Georgia State University Law Review

Volume 28
Issue 4 *Summer 2012*

Article 4

2011

Tough on Crime (On The State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should

W. David Ball

Follow this and additional works at: http://readingroom.law.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation
Ball, W. David (2011) "Tough on Crime (On The State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—and Why It Should," *Georgia State University Law Review*: Vol. 28: Iss. 4, Article 4.
Available at: http://readingroom.law.gsu.edu/gsulr/vol28/iss4/4

This Article is brought to you for free and open access by the College of Law Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized administrator of Reading Room. For more information, please contact dschander@gsu.edu.

TOUGH ON CRIME (ON THE STATE'S DIME): HOW VIOLENT CRIME DOES NOT DRIVE CALIFORNIA COUNTIES' INCARCERATION RATES—AND WHY IT SHOULD

W. David Ball*

Abstract

California's prisons are dangerously and unconstitutionally overcrowded; as a result of the Supreme Court's recent decision in Plata v. Schwarzenegger*, the state must act to reduce its prison population or face court-ordered prisoner releases. The state's plans to reduce overcrowding are centered around what it calls criminal justice "realignment," whereby California will divert some sentenced offenders away from state facilities towards county facilities. The plan faces opposition from county officials, who argue that the state is pushing its problem onto the counties.*

But what if the counties are actually responsible for state prison overcrowding? I argue that California's prison overcrowding is due in large part to county decisions about how to deal with crime. Using data from 2000-2009, I show that California's counties use state prison resources at dramatically different rates, and, moreover, that the counties which use state prisons the most have below-average crime rates. Viewed this way, the state is simply returning the problem to its source and forcing counties to pay for their criminal justice policies.

---

* Assistant Professor, Santa Clara Law School. This Article was written with the support of the Santa Clara School of Law Faculty Fund, and it greatly benefited from the insights of several people, though, of course, any errors are mine. First, I wish to thank participants in the Stanford Criminal Justice Center Executive Sessions (2008) for opening my eyes to the ways in which local actors affect state criminal justice populations and policies. Second, I thank participants in faculty workshops at the University of Oregon and Santa Clara. I would also like to thank several individuals for their helpful comments: Tim Coxon, Dan Ho, Naomi Levy, Ian McAllister-Nevins, Debbie Mukamal, Joan Petersilia., Karthick Ramakrishnan, and Bob Weisberg. I got great research assistance from Nik Warrior and Eugene Lee, and truly above-and-beyond research assistance from Vincent Ang. Finally, I would like to thank my father, Byrd Ball, for his insights and inspiration in helping me see the story in the numbers. Thanks Dad!

The contribution this Article makes, then, is twofold. First, it suggests that incarceration in state prisons is one policy choice among many, not an inexorable reaction to violent crime. Counties can and do make different choices about how to respond to violent crime, including the extent to which they use state prisons. Second, this Article demonstrates why localities are crucial—and critically underexamined—contributors to state prison populations. Decisions are made at local levels about prosecution, investigation, plea bargaining, and sentencing, and these decisions are made by officials who are either elected locally (DAs, judges, and sheriffs) or appointed locally (police and probation officers). Local policies and policymakers affect the state's corrections budget, even though the state has no say in designing or implementing these policies. State officials must take these local differences into account, and create incentives for counties to behave differently.

The problem is that it is difficult to distinguish between justifiable, crime-driven incarceration and optional, policy-driven incarceration. I propose a new metric for distinguishing between these two types of incarceration, one which defines justified incarceration in terms of violent crime. This would allow the state to manage local usage of state prison resources without either penalizing crime-ridden areas or rewarding prison-happy ones.

This Article is the first of two articles dealing with the state/county prison relationship. While this Article quantifies the ways in which the extent of local prison admissions is not necessarily a function of the violent crime rate, a second Article will examine whether, given these differences, it makes sense for the state to subsidize county commitments to prison.

INTRODUCTION 990
A. The Coverage Model.....998
B. Why Coverage Matters 1002
I. SOURCES, LIMITATIONS, AND METHODS OF THE STUDY 1004
A. Sources.....1004
B. Limitations of the Study 1010

C. Methods.....1014
II. VIOLENT CRIME RATES AND NEW FELON ADMISSION RATES....1018
A. The State.....1018
B. Violent Crime and NFA in the Four State Segments.....1022
1. High Use Counties: Dominated by NFA Surplus Counties.....1025
2. High Surplus Revisited: The Rich Four and the Poor Four.....1027
3. Low Use Counties: The Convergence of Low Coverage and NFA Deficits.....1029
4. Low Coverage and NFA Deficits Divided by Income: The High Five and the Low Six.....1031
5. Los Angeles.....1033
6. Middle Use Counties.....1034
III. ALTERNATIVE EXPLANATIONS.....1035
A. Offender Mix.....1036
B. Effectiveness.....1039
C. Local Dispositions.....1045
1. Jail.....1045
2. Probation.....1048
D. Local Resources.....1050
E. Politics.....1054
F. Reverse Causality: Is Low Crime the Product of a High NFA?.....1057
IV. FISCAL IMPLICATIONS.....1059
A. Subsidy by Segment.....1059
B. The Role of Sentence Lengths.....1065
C. Recalculating State Coverage Rates by Segment.....1069
V. POLICY IMPLICATIONS.....1072
A. Realignment, Prisoner Release.....1073
B. De-Subsidizing Prison, Re-Subsidizing Probation.....1075
C. State Population Control and Determinate Sentencing...1076
GLOSSARY.....1079
APPENDIX A: LIST OF COUNTY SEGMENTS.....1081
APPENDIX B: MAP OF COUNTY SEGMENTS.....1082

INTRODUCTION

California's prisons are dangerously and unconstitutionally overcrowded.[1] The state must find a way to cut its prison population by tens of thousands of prisoners or federal courts will force California to release them.[2] The state has long conceded that the conditions in its prisons violate the Eighth Amendment's prohibition on cruel and unusual punishment,[3] but it has struggled to find ways to sufficiently reduce overcrowding.[4] Last year, the state passed AB 109, a bill which radically reconfigured the relationship between local governments and the state prison system.[5] AB 109, Criminal Justice Alignment, shifted many sentences from the state level to the county level.[6] Local reaction to the plan has been mixed. Localities want to control the design and implementation of criminal justice policies, but they do not want to foot the bill.[7] Some members of the California assembly opposed to AB 109 see the overcrowding problem as a failure of state leadership and fear that realignment will result in threats to public safety.[8]

---

1. Brown v. Plata, 131 S. Ct. 1910, 1923 (2011).

2. *Id.* ("[A]bsent compliance through new construction, out-of-state transfers, or other means . . . the State will be required to release some number of prisoners before their full sentences have been served.").

3. *Id.* at 1926.

4. *Id.* at 1927–28. I note that the state reduced its prison population by 9,000 during the pendency of its appeal to the Supreme Court. *Id.* at 1923.

5. AB 109, 2011–2012 State Legis., (Cal. 2011). Because the bill changes so many individual statutes, I have also cited to the Legislative Counsel's Digest. COMM. ON BUDGET, LEGIS. COUNSEL'S DIGEST, AB 109 (2011), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110404_chaptered.html.

6. The default punishment for felonies is now 16 months or 2–3 years in county jail; before AB 109, the default punishment was 16 months or 2–3 years in state prison. *Id.* The bill will also transfer most of the state's parole system to the counties. *Id.*

7. *See, e.g.*, Curt Hagman, *Governor's Plan: Early Release Disguised as Realignment*, SAN BERNARDINO CNTY. SUN, May 7, 2011, *available at* 2011 WLNR 9126858 (Author, a California Assemblyman, agrees that localities can do a better job than the state but argues that it will cost his county (San Bernardino) money.). *See also* Don Thompson, *Calif Law to Shift Inmates Hinges on Elusive Funds*, ASSOCIATED PRESS, Apr. 5, 2011, *available at* http://www.businessweek.com/ap/financialnews/D9MDHDE01.htm (citing California State Sheriff's Association spokesman as saying the program is a "potential disaster" without guaranteed funding).

8. *See, e.g.*, Shannon Grove, *Taxpayers and Prisons*, DAILY INDEP. (Ridgecrest, Cal.) (June 8, 2011, 8:00 AM), http://www.ridgecrestca.com/opinions/columnists/x1841755204/Guest-Commentary-Shannon-Grove-Taxpayers-and-prisons (author is a California Assemblywoman).

But what if the counties are actually responsible for state prison overcrowding, and the state is simply returning the problem to the counties? Local officials, not state officials, control the inflow into prison, through decisions about which crimes to investigate, whom to arrest, and whom to prosecute.[9] Juries are empanelled locally, and the judges who preside over the proceedings are elected locally. The only thing statewide about the prison system is that the state administers it and pays for it.[10] Zimring and Hawkins famously referred to this as "the corrections free lunch" in their 1991 book, *The Scale of Imprisonment*.[11]

As the state seeks to manage its prison population, then, it must account for the potential policy distortions the prison subsidy creates. The difficulty is in distinguishing between incarceration that is, in

9. Local officials arguably have this power only because state legislatures have chosen to criminalize so much activity that there is, practically speaking, no substantive limit to the number of charges attaching to each set of criminal behaviors. For the classic treatment of this problem, see William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. J. 505 (2001).

10. In this Article, I am specifically using the word "prison" to mean the state prison system. This is not the only carceral option available, of course. Counties have jails, where they sentence offenders, process arrestees, and hold those who can't make bail until trial.

11. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 211 (1991). In California, county revenues pay for public protection, which includes judicial expenditures (including trial courts, clerks, the District Attorney, and the Public Defender), police and sheriffs, and detention and corrections (adult and youth detention, probation). Some counties receive block grants from the state through a number of different programs, most prominently the Local Public Safety Fund (LPSF) and the Local Safety and Protection Account (LPSA). The LPSF is funded through a half cent sales tax. CAL. CONST. art. 13, § 35. Funds are distributed based on counties' share of total state taxable sales. CAL. GOV'T CODE § 30052 (West 2011). The LPSA is funded through the vehicle license fund and, in turn, directs most of its funds to particular programs dealing with juvenile justice, law enforcement, and juvenile probation. CAL. STATE ASS'N OF CNTYS., LOCAL PUBLIC SAFETY FUNDING: SUMMARY OF RECENT STATUTORY CHANGES AND FREQUENTLY ASKED QUESTIONS 2 (2009), *available at* http://www.csac.counties.org/images/users/1/CSAC-CSSA-CPOC%20FAQ_May%2018.pdf. Both the juvenile justice program and the law enforcement program make their disbursements based on county population; the juvenile probation program allocations are fixed by statute. LEGIS. ANALYST'S OFFICE, JUDICIAL AND CRIMINAL JUSTICE: 2008-09 ANALYSIS D-21–D-26 (2008–2009), *available at* http://www.lao.ca.gov/analysis_2008/crim_justice/crimjust_anl08.pdf. Thirty-seven counties also receive funds of equal amounts through the Small and Rural Sheriffs' Grants. CAL. GOV'T CODE § 30070 (West 2011).

I note that none of these disbursements is made on the basis of demonstrated financial need, nor is any disbursement made on the basis of a county's level of crime. One complicating point: county revenues themselves come in large part from the state (32.60%) and federal (19.92%) government, meaning that the division between state and county (and federal government and county) is complex. CAL. STATE CONTROLLER, 2008-2009 COUNTIES ANNUAL REPORT iii (2011), *available at* http://www.sco.ca.gov/Files-ARD-Local/LocRep/counties_reports_0809counties.pdf.

some sense, justified by crime problems and that which is the result of local policy choices about how to deal with that crime.

While several studies have explored the relationship between incarceration and crime, most have focused on the state and national level.[12] No study has focused on the ways in which county governments contribute to overpopulation in the adult prison system. An unpublished paper by Tuosto and Peckenpaugh suggested that policy differences might explain the differences in county commitments to the California Department of Juvenile Justice.[13] A recent study looked at sentencing models in rural and urban areas of Nevada.[14] There have been several empirical studies examining county disparities in imposition of the death penalty in Illinois,[15] Missouri,[16] California,[17] and the federal system,[18] as well as an

12. Michael Tonry, in his 2004 survey of existing research, considered several possible explanations for why the U.S. incarcerates at such a high rate relative to other countries, concluding that the high crime explanation "has virtually no validity." MICHAEL TONRY, THINKING ABOUT CRIME 27 (2004). Bruce Western comprehensively analyzed the commonly-theorized causes of incarceration, ranging from politics to state sentencing, but he focused primarily on the state level. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006). Western's compelling survey of crime and incarceration examines research involving cities and neighborhoods, but his analysis does not focus on sub-state political units as political, policy-making entities. *Id.* at 36. His own comparison of murder and incarceration rates compares states to one another. *Id.* at 49. His analysis of politics, state penal laws, and the role of discretion in sentencing are all focused on the state level. *Id.* at 59–66.

13. Nicholas Tuosto & Jason Peckenpaugh, CA County Use of DJJ: 1990–2003 (unpublished article) (on file with author); *see also* SELENA TEJI & MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, AN ANALYSIS OF DIRECT ADULT CRIMINAL COURT FILING 2003–2009: WHAT HAS BEEN THE EFFECT OF PROPOSITION 21? (2011), *available at* http://www.cjcj.org/files/What_has_been_the_effect_of_Prop_21.pdf (noting disparities in the rates at which California counties filed charges against juveniles in adult court, and examining the fiscal impacts of the practice).

14. Victoria Springer et al., *Felony Sentencing in Rural and Urban Courts: Comparing Formal Legal and Substantive Political Models in the West* (Working Paper Series, 2009), *available at* http://ssrn.com/abstract=1441593.

15. Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Saliency for Issues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301, 1324–41 (2010) (analyzing, *inter alia*, county disparities in the prosecution of capital cases and concluding that "the total number of murders during the period and the average annual murder rate do not correlate with the number of capital prosecutions in the county").

16. Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305 (2009).

17. ROMY GANSCHOW, ACLU OF N. CAL., DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CALIFORNIA (2008), *available at* http://www.aclunc.org/docs/criminal_justice/death_penalty/death_by_geography/death_by_geography.pdf.

18. G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85

excellent theoretical treatment of the county role in death penalty administration.[19] In 2007, the Justice Policy Institute analyzed disparities in the prosecution of drug offenses among 198 counties nationwide.[20] The California state Offender Information Services Branch analyzed California counties' imposition of second and third strikes under its Three Strikes law, but did so only for a single year and only for strike-eligible offenses.[21] Twenty years after Zimring and Hawkins wrote that the correctional free lunch required "empirical and theoretical work which will both complicate and enrich the public choice model with special reference to decisions about imprisonment,"[22] few studies have been produced. This Article and the one to follow will try to fill that gap.

California is a massive state, with more than one tenth of the country's population.[23] Los Angeles County alone has a population greater than all but ten states.[24] Eight counties besides Los Angeles have more than a million people,[25] a population larger than that of the smallest seven states. California's prison population is,

---

WASH. L. REV. 425, 429 (2010) (finding that "the geography of the federal death penalty is anything but uniform. Six of the ninety-four federal judicial districts account for one-third of death-authorizations").

19. Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010).

20. PHILLIP BEATTY ET AL., JUSTICE POLICY INST., THE VORTEX: THE CONCENTRATED RACIAL IMPACT OF DRUG IMPRISONMENT AND THE CHARACTERISTICS OF PUNITIVE COUNTIES 3 (2007), *available at* http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf (finding that "it has become apparent that local policies shape the day-to-day identification of drug users and their entry into the criminal justice system").

21. DATA ANALYSIS UNIT, DEP'T OF CORR. & REHAB., SECOND AND THIRD STRIKER FELONS IN THE ADULT INSTITUTION POPULATION (2008), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d0806.pdf.

22. ZIMRING & HAWKINS, *supra* note 11, at 215.

23. U.S. Census Bureau, State Rankings—Statistical Abstract of the United States (2010), *available at* http://www.census.gov/compendia/statab/2012/ranks/rank01.html) (listing California's population as 36,961,664 out of a national population of 307,006,550).

24. *Id.* The California Department of Finance estimated that Los Angeles County's 2010 population was 9, 827, 070. CAL. DEP'T OF FIN., E-2. CALIFORNIA COUNTY POPULATION ESTIMATES AND COMPONENTS OF CHANGE BY YEAR—JULY 1, 2000–2010 (2010) [hereinafter E-2 CALIFORNIA COUNTY POPULATION ESTIMATES], *available at* http://www.dof.ca.gov/research/demographic/reports/estimates/e-2/2000-10/view.php (follow hyperlink).

25. In alphabetical order: Alameda, Contra Costa, Orange, Riverside, Sacramento, San Bernardino, San Diego, and Santa Clara. *See* E-2 CALIFORNIA COUNTY POPULATION ESTIMATES, *supra* note 24 (showing that Montana is 44th with a population of 979,989).

correspondingly, nearly the same size as the federal system's prison population. California is, therefore, a good place to start the analysis of the counties' role in state prison overpopulation: the scale of California's prisons—as well as the scale of its overcrowding—is of national import.

California can be thought of not only as a single state, but also as a collection of fifty-eight counties. Counties are significant political entities in their own right, distinct from the state. Residents run their counties: there is no statewide politicking in local elections for Sheriff, District Attorney, county council, or judge. A California voter in one county has no say in how another county makes its criminal justice decisions.

The pair of Alameda and San Bernardino Counties presents perhaps the starkest example of how local decisions can affect counties' usage of state prison resources. A ten-year average of county data (2000–2009) shown on the chart below indicates that both counties have similarly-sized populations, similar amounts of reported violent crime (criminal homicide, rape, robbery, and aggravated assault), similar amounts of reported property crime (burglary, motor vehicle theft, and larceny-theft over $400), and similar amounts of all reported "Part I" crime (all of the above crimes plus larceny-theft under $400 and arson).[26] Overall crime rates are nearly identical: Alameda is a little more violent and San Bernardino is a little worse for property crime. Both counties are part of the same state, governed by the same penal code and state judicial system, yet ten-year averages of prison usage for that time show two radically different outcomes: San Bernardino's prison population was more than twice as high, on average, as Alameda's, and it sent an average of more than three times as many "new felons" to prison each year.

