

April 2013

Alternatives to Incarceration: Why Is California Lagging Behind?

Michael Vitiello

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

 Part of the [Law Commons](#)

Recommended Citation

Vitiello, Michael (2013) "Alternatives to Incarceration: Why Is California Lagging Behind?," *Georgia State University Law Review*: Vol. 28 : Iss. 4 , Article 10.

Available at: <http://readingroom.law.gsu.edu/gsulr/vol28/iss4/10>

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

ALTERNATIVES TO INCARCERATION: WHY IS CALIFORNIA LAGGING BEHIND?

Michael Vitiello*

I. INTRODUCTION

Until quite recently, America was on an incarceration binge for almost forty years.¹ While the sharp increase in incarceration is almost certainly one cause of reduced crime rates in recent years,² a broad consensus has emerged that we incarcerate too many people to the point of diminishing returns.³ Further, commentators across a broad political spectrum recognize that alternatives to incarceration are necessary, especially in light of the current budget crises in many states.⁴ They also agree that states can protect the public with sound sentencing policies while saving money by resorting to less costly alternatives to incarceration.⁵

Critics of excessive incarceration include liberals,⁶ centrists,⁷ and conservatives⁸ outside the political arena. Proposals for reform vary, but many of their proposals share broad outlines for reform.⁹ In light of this consensus, one might have expected that sentencing reform

* Distinguished Professor and Scholar, the University of the Pacific McGeorge School of Law; University of Pennsylvania, J.D., 1974; Swarthmore College, B.A., 1969. Special thanks to my research assistants R.J. Cooper and Ashley Connell for their research efforts and to Ashley for organizing their efforts.

1. PEW CENTER ON THE STATES, PEW CHARITABLE TRUSTS, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS (2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf.

2. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 56 (2007).

3. See *infra* notes 74–119 and accompanying text.

4. See *infra* Part III.

5. See *infra* notes 74–119, Part III.

6. Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 952 (2004).

7. *Background/Mission/Approach*, PEW CENTER ON THE STATES, http://www.pewcenteronthestates.org/about_background.aspx (last visited Dec. 19, 2011).

8. *What's Gone Wrong*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-criminal-justice-challenge/whats-gone-wrong/> (last visited Dec. 19, 2011).

9. See *infra* notes 77–112 and accompanying text.

would have been easy to achieve nationwide. That has simply not been the case.¹⁰

Many of us predicted that a weak economy would lead to sentencing reform.¹¹ In some states, that has begun to take place. In recent years, both very conservative states, like Mississippi and Texas, and liberal states, like Washington, have achieved modest and sensible reforms.¹² At least, early reports suggest that public safety has not been sacrificed.¹³

California has the largest state prison system in the United States¹⁴ and a gaping hole in its budget.¹⁵ As California's economic crisis has become evident, some politicians have tried to advance modest reform proposals, including recourse to a sentencing commission¹⁶ and compassionate release of older prisoners.¹⁷ But California politicians have largely rejected proposals that have proven successful elsewhere.¹⁸ Federal court intervention, affirmed by a divided Supreme Court, has kept some pressure on California politicians to reform a badly designed system.¹⁹ Recent legislation advanced by Governor Brown is a partial and relatively tame

10. See *infra* Part VI.

11. See Vitiello & Kelso, *supra* note 6, at 952; Michael Santos, *Economic Crisis Opens Possibilities for Prison Reform*, PRISON NEWS BLOG (Mar. 4, 2009), <http://prisonnewsblog.com/2009/03/economic-crisis-opens-possibilities-for-prison-reform/>.

12. See *infra* Part III.

13. *Id.*

14. Sonja Steptoe, *California's Growing Prison Crisis*, TIME (June 21, 2007), <http://www.time.com/time/nation/article/0,8599,1635592,00.html>.

15. Claire Suddath, *Spotlight: California's Budget Crisis*, TIME (July 27, 2009), <http://www.time.com/time/magazine/article/0,9171,1910985-1,00.html>. Complicating the problem for the state is the fact that the prison system consumes about eleven percent of discretionary spending. Randal C. Archibold, *California, in Financial Crisis, Opens Doors*, N.Y. TIMES (Mar. 23, 2010), <http://www.nytimes.com/2010/03/24/us/24calprisons.html>. Thus, its difficulty in reducing those costs has forced the state to reduce funds for education and safety net programs. *Id.*

16. Marisa Lagos & Wyatt Buchanan, *Sen. Mark Leno Pushes for State Sentencing Panel*, S.F. CHRON. (Aug. 6, 2011), http://articles.sfgate.com/2011-08-06/bay-area/29857542_1_sentencing-panel-sentencing-commission-state-senator.

17. *Promoting Inmate Rehabilitation and Successful Release Planning: Testimony Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 110th Cong. 42–56 (Dec. 6, 2007) [hereinafter *Testimony Before the H. Subcomm.*] (statement of Jonathan Turley).

18. See *infra* Part V.

19. See *Brown v. Plata*, 131 S. Ct. 1910 (2011).

response to the problem.²⁰ But the state missed a chance to enact a more sweeping reform.²¹

This Article explores five themes. First, it discusses the consensus that has emerged among those calling for reform.²² Second, it examines how some states have responded to the call for reform.²³ Third, it reviews briefly the Court's ruling in *Brown v. Plata*,²⁴ upholding the decision of a three-judge panel, requiring California to reduce the population of its prisons to comply with the Eighth Amendment.²⁵ Fourth, it explores California's efforts to reform its prison overcrowding, especially in response to the federal court intervention in its prison health care system.²⁶ Fifth, it examines the unique situation in California: despite its liberalism, it has remained remarkably resistant to reform.²⁷ Specifically, this article examines the role of the prison guards' union,²⁸ victims' rights groups,²⁹ myths surrounding the effect of Three Strikes,³⁰ and term limits and a legislature consisting largely of safe districts³¹ in frustrating reform. Some commentators assumed that the federal court order in the prison health care cases would give California politicians cover, allowing them to back sensible reforms.³² Governor Brown's realignment plan is a step towards broad reform, but quite tame when compared to other states and the size of California's larger problems.

20. See 2011 Cal. Legis. Serv. Ch. 15 (West); *infra* notes 340–41 and accompanying text.

21. See *infra* notes 215–53 and accompanying text.

22. See *infra* Part II.

23. See *infra* Part III.

24. *Brown*, 131 S. Ct. at 1910.

25. See *infra* Part IV.

26. See *infra* Part V.

27. See *infra* Part VI.

28. See *infra* notes 278–97 and accompanying text.

29. See *infra* notes 289–313 and accompanying text.

30. See *infra* notes 314–19 and accompanying text; 1994 Cal. Stat. Ch. 12, sec. 1 (enacting Cal. Penal Code § 667), and the initiative, Proposition 184. See California Ballot Pamphlet, General Election (Nov. 8, 1994). As developed at notes 315–18, Three Strikes' proponents insist that crime rates were rising until enactment of Three Strikes, at which point, crime rates began their precipitous decline. They could argue that point only by skewing the data.

31. See *infra* notes 321–35 and accompanying text.

32. Marie Gottschalk, *Prison Overcrowding and Brown v. Plata*, NEW REPUBLIC (June 8, 2011), <http://www.tnr.com/article/politics/89575/prison-overcrowding-brown-plata-supreme-court-california>.

As explored below, California has missed an opportunity for more meaningful reform.³³

II. A NATIONAL CONSENSUS

Sentencing reform does occur in the United States. For example, between the early 1970s through the mid-1980s, groups on the center, left, and right all called for sentencing reform.³⁴ While the consensus began to unravel after reform took hold,³⁵ it led to an almost universal abandonment of indeterminate sentencing.³⁶ A similar consensus seems to be emerging today. This section reviews the consensus that emerged during the 1960s, '70s, and '80s and then compares it with current reform efforts.

Students of criminal justice today would have difficulty recognizing the dominant sentencing scheme in place during the 1950s and 1960s. Based on a rehabilitative model,³⁷ indeterminate sentencing gave judges wide latitude in imposing sentences³⁸ and left a great deal of discretion to parole boards to set a release date for offenders.³⁹ The prevailing model, grounded in faith of psychiatry and science,⁴⁰ was so integrated into the legal culture that it influenced the Supreme Court's case law in cases like *Robinson v. California*⁴¹ and *Powell v. Texas*.⁴² For example, in *Robinson*, the

33. See *infra* notes 213–51 and accompanying text.

34. Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1014–15 (1991).

35. *Id.* at 1029–31.

36. Indeterminate sentencing was abandoned at the national level by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (1984) (codified as amended at 18 U.S.C. §§ 3551–3586, 3621–3625, 3742 (2006) and 28 U.S.C. §§ 991–998 (2006)). Since the late 1970s, state after state has abandoned indeterminate sentencing in favor of determinate sentencing. *Alternative Incarceration Program: Oregon's "Alternative Incarceration Program,"* <http://www.crimevictimsunited.org/issues/corrections/aip.htm> (last visited Dec. 20, 2011).

37. AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE 10 (1971); MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 89–90 (1973); RICHARD SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 1–2 (1979).

38. FRANKEL, *supra* note 37, at 89–90; SINGER, *supra* note 37, at 1–2, 10.

39. FRANKEL, *supra* note 37, at 87.

40. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 7 (1981); Willard Gaylin & David J. Rothman, *Introduction* to ANDREW VON HIRSCH, COMM. FOR THE STUDY OF INCARCERATION, DOING JUSTICE: THE CHOICE OF PUNISHMENTS, at xxxvii (Ne. Univ. Press 1986) (1976).

41. *Robinson v. California*, 370 U.S. 660 (1962).

42. *Powell v. Texas*, 392 U.S. 514 (1968).

Court held that a state violated the prohibition against cruel and unusual punishment when it criminalized “a condition [a defendant] is powerless to change.”⁴³ In *Powell*, the Court came close to holding that a state could not criminalize an alcoholic for public drunkenness because alcoholism was a disease that the alcoholic could not control.⁴⁴

The medical model came under attack from the left, right, and center. Prepared by the American Friends Service Committee, *Struggle for Justice* presented a radical attack on the medical model. It contended that “[m]uch penal reform has been infected with . . . paternalistic motives.”⁴⁵ Managers of indeterminate sentencing and parole used them “as a tool of institutional control.”⁴⁶ The rehabilitative model, argued the authors, was a product of a class society. The treatment model allowed the system to treat upper and middle class criminals favorably because “they are not revolutionaries.”⁴⁷ Consistent with the prevailing view at the time, *Struggle for Justice* gained traction because of the generally held view that parole and rehabilitation did not work.⁴⁸

Conservatives saw the medical model as mollicoddling criminals.⁴⁹ They believed in retribution, not rehabilitation.⁵⁰ Further, they believed in longer sentences for criminal offenders and for “truth in sentencing.”⁵¹

More centrist in his assessment was Judge Marvin Frankel, whose book *Criminal Sentences* highlighted the inequities in the prevailing sentencing scheme.⁵² Judges’ discretion was “unchecked and sweeping,” inconsistent with our professed belief in the rule of law.⁵³

43. *Id.* at 566–67 (Fortas, J., dissenting).

