Realigning Research: A Proposed (Partial) Agenda for Sociolegal Scholars

I. Introduction

California’s AB 109, the Public Safety Realignment bill, was born of the Brown v. Plata constitutional crisis, but it nonetheless stands as an autonomous policy codifying a new structure for sentencing. The law devolves correctional responsibility to county jurisdictions for those convicted of nonviolent, nonserious, nonsexual felonies (“non-non-nons”) who otherwise would have been sent to state prison and then supervised on state parole. In practical terms, this means that local jails, probation offices, and various community correction facilities have an expanded caseload, potentially comprised of more serious offenders than had been the norm. It also affects sentencing in that it changes the terms around which pleas and sentencing bargains are negotiated in many routine felony cases.

This new county responsibility came with different forms of state funding to partially offset costs of managing the increased caseload; relatively few constraints were imposed on how the counties used it. Although it is not an uncommon practice for state corrections departments to lease space from county jails to house inmates, in this case, the law passes on to the counties full responsibility, and nearly complete discretion in management, for the designated offenders. Thus, Realignment is not merely a short-term population-reduction remedy put into place at the state level to comply with the dictates of Plata. Ostensibly, it will live on as a new model for managing lower-level felony offenders, even after the state fully complies or is otherwise relieved of its commitments under the Plata court order. As such, the Realignment policy is loosely coupled with, and operates in the shadow of, the Plata mandates, but it has the very real possibility of becoming a deeply rooted cultural shift in corrections that will go on to be emulated in other jurisdictions.

In light of the potential paradigm-shifting nature of Realignment, I lay out what I see as some of the key research trajectories that might be pursued to understand its sociolegal impacts on the local systems responsible for implementation. I limit this to the county effects, even though the law will also reshape corrections at the state level if in no other way than by shrinking and reconstituting the state penal population. Nonetheless, county criminal justice systems have been the most directly and dramatically impacted by Realignment and have had to collaboratively come up with strategies to manage their new responsibilities.

First, I briefly distinguish what I consider to be the major trajectories of scholarship that have already emerged or that are likely to emerge concerning the development, passage, and implementation of Realignment. In what may feel like an oversimplification, I roughly categorize those trajectories into three groups: legal scholarship, policy evaluation research, and theoretically driven sociolegal research.

I then focus in on the third category, making the case for two areas of research that should be pursued: transformations of local courts under Realignment, and the role of local jails as increasingly important places of punishment. I conclude by arguing why a robust, cross-disciplinary line of scholarship on Realignment is necessary for answering both fundamental questions about how law functions, as well as legal and policy implementation questions that are arising over Realignment.

II. Emerging Research Trajectories on Realignment

First out of the gate has been a growing corpus of legal scholarship on Realignment. Given the national significance of the Plata decision, and with Realignment being the state’s single most important remedial measure, a number of prison scholars, in particular, have turned their attention to California. The policy potentially raises a number of 8th Amendment issues, especially about the difficulties of monitoring conditions of confinement within the decen-tralized jail systems of 58 counties.

This potentiality, referred to by legal scholar Margo Schlanger as the “hydra risk,” is that the Plata case might “succeed at chopping the head off of unconstitutional conditions of prison confinement in California, only to cause fifty-eight counties to develop unconstitutional conditions of jail confinement.” Immediately pre-Realignment, many jail systems in California were already overtaxed, and about one third of jail inmates in the state resided in facilities operating under a court-ordered population cap, so it is not difficult to imagine that these local systems will quickly be overwhelmed and conditions inside deteriorate. Although this may be a relatively short-term problem, given that some counties are investing a significant share of their funding in jail-building programs, a number of corollary concerns are raised by transforming jails into longer-term facilities, given that their traditional purpose is not to function as long-term penal facilities.
A body of policy evaluation research is also developing that aims to assess implementation processes and outcomes on a number of dimensions. Last year, Lofstrom, Petersilia, and Raphael drafted a report for the Public Policy Institute of California, laying out a policy evaluation research agenda for assessing whether [Realignment] is achieving the goals of assuring public safety and doing so more efficiently than was accomplished by the state."11 Since then, the Stanford Law School’s Criminal Justice Center has begun to implement a major program of policy evaluation research, examining implementation plans and practices in counties statewide.12

