



Rationalizing Realignment

*A perspective on California's return to
alternative sentencing*

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The Criminal Justice Legal Foundation is a non-profit, public interest law organization dedicated to upholding the rights of crime victims and improving public safety. Founded in 1982, the CJLF is the only public interest legal group in the United States focused exclusively on crime and law enforcement.

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The combined impact of the national recession (which has caused a major reduction in tax revenue) and unsustainable spending policies during the earlier boom have placed unprecedented weight on state governments to significantly reduce spending. Corrections departments have become a major focus of these spending reductions for several reasons.

Policies enacted over the past three decades that required longer prison sentences for violent and habitual criminals have increased prison populations in many larger states. Prominent social scientists, criminologists, and academics have criticized these “tough on crime” sentencing policies as a naive abandonment of their growing expertise at identifying low risk offenders who were unsuitable for incarceration and prescribing treatment programs to rehabilitate high risk offenders.¹ The favorable publicity enjoyed by these critics and the volumes of research they have produced to support their conclusions have provided a plausible argument in the defense of states which have chosen alternative sentencing rather than to increase prison capacity to accommodate the increased inmate population.

California, perhaps more than any other state, is at the center of the conflict between the “tough on crime” sentencing, which has had broad popular support, and the alternative sentencing policies advanced by social scientists and encouraged by the mainstream media.

THE FIRST EXPERIMENT

The first major embrace of alternatives to incarceration by California’s governing class occurred in 1965, when Governor Pat Brown signed the Probation Subsidy Act into law. That measure paid counties to keep property felons, such as car thieves and burglars, in local jails or rehabilitation programs rather than sentencing them to state prison. At the time, and for the next several years, the prevailing wisdom advanced by social scientists was that “obviously harmless” offenders could be left in the community and successfully treated with little or no threat to public safety.²

As a means for reducing the number of criminals going to prison, the Act was a success. The state's inmate population between 1965 and 1978 ranged between a high of 28,482 (1966) and a low of 21,325 (1978). But the crime rate rose dramatically, including violent crime. In the five years preceding the implementation of probation subsidy (1960-1965), violent crime rose by 18% or roughly 3.6% per year. In the five years after its implementation (1966-1970), violent crime had increased by 68% or 13.6% per year. By 1980, violent crime had risen by 216% and the homicide rate had increased by 300%.³ The end result of keeping low risk criminals out of prison was a savings to the state in corrections costs, which was offset by the cost burden to local government for the arrest and prosecution of thousands of offenders, many of which had evolved into violent criminals during this experiment. The state budget avoided the direct costs of the trauma and death caused by this crime wave, but the public paid the full price.

THE PUBLIC REBELS

Beginning in 1980, and continuing over the next three decades, several changes in criminal justice policy contributed to what social scientists have characterized as the "get tough" movement. Over this period, the public largely abandoned the theory that reliable risk assessments could be made about criminals from factors other than the seriousness of the crime and an offender's criminal history. This approach seems to follow what Professor of Law, Psychology and Psychiatric Medicine John Monahan pointed out in 1981, "If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each criminal act."⁴

After several years of unsuccessful attempts by Republican legislators to gain passage of a law increasing the sentences for habitual felons, the public took matters into their own hands. Over the opposition of then-Governor Jerry Brown and the controlling majority of the Legislature, state voters adopted Proposition 8, the Victims' Bill of Rights Initiative in 1982. Among this groundbreaking measure's provisions was a five-year sentence increase for criminals convicted of new felonies for each prior conviction of a specified list of felonies.