44. *Id.* at 561–62; Vitiello, *supra* note 34, at 1016. The four-Justice dissent appears to have been drafted initially as a majority opinion. *Id.*

45. AM. FRIENDS SERV. COMM., *supra* note 37, at 18.

46. *Id.* at 28.

47. *Id.* at 30.

48. *Id.* at 83–99.

49. Gaylin & Rothman, *supra* note 40, at xxxvii.

50. Todd R. Clear, *Correctional Policy, Neo-Retributionism and the Determinate Sentence*, 4 JUST. SYS. J. 26, 37–41 (1978).

51. *Id.*

52. FRANKEL, *supra* note 37.

53. *Id.* at 5.

Legislatures left judges without guidance even on fundamental questions, including why we punish.⁵⁴ He saw the system as allowing “untrained, untested, unsupervised men armed with great power [to] perpetuate abuses.”⁵⁵ Like the authors of *Struggle for Justice*, he saw the parole process as flawed, lacking meaningful standards, and providing no means of “curing” inmates.⁵⁶

The emerging consensus culminated in the move towards sentencing guidelines and commissions. After an unsuccessful effort to pass legislation in the 1970s,⁵⁷ Congress enacted the Sentencing Reform Act in 1984.⁵⁸ It limited judicial discretion in sentencing by forcing judges to consider detailed sentencing guidelines.⁵⁹ The Act limited judges’ discretion to deviate from the guidelines.⁶⁰ Judges were to give written explanations for deviating from the guidelines, subjecting their decisions to appellate review.⁶¹ The Act also eliminated parole.⁶²

The consensus that led to abandonment of the rehabilitative model started to fall apart almost immediately. By the time Congress put its new sentencing scheme into place, law-and-order advocates were rising in power.⁶³ The victims’ rights movement gained traction locally and nationally.⁶⁴ Freed from the constraints of the rehabilitative model, retributivists called for longer and longer sentences.⁶⁵ One needs only to think back to the 1988 presidential election and President George H. W. Bush’s Willie Horton ad⁶⁶ to

54. *Id.* at 7.

55. *Id.* at 17.

56. *Id.* at 95.

57. LISA SEGHELLI & ALISON SMITH, CONG. RESEARCH SERV., RL 32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 11 (2007), available at <http://www.fas.org/sgp/crs/misc/RL32766.pdf>.

58. The Sentencing Reform Act of 1984 was enacted as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (1984) (codified as amended at 18 U.S.C. §§ 3551–3586, 3621–3625, 3742 (2006) and 28 U.S.C. §§ 991–998 (2006)).

59. S. REP. NO. 98-225, at 51 (1984), reprinted in 1984 U.S.C.C.A.N. 3220, 3234.

60. 18 U.S.C. § 3553(a)–(b) (1988).

61. *Id.* §§ 3553(c), 3742(a)–(b).

62. *Id.* § 3624(a)–(b).

63. Clear, *supra* note 50, at 37–41.

64. JOSHUA PAGE, THE TOUGHEST BEAT 83 (2011).

65. Clear, *supra* note 50, at 37–41.

66. Editorial, *George Bush and Willie Horton*, N.Y. TIMES, Nov. 4, 1988, at A34, available at

recognize the dramatic shift from Americans' view of crime in the 1960s and the 1980s. The widespread adoption of three strikes laws in the 1990s was the culmination of fixed minimum sentences and exceedingly long prison terms, often for relatively minor offenses.⁶⁷

These trends have resulted in massive increases in total incarceration around the country.⁶⁸ Despite dissatisfaction among liberals with the result of sentencing reform, the dramatic shift in sentencing policy was the product of the consensus built in the 1970s, a consensus which included many liberals.⁶⁹

I see a similar consensus emerging outside the political arena, a consensus across a broad political spectrum.⁷⁰ For most of the past decade, those groups have recognized that states and the federal government spend too much on prisons, that mandatory minimum sentences and long prison sentences are counterproductive, and that states can maintain public safety without such high levels of spending on prisons.⁷¹

In planning a ten-year retrospective on California's Three Strikes law, a colleague and I decided not to focus only on law but to broaden the inquiry to focus on sentencing reform generally.⁷² California's prison budget was out of control even before the worst of the recession hit the state.⁷³ The problem of prison overcrowding resulted not just from Three Strikes but also from an extraordinary number of sentencing enhancement provisions, satisfying the desire of politicians to address the crime "du jour."⁷⁴ Our report discussed

<http://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html>; *Willie Horton 1988 Attack Ad*, YOUTUBE (Nov. 3, 2008), <http://www.youtube.com/watch?v=Io9KMSSEZ0Y>.

67. PAGE, *supra* note 64, at 117–18.

68. *Id.* at 133. *But see* VINCENT SCHIRALDI, JASON COLBURN & ERIK LOTKE, JUSTICE POLICY INST., THREE STRIKES AND YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKE LAWS 10 YEARS AFTER THEIR ENACTMENT, (2004), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/04-09_rep_threestrikesnatl_ac.pdf (stating that as of 2004, fourteen states out of the twenty-two states with Three Strikes laws and available data had fewer than 100 prisoners sentenced under the Three Strikes laws).

69. Gaylin & Rothman, *supra* note 40, at xxxvii.

70. *See infra* notes 81–122 and accompanying text.

71. *See infra* notes 81–122 and accompanying text.

72. Vitiello & Kelso, *supra* note 6, at 903.

73. CORR. INDEP. REVIEW PANEL, REFORMING CORRECTIONS, at i-ii (2004), *available at* http://www.cpr.ca.gov/Review_Panel/pdf/introto6.pdf; Vitiello & Kelso, *supra* note 6, at 908–09.

74. Vitiello & Kelso, *supra* note 6, at 916–17, 921.

several bipartisan efforts aimed at addressing the crisis of prison overcrowding and overuse of prison as the only punishment.⁷⁵

Justice Kennedy's speech to the American Bar Association (ABA) in 2003 touched on many of the current system's excesses.⁷⁶ He argued that America spends too much on prisons and that "our punishments [are] too severe [and] our sentences [are] too long."⁷⁷ He urged that federal sentences be revised downward.⁷⁸ He questioned the use of mandatory minimum sentences.⁷⁹ His speech was a national call to action.⁸⁰

In response to the challenge, the ABA established a commission whose report advocated many ideas for reform shared by an increasing number of experts.⁸¹ Representative of several reports from the mid-2000s, the commission's report urged the repeal of mandatory minimum sentences.⁸² It urged adoption of sentencing systems that both guide judicial discretion and permit judges to consider unique characteristics of offenders and their offenses.⁸³ The commission urged creation of an entity that should monitor the sentencing system; that entity should urge alternatives to incarceration for some offenders.⁸⁴ It should also assess the financial impact of new legislation on crime rates and racial disparity in sentencing.⁸⁵

75. *Id.* at 952–65.

76. *Id.* at 909–10; Justice Anthony Kennedy, Speech at the Am. Bar Ass'n Annual Meeting (Aug. 9, 2003), available at <http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annual-meeting/>.

77. See Kennedy, *supra* note 76.

78. *Id.*

79. *Id.*

80. *Id.*

81. AM. BAR ASS'N., JUSTICE KENNEDY COMMISSION, REPORT WITH RECOMMENDATIONS 17 (2004), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf; Vitiello & Kelso, *supra* note 6, at 909–11.

82. AM. BAR ASS'N., *supra* note 81, at 9.

83. *Id.*

84. *Id.*

85. *Id.*

Elsewhere, organizations like the American Law Institute (ALI) have advanced similar proposals.⁸⁶ For over a decade, a committee of the ALI, for example, has been working on revisions to the Model Penal Code sentencing provisions.⁸⁷ Several principles have emerged, including disapproval of mandatory minimum sentences;⁸⁸ evidence-based sentencing;⁸⁹ proportionality constraints on sentences;⁹⁰ procedures to allow “second looks” at long-term sentences; and modifications of prison sentences based on an assortment of policies, including advanced age, mental infirmity, and exigent family circumstances.⁹¹

Organizations like the Vera Institute for Justice⁹² and the Pew Charitable Trust⁹³ have funded a variety of studies of the prison, probation, and parole systems. For example, the Vera Institute has published a detailed report on New York’s use of alternatives to incarceration.⁹⁴ It reported that offenders placed in an alternative program, in which they spent far less time in jail than similar situated offenders, provided the same level of public protection at a significantly lower cost.⁹⁵

The Pew Charitable Trust has been at the forefront of the crisis of over-incarceration.⁹⁶ It has identified the problem of overreliance on incarceration and has funded studies aimed at lowering incarceration rates while protecting the public.⁹⁷ Using traditional media, it has attempted to keep in front of the public positive developments aimed

86. *See generally, e.g.*, MODEL PENAL CODE: SENTENCING (Tentative Draft No. 2, 2011) (outlining various sentencing reform proposals).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Center on Sentencing and Corrections*, VERA INST. JUST., <http://www.vera.org/centers/center-sentencing-corrections> (last visited Dec. 22, 2011).

93. *Sentencing and Corrections*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/our_work_detail.aspx?id=74 (last visited Dec. 22, 2011).

94. RACHEL PORTER, SOPHIA LEE & MARY LUTZ, VERA INST. OF JUSTICE, *BALANCING PUNISHMENT AND TREATMENT: ALTERNATIVES TO INCARCERATION IN NEW YORK CITY* (2002), available at <http://www.vera.org/download?file=75/Balancing%2520ATI.pdf>.

95. *Id.* at 64–66.

96. *See Sentencing and Corrections*, *supra* note 93.

97. *See, e.g.*, PEW CENTER ON THE STATES, *supra* note 1.

at those goals.⁹⁸ In an extensive report published in 2011, the Pew Center on the States studied recidivism rates around the country.⁹⁹ It explored, for example, why Wyoming and Oregon have the lowest recidivism rates in the country, while California and Minnesota have the highest.¹⁰⁰ It explored why some states have experienced sharp declines in recidivism while others have experienced sharp increases in rates of recidivism.¹⁰¹ The report identified the problem of diminishing returns that states experience when they continue to expand their prison systems.¹⁰² The report provides state officials interested in sensible use of resources with a variety of strategies, including reentry strategies that successfully reduce recidivism.¹⁰³

Before the abandonment of indeterminate sentencing, critics of the system pointed to evidence that rehabilitation did not work.¹⁰⁴ By comparison, today, those interested in alternatives to prison cite an increasing body of literature suggesting that many alternatives to prison do work.¹⁰⁵ They can point to a host of innovative programs that have produced positive results.¹⁰⁶ Many of those programs have been validated with follow-up studies.¹⁰⁷ Further, because most such programs do not resort to prison, they are far less expensive than the incarceration alternative.¹⁰⁸

98. See, e.g., Sue Urahn, *How Red-Ink States Should Make Tough Budget Decisions*, CHRISTIAN SCI. MONITOR (Apr. 20, 2011), http://www.pewcenteronthestates.org/news_room_detail.aspx?id=85899358938.

99. PEW CENTER ON THE STATES, *supra* note 1.

100. *Id.*

101. *Id.* at 17–23.

102. *Id.* at 5–6.

103. *Id.* at 25–32.