Among advocacy groups, the Northern California affiliate of the ACLU has been at the forefront of policy analysis and evaluation in its effort to prompt implementation that does not simply shift mass incarceration from the state to the local level. Thus, in August 2011, it released a set of implementation guidelines that provided counties with recommended “evidence-based” practices.13 The following year, it published an evaluation of the 25 largest counties’ implementation plans and early practices, raising concerns about the degree to which confinement strategies dominated.14 Given the law’s stated commitment to “evidence-based” correctional practices,15 there are undoubtedly many systematic evaluations of various implementation dimensions to come, including its impact on crime and public safety, its burden on local criminal justice agencies and institutions, its fiscal efficiency, and its effectiveness with regard to rehabilitation and reentry.

Finally, as a dramatic and sweeping intervention into a complex and dysfunctional set of criminal justice institutions, Realignment raises a number of interesting, theoretically driven empirical questions about how such systems adapt and react to this top-down policy imposition. To date, little has been published about Realignment in the social science literature,16 yet this penal experiment can provide insights into a number of sociolegal phenomena, including the changing nature of popular, political, and institutional rhetoric around crime and punishment; the processes by which diverse institutional actors interpret and transform “on the books” legal policy; how local legal norms for resolving routine criminal cases resist and/or adapt to changing state mandates; and the experience of punishment at the local level. In the next section, I flesh out two lines of Realignment research that would be especially fruitful for sociolegal scholars to pursue. This is in no means a comprehensive account of possible lines of research, but each of these can inform contested bodies of scholarship about legal institutions.

III. Two Directions for County-Level Work

A. Local Courts
In many ways, questions about how Realignment is being put into practice must begin with whether and how sentencing norms at the county level have changed. In part due to data availability and in part due to the way routine cases get resolved, relying on county-by-county case outcome data will be insufficient to draw conclusions about Realignment’s impact on local practices. First off, the law does not mandate data collection, so counties vary considerably in whether they will collect and assess any outcome data, and if so, how those data are comprised.17 More fundamentally, outcome data can potentially mask how policy reforms actually affect adjudication, because they generally cannot account for the off-the-record negotiations that preceded formal sentencing in the vast majority of cases.18

County-level criminal courts have been understudied in the era of mass incarceration, despite being a key engine driving prison growth.19 In the context of Realignment, there is an implicit expectation (or hope) that the policy will be an antidote to mass incarceration.20 For this possibility to be realized, however, local court actors must implement the law in ways that neither widen the net nor add weight to the hammer of local sanctions, to compensate for the loss of state prison as a punitive option for many more offenders. Prior research on how courts adapt to legal change suggests that implementation is never straightforward, and that policy goals are rarely fully realized in practice.

A classic body of “court community ethnography”21 research has examined how local criminal courts function as social institutions, and may be instructive here. Beginning in the 1960s, a number of social scientists began to examine the daily life of criminal courts and the courtroom workgroup.22 This body of work revealed how routine criminal matters were resolved in reference to “going rates” for different offenses, where the modes of resolution were dictated by legal structures and the values shaped by well-established norms.23 This work documented both the stability within, and diversity among, local jurisdictions even when operating under the same formal policies. A small but significant body of research within this genre has also directly examined how trial-level courts respond to significant legal change, particularly as “tough on crime” policies began to be implemented at the state and federal levels. For example, McCoy examined how dramatic policy change in California as a result of the 1982 voter-passed Victims’ Bill of Rights initiative trickled down to courtroom processes, finding that a provision “banning” plea bargaining in felonies simply moved the stage at which bargains were struck to an earlier point in the process and, in so doing, increased prosecutorial power in negotiations.24 At the federal level, Schulhofer and Nagel conducted qualitative research that provided a contextual understanding of how the newly implemented sentencing guidelines were being circumvented in practice, finding that the nature of plea bargaining changed, especially in mandatory minimum cases, in an attempt to sustain preexisting norms around sentence outcomes.25 In both of these cases, an examination of informal negotiation processes that occurred outside of court was necessary to reveal how the policy mandates were reshaped to fit within long-standing practices. This kind of rich qualitative field research on local criminal courts has since become relatively sparse, and the predominant empirical examinations of sentencing have been
quantitative regression models of outcomes, using a range of available variables for predictors and controls.26

