

# JUSTICE REINVESTMENT IN ALASKA: THE PAST, PRESENT, AND FUTURE OF SB 91

Michael A. Rosengart\*

## ABSTRACT

*In the summer of 2016, Alaska Governor Bill Walker signed SB 91, a landmark criminal justice reform law that implements a “justice reinvestment” program. SB 91 aims to reduce Alaska’s prison population, cut corrections costs, and then reinvest savings back into the state to improve public safety and reduce recidivism. It is 193 sections long and is likely the most substantial change to Alaskan criminal law since statehood. It also comes at a time when similar legislation, spearheaded by the Justice Reinvestment Initiative, is proliferating through the country. This Note overviews Alaska’s corrections problems that prompted SB 91, discusses the law’s legislative history, highlights some of the most important changes the law makes, and introduces some of the issues that it may present going forward.*

## EDITOR’S NOTE

This Note was being finalized for publication between November 5 and November 17, 2017. On November 7, the Alaska House of Representatives passed an amended version of SB 54, which had originated in the Senate in the spring and made changes to SB 91, by a thirty-two to eight vote. On November 10, the Senate voted to concur with the amended House version. SB 54 passed despite concerns about the constitutionality of a change the House had made to class C felony sentencing. Because of the limited opportunity to review the House version of SB 54 before publication, those amendments are not considered in this Note. All references to “SB 54,” therefore, are to the version passed by the Senate in April 2017, which did not include the constitutionally suspect provision.

---

Copyright © 2017 by Michael A. Rosengart.

\* J.D. Candidate, Duke University School of Law, 2018; A.B. Political Science, Washington University in St. Louis, 2013. The author thanks Professor Benjamin Ewing for his time and advice guiding the development of this Note, as well as the *Alaska Law Review* editorial staff for their support and feedback.

## INTRODUCTION

Between 2007 and 2016, thirty-three states attempted criminal justice reform through “justice reinvestment.”<sup>1</sup> Justice reinvestment is about using data and evidence-based practices to strategically remove individuals from the corrections system, or reduce their exposure to the corrections system, and then using the resulting money saved to enhance public safety. Although this idea is straightforward, the details of who spends less time in prison, by what means, and then how the savings get reinvested are not.

In Alaska, the game in town is Senate Bill 91, more commonly known as “SB 91.”<sup>2</sup> At its core, SB 91 implements justice reinvestment by imposing less punishment on offenders who do less harm to the community and are less likely to reoffend, and reinvesting savings from averted prison growth into practices and strategies shown to reduce recidivism. Signed into law in the summer of 2016, SB 91 is likely the largest revision of Alaska’s criminal justice system since statehood.<sup>3</sup> It implements twenty-one policy recommendations made by the Alaska Criminal Justice Commission (ACJC).<sup>4</sup> The ACJC—chaired by Gregory P. Razo, a director of the Alaska Native Justice Center—is a group of stakeholders from across the criminal justice system, including judges, legislators, law enforcement officials, attorneys, and advocates, tasked by the legislature with evaluating the state’s criminal justice system and making recommendations for reform to the legislature.<sup>5</sup>

In April 2015, the ACJC engaged the Justice Reinvestment Initiative (JRI) to assist in researching the causes and consequences of Alaska’s growing prison population problem,<sup>6</sup> which had grown at a rate of 27% from 2005 to 2015.<sup>7</sup> The JRI is a partnership between the U.S. Department of Justice’s Bureau of Justice Assistance and The Pew Charitable Trusts that was formed in 2010 to assist states with developing “cost-effective

---

1. THE PEW CHARITABLE TRUSTS, 33 STATES REFORM CRIMINAL JUSTICE POLICIES THROUGH JUSTICE REINVESTMENT 1 (2016), [http://www.pewtrusts.org/~media/assets/2016/12/33\\_states\\_reform\\_criminal\\_justice\\_policies\\_through\\_justice\\_reinvestment.pdf](http://www.pewtrusts.org/~media/assets/2016/12/33_states_reform_criminal_justice_policies_through_justice_reinvestment.pdf).

2. S.B. 91, 29th Leg., 2d Reg. Sess. (Alaska 2016).

3. James Brooks, *Legislature Sends Crime Bill to Walker*, JUNEAU EMPIRE (May 15, 2016), <http://juneauempire.com/state/2016-05-15/legislature-sends-crime-bill-walker>.

4. *Criminal Justice Reform*, ALASKA SENATE MAJORITY, <https://www.alaskasenate.org/2016/criminal-justice-reform/> (last visited Sept. 10, 2017).

5. See S.B. 64, 28th Leg., 2d Reg. Sess. § 32 (Alaska 2014).

6. ALASKA CRIMINAL JUSTICE COMM’N, JUSTICE REINVESTMENT REPORT 4 (2015) [hereinafter JUSTICE REINVESTMENT REPORT] [http://www.ajc.state.ak.us/sites/default/files/imported/acjc/AJRI/ak\\_jri\\_report\\_final12-15.pdf](http://www.ajc.state.ak.us/sites/default/files/imported/acjc/AJRI/ak_jri_report_final12-15.pdf).

7. *Id.* at 1; see also discussion *infra* Section I.B.

and evidence-based strategies” for decarceration.<sup>8</sup> Based on findings the JRI helped establish, the ACJC released its Justice Reinvestment Report in December 2015.<sup>9</sup> The Justice Reinvestment Report makes twenty-one recommendations that fall into four categories: (i) adjustments to pretrial practices through reforms grounded in empirical data;<sup>10</sup> (ii) shifts to the criminal code’s sentencing structure so that prison capacity is concentrated on serious and violent offenders, rather than low-level nonviolent offenders;<sup>11</sup> (iii) improvements to re-entry, parole, and probation practice;<sup>12</sup> and (iv) additional oversight and accountability to the criminal justice system.<sup>13</sup> SB 91 implements these recommendations.

Within months of SB 91’s passage, the ACJC and the legislature became aware of problems with the new law.<sup>14</sup> In response to input from the public and law enforcement, the ACJC offered fourteen new recommendations in January 2017, mostly revising SB 91 provisions.<sup>15</sup> Senator John Coghill, SB 91’s main sponsor, introduced SB 54 the following month,<sup>16</sup> and it passed the Senate by a nineteen-to-one vote on April 7, 2017.<sup>17</sup> Uproar grew in September 2017, though, after the Department of Public Safety released its annual crime report for 2016, showing significant increases in crime almost across the board.<sup>18</sup> In response, Governor Bill Walker announced that action on SB 54 would

---

8. NANCY LAVIGNE ET AL., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT v (2014), <http://www.urban.org/sites/default/files/publication/22211/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.PDF>; see also *infra* notes 74–77 and accompanying text (describing JRI further).

9. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 4.

10. *Id.* at 15.

11. *Id.* at 18.

12. *Id.* at 22.

13. *Id.* at 27.

14. Zaz Hollander, *Alaska’s Sweeping New Crime Law Already Under Pressure For Change*, ALASKA DISPATCH NEWS (Jan. 25, 2017) <https://www.adn.com/alaska-news/crime-courts/2017/01/25/alaskas-sweeping-new-crime-law-already-under-pressure-for-change/>.

15. See generally ALASKA CRIMINAL JUSTICE COMM’N, RECOMMENDATIONS TO THE ALASKA STATE LEGISLATURE BY THE ALASKA CRIMINAL JUSTICE COMMISSION (2017) [hereinafter RECOMMENDATIONS TO THE LEGISLATURE], [www.ajc.state.ak.us/sites/default/files/commissionrecommendations/acjcrecommendations1-142017\\_10.pdf](http://www.ajc.state.ak.us/sites/default/files/commissionrecommendations/acjcrecommendations1-142017_10.pdf) (providing fourteen new recommendations, including revisions to SB 91).

16. ALASKA S. JOURNAL, 30th Leg., 1st Sess. 216 (Feb. 10, 2017).

17. ALASKA S. JOURNAL, 30th Leg., 1st Sess. 838 (Apr. 7, 2017).

18. Tim Bradner, *SB 91 Back in Legislative Crosshairs*, MAT-SU VALLEY FRONTIERSMAN (Sept. 16, 2017), [http://www.frontiersman.com/news/sb-back-in-legislative-crosshairs/article\\_493aa590-9b44-11e7-acfd-9f6cb4346065.html](http://www.frontiersman.com/news/sb-back-in-legislative-crosshairs/article_493aa590-9b44-11e7-acfd-9f6cb4346065.html).

therefore be a priority in the late October 2017 special legislative session.<sup>19</sup> SB 54, if passed, would make three noteworthy changes, which are discussed herein.

This Note contextualizes SB 91 both within Alaska and in the broader field of contemporary criminal justice reform to provide a starting point for discussion and evaluation of the law's reforms. Part I summarizes Alaska's criminal justice landscape, particularly the history of the state's criminal justice laws, the legislative history of SB 91, and the work of the ACJC. Part II illustrates how the ACJC's recommendations were translated into legislation. Part III highlights some potential concerns about SB 91 based on justice reinvestment efforts in other states, academic discussion of criminal justice reform, and the political realities in Alaska. However, this Note is neither an exhaustive nor authoritative summary of SB 91. Many of the law's 193 sections are not referenced, and some provisions that are discussed may have unmentioned exceptions. Instead, this Note intends to provide a foundation to prompt further discussion amongst stakeholders.

Ultimately, it is too soon to say with certainty how the relatively new idea of "justice reinvestment" will shape Alaska's criminal justice system in the long term. Moreover, SB 91 is an aggressive endeavor compared to justice reinvestment legislation in other states, making comparison difficult. Nevertheless, there are good questions to be asked about whether justice reinvestment is the "right way" to resolve the American and Alaskan mass incarceration problems, and if justice reinvestment is even capable of combatting mass incarceration at all. Put another way, do reforms, like those in SB 91, meaningfully reduce crime, or do they just cap prison populations with any improvement in crime rates merely incidental? Relatedly, SB 91 makes several key tradeoffs. Evaluating the law will therefore be crucial, and so are determinations of how to make those evaluations. Given the nature of the legislative process and the legislature's stated goals, "success" will presumably be based on data: the state's prison population, corrections budget, and the returns on reinvestment. But some argue that a data-driven framework misses the mark and suggest alternatively that criminal justice reform should be evaluated on the basis of fair justice, community safety, and pathways away from crime. This Note seeks to start these important discussions.

---

19. *Id.*

## I. THE PAST: THE ROAD TO SB 91

### A. Alaska's Pre-SB 91 Sentencing Law

Alaska's bloated prison population traces its roots back to the 1990s and early 2000s when the state, like the rest of the country, adopted a "tough on crime" posture.<sup>20</sup> As Senator John Coghill, who shepherded SB 91 through the legislature, later reflected, reacting to crime by expanding the reach of criminal offenses and the severity of sentences was "easy."<sup>21</sup> At that time, as Coghill put it, nobody ever "paused to ask whether what we were doing would actually reduce crime—it was just assumed that it would."<sup>22</sup> Indeed, the legislature increased the scope and severity of felony liability more than eighty times between 2000 and 2013, while reducing it just once.<sup>23</sup>

Two additional practices likely also spurred growth in Alaska's prison population without even intending to be "tough on crime." First, although the state's bail statute<sup>24</sup> created a presumption of personal-recognizance release,<sup>25</sup> courts overused third-party custodian release<sup>26</sup> in practice,<sup>27</sup> making it harder for defendants to await trial outside of prison. This arguably needless pre-trial incarceration can lead to higher conviction rates, longer sentences, litigation disadvantages for

---

20. See Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 10-11 (1999) (detailing trend of "tough on crime"); see also MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025 3-4 (2016) (same).

21. Sen. John Coghill, *Alaska Criminal Justice Reform Bill Has Been Unfairly Attacked*, ALASKA DISPATCH NEWS (June 25, 2016), <https://www.adn.com/commentary/article/alaska-criminal-justice-reform-bill-has-been-unfairly-attacked/2016/05/12/>.

22. *Id.*

23. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCING PATTERNS: 2012 - 2013 17 (2016) [hereinafter ALASKA FELONY SENTENCING PATTERNS], [http://www.ajc.state.ak.us/sites/default/files/reports/research/final\\_draft\\_alaska\\_sentencing\\_patterns\\_2012\\_-\\_2013.pdf](http://www.ajc.state.ak.us/sites/default/files/reports/research/final_draft_alaska_sentencing_patterns_2012_-_2013.pdf).

24. ALASKA STAT. § 12.30.020(a) (2008).

25. Personal-recognizance release is the "release of a defendant in a criminal case in which the court takes the defendant's word that he or she will appear for a scheduled matter or when told to appear." BLACK'S LAW DICTIONARY 1463 (10th ed. 2014). A defendant released on his personal recognizance does not have to post bail. See *id.*

26. A third-party custodian is an individual or organization, approved by a judicial officer, who is available to supervise a released defendant twenty-four hours a day and is expected to report the defendant should he or she violate conditions of their release. Elizabeth Johnston, Note, *Sentenced by Tradition: The Third-Party Custodian Condition of Pretrial Release in Alaska*, 26 ALASKA L. REV. 317, 317 (2009).

27. See *id.* at 329 (referencing legislative history expressing concern at overuse of third-party custodian requirement).

defendants, and greater expense for the corrections system.<sup>28</sup> Defendants with greater pre-trial exposure to prison may also be more likely to recidivate and engage in new criminal activity.<sup>29</sup>

Second, the state's response to the U.S. Supreme Court's decision in *Blakely v. Washington*, which held that factual bases for departures from a statutory sentence must be found by the jury beyond a reasonable doubt in order to be constitutional,<sup>30</sup> has led to longer prison sentences. Before 2005, Alaska, like many states, employed a system of presumptive sentencing with single-year terms.<sup>31</sup> To illustrate, a defendant convicted of first-degree sexual abuse of a minor pre-*Blakely* would have been sentenced to a presumptive prison term of eight years.<sup>32</sup> If aggravating or mitigating factors were proven to the sentencing judge by clear and convincing evidence, the defendant could receive a higher or lower sentence, respectively.<sup>33</sup>

The Alaska Court of Appeals soon confirmed that *Blakely's* holding had rendered Alaska's pre-2005 sentencing structure unconstitutional.<sup>34</sup> The legislature responded by enacting two key changes through SB 56.<sup>35</sup> First, under the revised system, all determinations of aggravators were put to the jury.<sup>36</sup> More significantly, SB 56 converted presumptive terms to presumptive ranges.<sup>37</sup> Despite a stated legislative intent not to "bring about an overall increase in the amount of active imprisonment for felony sentences,"<sup>38</sup> SB 56's new presumptive ranges consistently put the former presumptive term at the floor of the new presumptive ranges. In other words, whereas the aforementioned conviction of first-degree sexual abuse of a minor would carry a presumptive sentence of eight years in

---

28. See *id.* at 319-20 (arguing that third-party custodian release has been ineffective and counterproductive).

29. CHRISTOPHER T. LOWENKAMP ET AL., *THE HIDDEN COSTS OF PRETRIAL DETENTION* 4 (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf).

30. 542 U.S. 296, 301 (2004).

31. See Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 *CARDOZO L. REV.* 775, 797 tbl.I (2008) (listing twenty-one states, including Alaska, affected by *Blakely*).

32. *State v. Moreno*, 151 P.3d 480, 480-81 (Alaska Ct. App. 2006).

33. *Id.*

34. *Moreno*, 151 P.3d at 481 ("It is true that Alaska's pre-2005 presumptive sentencing law violated the Sixth Amendment right to jury trial recognized in *Blakely* because, under that law, aggravating factors (i.e., factors authorizing the superior court to impose a higher maximum sentence) were litigated to the sentencing judge under a 'clear and convincing evidence' standard, rather than to a jury under a 'beyond a reasonable doubt' standard.").

35. 2005 Alaska Sess. Laws ch. 2.

36. *Id.* § 21.

37. *Id.* §§ 8-10, 12.

38. *Id.* § 1.

prison before *Blakely*, the sentence would be eight to twelve years following *Blakely*.<sup>39</sup> Thus, an eight-year sentence went from being a standard sentence to what might be considered a lenient one. This tendency was typical for many felony-sentencing statutes,<sup>40</sup> and correlated with an increase in the average length of prison stays across all categories of felonies between 2005 and 2014.<sup>41</sup>

## B. Alaska's Problem of More Prisoners with Longer Sentences

Crime and prison data leading up to SB 91 generally painted a bleak picture of criminal justice outcomes in Alaska in the 2000s. Although the overall crime rate in Alaska has declined since the mid-1980s, it has been increasing since 2010.<sup>42</sup> Property crime has likewise been on a downward trend since 1985, but also has been rebounding upward since 2011.<sup>43</sup> The state's violent crime rate has trended upward since 1985, and increased considerably between 2014 and 2015.<sup>44</sup> Between 2004 and 2015, Alaska's violent crime rate increased by 15%, and the state went from having the country's seventh-worst violent crime rate to its second-worst, behind only the District of Columbia.<sup>45</sup>

---

39. See *id.* § 12 (amending ALASKA STAT. § 12.55.125(i)(1)(A) from presumptive term of eight years to presumptive range of eight to twelve years).

40. ALASKA FELONY SENTENCING PATTERNS, *supra* note 23, at 16; see also *id.* at 12 tbl.1 (demonstrating 2005 sentencing changes in tabular form).

41. THE PEW CHARITABLE TRUSTS, ALASKA'S CRIMINAL JUSTICE REFORMS 6, fig.4 (2016), [www.pewtrusts.org/~media/assets/2016/12/alaskas\\_criminal\\_justice\\_reforms.pdf](http://www.pewtrusts.org/~media/assets/2016/12/alaskas_criminal_justice_reforms.pdf); see also ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Mar. 30, 2016) (statement of Jordan Schilling, Staff, Sen. John Coghill at 2:07:06 PM) (indicating sentence length increases across felony classes).

42. KHRISTY PARKER, ALASKA JUSTICE STATISTICAL ANALYSIS CTR., VIOLENT CRIME REPORTED IN ALASKA, 1985–2015 1 fig.1 (2017) (showing downward trend in overall crime rate, incidences of crime per 100,000 people, since 1985, but a gradual increase since 2010); see also Nathaniel Herz, *Governor Wants Alaska Legislature to Toughen Criminal Justice in Special Session*, ALASKA DISPATCH NEWS (Sept. 15, 2017), <https://www.adn.com/alaska-news/crime-courts/2017/09/15/governor-wants-alaska-legislature-to-toughen-criminal-justice-during-special-session/> (providing graphic showing increased incidences of crime in seven categories of offenses since 2012).

43. KHRISTY PARKER, ALASKA JUSTICE STATISTICAL ANALYSIS CTR., PROPERTY CRIME REPORTED IN ALASKA, 1985–2015 1 fig.1 (2017) (showing downward trend in property crime rate, incidences of crime per 100,000 people, since 1985, but a gradual increase since 2011).

44. *Id.* (showing per 100,000 people, in 2014 about 600 violent crimes occurred, but by 2015, there was an increase to around 700 violent crimes).

45. Compare FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2004: UNIFORM CRIME REPORTS 86 tbl.5 (2004), [https://www2.fbi.gov/ucr/cius\\_04/documents/CIUS\\_2004\\_Section2.pdf](https://www2.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section2.pdf), with FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2015: UNIFORM CRIME REPORTS tbl.5 (2015), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-5>.