104. See AM. FRIENDS SERV. COMM., *supra* note 37; FRANKEL, *supra* note 37, at 89–90; Gaylin & Rothman, *supra* note 40, at 45–55. Many critics cited Robert Martinson's work suggesting that rehabilitation was a failure. Ironically, by the time Congress and states began abandoning indeterminate sentencing, Martinson had retracted the conclusions of his earlier work. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979).

105. See MARK A. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 35–48 (2009); PEW CENTER ON THE STATES, *supra* note 1, at 25–32.

106. See KLEIMAN, *supra* note 105, at 35–48; PEW CENTER ON THE STATES, *supra* note 1, at 25–32.

107. See PEW CENTER ON THE STATES, *supra* note 1.

108. KLEIMAN, *supra* note 105, at 34.

As developed below,¹⁰⁹ campaigning by portraying one's opponent as "soft on crime" remains attractive to some politicians. But outside the political arena, some conservatives have joined the call for sentencing reform. Several years ago, prominent California conservative Ward Connerly published an op-ed piece in which he laid out a conservative's argument for sentencing reform.¹¹⁰ Other prominent conservatives soon echoed Connerly's position.

In January 2011, Newt Gingrich and Pat Nolan authored an op-ed in *The Washington Post* summarizing a major shift in conservative thinking about crime in the United States.¹¹¹ Some prominent conservative leaders, including Gingrich and Connerly, have become part of the Right on Crime campaign, a movement which calls for "sensible and proven reforms to our criminal justice system—policies that will cut prison costs while keeping the public safe."¹¹² While few current politicians have signed on to the campaign, signatories include powerful political players, including former Attorney General Ed Meese, former drug czar Asa Hutchinson, and anti-tax leader Grover Norquist.¹¹³ The Right on Crime webpage lists former Florida Governor Jeb Bush as its most recent signatory.¹¹⁴ According to Gingrich and Nolan, this initiative "opens the way for a common-sense left-right agreement on an issue that has kept the parties apart for decades."¹¹⁵

The Right on Crime campaign has roots in traditional conservative thought. For example, conservatives expect government accountability for programs that it runs.¹¹⁶ As observed on Right on Crime's webpage: "As members of the nation's conservative

109. See *infra* text accompanying notes 110–20.

110. Ward Connerly, Don't Raise Taxes, But Reform Prisons, Special to the Sacramento Bee, Sept. 4, 2009, at <http://groups.yahoo.com/group/PrisonNewsNetwork/message/38110>.

111. Newt Gingrich & Pat Nolan, Op-Ed., *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST (Jan. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>.

112. *Id.* For a complete list of the signatories, see *Statement of Principles: National Signatories*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited Jan. 1, 2011).

113. *Id.*

114. *Id.*

115. Gingrich & Nolan, *supra* note 111.

116. *Statement of Principles: National Signatories*, *supra* note 112.

movement, we strongly support constitutionally limited government, transparency, individual liberty, personal responsibility, and free enterprise.”¹¹⁷ While liberals and centrists may not join all of the proposals supported by the Right on Crime campaign,¹¹⁸ those signing on to the campaign concur in the core of the message emerging elsewhere. In calling for more cost-effective approaches to criminal justice spending, the website lists as an example of ineffective governmental spending “our reliance on prisons, which serve a critical role by incapacitating dangerous offenders but are not the solution for every type of offender. And in some instances, they have the unintended consequence of hardening nonviolent, low-risk offenders—making them greater risk to the public than when they entered.”¹¹⁹

At least on several key issues, a consensus has emerged across a broad political spectrum, similar to the consensus that emerged briefly in the 1970s, which in turn led to sentencing reform.¹²⁰ I do not want to overstate the case. Politics have changed since the 1970s and 1980s. The Republicans’ performance in the summer of 2011, when they held the nation hostage before voting to raise the debt ceiling, suggests how far we have come from what now seems like a kinder, gentler era when conservative icon Ronald Reagan was President.¹²¹ But at least outside of the political arena, a consensus has emerged that America overuses incarceration and reform is necessary.

III. RED STATE BLUE STATE: REFORM CAN HAPPEN

As I indicated in the previous section, some prominent conservatives have joined the emerging consensus supporting

117. *Id.*

118. For example, among their proposals is an endorsement of faith-based initiatives. *Id.*

119. *Id.*

120. *See supra* text accompanying notes 34–69.

121. President Barack Obama, Speech on the Debt Limit (July 25, 2011), available at <http://washingtonexaminer.com/blogs/beltway-confidential/2011/07/transcript-obamas-speech-debt-limit>.

sentencing reform.¹²² Critics have come to that recognition for different policy reasons.¹²³ Nonetheless, critics of the overuse of incarceration have identified a handful of concrete proposals whereby states can reduce prison costs without endangering public safety.¹²⁴ This section reviews developments taking place in different states.¹²⁵

Faced with financial exigencies, policy makers have begun to look for ways to reduce prison costs.¹²⁶ Some state legislators have adopted some of the ideas advanced by critics of the current system of incarceration.¹²⁷ Reforms have taken place in some unlikely places. This section reviews some of the reforms adopted in a traditionally blue state, Washington,¹²⁸ and then reviews reforms in two states known for their conservative politics, Texas¹²⁹ and Mississippi.¹³⁰

A. *Washington's Reform*

Similar to California, Washington experienced dramatic prison population growth in the 1990s and early 2000s after the passage of a “Three Strikes and You’re Out” law and a “Hard Time for Armed Crime” law (similar to California’s 10-20-Life law).¹³¹ But unlike California, Washington has reformed its sentencing laws, parole mechanisms, and earned-time mechanisms. This subsection discusses

122. *See supra* text accompanying notes 109–22.

123. Charlie Savage, *Trend to Lighten Harsh Sentences Catches On in Conservative States*, N.Y. TIMES (Aug. 12, 2011), http://www.nytimes.com/2011/08/13/us/13penal.html?_r=3&hpw.

124. *See supra* text accompanying notes 93–108.

125. This section does not discuss some of the earlier efforts at reform. During the move toward sentencing guidelines, some states recognized that their prison resources were finite and that they needed to make better use of those resources. Some states like North Carolina and Virginia were able to limit prison growth without sacrificing public safety by designating prison beds for violent offenders. *Sentencing: Guidelines—Guidelines and Prison Population*, LAW LIBRARY, <http://law.jrank.org/pages/2067/Sentencing-Guidelines-Guidelines-prison-populations.html> (last visited Dec. 22, 2011).

126. Savage, *supra* note 123.

127. *Id.*

128. *See infra* text accompanying notes 131–43.

129. *See infra* text accompanying notes 155–76.

130. *See infra* text accompanying notes 144–54.

131. Vincent Schiraldi, *The Modern American Penal System: Digging Out as U.S. States Begin to Reduce Prison Use, Can American Turn the Corner on its Imprisonment Binge?*, 24 PACE L. REV. 563, 572–73 (2004).

some of the reforms Washington has made to curb prison population growth.

Even though Washington is one of many states with a truth-in-sentencing law, the Washington Legislature passed Senate Bill 44, which “increased the amount of earned-release time available to most drug and property offenders from 33 to 50 percent of their sentences.”¹³² Additionally, in an attempt to lower the recidivism rate, Washington also passed legislation dedicating \$3 million to pre-release treatment programs.¹³³ It is estimated that this legislation will save the state \$40 million over a two-year period.¹³⁴

Another reform bill passed by the legislature, House Bill 2194, authorizes the early release of certain individuals if they meet specified criteria. A form of compassionate release, this law considers the risk to the community of early release, the cost of medical treatment, and the estimated savings to the state.¹³⁵

Washington reduced the number of parolees reentering the prison system for technical parole violations by passing Senate Bill 5990, which effectively discontinued supervision of released low-level felons.¹³⁶ The Washington legislature enacted the Washington Sentencing Commission (the Commission) in 1981 with the passage of the Sentencing Reform Act.¹³⁷ The legislature created a sentencing commission dependent on the state legislature, gave the Commission only advisory power, and the Commission is required to consider prison resources and prison capacity when recommending guidelines to the state legislature.¹³⁸

132. Don Stemen & Jon Wool, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, 16 FED. SENT. R. 294, 297 (2004).

133. *Id.* at 304.

134. JUDITH A. GREENE, FAMILIES AGAINST MANDATORY MINIMUMS, POSITIVE TRENDS IN STATE-LEVEL SENTENCING AND CORRECTIONS POLICY 7 (2003), available at http://www.famm.org/Repository/Files/82751_Positive%20Trends.pdf.

135. NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2009: DEVELOPMENTS IN POLICY AND PRACTICE 14 (2010), available at http://www.sentencingproject.org/doc/publications/s_ssr2009Update.pdf.

136. Stemen & Wool, *supra* note 132, at 298.

137. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 777 (2005).

138. *Id.* at 780.

Although the Commission has no power to implement policy or enact legislation, the Commission has had an impact on Washington state prison reform.¹³⁹ For example, the Commission's guidelines influenced the Washington legislature's enactment of alternative treatment programs for drug offenders such as Senate Bill 5990.¹⁴⁰ Further, after reviewing a report published by the Commission in 2001, which analyzed and reviewed the sentencing laws and treatment programs, the legislature enacted reforms that saved the state an estimated \$45 million per year.¹⁴¹

Not only did Senate Bill 5990 reform the parole system in Washington, the bill also reformed the sentencing of drug offenders across the board. The law, which implemented the Drug Sentence Reform Act of 2002, "significantly reduces sentences for all drug offenses."¹⁴² Met with the same fiscal challenges as other states, Washington passed these sentencing reforms with bipartisan support. These reforms, spearheaded by Washington Corrections Secretary Joseph Lehman, included treatment for low-level, nonviolent drug offenders, to be managed and supervised by drug court judges instead of prison wardens. Additionally, the reform package reduced sentences for prisoners convicted of drug trafficking. This particular reform package was estimated to save the state "almost \$75 million in correctional costs and avert the need to build more than 2,000 new prison cells."¹⁴³

B. Mississippi's Reform

Although Mississippi is one of the most conservative states in the nation, the state has made significant strides toward reducing its prison population and reforming its prison system. Mississippi expanded its early release mechanism, releasing 1,300 inmates in 2008-2009 alone. Mississippi Department of Corrections Commissioner Chris Epps is largely responsible for reducing

139. *Id.* at 781-82.

140. *Id.*

141. *Id.* at 781.

142. Stemen & Wool, *supra* note 132, at 298.

143. GREENE, *supra* note 134.

Mississippi's prison population and reforming sentencing laws. In 2008, Epps spearheaded an effort to amend Mississippi's truth-in-sentencing law to allow nonviolent inmates to serve only 25% of their sentence before "becoming eligible for release," compared to the original 85%.¹⁴⁴ To further reduce Mississippi's prison population, the legislature enacted Senate Bill 2039, removing the cap on earned time for inmates participating and completing educational programs.¹⁴⁵ The previous law capped earned time at "10 days off of their sentence for 30 days participation," and the maximum amount of earned time was capped at 180 days off their sentence.¹⁴⁶ Senate Bill 2039 removed both caps.¹⁴⁷ Additionally, Mississippi expanded the state's compassionate release mechanism by passing House Bill 494. The new law mandates that nonviolent, terminally-ill offenders are eligible for release, "regardless of the time served on their sentence."¹⁴⁸

To further save space in the prisons for violent offenders, Mississippi invested in alternatives to traditional incarceration. Mississippi's most significant reforms have been in the area of house arrest. In 2009, Mississippi approved house arrest for 518 drug offenders—prior to 2009 "most drug offenders didn't qualify for house arrest."¹⁴⁹ It was estimated that such a change in law would save the state \$5 million annually.¹⁵⁰ In addition to providing another alternative to traditional incarceration, Mississippi's restitution centers have many other benefits. Restitution centers allow inmates convicted of property crimes to "work to repay the victims they owe" at "less than half the cost of the State Penitentiary."¹⁵¹ Not only do

144. Jimmie E. Gates, *Inmates Get Early Release*, CLARION-LEDGER (Jackson, Miss.), Nov. 29, 2009, available at 2009 WLNR 24110992.