26. The Uniform Crime Reporting Program divides crimes into Part I and Part II. Part I crimes include criminal homicide, forcible rape, aggravated assault, burglary (breaking and entering), larceny-theft not of a motor vehicle, motor vehicle theft, and arson. *UCR Offense Definitions*, UNIFORM CRIME REPORTING STATISTICS, http://www.ucrdatatool.gov/offenses.cfm (last visited Jan. 14, 2012). These offenses were chosen "because they are serious crimes, they occur with regularity in all areas of the country, and they are likely to be reported to police." *Id.*

Table 1: Crime Comparison Between San Bernardino and Alameda Counties, Average Yearly Values 2000-2009

	San Bernardino	Alameda	Ratio of San Bernardino to Alameda
Total Population	1,923,360	1,506,740	1.28
Reported Violent Crime	9,956.6	10,629	.94
Reported Property Crime	38,762	36,072	1.07
All Reported Part I Crime	72,454	74,194	.98
Yearly Prison Population	11,441	4,555	2.51
Yearly New Felon Admissions	3,792	1,088	3.49

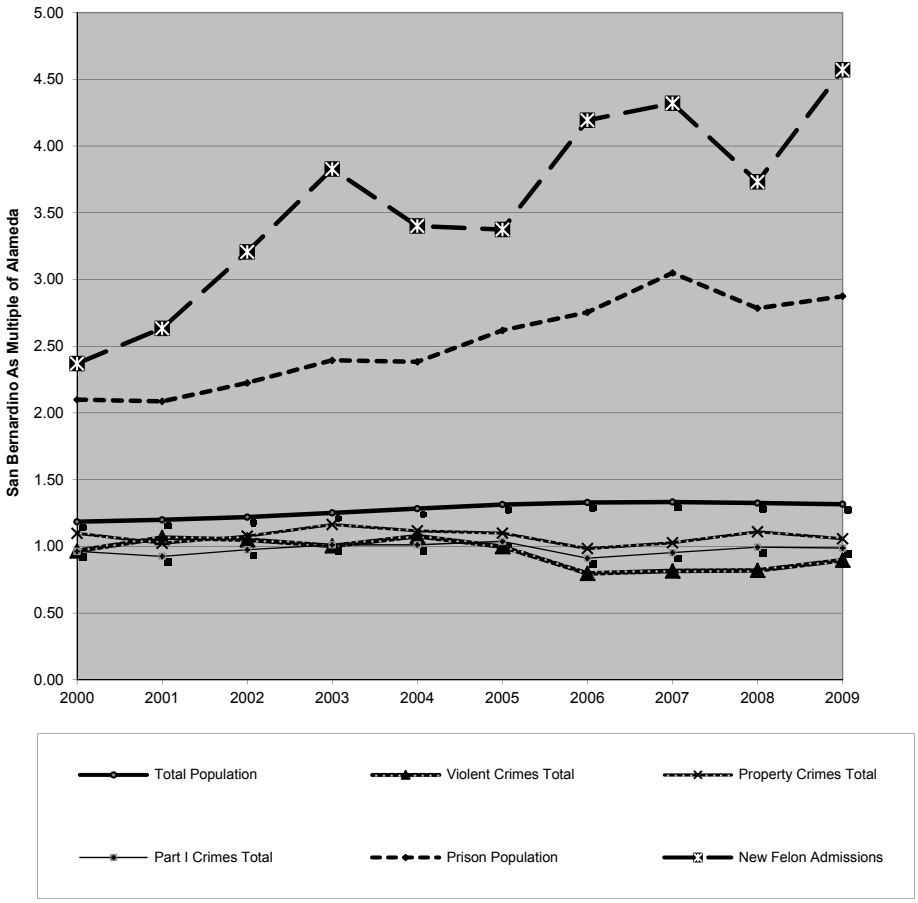
All figures are ten-year averages, 2000-2009.[27]

The results of this comparison on a year-to-year basis are shown graphically in Figure 1. The yearly data was calculated as a ratio (San Bernardino to Alameda). As in the chart above, a ratio of one means the counties have equal numbers for that particular category, a ratio above one indicates the degree to which San Bernardino's numbers exceed Alameda's, and a ratio below one indicates the degree to which San Bernardino's numbers are lower than Alameda's. The

27. The data for this chart, and all charts and tables in this Article, has been posted online *at* http://digitalcommons.law.scu.edu/facpubs/162. The hyperlink marked "READ ME FIRST.doc" contains a guide to every chart, table, and graph in this Article. The data from this table in particular comes from W. DAVID BALL, TOUGH CHART DATA MARCH 2012 REVISED (2012) [hereinafter TOUGH CHART DATA], *available at* http://digitalcommons.law.scu.edu/facpubs/162 (follow Tough Chart Data March 2012 Revised.xls hyperlink) (tab "All Data 10y avg as #s"); the ratio was calculated in W. DAVID BALL, COUNTY COMPARISONS (2012) [hereinafter COUNTY COMPARISONS], *available at* http://digitalcommons.law.scu.edu/facpubs/162 (follow County Comparisons.xls hyperlink) (tab "SB Alameda Pct").

chart clearly demonstrates that the year-to-year story is no different than the one told by the ten-year average. During all ten years, San Bernardino had at least twice the prison population and more than twice the number of new felon admissions—sometimes many more—and it did so without suffering from any more crime than Alameda.

Figure 1: San Bernardino and Alameda Crime Rates and Prison Usage



These two counties, then, are almost identical in material ways when it comes to crime, but they are incredibly different when it comes to usage of state prison resources. For new felon admissions alone, San Bernardino costs the state, on average, $93,045,566 more each year than Alameda; its total prison population costs the state, on

average, an extra $236,761,677 each year.[28] Referencing reported crime rates cannot explain this difference. The state is paying for San Bernardino's decision to treat crime with prison, but Alameda—indeed, any California citizen who does not live in San Bernardino—has no say in electing the people who design San Bernardino's criminal justice policies. Why should the state pay for a decision only some of its citizens make, when residents of other counties make different decisions? In other words, is realignment a sign that the correctional free lunch is over?

The most persuasive justification for the use of prison is that it is a response to crime; this paper primarily addresses that argument. For purposes of this analysis it is assumed that crime rates are exogenous: that is, counties do not (or cannot) breed crime through policy. This Article takes no position on whether this is necessarily the case; it is assumed merely to limit the scope of this Article, and to take the "prison as a necessary response to crime" argument at its strongest.[29] This Article makes no claim that prison should not be used to treat crime. The focus of the study is to show that violent crime rates alone cannot explain the observed difference in prison usage among counties. This Article specifically focuses on violent crimes because all the dominant justifications for imprisonment—incapacitation, retribution, and deterrence—consider violent crimes to be the most worthy of incapacitation, the most deserving of punishment, and the most serious offenses to be deterred.[30]

This analysis starts with the proposition that the average of a state as large as California—with a single county larger than all but nine states[31]—smooths over very real differences, much like taking the per capita average income in a room with Bill Gates would also be misleading. While the study examines data at the statewide level, the bulk of the analysis is focused at the county level. This analysis

28. *See* TOUGH CHART DATA, *supra* note 27.

29. For the argument that prison is criminogenic, see, e.g., Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 240–41 (2009).

30. This Article does not address drug crimes, except briefly in Part III.B., *infra*, for one main reason: there are no reported drug crimes and no reported drug crime statistics. The simple fact is that people who buy, sell, grow, make, possess, and use drugs typically do not report these activities to law enforcement, and thus they are not reflected in reported crime statistics.

31. *Supra* note 24.

shows that San Bernardino and Alameda are not anomalous: the state as a whole is divided between counties which persistently use prison resources at high rates and those which use prison at low rates. The counties with the highest rate of prison usage, have, as a whole, below-average violent crime rates. They also have lower property and "Part I" crime rates. The argument that prison usage is driven by violent crime rates has no statistical support.

A. The Coverage Model

This Article makes one normative proposal: that violent crime rates *should* be driving the state's willingness to pay for localities' prison commitments. This Article divides the state's counties into four segments based on the relationship, within each county, of reported violent crime and the number of new felons it sends to prison. A new variable is defined to measure this relationship: the violent crime coverage rate ("coverage").[32] Coverage is the amount of new felon admissions (NFA)[33] for a given county in a given year as a percentage of reported violent crime[34] for that county in the same year. Mathematically,

$$\text{Coverage}_{\text{countyyear}} = \text{NFA}_{\text{countyyear}} / (\text{Violent Crime}_{\text{countyyear}}).$$

A county with 100 reported violent crimes and 50 NFA would have a coverage rate of 50%. A county with 500 reported violent crimes and 50 NFA would have a coverage rate of 10%. Higher numbers indicate more carceral responses: for a given level of violent crime, a county with higher coverage sends a larger number of new

32. This measurement has sometimes been called the "effective incarceration rate," but because this variable raises key questions about what is (or is not) an effective use of prison, I will use the term coverage instead.

33. NFA measures prison admissions of individuals convicted of a new crime, as opposed to those returning to prison on either a "technical" parole violation (e.g. failed drug test) or a new crime charged as a parole violation. (That is, a crime that could have been charged by a DA—and thus reflected in NFA statistics—might instead be processed as a parole violation, returning the parolee to prison.) NFA describes new terms for new offenses; they do, of course, include recidivist prisoners who have been previously incarcerated.

34. Reported violent crimes include homicide, rape, robbery, and aggravated assault.

offenders to prison. Counties with lower numbers "cover" their violent crimes with fewer NFA.[35] Some variance might be explained by the types of violent crime—more murders, for example. This Article will explore whether this is the case.[36]

The coverage variable is used to evaluate the number of NFAs a county sends to state prison. Coverage is used to distinguish between the crime justified (or necessary) NFA and the non-justified (or surplus) NFA. In the above example, both counties have identical numbers of NFA, but the crime underlying those NFA numbers is five times greater in one county. Merely comparing NFA numbers would leave out a critical dimension of the analysis. This Article uses the statewide coverage rate as a baseline. Necessary incarceration is defined as violent crime in a county times the statewide coverage rate. That is, the state average is the "fair" amount of incarceration justified by a particular amount of violent crime; anything above the state average constitutes a local policy choice that is being subsidized with state funds. This is obviously a normative choice, but it aligns with the thrust of this Article's argument: the rest of the state should not subsidize a county's deviation from state policies. If a county makes different choices from the state as a whole, it should bear the cost of those policies (and reap the benefits). It is also consonant with California's realignment plan, which reserves state prison sentences for violent offenders, serious offenders, or sex offenders.[37]

The statewide coverage rate, then, is a proxy for the amount of incarceration dictated by violent crime itself, not a county's unique

---

35. A number of factors might explain coverage rates: higher clearance rates (more efficient law enforcement), more aggressive policing strategies (e.g. broken windows), or something to do with the seriousness of the particular offenses (e.g., those facts deserving of more serious punishment). *See infra* Part III.

36. My preliminary conclusion is that rates of each type of violent crime are lower in counties which use a lot of prison resources and, moreover, that the more serious crimes—such as homicide—have too few cases to account for much of a difference. *See infra* Part I.B. I also examine the offender mix of county NFA. *See infra* Part III.A.

37. *See* AB 109, 2011–2012 State Legis., (Cal. 2011), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110404_chaptered.html ("The bill provides exceptions to imprisonment in county jail for a variety of felonies, including serious felonies and violent felonies, as defined, felonies requiring registration as a sex offender, and when the defendant has a prior conviction for a serious or violent felony, or a felony subjecting the defendant to registration as a sex offender, among other exceptions.")

response to violent crime. Calculating the number of surplus NFA in this way more closely ties prison usage to the justification for that usage, and differentiates between counties which *have* to use a lot of prison and those which *choose* to use a lot of prison.

The surplus NFA numbers were calculated as follows. The state's coverage rate for a given year was multiplied by the number of reported violent crimes in each county that year to determine the "crime justified" NFA. These "crime justified" NFA numbers were subtracted from a county's actual NFA numbers to arrive at that county's NFA surplus (or deficit). As an example, consider a county with 100 reported violent crimes and 25 NFA during a year when the state coverage rate was ten percent. The justified NFA figure for the county would be 10 (100 x .1) and the surplus NFA figure would be 15 (25 minus 10). To calculate the dollar amount of the subsidy, this surplus (or deficit) NFA figure was multiplied by that year's per capita prisoner cost. Mathematically,

$$\text{Subsidy}_{\text{countyyear}} = (\text{GrossNFA}_{\text{countyyear}} - (\text{Coverage}_{\text{stateyear}} * \text{Violent Crime}_{\text{countyyear}})) * \text{Per Capita Prison Cost}_{\text{stateyear}}$$

I again emphasize that subsidy dollar amounts are not a measure of the total cost of prison.[38] This estimate only calculates the cost for the first year of imprisonment for surplus NFA. Sentence lengths are undoubtedly an immense factor in determining the total cost of a county's use of state prisons. That is, a county with a below-coverage NFA number might nevertheless have higher costs because their felons stay in prison longer. (Of course, it could also be that counties with higher NFA rates also give longer sentences, in which case the subsidy numbers will be underweighted relative to the ultimate fiscal cost.) Nevertheless, I believe that the cost of NFA provides us with a useful entry point to see which counties benefit from prison subsidies

38. We can easily get that number by multiplying the total numbers of prisoners from a given county by that year's cost per prisoner. That number, however, treats all prison commitments as desirable, or at least undifferentiated. Using coverage to calculate subsidies, however, accounts for the best reason for incarceration—violent crime. Incarceration at the statewide coverage rate is justified; anything else is surplus.

and which counties are taxed by them. I discuss the implications of sentence lengths *infra* at Part IVB.

This Article focuses on NFA, not total prison population, for simplicity. Stephen Raphael and Michael Stoll have modeled prison population as a function of admission rates, release rates, and the prison population the year before.[39] This Article focuses on admissions rates alone because it seeks to differentiate between crime-justified incarceration and policy-driven incarceration. Sentence length, which affects time to release, invariably involves case-specific factors which do not lend themselves to systematic analysis. It is difficult enough to determine what constitutes a "real offense;" it is that much more difficult to determine the "real" sentence length of a given offense, as the U.S. Sentencing Commission has so often demonstrated.

NFA, instead, simply measures who enters prison from a given county, not how long they stay there. Its simplicity is not without its costs, however. It is, of course, possible that Low Use counties are sending offenders to prison for longer sentences than High Use counties, and therefore their prison usage is greater over the long term. If that is the case, the method chosen in this Article will not account for that. I revisit this question with additional data *infra* at Part IIA and Part IVB, where I look at the actual percentages of offense types in each county's NFA and how long they are sentenced, respectively, and conclude that this is not the case. I also note that total prison population for Low Use counties is consistently much lower than that of High Use counties, suggesting that the "time to release" variable noted by Stoll and Raphael is not operative, at least in the ten years of data examined in this Article.

---

39. Stephen Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?*, *in* DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 6 (Steven Raphael & Michael A. Stoll eds., 2008), *available at* http://www.law.berkeley.edu/files/why_are_so_many_americans_in_prison.pdf. Raphael and Stoll conclude that the increase in population is not primarily due to increases in crime, characterizing the rise in incarceration as a policy experiment. *Id.* at 65.

B. Why Coverage Matters

If the violent crime to NFA relationship is not predictive at the state level, this raises two obvious questions: what might explain it, and why does this even matter? As to the first question, this Article considers a variety of explanations: other crimes, local law enforcement, politics, per capita income, and the use and type of in-county dispositions. The exploration of these subjects is, for space reasons, tentative, but the dataset is posted online and others are encouraged to do additional analysis.[40]

There are three ways in which this analysis makes potentially significant contributions. First, there are very real fiscal impacts to counties' usage of prison, ones that are not transparent enough in the present system. By controlling for the influence of violent crime, the estimation of fiscal impact is a closer representation of differences in policy among counties, policy choices which are subsidized by the unwilling residents of other counties. This Article is part of a two-part series that examines why states should subsidize state prisons when local officials decide who is sent there.[41] This Article will, it is hoped, dispel the idea that the level of prison usage in California is a necessary result of violent crime.

Using the coverage rate model of prison subsidy, this Article will demonstrate that some individual counties that make different policy choices—choices not dictated by the average response to violent crime—cost the state tens of millions of dollars a year, every year, while others leave tens of millions of dollars of prison resources on the table. This Article also explores what would happen if the entire state incarcerated at the coverage rate of the most carceral counties. This raises a key question: if one county or set of counties is entitled to incarcerate at a given rate, why shouldn't other counties do so as well? And if the state can only afford to have some counties incarcerating greater numbers of people per violent crime, which

---

40. *See* TOUGH CHART DATA, *supra* note 27. (The hyperlink marked "READ ME FIRST.doc" contains a guide to every chart, table, and graph in this Article.).

41. *See also* W. David Ball, *Why Should States Pay For Prisons, When Local Officials Decide Who Goes There?* (Working Paper Series, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871274.

ones get to do so, and on what basis? Ultimately, this analysis sheds light on how—or whether—residents of under-incarcerating counties can rein in over-incarcerating counties in the present system, given that all citizens pay for prison equally through general state revenues, regardless of how heavily their counties use prison.

The second point is that state prison problems are not necessarily best addressed by statewide solutions. As this Article demonstrates, counties operating under the same set of laws and in the same court system get widely different results. Statewide solutions—such as changes to statutes, sentencing commissions, and the like—are almost always proposed as the means of addressing state prison overpopulation. But, because they fail to address the differences in local enforcement, they cannot effectively address the problem. In other words, because they are based on an inaccurate or incomplete diagnosis of the cause of state prison usage, these solutions cannot cure the disease.[42]

Third, this analysis has important ramifications for the state's implementation of criminal justice realignment. The question of how much incarceration counties will be expected to deal with inside the county depends crucially on how California sets the baseline rate of each county's use of state resources. The current plan is to set the baseline at current levels of prison usage. This would be a mistake, in my view, because it would make permanent the state subsidies of what appear to be policy choices. Just because a county *has been* using state prisons at a given rate does not mean that it *had to*. I propose, instead, that the state base prison usage on reported violent crime rates and the statewide violent-crime-to-new-felon-admission coverage rate. This would tie funding to *need*, rather than funding to *use*.

***

42. Franklin Zimring, in a recent article, observes that the huge growth in prison population during the 1970s and 1980s was not accompanied by any significant changes in state penal codes. Because of the discretion in the American system, however, "substantial changes in aggregate punishment policy can take place without any substantial change in the legislation governing the levels of punishment available or the choice of punishments in individual cases." Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1232 (2010).

This Article proceeds in four parts. Part I explains the sources and methods used for this Article. Part II examines the relationship between crime and incarceration. Part III explores other possible explanations for differences in county commitments to state prisons. Part IV lays out the fiscal implications of differences in incarceration rates, demonstrating that counties which incarcerate at a relatively greater rate are doing so at great cost to the state: that is, they are tough on crime on the state's dime. This Article concludes with a discussion of potential policy implications this analysis has for the future of California criminal justice reform.

I. SOURCES, LIMITATIONS, AND METHODS OF THE STUDY

This Section provides a brief outline of how this study was conducted. I begin by describing the data sources used in this Article, all of which are made available online by the state. I then discuss some limitations with this study that might explain the results. I then discuss further the ways in which I subdivided the state on the basis of violent crime coverage rates and the calculated prison subsidy.

A. Sources

The state of California maintains several public databases available on the internet; it also publishes annual reports on the offender population incarcerated in the state's prison. The data I used in this analysis came from these sources and dates from 2000 to 2009. All data has been compiled into a single spreadsheet which I have made available online.[43] In this section, I will discuss sources for particular data, as well as changes to the data I made, where necessary to account for things such as the difference between calendar year and fiscal year reporting.

County population. The California Department of Justice uses estimates from the State Department of Finance to generate three potentially useful county population figures, divided by age: Total

43. *See generally* http://digitalcommons.law.scu.edu/facpubs/162.

Population at Risk, (ages 10-69), Adult Population at Risk (ages 18-69), and Juvenile Population at Risk (ages 10-17).[44] I have used the Adult Population at Risk (APAR) figures throughout this Article and have calculated crime, arrest, and new felon admission rates using raw numbers and dividing by these population figures, normalizing per 100,000.[45] I did so to avoid rate differences that might stem from using different population figures. The California Department of Finance estimates the total adult population for each county as of July 1 of each year.[46] I have used total population figures to contrast with Adult Population at Risk only where noted. These figures do not include relevant information about population distribution—e.g., degree of urbanization—that might be relevant drivers of crime and/or carceral responses, nor do they include figures about racial or ethnic subpopulations within a given county, which might also be

44. *See, e.*g., CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2000: BY COUNTY tbl.27 (2000), *available at* http://stats.doj.ca.gov/cjsc_stats/prof00/00/27.pdf. The term "at Risk" presumably refers to those people who are at greatest risk of becoming involved with the criminal justice system, either as juveniles or adults, but the figure counts all residents of a county in that age group.

45. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, STATISTICS BY CITY AND COUNTY: CSJC TABLES (2000), *available at* http://ag.ca.gov/cjsc/datatabs.php. Individual population reports are also available. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2009 BY COUNTY tbl.27 (2009), *available at* http://stats.doj.ca.gov/cjsc_stats/prof09/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2008 BY COUNTY tbl.27 (2008), *available at* http://stats.doj.ca.gov/cjsc_stats/prof08/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2007 BY COUNTY tbl.27 (2007), *available at* http://stats.doj.ca.gov/cjsc_stats/prof07/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2006 BY COUNTY tbl.27 (2006), *available at* http://stats.doj.ca.gov/cjsc_stats/prof06/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2005 BY COUNTY tbl.27 (2005), *available at* http://stats.doj.ca.gov/cjsc_stats/prof05/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2004 BY COUNTY tbl.27 (2004), *available at* http://stats.doj.ca.gov/cjsc_stats/prof04/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2003 BY COUNTY tbl.27 (2003), *available at* http://stats.doj.ca.gov/cjsc_stats/prof03/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2002 BY COUNTY tbl.27 (2002), *available at* http://stats.doj.ca.gov/cjsc_stats/prof02/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2001 BY COUNTY tbl.27 (2001), *available at* http://stats.doj.ca.gov/cjsc_stats/prof01/00/27.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, POPULATION ESTIMATES, 2000 BY COUNTY tbl.27 (2000), *available at* http://stats.doj.ca.gov/cjsc_stats/prof00/00/27.pdf.