The state's prison population has also been growing. In 2005, there were 3903 individuals in Alaskan prisons.<sup>46</sup> By 2015, there were 5095 individuals in Alaska prisons—an increase of 27%.<sup>47</sup> This growth, SB 91 advocates often noted, was three times faster than Alaska's population growth.<sup>48</sup> In reports produced for the ACJC, Pew projected an additional 11% increase in the state's prison population by 2018, which would make Alaska's prison population one of the fastest growing in the country.<sup>49</sup>

The ACJC identified three main drivers for the increase in the state's prison population. One was that while prison stays were getting longer—the average length of stay for Alaskan prisoners had risen for all categories of felony offenses since 2005—recidivism rates were not declining.<sup>50</sup> Two-thirds of released Alaskan offenders returned to prison within three years,<sup>51</sup> which was among the highest rates in the country.<sup>52</sup> Thus, longer sentences were failing to deter released offenders from committing new crimes.<sup>53</sup>

A second driver was the increase in the State's pretrial prison population.<sup>54</sup> While Alaska's post-conviction prison population grew 14% between 2005 and 2014, the pretrial prison population, which makes up over a quarter of the total prison population, grew by a staggering 81%.<sup>55</sup> That means the State is housing and spending money on far more individuals who have not yet been convicted of a crime.

Lastly, the ACJC highlighted the fact that three-quarters of the state's prison population were nonviolent offenders, and furthermore, over half of those nonviolent offenders were misdemeanants.<sup>56</sup> Thus, not only were Alaskan prisons filling with individuals who might more appropriately

---

46. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 4 fig.1.

47. *Id.* at 1, 4 fig.1.

48. *Id.* at 1.

49. PUB. SAFETY PERFORMANCE PROJECT, THE PEW CHARITABLE TRUSTS, STATES PROJECT 3% INCREASE IN PRISONERS BY 2018 (Nov. 18, 2014), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/states-project-3-percent-increase-in-prisoners-by-2018>.

50. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 9–10.

51. *Id.* at 1.

52. See PEW CTR. ON STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 10–11 exhibit.1 (2011) (listing highest rate of recidivism at 61.2%). This Pew study put Alaska's recidivism rate at 50.4%, which was still the sixth highest. *Id.* The two-thirds figure comes from a 2007 study by the Alaska Judicial Council. ALASKA JUDICIAL COUNCIL, CRIMINAL RECIDIVISM IN ALASKA 1 (2007), [www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf](http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf).

53. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 9.

54. See generally *id.* at 6–8 (noting findings on pretrial detention).

55. *Id.* at 6.

56. *Id.* at 2, 9 fig.3.

be out of prison because of the status of their case, many of those, and others, might not even be right for incarceration given the nature of their offense.

All of this, unsurprisingly, had a dramatic impact on corrections spending. In 2005, the State spent \$184 million on corrections.<sup>57</sup> By 2014, that figure had ballooned 75% to \$327 million.<sup>58</sup> As of 2016, close to 3% of Alaska's total expenditures went to corrections, which was above the national median.<sup>59</sup> The Department of Corrections reported that it was operating at 101% capacity in 2015, despite having recently opened a new prison, Goose Creek Correction Center, which had cost \$250 million to construct.<sup>60</sup> With the excess capacity and the projected additional growth in prison population, the status quo was unsustainable.<sup>61</sup>

### C. How the Perspective Changed in Alaska

Considering both of these trends—the uptick in violent crime and the growth in the prison population, as well as budgetary concerns—the interesting question is which one catalyzed SB 91. It was a contentious topic of discussion in the legislature, as evidenced by one exchange in the House Finance Committee between Representative Lance Pruitt and Senator Coghill, who was offering testimony:

*PRUITT*: I've heard it said by yourself, I've heard it said by others, but I guess I just want to make sure we explicitly make it clear what the intent of the bill is—the policy goal behind the bill. It seems like from your conversations, from others, that the intent and the genesis of this bill solely rests on the fact that we are trying to save money going forward in the state. Is that an appropriate way to kind of cache what the genesis and the intent of this bill is?

*COGHILL*: No.

[Pause]

---

57. *Id.* at 3.

58. *Id.*

59. NATIONAL ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2014–2016 STATE SPENDING 57 tbl.33 (2016), <http://www.nasbo.org/mainsite/reports-data/state-expenditure-report>.

60. JEFF JESSEE ET AL., 2015 RECIDIVISM REDUCTION PLAN 1 (2015), [www.correct.state.ak.us/commish/docs/hb266.pdf](http://www.correct.state.ak.us/commish/docs/hb266.pdf).

61. See, e.g., Alaska H. Fin. Comm. Audio Tapes, 29th Leg. (Apr. 20, 2016) (statement of Sen. John Coghill at 9:22:55 AM) (“[W]e don’t have the money to keep doing it the way we’re doing it.”).

PRUITT: Ok. Then can we expand on that?

COGHILL: You wanted a simple answer, and that is the simple answer. This is about public safety, but better outcomes for the dollars we spend. So dollars are involved, there's no doubt about that. . . . But it's explicit in the [Alaska Criminal Justice] Commission's instructions and I can tell you without any shame [sic] at all . . . [that] this is about how we can do it better. This is about public safety, this is about how do we hold people accountable . . . . So the question all along the way is how do we make it work better. Some people say it's broken and that this is not providing the outcomes that we want. I knew that before we started going into the downturn of the economy. I started working on this six years ago. . . . It's not a new topic. It's just that we've categorized it in a way now that says, 'we can't afford new prisons. How do we get better outcomes? Is the public going to be safer?' And so it's all wrapped up into it. But it really is about how do we keep the public safe, how do we reduce the crime rate. If people come in with behavior and health issues, how do we deal with it? And right now we're not dealing with that. . . . So it really is about public safety and not cost savings. However, we don't have the money to keep doing it the way we're doing it.<sup>62</sup>

Indeed, SB 91 is about public safety. But, as Senator Coghill acknowledged, the bill was also framed largely around fiscal savings. Discussion of SB 91's budgetary impact is pervasive in the bill's legislative history. This is unsurprising though, as the State's overall budget issues overshadowed just about everything the legislature was doing at the time. In 2015, the State was operating a deficit of between three and four billion dollars, in a depressed oil market to boot.<sup>63</sup> The Department of Law<sup>64</sup> and the Department of Corrections<sup>65</sup> were both greatly affected by budget

---

62. *Id.*

63. See, e.g., Alana Samuels, *The Stingiest State in the Union*, THE ATLANTIC (Aug. 31, 2015), <https://www.theatlantic.com/business/archive/2015/08/alaska-budget-crisis/402775/>.

64. See Matt Buxton, *Attorney General: Blaming Reform for Rise in Crime is Too Simple*, FAIRBANKS DAILY NEWS-MINER (Feb. 2, 2017), [http://www.newsminer.com/news/alaska\\_news/attorney-general-blaming-justice-reform-bill-for-rise-in-crime/article\\_3cf97d92-e92e-11e6-84df-9f841eb6f563.html](http://www.newsminer.com/news/alaska_news/attorney-general-blaming-justice-reform-bill-for-rise-in-crime/article_3cf97d92-e92e-11e6-84df-9f841eb6f563.html) (discussing Attorney General Jahna Lindemuth's legislative testimony describing Department of Law budget cuts and decreased capacity to prosecute).

65. See Will Earnhart, *Local Communities Often Pay the Price for State Budget Cuts*, ALASKA DISPATCH NEWS (Feb. 8, 2017), <https://www.adn.com/opinions/2017/02/08/local-communities-often-pay-the-price-for-state-budget-cuts/> (noting the Department of Correction's 35% budget cut for jails).

cuts. Furthermore, had the state not changed its corrections practices, it would have had more inmates than beds almost immediately and would have had to open another new prison at an estimated cost of \$169 million.<sup>66</sup>

Moreover, discussion of SB 91's budgetary impact is pervasive in the bill's legislative history, and there is ample direct evidence to suggest that the budget substantially motivated legislators. SB 64, which had created the ACJC and so kick-started the process culminating in SB 91, set the tone with its sponsor statement, indicating that the bill "implements proven-practices [sic] to reduce recidivism and cut the costs of corrections while maintaining public safety."<sup>67</sup> SB 91's sponsor statement likewise stated that the bill aimed in part to "control corrections spending."<sup>68</sup>

But the most indicative document may be the letter sent by the President of the Senate, Kevin Meyer, and the Speaker of the House, Mike Chenault, to the ACJC in September 2015. The letter instructed the ACJC to develop policy options that would avert future prison growth and reduce the prison population by between 15% and 25%.<sup>69</sup> The two legislators' stated reason for criminal justice reform was "the State's fiscal situation and . . . revenue shortfall," which was creating "pressure to examine all areas and programs of the state."<sup>70</sup> They added that "[t]he work that you are doing will be important as the legislature proceeds with budgetary changes in the areas of criminal justice and the Department of Corrections," and therefore asked the ACJC to "deliver policy options that . . . not only avoid future spending, but also achieve savings."<sup>71</sup> The letter's requests guided the ACJC's study of the issues in Alaska's criminal justice system.<sup>72</sup>

---

66. JUSTICE REINVESTMENT REPORT *supra* note 6, at 1.

67. JOHN COGHILL & LESIL MCGUIRE, SPONSOR STATEMENT: OMNIBUS CRIME/CORRECTIONS/RECIDIVISM BILL VERSION M (2014) (emphasis added), [http://www.akleg.gov/basis/get\\_documents.asp?session=28&docid=23445](http://www.akleg.gov/basis/get_documents.asp?session=28&docid=23445).

68. JOHN COGHILL, SENATE BILL 91 SPONSOR STATEMENT: OMNIBUS CRIMINAL LAW & PROCEDURE; CORRECTIONS VERSION N (2016), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=63794](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=63794).

69. Letter from Mike Chenault, Speaker of the House, Alaska State Legislature, and Kevin Meyer, Senate President, Alaska State Legislature, to Alaska Criminal Justice Comm'n (Sept. 8, 2015), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=66393](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=66393).

70. *Id.*

71. *Id.*

72. ALASKA CRIMINAL JUSTICE COMM'N, ANNUAL REPORT TO THE ALASKA STATE LEGISLATURE 3 (2016), [http://www.ajc.state.ak.us/sites/default/files/imported/acjc/acjc\\_annual\\_report\\_2016.pdf](http://www.ajc.state.ak.us/sites/default/files/imported/acjc/acjc_annual_report_2016.pdf).

The broader landscape surrounding justice reinvestment—including not only the recent embrace of criminal justice reform from fiscal conservatives,<sup>73</sup> but also the growing national involvement in the Justice Reinvestment Initiative (JRI)—also suggests a budgetary motivation for criminal justice reform in Alaska. The JRI assists states with “cost-effective and evidence-based strategies” for decarceration.<sup>74</sup> As of 2016, thirty-three states had engaged in the JRI process, meaning that Pew assisted those states’ governments in establishing bipartisan groups of policymakers, stakeholders, and professionals; worked with them to gather and analyze criminal justice data in their states; and then assisted them in producing recommendations for reform that legislatures could implement.<sup>75</sup> JRI policy packages often look very similar,<sup>76</sup> and the JRI notes that the “impetus” for joining JRI frequently includes rising corrections costs, “growing dissatisfaction with current returns on public safety investment,” and growing state budget crises and shortfalls.<sup>77</sup> Alaska requested JRI assistance in 2015.<sup>78</sup>

Finally, the way in which SB 91 was presented to the public confirms that budget-cutting helped move the bill. Op-eds from state officials often noted that SB 91 would save upwards of \$200 million dollars<sup>79</sup> and that rising costs, if not combatted, could soon begin jeopardizing public safety.<sup>80</sup> As two academic observers put it shortly before SB 91 was introduced: “The current fiscal crisis presents Alaska with both challenge and opportunity. The challenge is how to bring criminal justice

---

73. See generally, e.g., John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249, 254-57 (2016) (illustrating trend of conservative-controlled legislatures engaging with criminal justice reform to combat rising prison costs).

74. NANCY LAVIGNE ET AL., *supra* note 8, at v (emphasis added), <http://www.urban.org/sites/default/files/publication/22211/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.PDF>.

75. Samantha Harvell et al., *Reforming Sentencing and Corrections Policy: The Experience of Justice Reinvestment Initiative States* at Executive Summary, 29 FED. SENT’G REP. 175, 175 (2016-2017).

76. See generally *id.* at 176-77 (describing typical features of JRI legislation). See also Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 564 (2015) (discussing similar features).

77. LAVIGNE ET AL., *supra* note 8, at 7-8.

78. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 1.

79. E.g., Bill Walker, *Alaska Crime Bill is a Big Step Forward But Needs an Adjustment*, ALASKA DISPATCH NEWS (July 11, 2016), <https://www.adn.com/opinions/2016/07/11/walker-crime-bill-is-a-big-step-forward-but-needs-an-adjustment/> (“The reforms are estimated to save a total of \$380 million (\$211 million in direct net savings; \$169 [million] in savings from averted growth).”).

80. Jahnna Lindemuth, *Opinion, Criminal Justice Reform Bill is Right for Alaska*, ALASKA DISPATCH NEWS (Dec. 7, 2016), <https://www.adn.com/opinions/2016/12/07/criminal-justice-reform-bill-is-right-for-alaska/>.

expenditures in line with fiscal realities. The opportunity presented to Alaska is to use an evidence-based process to inform difficult decisions that lie ahead.”<sup>81</sup>

#### D. SB 91’s Legislative History

In 2014, the legislature indicated in its operating budget that it desired various government departments to study how they could combat Alaska’s nearly 66% recidivism rate, which had been identified in a report produced by the Alaska Judicial Council in 2007.<sup>82</sup> SB 64, passed in 2014, among other preliminary reforms, established the ACJC.<sup>83</sup> The ACJC engaged the JRI in April of 2015 to assist in researching the scope, causes, and consequences of Alaska’s growing prison population, and released its “Justice Reinvestment Report” shortly before the new year.<sup>84</sup> After discussing key findings—namely that pretrial defendants and nonviolent offenders were major drivers of the increased prison population,<sup>85</sup> that sentences were getting longer without getting more effective in terms of reducing recidivism,<sup>86</sup> and that alternatives to incarceration were being under- or inefficiently utilized<sup>87</sup>—the Report offered twenty-one recommendations that the ACJC projected could reduce the state’s prison population by 21% by 2024 and save \$424 million over a decade.<sup>88</sup> Its recommendations centered around changes, all based on data-proven practice, to pretrial procedure, sentencing, and supervision and re-entry.<sup>89</sup>

Senator Coghill introduced SB 91 in February of 2016.<sup>90</sup> Over the next two months, the bill wound its way through the Senate’s State Affairs, Judiciary, and Finance Committees, before being brought to the House Judiciary and Finance Committees in April.<sup>91</sup> Ultimately, the bill was

---

81. Brad A. Myr Stol & Barbara Armstrong, *Criminal Justice Reform and Recidivism Reduction*, 32(4) ALASKA JUST. F. 1, 12 (Winter 2016), <https://scholarworks.alaska.edu/bitstream/handle/11122/6461/ajf.324.winter2016.pdf?sequence=4>.

82. ALASKA JUDICIAL COUNCIL, CRIMINAL RECIDIVISM IN ALASKA 1 (2007), [www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf](http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf).

83. 2014 Alaska Sess. Laws ch. 83.

84. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 1.

85. *Id.* at 6–7.

86. *Id.* at 9–10.

87. *Id.* at 11–14.

88. *Id.* at 14.

89. *See id.* (listing effects of recommendations).

90. ALASKA S. JOURNAL, 29th Leg., 2d Sess. 1759 (Feb. 3, 2016).

91. *See generally*, ALASKA STATE LEGISLATURE, BILL HISTORY/ACTION FOR LEGISLATURE: SB 91, [http://www.akleg.gov/basis/Bill/detail/29?Root=SB91#tab6\\_4](http://www.akleg.gov/basis/Bill/detail/29?Root=SB91#tab6_4) (listing legislative actions on SB 91) (last visited Sept. 10, 2017).

supported by a wide spectrum of interest groups, including the ACLU of Alaska, the Alaska Federation of Natives, several outside conservative groups, several victims' groups, and several members of the Department of Corrections.<sup>92</sup> Even former U.S. House Speaker Newt Gingrich, a Republican from Georgia, wrote to the legislature in support of SB 91.<sup>93</sup> On the other hand, SB 91 was opposed by many representatives of law enforcement and other victims' advocates.<sup>94</sup>

The bill passed the House by a twenty-eight to ten margin on May 11, 2016,<sup>95</sup> and the Senate two days later by a fourteen to five vote.<sup>96</sup> Only one Democrat—Representative Andy Josephson from Anchorage, who had formerly been a prosecutor in Kotzebue<sup>97</sup>—voted no. All but one of the nay voters were from the Anchorage metropolitan area.

## II. THE PRESENT: SB 91 AS THE FOUNDATION OF ALASKA'S CRIMINAL JUSTICE REFORM

The ACJC's report offered twenty-one recommendations unanimously supported by its thirteen commissioners.<sup>98</sup> Each recommendation identifies a particular problem, and provides guidance on "specific action" that the legislature should implement. The first twenty recommendations relate to pretrial, sentencing, and community supervision practice, as well as general oversight and accountability.<sup>99</sup> The twenty-first recommendation offers general suggestions to "advance crime victim priorities," such as improving the courts' and law enforcement's communication with victims.<sup>100</sup> All of the ACJC's recommendations were guided by key findings, based on review of the data in Alaska as well as general criminology research (both of which were supported by Pew).<sup>101</sup> This part reviews those findings and recommendations, and then explains how they were implemented in SB 91.

---

92. *Criminal Justice Reform*, *supra* note 4.

93. *Id.*

94. *See, e.g.*, Letter from Gerard Asselin, President, Anchorage Police Dep't Emps. Ass'n et al., to Sen. John Coghill et al. (Apr. 7, 2016), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=66413](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=66413).

95. ALASKA H. JOURNAL, 29th Leg., 2d Sess. 2796 (May 11, 2016).

96. ALASKA S. JOURNAL, 29th Leg., 2d Sess. 2795 (May 13, 2016).

97. *Representative Andy Josephson: About Me*, ALASKA HOUSE MAJORITY COALITION, [http://akhouse.org/rep\\_josephson/about/](http://akhouse.org/rep_josephson/about/) (last visited Sept. 10, 2017).

98. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 2.

99. *Id.* at 14.

100. *Id.* at 28.

101. *See generally id.* at 4–13 (laying out basis for ACJC's recommendations).

### A. Employing Evidence-Based Pretrial Practices to Counter Alaska's Growing Pretrial Prison Population

Alaska's pretrial prison population grew 81% between 2005 and 2014, with approximately one-in-four Alaskan inmates still awaiting trial.<sup>102</sup> Half of this pretrial population consisted of nonviolent offenders.<sup>103</sup>

By law, in making pretrial release decisions courts consider the danger that a defendant poses to the victims and to the community, as well as the defendant's likelihood of missing court dates.<sup>104</sup> In practice however, the ACJC cautioned, whether or not defendants ended up spending time in prison prior to trial often depended simply upon whether they could afford bail.<sup>105</sup> The ACJC also found that low-risk defendants, in many cases, might have their bail set relative to their risk, yet still be unable to afford that bail, either because it was secured bail (that is, paid upfront) or otherwise too expensive.<sup>106</sup> Thus, defendants end up in prison when the court may have intended that they were good candidates for pretrial release.<sup>107</sup>

Further, implicit in the ACJC's recommendations is the concern that subjectivity in bail decisions is less desirable and unnecessary when objectivity is available in the form of actuarial risk assessment tools.<sup>108</sup> Objective risk assessment is a core idea that guides the JRI generally.<sup>109</sup>

The ACJC expressed serious concern about the practice of putting more defendants awaiting trial behind bars. For instance, ACJC Chairman Gregory Razo testified that Alaska's bail practice disproportionately affected rural Alaskans.<sup>110</sup> The ACJC's report added that the tendency to put pretrial defendants in prison was especially problematic given the risk of exposing low-level, low-risk defendants to prison's harmful

---

102. *Id.* at 6.

