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Hearing on California Criminal Justice Reform: Potential Lessons for the Nation in California

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Introduction

Reducing the prison population is a laudable goal if it can be done without endangering public safety. But the initial focus should be on how it can be done without compromising public safety rather than planning the release of inmates first and trying to figure out how to successfully rehabilitate them after the fact.

California's recent criminal justice reforms, such as Assembly Bill 109, Proposition 47, Proposition 57 have accomplished their primary goal of reducing the state prison population. But there have also been unintended consequences and negative impacts that could have been avoided had the drafters collaborated more with stakeholders and local government entities.

Assembly Bill 109

Assembly Bill 109 reduced the state prison population by transferring responsibility for housing those convicted of low-level felony prison sentences to the counties. It is important to note that it didn't significantly reduce overall incarceration – it merely shifted the housing location. It also made the counties responsible for the post-release supervision of such inmates. One unintended result of AB 109 was that it resulted in housing some individuals serving lengthy, sometimes decades-long-sentences, in a local facility that was never intended for long term housing. Local county jails typically do not have recreation yards, nor do they offer any rehabilitation or educational programs. AB 109 also placed individuals with violent criminal histories on low-level supervision by local agencies who had never previously been tasked with supervising such individuals. This occurred because the transfer in supervision was based solely on the present incarceration offense rather than the total criminal history of the individual. County agencies like the Los Angeles County Probation Department were ill-equipped to supervise offenders with violent criminal histories. The Los Angeles County Probation Department's website has a "Most Wanted" page that regularly lists dozens of AB 109 offenders with violent criminal histories who have absconded from supervision and disappeared into our communities.

AB 109 also reduced the consequences for a violation of the terms of release. It changed the consequences of violation of conditional release from a return to state prison for 6 months to a year, to what is called "flash-incarceration" – a maximum 10 day hold in local jail. Offenders released on "Post Release Community Supervision (PCRS) had little to fear by violating the terms of their release. Following the enactment of AB 109 there were at least two high-profile murders perpetrated in California by offenders who had been given flash incarceration several times during the term of their release. Although it would be unfair to say that AB 109 caused those murders, it is undeniable that these individuals would not have been able to commit those murders had they been returned to prison under the old system rather than given flash incarceration.

Proposition 47

The proponents of Proposition 47 promised it would "Improve public safety," "reduce prison spending and government waste" while diverting the savings into education, drug treatment and compensation for crime victims. While it did reduce the prison population, it did not deliver on its other promises. Prop 47 was immediately followed by a rising crime rate and a reduction in public safety.

Proposition 47 reduced most offenses for the use or possession of controlled substances to misdemeanors. It also raised the threshold amount for felony larceny offenses from \$450 to \$950. On the heels of the enactment of Proposition 47, larceny and motor vehicle thefts immediately went up.

More importantly, Prop 47 eliminated increased penalties for repeat larceny offenders and eliminated the option to charge shoplifting as a burglary. Those apparently minor changes had a significant unintended impact. In California, police powers of arrest are different for felonies and misdemeanors. For felony offenses, a police officer can make an arrest based upon the report of a complaining witness. But for most misdemeanors, the officer has to personally observe the offense in order to make an arrest, or the reporting party must make a citizens' arrest. In the case of shoplifting or auto break-ins, the reduction of these offenses to a misdemeanor even for those offenders with multiple prior convictions, created a situation that forced private citizens and store security officers to either attempt to detain a thief – at risk to their own safety – or to let them walk away. Citizens and business employees soon learned the difficult lesson that the police, when called, could do nothing. One store security officer was stabbed to death attempted to stop a theft of beer. Anecdotal evidence and information from retailer's associations strongly indicates that a decrease in theft reports in the second and third year after Prop 47 were not indicative of a drop in offenses, but of a drop in reporting. Even with the subsequent drop in reporting, larceny offenses rates remain higher than they were before the enactment of Prop 47.

A study published by the University of Irvine undertook to analyze whether those critics who claimed that Prop 47 caused an increase in crime were right or wrong. Rather than asking if critics were right or wrong about the causal effect of Prop 47, the authors would have done better to analyze instead whether Prop 47 was successful in its stated goals. In the end, the findings that were *not* relevant to the hypothesis were more illuminating than the final conclusion. The study began by concluding that Prop 47 had no effect on violent crime. Such a finding was hardly a surprise as Prop 47 did not change any laws relating to violent crime. The study acknowledges that after the enactment of Prop 47, correction spending remained high and the predicted savings never manifested. It also confirmed that California's already high recidivism rates remained high. The initial finding with respect to larceny and auto thefts was that Prop 47 caused an increase in these offenses. Only after changing the data sets upon which all their initial conclusions were based, were the authors able to eliminate this causal finding, and finally support their initial premise that critics of the initiative were wrong. Read as a whole, the study establishes that post- Prop 47, crime went up, no significant savings were realized, and recidivism rates remained high.