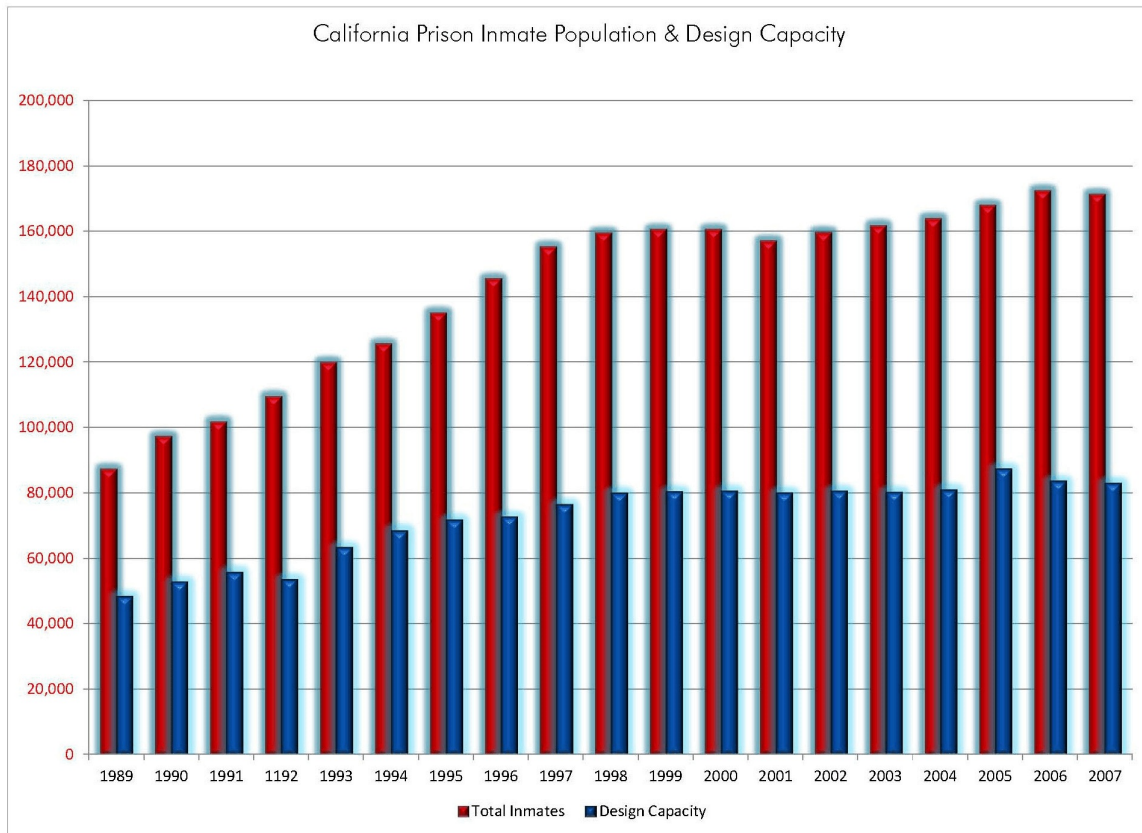
Since then, almost all of California's laws increasing sentences for habitual offenders have been adopted by ballot initiatives. In instances when the state Legislature has acted, it has been a direct result of public pressure during an election year. The adoption of the "Three Strikes" sentencing law in 1994 provides one example. After declining to adopt the "Three Strikes" bill in early 1993, California and the nation were jolted by the widely reported October 1, 1993, kidnaping of Polly Klaas. The 12-year-old girl had been abducted from her bedroom in the peaceful town of Petaluma by habitual felon Richard Allen Davis. For the next two months, the story remained prominent in state and national news until Davis was arrested and the girl's body was discovered. Early in 1994, after the "Three Strikes" initiative qualified in record time

for the June primary ballot, the Legislature sprung into action, passing the same “Three Strikes” bill (AB971 Jones) it had left to die a year earlier.