Relatedly, research on interventions that ostensibly aim to divert offenders from criminal punishment or otherwise tame punitive aspects of the system have been shown to dramatically increase the reach (and sting) of intervention. Thus the intermediate sanctions revolution of the 1980s27 and the drug courts movement that exploded in the 1990s28 both became net-widening and deepening projects that dramatically increased the number of case filings in court, and increased the likelihood that offenders sentenced to alternatives will fail and ultimately get sent to jail or prison.29

So what does this have to do with the research agenda on Realignment and county courts? Three things: First, we should attend to how local courts adapt the policy to fit within going rates and other such norms for how low-level felony cases are resolved. Because prior research has demonstrated that local practices do not change easily or immediately in response to top-down policy mandates, research is needed that can capture whether and how courtroom workgroups adapt sentence negotiations, especially around those offenders who are now mandated for local penalties.

One possibility is that norms for non-non-non sentence length creep up, especially if judges and prosecutors (and perhaps probation officers) view local jail time as less punitive than state prison time. Thus, it may be that a two-year prison term is seen as inherently more punishing than a two-year sentence to county jail, so the “going rate” is tweaked accordingly.30 Another real possibility is that charging decisions, at least in cases in which the fact pattern might be interpreted as either fitting in the non-non-non category or not, could be manipulated such that the prison-eligible conviction is pursued. One provision that may be especially susceptible to a charging-up tendency, with potentially significant racially disparate consequences, is the local management exemption for felonies that include a “gang enhancement.”31 Accordingly, the modes of plea negotiations are likely to be further differentiated by offense type, while sentence bargaining may be the norm for many low-level offenses, charge bargaining will come to predominate in cases at the boundary of the non-non-non category.

Second, each county begins with a different set of local norms so that adaptation processes should differ as a function of those preexisting norms. Indeed, there is the potential with a devolution model like Realignment that county-level behavior becomes further differentiated as local jurisdictions decide what their implementation will look like. Emerging evidence indirectly suggests that this may be occurring. As Verma has found, most of those counties that were most indulgent in using state prison pre-Realignment—that is, those with the highest rates per capita of sentencing felons to prison terms—are now allocating proportionally the highest share of Realignment funding to building more local jail beds.32 Conversely, those that were parsimonious consumers of state prison have been at the forefront of dramatically redesigning their criminal justice systems in an evidence-based model that maximizes use of incarceration alternatives. In other words, do San Francisco County, on one end, and Kern County, on the other, become more extreme versions of themselves as they take on proportionately more discretion and responsibility in criminal matters?33 This suggests the need for a robust, mixed-methods comparative research agenda that can examine sentencing practices over time (pre- and post-Realignment) and across county types, and that is sensitive to the myriad, off-the-record modes by which cases get resolved.

Third, we should attend to the possibility of general net-widening. From a theoretical standpoint, this is a very interesting experiment because it has emerged explicitly as a remedy for the state’s incarceration indulgence. As such, it exemplifies the move from a “tough on crime” to a “smart on crime” strategy34 that aims to use our limited criminal justice resources more wisely. Nonetheless, it would be foolhardy to ignore past lessons on the implementation of alternatives to incarceration. The amount of effort county workgroups are putting into Realignment may well contribute to a net-widening process in that they are comprehensively defining how the criminal justice system can best manage those in their communities deemed low-level offenders. The very act of doing this may make salient some categories of offenders who otherwise were not on the radar for criminal justice intervention. Thus, it will be important to see whether and how prosecutorial filings change in number and kind in the wake of Realignment. Will counties that plan to make greater use of “problem-solving courts” reach further into the community for clientele who fit the profile? How might different innovations that are implemented in various counties lead to this effect, and what are the mechanisms by which this can happen?

