites/default/files/Documents/Adult_Probation/SFO_APD_Strategic_Plan_12_17_final.pdf (last visited Feb. 11, 2018).

¹²⁶ Wendy S. Still, *San Francisco Realignment: Raising the Bar for Criminal Justice in California*, 25 FED. SENT'G REP. 246, 247 (Apr. 2013).

¹²⁷ *Id.*

¹²⁸ *Id.* at 247-48.

¹²⁹ *Id.*

¹³⁰ *Id.* at 247.

¹³¹ Agnese & Curran, *supra* note 120, at 21.

third.¹³² When recidivism is defined as a subsequent criminal conviction rather than just arrest, San Francisco had a rate of 14% for all inmates realigned under AB 109 from 2011 to 2014.¹³³ There were also fewer court hearings relating to noncompliant behavior, defined as technical violations or new violations, during 2013 and more court hearings seeking a positive modification on sentences.¹³⁴ Particularly striking, there were zero unsuccessful terminations of felony probation, which occurs when an offender's probation is terminated and he or she is returned to incarceration.¹³⁵ This number is significant when compared to the 3.2% unsuccessful termination rate in 2008.¹³⁶ Within the first three years after Realignment, around 60% of those completing post-release community supervision or mandatory supervision had completed successfully.¹³⁷ An additional positive impact of implementing COMPAS in San Francisco County is the reception by judicial officers. In 2013, CalRAPP surveyed the judiciary in the four test counties and found that 77% of the judges saw risk/needs assessments as beneficial sources of information.¹³⁸ Additionally, the number of judges who saw the risks/needs assessment as useful for decisions about community supervision doubled, from 32% to 63%.¹³⁹

The use of risk/needs assessments in sentencing has been able to successfully identify inmates' needs and the use of other evidence-based practices in San Francisco County have linked inmates with community services to address those needs. As a result, San Francisco County's jails are operating at only 65% of capacity, which is significant given that the initiation of the reform was extreme overcrowding in prisons.¹⁴⁰ Given the scope of changes made in San Francisco County, it may be impossible to parse out what effect is due specifically to the implementation of a risk/needs assessment in presentence investigations. But it is the argument of this Comment that the presentence risk assessment plays a pivotal role in these outcomes given that all criminal defendants in San Francisco County are assessed using this tool.

¹³² *Id.* at 33-34. In 2008, the rate was 51%, while in 2013 it was 31%.

¹³³ CMTY CORR. P'SHIP EXEC. COMM., *Three Years of Realignment in San Francisco: February 2015*, BD. OF STATE AND CMTY. CORR. 50 (Feb. 2015), <http://www.bscc.ca.gov/downloads/San%20Francisco%20County%20FY14.pdf>.

¹³⁴ Agnese & Curran, *supra* note 120, at 34.

¹³⁵ *Id.* at 35.

¹³⁶ *Id.*

¹³⁷ CMTY CORR. P'SHIP EXEC. COMM., *supra* note 133, at 43.

¹³⁸ Agnese & Curran, *supra* note 120, at 55.

¹³⁹ *Id.* at 55-56.

¹⁴⁰ Still, *supra* note 126, at 251.

V. CONCLUSION

The Realignment Act of 2011 shifted thousands of inmates from state prisons to local county jails. As a result, counties have had to find ways to cope with the influx of prisoners by using legislatively mandated, evidence-based practices. As legislative decisions further guided the future of criminal corrections in California, such as the creation of a presumption in favor of split sentences, counties have continued to innovate and find ways to reduce recidivism and keep inmate populations low. In implementing split sentencing, judges only received guidance on how to determine the length and conditions of mandatory supervision from the Judicial Council's Rules of Court, which listed nine factors to consider. This continued judicial discretion in sentencing, however, could be adversely affecting the Realignment's goals of rehabilitation and reducing recidivism, such as when conditions are assigned inappropriately to an offender. Adhering to the principles of RNR in order to determine the most suitable conditions for offenders could be highly beneficial when implemented at the sentencing phase.

California has come a long way from having unconstitutionally overcrowded prisons, to now being on the forefront of criminal corrections reform. Each change made is an experiment that can be evaluated and analyzed for its contribution to the goals of rehabilitation and reducing recidivism. The evidence coming out of San Francisco County demonstrates the benefits from making a risk/needs assessment a required part of presentencing to guide the judge in making the determinations of mandatory supervision conditions. The other 57 counties of California would benefit from using the same presentence assessments. The best way to accomplish this goal would be through a further rule or amendment to Rule 4.415 by the Judicial Council, in order to make a risk/needs assessment a mandatory part of the presentence investigation. This rule would require the assessment to be completed by the probation department as part of the presentence investigation, included in the report, and then would require the court to consider the results when determining the conditions of mandatory supervision. This would be the optimal way to ensure that courts across the state are implementing split sentences in a consistent way given the lack of a unified sentencing commission.

Twenty-one years after Marciano Plata was injured in prison, the reform that has been carried on in his name has drastically changed the state of California's criminal corrections system. The prison populations are within the operating limits, there is continued federal oversight to ensure the medical facilities are operating in a constitutional manner, and the increase in space at prisons has led to increased recidivism reduction

programs.¹⁴¹ However, California still is spending a lot of money on maintaining and improving the corrections system¹⁴² and many counties across California still experience high recidivism rates.¹⁴³ California will continue to experience these problems until proven methods at reducing recidivism are implemented state-wide, and making risk/needs assessments a standard procedure in split sentencing procedures is one of those methods. Eventually, risk/needs assessments may be a standard requirement for all criminal convictions other than infractions as California continues to pursue changes throughout the criminal corrections system, therefore it will be helpful to learn on a smaller scale by looking at its effect in split sentencing.

¹⁴¹ TIMES EDITORIAL BD., *California's Prison Spending is Out of Whack*, L.A. TIMES (Jan. 14, 2016), <http://www.latimes.com/opinion/editorials/la-ed-de-incarceration-dividend-20160114-story.html>.

¹⁴² *Id.*

¹⁴³ Mia Bird, Ryken Grattet, & Viet Nguyen, *Realignment and Recidivism in California*, PUB. POL'Y INST. OF CAL. 3 (Dec. 2017), http://www.ppic.org/wp-content/uploads/r_1217mbr.pdf.