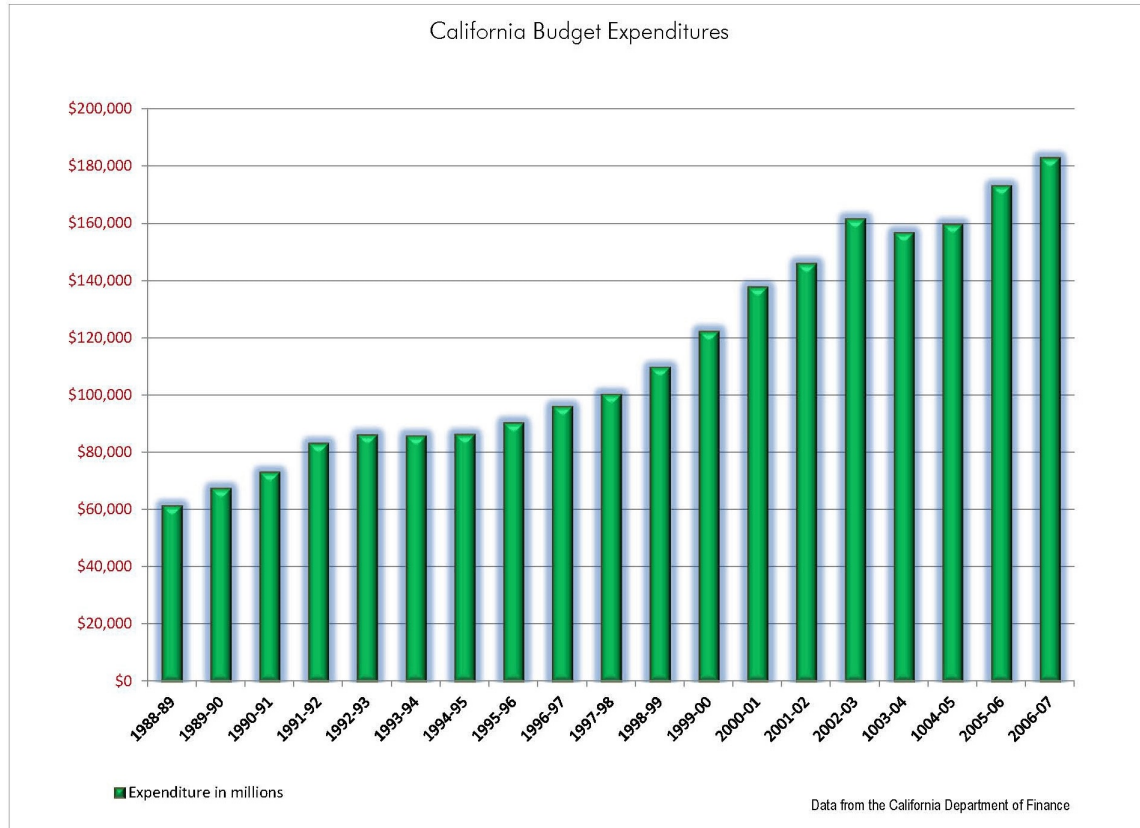
Recognizing that the Legislature would likely vote to weaken or abandon AB971 entirely after the 1994 election, proponent Mike Reynolds, whose daughter Kimber had been murdered by a repeat felon, continued the campaign for the “Three Strikes” initiative (Proposition 184), which was adopted by 72% of the voters later that year. California law denies the Legislature the authority to amend or repeal an initiative, unless doing so is explicitly permitted by the initiative.

THE LEGISLATURE SITS ON ITS HANDS

According to the California Department of Corrections and Rehabilitation, the design capacity of state prisons on December 31, 1989, was 48,311. While this number is premised upon the unrealistic basis of one inmate per cell, it is the capacity that the Legislature, the Governor, and the courts have utilized to determine the level of overcrowding in state prisons.



On that basis, California’s prison population has been roughly double the design capacity every year between 1989 (when the prison population was reported at 87,297) through 2007 (when the prison population was 171,444).



During the same 18-year period, as the state prison population nearly doubled, state expenditures (including federal spending) nearly tripled, increasing from just over \$67 billion in 1989 to just under \$183 billion in 2007.

This suggests that while the Legislature had authorized substantial annual increases in spending over the 18-year period, the controlling majority had been unwilling to spend the funds necessary to bring the state’s prison capacity in line with the increased inmate population guaranteed by the publicly-adopted sentencing policies the Legislature had opposed.

JUDICIAL SUPPORT FOR INMATE RELEASES

During most of this period (1989-2007), federal lawsuits initiated by prison inmates (**Coleman v. Schwarzenegger**, **Plata v. Schwarzenegger**) before two district judges known for their pro-defendant holdings, were accumulating evidence supporting the claim that prisons were overcrowded to an extent that rendered the state unable to

provide adequate healthcare services to inmates in violation of the Eighth Amendment prohibition against cruel and unusual punishment.