145. PORTER, *supra* note 135, at 13.

146. *Id.*

147. *Id.* at 13–14.

148. RYAN S. KING, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2008: DEVELOPMENTS IN POLICY AND PRACTICE 5 (2009), available at http://www.sentencingproject.org/doc/sl_statesentencingreport2008.pdf.

149. Gates, *supra* note 144.

150. *Id.*

151. Jerry Mitchell, *Lawmakers Look To Stave Off Prison Overcrowding*, CLARION-LEDGER (Jackson, Miss.), Dec. 12, 2000, at 1A.

the restitution programs save the state money, but they also provide rehabilitation, allowing the inmates to keep a portion of their earnings and opening opportunities for employment.¹⁵² Both alternatives to imprisonment have successfully helped to reduce Mississippi prison populations and thereby save the state money.

At one time Mississippi was one of the nation's "most aggressive incarcerators"; now Mississippi is reaping the rewards of its reforms. Not only has Mississippi reduced "its corrections budget by about 5%" since 2008, it did so with little danger to the public.¹⁵³ Mississippi's violent crime rates have fallen "toward 1970s levels, and the state's recidivism rate has decreased to 30% in the last four years—well below the national average."¹⁵⁴

C. Texas's Reform

Another conservative state, Texas, could no longer afford to build new prisons without questioning the underlying system. The reforms in Texas are indicative of a new movement on the right—epitomized by the group "Right on Crime"—preaching fiscal responsibility over the old "lock 'em up and throw away the key" approach. Texas has invested in alternatives to incarceration, reformed its parole system, made early-release and earned-release reforms, and made reforms to juvenile sentencing, all with positive impacts on Texans' safety and pocket books.

Texas prevented the construction of additional prisons by investing in alternatives to traditional incarceration. Where some states have invested in house arrest devices (such as Mississippi), Texas has invested in transitional programs for inmates, specifically "treatment-oriented programs."¹⁵⁵ Texas "allocated \$241 million for residential and non-residential treatment-oriented programs for non-violent

152. *Id.*

153. Steven Gray, *Why Mississippi Is Reversing Its Prison Policy*, TIME (June 10, 2011), <http://www.time.com/time/printout/0,8816,2077089,00.html>.

154. *Id.*

155. *State Initiatives: Texas*, RIGHT ON CRIME, <http://www.rightoncrime.com/reform-in-action/state-initiatives/texas/> (last visited Aug. 4, 2011).

offenders, along with enhancing in-prison treatment programs.”¹⁵⁶ The Texas legislature continued funding for the programs in 2009 and expanded the services provided by hiring more reentry transitional coordinators.¹⁵⁷

Another important way Texas avoided the need for additional prisons was House Bill 2668.¹⁵⁸ With the passage of House Bill 2668, first-time drug offenders possessing less than one gram of drugs receive mandatory probation versus prison time.¹⁵⁹ Additionally, the law gives judges the discretion to sentence probation with treatment for drug possession offenders that have prior felony convictions.¹⁶⁰ The estimated savings of this law alone are \$30 million over a five-year period and a reduction of the prison population by 2,500.¹⁶¹

Not only has Texas reformed its sentencing laws by expanding the number of offenders eligible for probation, the state has also implemented reforms to the parole system, reducing the number of parolees returning to state prison. In a little over a year, the Texas prison population decreased by 8,000 inmates because of parole reforms implemented in 2000.¹⁶² Texas “created a network of intermediate sanctions in lieu of parole revocation,” while the Texas Parole Board exercised their “release powers.”¹⁶³ Such changes dramatically affected the Texas prison population and the Texas budget.

With the passage of House Bill 93,¹⁶⁴ inmates can regain their good time forfeited by “cooperation or good behavior” while incarcerated.¹⁶⁵ Previously, once good time credit was forfeited, an

156. *Id.*

157. Richard Fausset, *Conservatives Latch Onto Prison Reform*, L.A. TIMES (Jan. 28, 2011), <http://articles.latimes.com/2011/jan/28/nation/la-na-conservative-crime-20110129>.

158. H.R. 2668, 78th Leg., Reg. Sess. (Tex. 2003).

159. *State Initiatives: Texas*, *supra* note 135.

160. Stemen & Wool, *supra* note 132, at 299.

161. *Id.*

162. Schiraldi, *supra* note 131, at 577–78.

163. *Id.*

164. H.R. 93, 81st Leg., Reg. Sess. (Tex. 2010).

165. PORTER, *supra* note 135, at 14.

inmate could not earn back the credit.¹⁶⁶ Not only will this change in the law positively impact an inmate's behavior while incarcerated, it will also have some impact on reducing the prison population (though no estimates were provided).

The Texas Legislature enacted Senate Bill 839¹⁶⁷ in 2009, eliminating juvenile sentences of life without parole.¹⁶⁸ Senate Bill 839 corrected previous law that placed all juvenile offenders convicted of capital offenses in the sentencing category of life without parole by default.¹⁶⁹ With the passage of Senate Bill 839, a juvenile "serving a life sentence for a capital offense is eligible for parole after he or she has completed 40 years of their sentence."¹⁷⁰

All of Texas's prison reforms have amounted to less violent crimes, less inmates, and less of the state budget going to corrections. Texas reforms are hailed as a model for other conservative states looking to implement prison reforms to save money.¹⁷¹ Texas crime rates have declined since the implementation of the above-discussed reform packages, even when other states on average saw an increase in incarceration rates.¹⁷²

Serious property, violent, and sex crimes per 100,000 Texas residents have declined 12.8 percent since 2003. Such crimes per 100,000 residents fell 7.3 percent from 2005 to 2008. From 2007 to 2008, there was a 5 percent drop in murders, a 4.3 percent drop in robberies, and a 6.8 percent decline in forcible rapes. The number of parolees convicted of a new crime declined 7.6 percent from 2007 to 2008, despite an increase in the number of parolees. The 2008 per capita crime rate in Dallas was at its lowest level in 40 years, declining 10 percent from 2007. It dropped

166. *Id.*

167. S. 839, 81st Leg., Reg. Sess. (Tex. 2009).

168. PORTER, *supra* note 135, at 16.

169. *Id.*

170. *Id.*

171. *State Initiatives: Texas*, *supra* note 155.

172. Fausset, *supra* note 157.

another 10.7 percent through August 31, 2009.¹⁷³

And with crime and incarceration rates on the decline for Texas, Texas has saved an estimated \$2 billion by reforming the existing prison system in lieu of expanding it.¹⁷⁴

Serious criminologists often confess uncertainty about what causes the decline in crime rates.¹⁷⁵ But the results from states like Washington, Mississippi, and Texas, among other states, are encouraging.¹⁷⁶ They demonstrate that reform efforts can cut costs without impairing public safety. What about California, a state that is struggling financially and that has the largest prison system in the nation? Can it achieve similarly meaningful sentencing reforms?

IV. *BROWN V. PLATA*: CALIFORNIA'S CHANCE AT REFORM?

A panel of three federal judges may have given California its best shot at meaningful sentencing reform. This section discusses briefly the litigation in *Brown v. Plata*¹⁷⁷ and explores how it may provide California with the opportunity to reform its broken system.¹⁷⁸

The Court's decision in *Brown v. Plata* involved consolidated cases. Filed in 1990 as a class action, *Coleman v. Brown* challenged the legality of the mental health care provided by the California Department of Corrections and Rehabilitation (CDCR).¹⁷⁹ *Coleman* resulted in a finding that the mental healthcare provided by the prison system violated inmates' Eighth Amendment rights. The court entered an injunction in 1995 and appointed a special master to

173. *State Initiatives: Texas*, *supra* note 155.

174. Fausset, *supra* note 157.

175. ZIMRING, *supra* note 2, at 23–24; Franklin Zimring: "The Decline in Crime in New York City," VERA INST. JUST. (Oct. 29, 2010), <http://www.vera.org/videos/franklin-zimring-decline-crime-new-york-city>.

176. PORTER, *supra* note 135, at 13–14.

177. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

178. *See infra* text accompanying notes 205–15.

179. *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995). The California Department of Corrections changed its name to the California Department of Corrections and Rehabilitation in 2005. Sara B. Miller, *California Prison Boom Ends, Signaling a Shift in Priorities*, CHRISTIAN SCI. MONITOR (June 20, 2005), <http://www.csmonitor.com/2005/0620/p03s02-usju.html>.

determine the state's compliance with the injunction. The special master's repeated interim reports found a "troubling reversal in the progress of the remedial efforts of the preceding decade."¹⁸⁰

Filed as a class action in 2001, *Plata v. Brown* challenged the adequacy of health care provided by the CDCR.¹⁸¹ The complaint included a host of grievances about the system, including inadequate screening of prisoners, untimely health care in response to emergencies, lack of competent medical personnel, and lack of adequate review of the care that physicians did provide.¹⁸² The plaintiffs alleged that inadequate medical care resulted in over thirty deaths.¹⁸³ In 2002, after the parties negotiated a stipulation for injunctive relief, the court entered an order requiring the CDCR to provide the minimum level of care consistent with the Eighth Amendment.¹⁸⁴

To carry out this order, the court appointed a receiver to take over the prison health care system.¹⁸⁵ Three years later, the court found continued existence of appalling conditions resulting from the failure of CDCR to provide even minimally acceptable medical care.¹⁸⁶ The continued failure of the state led the plaintiffs to petition for the appointment of a three-judge panel, an order that was granted.¹⁸⁷

After extensive proceedings, including a fourteen-day trial, the three-judge panel ordered the defendants to submit a plan to reduce the state's prison population within two years.¹⁸⁸ The state had to reduce the population to 137.5% of the design capacity.¹⁸⁹ The court based its order to reduce the prison population on the finding that

180. *Coleman v. Schwarzenegger*, No. CIV S-90-0520LKKJFMP, 2009 WL 2430820, at *17 (E.D. Cal. 2009).

181. *Brown*, 131 S. Ct. at 1917.

182. *Id.* at 1926–27.

183. See Karen Gullo, *California Must Reduce Inmate Population, U.S. Judges Rule*, BLOOMBERG (Feb. 10, 2009, 12:01 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aogBNJsZBpSY&refer=us> (noting that thirty-four California prisoners died because of inadequate care).

184. *Brown*, 131 S. Ct. at 1926–27.

185. *Id.* at 1926.

186. *Id.* at 1927.