103. Terry Schuster & Rachel Brushett, *Alaska Data Analysis - Part 1: Prison Drivers*, THE PEW CHARITABLE TRUSTS (June 18, 2005), <http://www.ajc.state.ak.us/sites/default/files/imported/acjc/pewpresent6-2015.pdf>.

104. ALASKA STAT. § 12.30.006(b) (2010).

105. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 8.

106. *See id.*

107. *Id.*

108. *Cf.* JUSTICE REINVESTMENT REPORT, *supra* note 6, at 6 (discussing effectiveness of objective tools).

109. *See, e.g.,* LAVIGNE ET AL., *supra* note 8, at 21 fig.6 (naming risk assessment as the most common JRI reform).

110. ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Mar. 28, 2016) (statement of Gregory P. Razo, Chair, Alaska Criminal Justice Comm'n at 2:27:50 PM).

criminogenic effects.<sup>111</sup> It cited studies indicating that as a low-risk defendant's length of stay increases beyond twenty-four hours, so does that defendant's likelihood of recidivating.<sup>112</sup> Pretrial incarceration also carries significant consequences for the defendant's likelihood of pleading guilty,<sup>113</sup> the defendant's ability to present a compelling legal defense,<sup>114</sup> as well as the defendant's likelihood of retaining employment and sustaining familial and community bonds.<sup>115</sup>

Based on these observations, the ACJC made four recommendations to "implement evidence-based [pretrial] practices."<sup>116</sup> Recommendation One called for expanded use of citations, rather than arrests, for low-level, nonviolent offenders to curb the flow of less serious offenders into prison.<sup>117</sup> While SB 91 continues to give law enforcement discretion in some situations to make an arrest, it permits officers to issue a citation to a person stopped for a class C felony, not just misdemeanors.<sup>118</sup> That the law stops short of the ACJC recommendation—which had actually suggested that there be a *presumption* of citation for class C felonies<sup>119</sup>—is a consequence of considerable pushback from law enforcement early on in the committee process.<sup>120</sup>

Recommendation Two addressed the problem of low-risk defendants being imprisoned because of their inability to pay bail.<sup>121</sup> SB 91 completely rewrites section 12.30.011 of the Alaska Statutes<sup>122</sup> to

---

111. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 11; *see also* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 21–23 (2011) (reviewing literature on criminogenic impact of exposure to imprisonment).

112. CHRISTOPHER T. LOWENKAMP ET AL., *supra* note 29, at 4.

113. Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (unpublished manuscript, July 2016), <https://www.princeton.edu/~wdobbie/files/bail.pdf>.

114. Johnston, *supra* note 26, at 319–20.

115. Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, JUST. POL'Y INST (Sept. 11, 2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>; *see also* ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Mar. 28, 2016) (statement of Gregory P. Razo, Chair, Alaska Criminal Justice Comm'n at 3:08:48 PM) (describing how removing individuals from rural Alaskan communities can be especially problematic).

116. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 15.

117. *Id.*

118. *See* S.B. 91, 29th Leg., 2d Reg. Sess. § 51 (Alaska 2016) (amending ALASKA STAT. § 12.25.180).

119. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 15.

120. *See, e.g.*, ALASKA S. STATE AFFAIRS COMM. MINUTES, 29th Leg. (Feb. 18, 2016) (statement of Officer Charles Baker, Anchorage Police Dep't at 9:05:50 AM) (illustrating practical issues of citation presumption).

121. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 15.

122. *See* Alaska S.B. 91 § 59 (repealing and reenacting ALASKA STAT. § 12.30.011).

generally mirror a table in the ACJC report.<sup>123</sup> The outcome can be summarized in three points:

- For low- and moderate-risk misdemeanants, as well as Class C felons not charged with domestic violence or driving under the influence (DUI), personal-recognition release or unsecured bail is mandatory.
- For low-risk DUI or domestic violence defendants, as well as certain other specified defendants, there is a presumption of personal-recognition release or unsecured bail. The presumption is rebuttable by clear and convincing evidence that nonmonetary conditions could not ensure the defendant's appearance and the community's safety. The same is true for moderate- and high-risk DUI defendants, high-risk non-personal misdemeanants, moderate-risk non-domestic violence class C felons, and other low-risk defendants.
- Defendants who are high-risk class C felons and have been charged with failure to appear or violation of conditions of release (VCOR) may be required to post appearance, bail, or performance bonds.<sup>124</sup>

These changes more precisely tie a defendant's pretrial detention or release to his objectively-determined "risk," reducing the probability of detention based solely on the defendant's inability to pay bail. To that end, SB 91 also allows a defendant to provide information about his inability to post the ordered bail when petitioning the court to have his bail conditions reconsidered.<sup>125</sup> Previously, the law expressly forbade courts from considering a defendant's inability to pay in the decision to set bail.<sup>126</sup>

Perhaps the bigger reform here is how the risk determination works, which was not fully determined in the legislation. SB 91 requires the Corrections Commissioner to approve "a risk assessment instrument that is objective, standardized, and developed based on analysis of empirical data and risk factors relevant to pretrial failure, that evaluates likelihood of failure to appear [or recidivate], and that is validated on the state's pretrial population."<sup>127</sup> Once developed and validated, pretrial services officers will use the tool to provide judges with a risk assessment report

---

123. See JUSTICE REINVESTMENT REPORT, *supra* note 6, at 16 (illustrating recommended pretrial release rules in tabular form).

124. Alaska S.B. 91 § 59 (setting forth new rules for pretrial release).

125. See *id.* § 57 (amending ALASKA STAT. § 12.30.006(d)).

126. *Id.*

127. See *id.* § 117 (creating ALASKA STAT. § 33.07.010-040); see also *infra* Section III.D (noting absence of any determination of what risk assessment tool will look like prior to enactment of SB 91).

that designates the defendant as low-, moderate-, or high-risk, and to offer judges a release recommendation based on the defendant's risk rating and the new statutory requirements.<sup>128</sup>

Recommendations Three and Four called for improvements in pretrial supervision,<sup>129</sup> which SB 91 implements in three particularly significant ways. First, the state's new pretrial services officers are vested with power to make arrests without a warrant where there is probable cause for a crime or VCOR.<sup>130</sup> Second, SB 91 streamlines the bail condition review process by ordering courts to revise bail conditions for defendants who have been in custody for forty-eight hours and cannot pay bail, unless the court finds, by clear and convincing evidence, that less restrictive conditions cannot ensure public safety or the defendant's appearance.<sup>131</sup> Third, SB 91 limits a court's ability to appoint a third-party custodian,<sup>132</sup> thereby creating a strong preference for supervision by pretrial services or some other condition of release, such as electronic monitoring. The main problem with the preference for third-party custodians was that willing and suitable individuals could be difficult to find, thus leading to incarceration by default.<sup>133</sup>

## **B. Shifts in Sentencing to Focus Prison Beds on Serious and Violent Offenders**

The ACJC reached two general conclusions regarding the impact of sentencing on Alaska's increasing prison population. First, presumptions of active jail time at the low end of the offense hierarchy were causing more low-level, nonviolent offenders to enter prison.<sup>134</sup> Three-quarters of the state's inmates were nonviolent offenders, and over half of those nonviolent offenders were misdemeanants.<sup>135</sup> In 2014, 82% of all prison admissions were misdemeanants, most of those nonviolent as well.<sup>136</sup> To

---

128. See *supra* note 124 and accompanying text (describing new pretrial release rules).

129. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 16-17.

130. See Alaska S.B. 91 § 117 (creating ALASKA STAT. § 33.07.030(g)).

131. See *id.* § 56 (amending ALASKA STAT. § 12.30.006).

132. See *id.* §§ 62-63 (amending ALASKA STAT. § 12.30.021).

133. ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 20, 2016) (statement of Gregory P. Razo, Chair, Alaska Criminal Justice Comm'n at 3:04:16 PM) (discussing barriers created by reliance of third-party custodians).

134. See generally JUSTICE REINVESTMENT REPORT, *supra* note 6, at 18-19 (suggesting sentencing reductions for low-level offenders).

135. *Id.* at 2, 9 fig.3.

136. *Id.* at 18.

this point, the ACJC re-emphasized that exposure to prison could increase the likelihood of low-level offenders recidivating, as compared to non-custodial sanctions.<sup>137</sup>

Second, the ACJC noted that felony offenders were staying in prison longer, with the length of prison stays steadily increasing between 2005 and 2014.<sup>138</sup> But the ACJC also determined that longer terms of incarceration were not adding value or improving public safety insofar as they were not reducing recidivism.<sup>139</sup> Recommendations Five through Ten, therefore, generally worked to keep low-risk individuals out of prison in the first place, and then shorten the amount of time offenders ultimately spend inside.

These recommendations lead to seven general changes. First, presumptive misdemeanor sentences have been relaxed to thirty days (down from one year) for most class A misdemeanors<sup>140</sup> and down to ten days (from ninety days) for most class B misdemeanors.<sup>141</sup> The exceptions are mostly tied to violent or sexual offenses, which remain at pre-SB 91 levels.<sup>142</sup>

Second, SB 91 downgrades violations of parole conditions and failures to appear from misdemeanors to violations, except when the violator intends to avoid prosecution or fails to make contact for thirty days after a hearing.<sup>143</sup> In those cases, the classification would be tied to the underlying charge.<sup>144</sup> However, SB 54, if passed, would return violations of conditions of release to a class B misdemeanor.<sup>145</sup>

Third, SB 91 changes punishments related to DUI and driving with a suspended license (DWLS). It reduces DWLS from a class A misdemeanor to an infraction, so long as the underlying basis for suspension was not itself a DUI or refusal to submit to a chemical test (“Refusal”).<sup>146</sup> If it was, the punishment is ten days of suspended imprisonment.<sup>147</sup> Furthermore, SB 91 responds to concerns of overcrowding in community residential centers (CRCs), caused by high volumes of DUI/Refusal cases, by requiring seventy-two hour

---

137. *Id.* at 9.

138. *Id.* at 10.

139. *Id.* at 9.

140. *See* S.B. 91, 29th Leg., 2d Reg. Sess. § 91 (Alaska 2016) (amending ALASKA STAT. § 12.55.135(a)).

141. *See id.* § 92 (amending ALASKA STAT. § 12.55.135(b)).

142. *See* ALASKA STAT. § 12.55.135(a)(1), (b)(2) (2016) (listing specific crimes for which heightened punishment applies).

143. *See* Alaska S.B. 91 §§ 27–31 (amending ALASKA STAT. §§ 11.56.730, 757).

144. *Id.*

145. S.B. 54, 30th Leg., 1st Reg. Sess. § 2 (Alaska 2017).

146. *See* Alaska S.B. 91 §§ 104–05 (repealing and reenacting ALASKA STAT. § 28.15.291).

147. *Id.*

mandatory minimums to be served on electronic monitoring rather than in the CRCs.<sup>148</sup> Where electronic monitoring is unavailable, the Commissioner of Corrections will determine another method that involves serving time in a private residence.<sup>149</sup>

Fourth, SB 91 relaxes drug penalties. Prior to SB 91, the law defined six degrees of misconduct involving controlled substances (MICS): MICS-1 was the most severe and MICS-6 was the least. The new regime repeals MICS-6, and then downgrades the offense classifications for MICS-2 through MICS-5.<sup>150</sup> That is, MICS-5 goes from a class A misdemeanor to a class B misdemeanor;<sup>151</sup> MICS-4 goes from a class C felony, to a class A misdemeanor;<sup>152</sup> and so on. In addition, MICS-4 and MICS-5 are no longer punishable by active prison sentences for an individual's first two convictions.<sup>153</sup>

Commercial drug offenses—delivery, manufacture, and possession with intent—have also been downgraded in some cases, with the quantity involved now becoming the determinative factor for offense classification. In other words, whereas quantity had previously been an aggravator<sup>154</sup> or a mitigator<sup>155</sup> to the presumptive sentence, now, the quantity involved in the offense may form the basis for the offense's classification.<sup>156</sup> To illustrate, a commercial offense of a Schedule IA substance had previously been a class A felony *with the potential for* sentence mitigation if only a small quantity of the substance was involved. Under SB 91 though, if there is indeed a small quantity of the substance involved, less than a gram or twenty-five tablets, the offense *is* a class C felony.<sup>157</sup> Likewise, with Schedule IIA or IIIA substances, a commercial offense involving less than 2.5 grams or fifty tablets is also a class C felony, rather than a class B felony.<sup>158</sup>

---

148. See *id.* § 107 (amending ALASKA STAT. § 28.35.030(k)); *id.* § 110 (amending ALASKA STAT. § 28.35.032(o)).

149. See *id.* § 107 (amending ALASKA STAT. § 28.35.030(k)); *id.* § 110 (amending ALASKA STAT. § 28.35.032(o)).

150. See *id.* (reclassifying ALASKA STAT. §§ 11.71.030-060).

151. Compare *id.* § 47 (deleting MICS-5 as a class A misdemeanor in ALASKA STAT. § 11.71.050(b)), with *id.* § 48 (inserting MICS-5 as a class B misdemeanor in ALASKA STAT. § 11.71.060(b)).

152. Compare *id.* § 46 (deleting MICS-4 as a class C felony in ALASKA STAT. § 11.71.040(d)), with *id.* § 47 (inserting MICS-4 as a class A misdemeanor in ALASKA STAT. § 11.71.050(b)).

153. See *id.* § 93 (amending ALASKA STAT. § 12.55.135(n)(1)).

154. ALASKA STAT. § 12.55.155(d)(25).

155. *Id.* § 12.55.155(d)(13), (15).

156. Alaska S.B. 91 § 45 (inserting subsection (a)(11) into ALASKA STAT. § 11.71.040).

157. See generally *id.* §§ 45-47 (prescribing new classifications for MICS offenses).

158. See generally *id.* (prescribing new classifications for MICS offenses).

Considering decades of practice in controlled substance aggravation and mitigation,<sup>159</sup> this is a dramatic change. But the new regime is not without trade-offs. On one hand, SB 91 provides resolution to the problem of applying vague standards for so-called “small” and “large” quantities that had begun to vex courts.<sup>160</sup> SB 91 drafters also indicated that the clarifications would help “differentiate between the drug trafficker and someone who presumably is selling to support their habit.”<sup>161</sup> That is, it reserves more severe punishment, like incarceration, for someone who warrants it while helping spare defendants who might be better served by rehabilitation.

On the other hand, advocates conceded that the prescribed quantity thresholds may be arbitrary.<sup>162</sup> In fact, without any apparent evidence-based reason, as is fundamental to JRI,<sup>163</sup> the threshold was reduced from the initially proposed five grams down to 2.5 grams.<sup>164</sup> The change was apparently precipitated by pushback from the Department of Law and State Troopers,<sup>165</sup> but at least one police department suggested that a 2.5 gram threshold would let serious dealers off too easily.<sup>166</sup>

Fifth, SB 91 employs a similar tactic for property theft by adjusting thresholds to soften classifications and penalties. It does so in three ways, all of which were controversial in the legislature. First, SB 91 eliminated active imprisonment for first and second convictions for theft in the fourth degree (under \$250 in stolen value).<sup>167</sup> For all repeat offenses thereafter, the maximum sentence is five days suspended jail time and six months probation.<sup>168</sup>

---

159. See, e.g., *Knight v. State*, 855 P.2d 1347, 1348 (Alaska Ct. App. 1993) (upholding sentencing court’s determination that 10.5 grams of cocaine was “small quantity” under mitigator statute); see also *Waters v. State*, 483 P.2d 199, 201 (Alaska 1971) (considering “small quantities” in determining drug sentence prior to use of presumptive sentencing).

160. See, e.g., *Hoekzema v. State*, 193 P.3d 765, 771–72 (Alaska Ct. App. 2008) (questioning whether determination that drug quantity is “large” or “small” is question of fact or law).

161. ALASKA S. JUDICIARY COMM. MINUTES, 29th Leg. (Mar. 9, 2016) (statement of Jordan Schilling, Staff, Sen. John Coghill at 2:42:01 PM).

162. *Id.*

163. LAVIGNE ET AL., *supra* note 8, at v.

164. *Id.*

165. ALASKA S. JUDICIARY COMM. MINUTES, 29th Leg. (Mar. 11, 2016) (statement of Craig Richards, Att’y Gen., Dep’t of Law at 2:29:19 PM).

166. ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 19, 2016) (statement of Craig Richards, Att’y Gen., Dep’t of Law at 1:46:56 PM).

167. See S.B. 91, 29th Leg., 2d Reg. Sess. § 93 (Alaska 2016) (adding subsection (l)(2) into ALASKA STAT. § 12.55.135).

168. See *id.* (adding subsection (l)(1) into ALASKA STAT. § 12.55.135).

The motivating concern was that many of these low-level offenders were drug users supporting habits by stealing toiletries and alcohol, and so it was concluded that treatment was more appropriate than imprisonment.<sup>169</sup> But there was some concern that such leniency may allow repeat offenders to carry on criminal propensities, quite literally, with impunity. Such an individual could hypothetically steal in small quantities as frequently as he desired and then avoid ever serving prison time so long as he was not caught more than once every six months. And even if he was caught more than twice, the sentence would only be five days imprisonment. One legislator claimed that the change “virtually decriminalizes theft under \$250,”<sup>170</sup> and a municipal prosecutor warned that criminals would wise up to the law.<sup>171</sup> Ultimately, SB 54, if passed, would reinstate some potential for incarceration with a five-day suspended sentence for a first offense, a five-day active sentence for a second offense, and a ten-day active sentence for the third offense and every offense thereafter.<sup>172</sup>

The second change to property theft sentencing, an adjustment to the felony threshold, was perhaps the most contentious in the bill. SB 91 raised the felony threshold – the value of property stolen that separates a class C felony from a class A misdemeanor – from \$750 to \$1000.<sup>173</sup> The history of this change actually predates SB 91, when the threshold was increased to \$750 from \$500 by SB 64.<sup>174</sup> From there, the ACJC recommended, and the original draft of SB 91 provided for, a \$2000 threshold.<sup>175</sup> The rationale for this proposed 400% increase was that the original \$500 threshold would stand at \$1800 by 2015 if it were adjusted for inflation.<sup>176</sup> Moreover, the ACJC noted that twenty-three states had made similar inflation adjustments without any demonstrated detrimental impact on property crime rates.<sup>177</sup>

---

169. Hollander, *supra* note 14.

170. Lora Reinbold, *My Turn: A Society's Laws Define What is Impermissible and Thereby What is Condoned*, JUNEAU EMPIRE (July 17, 2016), <http://juneauempire.com/opinion/2016-07-17/my-turn-societys-laws-define-what-impermissible-and-thereby-what-condoned>.

171. See ALASKA H. JUDICIARY COMM. MINUTES, 29th Leg. (Apr. 13, 2016) (statement of Michael Shaffer, Prosecutor, Municipality of Anchorage at 5:53:08 PM) (criticizing jailable offense threshold).