46. *See* E-2 CALIFORNIA COUNTY POPULATION ESTIMATES, *supra* note 24.

relevant. Department of Finance figures do, however, account for both legal residents and "unauthorized foreign immigrants."[47]

Prison Population by County, New Felon Admissions by County, and Parole Violators with a New Term by County. The California Department of Corrections and Rehabilitation publishes annual population reports on prisoners housed in state prisons. Each year, the state publishes the total population of prisoners by county of commitment as of December 31 of that year,[48] as well as yearly totals by county for new felon admissions and parole revocations.[49] I note

---

47. *Id.*

48. *California Prisoners & Parolees Report Archive*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPrisArchive.html (last visited Jan. 18, 2012) (follow hyperlinks for individuals years between 2000 and 2009). 2002 and 2001 reports contained data from the year prior; reports after 2004 contained data from that year. In 2003, the Data Analysis Unit combined two years' worth of data into one report. DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2009 tbl.10 (2009), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2009.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2008 tbl.10 (2008), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2008.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2007 tbl.10 (2007), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2007.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2006 tbl.10 (2006), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2005 tbl.10 (2005), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2005.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2004 tbl.10 (2004), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2004.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2003 34 tbl.10, 139 tbl.10 (2003), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2003.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2002 tbl.10 (2002), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2002.pdf; DATA ANALYSIS UNIT, CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2001 tbl.10 (2001), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2001.pdf.

49. *See California Prisoners & Parolees Report Archive*, *supra* note 48, at tbl.5A (for the years 2000 and 2002–06); *Id.* at tbl.15A (for the years 2007–09). 2000 data is in the 2001 report. 2002 data is in the 2002 report. The 2003 report provides 2003 data in the second set of tables. *Id.* at 128 tbl.5A. Thereafter the data for a given year is in that year's report. 2001 data was not given in any of the annual reports. It

that this population figure is taken in a different month (December) than the county population figures noted above (July) and that prison figures represent actual headcounts, while county population figures are estimated.

Crime and Arrest Figures; Probation and Jail Figures. I used Department of Justice published data for reported crimes,[50] felony arrests,[51] adult probation caseload,[52] and jail population figures.[53] As noted earlier, I chose to calculate rates per 100,000 APAR myself,

---

was, instead, taken from *Characteristics Of Felon New Admissions And Parole Violators Returned With A New Term: Calendar Year 2001*. DATA ANALYSIS UNIT, DEP'T OF CORR., CHARACTERISTICS OF FELON NEW ADMISSIONS AND PAROLE VIOLATORS RETURNED WITH A NEW TERM: CALENDAR YEAR 2001 tbl.11, tbl.16 (2002), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/ACHAR1/ACHAR1d2001.pdf. The figures from Tables 11 and 16 were added to arrive at total new admissions figures (calculated).

50. For the entry page for the Criminal Justice Statistics Center's county crimes data, see *Statistics: Crimes, 1999–2009*, CAL. DEP'T OF JUSTICE: OFFICE OF THE ATT'Y GEN., http://ag.ca.gov/cjsc/statisticsdatatabs/CrimeCo.php (last visited Jan. 18, 2012) (individual county data may be accessed by following hyperlinks to each county).

51. For the entry page for the Criminal Justice Statistics Center's county arrests data, see *Statistics: Felony Arrests, 1999–2009*, CAL. DEP'T OF JUSTICE: OFFICE OF THE ATT'Y GEN., http://ag.ca.gov/cjsc/statisticsdatatabs/ArrestCoFel.php (last visited Jan. 18, 2012) (individual county data may be accessed by following hyperlinks to each county).

52. For the entry page for the Criminal Justice Statistics Center's adult probation data, see *Statistics: Supervision, 1999–2009*, CAL. DEP'T OF JUSTICE: OFFICE OF THE ATT'Y GEN., http://ag.ca.gov/cjsc/statisticsdatatabs/SuperCo.php (last visited Jan. 18, 2012) (individual county data may be accessed by following hyperlinks to each county). The data is incomplete: Contra Costa, Merced, Sacramento, Siskiyou, Tulare, and Yolo counties did not report separate misdemeanor population counts. *See* CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, CRIMINAL JUSTICE TREND DATA FOOTNOTES (2009), *available at* http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf. Mariposa County reported -47 people on the misdemeanor probation caseload for 2000, so I deleted all data from that year; the same is true for San Joaquin County for 2002, which reported a felony probation caseload of -423. *See Statistics: Supervision, 1999–2009*, *supra* (follow hyperlinks for Mariposa County and San Joaquin County). Gaps in the data also crop up intermittently and are a result of no data being reported; they should not be read as zeroes.

53. For the entry page for the Criminal Justice Statistics Center's jail population data, see http://stats.doj.ca.gov/cjsc_stats/prof09/index.htm (2009), http://stats.doj.ca.gov/cjsc_stats/prof08/index.htm (2008), http://stats.doj.ca.gov/cjsc_stats/prof07/index.htm (2007), http://stats.doj.ca.gov/cjsc_stats/prof06/index.htm (2006), http://stats.doj.ca.gov/cjsc_stats/prof05/index.htm (2005), http://stats.doj.ca.gov/cjsc_stats/prof04/index.htm (2004), http://stats.doj.ca.gov/cjsc_stats/prof03/index.htm (2003), http://stats.doj.ca.gov/cjsc_stats/prof02/index.htm (2002), http://stats.doj.ca.gov/cjsc_stats/prof01/index.htm (2001), http://stats.doj.ca.gov/cjsc_stats/prof00/index.htm (2000) (individual county data may be accessed by following hyperlinks; select county name and table 8, jail profile survey). Total figures might not add up due to projections and rounding of numbers. *See* CRIMINAL JUSTICE STATISTICS CTR., *supra* note 52.

rather than rely on the state's rates, to avoid differentials based solely on different numbers (or definitions) of population. I use crime and arrest figures for two reasons. First, arrest figures can serve as a proxy for how active and/or effective law enforcement in a particular locale is (through the use of community policing, etc.). I examined county clearance rates as well to determine how effective a given county was at solving crimes.[54] Second, because there are no reported drug crime statistics, drug arrests serve as a proxy for drug crimes, albeit an imperfect one, since they conflate policing resources, strategies, and priorities with the level of underlying activity.

This data is subject to a number of limitations.[55] If multiple crimes take place, only the most serious is recorded.[56] The same is true when an offender is arrested for multiple offenses.[57] Crime is generally seen to be subject to reporting variations: a particular county might have actual crime rates that are a greater or lesser percentage of reported crimes. The state collects information on dispositions; however, this data is marred by a very large "other" category and the state cautions that dispositions "data may or may not be representative at the county level."[58] Accordingly, I have focused only on county jail and probation figures. Within the jail data, I have ignored data on Type I facilities, which are used only for detentions of up to 96 hours, not sentencing; I have, instead, used figures for Type II, III, and IV facilities[59] because they can be used to sentence

54. For the entry page for the Criminal Justice Statistics Center's county clearance data, see *Statistics: Crimes, 2009*, CAL. DEP'T OF JUSTICE: OFFICE OF THE ATT'Y GEN., http://ag.ca.gov/cjsc/statisticsdatatabs/ClearanceCo.php (last visited Jan. 18, 2012) (individual county data may be accessed by following hyperlinks to each county). I calculated clearance rates using the number of cleared cases.

55. *See, e.g.*, CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, DATA CHARACTERISTICS AND KNOWN LIMITATIONS (2009), *available at* http://stats.doj.ca.gov/cjsc_stats/prof09/limits.pdf. *See also* CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, CRIMINAL JUSTICE TREND DATA FOOTNOTES (2009), *available at* http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf.

56. CRIMINAL JUSTICE STATISTICS CTR., *supra* note 55, at 1.

57. *Id.* at 2.

58. *Id.* at 2–3.

59. CAL. CODE REGS. tit. 15, § 1006 (2012). "Type II facility" means a local detention facility used for the detention of persons pending arraignment, during trial, and upon a sentence of commitment. *Id.* "Type III facility" means a local detention facility used only for the detention of convicted and sentenced persons. *Id.* "Type IV facility" means a local detention facility or portion thereof designated for the housing of inmates eligible under Penal Code Section 1208 for work/education furlough and/or

offenders. These figures are taken from actual population reports and are divided between sentenced and non-sentenced prisoners. Non-sentenced prisoners are those who are denied bail, unable to make bail, or in some form of temporary detention.

Cost per Prisoner. I calculated the cost per prisoner by using corrections budget figures[60] and dividing by the prison population. This is a crude approximation of the cost per prisoner since there are certain fixed costs in the state prison system that are not fully realized on a marginal basis and because some of the funds go to the Department of Juvenile Justice. However, this is the same method the Bureau of Justice Statistics has used in its State Prison Expenditures series.[61] Again, because the state's fiscal year goes from July 1 to June 30, I averaged two years together in order to get approximations

---

other programs involving inmate access into the community. *Id.*

60. *See California Budget Historical Documents, 2012–13*, CAL. DEP'T OF FIN., http://www.dof.ca.gov/budget/historical/ (last visited Jan. 18, 2012) (for Final Budget Summaries, select year from drop down menu). For budget figures for 2000–2001, see CAL. DEP'T OF FIN., 2000–01 FINAL BUDGET SUMMARY 48 (2001), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2000-01budsum.pdf. For budget figures for 2001–2002, see CAL. DEP'T OF FIN., 2001–02 FINAL BUDGET SUMMARY (2002), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2001-02budsum.pdf. For budget figures for 2002–2003, see CAL. DEP'T OF FIN., 2002–03 FINAL BUDGET SUMMARY 384 (2003), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2002-03budsum.pdf. For budget figures for 2003–2004, see CAL. DEP'T OF FIN., 2003–04 FINAL BUDGET SUMMARY 2 (2004), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2003-04budsum.pdf. For budget figures for 2004–2005, see CAL. DEP'T OF FIN., 2004–05 FINAL BUDGET SUMMARY 6 (2005), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget04/pdf/fbudsum_04.pdf. For budget figures for 2005–2006, see CAL. DEP'T OF FIN., 2005–06 FINAL BUDGET SUMMARY 11 (2006), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget05/pdf/fbudsum_05.pdf. For budget reports for 2006–2007, see CAL. DEP'T OF FIN., 2006–07 FINAL BUDGET SUMMARY 400 (2007), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_06.pdf. For budget figures for 2007–2008, see CAL. DEP'T OF FIN., 2007–08 FINAL BUDGET SUMMARY 14 (2008), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_07.pdf. For budget figures for 2008–2009, see CAL. DEP'T OF FIN., 2008–09 FINAL BUDGET SUMMARY 18 (2009), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_0809.pdf. For budget figures for 2009–2010, see CAL. DEP'T OF FIN., 2009–10 FINAL BUDGET SUMMARY 7 (2010), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/fbudsum_09.pdf.

61. *See, e.g.*, JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 2001 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf.

of calendar year figures—with the exception of 2000, for which I simply used 2000–2001 figures.

My calculations are actually lower than the estimates published by the state Legislative Analyst's Office (L.A.O), which estimated that the cost of incarcerating each prisoner in California in 2008–2009 was $47,102.[62] My estimate for the calendar year 2008 was $41,200.05. Because the L.A.O has not released estimates for all the years in my survey, however, I decided to use calculated figures. If anything, this indicates that the subsidy the state pays to counties that are heavy users of the state prison system—and the corresponding tax on those counties that do not use it as heavily—might be greater than the figures used in this Article.

B. Limitations of the Study

The main difficulty with this study is deciding what proxy to use for the "fair" rate of prison usage to which a county is rightfully entitled. I make no normative claim about how a county should use prisons, nor have I found a statistical one.[63] There is no consensus on this in California, academia, or elsewhere. In fact, that is the point of this series of articles: given this lack of consensus, residents of a particular county should not have to pay for the policy choices of residents of another county. High coverage rates are not necessarily bad, nor are low ones good. My point is only that if there is no consensus, high rates should not be subsidized, nor low rates penalized. In other words, while I make no claims about high usage

---

62. *See California's Annual Costs to Incarcerate an Inmate in Prison*, CAL. LEGIS. ANALYSTS' OFFICE, http://www.lao.ca.gov/laoapp/laomenus/sections /crim_justice/6_cj_inmatecost.aspx?catid=3 (last visited Jan. 16, 2012); *see also* CAL. STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: IT FAILS TO TRACK AND USE DATA THAT WOULD ALLOW IT TO MORE EFFECTIVELY MONITOR AND MANAGE ITS OPERATIONS 26 (2009), *available at* http://www.bsa.ca.gov/pdfs/reports/2009-107.1.pdf (estimating an annual cost per inmate in 2007–2008 of $49,300).

63. In fact, as I have argued elsewhere, I believe that normative questions cannot be avoided even in a heavily quantified context. *See* W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395, 397 (2011) (questioning whether parole release is "inherently about risk or inherently about desert, or whether it is irreducibly about both").

itself, I do claim that the state's prison resources should not be distributed on a first-come, first-served basis.[64]

While using violent crime rates is a crude measure of the need for prison, I do not believe there is a "real offense" alternative. That is, there is no way to readily look at a given criminal case or set of criminal cases and determine which ones should result in a prison sentence and which ones should not. There are a number of complicating factors. The first is plea bargaining. Charged offenses are an inaccurate measure of the real offense because a DA might overcharge for strategic reasons in order to posture during plea or charge bargaining. Offenses might also be undercharged as the result of such bargaining. The second complicating factor is evidentiary. The strength of an individual case has as much to do with evidentiary concerns as with the heinousness of the underlying conduct. A case with bad facts might nevertheless get a lower sentence due to a lack of witnesses or a lack of high-quality witnesses (for example, if the available witnesses can be impeached due to prior criminal offenses). Evidence might be excluded due to violations of the Fourth Amendment, or confessions might be invalidated due to violations of the Fifth Amendment. A third issue has to do with what the defendant might be able to offer in a different case. Individuals with valuable testimony to offer can exchange that testimony for reduced sentences even if they're caught red-handed. This, again, has nothing to do with the real offense conduct at issue. Finally, isolating aggravating sentencing factors, such as prior offenses, use of a particular weapon, proximity to schools (in the case of drug dealing), etc., would be far too complex. I considered using "wobblers"—California crimes that can be charged as felonies or misdemeanors—

64. This might be different were citizens of a state to agree that prison beds should, for example, be allocated on the basis of risk, but these risk assessments would have to be administered routinely (and accurately) throughout the criminal justice system. For one argument exploring the fiscal implications of risk-based allocation of sentencing outcomes, see Michael Connelly, Evidence-Based, Public Safety Sentences and Fiscal Crisis: Maintaining Public Safety in the Face of Permanent Entrenchment (Jan. 19, 2010) (unpublished article) (on file with author). This Article analyzes survival rates (defined as no return to Oklahoma prison) of offenders with low, moderate, and high risk profiles sentenced to prison only, prison and probation, suspended probation, and deferred probation, and finds that prison is most effective for high risk prisoners and contraindicated for low and moderate risk offenders. *Id.* at 16–17.

but could not control for the above variables. If there were a way to determine whether an offense should have been charged as a felony or misdemeanor, one could obviously see how it was charged and determine overuse or underuse of prison accordingly. But asking how a wobbler should have been charged is, in fact, the question we cannot answer. The point of this study is not to question the decisions of individual DAs, judges, or juries in individual cases but to start to explore the systematic differences that might explain why California counties use prison at different rates.

I used counties to examine intra-state differences primarily because there are several county-wide elected officials instrumental in criminal justice: county citizens elect sheriffs, DAs, and judges; counties administer probation; cities within counties elect the mayors who appoint police chiefs; and juries are drawn from within counties. Perhaps a better way of putting it is that California citizens have no say in selecting another county's sheriffs, judges, DAs, or juries. Counties are thus responsible for the overwhelming proportion of law enforcement within their borders, the charges that are filed, the trials that take place, and the jails or probation departments to which offenders might be sent. California also publishes its crime data by county.

Nevertheless, I concede that parts of counties can be different from one another and might have more in common with parts of neighboring counties than they do with parts of their own counties.[65] Counties can be a mix of rural and urban, for example, and this might bear on the way crime manifests itself. Cities within counties also drive their own policies, primarily through municipal police departments. Some counties might have transient populations or be victimized by criminals who reside in neighboring counties. Even within a given county agency, different parts of the county might have different approaches. Different offices of a county DA might

65. For a fuller discussion, see W. David Ball, *E Pluribus Unum: Data and Operations Integration in the California Criminal Justice System*, 21 STAN. L. & POL'Y REV. 277, 294 (2010) (discussing shortcomings with using the county as the base unit for criminal justice).

have different sentencing or charging "going rates" for a given crime, for example, particularly in a county as large as Los Angeles.

I look at rates, not numbers, for a variety of reasons. The primary reason is the high degree of collinearity between population size and gross amounts of violent crime and new felon admissions.[66] That is, bigger counties have more crime and more NFAs as a result of having more people. Population size has nothing to do with NFA rate, however, and is not a reliable predictor of NFA rates normalized to 100,000 residents.

Comparing rates within a given year has the additional advantage of isolating for year-to-year statutory and regulatory changes. Statutes—albeit not their execution—are uniform across the state for every given year, but they change from year to year. This study looks laterally from county to county in a given year, not within a county across time. Year-to-year NFA rates, for example, would have to account for changes in the penal code during the period studied. Proposition 36, for example, was passed in 2000 and went into effect in 2001, and it allowed for first- and second-time nonviolent drug offenders to be diverted into treatment in lieu of incarceration.[67] This likely had some year-to-year effect on drug NFA.

I note that my conclusions are only as good as the reported data. I take no position on how accurate the data is, and I note that the state has expressed skepticism about particular counties' data in particular years.[68] I am unaware, however, of any systematic bias in the data. I note further that for data defects to affect the study in predictable ways (e.g. overestimating high use counties' use of the state prison system), the bias would have to operate for a particular county in a particular direction on a multi-year basis in order to skew the results.

---

66. Running a linear regression with gross (non-normalized) amounts of NFA as the dependent variable and gross (non-normalized) amounts of county population, violent crime, and property crime as the independent variables, the tolerance levels are between .035 and .105, meaning that 89.5% or more of the variance of each predictor can be explained by the other predictors. The variance inflation factors (VIFs) for each are also high, ranging from 9.521 to 28.338. VIFs above 2 are considered problematic.

67. Substance Abuse and Crime Prevention Act of 2000, Prop 36 (codified at Cal. Health & Safety Code § 11999.4–.14 (West 2011); Cal. Penal Code §§ 1210, 3063.1 (West 2012)), *available at* http://www.prop36.org/.

68. *See, e.g.*, CRIMINAL JUSTICE STATISTICS CTR., *supra* note 55; *see also* CRIMINAL JUSTICE STATISTICS CTR., *supra* note 52.

That is, Alameda would have to over-report crime for ten years and San Bernardino under-report it for the same duration, for example, in order to skew my results systematically against high use counties.

Finally, there are the obvious limitations of statistical analysis itself (and of my abilities). There is more than one way to analyze data and several tools to do so. My goal in this Article is to dispel the idea that NFA are the necessary result of crime rates. While I believe that the data provides potential insights, lack of a statistically significant correlation does not mean that there is in fact no correlation given chance variability. The analysis may also be altered by omitted variables.

C. Methods

This part explains the methods I used to subdivide California into four groups on the basis of violent crime coverage and the calculated numbers of surplus NFA: High Use counties, Low Use counties, Los Angeles County, and Middle Use counties. The terms "High Use," "Low Use," and "Middle Use" are relative, given that there is no consensus on the "fair" level of incarceration. For my purposes, "High Use" means a county that appeared in the top quartile more than seven times in ten years in either coverage rate or surplus (unjustified) NFA; "Low Use" means a county that appeared the same number of times in the bottom quartile of these measurements.