Finally, Prop 47 had the unintended consequence of eliminating DNA collection for those offenses reduced from a felony to a misdemeanor. A California Department of Justice Study conducted in 2010, showed that collection of DNA – particularly DNA collected on non-violent offenses – helped solve cold cases. Seventy-eight percent of DNA matches to unsolved violent crimes were based on DNA collected from adult offenders arrested for low level crime such as drug or property crimes. The elimination of DNA collection reduced the ability of the state to solve violent crimes and exonerate those wrongly accused.

Proposition 57

Proposition 57 was the third justice reform law whose primary goal was a reduction in the state prison population. Prop 57 was described to the voters as a change in law that would permit early release only

“non-violent” offenders. Unfortunately, the language of the initiative failed to define who qualified as “non-violent.” By failing to define its own terms (which is the standard practice when drafting a new law) the measure left the door open to numerous classes of offenders whose crimes were violent by any common definition, but not “violent” under existing law. Under normal statutory construction, in the absence of a definition the normal remedy is to turn to existing definitions. The Penal Code did not contain a “non-violent” crime list, but it did contain a “violent” crime list in Section 667.5. That list, however, was never intended to be an exhaustive list of all violent offenses. It was a list of those crimes designated for alternative sentences and reduced credit-earning under the “three-strikes” law. In addition, the language of Prop 57 was so broadly written, critics warned that it would make not only violent offenders eligible for early release but also register sex offenders and inmates serving “three-strikes” sentences. Governor Jerry Brown, who was the proponent of the initiative, denied that registered sex offenders and third-strikers with violent criminal histories would be released. The governor insisted that the regulations written to implement the initiative would exclude such offenders from eligibility. This was an obviously false promise as a regulation cannot be written to expand the scope of a law that it purports to implement. Regulations were written to exclude registered sex offenders and third-strikers with violent criminal histories. Those regulations were promptly challenged in court and found to be invalid. The courts ruled that registered sex offenders and third strikers must be considered for early release under Prop 57.

In the wake of its reduction in the prison population, California’s efforts at effective and meaningful rehabilitation have been less than successful. A recent audit of The California Department of Corrections and Rehabilitation (CDCR) showed that those who participated in rehabilitation programs had the same rate of recidivism and those who participated in no programs. In other words – the programs were as effective as no program at all. According to the state audit, California spent \$298 million on rehabilitation programs that don’t work. The audit recommended that the CDCR:

- Use evidence-based programs;
- Measure the cost-effectiveness of the programs;
- Target programs to the highest risk and highest need inmates;
- Employ performance measures.

The Los Angeles County Probation Department, the largest probation department in the state and the nation, has comparable success. The department has a 45% recidivism rate for AB 109 supervisees. That rate is better than the CDCR, but still little better than fifty-fifty. The department does not even track recidivism rates for normal probationers serving non-AB 109 sentences.

Conclusion

It is possible to divert at risk youth from the justice system and it is possible to successfully rehabilitate adult offenders. One program that has been successful is a private program operating on outside funding and some funding from the CDCR. The Anti-Recidivism Coalition (ARC) in Los Angeles experiences a mere 11% recidivism rate despite including the most violent offenders in its program. They employ a peer-to-peer model using “credible messenger mentoring.” Rehabilitation, they believe, should start from an individual’s first day in prison.

If there are lessons to be learned from California, it is that successful rehabilitation must be achieved before sweeping reductions in incarceration are attempted. If the government chooses rehabilitation

over incarceration it needs to choose and fund rehabilitation that works, rather than merely pay lip service to the idea. To quote one of the other speakers, Mrs. Kubrin, who co-authored the UCI study, "Solutions to America's 'crime problem' should not be limited to 'back-end' efforts at reform, or efforts that focus solely on sentencing and incarceration. 'Front-end' solutions—primarily those aimed at crime prevention—also deserve a seat at the table."

Successful and effective rehabilitation may require as much or *more* resources than the initial cost of incarceration. But long-term savings can still be achieved through the elimination of future incarceration of those individuals and the benefit of changing them into productive members of society. These changes cannot be made unilaterally. Success requires a front-end commitment to rehabilitation that works. Achieving that requires collaboration with all stakeholders to reduce unintended consequences. Anything less is a gamble with public safety.