172. S.B. 54, 30th Leg., 1st Sess. § 10 (Alaska 2017).

173. See Alaska S.B. 91 §§ 6-15, 18-23 (changing \$750 to \$1000 throughout Chapter 46 of Title 11).

174. See generally 2014 Alaska Sess. Laws ch. 83 (changing \$500 to \$750 throughout Chapter 46 of Title 11).

175. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 20.

176. *Id.* at 19-20.

177. *Id.*

The \$2000 proposal encountered almost immediate pushback from small businesses who worried about enabling thieves,<sup>178</sup> prompting the Senate State Affairs Committee to restore the threshold to \$750.<sup>179</sup> Nevertheless, the Senate Finance Committee subsequently reinstated the \$2000 threshold.<sup>180</sup> When SB 91 reached the House though, the House Finance Committee, by a vote of five to six, failed to adopt the Senate's \$2000 threshold to replace a House-authored \$1000 threshold proposal.<sup>181</sup> Thus, the \$1000 threshold became the official position of SB 91.

The third change to property theft offenses was to subject both those thresholds—the \$250 for a non-jailable offense threshold as well as the \$1000 felony threshold—to an inflation readjustment every five years.<sup>182</sup> As a matter of policy, employing an automatic inflation adjustment mechanism stimulated vigorous debate.<sup>183</sup> The argument for this provision was that the Alaska legislature, despite its insistences in other contexts that it would periodically make inflation adjustments, often fails to pass the needed follow-up legislation.<sup>184</sup> Thus, by bypassing the

---

178. See ALASKA S. STATE AFFAIRS COMM. MINUTES, 29th Leg. (Feb. 13, 2016) (statement of Chris Nettles, President, NFIB of Alaska at 12:49:42 PM) (opposing raising felony theft threshold to \$2000).

179. ALASKA S. STATE AFFAIRS COMM. MINUTES, 29th Leg. (Mar. 3, 2016) (statement of Daniel George, Staff, Sen. Bill Stoltze at 8:36:57 AM).

180. See ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Apr. 2, 2016) (debate among committee members at 11:10:31 AM). This was one of the few amendments in committee in SB 91's entire legislative history that required a vote. The amendment was adopted five-to-two. *Id.* at 11:51:42 AM.

181. ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 27, 2016) (committee vote at 5:53:20 PM). There appears to be a clerical error in the minutes. Representative Gara had offered two amendments, one pertaining to the \$2000 threshold and another pertaining to periodic adjustment for inflation. "Misunderst[anding]," Representative Gara initially withdrew the former amendment when he had intended to withdraw the latter and vote on the former. Debate then proceeded on whether to raise the felony theft threshold to \$2000. Thereafter, according to the audio, a vote was taken on whether to raise the felony theft threshold to \$2000. However, the minutes, despite correct transcription up to that point, indicate the vote was taken on the periodic inflation adjustment, which had been, upon correction, withdrawn by Representative Gara. *See id.*

182. See S.B. 91, 29th Leg., 2d Reg. Sess. §§ 6–15, 18–23 (Alaska 2016) (inserting "adjusted for inflation as provided in AS 11.46.982" throughout Chapter 46 of Title 11).

183. See, e.g., ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 27, 2016) (debate among committee members at 5:30:35 PM).

184. House Floor Session: S.B. 91 Omnibus Criminal Law Procedure, 29th Leg., 2d Reg. Sess. (Alaska May 3, 2016) (statement of Rep. Jonathan Kreiss-Tomkins at 4:36 PM), <http://www.360north.org/gavel/video/?clientID=2147483647&eventID=2016051012> (noting recurring problem of the legislature failing to make inflation adjustments). *Contra* House Floor Session: S.B. 91 Omnibus Criminal Law Procedure, 29th Leg., 2d Reg. Sess. (Alaska May 3, 2016) (statement of Rep. Bob Herron at 4:31 PM), <http://www.360north.org/gavel/video/?clientID=2147483647&eventID=2016051012> (expressing concern about taking legislative

legislative process through delegation to the Judicial Council, SB 91 ensures that inflation adjustments actually happen.

There might be some concern whether this manner of adjusting for inflation provides constitutionally sufficient notice.<sup>185</sup> As enacted, the statute provides that the Alaska Judicial Council, a state agency<sup>186</sup> within the judicial branch,<sup>187</sup> shall “publish a report” calculating the inflation-adjusted thresholds every five years.<sup>188</sup> This calculation is to be “based on a formula provided by the Department of Labor and Workforce Development, reflecting the change in the Consumer Price Index for the Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States Department of Labor.”<sup>189</sup> SB 91 says nothing explicitly, however, about implementation; it merely states that the published report will be delivered to several legal departments and legislative clerks.<sup>190</sup> The revised offense statutes, furthermore, say only that the offense classifications are related to property value as “adjusted for inflation as provided in AS 11.46.982.”<sup>191</sup> The statute, therefore, does not itself close the loop on the relevant circumstance (i.e., the property value). In other words, the new threshold level might never actually make it into the criminal code; it would only be incorporated by reference to the Department of Labor and Workforce Development’s published report.

Sixth, SB 91 decreases felony presumptive sentences to correct for the unintended increases in sentences following *Blakely*.<sup>192</sup> The result is that the pre-*Blakely* presumptive terms, which SB 56 had put at the floor of the post-*Blakely* presumptive ranges, now fall into the middle of the presumptive ranges.<sup>193</sup> For illustration, consider a second class A felony conviction.<sup>194</sup> In 2004, the presumptive term would have been ten years imprisonment.<sup>195</sup> The following year, in response to *Blakely*, SB 56 created a four-year presumptive range with ten years imprisonment at the

---

matter out of hands of legislature).

185. See *Larson v. State*, 564 P.2d 365, 372 (Alaska 1977) (recognizing constitutional requirement of “adequate notice of the conduct that is prohibited”).

186. ALASKA STAT. § 44.99.240(2)(C) (2016).

187. ALASKA CONST. art. IV, § 8.

188. Alaska S.B. 91 § 25.

189. *Id.*

190. *Id.*

191. *Id.* §§ 6–15, 18–23.

192. See *supra* notes 31–41 and accompanying text (describing move to presumptive ranges following *Blakely*).

193. S.B. 91, 29th Leg., 2d Reg. Sess. §§ 88–89 (Alaska 2016).

194. ALASKA STAT. § 12.55.125(c)(3) (2016).

195. 2005 Alaska Sess. Laws ch. 2, § 1 (amending ALASKA STAT. § 12.55.125(c)(3) to delete presumptive term of ten years imprisonment).

floor.<sup>196</sup> Consequently, the range was ten years to fourteen years.<sup>197</sup> Under SB 91, the same second class A felony conviction will carry a presumptive range of eight to twelve years.<sup>198</sup> Accordingly, the original ten-year term is returned to the middle of the presumptive range, making it a standard sentence, rather than at the floor of the presumptive range, or what might be considered a lenient sentence.

While this type of revision affects most felony convictions, SB 91 also removes any presumption of prison time for first-time class C felonies (previously a zero to two year presumptive sentence), and instead calls for probation with eighteen months imprisonment suspended.<sup>199</sup> The change, which was emphatically contested in the House Finance Committee,<sup>200</sup> creates a peculiar problem whereby a class A misdemeanor may now warrant more jail time, zero to thirty days, than a class C felony.<sup>201</sup> The paradox did not go unnoticed, and restoring a presumption of up to one year of imprisonment for a first class C felony conviction may be the most significant rollback of SB 91 that SB 54 would implement, if passed.<sup>202</sup>

Seventh and lastly, Recommendations Nine and Ten, along with Recommendations Fifteen and Sixteen, advocated alterations to parole and probation.<sup>203</sup> Among other changes, SB 91 reduces the length of probation time a court can impose for most felonies;<sup>204</sup> enhances the impact of electronic monitoring by entitling offenders to good time deductions for time spent on electronic monitoring;<sup>205</sup> expedites offenders' exit from the corrections system by creating new systems of administrative parole (which streamlines the application and hearing process for some low-level, nonviolent misdemeanants)<sup>206</sup> and geriatric parole (which permits discretionary parole for inmates over the age of 60 who have served ten years of a non-sex or unclassified felony);<sup>207</sup>

---

196. S.B. 56, 24th Leg., 1st Reg. Sess. § 8 (Alaska 2005) (inserting presumptive range of ten to fourteen years imprisonment).

197. *Id.*

198. See Alaska S.B. 91 § 88 (amending ALASKA STAT. § 12.55.125(c)(3)).

199. See *id.* § 90 (amending ALASKA STAT. § 12.55.125(e)(1)).

200. See, e.g., ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 27, 2016) (statement of Rep. Lance Pruitt at 6:19:34 PM).

201. Compare Alaska S.B. 91 § 90 (amending ALASKA STAT. § 12.55.125(e)(1) to create presumption of probation for first class C felony conviction with eighteen months suspended), with *id.* § 91 (amending ALASKA STAT. § 12.55.135(a) to create a presumption of up to thirty days active imprisonment for a class A misdemeanor conviction).

202. S.B. 54, 30th Leg., 1st Sess. § 6 (Alaska 2017).

203. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 20–21, 24–25.

204. See Alaska S.B. 91 § 79 (amending ALASKA STAT. § 12.55.090(c)).

205. See *id.* § 154 (repealing and reenacting ALASKA STAT. § 33.20.010(c)).

206. See *id.* § 122 (creating ALASKA STAT. § 33.16.089).

207. See *id.* § 123 (creating ALASKA STAT. § 33.16.089(a)(2)).

broadens eligibility for discretionary parole;<sup>208</sup> and facilitates early discharge recommendations for offenders who have completed treatment and have satisfied other imposed conditions.<sup>209</sup>

It is worth noting that the legislature did not adopt Recommendation Eleven, which suggested removing exclusions from receiving earned time credit imposed upon unclassified, class A, and recidivist sex felons.<sup>210</sup> The ACJC's view was that earned time incentivized completion of treatment for these offenders, and so had a positive cost-benefit ratio.<sup>211</sup> Although the recommendation, like all others, was adopted by consensus, Brenda Stanfill, the designated victims' advocate commissioner, testified that the recommendation made victims' services "a little nervous."<sup>212</sup> Ultimately, Senator Coghill lobbied for the recommendation's exclusion from the legislation, arguing that sex offenses, as a class, were considerably more complicated and visceral than many other reforms included in SB 91, and so warranted separate and more careful consideration by the legislature.<sup>213</sup> Accordingly, Alaska's sex offense laws remain virtually untouched by SB 91.

### C. Improved Supervision and Intervention to Reduce Recidivism

The ACJC's third set of recommendations respond to its finding that the State's scarce supervisory resources were overstretched, and should therefore be focused on offenders who were most likely to recidivate.<sup>214</sup> The ACJC also determined that re-incarceration was too often imposed upon technical violators who had not committed any new crime.<sup>215</sup> The ACJC also noted that parolees were being kept under State supervision for longer periods of time, even though violations most frequently occurred in the first three months.<sup>216</sup> This meant that the State was spending more time and money on individuals whose criminal risk had

---

208. See *id.* § 124 (amending ALASKA STAT. § 33.16.090(b) by creating new eligibility); *id.* §§ 125, 127 (amending ALASKA STAT. § 33.16.100).

209. See *id.* §§ 80–81 (amending ALASKA STAT. § 12.55.090); *id.* §§ 143–44 (amending ALASKA STAT. § 33.16.120).

210. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 22.

211. *Id.*

212. ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 19, 2016) (statement of Brenda Stanfill, Comm'r, Alaska Criminal Justice Comm'n at 3:17:01 PM).

213. ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 20, 2016) (statement of Sen. John Coghill at 9:46:00 AM).

214. See JUSTICE REINVESTMENT REPORT, *supra* note 6, at 11–14 (discussing inefficiencies in community supervision).

215. *Id.* at 23.

216. *Id.* at 13.

likely subsided.<sup>217</sup> In sum, according to the ACJC, the State was not effectively or efficiently managing its probation and parole populations.<sup>218</sup>

To reform post-incarceration sanctions, the ACJC recommended the development of “swift, certain, and proportional” sanctions for technical violations of community supervision, like missed drug tests and treatment sessions.<sup>219</sup> Through rewrites of title 33 of the Alaska Statutes, SB 91 authorizes the Commissioner of Corrections to develop and implement such a system.<sup>220</sup> Relatedly, the ACJC was concerned that technical violators of parole and probation conditions, who made up a quarter of the Alaskan prison population, were spending too long (an average of 106 days) behind bars despite having committed no new crime.<sup>221</sup> SB 91 responds by capping the length of their re-incarceration at generally just a few days.<sup>222</sup>

If those recommendations might be thought of as offering the State more proportionate and effective sanctions to apply, then Recommendation Fourteen might be considered to direct more appealing incentives towards offenders. The ACJC sought to make it easier for “compliant and low risk offenders [to] earn their way off supervision,”<sup>223</sup> which SB 91 achieves by changing the State’s earned compliance credit system to grant one-for-one credit for every thirty days an offender goes without a violation.<sup>224</sup>

Recommendation Seventeen concerned the effectiveness of the State’s Alcohol Safety Action Program (ASAP).<sup>225</sup> ASAP was originally established to address the needs of DUI offenders,<sup>226</sup> but unintentionally grew into a general alcoholism and substance abuse treatment program.<sup>227</sup> The ACJC initially expressed a desire to expand ASAP through grant funding to meet substance abusers’ needs, but

---

217. *Id.*

218. *Id.* at 12–14.

219. *Id.* at 22–23.

220. See S.B. 91, 29th Leg., 2d Reg. Sess. §§ 114–15, 141 (Alaska 2016) (rewriting portions of Title 33).

221. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 23.

222. Alaska S.B. 91 §§ 84, 145 (limiting length of imprisonment for technical violation of probation or parole conditions to three, five, and ten days for first three violations, respectively).

223. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 24.

224. Alaska S.B. 91 §§ 114, 151.

225. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 25–26.

226. ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Apr. 2, 2016) (statement of Jordan Schilling, Staff, Sen. John Coghill at 12:45:20 PM).

227. See JUSTICE REINVESTMENT REPORT, *supra* note 6, at 25 (expressing concern about ASAP’s limited effectiveness given burden imposed upon it).

“recognize[d] that, in the current fiscal climate, this is unlikely.”<sup>228</sup> Accordingly, it instead recommended that ASAP eligibility be confined to the originally-intended eligibility requirements (DUI, Refusal, and habitual minor consuming alcohol offenders),<sup>229</sup> which SB 91 effectuates.<sup>230</sup>

Finally, while recognizing the capacity of community residential centers (CRCs) to reduce recidivism, the ACJC also cautioned that their efficacy was being hindered by intermingling low-, moderate-, and high-risk offenders.<sup>231</sup> With the aid of the new risk assessment tool, SB 91 tasks the Commissioner of Corrections with ensuring that CRCs achieve their rehabilitative objectives.<sup>232</sup>

#### D. Victims and Additional Provisions

SB 91 includes other provisions based on the ACJC’s recommendations. For example, SB 91 has scattered provisions that increase notice and information dissemination to victims<sup>233</sup> in response to the ACJC’s final recommendation.<sup>234</sup> Per Recommendation Nineteen,<sup>235</sup> SB 91 provides for continuing oversight and review by the ACJC.<sup>236</sup> The ACJC’s mandate has been extended four years, through 2021,<sup>237</sup> and its annual reports must include statistical summaries of savings, reinvestment, and performance metrics created by SB 91, along with additional recommendations if appropriate.<sup>238</sup>

SB 91 also includes provisions that are not derived from the ACJC’s recommendations. One example is section 77, which creates a new option for suspended entry of judgment, whereby some convicted offenders may

---

228. *Id.*

229. *Id.* at 236.

230. See S.B. 91, 29th Leg., 2d Reg. Sess. § 170 (Alaska 2016) (amending ALASKA STAT. § 47.37.040(21)); see also *id.* § 171 (supplementing ALASKA STAT. § 47.37.130(h)).

231. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 26.

232. See Alaska S.B. 91 § 159 (amending ALASKA STAT. § 33.30.151).

233. See, e.g., *id.* § 65 (creating new subsection ALASKA STAT. § 12.55.011(b)); *id.* §§ 94–97 (amending ALASKA STAT. §§ 12.61.015–017); *id.* § 122 (creating ALASKA STAT. § 33.16.089); *id.* §§ 131–33 (amending ALASKA STAT. §§ 33.16.120–130); *id.* § 141 (amending ALASKA STAT. § 33.16.180).

234. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 28.

235. *Id.* at 27.

236. Alaska S.B. 91 §§ 163–67.

237. *Id.* § 167.

238. *Id.* § 166.

have their guilty judgment deferred while they attempt to complete a probationary program.<sup>239</sup> If successful, the court will dismiss the case.<sup>240</sup> Otherwise, the judgment will be issued and a sentence imposed.<sup>241</sup>

There was also the frequently debated question of drug testing convicted drug felons to regain federal temporary assistance and food stamp eligibility. The federal rule is that drug felons are ineligible for that assistance.<sup>242</sup> Since 1996 however, states have been permitted to affirmatively opt-out of the requirement.<sup>243</sup> Under SB 91, Alaska joined the majority of states by taking up that option, albeit to a limited extent.<sup>244</sup> Section 169 of SB 91 allows MICS-1 through MICS-4 offenders to receive federal welfare if they demonstrate to the Department of Health and Social Services that they have satisfied at least one of four prescribed conditions related to treatment.<sup>245</sup> Drug testing, which was a serious point of contention in committee,<sup>246</sup> is not included among those.

### III. THE FUTURE: CONSIDERING THE CONCERNS AND ISSUES THAT MIGHT LIE AHEAD FOR SB 91

SB 91 is likely the most sweeping change to Alaska's criminal code since statehood.<sup>247</sup> Furthermore, it is part of a sea change in criminal justice reform occurring across the country.<sup>248</sup> The law's potential consequences are many. This Part highlights five potential issues to guide evaluation of SB 91's provisions. First, it looks at how SB 91—that is, Alaska's version of justice reinvestment—compares to academic calls for criminal justice reform and alternative conceptions of justice reinvestment. Next, it highlights a particular concern with the

---

239. *Id.* § 77 (creating ALASKA STAT. § 12.55.078).

240. ALASKA STAT. § 12.55.078(d) (2016).

241. *Id.* § 12.55.078(e).

242. MAGGIE McCARTY ET AL., CONG. RESEARCH SERV., R42394, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE 1 (2016).

243. *Id.*

244. *Id.* at 9 tbl.1, 13 tbl.2.

245. See S.B. 91, 29th Leg., 2d Reg. Sess. § 169 (Alaska 2016) (creating ALASKA STAT. § 47.27.015(i)).

246. Compare, e.g., ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Mar. 28, 2016) (statement of Sen. John Coghil at 1:33:30 PM) (arguing in favor of drug testing), with, e.g., ALASKA S. STATE AFFAIRS COMM. MINUTES, 29th Leg. (Mar. 8, 2016) (statement of Grace Singh, Assistant to the President, Cent. Council of Tlingit & Haida Indian Tribes of Alaska at 9:43:08 AM) (opposing drug testing for felons as causing unfair logistical problems for Alaska Natives).

247. Brooks, *supra* note 3.

248. See generally THE PEW CHARITABLE TRUSTS, *supra* note 1 (showing justice reinvestment efforts in over thirty states); see also JUSTICE REINVESTMENT REPORT, *supra* note 6, at 1 (noting JRI initiatives throughout the country).

legislature's judgment on implementing a violent crime demarcation. Third, it considers the experience of two states, Mississippi and South Dakota, that might foreshadow Alaska's future with SB 91. Fourth, it discusses the caution that should be attended to risk assessment. Finally, it looks at how SB 91 might particularly impact Alaska Natives, who make up a considerable part of the prison system, and discussed the need for greater emphasis on reinvestment.