As stated earlier, coverage is the ratio of NFA to reported violent crime, expressed as a percentage. For the purposes of county classification, I calculated the yearly state average coverage rate for each of the ten years of the study (2000–2009). I then calculated yearly coverage rates for each of California's fifty-eight counties. I expressed the county coverage rate as a percentage of that year's state coverage rate, which gave me a relative measure of how much a given county's coverage exceeded or undercut the state rate during that year. Mathematically, the formula was:

$$\text{Relative Coverage}_{year} = \text{County Coverage}_{year} / (\text{State Coverage}_{year})$$

This method had the benefit of controlling for year-to-year statewide differences in crime rate, pinpointing which *counties* were relatively more carceral, not which *years* were. I divided the results into quartiles. The top quartile contained county coverage rates that were almost twice as high as that year's state coverage rate (199.75%). That is, in those years, these counties sent almost twice as many people to prison per reported violent crime as the state as a whole. Two counties appeared in the top quartile all ten years: Kings and Sutter. Eight more appeared at least seven times: Glenn and Trinity (both appeared eight of ten years) and Butte, Colusa, Inyo, Lake, Lassen, and Shasta Counties (appearing seven years). In the bottom quartile, six counties had coverage rates less than or equal to 88.29% of the state coverage rate in all ten years: Alameda, Contra Costa, San Francisco, San Joaquin, and Santa Cruz. Eight more were in the bottom quartile at least seven times: Marin (appearing nine years), Imperial (appearing eight years), and Alpine, Nevada, Sacramento, San Benito, Sonoma, and Stanislaus (appearing seven years). I used all ten years of data for any county listed above, even those with some yearly data not in the top quartile. I did so because the purpose of this study is to discover whether there is something inherent in these particular counties, not to explore what might have happened in anomalous years.[69]

I then divided the state based on calculated numbers of surplus NFA. The ultimate focus of this Article is on the use of state prison resources. Because small counties with high coverage rates nevertheless consume very little of the state's ten billion dollar prison budget, this measure accounted for gross numbers of each county's prison usage not justified by violent crime. That is, this variable measured the size of the problem—how many surplus NFA a given county was sending to prison each year. As explained above, surplus NFA was calculated by multiplying a county's reported violent crime rate by the state coverage rate for that year, which yields a "crime justified" number of NFA. This yields the average statewide carceral

69. *See infra* Appendix A for a complete list of all counties. *See also infra* Appendix B for a map of the counties.

reaction to a particular level of violent crime. I subtracted this amount from a county's actual NFA to get the surplus NFA (or, for negative numbers, the NFA deficit).

As with coverage, I looked at counties that appeared in the top or bottom quartile more than seven times. Counties appearing in the top surplus NFA quartile were as follows: Kern, Kings, Orange, Riverside, San Bernardino, and Santa Clara appeared all ten years; Butte, Fresno, Shasta and Sutter were appeared nine out of ten years; Placer and Santa Barbara appeared seven out of ten years. Counties in the bottom quartile were as follows: Alameda, Contra Costa, Sacramento, San Francisco, San Joaquin, and Santa Cruz appeared all ten years; Imperial, Los Angeles, and Marin appeared nine of ten years; and Nevada, San Diego, Sonoma, and Stanislaus appeared seven of ten years. I included data from all ten years for each county in the top and bottom group. San Diego appeared twice in the top quartile for surplus NFA, which shows that these figures are sensitive to small changes in coverage for counties with large populations.

Initial analysis revealed that both coverage and surplus top and bottom quartiles exhibited similar responsiveness to the key variables in my analysis. I grouped them together in what I call the Low Use and High Use groups respectively. High Use counties, in other words, contain counties with high coverage, high surplus NFA, or both. Low Use counties contain counties with low coverage, NFA deficits, or both. I will discuss general observations about these groups in the following section.[70]

Because Los Angeles is such a large county, I decided to calculate results for the Low Use group without it, even though Los Angeles had an NFA deficit in nine of the ten years of the study. Exempting Los Angeles also ensured that the populations of the High and Low Use groups would be relatively similar—and relatively similar to that of Los Angeles—and thus that contrasts between them could be more readily observed.[71]

---

70. *See infra* Part II.

71. Los Angeles' average total population from 2000 to 2009 was 10.1 million, and the adult population at risk for Los Angeles was 6.6 million. The Low Use population was 10.2 million with 6.8 million at risk, and the High Use population was 11.7 million with 7.6 million at risk.

This leaves twenty five other counties, with a combined average population of 4.5 million that did not appear more than seven times in either the top or bottom quartile of either coverage or surplus NFA. While the bulk of my analysis will focus on the other three segments of California, I briefly note that this group is heterogeneous. For example, Merced and Yolo are both members of this group and have almost identical NFA numbers, and yet Yolo has less violent crime (and property and Part I crime) than Merced, giving it a much higher coverage rate. Several counties appeared in the top coverage quartile more than four times: Modoc and Yuba (appearing six of ten years); Plumas, Sierra, and Siskiyou (appearing five of ten years); and Amador, Calaveras, and Tuolomne (appearing four of ten years). Only one county appeared more than four times in the bottom quartile: Monterey (appearing five of ten years).

Table 2: Demographics of the Four State Segments, Average Yearly Values 2000–2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Population (millions)	**11.74**	10.17	10.07	*4.53*	36.51
APAR Population (millions)	**7.62**	6.81	6.55	*3.00*	23.98
Prison Population	**55,079**	37,023	54,187	*17,612*	164,000
Number of Counties	18	14	*1*	**25**	58

Bold: highest value; *Italics:* lowest value. All figures based on ten-year averages.[72]

72. *See* TOUGH CHART DATA, *supra* note 27 (" tab "Stats by County Segment").

All data was prepared in Excel. I then used Statistical Package for the Social Sciences (SPSS) to draw histograms and scatterplots, using linear regression models and linear fit lines. Syntax for my SPSS work has been posted to the folder with the rest of my data.[73]

II. VIOLENT CRIME RATES AND NEW FELON ADMISSION RATES

Although violent crime rates and NFA rates are correlated on a statewide level, reported violent crime does not sufficiently explain why counties have such disparate NFA rates. Why do counties respond to violent crime so differently? Throughout this section, I will use the coverage variable as my proxy variable for a county's carceral response to violent crime.

I begin with a discussion of the statewide numbers, and then I examine High Use counties, Low Use counties, Los Angeles County, and the rest of the state.

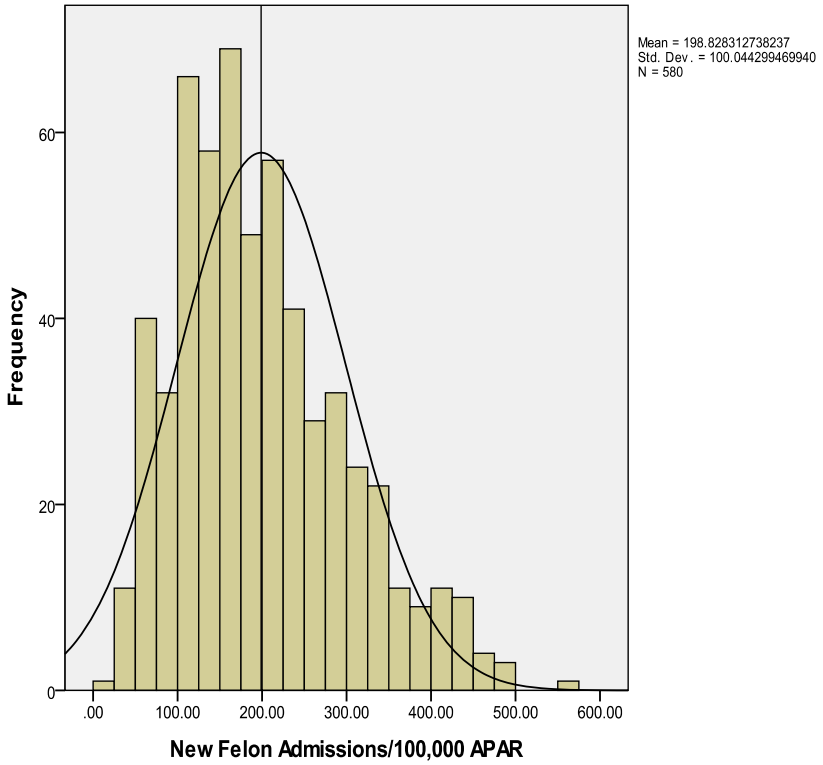
A. The State

In this section, I will first demonstrate that some counties systematically incarcerate at different rates. I will then look at whether reported violent crime explains this differential usage at the statewide level.

First, counties send people to prison at different rates, even without correcting for crime. Figure 2 plots NFA rates, normalized to 100,000 APAR. The chart looks at all fifty-eight counties for all ten years of data and counts the number of instances counties reported a particular NFA rate.

73. W. DAVID BALL, Final Charts syntax (2012), http://digitalcommons.law.scu.edu/facpubs/162 (follow Final Charts syntax with split.sps hyperlink).

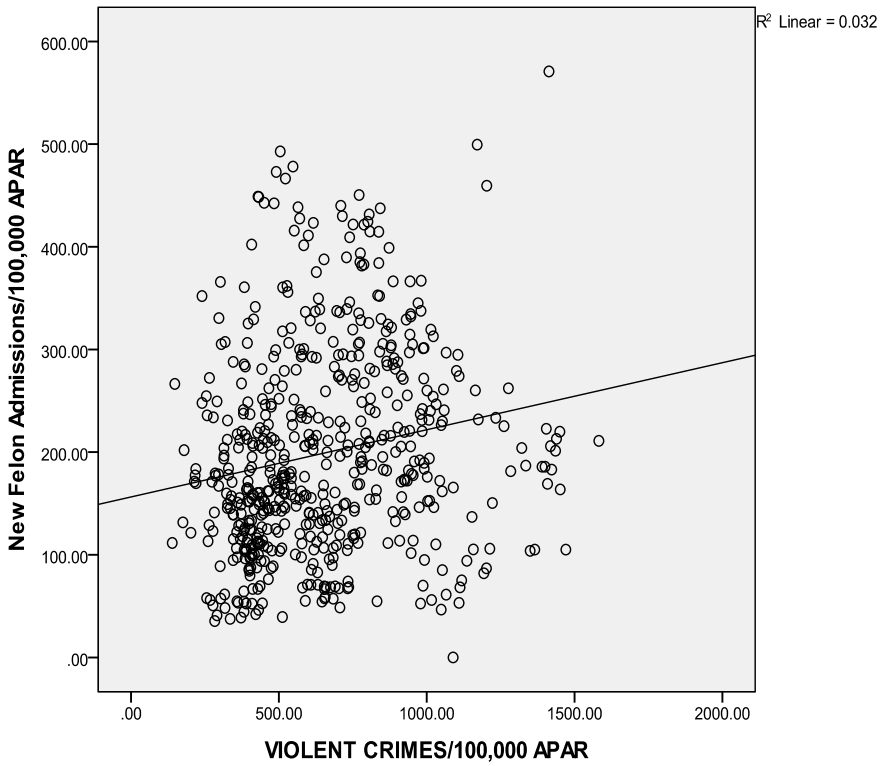
Figure 2: Frequency of NFA Rates/100K APAR, 2000–2009



The shape of the histogram is relatively normal, although high NFA counties skew the distribution right. If individual counties were in these ranges an equal amount of time, the distribution would be normal as well. Certain counties, however, appear consistently in the top and bottom quartiles. Some counties consistently send people to prison at greater rates than others.

But NFA only tells part of the story. NFA looks normal when compared to population. NFA as a function of reported violent crime presents a more chaotic picture. Figure 3 plots NFA rates and rates of reported violent crime for all fifty-eight counties and all ten years.

Figure 3: Violent Crime to NFA (Rates, 100,000 APAR), 2000–2009

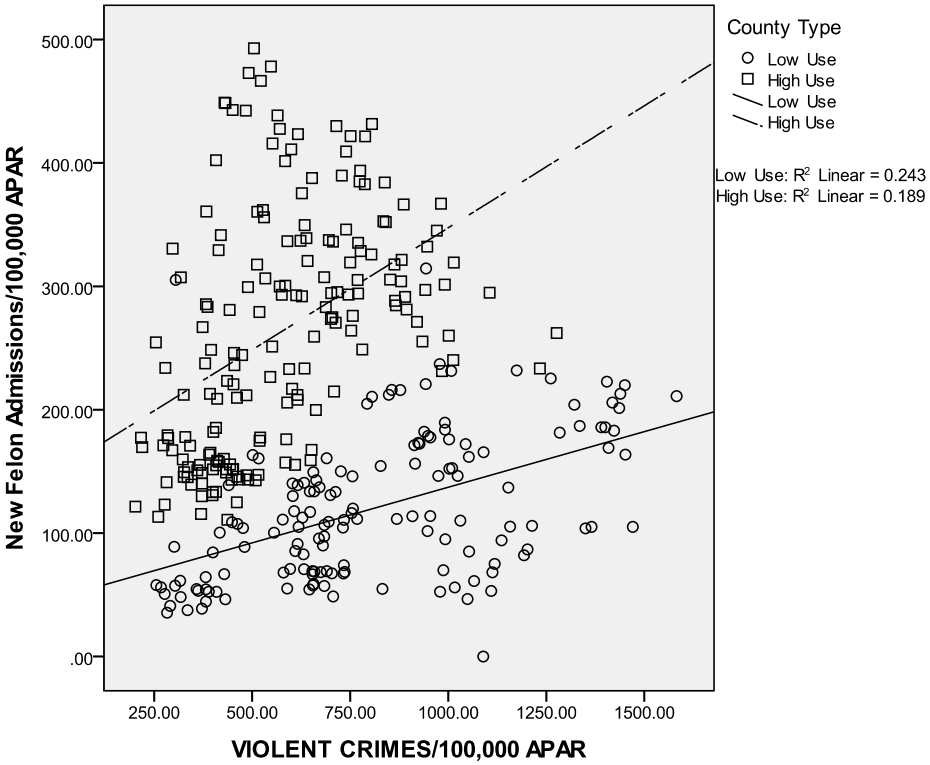


Although the relationship of the Violent Crime Rate per 100,000 APAR is statistically significant at the one percent level, it is not a significant statistic. The amount of variance it explains is minute (r^2=.032, which means changes in Violent Crime rates explain 3.2 % of the variance in NFA rates), and the standard error is relatively large (root mean squared error (RMSE) = 98.50139). What does this mean? The scatterplot data shows that, although a linear fit line can be drawn, the data does not cluster around it and the relationship is barely above zero. In other words, if we were to use violent crime rates to predict NFA rates at the county level, the amount it would predict would be very small.

The correlation between crime and NFA might be weak because county type dominates any effects crime might have. That is, violent

crime itself does not make a county High or Low Use. However, we might still see that changes in reported violent crime does, in fact, predict changes in NFA within county types. For example, more crime in a Low Use county might result in more NFA, and less crime in a High Use county might result in fewer NFA. The following chart shows what happens to the crime-NFA relationship within the state once counties are divided by county type.

Figure 4: Violent Crime to NFA (Rates, 100,000 APAR), 2000–2009, By County Type



Here we see that there is a much more robust correlation between crime and NFA within county type, with an r^2 of .243 for Low Use counties (including Los Angeles) and an r^2 of .189 for High Use

counties (both statistically significant at the 1 percent level).[74] This means that within county types variance in crime explains approximately twenty percent of variance in NFA. Crucially, we have also already seen that without dividing the state, variance in crime only explains roughly three percent of variance in NFA. County types dominate the effects of crime at the statewide level. Without subdividing the state by county type, crime explains very little about NFA. There is no statewide story about "the typical California response to crime," just sub-stories within segments of the state. Violent crime does not make a county High Use or Low Use: it only operates to change relative usage within those segments.

B. Violent Crime and NFA in the Four State Segments

Crime rates do not explain why some segments have higher NFA and higher total prison populations than others. High Use counties have below average crime, and Low Use counties have above average crime.

I looked at criminal justice statistics for each of the four segments (High Use, Low Use, Los Angeles, and Middle Use) to see what, besides levels of state prison usage, distinguishes them in hopes of shedding light on why each segment uses state prison resources at such different rates. This analysis is largely descriptive, not predictive.

74. The data is still relatively scattered, with an RMSE of 51.83820 and 76.20699 for Low and High Use counties respectively. Middle Use counties, not pictured, have an r^2 of .239, also statistically significant at the one percent level.

Table 3: Crime Rates and Prison Usage, Average Yearly Values, 2000–2009

	High Use	Low Use	Los Angeles	Middle Use	State Average
Violent Crime	622.67	835.94	**1,128.27**	*609.13*	819.70
Property Crime	2,618.73	**3,134.31**	2,780.05	*2,296.28*	2,768.84
Part I Crime	5243.54	**6404.46**	5494.90	*4881.71*	5,596.56
NFA	**223.57**	*122.04*	211.87	167.99	184.58
VC Coverage Rate	**35.90%**	*14.60%*	18.78%	27.58%	22.52%
Total Prison Population	723.13	*543.63*	**826.68**	586.48	683.36

Bold: highest value; *Italics:* lowest value. All figures except VC Coverage Rate are calculated per 100,000 APAR. State averages include Los Angeles County.[75]

California counties that incarcerate the most do not have the highest violent crime, property crime, or total Part I crime rates in the state. In fact, all three rates are below the state average. What is more, both Low Use counties and Los Angeles have higher violent, property, and Part I crime rates while maintaining lower NFA rates. Low Use counties' NFA rates are slightly more than half those of High Use counties, even though each measure of crime in Low Use counties is approximately twenty percent higher. The Middle Use counties have the lowest crime rates in all three categories but still incarcerate at substantially higher rates than the Low Use counties.

75. *See* TOUGH CHART DATA, *supra* note 27 (tab "Stats by County Segment").

The chart also demonstrates the importance of choosing what measure to use to justify incarceration. Los Angeles has a significant violent crime problem, so according to the method used in this study, its NFA are justified. In fact, Los Angeles could justify more NFA on the basis of its reported violent crime rate. Because Los Angeles has a significant violent crime problem, its coverage rate is half of that of High Use counties. However, property and Part I crime rates in Los Angeles County are at the state average. On these alternative measures of crime, Los Angeles is at the state average, so its NFA rate expressed in terms of property crime coverage or Part I coverage would be unjustified.

What about the composition of violent crime? Could it be that High Use counties experience worse types of violent crime? The answer is no. As seen in Table 4, rates of all four categories of violent crime are below the state average in High Use counties. More importantly, the numbers of more serious crimes are not high enough to drive differences in NFA. There simply are not that many rapes and homicides to account for the difference, even if High Use counties had a 100% clearance rate on those crimes.

Table 4: Average Yearly NFA and Violent Crime Rates, by Offense, 2000–2009

	High Use	Low Use	Los Angeles	Middle Use	State Average
NFA	**223.57**	*122.04*	211.87	167.99	184.58
Homicide	6.81	8.66	**14.91**	*6.54*	9.51
Forcible Rape	*37.41*	**42.36**	37.85	41.34	39.43
Robbery	173.83	293.87	**423.43**	*139.60*	271.84
Aggravated Assault	*404.62*	491.05	**652.07**	421.65	498.92

Bold: highest value; *Italics:* lowest value. All figures except VC Coverage Rate are calculated per 100,000 APAR. State averages include Los Angeles County.[76]

I will now discuss each of the segments of the state in greater detail, describing how they are different and what impact each has on the overall state prison population.

1. High Use Counties: Dominated by NFA Surplus Counties

The High Use counties are made up of three more or less equal numbers of counties: those in the top quartile of coverage, those in the top quartile of NFA surplus, and those who were in both. Though the numbers of counties are similar, their populations are not. The counties in the NFA surplus group are the overwhelming source of this segment's population, and will get the majority of the analysis.

76. *Id.*

Table 5: High Use Counties, Average Yearly Values, 2000-2009

	High Coverage	High Surplus NFA	Both	High Use Total	State Total	High Use as % of State Total
Population (millions)	*.18*	**10.94**	.62	11.74	36.51	32.16%
Number of Counties	6	**8**	*4*	18	58	31.03%
Prison Population	1,085	**49,391**	4,603	55,079	164,000	33.60%
NFA	271.68	*215.75*	**344.10**	223.57	184.58	38.46%
Violent Crime	*497.50*	**626.19**	598.84	622.67	819.70	24.12%
Coverage Rate	54.61%	34.45%	**57.46%**	35.90%	22.52%	N/A
Part I Crime Rate	*3,882.92*	**5,274.60**	5,109.53	5,243.54	5,596.56	29.75%

Bold: highest value; *Italics:* lowest value. NFA, Violent Crime, and Part I Crime Rate are calculated per 100,000 APAR off 10-year averages. State averages include Los Angeles County.[77]

Counties in the "high coverage" and "both" groups are generally too small to make much of a difference statewide. High coverage counties in particular are not populated enough to make much of an impact on the state's prison population or on its bottom line. The counties with both high coverage and high NFA surplus are also small, but they incarcerate at such high coverage rates that they nevertheless manage to make it into the top quartile of surplus NFA. NFA rates for the "both" group are nearly twice that of the state

77. *Id.*

average (344.1 versus 184.58), even though violent crime rates are just three-quarters of the state rate (598.84 versus 819.70).[78] This yields a coverage rate more than twice that of the state average (57.46% versus 22.52%).[79] These counties are so far out of step with the rest of the state that despite having just over 620,000 people, the average yearly total subsidy for this group of counties is almost thirty million dollars.[80]

The NFA surplus group is relatively tame by comparison, incarcerating at a coverage rate only fifty percent more than the state average. In fact, looking at NFA rates alone (184.58 for the state, 215.75 for the NFA surplus group), the subsidy group does not appear to be so unusual. But these NFA figures are higher despite the fact that the justifications for prison—crime rates—are below the state average in all three major categories of violent crime, property crime (not pictured), and Part I crime. Again, this underscores the fundamental difference between looking at prison usage alone—i.e., NFA rates—and tying that usage to its justification. In some cases, looking at NFA rates based on county population alone can obscure the fact that a county lacks a crime-based justification for the level of incarceration it uses.