187. *Id.* at 1928.

188. *Id.*

189. *Id.*

overcrowding and poor health care led to the harm suffered by members of the class.¹⁹⁰ Over the period of the litigation, the prison population averaged 190% of the system's designed capacity.¹⁹¹ Despite headlines to the contrary,¹⁹² the three-judge panel did not order the release of prisoners. Instead, while it recommended reductions in the population, for example, by reducing the imprisonment of nonviolent offenders, it did not compel the manner in which the state had to comply with the order.¹⁹³ Further, the three-judge panel indicated frustration with the state's repeated failures to comply with previous orders.¹⁹⁴

Decided by a vote of 5–4, *Brown v. Plata* upheld the lower court order.¹⁹⁵ Justice Kennedy's opinion recounted some of the horrible conditions that resulted from overcrowding, including as many as fifty sick inmates held in twelve-by-twenty foot cages for up to five hours while they awaited medical treatment, fifty-four prisoners sharing a single toilet, a suicide rate nearly twice the national average for prisons, and waiting periods of up to a year to get mental health care.¹⁹⁶ While the Court affirmed the lower court, it noted the state's options other than releasing prisoners.¹⁹⁷

Justice Kennedy returned to themes he raised in his 2003 speech to the ABA. He discussed findings by experts on crime and punishment, including raising questions about mass incarceration and public safety.¹⁹⁸ He contrasted the experience in other states, some of which have reduced their prison populations without impairing public

190. *Coleman v. Schwarzenegger*, No. CIV S-90-0520LKKJFMP, 2009 WL 2430820, at *32–33 (E.D. Cal. 2009).

191. *Id.* at *31.

192. Mary Ratcliff, *Federal Judges Tentatively Order Release of 37,000 to 58,000 California Prisoners*, S.F. BAY VIEW (Feb. 9, 2009), <http://sfbayview.com/2009/federal-judges-tentatively-order-release-of-37000-to-58000-california-prisoners/>.

193. *Coleman*, 2009 WL 2430820, at *84.

194. *Id.*

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

196. *Id.* at 1923–25.

197. *Id.* at 1929. Justice Kennedy identified that those options included sending prisoners out of state. *Id.*

198. *Id.* at 1942–43.

safety.¹⁹⁹ He cited studies suggesting that prisons may be criminogenic.²⁰⁰

Given the protracted litigation in *Plata*, the state has had years to seek solutions to overcrowding.²⁰¹ The three-judge panel and Supreme Court decisions still leave open the opportunity to re-petition the court if it cannot comply with the order.²⁰² In the next section, I explore California's response to *Plata* and other developments in the state.²⁰³ At this point, *Plata* contains good and bad news for reform-minded observers of the system.

Obviously, the majority kept some pressure on the state to reform its prison system and, perhaps, its sentencing scheme.²⁰⁴ A contrary holding would have allowed the state to go back to its old habits of largely ignoring the problem by providing a few minor reforms.

A less obvious benefit of Justice Kennedy's opinion can be seen in his endorsement of social science research.²⁰⁵ Policymakers have ignored social scientists and academic lawyers for many years. Frank Zimring and his co-authors summarized the problem in *Punishment and Democracy: Three Strikes and You're Out in California*:

[E]xpert influence on the process and expert involvement in

199. *Id.*

200. *Id.* at 1943.

201. *Brown*, 131 S. Ct. at 1930–31.

202. *Id.* at 1947–48. In addition to the extensive record from trial, in an amicus brief filed by Corrections and Law Enforcement Personnel, eleven former prison system directors and six former federal judges signed a brief in support of the plaintiffs. Brief of Corrections and Law Enforcement Personnel Amici Curiae in Support of Appellees at 4–5, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (No. 09-1233). They believed that “crowding can be reduced without jeopardizing public safety.” *Id.* Despite those views and the extensive record amassed at trial and despite the majority's assurances that the state had options to a massive release of prisoners, Justice Alito argued the majority required “the premature release of approximately 46,000 criminals—the equivalent of three Army divisions.” *Brown*, 131 S. Ct. at 1959 (Alito, J., dissenting). Further, he accused the Court of “gambling with the safety of the people of California.” *Id.* at 1967–68. Justice Scalia invoked the specter that among the prisoners released will be “many . . . fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.” *Id.* at 1953 (Scalia, J., dissenting). Beyond a quibble with Justice Scalia, who was unaware that California punitively outlawed weights in prisons in 1997, Justices Scalia and Alito's rhetoric is demagoguery. As indicated earlier, even many of their conservative admirers reject their overblown claims.

203. See discussion *infra* Part V.

204. As developed below, meaningful reform is hardly a foregone conclusion.

205. *Brown*, 131 S. Ct. at 1942–43.

the process have declined. . . . [For example, t]he Model Penal Code effort of the American Law Institute brought the best and the brightest in academic law into the process of substantive criminal law reform. But there is now a large gap between law professors and the legislative process. . . . Part of the problem is that most academic lawyers are not much interested in criminal justice policy processes. Most of the problem is that there is no demand for what experts have to offer, which is information about the implications and consequences of policy choices.²⁰⁶

Led by Justice Kennedy, the *Plata* majority seemed open to rethinking the role of experts in formulating criminal justice policy.²⁰⁷ In effect, *Plata* gives credence to the kinds of studies cited above, indicating that alternatives to prison work.²⁰⁸

The bad news in *Plata* can be found in its fragile majority. Perhaps to hold together the slim majority, Justice Kennedy's opinion suggests a host of alternatives open to the state that fall short of forcing the state to enact meaningful sentencing reform.²⁰⁹ Further, *Plata* hedges on the timing of final implementation of the three-judge panel's order.²¹⁰ That may take additional pressure off the state if it believes that it can go back to its old habits of delay. While I lack a crystal ball, post-*Plata* developments fall short of the broader reform needed by the state.

V. CALIFORNIA'S RESPONSE

Even before *Plata*, commentators have speculated that California's budget crisis would force the state to consider comprehensive sentencing reform. For example, I, along with several co-authors,

206. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 13 (2001).

207. *Brown*, 131 S. Ct. at 1942–45.

208. *See supra* text accompanying notes 93–108.

209. *Brown*, 131 S. Ct. at 1929.

210. *Id.* at 1945–46.

speculated in 2004 that “California’s budget woes provide an opportunity to reexamine policies that have led to dramatic prison increases. The California budget has few areas of discretionary spending. Further, the prison budget is one budget item that has undergone little scrutiny.”²¹¹ Prior to *Plata*, however, California’s efforts at reform had been tepid at best. As indicated above,²¹² *Plata* may provide the state with the impetus to tackle sentencing reform. This section reviews the limited efforts at reform prior to *Plata*²¹³ and the state’s short-term response to *Plata*.²¹⁴

Faced with similar budgetary crises over a decade ago, several states used sentencing commissions to allocate limited prison resources.²¹⁵ Notably, states like North Carolina have been able to reallocate prison resources, reserving longer sentences for violent offenders, without endangering the public.²¹⁶

By comparison, efforts at creating a sentencing commission in California have gone nowhere. Such efforts have had a great deal of academic support,²¹⁷ as well as support from various non-partisan organizations like the Little Hoover Institute.²¹⁸ For example, Stanford’s Criminal Justice Center sponsored executive sessions on sentencing reform that brought together participants from various backgrounds, including academics, policymakers, politicians, and members of several organizations like the California Correctional Peace Officers Association (CCPOA) that have a stake in sentencing reform.²¹⁹ But that kind of reform has floundered in the political arena. Various Democratic legislators have proposed legislation

211. Vitiello & Kelso, *supra* note 6, at 908–09.

212. *See supra* text accompanying notes 177–210.

213. *See infra* text accompanying notes 215–27.

214. *See infra* text accompanying notes 228–52.

215. MODEL PENAL CODE: SENTENCING § 6A introductory cmt., at 40 (Preliminary Draft No. 1, 2002) (noting Minnesota, Pennsylvania, Washington, Delaware, Oregon, Kansas, North Carolina, Virginia, and Ohio as states with successful sentencing commissions).

216. *Id.* § 6A.01 (Preliminary Draft No. 1, 2002) (noting Delaware, Pennsylvania, and North Carolina allocate more funding to intermediate punishments to avoid prison sentences).

217. THE STANFORD EXEC. SESSIONS ON SENTENCING & CORRS., THE CALIFORNIA SENTENCING COMMISSION: LAYING THE GROUNDWORK 3 (2007); Vitiello & Kelso, *supra* note 6, at 960.

218. LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT 33–48 (2007), available at <http://www.lhc.ca.gov/studies/185/Report185.pdf>

219. THE STANFORD EXEC. SESSIONS ON SENTENCING & CORRS., *supra* note 217.

creating a commission.²²⁰ At one point, then-Governor Schwarzenegger proposed a sentencing commission.²²¹ Those efforts went nowhere.²²²

California does have in place a compassionate release program, allowing the Parole Hearings Board to order the release of terminally ill prisoners.²²³ But as some recent headlines make clear, the board is hardly opening the prison doors.²²⁴ At various times, the legislature has considered a more general program for older prisoners.²²⁵ Those efforts have gone nowhere,²²⁶ despite an aging prison population that is expensive to maintain.²²⁷

Thus far, California's primary response to *Plata* has been the enactment of Assembly Bill 109, the Public Safety Realignment Act.²²⁸ Importantly, Assembly Bill 109 became law without a single Republican member of the legislature voting for it.²²⁹ The legislation

220. Jenifer Warren, *Democrats Offer Plan to Overhaul Sentencing: Lawmakers Recommend Creating a Panel that Would Set Prison Terms to Ease Overcrowding*, L.A. TIMES, Jan. 19, 2007, at 1, available at 2007 WLNR 1060787.

221. CAL. DEPT. OF FINANCE, CALIFORNIA'S GOVERNOR'S BUDGET 2007-08 PROPOSED BUDGET SUMMARY: CORRECTIONS AND REHABILITATION 185 (2007), available at <http://2007-08.archives.ebudget.ca.gov/pdf/BudgetSummary/CorrectionsandRehabilitation.pdf>.

222. Marisa Lagos, *Political Will for Reform is Lacking: California Lags Behind in Reducing Incarceration*, S.F. CHRON., June 13, 2011, A1, available at 2011 WLNR 11758764.

223. Assem. 29, 1997-1998 Reg. Sess. (Cal. 1997).

224. Leticia Juarez, *Judge Blocks Path for Release of Inmate With Terminal Cancer*, KABC INLAND EMPIRE NEWS (Oct. 11, 2011), http://abclocal.go.com/kabc/story?section=news/local/inland_empire&id=8388006; *Limiting California's 'Compassionate Release' Program*, L.A. TIMES (Oct. 22, 2011), <http://articles.latimes.com/2011/oct/22/opinion/la-ed-compassion-20111022>. But see Tracy Wilson, *Murderer Dying of Cancer Gains Release From Prison*, L.A. TIMES (Sept. 20, 2003), <http://articles.latimes.com/2003/sep/20/local/me-spragin20>.