### A. Does SB 91 Do Criminal Justice "The Right Way"?

Many criminal justice reform advocates might contest labelling SB 91 as "justice reinvestment."<sup>249</sup> Others still might go even further, maligning SB 91 as mere budget-slashing technocratic tinkering unworthy of the label "criminal justice reform" at all.<sup>250</sup> To understand these concerns, it is worth exploring the history of the idea of justice reinvestment further. This Note, for the most part, has described justice reinvestment as it has been executed by the JRI—that is, Pew, the U.S. Department of Justice's Bureau of Justice Assistance (BJA), and working groups established in the states, such as the ACJC in Alaska. Since 2007, the JRI has controlled the working model of justice reinvestment.<sup>251</sup> As the ACJC described the model, justice reinvestment is a revision of "sentencing and corrections policies to focus state prison beds on violent and habitual offenders and then invest[ ] a portion of the savings from averted prison growth into more effective strategies to reduce recidivism."<sup>252</sup>

But the idea of justice reinvestment predates 2007 and the earlier form took a much different angle. Whereas the JRI model is highly technical and focused on the macro level, the original concept of justice

---

249. See JAMES AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 1, 9–14 (2013), <http://www.justicestrategies.net/sites/default/files/publications/Charting%20a%20New%20Justice%20Reinvestment.pdf> (arguing that JRI has become overly formalized and focused on the number of prisoners, and so departed from original purpose of "justice reinvestment" to combat the causes of crime).

250. See, e.g., MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 143, 302, 307 (2015) (criticizing reinvestment as insufficient to meet criminal justice challenges); Klingele, *supra* note 76, at 581–82 (criticizing "evidence-based practices," like JRI, for picking "low hanging fruit," "nibbl[ing] at the edges," and ultimately not showing significant difference vis-à-vis non-JRI reforms); Michael Tonry, *Making Peace, Not a Desert*, 10 CRIMINOLOGY & PUB. POL'Y 637, 637–38, 640, 647 (2011) (conceding that justice reinvestment may be sensible, but calling it "unlikely to serve as a successful strategy for policy change" and criticizing "liberal reform advocates" for acceding to its cost and effectiveness framework).

251. THE PEW CHARITABLE TRUSTS, *supra* note 1.

252. JUSTICE REINVESTMENT REPORT, *supra* note 6, at 5.

reinvestment was focused more on root causes and particular communities. In an early report on justice reinvestment by Susan B. Tucker and Eric Cadora, reformers sought “community level solutions to community level problems.”<sup>253</sup> There was a much greater emphasis on the reinvestment element of the program, as opposed to the data-driven reform element, with money targeted toward stopping the cycle of individuals in high incarceration neighborhoods – which were generally minority communities – going to prison again and again.<sup>254</sup>

Joined by other commentators a decade later, Tucker and Cadora reflected that justice reinvestment “was developed as a public safety mechanism to downsize prison populations and budgets and re-allocate savings to leverage the public and private resources for reinvestment in minority communities disproportionately harmed by the system and culture of harsh punishment.”<sup>255</sup> The idea, in other words, was to build stronger infrastructures to keep individuals in communities most weakened by crime away from crime.<sup>256</sup> Under JRI, they lament that justice reinvestment “has come to stand for any corrections reform that is expected to save states money and improve public safety, but without concurrent reinvestment in the community . . . .”<sup>257</sup> In sum, their contention is that JRI has perpetuated the system of mass incarceration, although perhaps with less intensity, whereas the original idea behind justice reinvestment was to attempt to stop the conveyor belt.

Similarly, these progenitors-turned-critics have expressed concern that JRI legislative programs, like SB 91, work top-down rather than bottom-up, which is the opposite direction from the most successful programs, and thereby stunt whatever benefit may be possible.<sup>258</sup> In fact, the argument goes, JRI legislative programs will mainly serve to exacerbate current problems by *expanding* the scope of state control.<sup>259</sup> In Alaska, 553 state statutes already affect the lives of individuals with past

---

253. SUSAN B. TUCKER & ERIC CADORA, OPEN SOCIETY INST., JUSTICE REINVESTMENT 2 (2003), [https://www.opensocietyfoundations.org/sites/default/files/ideas\\_reinvestment.pdf](https://www.opensocietyfoundations.org/sites/default/files/ideas_reinvestment.pdf).

254. *See id.* at 3–4.

255. AUSTIN ET AL., *supra* note 249, at 3.

256. *See id.* at 3–4.

257. *Id.* at 4.

258. *See id.* (criticizing JRI’s focus on state government policymakers to exclusion of other constituencies and stakeholders); *see also* Judith A. Green & Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Improving Public Safety*, 29 FED. SENT’G REP. 22, 36 (2016) (praising success of New York City’s “bottom-up, advocacy-driven, community-focused strategy, as opposed to [justice reinvestment’s] top-down, technocratic, elite-consensus approach”).

259. Klingele, *supra* note 76, at 540.

convictions,<sup>260</sup> and that is before the vastly larger galaxy of federal statutes.<sup>261</sup> SB 91 would only create more mandates, conditions, and procedures for justice-involved individuals, which translates to more difficult individual reformation and escape from the criminal justice system. Ultimately, if the critics' concern about the problems of elite control is indeed valid, and there is compelling evidence that it may be given New York City's experience cutting its massive prison population in half through bottom-up initiatives,<sup>262</sup> then JRI might only entrench the tendencies that enabled mass incarceration.<sup>263</sup>

There has also been an academic pile-on criticizing the JRI approach for not targeting the roots of crime. Put broadly, the issue is that mass incarceration problems run far deeper than what might possibly be discernible from the aggregate data about prison populations and sentences.<sup>264</sup> Academic critics caution that data has led policymakers astray before, and question whether data can even provide an accurate picture in these circumstances where there are so many factors involved that the data might not capture.<sup>265</sup> Furthermore, they question the motive of justice reinvestment, adding that "[c]riminal justice is fundamentally . . . not . . . a dollars-and-cents problem."<sup>266</sup> One scholar has derided JRI's focus on "non, non, nons" (nonserious, nonviolent, and nonsexual offenders) as only entrenching the "carceral state"<sup>267</sup> and diverting public attention away from the need for more serious reform

---

260. Deborah Periman, *Prisoner Reentry and the Uniform Collateral Consequences of Conviction Act*, 27(4) ALASKA JUST. F. 1, 7 (Winter 2011).

261. *Id.*

262. See generally, Green & Schiraldi, *supra* note 258 (highlighting New York City's bottom-up, advocacy-driven, community-focused strategy that cut prison population by roughly 50%).

263. Cf. Harvell et al., *supra* note 75, at 177 (emphasizing value of buy-in from judges, district attorneys, and governors).

264. See Klingele, *supra* note 76, at 583 (arguing that data "is cool and detached" from the uncomfortable truth that there is need for "culture change"). See generally GOTTSCHALK, *supra* note 250.

265. See Klingele, *supra* note 76, at 561-62 (cautioning about data's accuracy and appeal).

266. GOTTSCHALK, *supra* note 250, at 37.

267. Gottschalk does not provide a precise definition of the "carceral state," but it may be analogized to the "welfare state," affecting the country's political, economic, and social framework and characterized by the enormous size of the American prison population; the state's reliance on harsh and degrading sanctions; and the disproportionate impact of those criminal sanctions upon low-income, minority communities. See Marie Gottschalk, *Bring It On: The Future of Penal Reform, The Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559-61 (2015); Marie Gottschalk, *Democracy and the Carceral State in America*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 288, 288-90 (2014); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693-95 (2006).

that is actually capable of more markedly reducing crime and incarceration.<sup>268</sup> The academy's suggested reforms might include reducing the scope of criminal offenses, changing policing practices, and reforming prosecutorial discretion and decision-making.<sup>269</sup> Any change that legislation like SB 91 could produce, these critics claim, is only making a difference, if any, at the margins.<sup>270</sup>

But is the academic hand-wringing over JRI, and its incumbent emphasis on economics, overblown when compared to the political realities of criminal justice reform?<sup>271</sup> For better or for worse, criminal justice is part of a politicized process.<sup>272</sup> That means that political incentives often drive what lawmakers do, or limit what they can do.<sup>273</sup> One political consequence is public outcry against legislators who are seen as "weak on crime."<sup>274</sup>

---

268. GOTTSCHALK, *supra* note 250, at 143.

269. See generally TONRY, *supra* note 20, at 18–40 (describing needed reforms to reduce flow into prisons).

270. See Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 238, 254 (2011) (suggesting that significant reduction in incarceration rates will require more than marginal changes for low-level, nonviolent offenders, which has not yet occurred); see also Tonry, *supra* note 250, at 638 (stating justice reinvestment reforms have "mostly nibbled at the edges").

271. But see JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 179–80 (Basic Books 2017) (recognizing political realities in penal policy and their impact on politicians and influencers, but arguing that "scholars, the media, and advocacy groups" must "ask these seemingly 'impossible' questions" anyhow).

272. See generally Michael Tonry *Determinants of Penal Policy*, in CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE—CRIME AND JUSTICE: A REVIEW OF RESEARCH 1–46 (Michael Tonry ed., 2007) (comparing United States with other criminal justice systems where many criminal policymakers are civil servants rather than elected politicians); see also GOTTSCHALK, *supra* note 250, at 176 ("increase in violent crime opened up enormous political space to redefine the law-and-order problem and its solutions"); Heather Schoenfeld, *Putting Politics in Penal Policy Reform*, 10 CRIMINOLOGY & PUB. POL'Y 715, 717 (2011) (arguing that penal policy implementation involves responding to political incentives); Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. L. REV. 23, 29 (1997) (contrasting influence of politics on criminal justice in the United States from other countries).

273. See Schoenfeld, *supra* note 272, at 717 ("[P]olitical incentives matter for policy enactment and implementation.") (emphasis original); see also Michael Tonry, *Evidence, Ideology, and Politics in the Making of American Criminal Justice*, 42 CRIME & JUST. 1, 8 (2013) (noting that on important issues, like criminal justice, change is impeded by political dispositions); Sean Nicholson-Crotty, *The Politics of Diffusion: Public Policy in the American States*, 71 J. OF POL. 192, 201 (2009) (finding, in a case study of California's adoption of Three Strikes sentencing policy, that there is "significant evidence" that the legislature was focused on short-term electoral gain rather than the merits of the policy itself).

274. See J.C. Olesen, *A Decoupled System: Federal Criminal Justice and the*

Alaska's experience since SB 91 is a case study in how sensitive constituents are to perceptions that their elected representatives are failing to keep their communities safe. As noted, the Department of Public Safety reported in 2017 that crime in Alaska had increased in 2016 nearly across the board.<sup>275</sup> Notwithstanding that there is little evidence to suggest that the increase in crime in Alaska between 2015 and 2016 was caused by SB 91,<sup>276</sup> Alaskans have expressed furor at legislators,<sup>277</sup> leading Governor Walker to put changes to the bill on the agenda for the special legislative session in October, 2017.<sup>278</sup> In September 2017, Senator Mia Costello, who had co-sponsored SB 91 just a year earlier, acceded to the uproar and announced that she would introduce a bill to repeal SB 91.<sup>279</sup> She noted that constituents are "frustrated and angry, and we have a responsibility to do something about it, now."<sup>280</sup> "Every Alaskan is

---

*Structural Limits of Transformation*, 35 JUST. SYSTEM J. 383, 394 (2014) ("[F]or politicians who rely on popular support for reelection, appearing tough on crime is traditionally a safe bet, while appearing weak on crime can be fatal, professionally speaking.") (internal citations omitted).

275. Bradner, *supra* note 18.

276. Anne Hillman, *SB 91 and its Effect on Crime Rates*, ALASKA PUB. MEDIA (Sept. 29, 2017), <https://www.alaskapublic.org/2017/09/29/sb-91-and-its-effects-on-crime-rates/> (audio recording with host and University of Alaska Anchorage Professor Brad Myrstol discussing the conceptual problems with pinning increase in crime to SB 91); *see also* Brad A. Myrstol & Pamela Cravez, *Crime Rates and Alaska Criminal Justice Reform*, 34(2) ALASKA JUST. F. 1, 2 (Fall 2017).

277. *See* Andrew Kitchenman, *As Anger Over Crime Boils Over, Alaska Lawmakers Weigh Changes to Law*, KTOO (Oct. 4, 2017), <https://www.ktoo.org/2017/10/04/anger-crime-boils-lawmakers-weigh-changes-law/> (reporting on outraged town hall participants who called for the death penalty and for letting drug overdosers die); Victoria Taylor, *Concerns of SB-91 Resolution Stall Assembly Work Session*, KTUU (Sept. 29, 2017), <http://www.ktuu.com/content/news/Concerns-of-SB91-resolution-stall-Assembly-worksession-448737023.html>; Liz Kellar, *After Public Condemnation, Criminal Justice Commission Recommends Some Roll-Backs to SB 91*, JUNEAU EMPIRE (Feb. 2, 2017), <http://juneauempire.com/local/2017-02-01/after-public-condemnation-criminal-justice-commission-recommends-some-roll-backs-sb> (quoting Senator Coghill as saying "[p]ublic condemnation has played a huge part in [the need to amend SB 91] . . . We cannot ignore the public, who feel so violated."); Zaz Hollander, *Parents of Slain Palmer Teen Question Crime Bill as Defendants Appear Again in Court*, ALASKA DISPATCH NEWS (Dec. 29, 2016), <https://www.adn.com/alaska-news/crime-courts/2016/12/27/parents-of-slain-palmer-teen-question-crime-bill-as-defendants-appear-again-in-court/> (reporting on parents' concern that teenagers accused of killing their son had been released because of SB 91, even though prosecutors say the issue was that prior offense was not prosecutable).

278. Bradner, *supra* note 18.

279. James Brooks, *Former Backer of SB 91 Now Seeks its Repeal in Legislature*, JUNEAU EMPIRE (Sept. 27, 2017), <http://juneauempire.com/news/state/2017-09-27/former-backer-sb-91-now-seeks-its-repeal-legislature>.

280. *Id.*

suffering from either a burglary, theft or threat of these crimes, or worse, making us feel unsafe in our own homes and neighborhoods,” she said, adding to the hyperbole.<sup>281</sup>

Simply stated then, the premise that “current correctional practices are morally unjustified,”<sup>282</sup> as academic critics might posit, faces a tough political fight against community outrage that neighborhoods are less safe,<sup>283</sup> that victims are the ‘losers’ of criminal justice reform,<sup>284</sup> that criminals—even the petty ones—have been emboldened by sentencing leniency,<sup>285</sup> that communities have been made less safe,<sup>286</sup> and that—even if untrue—innocent people are being killed by criminals who had been released in the name of “criminal justice reform.”<sup>287</sup> Accordingly, legislators’ ability to pass criminal justice reform may be limited by their ability to provide justification to their constituents.

The need for a compelling justification may also explain SB 91 advocates’ emphasis on the fiscal benefit that the law may provide.<sup>288</sup> Particularly given Alaska’s distressed budgetary climate,<sup>289</sup> the ability to

---

281. *Anchorage Lawmaker Costello Introduces Bill to Repeal SB 91*, MAT-SU VALLEY FRONTIERSMAN (Sept. 23, 2017), [http://www.frontiersman.com/news/anchorage-lawmaker-costello-introduces-bill-to-repeal-sb/article\\_266060d6-a0c2-11e7-b359-37a70504a7df.html](http://www.frontiersman.com/news/anchorage-lawmaker-costello-introduces-bill-to-repeal-sb/article_266060d6-a0c2-11e7-b359-37a70504a7df.html).

282. Klingele, *supra* note 76, at 567.

283. See *supra* notes 275–81 and accompanying text; see also ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Mar. 29, 2016) (statement of Sen. Peter Micciche at 9:16:38 AM) (“[P]art of the concerns of Alaskans is that because of a tightened budget . . . that we are willing to . . . release potentially dangerous criminals back into the community.”).

284. See generally, e.g., Eric Ruble, *Office of Victims’ Rights: SB 91 is Well Intended, Poorly Executed*, KTVA-ALASKA (Feb. 23, 2016), <http://live-ktva-ak.pantheonsite.io/office-of-victims-rights-sb91-is-well-intended-poorly-executed-780/> (detailing OVR’s opposition to SB 91).

285. E.g., Kellar, *supra* note 277.

286. See, e.g., Alaska S. Fin. Comm. Minutes, 29th Leg. (Mar. 29, 2016) (statement of Sen. Peter Micciche at 9:16:38 AM) (“[P]art of the concerns of Alaskans is that because of a tightened budget . . . that we are willing to . . . release potentially dangerous criminals back into the community.”).

287. Hollander, *supra* note 277 (reporting on parents’ concern that teenagers accused of killing their son had been released because of SB 91, even though prosecutors say the issue was that prior offense was not prosecutable); see also ALASKA S. JUD. STANDING COMM. MINUTES, 30th Leg. (Mar. 3, 2017) (statement of Butch Moore, at 2:28:18 PM) (claiming that the Fort Lauderdale Airport shooting in Jan. 2017 was perpetrated by a man released in Alaska pursuant to SB 91). *But see*, ALASKA S. JUD. STANDING COMM. MINUTES, 30th Leg. (Mar. 10, 2017) (statement of Sen. John Coghill, at 1:34:57 PM) (disputing Moore’s testimony as factually incorrect). These minutes refer to testimony given on March 6. See *id.* However, there was no meeting on March 6, and the minutes likely intend to reference testimony given at the March 3 hearing. See *id.*

288. See discussion *supra* Section I.C.

289. See Samuels, *supra* note 63 (noting Alaska’s multibillion dollar budget deficit).

point to a record of saving money is likely to be advantageous for any reelection motivated legislator. And given corrections' costliness—specifically, the lack of return on investment in terms of public safety for dollars spent on punishment<sup>290</sup>—legislators seem likely to calculate that surely *something* ought to be done,<sup>291</sup> particularly when even so-called marginal improvements can save tens of millions of dollars, as with SB 91.

What the academic critics fail to consider is that given the political challenges surrounding criminal justice reform—the need for politicians to avoid appearing soft on crime and the importance of appearing fiscally responsible—SB 91 may be one of the only politically realistic options.<sup>292</sup> Why, then, make the perfect the enemy of the good, particularly where 'good' might be all that is on the table given criminal justice's politicization and also where, as in Alaska, the fiscal need is so pressing?<sup>293</sup> In other words, viewed through a political lens, it is not difficult to see why SB 91 came together as it did. As Professor Sean Hopwood, a federal inmate turned criminal justice scholar and reform advocate, said in describing Maryland's JRI legislation:

[P]ragmatism has its pitfalls. It does not inspire us the way an idealist's call to action does. It moves gradually. It trades in compromise. It demands less while crusaders demand more. Still, it has its place in progressive reform in America. *If it starts with the feasible, it does so in the hope that the ideal may someday be realized, at least in some measure. If it is modest, it does so with the knowledge that by aiming lower it increases the chances of hitting its target. Pragmatism is not always a panacea but, then again, neither is it a path to nowhere.*<sup>294</sup>

---

290. See discussion *supra* Section I.B (overviewing increasing corrections budget and diminishing corrections outcomes).