2. *High Surplus Revisited: The Rich Four and the Poor Four*

The high surplus counties can be further divided on the basis of income. These counties divide neatly into two groups of four, both with roughly the same population. The "Rich Four" counties are Orange, Placer, Santa Barbara, and Santa Clara. Three of these counties reported incomes above the state per capita average for each of the ten years in the study. One of them, Santa Barbara, was above the state average seven times and missed by less than $617 the other three times. The "Poor Four" counties are Fresno, Kern, Riverside, and San Bernardino. Each of these counties reported incomes below

78. *See supra* Table 5; *supra* Table 6.
79. *See supra* Table 5; *supra* Table 6.
80. *See infra* Table 19 and accompanying text.

the state per capita average for all ten years, with none coming within $8,000 of the state average in any of those years.

Table 6: The Rich Four and the Poor Four, Average Yearly Values, 2000-2009

	Rich Four	Poor Four	State Total
Population (millions)	5.52	5.42	36.51
APAR Population (millions)	3.68	3.40	23.98
Prison Population	17,280	32,111	164,000
NFA	149.31	287.46	184.58
Violent Crime Rate	442.79	824.17	819.70
Property Crime Rate	1,887.55	3,447.97	2,768.84
Part I Crime Rate	3,967.13	6,686.01	5,596.56
Coverage	33.72%	34.88%	22.52%

Bold: highest value; *Italics:* lowest value. All figures based on ten-year averages.[81]

This chart reveals how coverage changes the analysis. The Rich Four and Poor Four have dramatically different NFA rates, but because they also have dramatically different violent crime rates, their coverage rates are very similar. If one looked only at NFA rates per 100,000 APAR, the Rich Four appear to use very little prison,

81. *See* TOUGH CHART DATA, *supra* note 27 (tab "Stats by County Segment"; Rich Four figures begin on line 220).

with an NFA around nineteen percent below the state average. The problem is that the Rich Four's violent crime rate is approximately forty-six percent below the state average. The Rich Four incarcerate less than the state average, but not as little as their crime rate indicates. Overuse is relative, and below-average NFA can be high use if a county's crime rate is sufficiently low.

The Poor Four, on the other hand, have violent crime rates slightly above the state average, but their NFA rate is more than fifty percent greater than the state's NFA. They are justified in incarcerating at a slightly higher rate, but not nearly as much as they do. Again, looking at NFA rates themselves obscures the fact that violent crime is not driving rates of incarceration.

The Rich Four and the Poor Four are a drain on the rest of the state. To the extent that these counties are being subsidized for prison usage that cannot be explained by reported violent crime, the Rich Four in particular cannot justify their subsidy on the basis of need. It would be difficult to argue that these counties are due a larger share of the state prison budget either because they cannot afford it or because crime demands that they do so. In fact, the Rich Four can afford to fund their prisons independently and the counties are relatively safe. The Poor Four do not have the same resources as the Rich Four, but they consume many more prison resources than the Rich Four and more than the state coverage rate would indicate. To the extent the state needs to focus on overcrowding, however, these are the counties that incarcerate at a high rate and in large numbers.

3. Low Use Counties: The Convergence of Low Coverage and NFA Deficits

Low Use counties are clustered in the "both" category of both low coverage and NFA deficits—that is, negative surplus NFA numbers. The eleven counties that contain most of the Low Use counties' population also have the lowest coverage rates, meaning they have large NFA deficits. All members of the Low Use group pay a substantial prison tax.

Table 7: Low Use Counties, Average Yearly Values, 2000-2009

	Low Coverage	NFA Deficits (minus L.A.)	Both	Low Use Total	State Total	Low Use as % of State Total
Population (millions)	*.06*	3.03	**7.08**	10.17	36.51	27.85%
Number of Counties	2	*1*	**11**	14	58	24.14%
Prison Population	*1,262*	12,713	**24,183**	37,023	164,000	22.59%
NFA Rate	124.53	**140.93**	*113.89*	122.04	184.58	18.77%
Violent Crime Rate	*648.35*	671.93	**908.08**	835.94	819.70	28.96%
Coverage Rate	19.21%	**20.97%**	*12.54%*	14.60%	22.52%	N/A
Part I Crime Rate	4,340.26	5,051.86	7,003.53	6404.46	5,596.56	32.49%

Bold: highest value; *Italics:* lowest value. NFA,Violent Crime, and Part I Crime Rate are calculated per 100,000 APAR off 10 year averages. State averages include Los Angeles County.[82]

As stated earlier, Los Angeles was in the NFA surplus bottom quartile but is being excluded for other reasons, leaving this group with only San Diego in the NFA deficit category. San Diego has violent and Part I crime rates well below the state average, and a coverage rate around 1.5% below the state average. Because it is a populous county, however, small changes in coverage result in large changes to the calculated NFA surplus. For example, San Diego appeared in the top quartile for NFA surplus twice, but because it

82. *See* TOUGH CHART DATA, *supra* note 27 (tab "Stats by County Segment").

was in the bottom quartile seven years, I included it in the Low Use list. The low coverage counties, Alpine and San Benito, are too small to be worthy of commentary.

The rest of the counties in the group are relatively populous. The "both" counties have a coverage rate equaling a third of the coverage rate in High Use counties. These counties have violent crime and Part I crime rates well above the state average, while their NFA is just two-thirds of the state average. In these counties, which constitute twenty percent of the state's population, higher violent crime rates are associated with lower prison use.

4. Low Coverage and NFA Deficits Divided by Income: The High Five and the Low Six

These counties can be divided into relatively equal populations on the basis of income, but they do not divide as neatly as the High Use counties. Including only the counties below the state per capita income level in all ten years would have resulted in an unequal division of population. Thus, I added two counties with the next lowest incomes—Nevada and Sonoma—to the four counties with below-average incomes (Imperial, Sacramento, San Joaquin, and Stanislaus). The richer five counties are Alameda, Contra Costa, Marin, San Francisco, and Santa Cruz.

Table 8: Dividing Low Coverage, NFA Deficit Counties, Average Yearly Values, 2000-2009

	Low Six	High Five	State Total
Population (millions)	3.23	3.85	36.51
APAR Population (millions)	2.09	2.64	23.98
Prison Population	14,797	9,386	164,000
NFA	158.09	78.96	184.58
Violent Crime Rate	961.07	866.2	819.70
Property Crime Rate	3744.92	2952.36	2,768.84
Part I Crime Rate	7,521.39	6,594.29	5,596.56
Coverage	16.45%	9.12%	22.52%

Bold: highest value; *Italics:* lowest value. All figures based on ten-year averages.[83]

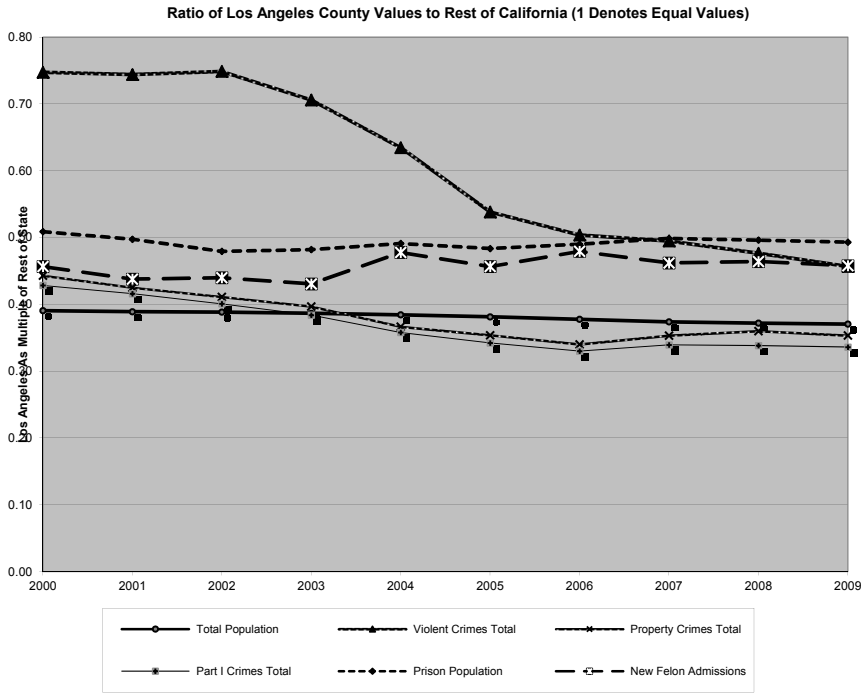
Table 8 summarizes the differences between the two groups. Note that the distribution of crime among these counties does not track income group as it did with the Rich Four and the Poor Four. Both sets of crime rates are above the state average, and they are more or less equally distributed on either side: Marin (rich) and Nevada (poor) have violent crime rates in the 300's, Alameda and San Francisco (rich), Sacramento, San Joaquin, and Stanislaus (poor) have violent crime rates above 1000, and Contra Costa and Santa Cruz (rich), Imperial and Sonoma (poor) are in the 500 and 600's.[84] Coverage rates are generally lower in the high income areas, however, as are NFA.

83. *Id.*
84. *See* TOUGH CHART DATA, *supra* note 27 (tab "All Data 10y avg as #s").

5. Los Angeles

Los Angeles County is atypically large, accounting for slightly less than a third of the state's population and about a third of its prison population, but its prison usage is not atypically high when its high violent crime rate is taken into account. On a per capita basis, L.A.'s NFA rate is higher than the state average. However, its violent crime rate is almost fifty percent greater than the state average. The coverage variable expresses this relationship more simply: L.A.'s coverage rate is less than the state average, and about half that of the High Use counties. L.A. does have below average property and Part I crime rates, however, and an analysis that does not center on violent crime might conclude that L.A.'s prison usage is not justified.

Figure 4: Los Angeles County and the Rest of the State, 2000-2009[85]



The above chart summarizes L.A.'s relationship to the rest of the state graphically. L.A. comes in generally at about forty to fifty percent of the rest of the state numbers, except for violent crime in the early part of the past decade.

6. *Middle Use Counties*

The populations of these counties are in the small to medium range, spanning from tiny Sierra County to relatively populous San Mateo and Ventura counties. Yearly coverage rates bounce around, reaching lows of about one-third of the state coverage rate and highs of several times the state rate. Annual NFA rates range from less than

85. *See supra* note 27 (chart taken from COUNTY COMPARISONS (tab "LA Chart"); chart data based on TOUGH CHART DATA (tab "All Data").

100 to more than 400 in particular years. These counties were ones that might have particular years—or even several years—of High or Low Use that nevertheless did not exhibit the kind of consistency (seven of ten years) required for inclusion into either group.

III. ALTERNATIVE EXPLANATIONS

This section explores factors other than violent crime that could have caused disparities in prison use. I first look at whether counties are sentencing different types of offenders to state prison. That is, perhaps the violent crime/NFA disparity among groups of counties is a result of High Use counties sending more property offenders to prison, or perhaps Low Use counties send fewer violent offenders to prison. I conclude that this is not the case. I then look at the number of drug offenders sent to prison. Because I have already looked at property crime and Part I crime (the general crime rate), and because other types of crime (notably sex offenses) are not numerous enough to account for the disparity, I consider whether drug offenders account for the difference between High Use and Low Use counties. I then look at law enforcement, using general arrest data as a crude proxy for how active a force is, to try to explore whether high coverage is simply a matter of more active (or effective) law enforcement. I next look to in-county dispositions—jail and probation—to see if differential usage of these resources explains differences in prison usage. I next look at local resources—using per capita income as a proxy—as a means of exploring whether counties rely on prison because they do not have the money to do anything else. I examine the role of politics by analyzing voter registration numbers, to see if party politics or levels of participation might explain what is different about different segments of the state.

From time to time, I will discuss state segments as they bear on the variables in question. These factors will not operate similarly across counties—California is a huge, diverse place. The principal statistical inquiry was, of course, whether violent crimes explain differences in prison usage. This part attempts to shed some light on what might

explain differences in usage, although it should be seen only as a very preliminary investigation.

A. Offender Mix

I have thus far examined only violent crime and new felon admissions (NFA) and concluded that High Use counties are over-incarcerating relative to the state average and Low Use counties are under-incarcerating relative to the state average. But it could be the case that these differences in NFA levels can be explained by the types of offenders being sent to prison—what I will call the "offender mix" of a county's prison population. Perhaps High Use and Low Use counties respond at the same rate to violent crimes, but their responses to property and drug crimes explain why High Use counties use prison at a greater rate. That is, perhaps High Use counties spend a greater percentage of prison resources on drug and property offenders.[86] It could also be true that Low Use counties' lower NFA rates are not necessarily the result of them ignoring violent crime but a result of having lower NFA numbers for non-violent offenses. In other words, Low Use counties might be laser-focused on violent crime and use prison for those offenses alone.

In this section I use non-public data from the California Department of Corrections and Rehabilitation as part of an official request from the Offender Information Services Unit (OIS).[87] The data contains all county commitments to state prison for the years 2000-2009. The data includes offense, offense category, and sentence lengths. Because the categories used by the CDCR (e.g. Crimes Against Persons) include different offenses from those in the FBI's UCR categories (e.g. Violent Crimes), I recoded the offense categories to try to match crime reporting data.[88] I note also that the

86. Alternatively, it might be the case that, say, a given High Use county has a huge problem with property offenses. Their resulting incarceration rate might not be an overreaction to violent crime, but a rational response to property offenses. These property NFA would distort the coverage rate (violent crime to NFA) and give misleading results.

87. W. DAVID BALL, SENTENCE LENGTHS DB DEC. 2011 (2011), *available at* http://digitalcommons.law.scu.edu/facpubs/162 (follow Sentence Lengths DB Dec. 2011.xls hyperlink); *see also infra* Part IV.B.

88. The CDCR categories in the data I received were Crimes Against Persons, Drug Crimes,

numbers of offenders in the CDCR OIS data are slightly higher than the yearly numbers from the CDCR's published statistics (between 1.5 and 5.5 percent).[89] Accordingly, I will refrain from comparing prison population numbers from the two sources. I nevertheless will report results from the OIS and make comparisons within this data set.

Table 9: NFA Offender Mix, Total Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Violent Crimes as % of Segment NFA	*13.54%*	**19.22%**	18.97%	14.64%	16.43%
Property Crimes as % of Segment NFA	16.97%	18.43%	**18.74%**	*14.67%*	17.54%

Property Crimes, Other Crimes, and Uncategorized. Crimes Against Persons includes certain sex offenses not included in the FBI's Violent Crimes definition (e.g. oral copulation, other sex offenses, and sodomy). *See UCR Offense Definitions*, UNIFORM CRIME REPORTING STATISTICS, http://www.ucrdatatool.gov/offenses.cfm (last visited Jan. 14, 2012). For Violent Crimes, I included all forms of homicide (including vehicular manslaughter), robbery, rape, and assault with a deadly weapon. I did not include kidnapping or other assault/battery. For Property Crimes, I included first and second-degree burglary, grand theft, and motor vehicle theft. For Part I, I included all crimes above and added arson and petty theft with a prior offense. I put other violent and property crimes in separate categories (Other Violent and Other Property), made a separate category for Sex Offenses, and put DUIs and weapons possession charges in Other Crimes.

89. The OIS numbers include all offenders sentenced in a given year, whereas the CDCR's published statistics are simply a year-end population count. Because some offenders served less than one year during the period of the study, more offenders were sentenced in a given year than were reflected in the year-end head count. I note again that these figures are for sentenced new felon admissions—they do not include parole violators. I say this only to distinguish short-term NFA sentences from short-term parole violation sentences.

Part I as % of Segment NFA	33.90%	41.58%	**42.95%**	*33.70%*	38.13%
Drug Crimes as % of Segment NFA	**31.18%**	27.63%	28.12%	*27.08%*	29.09%
Sex Offenses as % of NFA	5.52%	6.01%	*4.00%*	**6.77%**	5.29%
Other Violent Offenses as % of NFA	9.25%	7.74%	*6.73%*	**10.57%**	8.33%
Other Property Offenses as % of NFA	8.80%	*6.40%*	6.53%	**9.01%**	7.66%
Other Offenses as % of NFA	11.36%	*10.65%*	11.67%	**12.87%**	11.49%

Bold: highest value; *Italics:* lowest value. All figures based on ten-year totals provided by the CDCR OIS. Crime categories based on FBI definitions.[90]

Based on the data, we can reject the theory that High Use counties are incarcerating more because they focus on violent offenders. High Use counties do not spend a greater percentage of their prison

90. *See* BALL *supra* note 87.

resources incarcerating violent offenders, or even Part I offenders. High Use and Middle Use counties have a much lower percentage of violent and Part I crimes in their offender mix (albeit off a higher base rate of incarceration). Low Use counties and Los Angeles concentrate their prison usage on Part I crimes, with over forty-two percent of their NFA coming from this category. High Use counties have greater percentages of drug offenders in their offender pool, as well as larger numbers of "other" violent and property crimes (those crimes which are not part of the FBI property and violent crime categories). These are escape, forgery/fraud, kidnapping, other assault/battery, other property offenses, and receiving stolen property.

Historical information about offender mix will become particularly important as California undergoes realignment,[91] because, moving forward, counties will only be able to sentence those who have committed violent, sexual, or serious offenses to state prison. Thus, there may be a separate value in isolating what percentage of offenders from each county would be prison-eligible after realignment and use that as a historical baseline for comparing pre- and post-realignment NFA and offender mix. Using Part I crimes as a rough proxy, it appears that a greater number of High Use admissions from 2000-2009 would be ineligible for prison under the new realignment guidelines. All other things being equal (especially reported violent crime), one should expect post-realignment prison commitments in High Use counties to decrease by a greater rate than in Low Use counties. If they do not, that might suggest that these counties have responded to realignment by changing other policies, such as those relating to charging and sentencing.

B. Effectiveness

As we have seen, differences in violent crime rates inadequately explain differences in NFA rates.[92] In this section, I look at other

91. *See* discussion *infra* Part V.

92. In Table 18, I also calculate reported Property Crime and Part I Crime coverage rates, concluding that these crime rates also inadequately explain differences in NFA rates. *See infra* Table 18.

types of crimes—notably drug crimes—for a possible explanation. As stated earlier, drug crimes themselves are not reported. Therefore I will use drug arrests as a very crude measurement of actual drug crimes. There are obvious problems with this method because arrests are never a complete—or accurate—measure of any criminal activity. Because drugs are such a big part of the prison system, however, I have decided to attempt an explanation rather than avoid the subject entirely. This analysis, however, should be taken even more provisionally than the rest of this Article. In this section, I will also look at the percentage of reported crimes that result in actual prison sentences to help isolate what happens between the report of a crime and sentencing.

Arrest data might be used as a proxy for law enforcement activity, law enforcement effectiveness, and/or for differences in policing strategies. One might associate higher arrest rates with broken windows style policing, or perhaps lower rates with a less active (or more cautious) force. Without getting into the merits of different policing strategies, this section analyzes whether policing inputs could explain differences in NFA. For Table 10, I calculated arrest coverage rates for reported violent and property crimes. These coverage rates measured the number of arrests per reported crime. I compared these arrest coverage figures with clearance rates (the percentage of cases deemed closed).