225. See *Testimony Before the H. Subcomm.*, supra note 17 (statement of Jonathan Turley).

226. See Helen Rippier Wheeler, *Senior Power: "Graying Prison," Early Release, and 'Assisted Living'*, BERKELEY DAILY PLANET (Jan. 03, 2011, 5:01 PM), <http://www.berkeleydailyplanet.com/issue/2011-01-05/article/37048?headline=Senior-Power-Graying-prisons-early-release-and-assisted-living->.

227. See *Testimony Before the H. Subcomm.*, supra note 17. Even Mississippi has already netted significant savings by resort to early medical release. *Prison Early Release Program Saving Mississippi Millions*, CLARION-LEDGER (Jackson, Miss.), Oct. 2, 2011, at A1, available at 2011 WLNR 21133956.

228. Assem. 109, 2011-2012 Reg. Sess. (Cal. 2011). Assembly Bill 117 amended Assembly Bill 109 and delayed the operative date of Assembly Bill 117. CAL. STATE ASS'N OF COUNTIES ET AL., 2011 PUBLIC SAFETY REALIGNMENT (2011), available at [http://www.cpoc.org/php/realign/CSAC-CSSA-CPOC%20\(22%20July%202011\)%20update%20on%20AB%20109-AB%20117.pdf](http://www.cpoc.org/php/realign/CSAC-CSSA-CPOC%20(22%20July%202011)%20update%20on%20AB%20109-AB%20117.pdf).

229. *AB 109 Criminal Justice Realignment—Voting Record*, PROJECT VOTE SMART (Mar. 17, 2011), <http://www.votesmart.org/bill/votes/34132>. Project Vote Smart, *AB 109 Criminal Justice Realignment—Voting Record*, Project Vote Smart (Mar. 17, 2011), <http://www.votesmart.org/bill/votes/34134>

does not require the release of currently incarcerated prisoners.²³⁰ It does shift responsibility from the state to county governments in a number of areas.

Instead of sending many lower level, non-violent felons and parole violators to state prisons, the Act now shifts responsibility for those offenders to the counties.²³¹ The proponents of realignment intend the Act to do more than simply shift responsibility for prisoners from the state to the counties. The legislative findings noted the high recidivism rate in California.²³² Assembly Bill 109, therefore, encourages local governments to use evidence-based sanctions and programs “encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity.”²³³ While providing the counties with additional funds, the Act envisions local governments saving money by shifting to less expensive interventions, like drug treatment, home arrest and other alternatives to jail and prison.²³⁴ The law also encourages counties to adopt a variety of other cost-savings alternatives, including alternatives to expensive booking and arraignment processes. Instead, counties may direct consenting offenders directly into treatment programs.²³⁵ The law also includes a recommendation that local governments adopt evidence-based reentry programs addressing housing, education, employment, and health status of individuals released back into the

230. See Assem. 109, 2011–2012 Reg. Sess. (Cal. 2011); Assem. 117, 2011–2012 Reg. Sess. (Cal. 2011); Ryan Vaillancourt, *State Prison Shift Puts Skid Row at Risk*, L.A. DOWNTOWN NEWS (Nov. 4, 2011), http://www.ladowntownnews.com/news/state-prison-shift-puts-skid-row-at-risk/article_6ba8a322-0737-11e1-bd51-001cc4c002e0.html.

231. Assem. 109, 2011–2012 Reg. Sess. (Cal. 2011); Assem. 117, 2011–2012 Reg. Sess. (Cal. 2011).

232. Assem. 117, 2011–2012 Reg. Sess. § 5 (Cal. 2011) (to be codified at CAL. PENAL CODE 17.5(a)(2)).

233. See *id.* (to be codified at CAL. PENAL CODE § 17.5(a)(8)).

234. Niko Kyriakou, *Ruling on Prison Overcrowding Could Slam San Mateo County Jails*, S.F. EXAMINER (June 11, 2011, 8:00 AM), <http://www.sfexaminer.com/local/peninsula/2011/06/ruling-prison-overcrowding-could-slam-san-mateo-county-jails>.

235. AMERICAN CIVIL LIBERTIES UNION OF CALIFORNIA, COMMUNITY SAFETY, COMMUNITY SOLUTIONS: IMPLEMENTING AB 109, at 12–13 (2011), available at http://www.aclunc.org/issues/criminal_justice/asset_upload_file459_10684.pdf. Assembly Bill 109’s drafters borrowed the concept from a similar program adopted in Seattle. *Id.* at 13. Assembly Bill 109’s drafters borrowed the concept from a similar program adopted in Seattle. *Id.* at 13.

community.²³⁶ Again, the expectation of the drafters of the law is that such programs will reduce recidivism.²³⁷

The Act also requires counties to develop implementation plans.²³⁸ Reminding county officials that the Brown Act requires open meetings,²³⁹ the law anticipates participation of stakeholders, including providers of health, drug treatments, and other social services along with local business interests.²⁴⁰

Realignment holds some promise. Policymakers seem to have taken notice of some of the current trends elsewhere. For example, although not directly requiring evidence-based practices, the law encourages counties to adopt such practices.²⁴¹ In addition, it suggests adoption of practices found effective at reducing recidivism in other jurisdictions.²⁴² As discussed above, adopting similar programs elsewhere has led to dramatically lower recidivism rates.²⁴³

What's not to like about such a law? Critics of the law come from a number of perspectives. Some fear that the state's financial commitment to the counties will be short-lived.²⁴⁴ My concerns are two-fold. My first concern is that the state left too much discretion to county governments, leaving in place the conditions that lead to unequal enforcement of the law. Similar policies have led to much higher incarceration rates for minority men.²⁴⁵

My second criticism of realignment is what the law did not do. It left on the table numerous more ambitious measures that would have

236. *Id.* at 11–12.

237. *Id.* at 11.

238. *Id.* at 8. Some of those plans are available online. See, e.g., *AB 109 Implementation Information*, CAL. MENTAL HEALTH DIRECTORS ASS'N, <http://www.cmhda.org/go/Committees/ForensicsCommittee/AB109ImplementationInformation.aspx> (last visited Dec. 28, 2011) (providing links to Butte County, Merced County, and San Francisco County implementation plans).

239. CAL. GOV'T CODE § 54950 (West, Westlaw through Ch. 8 of 2012 Reg. Sess.).

240. AMERICAN CIVIL LIBERTIES UNION OF CALIFORNIA, *supra* note 235, at 9.

241. Assem. 109, 2011–2012 Reg. Sess. (Cal. 2011); Assem. 117, 2011–2012 Reg. Sess. § 5 (Cal. 2011) (to be codified at CAL. PENAL CODE § 17.5).

242. Assem. 109, 2011–2012 Reg. Sess. (Cal. 2011).

243. See *supra* text accompanying notes 133–57.

244. Chris Meagher, *S.B. Braces for Inmate Influx*, SANTA BARBARA INDEP. (Sept. 22, 2011), <http://www.independent.com/news/2011/sep/22/sb-braces-inmate-influx/>.

245. SCOTT EHLERS, VINCENT SCHIRALDI & ERIC LOTKE, JUSTICE POLICY INST., RACIAL DIVIDE (2004), available at http://www.justicepolicy.org/images/upload/04-10_tac_caracialdivide_ac-rd.pdf.

provided the state with a more rational sentencing scheme and would have made greater savings in prison costs. Despite some confusion in the public's mind,²⁴⁶ the law did not require the state to release anyone currently in prison.²⁴⁷ It does not address the unnecessarily expensive and sometimes unfair treatment of sex offenders.²⁴⁸ The law does not allow county-level supervision for third-strike offenders or any individual with a serious or violent offense.²⁴⁹ Finally, it does not put in place for the prison population about to be released similar evidence-based practices aimed at reducing that cohort's recidivism rates.²⁵⁰

If my conclusions are correct, California missed a unique opportunity to achieve much broader reforms. As developed in Section II above, the opportunity for broad sentencing reform occurs infrequently, when broad consensus emerges across the political divide.²⁵¹ The discussion above begs another question: Why has it been so difficult for California, on many measures a progressive state, to enact broad reforms? I take up that as the topic for the final section.²⁵²

VI. ELUSIVE REFORM

As discussed above, some conservative states like Mississippi and Texas have adopted some progressive reforms in light of financial constraints.²⁵³ Over a decade ago, states less progressive than California, like North Carolina and Virginia, were able to enact sentencing commissions.²⁵⁴ Commentators often cite those states as

246. See, e.g., *Governor Brown's Prison Plan Jeopardizes Safety of Streets*, *supra* note 230.

247. *Governor Brown Signs Legislation to Improve Public Safety and Empower Local Law Enforcement*, CA.GOV. (Apr. 5, 2011), <http://gov.ca.gov/news.php?id=16964>.

248. *Unjust and Ineffective: America has Pioneered the Harsh Punishment of Sex Offenders. Does it Work?*, ECONOMIST, Aug. 8, 2009, at 21, available at <http://www.economist.com/node/14164614>.

249. CAL. DEP'T OF CORR. & REHAB., 2011 PUBLIC SAFETY REALIGNMENT FACT SHEET (July 15, 2011), http://www.cdcr.ca.gov/About_CDRCR/docs/Realignment-Fact-Sheet.pdf.

250. See Assem. 109, 2011–2012 Reg. Sess. (Cal. 2011); Assem. 117, 2011–2012 Reg. Sess. (Cal. 2011).

251. See discussion *supra* Part II.

252. See discussion *infra* Part VI.

253. See *supra* text accompanying notes 122–75.

254. See *supra* text accompanying notes 214–15.

models for how to allocate rationally limited prison resources while protecting the public.²⁵⁵ So why has broad reform been so elusive in California?

Around the country, early release for older prisoners—typically based on evidence-based criteria—is not controversial. States adopting Project for Older Prisoners (POP)²⁵⁶ programs have experienced significant savings by releasing older felons, who do not commit additional crimes.²⁵⁷ Mississippi, according to a recent story on the web, has saved \$5 million over seven years by releasing eighty-nine terminally ill inmates.²⁵⁸

By comparison, California first enacted a compassionate release statute in the late 1990s²⁵⁹ and then another, replacing the earlier act in 2010.²⁶⁰ But the state seldom grants parole for this target group even under the 2010 provision.²⁶¹ Further, unlike early release programs elsewhere, in California, an offender granted medical parole must be returned to prison if his condition improves.²⁶²

Early release programs in both states have their critics. For example, a victims' rights group in Mississippi has questioned whether early release shows more compassion to prisoners than the offenders showed their victims.²⁶³ Despite its infrequent use and

255. MODEL PENAL CODE: SENTENCING § 6B.09 (Tentative Draft No. 2, Mar. 25, 2011) (Reporter's Note at 58–64).

256. Vitiello & Kelso, *supra* note 6, at 948–49.

257. See *Testimony Before the H. Subcomm.*, *supra* note 17. Savings do not come merely from shifting the responsibility of care from the states to Medicare or Medicaid. Caring for infirm individuals is much less expensive outside the prison setting. Jack Dolan, *Despite Medical Parole Law, Hospitalized Prisoners Are Costing Taxpayers Millions*, L.A. TIMES (Mar. 2, 2011), <http://articles.latimes.com/2011/mar/02/local/la-me-prisons-20110302> (“Authorities have identified 25 ‘permanently medically incapacitated’ inmates being treated at outside hospitals who are candidates for parole because they no longer pose a threat to the public. Californians will pay more than \$50 million to treat them this year, between \$19 million and \$21 million of that for guards’ salaries, benefits[,] and overtime, according to data from the federal receiver who oversees California prison healthcare.”).