291. See discussion *supra* Section I.C (arguing that state budget had substantial impact on moving SB 91). *But cf.* Tonry, *supra* note 250, at 641 (noting that most corrections costs are fixed, therefore gains unlikely to be substantial unless large numbers of prisoners diverted or avoided).

292. See, e.g., Klingele, *supra* note 76, at 582 ("Defenders of the current approach to reform emphasize that any decrease in prison growth is better than a continuation of the soaring rates of custody that have defined the past forty years. In this view, incremental improvement—or even stabilization—means more net justice . . .").

293. See, e.g., Samuels, *supra* note 63 (discussing challenges of Alaska's fiscal situation).

294. Shon Hopwood, Book Review, 66 J. LEGAL EDUC. 445, 454 (2017) (reviewing GOTTSCHALK, *supra* note 250) (emphasis added).

Even if constrained, SB 91 makes important steps toward reducing the massive scope of the criminal justice system, and that is cause for some satisfaction. And while it is not everything that could be done, perhaps, as even the originators of justice reinvestment acknowledge, initiatives like SB 91 can pave the way for deeper and more politically challenging mass incarceration reform.<sup>295</sup> To this end, Professor Hopwood suggests that JRI legislation may be a way to ensure that more is done by facilitating understanding that “a more humane and fair criminal justice system is a more effective one, and a more effective criminal justice system benefits us all.”<sup>296</sup>

Nevertheless, the academic critics’ point about the need to think harder, do more, and go further is well-reasoned and thoroughly supported. The ACJC and the legislature would do well not to lose sight of it as they evaluate SB 91. Stakeholders, therefore, should monitor the state’s success with JRI, and use it as momentum for more.

## **B. Does SB 91 Properly Draw the Line on “Violent Crime”?**

A second potential concern may be how the penal code delineates nonviolent offenses. The ACJC suggested that reducing the lower-level or “nonviolent” offender prison population presented an opportunity for the state to save costs while also reducing recidivism.<sup>297</sup> It recommended, and SB 91 implemented, expanded use of citations for nonviolent misdemeanants<sup>298</sup> and limited prison time for nonviolent offenders.<sup>299</sup>

But crime is not classified by violence or nonviolence. Instead, it is classified by felonies, misdemeanors, and then infractions and violations. Because of this classification system, the ACJC’s recommendations regarding nonviolent crimes required the legislature to make its own determinations on how to actually effect such a policy. In SB 91, it appears that the legislature drew a cut-off point between class B and class C felonies. That is, many of SB 91’s most substantial changes affect the class C felony tier and below.<sup>300</sup> These offenses have consequently seen punishment relaxed by SB 91. For instance, they now carry a presumption of probation for first-time offenses.<sup>301</sup>

---

295. AUSTIN ET AL., *supra* note 249, at 3.

296. Hopwood, *supra* note 294, at 454.

297. See JUSTICE REINVESTMENT REPORT, *supra* note 6, at 9 (discussing expert consensus that lower-level offenders were not good candidates for incarceration).

298. See *supra* notes 117–20 and accompanying text.

299. See discussion *supra* Section II.B.

300. See *supra* notes 118–20, 199–202 and accompanying text (discussing key changes built around class C felonies).

301. See *supra* notes 199–201 and accompanying text.

This may create intuitive problems in practice when it comes to the types of offenses that are now punished much less severely. Consider some class C felonies: burglary in the second degree;<sup>302</sup> an attempt to commit,<sup>303</sup> a solicitation of,<sup>304</sup> or the criminal possession of explosives with an intent to commit any class B felony;<sup>305</sup> criminal mischief in the third degree, which is the intentional damaging of another person's property at the felony threshold level;<sup>306</sup> riot, which includes "tumultuous and *violent* conduct;"<sup>307</sup> misconduct involving weapons in the third degree;<sup>308</sup> vehicle theft in the first degree;<sup>309</sup> and stalking in the first degree, which requires conduct that places the victim or a family member in *fear of death or physical injury*.<sup>310</sup>

These are disturbing offenses, which may now be treated similarly to, or perhaps more leniently than, some "nonviolent" class A misdemeanor offenses. In other words, by its blanket treatment of class C felonies, SB 91 may have covered too broad a spectrum of offenses and created some unwarranted lenience.<sup>311</sup>

Additionally, one legislator made the argument that SB 91 causes a community condemnation issue.<sup>312</sup> That is, these are crimes that any reasonable citizen would know to be offensive to the public yet the punishment imposed by the citizenry, through its laws, no longer reflects as much.

Policymakers have already noticed problems with SB 91's line-drawing, though. SB 54, if passed, would reinstate a presumption of up to one year of prison time for a first class C felony conviction. This issue, though, seems to have already caught the attention of the ACJC to some degree, which has recommended restoring presumptive jail terms to class C felonies.<sup>313</sup>

---

302. ALASKA STAT. § 11.46.310 (2016).

303. *Id.* § 11.31.100(d)(4).

304. *Id.* § 11.31.110(c)(4).

305. *Id.* § 11.61.240(b)(3).

306. *Id.* § 11.46.482.

307. *Id.* § 11.61.100 (emphasis added).

308. *Id.* § 11.61.200.

309. *Id.* § 11.46.360.

310. *Id.* § 11.41.260.

311. See generally ALASKA H. JOURNAL, 29th Leg., 2d Sess. 2637-43 (May 2, 2016), and ALASKA H. JOURNAL, 29th Leg., 2d Sess. 2650-62 (May 3, 2016) (recording amendments offered by Rep. Josephson, many of which involved removing relaxed punishment for certain offenses).

312. See Reinbold, *supra* note 170 (arguing that relaxing criminal punishments does not signal community condemnation of crime).

313. S.B. 54, 30th Leg., 1st Sess. § 6 (Alaska 2017).

Nevertheless, this problem also highlighted a potential future reform involving further subdivision of felony classifications. The legislature could consider reviewing the plethora of class C felonies and separating those offenses that are less serious, and do indeed warrant less severe punishment, into a new felony class, or perhaps relegate them to misdemeanors.

### C. The View from Other States

Other states' experiences with JRI paints an unclear picture for Alaska. According to JRI supporters, six of eighteen states that have implemented JRI legislation long enough ago to allow for reasonable observation have seen their prison populations shrink.<sup>314</sup> Another nine states had reported increases in their total prison populations, but at a lower growth rate than would have occurred without reform, according to Pew's projections.<sup>315</sup> A majority of states saw declines in their probation populations.<sup>316</sup> Supporters also report that JRI states had saved over a billion dollars as of 2016, and reinvested approximately \$450 million.<sup>317</sup> Recidivism rates, furthermore, had been cut by as much as 30%.<sup>318</sup> In sum, their self-portrait is a rosy one, with benign "challenges" like improving implementation through greater stakeholder support.<sup>319</sup>

Critics paint a different picture though. According to one review, JRI's claims of effectiveness are simply not true at worst, and based on incomplete data and analysis at best.<sup>320</sup> The study, conducted by some of the originators of "justice reinvestment" as an idea, argued that there was an inherent flaw in JRI's method of basing claims of success on JRI's own hypothetical projections.<sup>321</sup> Moreover, the study pointed out that 88% of the decline in state prison populations across the country between 2008 and 2014 had come from just three states—California, New Jersey, and New York—none of which had engaged the JRI.<sup>322</sup> Ultimately, the study

---

314. See Harvell et al., *supra* note 75, at 176 (reporting that fifteen states had prison populations below projections and that in nine of those states there was an increase, meaning that six had seen a decrease).

315. *Id.*

316. *Id.* at 177.

317. *Id.*

318. *Id.*

319. *Id.* at 178. *But see supra* notes 258–63 and accompanying text (discussing criticism of whether JRI is too elite-focused).

320. See AUSTIN ET AL., *supra* note 249, at 11–16 (analyzing data of JRI and non-JRI states).

321. *Id.* at 14 n.7.

322. James Austen et al., *Reinvigorating Justice Reinvestment*, 29 FED. SENT'G REP. 6, 9 (2016).

concluded that there is no overall difference in the pattern of prison populations between JRI and non-JRI states.<sup>323</sup>

By Pew's menu of JRI policy options, Alaska was the most aggressive JRI participant, adopting twenty-one of thirty-two types of JRI reforms.<sup>324</sup> For perspective, the median was eight policy reforms, although it was thirteen among the seventeen states that have enacted JRI legislation since 2012.<sup>325</sup> Risk-needs assessment was one category where Alaska was in the mainstream, joining twenty-one other states, as were graduated responses to violations.<sup>326</sup> On the other hand, when it came to sentencing, Alaska (i) reclassified drug offenses, (ii) reclassified property offenses, (iii) established a presumption of probation for certain offenses, (iv) revised mandatory minimums, and (v) revised sentencing guidelines.<sup>327</sup> No other JRI state implemented all six, or even five, of these reforms; only four of thirty-three states implemented more than three.<sup>328</sup>

Mississippi is one of three states that shared fourteen reforms with Alaska, making it the most similar purely in terms of that number.<sup>329</sup> Between 2004 and 2014, Mississippi's prison population grew 17% to over 22,600 inmates.<sup>330</sup> The cost of doing nothing was projected to be \$266 million.<sup>331</sup> There is not a lot of reporting available on Mississippi since then, but according to the BJA, Mississippi's reforms have resulted in a 19% decline in the prison population relative to what had been projected.<sup>332</sup> Interestingly though, that decline had already begun a year before Mississippi passed JRI legislation and continued at a similar rate after enactment.<sup>333</sup> The problems occurred while violent and property crime rates in Mississippi increased by approximately 2% between 2013

---

323. *Id.* at 13; see also AUSTIN ET AL., *supra* note 249, at 11-16 (comparing JRI and non-JRI states and concluding no significant progress).

324. THE PEW CHARITABLE TRUSTS, *supra* note 1.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Mississippi HB 585: Recommendations of the Corrections and Criminal Justice Task Force*, RIGHT ON CRIME (Apr. 8, 2014) [hereinafter *Mississippi HB 585*], <http://rightoncrime.com/2014/04/mississippi-hb-585-recommendations-of-the-corrections-and-criminal-justice-task-force/>.

331. *Id.*

332. *Mississippi*, BUREAU OF JUSTICE ASSISTANCE, <https://www.bja.gov/programs/justicereinvestment/mississippi.html> (last updated July 2015).

333. *Id.*

and 2016.<sup>334</sup> Accordingly, and especially given that it does not appear that Mississippi's rate of decarceration accelerated, it may be that JRI is not responsible for improvement in Mississippi's reduced prison population.

South Dakota is in some ways more similar to Alaska. For one, whereas Mississippi had the second-highest total prison population in the country prior to its JRI law,<sup>335</sup> South Dakota is a more sparsely populated state like Alaska,<sup>336</sup> and so has a relatively small overall prison population as well.<sup>337</sup> Nevertheless, South Dakota's prison population was at an all-time high prior to JRI and was projected to grow considerably, at a cost of \$224 million.<sup>338</sup> Also like Alaska, the growth in South Dakota's prison population came as its crime rates were declining in the long-term,<sup>339</sup> nonviolent offenders and parole revocations were identified as major drivers of the increase.<sup>340</sup> South Dakota was also similar to Alaska insofar as its budget was a significant catalyst for JRI.<sup>341</sup> South Dakota also took a similar approach to Alaska by focusing on diversion for nonviolent, low-level offenders as well as strengthened supervision and intervention.<sup>342</sup>

---

334. Compare FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2016: UNIFORM CRIME REPORTS tbl.3 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s/2016/tables/table-3> (showing Mississippi with a 280.1 violent crime rate and a 2768.1 property crime rate), with FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013: UNIFORM CRIME REPORTS tbl.5 (2014), [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s-2013/tables/5table-datadecpdf/table\\_5\\_crime\\_in\\_the\\_united\\_states\\_by\\_state\\_2013.xls](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s-2013/tables/5table-datadecpdf/table_5_crime_in_the_united_states_by_state_2013.xls) (showing Mississippi with a 274.6 violent crime rate and a 2724.1 property crime rate).

335. Mississippi HB 585, *supra* note 330.

336. See *Resident Population Data (Text Version)*, UNITED STATES CENSUS 2010, <https://www.census.gov/2010census/data/apportionment-dens-text.php> (last visited Apr. 11, 2017) (ranking South Dakota forty-eighth in population density and Alaska fifty-second).

337. Compare THE PEW CHARITABLE TRUSTS, SOUTH DAKOTA'S 2013 CRIMINAL JUSTICE INITIATIVE 1 fig.1 (2013), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2013/PSPPSD2013CriminalJusticeInitiativepdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2013/PSPPSD2013CriminalJusticeInitiativepdf.pdf) (listing South Dakota as having 3636 inmates in 2012), with JUSTICE REINVESTMENT REPORT, *supra* note 6, at 4 fig.1 (listing Alaska as having 5095 inmates in 2015).

338. BRIAN ELDERBROOM ET AL., URBAN INST., ASSESSING THE IMPACT OF SOUTH DAKOTA'S SENTENCING REFORMS 1 (2016), <http://www.urban.org/sites/default/files/publication/80106/2000762-Assessing-the-Impact-of-South-Dakota%27s-Sentencing-Reforms-Justice-Reinvestment-Initiative.pdf>.

339. Compare *id.* at 3, with PARKER, *supra* note 42, at 1 fig.1. (declining crime rate), with JUSTICE REINVESTMENT REPORT, *supra* note 6, at 1 (increasing prison population).

340. Compare THE PEW CHARITABLE TRUSTS, *supra* note 337, at 3-4, with JUSTICE REINVESTMENT REPORT, *supra* note 6, at 2, 9 fig.3, 12.

341. Compare THE PEW CHARITABLE TRUSTS, *supra* note 337, at 4, with discussion *supra* Section I.C.

342. See THE PEW CHARITABLE TRUSTS, *supra* note 1 (showing policy reforms implemented by South Dakota and Alaska).

South Dakota's JRI results, however, are discouraging. According to the BJA, although South Dakota's prison population had decreased 9% compared to projections by 2015 (two years after implementation), the prison population had declined on net by a mere thirty-five inmates – not even a 1% decrease.<sup>343</sup> Worse, according to South Dakota's Department of Corrections more recent updates, the prison population had increased by approximately 8% between enactment and September 2017, putting it less than 7% below projections.<sup>344</sup> South Dakota was also crushed by a 30% jump in its violent crime rate between 2012 and 2016,<sup>345</sup> but this may be part of a trend that spans much longer.<sup>346</sup>

In other words, South Dakota is illustrative of JRI critics' point that making claims of improvement based on (perhaps inflated) projections may be misleading.<sup>347</sup> South Dakota's reforms have also caused considerable tension within the state's law enforcement and legal community,<sup>348</sup> and there has been some assertion that the problem is a failure to focus on reducing drug crime.<sup>349</sup> This result, combined with

---

343. *South Dakota*, BUREAU OF JUST. ASSISTANCE, [https://www.bja.gov/programs/justicereinvestment/south\\_dakota.html](https://www.bja.gov/programs/justicereinvestment/south_dakota.html) (last updated June 2015).

344. *Compare id.*, with S.D. DEP'T OF CORRS., SEPTEMBER 30, 2017 ADULT CORRECTIONS (2017) (on file with author).

345. *Compare* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2016: UNIFORM CRIME REPORTS tbl.3 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s/2016/tables/table-3> (showing South Dakota with a 417.4 violent crime rate), with FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012: UNIFORM CRIME REPORTS tbl.5 (2013), [https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s-2012/tables/5tabledatadecpdf/table\\_5\\_crime\\_in\\_the\\_united\\_states\\_by\\_state\\_2013.xls](https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s-2012/tables/5tabledatadecpdf/table_5_crime_in_the_united_states_by_state_2013.xls) (showing South Dakota with a 321.8 violent crime rate).

346. See John Hult, *Is South Dakota More Violent Than It's Ever Been?*, ARGUS LEADER (Jan. 13, 2017), <http://argusleader.com/story/news/crime/2017/01/13/south-dakota-more-violent-than-s-ever-been/96456896/>.

347. See *supra* note 321 and accompanying text.

348. See generally Angela Kennecke, *Problems with Parole & Probation*, KELOLAND MEDIA GRP. (July 28, 2016, 10:00 PM), <http://www.keloland.com/news/article/investigates/problems-with-parole-probation> (interviewing law enforcement and corrections officials, as well as prosecutors and civilians, on concerns about parole and probation); Jake Shama, *Legal Battle: SB 70 Creating Rift Between Officials, Judicial Process*, THE DAILY REPUBLIC (Mar. 12, 2016, 10:18 AM), <http://www.mitchellrepublic.com/news/local/3985571-legal-battle-sb-70-creating-rift-between-officials-judicial-process> (detailing law enforcement's frustration with South Dakota's JRI legislation).

349. See Kennecke, *supra* note 348 (quoting prosecutor complaining about failure "to break the cycle of addiction"); cf. ELDERBLOOM ET AL., *supra* note 338, at 12 (concluding that South Dakota still has a problem with the way it criminalizes drug ingestion). Pfaff suggests, in the alternative, that JRI in South Dakota was essentially an incomplete effort insofar as it left prosecutors with too much discretion that has been used to charge more low-level felony cases. PFAFF, *supra* note 271, at 164; cf. TONRY, *supra* note 20, at 23–24 (describing need to reform prosecutorial discretion).

South Dakota's reinvestment in criminal justice and law enforcement agencies rather than services and treatment for offenders and victims,<sup>350</sup> may also provide some validation to JRI critics' concerns about not fulfilling justice reinvestment's original purpose.<sup>351</sup>

#### D. The Risk in Risk Assessment

Pretrial risk assessment is to play a fundamental role in reducing prison populations in Alaska's new criminal justice regime.<sup>352</sup> Yet SB 91, though establishing a framework for how risk assessment will be employed,<sup>353</sup> offers little about what risk assessment might actually look like.<sup>354</sup> The legislative committees that reviewed SB 91 rarely cast more than a fleeting look, at least on the record, at the development of a risk assessment tool. And even then those exchanges hardly amounted to a searching inquiry. A committee hearing inquiry from Senator Anna MacKinnon to Nancy Meade, the general counsel of the Alaska Judicial Council, may be the most probing:

*MACKINNON*: How and who will adopt a risk assessment tool? Is it Corrections? Is it the courts? Who is going to adopt it? I know that they are out there in other states now and being successfully used as an objective tool; or at least I've been told. It's been asserted that there's an objective tool out there that can determine with a high rate of success—not 100% but a high rate of success—whether a person is risky or not. So who is going to adopt and choose the risk assessment?

*MEADE*: . . . That would be the Department of Corrections. . . . The pretrial services program is the group within the Department of Corrections that will be conducting the risk assessment and adopting the tool. They will be doing that in connection with the other affected criminal justice agencies. And there are tools, that I understand it, that you can buy off-the-

---

350. THE PEW CHARITABLE TRUSTS, *supra* note 337, at 6 tbl.1 (showing over one-third of initial \$8 million in reinvestment going into training and implementation and corrections infrastructure).

351. See AUSTIN ET AL., *supra* note 249, at 9–14 (arguing that JRI has become overly formalized and focused on the number of prisoners and has so departed from the original purpose of “justice reinvestment” to combat the causes of crime).

352. See *supra* notes 121–26 and accompanying text (discussing pretrial risk assessment tool's role in pretrial practice).