**B. County Jails as Penal Settings**

In the punishment and society literature, jails have garnered much less attention than they deserve given their prevalence as penal institutions. In mid-year 2011, local jails held over 736,000 inmates (including pretrial, postconviction, and immigration detainees), which is nearly 50 percent of the state and federal prison population.35 Yet contemporary scholarship on incarceration has focused almost exclusively on prisons, in terms of growth in imprisonment rates, their impact on crime rates, conditions of confinement, and social relations inside. The existing social science research suggests that, because of their transient, multipurpose characteristics, and their role as landing spots for troubled populations in the community, jails are experienced as stressful environments. The experience of being in jail worsens symptoms among those with preexisting psychological disorders and prompts psychopathological symptoms among those without prior illnesses.36 Under Realignment, jails have taken on an even more important role as penal institutions, both by virtue of
the larger share of felony inmates they now house and because they are being transformed into longer-term facilities than their traditional use.

Given the diversity of California counties in terms of size, demographics, resources, and political cultures, the 58 distinct jail systems also vary widely from each other. At one end, Los Angeles County’s jail system is the largest in the nation with a current average daily population of about 19,000; it houses more inmates than half of the state prison systems in the United States.37 It is comprised of nine facilities, with plans to add an additional 1,024 beds using AB 900 funds.38 Dealing with a highly diverse population, the system has institutionalized education, mental health resources, and some other resources that can serve the needs of longer-term inmates. But it has also been subject to intense public and legal scrutiny, given problems with severe overcrowding,19 systematic and widespread brutalization of inmates by officers, and generally abysmal management and training.40

On the other end of the spectrum are several small, rural counties, such as Sierra and Mono Counties, whose daily jail population averages fewer than 30, and which do not deal with the kind of population pressures faced by large urban counties. Nonetheless, smaller counties often have less ability to offer the kinds of specialized programming and resources that longer-term inmates should receive, since their jails have primarily serviced relatively short pretrial or postconviction stays, and there is no economy of scale to make the kinds of investments needed to adapt. Both varieties of county jail have deficiencies as places of long-term confinement, but they are worlds apart as far as the specific elements of those deficiencies.

This means that there is a wide range of experience for those confined to jails in California. These differences are likely much more acute for the new Realigned population who may be sentenced to years inside (as opposed to months for traditional local sentences). Some existing ethnographic research provides insights into life in different units of the Los Angeles County jail system, pre-Realignment, but little else has been published in the social science literature to offer rich accounts of the California jail experience.41 There is a clear benefit to being confined locally, allowing for more family visits and the maintenance of ties to the community, but this may well be outweighed by lack of design features for long-term living. Thus, a comparative multicounty research program assessing the social and psychological effects of longer-term confinement will not only be of use to legal and policy audiences, but it can shed light on the triggers and specificities of the “pains of imprisonment”42 in these diverse, understudied settings.

The characteristics and impacts of custodial staff must be included in research on the experience of long-term jail confinement. In most local systems, jail facilities are staffed by the county sheriff’s office,43 and some detention officers take the job as a stepping-stone to obtain more desirable positions within the larger organization or in another law enforcement agency.44 Thus, their career interests are not aligned with the assignment, which can be consequential for the overall functionality of the environment. To the extent that Realignment complicates the correctional setting by increasing crowding, adding more diversity to the pool of inmates, and creating a long-term population with programming and recreational needs, detention officers in California jails will undoubtedly undergo more stress and pressure in their jobs, potentially leading to increased turnover, poor performance, and other negative consequences.45

Ultimately, under Realignment, jails have the potential to replace the state prisons as mass incarcerative, revolving-door institutions, but they are not destined to go that route. A close, context-rich examination of how different counties adapt their carceral behavior in the Realignment era has the potential to reveal fundamental insights about the penal experience. It will not be enough to quantify degree of reliance on jails, or rates of local incarceration by county. Realignment should serve as an impetus for scholars to pursue a new ethnographic research agenda in local jails, a penal site long-marginalized in the punishment and society literature.