258. *Prison Early Release Program Saving Mississippi Millions*, *supra* note 227.

259. Assem. 29, 1997–1998 Reg. Sess. (Cal. 1997).

260. CAL. PENAL CODE § 2065 (West, Westlaw through Ch. 8 of 2012 Reg. Sess.).

261. *Reforms Needed for Compassionate Release of Prison Inmates*, MEDICAL XPRESS (June 2, 2011), <http://medicalxpress.com/news/2011-06-reforms-compassionate-prison-inmates.html>.

262. Assem. 29, 1997–1998 Reg. Sess. (Cal. 1997).

263. Gates, *supra* note 144.

significant restrictions, California's program has similar critics among victims' rights advocates.²⁶⁴

Despite criticisms from victims' rights groups, reforms have taken place in states like Mississippi, seemingly with a consensus among diverse political groups.²⁶⁵ The comparison to California is striking: California, a far more progressive state on a broad range of issues, has greater difficulty in achieving reform.

As with medical parole, similar groups have already targeted realignment despite the fact that, at least if my analysis is correct, realignment is a modest reform effort.²⁶⁶ Notable are efforts by California's Assembly Republicans, who have created a video attacking Governor Brown for risking public safety by backing realignment.²⁶⁷ The ad includes "scary-looking thugs and ominous music."²⁶⁸ The Assembly Republicans have also created a website, California Crime Watch, where they will post information about increased criminal activity.²⁶⁹ Similarly, the Los Angeles County District Attorney has joined the criticism of realignment and has argued that the new law "casts too wide a net in defining 'low level offenses.'"²⁷⁰

Comparing California's difficulty in achieving modest sentencing reform with broader efforts around the county invites a legitimate question: why does California have such a difficult time in achieving reform? A number of factors have coalesced over the past thirty years: anyone interested in identifying why California cannot reform its system should examine the role of the prison guards' union,²⁷¹

264. Kathy McManus, *Redefining Compassionate Release*, RESP. PROJECT (Sept. 29, 2009), <http://responsibility-project.libertymutual.com/blog/redefining-compassionate-release#fbid=sDYoxQ5EoDx>.

265. See *supra* text accompanying notes 122–75.

266. See *supra* text accompanying notes 227–51.

267. Nannette Miranda, *Assembly Republicans Release Ad on Brown's Prison Shift*, ABC7 NEWS (Oct. 17, 2011), <http://abclocal.go.com/kgo/story?section=news/politics&id=8395637>.

268. *Id.*

269. *Id.*

270. Don Thompson, *California Prison Realignment Plan Broadly Defines Crimes*, HUFFINGTON POST (Oct. 4, 2011, 7:43 PM), http://www.huffingtonpost.com/2011/10/04/california-prison-realignment_n_995075.html.

271. See *infra* text accompanying notes 276–88.

victim rights groups,²⁷² myths surrounding the effect of Three Strikes,²⁷³ and term limits.²⁷⁴ Further, one cannot discuss the role of CCPOA and victims' rights groups separately because of the union's role in creating and supporting some of those groups.²⁷⁵

Created in 1957 as a social club, the California Correctional Officers Association (CCOA) became a powerful political association during the 1980s.²⁷⁶ Under the tutelage of union President Don Novey beginning in 1980, the CCOA became the California Correctional Peace Officers Association.²⁷⁷ Novey took over at an ideal time for the growth of the union.²⁷⁸ Beginning with the 1968 presidential election, conservatives made law-and-order a winning political strategy.²⁷⁹ The 1980s also saw the expansion of the war on drugs.²⁸⁰ After abandoning indeterminate sentencing in 1976, the legislature went on a binge from 1984 to 1991, during which it passed more than a thousand bills changing criminal laws, usually increasing prison sentences or changing misdemeanors to felonies.²⁸¹ With the increased prison population came a 600% increase in CCPOA's membership from 1982 to 2001.²⁸²

Not only were dues pouring in, but Novey understood the power of money in the political process. Since 1982, CCPOA has created at least eight PACs and "employed its political resources to reward friends, punish enemies, and construct the 'specter of the CCPOA'—an image of an omnipotent, unpredictable, and merciless labor organization."²⁸³ The association has spread its largesse across the political aisle. For example, Governor Pete Wilson received \$1 million in donations from the CCPOA after he announced his support

272. *See infra* text accompanying notes 289–98.

273. *See infra* text accompanying notes 313–21.

274. *See infra* text accompanying notes 322–29.

275. *See infra* text accompanying notes 289–95.

276. PAGE, *supra* note 64, at 15, 41.

277. *Id.* at 41–43.

278. *Id.* at 45–50.

279. *Id.* at 9.

280. *Id.* at 9, 47.

281. *Id.* at 47.

282. PAGE, *supra* note 64, at 48.

283. *Id.* at 44, 52.

for the three strikes law.²⁸⁴ Both recent Democratic Governors Davis and Brown have also received significant support from the union.²⁸⁵ In 2010, CCPOA spent \$7 million supporting 107 candidates; 104 of them were elected.²⁸⁶

One measure of the union's success is the pay scale for its members. Requiring only a high school education, officers make substantial incomes: one in ten officers make more than \$100,000 a year.²⁸⁷ One effective political campaign resulted in a union contract spanning 2001 to 2006 in which the state agreed to match pay for CCPOA members with California Highway Patrol officers.²⁸⁸

The CCPOA's focus is not limited to member benefits. As part of its strategy to extend its power, the union has created victims' rights groups.²⁸⁹ The CCPOA created both Crime Victims United of California (a political action committee) and the Doris Tate Crime Victims Bureau. Both groups have influenced public debate and political discussion of prison reform in California. These groups act as the unions' alter egos. Crime Victims United of California is the vehicle through which the CCPOA donates to political issues.²⁹⁰ For many years the CCPOA has been Crime Victims United of California's only donor.²⁹¹ Although the union claims there is no ulterior motive to their involvement in victims' rights, union

284. Laura Sullivan, *Folsom Embodies California's Prison Blues*, NPR (Aug. 13, 2009), <http://www.npr.org/templates/story/story.php?storyId=111843426>.

285. *California Correctional Peace Officers Association*, UC Berkeley INST. GOVERNMENTAL STUD. (Jan 31, 2008), http://igs.berkeley.edu/library/research/quickhelp/policy/social/ca_prison_unionOLD.html;

John Seiler, *Court Decision Could Spur Prison Reform*, CAL. WATCHDOG (May 23, 2011), <http://www.calwatchdog.com/2011/05/23/court-decision-could-spur-prison-reform/>.

286. John Seiler, *Court Decision Could Spur Prison Reform*, CAL. WATCHDOG (May 23, 2011), <http://www.calwatchdog.com/2011/05/23/court-decision-could-spur-prison-reform/>.

287. Sullivan, *supra* note 284. Even apart from the increased criminal sentences, that figure alone explains why California spends so much more on its prison system than other states. For example, guards in states like Texas make half as much as those in California. David Mildenberg & James Nash, *California, Texas, and State Workers' Pay*, BLOOMBERG BUSINESSWEEK (Apr. 28, 2011, 5:00 PM), http://www.businessweek.com/magazine/content/11_19/b4227025728517.htm.

288. PAGE, *supra* note 64, at 76–77.

289. *Id.* at 82.

290. Sullivan, *supra* note 284.

291. *Id.*

spokesman Lance Corcoran could not deny that the union benefited from the passage of laws mandating longer prison sentences.²⁹²

Whether the group was created by the CCPOA or merely supported by the CCPOA, victims' rights groups have crusaded against prison reform mechanisms such as early release and compassionate release of prisoners. Crime Victims United of California sued the state over the state's day-for-day early release program.²⁹³ "The suit contends that the state Constitution prohibits the early release of prisoners because of crowding, that crime victims have a right to weigh in before an inmate is released and that the state is legally bound to provide adequate prisons."²⁹⁴ Further, rumors of the union's loss of political clout have proven overstated in light of its recent contract with Governor Brown. At least for now, the CCPOA is a force not easily opposed.²⁹⁵

A discussion of the CCPOA's relationship with victims' rights organizations and victims' rights advocates is not complete without mentioning Mike Reynolds. Reynolds became an activist after a repeat felon murdered his daughter.²⁹⁶ His efforts led to the passage of the "Three Strikes and You're Out" law and the 10-20-Life law, both of which add years of incarceration to criminals sentenced under these provisions.²⁹⁷ He also opposes the early release and compassionate release of prisoners and warns of the dangers associated with releasing violent criminals in order to save money.²⁹⁸

292. Duane Lester, *How Prison Unions Helped Create Overcrowding Problem In California*, ALL AM. BLOGGER (May 24, 2011), <http://www.allamericanblogger.com/15848/how-prison-unions-helped-create-overcrowding-problem-in-california/>.

293. Marisa Lagos, *Advocacy Group Sues Over Early-Release Law*, S.F. CHRON. (Feb 18, 2010, 4:00 AM), http://articles.sfgate.com/2010-02-18/bay-area/17926727_1_early-release-early-release-crime-victims-united.

294. *Id.*

295. See Jon Ortiz, *Crown Administration Issues Statement on CCPOA Contract*, SACRAMENTO BEE STATE WORKER BLOG (Mar. 15, 2011, 6:22 PM), http://blogs.sacbee.com/the_state_worker/2011/03/brown-administration-issues-st.html.

296. Michael Doyle, *Jurists Take Up 'Three Strikes'*, THREE STRIKES & YOU'RE OUT, http://www.threestrikes.org/fresbee_7.html (last visited Feb. 8, 2012).

297. *Mike Reynolds Biography*, THREE STRIKES & YOU'RE OUT, http://www.threestrikes.org/mreynolds_bio.html (last updated Apr. 4, 2006).

298. *Three Strikes Information*, THREE STRIKES & YOU'RE OUT, <http://www.threestrikes.org/articles.html> (last updated Dec. 7, 2011).

Although the CCPOA publicly announced in the early 1990s that it would no longer support longer sentencing laws, the CCPOA has made numerous exceptions to that rule, most notably the Three Strikes Law.²⁹⁹ In 1994, the CCPOA contributed \$100,000 to Reynolds's campaign in support of the Three Strikes Law.³⁰⁰ Novey stated, "Mike Reynolds sought the assistance of CCPOA and we jumped on board—we were determined to help him rid our neighborhoods of violent felons. Three Strikes and You're Out became *our* initiative."³⁰¹ Reports obtained from the Secretary of State's office show that the CCPOA has vigorously opposed any attempt to reform the Three Strikes Law.³⁰² Specifically, between 1995 and 2003, the CCPOA lobbied against all seven reform bills.³⁰³ Crime-victims groups opposed six of the seven reform bills.³⁰⁴

Notably, Assembly Bill 109 excluded Three Strikes from its provisions.³⁰⁵ Even when the public seemed to support modest reforms to Three Strikes,³⁰⁶ then-Governor Schwarzenegger and the CCPOA led a last minute effort to defeat Proposition 66.³⁰⁷ In 2004, Proposition 66 would have required all strikes to be "violent" or "serious" and would have reduced the number of felonies that qualified as strikes.³⁰⁸ The CCPOA provided close to \$750,000 to

299. PAGE, *supra* note 64, at 112. Other exceptions to the CCPOA's no-support-for-longer-sentences rule abound. The union sponsored the truth-in-sentencing bill in 1994, which increased the minimum amount of sentence a prisoner would have to serve from 50% of their sentence to 85%. *Id.* at 113. The union also sponsored a "one strike for violent sex offenders" bill in 1994, which required a mandatory twenty-five-to-life sentence for sex crimes involving force or kidnapping. *Id.* at 113. The CCPOA also sponsored a bill which increased the age a minor could be tried as an adult from sixteen to fourteen, and sponsored a separate bill which sent juveniles sixteen and older to adult prison for certain violent or serious crimes, rather than to the California Youth Authority. *Id.* at 113–14.