353. S.B. 91, 29th Leg., 2d Reg. Sess. § 59 (Alaska 2016) (setting forth new rules for pretrial release).

354. See *id.* § 117 (charging Commissioner of Department of Corrections with approving risk assessment instrument).

shelf, or that you can create yourself. In any case, the tool needs to be . . . normalized to the local population so that it comes up with the appropriate conclusion for our population.<sup>355</sup>

In an October 2017 report, the ACJC announced that it had selected a risk assessment tool developed by the Crime and Justice Institute (CJI) and that the CJI tool had been developed and validated for Alaska to ensure equal treatment.<sup>356</sup> Through the development process, the ACJC had to make two adaptations to CJI's tool to comply with SB 91 requirements.<sup>357</sup> First, SB 91 mandated that Alaska's tool assess a defendant as either low-risk, medium-risk, or high-risk, whereas CJI's original tool used five categories.<sup>358</sup> Additionally, SB 91 required that judges be provided a single score, whereas CJI's original tool separated risk of failure to appear from the risk of a new criminal offense.<sup>359</sup>

But the issues regarding actuarial instruments run far deeper than the legislature seems to have considered. As Senator Coghill noted, there are several issues with pretrial risk assessment.<sup>360</sup> One is whether making a pretrial release determination based upon an actuarial tool is constitutional.<sup>361</sup> Alaska's Constitution guarantees the right to be released on bail except for capital offenses.<sup>362</sup> The Alaska Supreme Court, in dicta, has qualified that while there is no absolute pretrial right to personal recognizance release, there is a strong interest in pretrial freedom and so release is favored.<sup>363</sup> Thus, pretrial risk assessment by an actuarial tool would seem to be constitutional so long as it was not eliminating the preference for pretrial release, which, of course, is the opposite of what the tool seeks insofar as it is an effort to facilitate *more* pretrial release. The United States Supreme Court also recently denied a petition for certiorari on the question of whether relying on a risk assessment tool, without providing the defendant discovery about how the tool makes its

---

355. Alaska S. Fin. Comm. Audio Tapes, 29th Leg. (Mar. 30, 2016) [hereinafter Fin. Comm. Mar. 30] (discussion between Sen. Anne Mackinnon and Nancy Meade at 2:46:45 PM).

356. ALASKA CRIMINAL JUSTICE COMM'N, ANNUAL REPORT 17 (2017), [www.ajc.state.ak.us/sites/default/files/imported/acjc/alaska\\_criminal\\_justice\\_commission\\_annual\\_report\\_2017.pdf](http://www.ajc.state.ak.us/sites/default/files/imported/acjc/alaska_criminal_justice_commission_annual_report_2017.pdf).

357. ALASKA CRIMINAL JUSTICE COMM'N, MEETING MINUTES 1 (Aug. 23, 2017), [www.ajc.state.ak.us/sites/default/files/meeting-summaries/commission/acjc8-23-17meetingsummary.pdf](http://www.ajc.state.ak.us/sites/default/files/meeting-summaries/commission/acjc8-23-17meetingsummary.pdf).

358. *Id.*

359. *Id.*

360. ALASKA S. JUD. COMM. MINUTES, 29th Leg. (Mar. 11, 2016) (statement of Sen. John Coghill at 3:30:31 PM).

361. *Id.*

362. ALASKA CONST. art. I, § 11.

363. *In re Doe v. State*, 487 P.2d 47, 51 (Alaska 1971) (citing *Reeves v. State*, 411 P.2d 212, 215-16 (Alaska 1966)).

calculation, violates due process.<sup>364</sup> In 2016, a Wisconsin man who had pled guilty and had a risk assessment included in his Presentence Investigation Report hoped the Court would reverse the Wisconsin Supreme Court's decision that there was no due process violation when a trial court relied on the risk assessment in sentencing without ever disclosing to him how it computed his risk assessment.<sup>365</sup> The federal government was invited to file a brief as *amicus curiae*,<sup>366</sup> and argued that the lack of full transparency did not amount to a due process violation.<sup>367</sup> It also noted that the Indiana Supreme Court had reached a similar conclusion.<sup>368</sup> The Supreme Court denied the petition.<sup>369</sup>

Another concern is whether actuarial tools function fairly. Supporters assert that Big Data more accurately predicts risk than humans.<sup>370</sup> Actuarial tools, then, are valuable given that some sort of risk assessment is an unavoidable part of the criminal justice process.<sup>371</sup> Opponents of the tools, while not necessarily conceding the point on accuracy,<sup>372</sup> rejoin that punishment ought to be about more than just accuracy when an individual's liberty is at stake.<sup>373</sup> If the ideal sentencing

---

364. Shayna Posses, *Justices Seek Solicitor General's Take on Reoffense-Risk Tool*, LAW360 (Mar. 6, 2017), <https://www.law360.com/appellate/articles/898446/justices-seek-solicitor-general-s-take-on-reoffense-risk-tool>.

365. *Id.*

366. *Id.*

367. Brief for the United States as *Amicus Curiae*, *Loomis v. Wisconsin*, No. 16-6387 (2016) at 12.

368. *Id.* at 21.

369. Michelle Liu, *Supreme Court Refuses to Hear Wisconsin Predictive Crime Assessment Case*, MILWAUKEE J. SENTINEL (June 26, 2017), <http://www.jsonline.com/story/news/crime/2017/06/26/supreme-court-refuses-hear-wisconsin-predictive-crime-assessment-case/428240001/>.

370. See Anna Maria Barry-Jester et al., *Should Prison Sentences Be Based on Crimes That Haven't Been Committed Yet?*, FIVETHIRTYEIGHT (Aug. 4, 2015), <https://fivethirtyeight.com/features/prison-reform-risk-assessment/>; see also Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1406 n.73 (listing sources that detail actuarial predictions' superior accuracy to human judgment).

371. See MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a, at 53, 55 (Tentative Draft No. 2, 2011) ("[J]udges . . . make daily judgments about . . . the risks of recidivism posed by offenders. These judgments, pervasive as they are, are notoriously imperfect."); see also Sonja B. Starr, *Sentencing, by the Numbers*, N.Y. TIMES (Aug. 10, 2014), <https://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html?ref=todayspaper&r=2> (conceding that judges always make judgments about future risk informally).

372. See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 842-62 (2014) (questioning accuracy of actuarial tools).

373. See Starr, *supra* note 371 ("[I]t's worth considering whether actuarial methods can help make . . . predictions more accurate. The problem isn't risk assessment per se; it's basing scores on demographic and socioeconomics."); Anna Maria Barry-Jester, *supra* note 370 ("But to critics, just because a trait predicts

system would base punishment on the individual and the charged conduct, then there is something deeply unfair about determining an individual's punishment based on group averages.<sup>374</sup> Opponents add that risk assessment tools are racially biased and will only exacerbate racial injustice in America's mass incarceration problem.<sup>375</sup> ProPublica studied one risk assessment tool used in Florida, called COMPAS, and found that it falsely flagged black defendants as high-risk twice as frequently as it did white defendants.<sup>376</sup> COMPAS also misjudged white defendants to be low-risk more frequently than it did black defendants.<sup>377</sup>

Alaskan legislators do not seem to have discussed COMPAS,<sup>378</sup> but they did explicitly mention Kentucky's tool in hearings,<sup>379</sup> long before the CJI tool was selected. Kentucky's validated tool, developed by the Arnold Foundation,<sup>380</sup> weighs twelve questions considering the defendant's residency, means of support, charge and prior criminal history, as well as history of drug or alcohol abuse.<sup>381</sup> The tool has generally been considered to be successful, with Kentucky authorities reporting that personal recognizance and unsecured bond release have increased without diminishing appearance or public safety rates.<sup>382</sup> One can imagine,

---

crime doesn't mean it's fair to use . . .").

374. See, e.g., Att'y Gen. Eric Holder, Remarks at Nat'l Ass'n of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th> (discussing values of data in justice, but expressing deep concern about implications for individualized and equal justice); Starr, *supra* note 371 (calling current use of risk assessment tools "deeply unfair").

375. See generally Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (studying use of COMPAS risk assessment tool in one county and finding bias against African-Americans). See also Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015) (arguing against use of all risk assessment because advantages outweighed by cost to racial justice).

376. Angwin et al., *supra* note 375.

377. *Id.*

378. But see Nathaniel Herz, *As Alaska Prepares to Use a Crime Prediction Tool, Racial Bias is Found in One*, ALASKA DISPATCH NEWS (June 27, 2016), <https://www.adn.com/alaska-news/crime-justice/2016/05/24/as-alaska-prepares-to-use-a-crime-prediction-tool-racial-bias-is-found-in-one/> (quoting Sen. Coghill as neither confirming nor denying interest in COMPAS, but stating that Alaska's system will be subject to tight scrutiny and review, as required by SB 91).

379. ALASKA S. JUD. COMM. MINUTES, 29th Leg. (Mar. 11, 2016) (statement of Jordan Schilling, Staff, Sen. John Coghill at 2:23:41 PM).

380. Anna Maria Barry-Jester et al., *supra* note 370.

381. JAMES AUSTIN ET AL., KENTUCKY PRETRIAL RISK ASSESSMENT INSTRUMENT VALIDATION tbl.11 (2010), <http://www.pretrial.org/download/risk-assessment/2010%20KY%20Risk%20Assessment%20Study%20JFA.pdf>.

382. See PRETRIAL SERVS., ADMIN. OFF. OF THE CTS. KY. CT. OF JUST., PRETRIAL REFORM IN KENTUCKY 16–17 (showing increase in pretrial release, appearance rate, and public safety rate before and after validation of risk assessment tool).

however, how factors like residency, substance abuse history, and means of support, even if not explicitly biased, may cause some individual offenders to be prejudiced. It is unclear what factors the CJI tool uses in its calculation.

Proponents of risk assessment tools have vigorously disputed the charges of racial bias,<sup>383</sup> and have added that even if risk assessments were identified as biased, pernicious factors can be omitted.<sup>384</sup> But opponents respond that this belies the entire purpose of the tool; if the benefit of the tool is accuracy, then the proponents' logic would require the use of race-related factors because they tend to correlate with accuracy.<sup>385</sup> Not to consider race, then, would undermine the principal benefits of risk assessment tools: their objectivity and accuracy.<sup>386</sup> Proponents respond by pointing to the safeguard of judicial discretion,<sup>387</sup> as is provided for in SB 91.<sup>388</sup> Ultimately, they might contend, judges can and will correct unfairness. However, in addition to that not being borne out by years of judges making their own risk assessments in a manner that has often been racially prejudicial,<sup>389</sup> opponents of the tools contend that advocates ought to be careful what they wish for.

In sum, the issue is extraordinarily fraught. SB 91 requires that the risk assessment tool be validated,<sup>390</sup> and, according to the ACJC's 2017 Annual Report, it has been.<sup>391</sup> Stakeholders should continue to scrutinize

---

383. ANTHONY W. FLORES ET AL., FALSE POSITIVES, FALSE NEGATIVES, AND FALSE ANALYSES: A REJOINDER TO "MACHINE BIAS: THERE'S SOFTWARE ACROSS THE COUNTRY TO PREDICT FUTURE CRIMINALS. AND IT'S BIASED AGAINST BLACKS." 19 (July 11, 2016), [http://www.crj.org/assets/2017/07/9\\_Machine\\_bias\\_rejoinder.pdf](http://www.crj.org/assets/2017/07/9_Machine_bias_rejoinder.pdf); JENNIFER L. SKEEM & CHRISTOPHER T. LOWENKAMP, RISK, RACE, & RECIDIVISM: PREDICTIVE BIAS & DISPARATE IMPACT 29, 36–37 (June 14, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2687339](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339).

384. See SKEEM & LOWENKAMP, *supra* note 383, at 6 (noting studies showing "how to remove 'invidious predictors'").

385. See Joan Petersilia & Susan Turner, *Guideline-Based Justice: Prediction and Racial Minorities*, 9 CRIME & JUST. 151, 173–74 (1987).

386. See J.C. Olesen, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1356–58 (2011) (noting strong correlation between race and recidivism and that, although there are sound reasons for exclusion, it may make predictors less accurate).

387. See JOINT TECH. COMM., JTC RESOURCE BULLETIN: USING TECHNOLOGY TO IMPROVE PRETRIAL RELEASE DECISION-MAKING 13 (2016), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=91b29133-7689-ca6f-0147-b0720ec901e1&forceDialog=0>.

388. See S.B. 91, 29th Leg., 2d Reg. Sess. § 59 (Alaska 2016) (granting judges discretion to not allow release for certain defendants if clear and convincing evidence of risk to community for not appearing).

389. See generally Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919 (2013) (overviewing racial disparities in bail determinations and pretrial decisions).

390. S.B. 91, 29th Leg., 2d Reg. Sess. § 117 (Alaska 2016).

391. ALASKA CRIMINAL JUSTICE COMM'N, *supra* note 356, at 18.

the tool carefully to ensure that the CJJ tool reliably does more good than harm once implemented in January of 2018.

### E. Alaska Natives and Reinvestment

The ACJC's Justice Reinvestment Report never mentions the impact that criminal justice reform will have on Alaska Natives.<sup>392</sup> Although Alaska Natives make up just one-sixth of Alaska's population, they make up over one-third of the state's prison population.<sup>393</sup> In 2015, Alaska Natives constituted nearly 40% of all inmates convicted of alcohol and personal offenses, one-third of those convicted of property and public order offenses, and 44% of those convicted of registerable sex offenses.<sup>394</sup> Among the state's 1792 Alaska Native inmates in 2016, almost one-third were property offenders and one-fifth were sex offenders.<sup>395</sup> A 2013 study found that almost half of the state's rape victims were Alaska Natives, and that Alaska Natives suffer domestic violence at immensely higher rates than other groups in both the state and the country.<sup>396</sup> Alaska Natives also far outpaced other demographic groups in Alaska when it came to the offender population's criminal history as of 2013, with 29% of Alaska Natives having no prior felonies but four or more misdemeanors.<sup>397</sup> A study conducted in 2006 found that alcohol abuse was a contributing factor in 97% of all crimes committed by Alaska Natives.<sup>398</sup>

These are devastating statistics. Alaska Natives are precisely the type of community, so harmed by crime, that the originators of justice reinvestment were concerned about. Successful reform in Alaska's growing prison population, the data plainly indicates, requires some specific attention to address the needs and challenges of Alaska Natives.

Compounding those challenges, rural Alaskan villages are disadvantaged by a lack of resources for public safety, for victims, and for substance abusers.<sup>399</sup> Relatedly, as of 2015, Alaska Natives were placed on

---

392. See generally JUSTICE REINVESTMENT REPORT, *supra* note 6.

393. THE PEW CHARITABLE TRUSTS, *supra* note 41, at 15.

394. DIV. OF ADMIN. SERV., 2015 OFFENDER PROFILE 17-18, ALASKA DEP'T OF CORRECTIONS (2016) [hereinafter 2015 OFFENDER PROFILE], <http://www.correct.state.ak.us/admin/docs/2015profile.pdf>.

395. *Id.*

396. INDIAN LAW. & ORDER. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 41 (2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf).

397. ALASKA FELONY SENTENCING PATTERNS, *supra* note 23, at 33 tbl.11.

398. Ryan Fortson, *Advancing Tribal Court Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 98 (2015).

399. INDIAN LAW. & ORDER. COMM'N, *supra* note 396, at 41 (noting lack of police

electronic monitoring at a rate of 25%, only slightly higher than African-Americans who more often live in urban areas closer to courts and jails, despite far more Alaska Natives being involved in the criminal justice system.<sup>400</sup> That means that because of their remoteness, large numbers of Alaska Natives are brought hundreds of miles from their families and communities to await trial, a problem other demographic groups confront less frequently.

Alaska Native groups, such as the Alaska Federation of Natives,<sup>401</sup> the Tanana Chiefs Conference,<sup>402</sup> the Bristol Bay Native Corporation,<sup>403</sup> and the Central Council of Tlingit & Haida Indian Tribes of Alaska,<sup>404</sup> have expressed support for SB 91. They conveyed optimism about, among other provisions, reductions in pre-trial incarceration,<sup>405</sup> graduated sanctions for VCOR,<sup>406</sup> relaxing of driver's license restrictions,<sup>407</sup> and suspended entry of judgment.<sup>408</sup> Uniformly, Alaska Native groups were also supportive of reinvestment opportunities.<sup>409</sup>

Perhaps reinvestment is SB 91's answer to better justice for Alaska Natives. While some elements of SB 91 may continue to disadvantage Alaska Natives,<sup>410</sup> if SB 91 is to reduce the deluge of Alaska Natives into

---

officers, shelters for women who are victims of domestic violence, and substance abuse treatment facilities in rural Alaska).

400. 2015 OFFENDER PROFILE, *supra* note 394, at 23.

401. Julie Kitka, *Criminal Justice Reform is Right on the Money for Rural Alaska*, ALASKA DISPATCH NEWS (June 26, 2016), <https://www.adn.com/commentary/article/criminal-justice-reform-right-money-rural-alaska/2016/04/04/>.

402. Letter from Victor Joseph, President & CEO, Tanana Chiefs Conference, to S. State Affairs Comm. Members (Feb. 29, 2016), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=63793](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=63793).

403. Letter from Jason Metrokin, President & CEO, Bristol Bay Native Corp., to Reps. Mark Neuman & Steve Thompson (Apr. 20, 2016), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=66455](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=66455).

404. ALASKA S. STATE AFFAIRS. COMM. MINUTES, 29th Leg. (Mar. 8, 2016) [hereinafter Singh Statement] (statement of Natasha Singh, Gen. Counsel, Cent. Council of Tlingit & Haida Indian Tribes of Alaska at 9:49:35 AM).

405. *E.g.*, Kitka, *supra* note 401.

406. *E.g.*, *id.*

407. *E.g.*, Letter from Julie Kitka, President, The Alaska Fed'n of Natives, to S. President Kevin Meyer & H. Speaker Mike Chenault (Feb. 9, 2016), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=63793](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=63793).

408. Letter from Victor Joseph to S. State Affairs Comm. Members, *supra* note 402.

409. Kitka, *supra* note 401; *see* Letter from Victor Joseph to S. State Affairs Comm. Members, *supra* note 402; Letter from Jason Metrokin to Mark Neuman & Steve Thompson, *supra* note 403; Singh Statement, *supra* note 404.

410. For example, according to Senator Coghill, who was also an ACJC commissioner, the ACJC recommended a \$2000 felony theft threshold – which the Legislature had previously lowered to \$1000 – in part to account for the fact that property valuations are so much greater in the Alaskan bush compared to urban and suburban Alaska. ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 27, 2016) (statement of Sen. John Coghill at 5:43:10 PM). For instance, stealing the same

state prisons, reform will have to meaningfully attack the resource shortage, substance abuse, and victimization issues that disparately impact Alaska Natives and others who live in rural Alaska. However, given the experiences of other states, where reinvestment has often returned to the criminal justice system rather than the types of services that help individuals overcome criminal tendencies,<sup>411</sup> critics of JRI are not so optimistic that meaningful reinvestment will happen.<sup>412</sup> This was, after all, Cadora and Turner's primary critique of the way justice reinvestment has been implemented.<sup>413</sup>

A lack of prepared reinvestment was part of the problem in South Dakota.<sup>414</sup> It also may be borne out in Alaska too. SB 91 makes no reinvestment commitments, but rather leaves it to the ACJC to make annual recommendations.<sup>415</sup> According to Pew's review of SB 91 fiscal notes, over half of Alaska's \$98 million in projected reinvestment between 2016 and 2022 will go to "pretrial services and supervision."<sup>416</sup> Another \$7 million will go to implementation, while \$11 million will be left for victims' services and violence prevention, and \$15.5 million will be directed to "community-based behavioral health and re-entry services."<sup>417</sup> Finally, \$11 million will go to treatment in prisons.<sup>418</sup> In 2018, \$17 million of the \$25 million reinvested will go to administrative costs.<sup>419</sup> Just one-tenth of that, a mere \$1.7 million, will go to substance abuse

---

snow machine could be a misdemeanor in Anchorage but a felony in Anvik simply because the snow machine is more valuable in the bush. Additionally, it never seemed to be clear, even to legislators, how the benefits of avoiding third-party custodians through electronic monitoring will actually accrue to villagers. See ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 20, 2016) (statements of Rep. Les Gara and Dean Williams, Comm'r, Dep't of Corrections at 2:21:47 PM) (expressing concern that rural Alaskans will not benefit from expanded electronic monitoring).