In 2005, Judge Thelton Henderson, who was presiding over the **Plata** case, placed the entire prison healthcare system under federal receivership.⁵ A year later, the judge in the **Coleman** case, Lawrence Karlton, ordered the Schwarzenegger Administration to propose legislation to address the prison healthcare delivery problem. In 2007, the two judges held a joint hearing resulting in a ruling announcing that reduction of the inmate population had to be considered to alleviate the healthcare services delivery problem. The two judges asked that a three-judge panel, which would include them, be appointed to rule on the matter. Later in 2007, the outgoing Chief Judge of the U. S. Ninth Circuit Court of Appeals appointed Judge Stephen Reinhardt, widely known as the “liberal lion” of the court, to round out the panel. The panel announced its unanimous decision for inmate releases in August 2009,⁶ but waited until January 2010 to order it formally.⁷ The order required California to release 30,000 to 35,000 inmates within two years. The panel’s ruling also claimed that if funds saved by releasing inmates were used to finance local rehabilitation programs, public safety would be improved.⁸ In May 2011, a divided U. S. Supreme Court upheld the release order by a single vote.

A month earlier, seemingly in anticipation of the high court’s ruling, California’s newly elected Governor Jerry Brown signed into law AB109, a massive piece of legislation which effectively restored the 1965 Probation Subsidy Act. The 423-page Public Safety Realignment Act, which passed both houses of the Legislature without hearings, mandated that criminals convicted of property crimes or other felonies defined as “non-serious” were no longer eligible for state prison and were to be sentenced to county jail and/or rehabilitation programs. The Governor’s Department of Corrections and Rehabilitation describes the Act as “the cornerstone of California’s solution for reducing the number of inmates in the state’s 33 prisons to 137.5 percent of design capacity by June 27, 2013, as ordered by the Three-Judge court and affirmed by the U. S. Supreme Court.”⁹

The law obligates the state to help pay counties to offset the costs of jail, treatment, and supervision of the thousands of “low level” offenders they are now required to keep, but the amount of state support is not specified.

SOCIAL SCIENCE WEIGHS IN

In 1975, an exhaustive analysis of prison treatment programs from 1945 through 1967 by New York Criminologist Robert Martinson and colleagues Douglas Lipton and Judith Wilks concluded that, with few exceptions, rehabilitative efforts over that period had no appreciable effect on preventing criminals from continuing to commit crimes.¹⁰ This study, and the dramatic increase in crime which occurred during the nationwide

experiment with rehabilitation, turned the public against the social science approach. It also caused many social scientists who had promoted their risk assessment and rehabilitation expertise as a reason to adopt alternative sentencing in California to re-evaluate their methods.

A new risk and needs assessment methodology called “evidence-based practices” was developed during the 1970s to become the new standard.¹¹ While these practices evolved over the next three decades, the basic model of compiling multiple factors beyond the arrest and conviction record of an individual offender (such as impulsiveness, drug abuse, family relationships, education, etc.) and applying a formula to determine a risk level, constitutes the risk assessment tools in use today. Sociologists also designed treatment protocols and intervention goals for offenders at various risk levels.

By the late 1980s, these evidence-based tools were being widely used by local law enforcement and state corrections agencies across the country. Volumes of published and unpublished evaluations of programs using these tools, both in prison and in community-based settings, had been conducted and advanced by advocates of alternatives to incarceration as evidence that they could assure accurate risk assessments and the correct treatment to rehabilitate criminals.

The intuitive appeal of programs that could simultaneously reduce prison populations, rehabilitate criminals, and protect public safety encouraged 37 states to rely on some form of evidence-based practices in programs involving the early release of prison inmates.¹² In California, evidence-based practices have been widely utilized since 1997 by counties to make risk assessments and treatment determinations for the increasing number of felons who were eligible for a prison sentence, but were instead sentenced to probation.¹³

As recently as November 2011, in a full-page article published in the *Sacramento Bee*, retired judge and advocate of evidence based practices, Roger K. Warren, wrote, “Yet today, unlike 35 years ago, there is a voluminous body of rigorous research about what does work to change offender behavior and reduce recidivism. This body of research is now so compelling that three leading criminologists have written that in light of what we now know about what works, ‘what is done today in corrections would be grounds for malpractice in medicine.’”¹⁴

BACK TO THE FUTURE

But confidence regarding the reliability of evidence-based practices is not universal among criminologists. In a 2001 review published in the *Annals of the American Association of Political and Social Science*, 3 criminologists analyzed 68 evaluations of evidence-based correctional programs, ranking each evaluation according to the

methodological rigor used to measure outcomes. They found that the lower the quality of the science used by the evaluators, the stronger the findings of the program's impact on recidivism. The most rigorous evaluations "showed an average effect size of 0."¹⁵