Table 10: Arrest Data, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Average
NFA	**223.57**	*122.04*	211.87	167.99	184.58
Total Offense Arrests	1,802.26	**1,864.45**	1,858.76	*1,730.58*	1,826.38
Violent Offense	458.77	*452.07*	**502.76**	461.47	469.22

Arrests					
Arrest Coverage of Reported Violent Crimes	73.68%	54.08%	*44.56%*	**75.76%**	57.24%
Violent Crime Clearance Rate	47.36%	*41.69%*	44.81%	**50.46%**	45.05%
Property Offense Arrests	472.42	**481.17**	473.75	*418.01*	468.46
Arrest Coverage of Property Crimes	18.04%	*15.35%*	17.04%	**18.20%**	16.92%
Sex Offense Arrests	36.06	28.27	*26.93*	**37.00**	31.47
Drug Arrests	532.34	565.52	**592.97**	*473.87*	551.01
Dangerous Drugs Arrests	**354.15**	260.34	*220.65*	301.69	284.46
Weapons Arrests	69.33	*63.19*	**80.52**	69.94	70.72

Bold: highest value; *Italics:* lowest value. All figures except percentages are calculated per 100,000 APAR. State averages include Los Angeles County.[93]

Arrest data reveals almost no significant differences across the four segments for total arrests, property arrests, sex offenses, drug

93. *See* TOUGH CHART DATA, *supra* note 27. Most of the data comes from the tab "Stats by County Segment." (NFA figures are from the tab "Rates per 100k APAR".) Property Arrest Coverage is calculated in row AE beneath individual county segments (e.g., High Use Counties' Property Arrest Coverage is calculated in AE170). Violent Crime Clearance Rate was calculated by filtering counties in the tab "All Data noStwd as #s filter" and reading GE590 ("rate") amounts.

arrests, and weapons arrests. In addition, sex offense arrests are too infrequent to make a difference in NFA rates. Two areas which merit closer study are dangerous drug arrests per 100,000 APAR and the arrest coverage rate for violent crime. Both are much higher in High Use counties than in Los Angeles County or the Low Use counties. Higher dangerous drug arrests may suggest that the severity, if not the number, of drug crimes are worse in High Use areas. High Use counties do, in fact, have a greater percentage of drug offenders in their NFA pool, although the median sentence length of High Use drug crime sentences is at the state average, suggesting that the sentenced crimes are not more severe, even if arrest activity is greater.[94] The high ratio of violent crime arrests to violent crime suggests that violent crimes are policed more aggressively in High Use counties, leading to more prosecutions and more prison time. High Use clearance rates are higher than in Los Angeles or the Low Use counties, but the difference between High and Low clearance rates is not nearly as large as the difference between High and Low Arrest Coverage, suggesting an independent carceral effect to police activity irrespective of the eventual disposition of the case.

The next table examines what one might call "actual" coverage—the number of NFA by offense compared to reported numbers of those offenses. Coverage is just a proxy; this chart examines the actual pipeline from report to sentence, sorted by crime type.

Table 11: Reported Crimes and New Felon Admissions by Crime, Total Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Total NFA Sentenced	**177,799**	88,061	140,971	*51,664*	458,495
Total Reported Violent Crimes	474,266	569,291	**739,556**	*182,926*	1,966,039

94. *See supra* Table 9 and accompanying text (providing data on the percentage of drug offenders as a proportion of NFA); *infra* Table 20 and accompanying text (providing data on sentence length).

Total Violent Crime Prison Sentences	24,082	16,925	**26,741**	*7,565*	75,313
% Reported Violent Crimes Resulting in Prison	**5.08%**	*2.97%*	3.62%	**4.14%**	3.83%
Total Reported Property Crimes	1,994,605	**2,134,530**	1,822,269	***689,592***	6,640,996
Total Property Crime Prison Sentences	**30,174**	16,229	26,422	***7,577***	80,402
% Reported Property Crimes Resulting in Prison	**1.51%**	*.76%*	1.45%	**1.10%**	1.21%
Total Reported Part I Crimes	4,643,006	**4,981,645**	4,195,939	*1,694,573*	15,515,163
Total Part I Crime Prison Sentences	60,276	36,616	**60,544**	*17,411*	174,847
% Reported Part I Crimes Resulting in Prison	1.30%	*.74%*	**1.44%**	**1.03%**	1.13%

Bold: highest value; *Italics:* lowest value. Sentence figures based on ten-year totals provided by the CDCR OIS. Crime categories based on FBI definitions.[95]

95. *See supra* note 27. The data for this chart can be found in the spreadsheet "Table 11 data". The data on sentenced offenders comes from the Spreadsheet "sentence lengths db dec 2011", beginning at cell N90227; the data on reported crimes comes from "Tough Chart Data March 2012," tab "Stats by County Segment".

The above data stands out because of the relationship of reported crime to prison sentences. Violent crime prison sentences as a percentage of reported violent crime is, even in high use counties, vanishingly small, with NFA accounting for, at most, just over five percent of reported violent crimes. This is not to say, of course, that there are few crimes solved. I note from the prior table that clearance rates are well into the double digits. These numbers could be explained in part by serial offenders, each responsible for multiple crimes, meaning each NFA would account for several reported crimes. Note, too, that these numbers only refer to prison, not punishment, effectiveness, or clearance in general. That is, this data illuminates where offenders are punished—not whether they are punished. Counties might sentence offenders to jail or probation, they might drop charges, and, of course, a significant number of crimes go unsolved.[96] Having said that, violent offenders in High Use counties are still more likely to get prison time than violent offenders in Low Use counties, even though both figures are relatively small.

But, even if we were to assume that prison usage is somehow correlated with effectiveness (even at these low levels) and that High Use counties devote more energy and resources towards fighting crime—and do so more effectively—responding to violent crime aggressively is still a policy response to violent crime, not a necessary function of it. Accordingly, this policy—as with all good policies—is subject to the key question: why should the state pay for it? If it is good policy,[97] after all, the county should happily make the investment itself. The individual county is the polity that made the choice to deal with crime in this fashion, and the individual county is the polity that will benefit. The issue is not whether the policies in question are good or bad. The issue is why the state should pay for something it has no control over, a policy that benefits a readily identifiable subset of the population (the county) which drew up and implemented the policy. Even if we were to think the state should be subsidizing these kinds of choices, questions remain: why subsidize

96. *See infra* Part IV.
97. If it is, in fact, a policy and not either random or inadvertent.

these counties and not others, and these policies and not others? Or, is the state willing and able to subsidize all counties who wish to make this choice?[98]

C. Local Dispositions

On a zero-sum view of offender management, one might expect that lower use of prison would result in higher use of jail and probation. In other words, offenders not sent to prison would simply go elsewhere in the system. That is not the case, however. High Use counties use jails at higher rates than Low Use counties, suggesting that High Use counties are simply more punitive and use incarceration at a higher rate irrespective of whether the county or state pays for it. As for probation, there is almost no difference between Low Use and High Use counties along any of the dimensions examined—a surprising figure that might be the result of weaknesses in the probation data.

1. Jail

Mike Males has written a comprehensive analysis of local jails and their ability to absorb offenders from state prisons.[99] Males looked at county jail capacities and county offender mixes to estimate whether county jails could absorb the numbers of low-level offenders most likely to return to them under realignment, concluding that county jails "can provide beds for only around 38% of the 15,400 low-level, non-strike property and drug convicts now held in state prisons."[100]

Males's study, unfortunately, only has data from one year (2009), so I was unable to incorporate his findings fully. The following table examines the issue using figures for jail population and jail budgets. The table also includes percentages of jail inmates who are sentenced and not sentenced. Non-sentenced inmates can be those too

98. For a discussion of the fiscal implications of this question, see *infra* Part IV.

99. MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, CAN CALIFORNIA COUNTY JAILS ABSORB LOW-LEVEL STATE PRISONERS? (2011), *available at* http://www.cjcj.org/files/Can_California_County_Jails_Absorb_Low-Level_State_Prisoners.pdf.

100. *Id.* at 4.

dangerous to be released before trial, those unable to post bail, or those awaiting processing. Because California Department of Justice expenditure data[101] is based on a fiscal year that goes from July 1 to June 30,[102] I averaged adjacent years to calculate an estimated yearly total. That is, figures for 2000 are the average of 1999-2000 and 2000-2001. There are no police expenditures for Alpine County; the sheriff provides the county with all of its law enforcement.[103] These figures extend only to 2007.

Table 12: Jail Statistics, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Jail Population	**363.96**	323.30	*282.49*	353.17	328.80
Sentenced	121.14	115.31	*92.54*	**137.33**	113.70
Non Sentenced	**242.83**	207.99	*189.95*	215.87	215.11
% Sentenced	33.28%	35.67%	*32.76%*	**38.89%**	34.58%
% County CJ Budget Spent on Jail	14.99%	16.44%	*10.54%*	**17.64%**	14.18%

Bold: highest value; *Italics:* lowest value. All figures except Budget are calculated per 100,000 APAR; Budget figures through 2007 only. County criminal justice budget is the sum of probation, jail, and law enforcement budgets.[104]

101. For the entry page for the Criminal Justice Statistics Center's county crimes data, see *Statistics: Expenditures, 1999–2009*, CAL. DEP'T OF JUSTICE: OFFICE OF THE ATT'Y GEN., http://ag.ca.gov/cjsc/statisticsdatatabs/ExpenCo.php (last visited Jan. 18, 2012) (individual county data was taken by following hyperlinks to each county).

102. *See, e.g.*, CRIMINAL JUSTICE STATISTICS CTR., *supra* note 52, at 4.

103. Email on file with the Georgia State University Law Review.author.

104. *See* TOUGH CHART DATA, *supra* note 27 (tab "Stats by County Segment"). "Stats by County Segment" figures came from filtering the tab "All Data IncStwd as #s filter". Rates per 100,000 APAR were obtained via calculation in the cells marked "Segment Variable/100KVP".

The jail numbers do not support the theory that Low Use counties are sentencing their offenders to jail rather than prison. Jail use is higher in both High and Middle Use counties than in Los Angeles and the Low Use counties. This tends to support the theory that High Use counties use more of all forms of incarceration, not just those subsidized by the state. These differences, however, are not nearly as stark as those involving NFA. What these population figures do not account for, however, is how crowded jails are, and whether these populations are near the jail's capacity. Males did not adopt my violent crime coverage methodology, nor did he group counties by prison use. However, looking at his list of counties with insufficient space to absorb low-level state prisoners, we see that all of the Rich Four and three of the Poor Four (Kern, Riverside, and San Bernardino) are rated as having insufficient unused jail capacity to absorb returning prisoners.[105] On the Low Use side, focusing only on the combined low coverage/low subsidy group, only those counties with incomes below the average state per capita income in all four years of the study (Imperial, Sacramento, San Joaquin, and Stanislaus) have insufficient jail space. The other seven counties have sufficient jail space.[106] At the margin, sentencing decisions might be affected by local jail capacity—without jail beds, county officials might perhaps feel pressure to push for prison-eligible sentences and charges.

Finally, I note that almost two-thirds of jail populations are non-sentenced, which is in line with the national average.[107] U.S. Attorney General Eric Holder recently remarked that "[a]lmost all of these individuals could be released and supervised in their communities—and allowed to pursue or maintain employment, and participate in educational opportunities and their normal family lives—without risk of endangering their fellow citizens or fleeing

105. *See supra* note 100. MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, CAN CALIFORNIA COUNTY JAILS ABSORB LOW-LEVEL STATE PRISONERS? (2011), *available at* http://www.cjcj.org/files/Can_California_County_Jails_Absorb_Low-Level_State_Prisoners.pdf.

106. *Id.*

107. Eric Tucker, *Holder: Petty Offenders Should Await Trial at Home*, Associated Press, June 1, 2011, *available at* http://abcnews.go.com/US/wireStory?id=13737523.

from justice."[108] The problem is that many non-sentenced offenders cannot make bail; Holder suggested, instead, that they be released on their own recognizance. The numbers suggest that at least a preliminary exploration of this alternative is warranted to deal with jail overcrowding.

2. *Probation*

Counties use probation in dramatically different ways, and an entire article could be devoted to the ways in which statewide statistics obscure real local trends. Statewide figures on total probation caseloads indicate that statewide probation use has not changed, but several counties within the period of study have moved dramatically in non-random ways, expanding in some counties and contracting in others.[109] To cite just a few examples: in Riverside County, total caseload almost doubled from 2000 to 2009, and new admissions more than doubled.[110] In Santa Clara County, new admissions (both total and felony only) almost doubled, but total caseload decreased around forty percent.[111] In Orange County, total caseload was also almost cut in half, but new admissions for felons stayed roughly the same.[112] Probation might be one area in which county policies show real year-to-year variations, and it is certainly deserving of a much closer analysis than I give it here.

Table 13: Probation Use by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Probation	1,461.59	1,444.00	*937.23*	**2,245.17**	1,411.40

108. *Id.*
109. Note that some probation data is missing. *See* CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, CRIMINAL JUSTICE TREND DATA FOOTNOTES (2009), *available at* http://stats.doj.ca.gov/cjsc_stats/prof09/footnotes.pdf.
110. *See* TOUGH CHART DATA, *supra* note 27 (tab "All Data noStwd as #s filter").
111. *Id.*
112. *Id.*

Caseload					
Probation Budget	*$6,933*	$7,074	$7,137	**$7,355**	$7,082
% Felony	76.51%	79.31%	**86.68%**	*58.90%*	75.66%
Probation New Admissions	904.66	809.95	*363.77*	**1,070.32**	750.69
% Felony	73.99%	78.40%	**88.93%**	*60.09%*	74.84%
% County CJ Budget Spent on Probation	12.34%	12.10%	*9.38%*	**13.46%**	11.40%

Bold: highest value; *Italics:* lowest value. All figures except percentage figures are calculated per 100,000 APAR. All calculations made on ten-year averages except budget figures, which are through 2007 only. County criminal justice budget is the sum of probation, jail, and law enforcement budgets.[113]

These numbers are, frankly, surprising. Some of the data is not complete, and probation data is limited to "original grants of probation and do[es] not include subsequent grants of probation to those already under supervised probation in the same county."[114] It is unclear, though, how the results obtained could be fully explained by this. I am reluctant to draw any conclusions of my own from Table 13, but I will instead point out areas that require explanation. Probation budgets are almost identical, and Low Use and High Use counties have similar caseloads and felony populations. Los Angeles has fewer total probation cases and dramatically lower new admissions, suggesting perhaps that probation in Los Angeles County is longer-term than in High and Low Use counties. I am unsure whether there is a quality-versus-quantity story to be told here or why

113. *See* TOUGH CHART DATA, *supra* note 27 (tab "States by County Segment"). "Stats by County Segment" figures came from filtering the tab "All Data IncStwd as #s filter". Rates per 100,000 APAR were obtained via calculation in the cells marked "Segment Variable/100KVP".

114. *See, e.g.*, CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, DATA CHARACTERISTICS AND KNOWN LIMITATIONS (2009), *available at* http://stats.doj.ca.gov/cjsc_stats/prof09/limits.pdf.

both probation and jail use are higher in High Use counties. This might also be one area where individual counties behave so differently within segments that patterns are not readily discernible.

D. Local Resources

Local resources were measured by looking at per capita income—both per capita income itself and the difference between per capita income and state per capita income. I chose not to look at gross population size of a county as a measure of resources. The relationship of Total Population to NFA rates is not statistically significant at the 1% level ($p = .089$). The amount that Total Population explains in NFA rates is small ($r^2 = .005$), which means changes in Total Population explain less than .5% of the variance in NFA rates. And, the standard error is relatively large (root mean squared error (RMSE) = 63.35824. RMSE is a guide to how closely the data fits the trend line).

Figures for per capita income were obtained from the Bureau of Economic Analysis.[115] These figures do not account for income inequality within a given county, which might be relevant in explaining crime and responses to crime, particularly where property crimes are concerned. I take per capita income as a measure of resources independent of criminal justice budgets. Note also that state criminal justice funding is not necessarily related to per capita income, where poorer counties get more resources.[116]

---

115. *Local Area Personal Income*, U.S. DEP'T OF COMMERCE: BUREAU OF ECON. ANALYSIS, http://www.bea.gov/regional/reis/default.cfm?selTable=CA1-3&section=2 (last visited Feb. 13, 2011) (selected "Per Capita Personal Income," "California," and the years 2000–2009).

116. *See supra* note 11 and accompanying text. As a reminder, state funding is not related to crime rates, either. *Id.* Because some funding comes from a county's share of state sales tax revenues, we might expect more criminal justice resources in wealthier counties. *Id.*

Table 14: Per Capita Income by Segment, Average Yearly Values, 2000-2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
Mean Per Capita Income	$36,893	**$42,611**	*$36,198*	$38,490	$38,492
Max	$60,038	**$93,263**	*$42,195*	$72,576	$93, 263
Min	*$16,920*	$18,973	**$29,865**	$18,542	$16, 920
Standard Deviation	9,013	**15,103**	*4,313*	9,615	11,770
Mean Difference From State Average	*-$1,614*	**$4,176**	*-$2,195*	$64	N/A
Max Difference	$22,161	**$49,410**	*-$1,528*	$29,336	N/A
Min Difference	-$17,864	-$16,498	**-$3,533**	*-$18,104*	N/A
Standard Deviation	8,374	**14,437**	*523*	8,831	N/A

Figures based on county per capita income numbers and were weighted based on county population.[117]

Generally, Low Use counties have higher per capita incomes: approximately $6,000 higher than High Use counties and Los Angeles.[118] All income figures across all segments, however, had a

117. Chart data based on filtered data in "Per capita income recalculation" spreadsheet, which took per capita income from "Tough Chart Data March 2012," tab "All Data", multiplied by total population, and divided total figures.

118. These numbers were calculated to account for county population size. I took per capita income in a given county for a given year and multiplied that number by the county's population that year. I added these figures for a given segment of the state and divided by total population for that segment. Figures were not adjusted for inflation.

great deal of variation, and the richest group, Low Use, had the highest coefficient of variation. The gap between the highest and lowest reported county incomes for all three segments besides Los Angeles was at least $40,000. These same segments reported incomes of more than $15,000 below and $20,000 above the state per capita income level in a given year. Income merits further study. A project that divides the state into income segments might reveal further insights about the relationship between income levels and prison usage.

Table 15: Per Capita Income of High Use Counties, Average Yearly Values, 2000-2009

	High Coverage	High NFA Surplus	Rich Four	Poor Four	High Coverage and NFA Surplus
Mean Per Capita Income	*$27,089*	$37,567	**$47,484**	$27,481	$27,872
Max	$40,721	**$60,038**	**$60,038**	*$31,111*	$34,432
Min	$18,021	$21,517	**$33,307**	$21,517	*$16,920*
Mean Difference From State Average	-$11,319	-$945	**$9,057**	*-$11,118*	-$10,593
Max Difference	-$1,674	**$22,161**	**$22,161**	*-$8,123*	-$6,699
Min Difference	*-$17,864*	-$13,828	**-$617**	-$13,828	-$17,455

Figures based on county per capita income numbers and were weighted by county population.[119]

119. Chart data based on filtered data in "Per capita income recalculation" spreadsheet, which took per capita income from "Tough Chart Data March 2012," tab "All Data", multiplied by total population, and divided total figures.

In Table 15, we see that there is a sharp divide between the Rich Four and the Poor Four. Three of the Rich Four counties were above the average state per capita income every year in the study. Santa Barbara was below it during only three years and even then missed it by no more than $617. The Poor Four, however, were at least $8,000 below the average state per capita income level every single year. The best a Poor Four county did, relative to the state average, was still more than $7,000 less than the worst a rich county did and almost $30,000 less than the highest Rich Four figure. The mean difference between the two groups was approximately $20,000 a year. The Rich Four are, in fact, the only above-average income group of High Use counties. Neither high coverage nor high coverage/high NFA surplus counties ever broke above the state average per capita income level for even a single year. Again, the Rich Four have large total populations, with around fifty percent of the High Use segment's total population. But none of these figures accounts for income differences within a county; counties undoubtedly have richer and poorer areas.

Table 16: Per Capita Income of Low Coverage/Low Surplus Counties, Average Yearly Values, 2000-2009

	Low Six	High Five	Low Use Without San Francisco and Marin
Mean Per Capita Income	*$33,086*	**$52,295**	$39,800
Max	*$47,813*	**$93,263**	$58,228
Min	*$18,973*	**$39,013**	*$18,973*
Mean Difference From State Average	*-$5,395*	**$13,900**	$1,360
Max	*$4,573*	**$49,410**	$14,375

Difference			
Min Difference	*-$16,498*	$4,880	*-14,425*

Figures based on county per capita income numbers and were weighted by county population.[120]

Low Use counties do not divide as easily as High Use counties. This chart looks only at the group of eleven counties with both low coverage and low subsidies and excludes Alpine, San Benito, and San Diego, as well as Los Angeles. There are four Low Use counties that never had incomes above the state per capita average during any year of the study, but an even division of this segment by population adds two counties with above-average incomes. The mean difference between the two groups is nearly $20,000, but this segment is made up mostly of average-income counties with two outliers: Marin County and San Francisco County. Recalculating the mean per capita income of the segment without Marin and San Francisco counties gives a mean per capita income of $39,800, approximately $1,500 higher than the state average for this period. While this number is still above the state average, and still above that of the other three segments, it is lower than the mean income of the Rich Four.