411. See, e.g., PFAFF, *supra* note 271, at 165, 226–27 (overviewing reinvestment problems in JRI programs).

412. AUSTIN ET AL., *supra* note 249, at 9–14 (questioning whether JRI serves justice reinvestment's original purpose of delivering crime-reducing spending to high incarceration communities).

413. See *supra* notes 253–57 (comparing original intention of justice reinvestment to reinvest in communities weakened by crime with system-oriented way that reinvestment has taken place).

414. THE PEW CHARITABLE TRUSTS, *supra* note 337, at 6 tbl.1 (showing over one-third of initial \$8 million in reinvestment going into training and implementation and corrections infrastructure).

415. S.B. 91, 29th Leg., 2d Reg. Sess. §§ 163, 165 (Alaska 2016).

416. THE PEW CHARITABLE TRUSTS, *supra* note 41, at 20 tbl.5.

417. *Id.*

418. *Id.*

419. Devin Kelly et al., *How SB 91 Has Changed Alaska's Criminal Justice System*, ALASKA DISPATCH NEWS (Oct. 23, 2017), <https://www.adn.com/alaska-news/crime-courts-2017/10/21/how-sb-91-has-changed-alaskas-criminal-justice-system/>.

treatment in prisons.<sup>420</sup> Less than \$4 million would go out-of-prison treatment and prevention programs.<sup>421</sup> And of the \$3 million allocated for re-entry, over half of that was appropriated to Medicaid claims.<sup>422</sup>

In the lead-up to the 2017 special legislative session, it was frequently lamented that reinvestment did not occur early enough in SB 91's implementation.<sup>423</sup> ACJC commissioners similarly indicated at their August 2017 meeting that "there has been no strategic plan for deploying reinvestment money," "a lot of time [had been spent] talking about mechanics of reform, but not the details of reinvestment," and that there had been struggles "with a lack of infrastructure for reentry work."<sup>424</sup> The ACJC's 2017 annual report "strongly recommend[ed] further reinvestment in treatment for substance abuse and mental health issues going forward."<sup>425</sup> The report also provided several "principles" for reinvestment. Most of these—aimed toward evidenced-based and data-driven practices, as well as tangible monetary returns—are deeply intertwined with the JRI model.<sup>426</sup> Principles six and seven offer promise by urging targeting across the state and funding for prevention programming.<sup>427</sup>

For SB 91 to be what it was promised—a scheme that will save the state money by shrinking the prison population, and keep the public safer by using that money to slow the conveyor belt of individuals into the criminal justice system—reinvestment must play a significant role. For example, reinvestment could be directed toward meeting the ACJC's preferred recommendation of making ASAP available to more

---

420. *Id.*

421. *Id.*

422. *Id.*

423. Victoria Taylor, *Anchorage Assembly Drafts Resolution Addressing Some Public Safety Concerns*, KTOO (Oct. 4, 2017), <https://www.ktoo.org/2017/10/04/anger-crime-boils-lawmakers-weigh-changes-law/> (quoting Anchorage Assemblyman Eric Croft as complaining that although SB 91 savings were upfront, their reinvestment was back-loaded or never funded treatment and probation); Lori Townsend, *The Mayor of Anchorage Addresses Concern over Crime and Safety*, ALASKA PUB. MEDIA (Sept. 22, 2017), <https://www.alaskapublic.org/2017/09/22/the-mayor-of-anchorage-addresses-concern-over-crime-and-safety/> (quoting Anchorage Mayor Ethan Berkowitz as saying "Senate Bill 91 was intended to replace incarceration with rehabilitation. . . . But they didn't back-fill at the same time with putting the rehabilitation resources in place. So in a little bit, we've not even seen [SB 91] the way it was created.").

424. See ALASKA CRIMINAL JUSTICE COMM'N, MEETING MINUTES 9 (Aug. 23, 2017), [www.ajc.state.ak.us/sites/default/files/meeting-summaries/commission/acjc8-23-17meetingsummary.pdf](http://www.ajc.state.ak.us/sites/default/files/meeting-summaries/commission/acjc8-23-17meetingsummary.pdf) (quoting ACJC Chairman Stephanie Rhoades, Chairman Razo and Commissioner Stanfill, respectively).

425. ALASKA CRIMINAL JUSTICE COMM'N, *supra* note 356, at ix.

426. *Id.* at 56–59.

427. *Id.* at 59.

individuals through increased funding.<sup>428</sup> The importance of reinvestment is accentuated by the interplay between crime and Alaska's severe opioid crisis, which causes crime.<sup>429</sup>

Accordingly, stakeholders, Alaska Native stakeholders particularly, should be careful to ensure that SB 91's savings support measures that will reduce crime and help both offenders and victims in communities, both rural and urban, that need the assistance the most.

## CONCLUSION

This Note examined SB 91, Alaska's version of justice reinvestment, and addressed some of the potential concerns that may lie ahead for the state to facilitate discussion and evaluation of SB 91. There are other issues to be sure. This Note did not discuss, for example, whether reduced sentences will affect plea bargaining and trial rates, whether more lenient punishment will disincentivize time-intensive diversion to therapeutic courts, whether SB 91 provides sufficient regard for constitutionally-protected victims' rights, and how certain changes might alter the conduct of police and prosecutors.

The uncertainty that lies ahead for SB 91 is captured by what has taken place in other states, and even by events in Alaska in the year since the law's enactment. Not half a year after Governor Walker signed SB 91, the ACJC provided fourteen new recommendations, neither unanimously approved nor based on empirical evidence, that advocated rolling back some of SB 91's changes.<sup>430</sup> The new recommendations were offered in response to criticism from the public,<sup>431</sup> law enforcement,<sup>432</sup> and

---

428. See *supra* notes 229–30 and accompanying text.

429. See *id.* at 47; see also Press Release, Jahna Lindemuth & Walt Monegan, Commentary: SB 54 (Oct. 3, 2017), <http://www.law.state.ak.us/press/releases/2017/100317-SB54.html> (regarding opioid epidemic as a foremost issue contributing to Alaska's public safety problem); Townsend, *supra* note 423 (reporting concerns from Anchorage Mayor Ethan Berkowitz about opioid epidemic's impact on increased crime rates); Travis Khachatoorian, *After Increase in Crime, Anchorage Business Owners Advocate for Changes to SB 91*, KTUU (Sept. 20, 2017), <http://www.ktuu.com/content/news/Business-owners-meet-with-criminal-justice-446330263.html> (quoting Anchorage District Attorney Clint Champion's caution that opioid crisis needs to be taken into account in increased crime rates).

430. See RECOMMENDATIONS TO THE LEGISLATURE, *supra* note 15, at 1–2.

431. See *id.* at 1, 6 (noting public concern); see also Liz Kellar, *supra* note 277 (quoting Sen. Coghill as saying, "Public condemnation has played a huge part in this. We cannot ignore the public, who feel [sic] so violated.").

432. See RECOMMENDATIONS TO THE LEGISLATURE, *supra* note 15, at 1, 3, 5 (noting law enforcement concerns); see also Kellar, *supra* note 277 (noting some SB 91 changes were unpopular with law enforcement). Additionally, the representative of law enforcement on the ACJC, Juneau Police Department Lieutenant Kris Sell,

prosecutors.<sup>433</sup> Among other objectives, the recommendations proposed returning VCOR to misdemeanor status<sup>434</sup> and reinstating jail time for class C felonies<sup>435</sup> and property theft below \$250.<sup>436</sup> In April 2017, SB 54, which more or less embodies these changes, had passed the Senate by a nineteen-to-one vote.<sup>437</sup> In some regards, though, the Senate version of SB 54 goes even further than the ACJC's new recommendations. For example, while the ACJC advised restoring a zero- to ninety-day active prison presumption for class C felonies,<sup>438</sup> SB 54 rolls the presumption back to range from zero days to one year.<sup>439</sup> SB 54 also adds a five-day suspended sentence for property theft less than \$250 (fourth degree property theft), a five-day active sentence for the second conviction, and ten days for every conviction thereafter.<sup>440</sup> The ACJC's new recommendations had only suggested that a third offense be punishable by up to ten days in jail.<sup>441</sup> SB 54's third main change is to return a violation of conditions of release to a misdemeanor, thereby making it punishable by prison time.<sup>442</sup>

SB 54 has also fractured the broad coalition of stakeholders that helped usher in SB 91.<sup>443</sup> This retrenchment is a reminder of just how

---

resigned from the ACJC, allegedly due to pushback from the law enforcement community. Liz Kellar, *With Clashing Views on SB 91, JPD Lt. Kris Sell Resigns from Criminal Justice Commission*, JUNEAU EMPIRE (Feb. 16, 2017), <http://juneauempire.com/local/2017-02-16/clashing-views-sb-91-jpd-lt-kris-sell-resigns-criminal-justice-commission>. Sell had been a charismatic advocate of the ACJC's recommendations. See, e.g., ALASKA H. FIN. COMM. MINUTES, 29th Leg. (Apr. 19, 2016) (statement of Lt. Kris Sell at 2:03:21 PM) (testifying as to difficult personal "journey" on criminal justice reform and consequent unpopularity from law enforcement colleagues).

433. See RECOMMENDATIONS TO THE LEGISLATURE, *supra* note 15, at 1, 3, 5, 6 (noting prosecutor concerns).

434. *Id.* at 2.

435. *Id.* at 5.

436. *Id.* at 2–3.

437. ALASKA S. JOURNAL, 30th Leg., 1st Sess. 839 (Apr. 7, 2017).

438. RECOMMENDATIONS TO THE LEGISLATURE, *supra* note 15, at 5.

439. S.B. 54, 30th Leg., 1st Sess. § 6 (Alaska 2017).

440. *Id.* § 10.

441. RECOMMENDATIONS TO THE LEGISLATURE, *supra* note 15, at 3.

442. *Id.* § 2.

443. See Letter from the Bd. of Dirs. of the Alaska Ass'n of Chiefs of Police, to Sen. Anna MacKinnon (Mar. 27, 2017), [http://www.akleg.gov/basis/get\\_documents.asp?session=30&docid=15055](http://www.akleg.gov/basis/get_documents.asp?session=30&docid=15055) (conveying law enforcement's support of SB 54 to rollback SB 91); see also *supra* note 280–281 (discussing Senator Costello's support of a bill to repeal SB 91, although she was formerly a co-sponsor of SB 91). But see Letter from Tara A. Rich, to Sens. Lyman Hoffman & Anna MacKinnon, (Mar. 27, 2017), [http://www.akleg.gov/basis/get\\_documents.asp?session=30&docid=15054](http://www.akleg.gov/basis/get_documents.asp?session=30&docid=15054) (conveying ACLU of Alaska's opposition to SB 54 and support for allowing SB 91 reforms to mature).

politically fraught criminal justice reform can be, and how evaluation of legislated criminal justice reform must be mindful of political realities.<sup>444</sup>

Part of what this Note has aimed to point out is that some of the rollbacks to SB 91 might be prudent on their own merits. The absence of a potential for prison time for a first-time class C felony, for instance, was problematic.<sup>445</sup> The reduction of sanctions for petty theft likewise did significant damage to any deterrence function that criminal sanction might play for those offenses.<sup>446</sup>

But it would be rash to lose faith in SB 91 because of the 2016 crime data's upward trend.<sup>447</sup> Professor Brad A. Myrstol of the University of Alaska Anchorage Justice Center has cautioned that there is not enough data to support a conclusion that SB 91 *caused* the reported increase in crime.<sup>448</sup> Professor Myrstol and Pamela Cravez have wisely cautioned that community variance would seem to belie the arguments that a statewide change (i.e., SB 91) was the primary cause of changes in crime rates.<sup>449</sup> They also contend that SB 91 is really about recidivism reduction, meaning that it is imperative to wait until there is more data on whether offenders are repeating more or less frequently.<sup>450</sup> But, most importantly perhaps, they note that crime has been trending upward for the past several years, not just in 2016.<sup>451</sup>

The 2016 crime report data, itself, also challenges the hypothesis that SB 91 has led to more crime. For instance, consider the critique that the reduced sanctions for fourth degree theft were letting petty thieves steal with impunity.<sup>452</sup> If so, we might expect to see more shoplifting, but shoplifting actually went down by 6% between 2015 and 2016.<sup>453</sup>

---

444. See *supra* discussion Part III.A.

445. See *supra* notes 199-202 and accompanying text.

446. See *supra* notes 169-72 and accompanying text.

447. See Herz, *supra* note 42.

448. Hillman, *supra* note 276 (audio recording with Myrstol discussing trouble with pinning increase in crime to SB 91); see also Myrstol & Cravez, *supra* note 276, at 2.

449. Myrstol & Cravez, *supra* note 276, at 2; see also Hillman, *supra* note 276 (audio recording with host and Myrstol comparing crime trends in various parts of the state).

450. Myrstol & Cravez, *supra* note 276, at 2.

451. *Id.* at 1-2 (presenting four figures showing increases in crime in recent years); see also Herz, *supra* note 42 (showing increased incidences of crime in seven categories of offenses since 2012).

452. See *supra* note 170 and accompanying text.

453. Compare CHRISTEN L. SPEARS, ALASKA DEP'T OF PUB. SAFETY, CRIME IN ALASKA 2016: UNIFORM CRIME REPORTING PROGRAM ANNUAL REPORT 29 (2017), [dps.alaska.gov/DPSPublicSite/media/Statewide/Documents/UCR/CIAC2016-for-publication-REV-09-06-17.pdf](https://dps.alaska.gov/DPSPublicSite/media/Statewide/Documents/UCR/CIAC2016-for-publication-REV-09-06-17.pdf) (3383 shoplifting offenses in 2016), with CHRISTEN L. MCCLURE, ALASKA DEP'T OF PUB. SAFETY, CRIME IN ALASKA 2015: UNIFORM CRIME REPORTING PROGRAM ANNUAL REPORT 29 (2016), [dps.alaska.gov/](https://dps.alaska.gov/)

Additionally, the average value stolen in reported larceny offenses, which does not involve force and therefore most likely captures the changes in SB 91 that worried critics, went up by \$40.<sup>454</sup> This might further cast doubt on SB 91's causal role in Alaskan crime in 2016 insofar as we would expect to see more low-level thefts, and therefore a decrease in the average value stolen, if SB 91 was emboldening petty criminals. However, the increase could also be from small thefts going unreported more frequently. In short, while it is tempting to blame SB 91 for increased crime in Alaska in 2016, the data is not clear.

Moreover, SB 91 has not even been fully implemented. Important components, like risk assessments, have not yet gone into effect.<sup>455</sup> Rolling back SB 91 now, at the cost of millions of dollars,<sup>456</sup> for what was always going to be a long-term project on such a limited data set would be imprudent.

Ultimately, for a number of reasons—whether race, economics, scholarship, politics, or public safety—criminal justice has returned as a salient issue in the American consciousness.<sup>457</sup> What this Note illustrates is that issue salience is one thing, but issue framing is another.<sup>458</sup> Alaska has chosen a particular frame, fixed largely, although not exclusively, around fiscal responsibility. SB 91's goals have thus been cast as saving money that can then be reinvested into the criminal justice system in ways

---

DPSPublicSite/media/Statewide/Documents/UCR/2015-CIAK-Revised-02-08-2017.pdf (3601 shoplifting offenses in 2015).

454. CHRISTEN L. SPEARS, ALASKA DEP'T OF PUB. SAFETY, CRIME IN ALASKA 2016: UNIFORM CRIME REPORTING PROGRAM ANNUAL REPORT 28 (2017), [dps.alaska.gov/DPSPublicSite/media/Statewide/Documents/UCR/CIAK2016-for-publication-REV-09-06-17.pdf](https://dps.alaska.gov/DPSPublicSite/media/Statewide/Documents/UCR/CIAK2016-for-publication-REV-09-06-17.pdf).

455. Brad A. Myrstol & Pamela Cravez, *Crime Rates and Alaska Criminal Justice Reform*, ALASKA JUST. F. (last visited Oct. 21, 2017), <https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/34/2fall2017/a.crime-rates-and-reform.cshtml>; see also Letter from Tara A. Rich to Sens. Lyman Hoffman & Anna MacKinnon, *supra* note 443 (arguing that it is too soon to undo SB 91 before key parts of the process, particularly reinvestment, are implemented).

456. James Brooks, *Rolling Back Criminal Justice Reform Would Cost Alaska Millions*, JUNEAU EMPIRE (Mar. 30, 2017), <http://juneauempire.com/state/2017-03-29/rolling-back-criminal-justice-reform-would-cost-alaska-millions>.

457. See, e.g., Steven M. Teles, *Why Criminal Justice Reform Still Needs the Right*, CATO UNBOUND (Nov. 7, 2016), <https://www.cato-unbound.org/2016/11/07/steven-m-teles/why-criminal-justice-reform-still-needs-right> (discussing change in issue salience of criminal justice reform).

458. See Kevin M. Drakulich & Eileen M. Kirk, *Public Opinion and Criminal Justice Reform*, 15 CRIMINOLOGY & PUB. POL'Y 171, 173-75 (2016) (discussing importance of framing in criminal justice reform).

that otherwise would be unavailable given the state's budget shortfalls.<sup>459</sup> SB 91's trade-offs have likewise been largely focused on making the policy choices that will do the most to reduce prison populations and corrections costs. When Pew, the ACJC, and the legislature evaluate SB 91's success, they will likely look at three metrics: the prison population, the corrections budget, and recidivism rates. In sum, the choice of framing around cost has had impacts at the front-end (goal setting), the middle (policymaking), and the back-end (evaluation) of the SB 91 process. There is undoubtedly sound reasoning behind SB 91's framing and SB 91's policies.<sup>460</sup> No one can fault Senator Coghill's urging that SB 91, or something like it, was necessary.<sup>461</sup> But whether that framing can create wholesale and long-term improvement to the health of Alaska's criminal justice system may depend on recognizing its limitations.

---

459. See, e.g., ALASKA S. FIN. COMM. MINUTES, 29th Leg. (Mar. 29, 2016) (statement of Jordan Schilling, Staff, Sen. John Coghill at 9:16:38 AM) (emphasizing halting spending on practices that are not working and reinvesting in those that data has shown will).

460. See PFAFF, *supra* note 271, at 186 (acknowledging prudence of making reforms that may only reach "low-hanging fruit"); see AUSTIN ET AL., *supra* note 249, at 1 ("JRI has played a major role in educating state legislators and public officials about the bloated and expensive correctional system, persuading them to undertake reforms not previously on the table. Considering the country's four-decade addiction to mass incarceration and harsh punishment, the general refusal to acknowledge its failures and the monumental resistance to change, JRI's most enduring contribution to date may be its having created a space and a mindset among state officials to seriously entertain the possibility of lowering prison populations.").

461. See *supra* note 62 and accompanying text.