In 2009, UCLA Professor David Farabee and 2 colleagues reviewed studies listed on the National Registry of Evidence Based Practices. Of the 31 studies that specifically targeted criminal justice populations, they found that only 5 had a methodology rating of 3.5 on a scale of 4. They also found that over two-thirds of the studies had been authored by proprietors of the program being studied. "We don't rely on tobacco company executives to give us the facts about smoking and we shouldn't rely on program developers to tell us how well their programs work," said Farabee.¹⁶

In 2009, the California Legislative Analyst's Office issued a report on the risk assessment, treatment, and supervision of felons on probation between 1997 and 2007. The report noted that, in general, the risk assessments were inaccurate and incomplete, the programs were limited or of poor quality, and the high number of probationers assigned to each probation officer (often over 200) made adequate supervision virtually impossible. The report recommended that increased resources and more rigorous rules be applied to local probation programs. The report determined that the 1965 Probation Subsidy Act was relatively successful at reducing the state prison population, but noted that it had a "minimal impact on crime rates," but excused the sharp increases in crime following the Act's adoption as part of a trend preceding it.¹⁷

In June 2010, the California Office of the Inspector General issued a Special Report regarding the supervision of habitual sex offender John Gardner. Earlier that year, Gardner had pled guilty to the February 2009 sexual assault and murder of 14-year-old Amber Dubois, the February 2010 sexual assault and murder of 17-year-old Chelsea King, and the December 2009 assault with intent to commit rape of 23-year-old Candice Moncayo. All the crimes were committed in San Diego while Gardner was under supervision via passive GPS monitoring as a low risk sex offender.

In September 2000, Gardner had been convicted and sentenced to prison for the sexual assault of a 13-year-old girl the previous March. After serving 5 years of a 6-year term, Gardner was assessed as low risk for re-offending, utilizing an evidence-based static risk assessment tool, and released on parole. During his three years on supervised parole as a registered sex offender, state officials considered returning him to prison for parole violations 7 times, but decided not to each time.

In November 2006, California voters adopted Proposition 83, known as Jessica's Law, which among other things, required lifetime GPS monitoring of felony registered sex offenders. A year later, Gardner was fitted with an ankle bracelet and placed on the state's GPS monitoring program. Because of his previous assessment as a low risk offender, Gardner qualified for "passive monitoring," which only required occasional tracking of his movements. In September 2009, Gardner was discharged from parole.

This was 8 months after he had raped and murdered Amber Dubois. The Inspector General's report noted several mistakes made by the Department of Corrections and Rehabilitation and parole authorities in Gardner's case. Among these were that: Gardner was improperly assessed as a low risk offender; corrections policies did not set adequate standards for supervision; parole and corrections officials chose not to act on Gardner's 7 parole violations, including one which constituted a felony; and the passive GPS monitoring program was too passive.¹⁸

In January 2010, the state implemented a Non-Revocable Parole program in order to reduce the number of felons released on parole who were sent back to prison for violating the conditions of parole. Evidence-based practices were used to determine which parolees would be classified as low risk and therefore eligible for this program. Under the program, parolees qualified as low risk were not supervised, and were not subject to arrest and re-incarceration for parole violations. At the end of 12 months, if a parolee had not been arrested for a new felony, he was discharged from the program. The screening of parolees for this program utilized a similar static risk assessment tool utilized to assess Gardner. This process scores offenders on a variety of factors and can be performed manually by corrections employees or via an automated process.

In May 2011, the California Office of the Inspector General issued a report on the state's implementation of the Non-Revocable Parole program. The report found that nearly one-quarter of the felons assessed for the program using the automated process were incorrectly scored. An evaluation of the more than 10,000 felons released on non-revocable parole between January and July 2010 found that roughly 1,500 should not have qualified for the program. Over 450 of these criminals carried a "high risk" for violence, and some of them may have been discharged after completing the 12 months without committing a new crime. The Inspector General identified incomplete data, failure to utilize available data, bureaucratic delays in entering data, and policies that restricted the use of relevant data as primary reasons for the errors.¹⁹

ASSESSING THE RISKS OF REALIGNMENT

When California's Public Safety Realignment law took effect on October 1, 2011, it phased out the Non-Revocable Parole program, placing the responsibility of risk assessing offenders and supervising the large new class of felons on probation on counties. Evidence-based risk and needs assessments are now being used at different stages in the local criminal process to determine which offenders should be released on bail prior to trial, which may benefit from treatment following conviction, and which should be incarcerated in county jail.