300. *Id.* at 119.

301. *Id.* at 121.

302. *Id.*

303. *Id.*

304. *Id.*

305. CAL. DEP'T OF CORR. & REHAB, *supra* note 249.

306. MARK DICAMILLO & MERVIN FIELD, FIELD RES. CORP., THE FIELD POLL: LARGE MAJORITY CONTINUES TO FAVOR PROP. 66, TO LIMIT "THREE STRIKES" LAW (2004), available at <http://www.field.com/fieldpollonline/subscribers/RLS2141.pdf>.

307. Mark Martin, *Proposition 66: Efforts to Reform 'Three Strikes' Law Likely to be on Ballot Again*, S.F. CHRON. (Nov. 4, 2004), http://articles.sfgate.com/2004-11-04/bay-area/17451993_1_three-strikes-strikes-law-sentences.

308. PAGE, *supra* note 64, at 123.

fund the campaign against Proposition 66.³⁰⁹ The CCPOA created an organization to defeat Proposition 66 called Californians United for Public Safety (CUPS), comprised of law enforcement and victims' rights groups.³¹⁰ CUPS launched the "Felon a Day" campaign against Proposition 66, which released a mug shot and rap sheet of a felon every day who could have been released early by Proposition 66.³¹¹ CUPS also sent out press releases, produced three television commercials, and created three radio spots to oppose Proposition 66.³¹²

More recently, when moderate-conservative District Attorney Steve Cooley backed another even more modest ballot initiative to limit Three Strikes,³¹³ leaders of the California District Attorneys Association caused him to withdraw from its board.³¹⁴ Simply put, the Three Strikes Law has powerful allies and real staying power. But does the law deserve such strong adherence?

The best explanation for Three Strikes's staying power can be found in *Punishment and Democracy: Three Strikes and You're Out in California*.³¹⁵ There, Frank Zimring and his co-authors describe the powerful mythology built up around the law: until passage of Three Strikes, crime rates were on a steady incline; as soon as the law passed, crime rates showed a sharp decline that remained constant over time.³¹⁶ But as the authors demonstrated, to make that claim, supporters of Three Strikes had to aggregate crime data for the three years prior to the passage of the law.³¹⁷ A year-by-year analysis showed the decline beginning before passage of Three Strikes.³¹⁸

309. *Id.* at 127.

310. *Id.* at 124.

311. *Id.* at 126.

312. *Id.* at 126–27.

313. Joe Domanick, *New Count for Three-Strikes Law*, L.A. WKLY NEWS (Jan. 13, 2006), <http://www.laweekly.com/2006-01-12/news/new-count-for-three-strikes-law/2/>.

314. Kenneth Ofgang, *Personality Profile: Steve Cooley. County's Second-Longest Serving D.A. Takes Pride in Record, Looks to Future*, METROPOLITAN NEWS-ENTERPRISE (Jan. 14, 2010), <http://www.metnews.com/articles/2010/cooley011410.htm>.

315. ZIMRING, *supra* note 206.

316. Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 65–68 (1999).

317. ZIMRING, *supra* note 206, at 91–100.

318. *Id.*

Further, the authors' empirical study demonstrated very limited benefits, if any at all, that result from a possible deterrent effect of the law.³¹⁹ More importantly, other states have experienced even sharper drops in crime without the benefit of such expansive statutes as Three Strikes.³²⁰

In reviewing *Punishment and Democracy*, I wrote,

Economic arguments may influence voters and politicians. Polls suggest that voters are less enthusiastic about Three Strikes when they realize that it may require hard choices between further prison construction and education spending. The recent downturn in the state and national economies soon may make competition for scarce resources a reality again. California's energy crisis demonstrates how quickly a budgetary surplus can disappear.³²¹

Subsequent developments, including the exemption of Three Strikes from Assembly Bill 109, prove that I was not a very good prognosticator.

The influence of the CCPOA and victims' rights groups is hardly a secret. Less obvious is the role of term limits put in place in 1990.³²² California recently enacted an initiative aimed at creating more competitive legislative districts.³²³ To date, however, most voting districts have been crafted to create safe seats for either party.³²⁴ As a result, members of the assembly, for example, have tended to

319. *Id.* at 104–05.

320. Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 *LOY. L.A. L. REV.* 101, 128–29 (1998); Franklin Zimring, "The Decline in Crime in New York City," *supra* note 175.

321. Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 *CAL. L. REV.* 257, 287 (2002).

322. *CAL. CONST.* Amend. Initiative, Proposition 140 (approved Nov. 6, 1990).

323. Peter Schrag, Op-Ed., *California Redistricting: Don't Expect Any Magic*, *L.A. TIMES* (June 14, 2011), <http://articles.latimes.com/2011/jun/14/opinion/la-oe-schrag-redistricting-20110614>.

324. Editorial, *The Politics of Redistricting in California*, *L.A. TIMES* (Dec. 24, 2011), <http://articles.latimes.com/2011/dec/24/opinion/la-ed-redistricting-20111224>.

represent the extreme wings of their respective parties.³²⁵ One might have thought Democrats interested in sentencing reform could enact legislation, for example, creating a sentencing commission, without fear of reprisals. That has not been the case.

Elsewhere, I have speculated that the adoption of term limits goes a long way towards explaining the unwillingness of many liberal politicians from tackling reform. Consider a member of the assembly from one of the bluest districts in the state where constituents may favor reform.³²⁶ Why would that member of the assembly hesitate to propose or at least back reform? Term limits force that politician to think about the next political step in his or her career. That step often means making a run for the state senate and eventually statewide office.³²⁷ And while the assembly district may be deep blue, senate districts include a much larger and usually more conservative mix of voters.³²⁸ It may also include communities where state prisons are located, with the resulting economic dependence that those communities have on the status quo.³²⁹

A second aspect of California politics helps to explain the lack of broader reform. Until a recent initiative created a non-partisan citizens' board to oversee redistricting,³³⁰ California legislators effectively redrew their own districts.³³¹ The resulting districts were

325. See Jarrett Stepman, *Column: Working Part Time*, CAL. AGGIE (Jan. 19, 2010), <http://www.theaggie.org/2010/01/19/column-working-part-time/>.

326. I live in Davis, California, considered one of the most liberal communities in the state. For example, it is sometimes called the "People's Republic of Davis." MIKE FITCH, INTRODUCTION TO GROWING PAINS: THIRTY YEARS IN THE HISTORY OF DAVIS (1998), <http://cityofdavis.org/cdd/cultural/30years/intro.cfm>.

327. William P. Meyers, *California: Term Limits Not Enough*, CAL. DEMOCRACY (Sept. 25, 2011), http://www.californiademocracy.org/cal/2011/09_25_2011.html.

328. See Juliet Williams, *Election Reforms, Tax Initiatives Will Shape 2012*, SAN JOSE MERCURY NEWS (Dec. 31, 2011, 11:13 AM), http://www.mercurynews.com/breaking-news/ci_19652680 (noting that main purpose of California's independent redistricting commission was to "promote more centrist candidates to state legislative seats"). The hope was the creation of the commission would force candidates to appeal to a broader swath of voters rather than the extremes of either political party. *Id.*

329. Rina Palta, *Could California Close a Women's Prison?*, CROSSCURRENTS FROM KALW NEWS (Aug. 17, 2011), http://kalwnews.org/audio/2011/08/17/could-california-close-women's-prison_1175981.html.

330. CAL. CONST. Amend. Initiative, Proposition 11 (approved Nov. 4, 2008).

331. Cal. Citizens Redistricting Comm'n, *FAQ*, WEDRAWTHELINES.CA.GOV, <http://wedrawthelines.ca.gov/faq.html> (last visited Dec. 29, 2011).

drawn to include large majorities of the incumbents' own party.³³² Too often, legislators' primary fear was a challenge from a more extreme member of their own party.³³³ As budget battles in California have demonstrated so often, Republicans have held ranks almost without exception.³³⁴ The lack of a single Republican vote for Assembly Bill 109 demonstrates the extent of party discipline. Further, in light of arguments by conservatives in favor of sentencing reform outside the political arena³³⁵ and the participation of conservative Republicans in other conservative states like Mississippi and Texas,³³⁶ Republican members of California's legislature appear particularly irresponsible.

I find the view from California truly perplexing. As indicated above, outside the political arena, a consensus has emerged across a broad political spectrum including some extreme conservatives that sentencing reform is imperative and that it can be done without risking public safety.³³⁷ Further, states more conservative than California have accomplished broader reform than has California.³³⁸ In California, assembly Republicans are ready to pounce on Governor Brown's modest reform.³³⁹ Democrats seem content with steps far short of the reform that the state needs.³⁴⁰

332. *Id.*

333. See Reid Wilson, *California's Golden Opportunity at Bipartisanship*, NAT'L J. (Aug. 4, 2011, 6:19 AM), <http://mobile.nationaljournal.com/columns/on-the-trail/california-s-golden-opportunity-at-bipartisanship-20110804>.

334. See Phil Matier, *Gov. Brown's Camp Resorts to Name-Calling in Budget Battle*, CBS S.F. (June 27, 2011, 3:51 PM), <http://sanfrancisco.cbslocal.com/2011/06/27/phil-matier-gov-browns-camp-resorts-to-name-calling-in-budget-battle/>.

335. See *supra* text accompanying notes 109–22.

336. See Lagos, *supra* note 222.

337. See *supra* text accompanying notes 34–122.

338. See *supra* text accompanying notes 123–76.

339. Nannette Miranda, *Jerry Brown's Prison Realignment Plan Comes Under Fire*, ABC30 HD (Oct. 18, 2011), <http://abclocal.go.com/kfsn/story?section=news/politics&id=8395689>.

340. See *supra* text accompanying notes 253–340.

VII. CONCLUSION

Elsewhere, I have speculated how reform might come to California.³⁴¹ Perhaps naively optimistic, I thought that an economic crisis might force the state to engage in meaningful reform.³⁴² Further, the three-judge panel seemed to offer the added incentive for broad reform.³⁴³ One must hope that California's economic crisis does not get worse. Unless it does, the state may have missed its best chance for meaningful reform of the state's sentencing scheme and bloated prison budget.

341. Vitiello & Kelso, *supra* note 6, at 903.

342. *Id.* at 952.

343. *See supra* text accompanying notes 187–210.