IV. Conclusion

We are not nearly at the point of seeing whether, or how much, Realignment is revolutionizing penal practices in California. Whether it will decrease overall reliance upon incarceration as a crime control strategy, whether it will innovate smarter and more tailored responses to criminal offending, or whether it becomes another net-widening project as a consequence of the local institution-building that is underway—these are open questions. To help chronicle and (ideally) shape that future, we need a multi-pronged and integrated research agenda that more effectively links legal scholars, policy analysts, and more theoretically oriented sociolegal scholars whose interests and concerns intersect. Both objects of study that I detail here—criminal courts and penal institutions—have generated significant, diverse bodies of work, but they tend to talk past each other. At this very early point in the life of Realignment, it appears that these disciplinary boundaries are beginning to be transcended (as exemplified by this special issue of FSR), and the artificial divisions between different research goals and traditions seem to be fading. This is an important development for both policy and the scientific enterprise, at least if we hope to move beyond the cycle of correctional failures that culminated in Brown v. Plata and understand why even ostensibly sound policies so easily fail when implemented.

Beyond the two sites I focused on here, other local institutions should be incorporated into the Realignment research agenda. For instance, county-level probation has been significantly transformed and is likely to be a key mediating institution, affecting both the courts and jails through its expanded correctional role. Sheriff’s offices have also been given additional discretionary power in how
they manage those sent to their facilities, including broad authority to use nonincarceral alternatives, so their adaption to Realignment will play a significant role in whether counties become the new mass incarcerators in the state. Realignment presents us with a relatively unique opportunity to reinvigorate social research on local criminal justice operations. It will likely take a broad-based, transdisciplinary effort to comprehensively chronicle whether devolving significant discretion, power, and authority to counties is a viable pathway out of mass incarceration, or whether it will simply decentralize the penal state.

Notes
3 There are additional restrictions on who is eligible for local management; those with specified prior convictions are barred, and local courts have the discretion to send otherwise eligible offenders to state prison when the offenders are deemed high risk. Local control has also expanded to a subset of parole violators as well. Supra note 1.
4 I say “potentially” here because, in practice, a range of felons subject to prison sentences have long been managed at the local level, some of whom are given a suspended prison term, others who are simply sentenced to less than one year in local custody and/or felony probation.
5 In the 1980s and 1990s, a typical state response to prison conditions cases that resulted in population reduction orders was to comply by developing a number of creative strategies to lower counts in affected facilities, including back-end early release valves and transfers of inmates to leased spaces, without making significant policy changes to ensure overcrowding would not easily recur. Eventually, this strategy gave way to massive prison construction projects in many states. For the Arizona case, see generally Mona Lynch, Sunbelt Justice: Arizona and the Transformation of American Punishment (2010); for Florida, see Heather Schoenfeld, Mass Incarceration and the Paradox of Prison Conditions Litigation, 44 Law & Soc’y Rev. 731 (2010).
8 Id. at 4.
9 Id.
10 Id. at 33.
12 For a full description of these projects, see: http://www.law.stanford.edu/organizations/programs-and-centers/stanford-criminal-justice-center-scjc/california-realignment. Evaluation research on Realignment’s effectiveness is also just beginning to get underway at U.C.–Irvine’s Center for Evidence-Based Corrections.


30 This may especially be the case since judges and prosecutors know that the law gives sheriff’s offices considerable discretion to use alternative sanctions for those sent to their custody. See supra note 1.

31 Supra note 15.

32 Anjuli Verma, Institutional Crisis and Local Criminal Justice Work Groups, Paper presented at the Annual Law and Society Meeting, Honolulu, June 7, 2012 (on file with author). Verma does find a small set of “innovators” who either are moving from high-incarceration to investment in alternatives, or from low-incarceration to high investment in jails.


34 Kamala Harris, Smart On Crime (2009).


37 Carson & Sabol, supra note 35.


39 Schlanger, supra note 7.