E. Politics

I looked at voter registration numbers for my political analysis. Voter registration data came from the California Secretary of State.[121]

---

120. *See* TOUGH CHART DATA, *supra* note 27.

121. For the entry page for the Voter Registration and Participation Statistics, see *Voter Registration Statistics*, CAL. SEC'Y OF STATE, http://www.sos.ca.gov/elections/elections_u.htm (last visited Feb. 13, 2011). *See also* CAL. SEC'Y OF STATE, FEBRUARY 10, 2009 REPORT OF REGISTRATION (2009), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-09/county.xls; CAL. SEC'Y OF STATE, JANUARY 22, 2008 REPORT OF REGISTRATION (2008), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/15day-presprim-08/county.xls; CAL. SEC'Y OF STATE, FEBRUARY 10, 2007 REPORT OF REGISTRATION (2007), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-07/county.xls; CAL. SEC'Y OF STATE, JANUARY 3, 2006 REPORT OF REGISTRATION (2006), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/154day-prim-06/county.xls; CAL. SEC'Y OF STATE, FEBRUARY 10, 2005 REPORT OF REGISTRATION (2005), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-05/county.xls; CAL. SEC'Y OF STATE,

I used the date closest to February for years with multiple reports; this is because odd-numbered years only have a single registration report, which comes out in February. I collected percentage data on total registration, Democratic and Republican registration, and those who declined to state (as a proxy for swing voters). I calculated third party registration by taking these three numbers and subtracting them from 100; this procedure, admittedly, amalgamates third parties of very different political stripes and should be read as a measure of anti-two-party sentiment rather than, say, a measure of Green or Libertarian sentiments. I then calculated the political valence of a county by subtracting the percentage of Republicans from the percentage of Democrats, yielding positive numbers for Democratic majorities and negative numbers for Republican majorities.

I used registration data, rather than actual voting patterns, for a number of reasons. First, I was wary of including data from actual races out of the concern that individual candidates and/or issues might shift turnout one way or another. Second, the data is less readily available. Registration figures might be seen as a general measure of civic engagement, and a baseline for individual attitudes. I acknowledge that there is a variety of opinions expressed on crime within parties, and that party affiliation is in no way a guarantee of left/right tendencies or particular attitudes about crime.[122]

FEBRUARY 17, 2004 REPORT OF REGISTRATION (2004), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/15day-presprim-04/county.xls; CAL. SEC'Y OF STATE, February 10, 2003 Report of Registration (2003), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-03/county.xls; CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF FEBRUARY 4, 2002 (2002), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/29day-prim-02/county.xls; CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF FEBRUARY 10, 2001 (2001), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-01/county.pdf (Sierra County is reported as having more than 100 percent of its population registered to vote); CAL. SEC'Y OF STATE, REPORT OF REGISTRATION AS OF FEBRUARY 7, 2000 (2000), *available at* http://www.sos.ca.gov/elections/ror/ror-pages/29day-presprim-00/county.pdf.

122. Of course, it sometimes does indicate something useful. The AB 109 vote in the California assembly, for example, was almost entirely on party lines, with all but one Democrat voting yes, and no Republican voting yes (one member was absent or abstained). *See* Comm. on Budget, *Unofficial Ballot, AB 109 Budget*, CAL. STATE ASSEMBLY (Mar. 17, 2011), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_vote_20110317_0532PM_asm_floor.html. Party affiliations were obtained at the official party websites for the California Assembly. *Assembly Republican Members*, CAL. ST. ASSEMBLY: REPUBLICAN CAUCUS, http://republican.assembly.ca.gov/?p=members (last visited Jan. 18, 2012); *Democratic Members*, CAL. ST. ASSEMBLY: DEMOCRATIC CAUCUS, http://asmdc.org/members/democratic-members (last visited Jan. 18, 2012).

I also calculated my figures without correcting for population. I did so because I wanted to evaluate the party identity of a county's political leadership. In other words, this method simulates the electoral college model, where all that matters is who finishes first, not the popular vote model, where the margin of victory also matters.[123] My state figures are calculated means for the group of 580 counties.[124]

Table 17: Voter Registration by Segment, Average Yearly Values, 2000–2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
% Registration	*70.73%*	73.88%	70.97%	**73.95%**	72.88%
% Democrats	36.79%	46.24%	**51.51%**	*39.27%*	40.39%
% Republicans	**43.62%**	31.16%	*26.88%*	39.63%	38.60%
Democrats Minus Republicans	*-6.83%*	15.08%	**24.63%**	-0.36%	1.79%
Decline to State	*14.66%*	**17.18%**	17.04%	15.48%	15.66%
Third Party	4.93%	5.42%	*4.57%*	**5.63%**	5.34%

Bold: highest value; *Italics:* lowest value. All figures are not corrected for population; they are means of the group of counties for 2000–2009.[125]

123. Consider this thought experiment. If Los Angeles were 99% Democratic and every other county were 51% Republican, popular (population-adjusted) registration numbers would indicate a heavy advantage for Democrats, even though county policies would be under the direction of Republicans in 57 counties.

124. Actual state numbers are slightly more Democratic: 70.70% overall, 43.97% Democratic, 34.35% Republican, 9.62% Party Differential, 16.90% Decline to State, 4.79% Third Party.

125. *See* TOUGH CHART DATA, *supra* note 27 (tab "Stats by County Segment"). "Stats by County Segment" figures came from filtering the tab "All Data IncStwd as #s filter". Rates per 100,000 APAR were obtained via calculation in the cells marked "Segment Variable/100KVP".

All segments showed similar rates of voter registration, with a bit more registration in Low Use counties. High Use counties had more registered Republicans than other segments of the state, as well as greater numbers of Republicans versus Democrats. This might suggest that higher coverage is more associated with Republican politics. I should caution, however, that my analysis is not comprehensive enough to support more than a tentative observation. Two of the Rich Four counties are Democratic, for example. Nevada, which has an extremely low percentage of its population in prison, is Republican.[126]

Intra-county distribution might affect policy, in that a county might have Democratic cities within counties, or particular seats on the county council. Slates for county officials specify not just party, but person, and individual differences on criminal justice might account for some of the observed results. Finally, individual county council seats are drawn within counties and might heighten the effects of how Democrats and Republicans are distributed within the county.[127]

F. Reverse Causality: Is Low Crime the Product of a High NFA?

In this Part, I consider whether I have been analyzing the problem backwards. I have analyzed whether prison is a product of crime. Perhaps, though, crime is a product of prison. That would mean the low crime rates associated with high NFA are an indicator that prison works. Under this theory, because offenders in High Use counties are subject to swift and certain punishment, this means both that there are fewer of them left to offend (incapacitation) and that any remaining offenders are less likely to risk prison (deterrence).

---

126. *See* TOUGH CHART DATA, *supra* note 27 (tab "All Data noStwd as #s filter").

127. For an evaluation of the role of party politics in sentencing commissions, see Rachel Barkow & Kathleen O'Neil, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973 (2006). For an evaluation of the effect of elections on District Attorneys, see Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

In response, I note first that it is not logically necessary that a decrease in crime is a sign that incarceration is working and an increase in crime means more prisons are needed. It could just as easily be said that a decrease in crime is a sign that fewer prisons are needed and an increase in crime is a sign that incarceration is not working.[128] I will not attempt to determine whether changes in prison usage are, in fact, the cause of changes in crime. I do, however, note that this is the subject of vociferous—and voluminous—academic debate.[129] I note also that, to hearken back to the comparison of Alameda and San Bernardino, crime rates in particular High Use counties might be the same as those in counties which have not used prison.

I will, instead, frame the problems in terms of the central question of this paper. Even if one were to assume that the causation in fact runs from prison to crime, and that High Use policies are effective, then why should the state pay for it? The choice is made in the county, and the benefits go to the county. If the policies are, in fact, effective, then the counties should be happy to pay for it. Alternatively, if the state pays for prison because it believes the policy is worth subsidizing as a means of fighting crime, which counties should it pay for? Can it afford to subsidize all counties at High Use rates? Should it subsidize just prison, or should it subsidize other policy choices as well? I discuss these and other issues in the following section, which discusses the state's role in funding prisons.

---

128. *See* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 16 (2007) (noting that between 1973 and 2004 the total United States prison population rose every year (an aggregate total of 400 percent), while, during that time, there were about an equal number of years of rising and falling crime).

129. *See, e.g.*, William Spelman, *Specifying the Relationship Between Crime and Prisons*, 24 J. QUANTITATIVE CRIMINOLOGY 149, 149 (2008) (surveying several quantitative studies and finding that, "[d]espite many years of study, the effect of prisons on crime remains a controversial question"). There is a more accessible introduction to this debate. *See* Alfred Blumstein & James Q. Wilson, *The Impact of Incarceration on Crime: Two National Experts Weigh In*, PEW CTR. ON STATES, Apr. 2008, *available at* http://www.pewcenteronthestates.org/uploadedFiles/Crime%20Incarceration%20QA.pdf.

IV. FISCAL IMPLICATIONS

This Part examines the fiscal ramifications of the state prison subsidy. Given that the state pays for prison, and that counties use prisons at different rates, what is the net prison subsidy (or tax) for counties? I have heretofore adverted to the idea of subsidy without mentioning the numbers. This Part details exactly what those numbers are: they run into the hundreds of millions of dollars each year for just the first year of NFA sentences. In addition to exploring what state prison expenditures are, I also calculate what prison expenditures might be if California emulated the High Use counties or the Low Use ones. I also calculate what would happen if a single segment of the state moved to another segment's coverage rates. There we see that if Los Angeles County alone moved to a High Use coverage rate, for example, the fiscal impacts would be substantial.

A. Subsidy by Segment

The following table calculates prison subsidies in the manner described earlier.[130] I multiplied the coverage rate by the number of violent crimes in a segment to come up with the "fair" or "justified" NFA number. I then subtracted this number from actual NFA and multiplied the result by per capita prison costs to arrive at the NFA surplus. I also calculated the subsidy on the basis of property crime coverage and Part I coverage, to see if an NFA rate not justified on the basis of violent crime might be justified by some other measure of crime.

Table 18: Prison Subsidy by Segment, Average Yearly Values, 2000–2009

	High Use	Low Use	Los Angeles	Middle Use	State Total
NFA	**17,028**	*8,311*	13,888	5,045	44,272

130. *See supra* notes 11–12 and accompanying text.

Coverage	**35.90%**	*14.60%*	18.78%	27.58%	22.52%
Violent Crime	47,427	56,929	**73,956**	*18,293*	196,604
NFA if at State Coverage Rate	10,734	12,982	**16,406**	*4,150*	N/A
NFA Surplus (Deficit)	**6,294**	*-4,671*	-2,518	895	N/A
Average yearly Subsidy (millions)	**$210.05**	*-$166.30*	-$72.73	$28.97	N/A
Highest Individual Yearly County Subsidy (Millions)	**$68.78**	$5.23	*$.97*	$12.92	N/A
Lowest Individual Yearly County Subsidy (Millions)	**-$.32**	-$85.90	*-$145.04*	-$5.79	N/A
Property Coverage Subsidy (millions)	**$122.10**	*-$201.64*	$64.86	$14.67	N/A
Part I coverage Subsidy (millions)	**$123.52**	*-$201.81*	$71.66	$6.62	N/A

Bold: highest value; *Italics:* lowest value. All figures are gross numbers. High and Low Subsidy figures refer to individual counties within the respective groups.[131]

131. *See* TOUGH CHART DATA, *supra* note 27 (tab "Stats by County Segment", columns BD (NFA), EJ (Coverage), (G) Violent Crime, EM (NFA at State Coverage Rate), EO (Average subsidy—divided by 10), EZ (Property Coverage), FV (Part I coverage subsidy)).

California pays an immense amount of money to subsidize the violent-crime-unjustified prison usage of High Use counties, an average of $210 million a year. I emphasize that these figures are not the cost of a county's total NFA, but just the NFA not justified by reported violent crime. Total NFA costs are much higher. Even focusing solely on surplus NFA, individual counties used huge sums of state resources: San Bernardino's surplus prison use was subsidized an average of $51 million a year, with a high of almost $69 million in 2006. These figures, again, only calculate the cost of the first year of imprisonment of NFA for that particular year, and only for the number of NFA exceeding that justified by the statewide violent crime coverage rate.[132] During the ten years of the study, only one of the eighteen High Use counties had a negative subsidy. Fresno had a single year (2000) in which its prison usage was not subsidized (-$320,000). Overall, however, Fresno's excess prison usage cost the state an average of more than $15 million a year between 2000 and 2009.

Low Use counties left millions of dollars of prison resources on the table. If they had incarcerated at the statewide coverage rate, they would have used, on average, an extra $166 million in prison resources in the first year of NFA sentences. The difference between the cost of High Use deviations from the state average and Low Use deviations is more than $375 million a year, a tremendous transfer of resources from one-third of the state to another. Individual Low Use counties forewent huge amounts of crime-justified prison resources. Alameda County used an average of $48 million dollars less than its justified amount, with a high (or low) of -$85 million in 2008. (Again, this estimate only includes the cost of the first year of imprisonment for each new felon admission.) Estimates of Low Use counties as a segment are somewhat dampened by the inclusion of San Diego, which was in the *top* quartile for subsidies for two years (though its average annual subsidy was -$8.5 million).

132. I note that the mean NFA sentence statewide is just over four and a half years, and the median is two years, suggesting that the actual cost of NFA might be much greater. Note, however, that new felons in Low Use counties are sentenced to slightly longer median prison terms. *See infra* Table 20 and accompanying text.

Los Angeles County was also on the losing end of the prison subsidy, averaging a -$72 million subsidy for the ten years of the study. Los Angeles spent the first five years of the past decade in the -$100 million range, hitting a peak of -$145 million in 2003 before dropping to -$96 million in 2004. The rest of the decade saw the Los Angeles subsidy numbers increase as Los Angeles's coverage rates increased, a product both of decreasing violent crime and increased NFA. Los Angeles had a positive net subsidy of $970,000 in 2009.

The Middle Use counties were subsidized overall, and I note again the heterogeneity of the group. More than half of the Middle Use counties were subsidized in nine or more years of the study.[133]

Table 18 also calculates subsidies according to alternative coverage rates. If prison is justified on the basis of something other than reported violent crime, are the subsidy numbers different? The answer depends on which segment of the state one looks at. High Use counties look a little less high use when coverage is calculated using either reported property crimes or reported Part I crimes. Their subsidy drops to a yearly average of about $122 million, a little more than $70 million less than the yearly violent crime subsidy. Low Use counties, however, see their prison resource shortfall grow, dropping to below $200 million. These numbers can be explained by reference to the relatively high property and Part I crime rates in both High and Low Use counties. High property and Part I crime justifies more of the High Use counties' NFA and increases the amount of prison resources left unused by the Low Use counties.

Perhaps the most interesting result of recalculating coverage by property and Part I crime, though, is that Los Angeles goes from being a net donor to a net recipient of unjustified prison resources. Remember, Los Angeles County's NFA rate is high on a straight per capita basis—it is low only when adjusted for its high violent crime rate. Because Los Angeles does not suffer from relatively high property and Part I crime, however, its high NFA rate is no longer

133. Amador, Del Norte, Mariposa, San Luis Obispo, Siskiyou, and Tulare were subsidized in nine of the ten years; Humboldt, Madera, Tuolomne, Ventura, Yolo and Yuba were subsidized all ten years. They were not included in the High Use group, however, because the extent of their NFA surplus was not sufficiently large to put them in the top quartile of the state.

justified when adjusted for these types of crimes. Once again, the measure of subsidy is ultimately a normative question: what prison admissions are justified, and on what basis?

Table 19: Prison Subsidies for High Use Counties, Average Yearly Values, 2000–2009

	High Coverage	High NFA Surplus	Rich Four	Poor Four	High Coverage and NFA Surplus
Average Raw NFA Numbers Per Year	*329*	**15,284**	5,491	9,793	1,415
Coverage	54.61%	34.45%	33.72%	34.88%	**57.46%**
Violent Crime Raw Numbers	*603*	**44,361**	16,284	28,077	2,463
NFA if at State Coverage Rate	*138*	**10,030**	3,674	6,357	566
Excess NFA	*192*	**5,254**	1,817	3,436	849
Average yearly Subsidy (millions)	*$6.36*	**$175.37**	$60.85	$114.52	$28.32
Highest Individual Yearly Subsidy	*$3.85*	**$68.78**	$55.39	**$68.78**	$14.84

(millions)					
Lowest Individual Yearly Subsidy (millions)	$.01	*-$.32*	$1.16	*-$.32*	$2.51
Property Coverage Subsidy (millions)	*$5.81*	**$91.29**	$28.27	$63.02	$25.00
Part I coverage Subsidy (millions)	*$5.95*	**$92.85**	$17.37	$75.48	$24.71

Bold: highest value; *Italics:* lowest value. All figures are gross (non-normalized) numbers. High and Low Subsidy values are for individual counties within the respective groups. Figures might not add due to rounding.[134]

Table 19 takes a closer look at just the subsidized counties. The Poor Four dominate here, sending, in an average year, 3,436 excess new felons (those sent above the number calculated at the state coverage rate). These prisoners cost an average of $115 million in just the first year of their incarceration, and the state must pay for this cost every year. The Rich Four also cost the state large sums of money on the NFA they send above the state coverage rate. Two rich counties in particular receive large subsidies: Santa Clara and Orange, both of which received eight digit subsidies each year, an average of more than $16 million for Santa Clara and $36 million for Orange. The state pays for the prison sentences of these crime-unjustified prisoners even though, each year, the average citizen in

134. *See* TOUGH CHART DATA, *supra* note 27 (tab "Stats by County Segment", columns BD (NFA), EJ (Coverage), (G) Violent Crime, EM (NFA at State Coverage Rate), EO (Average subsidy—divided by 10), EZ (Property Coverage), FV (Part I coverage subsidy)).

these counties makes at least $4,000 more than the average Californian.

B. The Role of Sentence Lengths

In this Part, I take a second cut at costs, examining sentence lengths. As I have stated repeatedly, my cost estimates heretofore have only considered the first year of confinement. To get a better estimate of the cost of a given county's prison usage, one must also take sentence length into account.[135] It might be the case that High Use counties nevertheless use fewer prison resources than Low Use counties because they send people to prison for shorter terms. Of course, it might also be the case that High Use counties use an even greater amount of prison resources if they not only send more people to prison but send them there for a longer time.

I again used data from the CDCR's OIS branch. I used data on all individual sentences and crimes for each county from 2000 to 2009 to calculate total prison years for each county and each set of counties. I also looked at total prison years for certain subsets of crime (e.g. Violent Crime, Property Crime, Part I Crime), again using FBI typology. I divided these numbers by NFA to get the mean sentence. I also calculated the median sentence for total NFA, given potential distorting effects of lengthy sentences. In fact, just .16% of the total statewide number of sentences—the 746 sentences greater than or equal to 100 years—accounts for approximately seven percent of the total time sentenced from 2000–2009.

135. Of course, these are just estimates of the time prisoners will spend in prison. Actual time served depends on other factors (e.g. mortality levels in prison).

Table 20: Sentence Length by Segment, 2000–2009[136]

	High Use	Low Use	Los Angeles	Middle Use	State Total
Segment NFA as % of State Total	**38.78%**	19.21%	30.75%	*11.22%*	N/A
Segment Sentence Years as % of State Total	**34.65%**	22.01%	31.78%	*11.56%*	N/A
Median (Mean) Sentence in Years	2 (4.14)	2.67 (5.31)	2 (4.79)	**3 (4.75)**	2 (4.63)
Violent Crime Median (Mean) Sentence Years	*4 (9.25)*	5 (11.03)	5 (11.24)	5 (9.88)	5 (10.42)
Property Crime Median (Mean) Sentence Years	2 (2.74)	2 (3.08)	2 (2.66)	2 (3.35)	2 (2.84)
Part I Crime Median	2 (5.31)	2 (6.69)	2.67 (6.40)	**3 (6.11)**	2.67 (6.05)

136. *See* BALL, *supra* note 87. Mean sentence data (calculated) begins at cell N90228. Median figures were calculated manually, filtering by months.