As in the past, the change in policy preventing most property felons from receiving state prison sentences has quickly impacted the state's prison inmate population. On

February 28, 2012, state corrections officials announced that, due to Realignment, California's prison inmate population has dropped from 144,000 to about 127,770.²⁰

According to news reports and statements by county government and law enforcement officials, in the five months since Realignment was implemented, many counties are retaining far more felons than they have the capacity or staff to accommodate. State funds to properly assess, supervise, treat, and incarcerate offenders have been inadequate. These same sources are also reporting that serious crimes such as assault, rape, burglary, and murder are being committed by offenders assessed as "low risk."²¹

This information is anecdotal, and trends cannot be confirmed until statewide crime reports are published by the California Department of Justice. However, based upon past practice, both recently and more than four decades ago, it is likely that crime, and more importantly violent crime, will increase significantly under Realignment.

Several weaknesses with the policy itself, the capabilities of both state and county governments, the availability of necessary funds, and the incentives governing implementation will work together to reduce the ability of local law enforcement agencies to protect the public from criminals they have been forced to take responsibility for.

While the Governor, his corrections officials, and many social scientists invested in treatment alternatives have assured the public that reducing crime is a co-equal goal of Realignment, the unalloyed purpose of the policy is to cap the state prison population to both comply with a court order and reduce the impact on the state budget for the exorbitant cost to incarcerate criminals in California.

The evidence-based practices advanced to reassure a concerned public have not been administered properly to large and diverse populations of offenders. To utilize these tools in the manner recommended by their proponents would require a sea change in the culture of the government workforce and the infusion of hundreds of highly-paid experts to perform the key tasks necessary to even attempt accurate risk assessments and proper supervision.

Government auditors have reported that adequate specialized treatment programs recommended by social scientists are often unavailable and poorly administered. To provide enough programs and trained professional staff to meet the increased volume of felons assigned to treatment will require substantial investments by both county and state government at a time when neither have the necessary funds.

Habitual felons, who are found to be unsuitable for probation and treatment but who cannot be sentenced to state prison, will now serve their sentences in county jail. Jail capacity in many counties, just five months into Realignment, are already at or near maximum, and counties now face the cost of increasing jail space or releasing some

criminals assessed to be at “high risk” of re-offending.²² The state budget crisis and sharp decreases in local revenue, which have caused some counties to consider bankruptcy, virtually guarantee that there will not be funding to increase jail capacity for most counties in the foreseeable future.

The incentive today and for most of the past decade throughout the California criminal justice system is to save money. This top down objective has influenced decisions on how criminals are assessed, which criminals are released on parole and probation, how well they are supervised after release, the value of the treatment they receive, and what happens to them when they re-offend. While we wait for statewide reports on the performance of Realignment and its effect on crime rates, the empirical evidence is piling up.

Under ideal conditions, the cost to properly implement Realignment as envisioned by its proponents in social science would likely exceed the cost to incarcerate felons, and it would still not guarantee error-free operation.

It is an incontrovertible fact that habitual felons serving prison sentences rarely commit new crimes or graduate from property crimes to violent crimes. Any alternative to incarceration for habitual criminals is accompanied with the certainty that some, and perhaps many, will commit new crimes. There are alternatives to how California has operated its prison system over the past three decades, which would reduce the cost of incarceration while improving the effectiveness at rehabilitating inmates and reducing recidivism, but the state’s political leaders have not been willing to make the necessary investment, even in times of prosperity.

To reduce excessive and unsustainable state spending, the Governor and the Legislature have chosen to place thousands of known criminals, previously eligible for prison, in counties which have neither the funding or capacity to properly handle them. This guarantees that an increasing number of law-abiding Californians will be robbed, assaulted, injured, or murdered. The rational-sounding arguments advanced by social scientists in support of this decision don’t stand up to scrutiny and will be of little comfort to these new victims and their families.

When private individuals, institutions, or businesses have made decisions risking the safety of people, or even animals, they have been prosecuted, punished, or sued.²³

Who will hold the Governor, the Legislature, and their apologists responsible for the carnage caused by Realignment?

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