(Mean) Sentence Years					
Drug Crime Median (Mean) Sentence Years	2 (2.71)	**2.67 (3.17)**	2 (2.87)	**2.67 (3.20)**	2 (2.89)
Sex Offense Median (Mean) Sentence Years	*3 (10.56)*	**5 (12.64)**	*3 (9.11)*	**5 (10.46)**	3.67 (10.66)
Other Violent Crime Median (Mean) Sentence Years	*2 (4.58)*	3 (5.53)	3 (6.35)	3 (4.85)	3 (5.23)
Other Property Crime Median (Mean) Sentence Years	2 (2.25)	2 (2.52)	2 (2.23)	2 (2.60)	2 (2.33)
Other Offense Median (Mean) Sentence Years	2 (2.56)	2 (2.85)	2 (2.54)	2 (2.90)	2 (2.65)

Bold: highest value; *Italics:* lowest value. All figures based on ten-year totals provided by the CDCR OIS. Crime categories based on FBI definitions.

My conclusion is that sentence lengths are more or less uniform—it is not the case that High Use and Low Use counties (or any segment of the state, for that matter), impose remarkably divergent median sentences from one another. The data is relatively uniform: total new felon admission percentages by segment are roughly comparable to total years sentenced by segment. That is, counties send people and sentence them at roughly similar proportions of the state total, although it should be noted that Low Use counties do impose slightly longer mean sentences than High Use ones. This could be due to lengthy sentences on the top end, or it could be consistent with the observation in Table 9 (Offender Mix) that Low Use counties use prison for more serious offenders.[137] An initial cut, removing just those prisoners sentenced to serve more than 100 years, does slightly narrow the gap between the two segments.[138] One conclusion I draw from this data is that, in some ways, sentencing reform has worked—there is uniformity across the state, in that offense X generally gets sentence Y. The issue, however, is that there are few substantive limits on officials' ability to charge offense X. This might suggest that any future changes to statewide laws should focus less on harmonizing the time associated with particular crimes and more on harmonizing counties' abilities to charge offenses. This could be done by mandatory charging (harmonizing counties on a higher level of incarceration), by reducing the number of substantive offenses (harmonizing counties on a lower level of incarceration), or some combination of the two. Realignment, discussed in Part V, *infra*, tends toward the latter approach.

137. Note, for example, that High Use counties, which have greater percentages of "Other Violent" offenders, have a median sentence length of a year less than anywhere else in the state.

138. New figures for NFA percentage are roughly unchanged (38.79, 19.19, 30.75, and 11.27 for High, Low, Los Angeles, Middle, and State, respectively), while percentage of total sentence length increases slightly for High Use and drops slightly for Low Use (34.75, 21.62, 31.97, and 11.65 percent respectively).

Ultimately, any differences in time sentenced might reflect real differences in the crimes themselves. That is, some offenses might get greater or lesser amounts of time because of qualitative differences in the crimes themselves, not just policy decisions. I speak not only of statutorily enumerated aggravating and mitigating factors, but the heinousness of the offense.[139] This is why, ultimately, the comparison of offenses to one another must take place at a certain level of generality and imprecision. Some differences in sentence length might be because offenses are genuinely different from one another, and some differences might be because counties (and their policies) are genuinely different from one another. But in any given case, it is nearly impossible to tell which dominates,[140] which is why this analysis has generally not focused on sentence lengths.

C. Recalculating State Coverage Rates by Segment

What would happen if other segments of the state began acting like one another? I consider a variety of scenarios. First, I calculate what would happen if the state coverage rate were replaced with the coverage rate of each of the four segments. Even though the resulting figures include only the first year of each new felon's sentence, the results would be dramatic, ranging from an additional cost of $879 million to a cut of more than half a billion dollars. Second, I calculate what would happen if only individual segments of the state changed their coverage rates. This analysis shows that changing just parts of California could have profound fiscal impacts.

139. Cunningham v. California, 549 U.S. 270, 288–89 (2007) (holding that statutorily enumerated factors must be charged and found by a jury beyond a reasonable doubt). This governed California sentencing in the later years of the study, although it is unclear what practical effect this might have had.

140. *See supra* text accompanying notes 63–65 ("real offense discussion"). For a further exploration of this issue, see Ball, *supra* note 41.

Table 21: Subsidy Recalculated with Changed Statewide Coverage Rate, by Segment, Average Yearly Values, 2000–2009[141]

	High Use	Low Use	Los Angeles	Middle Use	State Total
Coverage	**35.90%**	*14.60%*	18.78%	27.58%	22.52%
State NFA if at Segment Coverage Rate	**70,581**	*28,704*	36,922	54,223	44,272
Excess NFA	**26,309**	*-15,568*	-7,350	9,951	N/A
Change in Cost (millions)	**$879.28**	*-$520.31*	-$245.65	$332.58	N/A

Bold: highest value; *Italics:* lowest value. All figures are gross numbers per year. High and Low Subsidy values are for individual counties within the respective groups.

One thing is immediately apparent from Table 21: the state cannot afford for all counties to act like High Use counties. If the state incarcerated at the High Use coverage rate, it would cost an additional $879 million each year for just the first year of new felons' sentences. The state would also have to find room in its already overcrowded prisons to house an additional 26,309 incoming prisoners each year. The state could, however, shed an average of more than 15,000 inmates if it adopted Low Use coverage rates statewide. In doing so, it would save more than $500 million in the cost of the first year of new felons' sentences.

141. *See* TOUGH CHART DATA, *supra* note 27 (tab "Statewide All Data").

Table 22: Change in NFA with Changed Segment Coverage Rate, by Segment, Average Yearly Values, 2000–2009[142]

	High Use	Low Use	Los Angeles	Rich Four	Poor Four
Segment Changes to High Use Coverage Rate	**N/A**	12, 127	**12,662**	355	*287*
Segment Changes to Low Use Coverage Rate	*-10,104*	N/A	**-3,090**	-3,114	-5,694
Segment Changes to Los Angeles Coverage Rate	*-8,121*	**2,380**	N/A	-2,433	-4,520
Segment Changes to Middle Use Coverage Rate	*-3,948*	**7,390**	6,509	-1,000	-2,049
Segment Changes to State Average Coverage Rate	*-6,347*	**4,509**	2,767	-1,824	-3,470

Bold: highest value; *Italics:* lowest value. All figures are gross numbers per year.

142. *See* TOUGH CHART DATA, *supra* note 27 (tab "Segment Coverage Change").

Even if the state were not to change as a whole, just changing a segment of the state—or just the Rich and Poor Four—could have significant impacts on prison space and prison budgets. If the High Use counties changed their coverage rates to the state average, the state would immediately save an average of more than 6,300 prison beds in the first year alone (plus additional projected bed space in following years for inmates serving multi-year sentences). If the Poor Four counties alone changed to the state average, the state would save an average of almost 3,500 prison beds. In fact, if the Poor Four adopted the coverage rate of any of the other segments (besides that of the High Use counties), the state would save millions of dollars and thousands of prison beds. Alternatively, if the Low Use counties—or just Los Angeles County—begin to emulate the High Use counties, the state would face even more crowded prisons—more than 24,000 prisoners each year (an effect that would be compounded by sentences of more than one year).

With this diagnosis, what can California do to change coverage rates and prison usage, or at least to account for them? The next section sketches out some answers to that question.

V. POLICY IMPLICATIONS

California faces many challenges relating to its overcrowded prisons. Once we understand that California's counties are different when it comes to prison use, what are the policy implications? What would happen if California's policymakers understood that counties are different—and that a county's use of prison might be the result of policy choices, not responses to crime? What effect would it have on policies to promote prison population reductions? I examine three possibilities: realignment, probation subsidies, and sentencing.

A. Realignment, Prisoner Release

California must cut its prison population by approximately 37,000 inmates[143] within the next two years[144] or federal courts will order it to release prisoners. Recently, the California Assembly passed legislation to "realign" criminal justice, shifting more responsibilities from the state to counties.[145] As the state moves to redefine its relationship to the counties, the county analysis in this Article might be useful in blunting the criticism that the state is pushing its problem onto the counties. With High Use counties, it might be argued that the state is simply returning the problem to those counties. The state has thus far given no indication that it will attempt to tailor realignment to individual counties, but ideally, it would tailor its responses to High and Low Use counties and demand more of the former than the latter.

A second way this analysis might help is in the implementation of realignment, particularly when it comes to setting benchmarks of current versus desired prison usage. As I have stated, prison usage per capita—whether total prison population or NFA—is too crude a measure of prison need. Tying realignment benchmarks and/or funding to current usage would merely lock in the existing subsidy, rewarding (in perpetuity) counties which choose prison—and not other options—as a response to crime. In some ways, in fact, tying benchmarks for new reforms to existing prison usage is ironic: it treats overcrowding by rewarding those counties most responsible for it. Yet funding for the first nine months of realignment makes this very mistake: Alameda is getting $9,219,946 of the realignment budget, while San Bernardino is getting more than twice that amount—$25,785,695—even though they have similar crime problems.[146] The only difference is that San Bernardino uses prison

143. Brown v. Plata, 131 S. Ct. 1910, 1923 (2011).

144. *Id.* at 1945. The Supreme Court did, however, strongly hint that the three-judge panel should extend the timeline if the state requests it. *Id.* at 1946–47.

145. *See supra* notes 5–8 and accompanying text.

146. These figures were disseminated by the Chief Probation Officers of California on their website. CHIEF PROB. OFFICERS OF CAL., AB 109 ALLOCATION REFINEMENTS (2011), *available at* http://www.cpoc.org/php/realign/ab109fiscal/AB%20109%20Allocation%20Refinements%20for%20062411.xls. There is no clear information on exactly how these figures were calculated, and the long-term

much more than Alameda. Using per capita prison usage does not eliminate the prison subsidy, it merely shifts it to another part of the ledger.

The state should, instead, tie realignment benchmarks to the violent crime coverage rate. This would allow for flexibility in letting counties imprison greater numbers in response to local outbreaks of reported violent crime, while tying state subsidies for prison usage to its most persuasive justification: crime.[147] Violent crimes are readily reported, and because higher crime rates are political poison, counties have disincentives to game them. It is unlikely that localities would risk the political discontent from rising crime rates in order to reserve more prison resources for themselves.

Finally, one thing that has gotten lost in the realignment discussion—and in this Article—is the relative size of the county and state in criminal justice. Prison subsidies figures are sizeable, but they are dwarfed by local criminal justice budgets. I added statewide

---

funding formula was deliberately left unresolved. *See* MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, 2011 REALIGNMENT: ADDRESSING ISSUES TO PROMOTE ITS LONG-TERM SUCCESS (2011), *available at* http://www.lao.ca.gov/reports/2011/stadm/realignment/realignment_081911.pdf. For the first nine months of AB 109, however, the amount counties received was calculated as follows: 60 percent of the total was given based on a county's adult daily population in prison, 30 percent was based on total population of adults (18–64) as a percentage of the state population, and 10 percent was based on a county's performance on SB 678, a bill which established performance-based funding for county probation subsidies. EDMUND G. BROWN, JR., GOVERNOR'S BUDGET SUMMARY 2012-13, at 74 (2012), *available at* http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf (describing how the county funding allocation involves three factors: "the estimates of the number of offenders who would be under the jurisdiction of each county, each county's population between the ages of 18 to 64, and a county's success under the felony probation program initiated under Chapter 608, Statues of 2009 (SB 678).").

I note that Fresno and San Francisco Counties, among many others, present similar differences. During the period of this study, Fresno County and San Francisco County had similar population sizes, and even though San Francisco suffered from greater levels of violent crime, Fresno sent 2½ to 7 times as many people to prison each year, and had between 2 and 3 times the number of people in prison. Fresno's initial realignment funding is $8,838,319; San Francisco County's is $5,049,763. CHIEF PROB. OFFICERS OF CAL., *supra*. Realignment is, of course, not the only area in which the state funds prison population rather than prison need: a bill passed in May to reimburse counties for building local jail facilities would "give funding preference to counties that committed the largest percentage of inmates to state custody in relation to the total population of CDCR in 2010." CAL. GOV'T CODE § 15820.917 (West 2011).

147. The state/local funding relationship in California is incredibly complex, however, due to a series of ballot initiatives restricting the county's ability to raise funds and the state's ability to mandate programs that would require county expenditures. *See, e.g.*, MAC TAYLOR, *supra* note 146, at 8–15 (noting the current restrictions and the difficulty of providing counties with flexible block grants).

budget figures for local law enforcement (sheriffs and police), jail, and probation to get an approximation of the amount of money spent locally on criminal justice—though these figures in particular do not include the budget for the county's chief law enforcement official, the District Attorney. I then added a county's imputed gross prison budget (total prison population times per capita prisoner cost) to these budget figures. The result gives a total measure of county criminal justice costs. Prisons are only one quarter of this total amount. Counties have, on average, three times the criminal justice resources available in-county that the state spends on its behalf for imprisonment. Prisoners in state facilities are not the largest part of county criminal justice. They never have been. I say this only to give the financial concerns about realignment their proper context.

B. De-Subsidizing Prison, Re-Subsidizing Probation

The state could create two incentive mechanisms to encourage High Use counties to lower their coverage rates—and to encourage Low Use counties not to raise theirs. The first would be to decrease the relative cost of in-county dispositions. The second would be to increase the cost of prison usage.

Lowering the cost of in-county dispositions means expanding financial support for diversion programs (such as those aimed at drug abusers or the mentally ill), jail construction, and probation. As noted earlier, jail bed numbers can increase without new construction if counties relied less on bail and released more of the arraigned on their own recognizance.[148] The state could encourage this—or mandate it—through, *inter alia*, changes to statutes or the uniform bail schedule, by subsidizing the bail bond market, or subsidizing electronic monitoring. The state could also subsidize probation, as, indeed, it did until the mid-1970's.[149] The state would need to ensure that subsidies kept pace with actual costs to the county, and it could build political will by framing the costs to the state in terms of money saved on prison usage. Any program must tie funding to measurable

148. *See supra* notes 99–100 and accompanying text.
149. *See, e.g.*, Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 63 (2008).

outcomes to ensure that the programs actually reduce the strain on the state's prisons. Otherwise, the state will be spending money without saving it.

The second option, charging counties for surplus prison usage, is more policy neutral. Whereas probation subsidies might encourage an uptake in the gross numbers of people in the criminal justice system (or at least make it more affordable), charging for prison usage would be more narrowly targeted at reducing unjustified use. California actually used capitation fees in its successful drive to decrease the state's youth prison population.[150] The state charged counties per a rate schedule inverted with the seriousness of offense: the state charged counties a lower day rate to house more serious offenders and a higher day rate to house less serious offenders.[151] The capitation rate policy has not been tried with adult prison populations, however.[152]

C. State Population Control and Determinate Sentencing

Although I have stated that prison overpopulation is largely a county problem, and, accordingly, that statewide solutions generally miss the mark, I nevertheless have one recommendation for sentencing reform. The difference is that my suggestion is not on the charging side, but on the release side. The state should explore the reintroduction of indeterminate sentences—those sentences terminating in a discretionary parole release decision—on a wider basis as a means of prison population control. In an indeterminate system, the state can release prisoners to parole at times of crowding; determinate sentences means the state has no such leeway. In some

150. *See, e.g.*, LITTLE HOOVER COMM'N, JUVENILE JUSTICE REFORM: REALIGNING RESPONSIBILITIES 4 (2008), *available at* http://www.lhc.ca.gov/studies/192/report192.pdf.

151. *Id.* There is some evidence, however, that counties have changed their charging practices and have simply increased the number of adult criminal court filings in response. *See, e.g.*, DANIEL MACALLAIR ET AL., CTR. ON JUVENILE & CRIMINAL JUSTICE, THE IMPACT OF REALIGNMENT ON COUNTY JUVENILE JUSTICE PRACTICE: WILL CLOSING STATE YOUTH CORRECTIONAL FACILITIES INCREASE ADULT CRIMINAL COURT FILINGS? (2011), *available at* http://www.cjcj.org/files/The_impact_of_realignment_on_county_juvenile_justice_practice.pdf.

152. *See, e.g.*, ZIMRING & HAWKINS, *supra* note 11, at 212 (describing a policy of "surcharg[ing] units of local government for additional offenders referred to state prisons" but noting that "we know of no American jurisdiction where this has been seriously proposed or considered").

ways, then, indeterminate sentencing systems allow the state to push back on county decisions by controlling release decisions. In determinate systems, the state has no such power.

California moved to determinate sentencing in 1975. Before then, the state had some control when to release an offender, even though it never controlled who was sent there. Now the state doesn't have any control. The only population variable is who goes to prison under what charge, both of which are determined long before the state has custody. There is a large amount of discretion with inputs to the prison system—all of it at the county level or below—and none on the state side with release. [153]

Of course, I am well aware of the problems with some forms of indeterminate sentencing, as I have demonstrated elsewhere.[154] I would not support the introduction of fully discretionary, unguided, haphazard indeterminate sentencing. Instead, the state should go one of two ways: set statewide standards on risk and enforce them system-wide, or acknowledge the role of community differences and break up the state system entirely. I have already written about the former point;[155] my next Article takes on the latter.[156]

***

California is one state; it is also fifty-eight counties. When it comes to criminal justice and the state prison population, localities are where the action is. County criminal justice budgets are much larger than prison budgets, county officials make most of the key decisions, and county responses to crime—not crime itself—drive new felon admission rates. Alameda and San Bernardino are very similar when it comes to criminal justice except in their usage of prison. It is hard to understand why the tax revenues from Alameda's

153. *Id.* at 212 ("Eliminating or reducing the power of parole boards over the release of prisoners removed a significant means of controlling prison population from that level of government responsible for the cost of the prison system.").

154. *See, e.g.*, Ball, *supra* note 63 (describing California's current parole release system as "less a form of parole release than a form of parole retention"). *See also* W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COL. L. REV. 893 (2009).

155. *See* Ball, *supra* note 63.

156. *See* Ball, *supra* note 41.

residents should go towards paying for San Bernardino's choices. I am not suggesting that the case cannot be made; I am, however, saying that on the basis of crime, the case has not been made.[157]

I want to emphasize, again, that this study is subject to several limitations. Measuring prison usage in terms of violent crime is a choice I made in designing the study, not a result of it. I have no smoking gun evidence that prison usage is a policy choice; I have only evidence that higher prison usage is not the result of higher crime. Ultimately, the conclusion of this study is that counties are different. The difficult question that remains is which of those differences the state should subsidize, if any.

157. Perhaps Alameda receives a greater share of other state resources that evens out with San Bernardino's greater share of prison resources.

GLOSSARY

APAR—Adult Population at Risk. The subset of a county population between the ages of 18 and 69.

Coverage—NFA as a percentage of violent crime. This is a proxy variable for the degree to which a county responds to crime with incarceration.

High Use—Counties with annual coverage rates and/or NFA surplus in the top quartile for at least 7 of the 10 years of the study.

High Five—The subset of low coverage/NFA deficit counties with relatively high per capita incomes: Alameda, Contra Costa, Marin, San Francisco, and Santa Cruz

Low Six—The subset of low coverage/NFA deficit counties with relatively low per capita incomes: Imperial, Nevada, Sacramento, San Joaquin, Sonoma, and Stanislaus.

Low Use—Counties with annual coverage rates and/or NFA deficits in the bottom quartile for at least 7 of the 10 years of the study.

NFA—new felon admissions, prisoners entering prison upon conviction or plea of a new felony charge. Distinguished from other entrants to the prison system, such as those who have had their parole revoked or parolees admitted with a new term (as a result of a new crime).

Poor Four—The four high-NFA-surplus counties with below-average per capita incomes: Fresno, Kern, Riverside, and San Bernardino.

Rich Four—The four high-NFA-surplus counties with above-average per capita incomes: Orange, Placer, Santa Barbara, and Santa Clara.

APPENDIX A: LIST OF COUNTY SEGMENTS

High Use

High Coverage	**High NFA Surplus**	**Both**
Colusa	Fresno	Butte
Glenn	Kern	Kings
Inyo	Orange	Shasta
Lake	Placer	Sutter
Lassen	Riverside	
Trinity	San Bernardino	
	Santa Barbara	
	Santa Clara	

Low Use

Low Coverage	**NFA Deficit**	**Both**
Alpine	(Los Angeles)	Alameda
San Benito	San Diego	Contra Costa
		Imperial
		Marin
		Nevada
		Sacramento
		San Francisco
		San Joaquin
		Santa Cruz
		Sonoma
		Stanislaus

Middle Use

Amador, Calaveras, Del Norte, El Dorado, Humboldt, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Plumas, San Luis Obispo, San Mateo, Sierra, Siskiyou, Solano, Tehama, Tulare, Tuolumne, Ventura, Yolo, Yuba.

APPENDIX B: MAP OF COUNTY SEGMENTS