Alternatives to Incarceration: Why Is California Lagging Behind?

Michael Vitiello

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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

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1 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.


3 See infra notes 74–119 and accompanying text.

4 See infra Part III.

5 See infra notes 74–119, Part III.


9 See infra notes 77–112 and accompanying text.
would have been easy to achieve nationwide. That has simply not been the case.\footnote{See infra Part VI.}

Many of us predicted that a weak economy would lead to sentencing reform.\footnote{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/.} 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.\footnote{See infra Part III.} At least, early reports suggest that public safety has not been sacrificed.\footnote{Id.}

California has the largest state prison system in the United States\footnote{Sonja Steptoe, California’s Growing Prison Crisis, TIME (June 21, 2007), http://www.time.com/time/nation/article/0,8599,1635592,00.html.} and a gaping hole in its budget.\footnote{Claire Suddath, Spotlight: California’s Budget Crisis, TIME (July 27, 2009), http://www.time.com/time/magazine/article/0,8599,1910985-1,00.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.} As California’s economic crisis has become evident, some politicians have tried to advance modest reform proposals, including recourse to a sentencing commission\footnote{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/2985742_1_sentencing-panel-sentencing-commission-state-senator.} and compassionate release of older prisoners.\footnote{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).} But California politicians have largely rejected proposals that have proven successful elsewhere.\footnote{See infra Part V.} Federal court intervention, affirmed by a divided Supreme Court, has kept some pressure on California politicians to reform a badly designed system.\footnote{See Brown v. Plata, 131 S. Ct. 1910 (2011).} Recent legislation advanced by Governor Brown is a partial and relatively tame
response to the problem. But the state missed a chance to enact a more sweeping reform.

This Article explores five themes. First, it discusses the consensus that has emerged among those calling for reform. Second, it examines how some states have responded to the call for reform. Third, it reviews briefly the Court’s ruling in Brown v. Plata, upholding the decision of a three-judge panel, requiring California to reduce the population of its prisons to comply with the Eighth Amendment. 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. Fifth, it examines the unique situation in California: despite its liberalism, it has remained remarkably resistant to reform. Specifically, this article examines the role of the prison guards’ union, victims’ rights groups, myths surrounding the effect of Three Strikes, and term limits and a legislature consisting largely of safe districts 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. 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.
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.
As explored below, California has missed an opportunity for more meaningful reform.\textsuperscript{33}

\section*{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.\textsuperscript{34} While the consensus began to unravel after reform took hold,\textsuperscript{35} it led to an almost universal abandonment of indeterminate sentencing.\textsuperscript{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,\textsuperscript{37} indeterminate sentencing gave judges wide latitude in imposing sentences\textsuperscript{38} and left a great deal of discretion to parole boards to set a release date for offenders.\textsuperscript{39} The prevailing model, grounded in faith of psychiatry and science,\textsuperscript{40} was so integrated into the legal culture that it influenced the Supreme Court’s case law in cases like \textit{Robinson v. California}\textsuperscript{41} and \textit{Powell v. Texas}.\textsuperscript{42} For example, in \textit{Robinson}, the

\textsuperscript{33} See infra notes 213–51 and accompanying text.


\textsuperscript{35} Id. at 1029–31.


\textsuperscript{37} A M. FRIENDS SERV. COMM., \textit{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).

\textsuperscript{38} FRANKEL, supra note 37, at 89–90; SINGER, supra note 37, at 1–2, 10.

\textsuperscript{39} FRANKEL, supra note 37, at 87.


\textsuperscript{41} Robinson v. California, 370 U.S. 660 (1962).

\textsuperscript{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.” 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.

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.” Managers of indeterminate sentencing and parole used them “as a tool of institutional control.” 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.” 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.

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

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

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43. Id. at 566–67 (Fortas, J., dissenting).
44. Id. at 561–62; Vitiello, supra note 34, at 1016. The four-Judge 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.
51. Id.
52. FRANKEL, supra note 37.
53. Id. at 5.
Legislatures left judges without guidance even on fundamental questions, including why we punish.\textsuperscript{54} He saw the system as allowing “untrained, untested, unsupervised men armed with great power [to] perpetuate abuses.”\textsuperscript{55} Like the authors of \textit{Struggle for Justice}, he saw the parole process as flawed, lacking meaningful standards, and providing no means of “curing” inmates.\textsuperscript{56}

The emerging consensus culminated in the move towards sentencing guidelines and commissions. After an unsuccessful effort to pass legislation in the 1970s,\textsuperscript{57} Congress enacted the Sentencing Reform Act in 1984.\textsuperscript{58} It limited judicial discretion in sentencing by forcing judges to consider detailed sentencing guidelines.\textsuperscript{59} The Act limited judges’ discretion to deviate from the guidelines.\textsuperscript{60} Judges were to give written explanations for deviating from the guidelines, subjecting their decisions to appellate review.\textsuperscript{61} The Act also eliminated parole.\textsuperscript{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.\textsuperscript{63} The victims’ rights movement gained traction locally and nationally.\textsuperscript{64} Freed from the constraints of the rehabilitative model, retributivists called for longer and longer sentences.\textsuperscript{65} One needs only to think back to the 1988 presidential election and President George H. W. Bush’s Willie Horton ad\textsuperscript{66} to

\begin{flushleft}
\textsuperscript{54} \textit{Id.} at 7.
\textsuperscript{55} \textit{Id.} at 17.
\textsuperscript{56} \textit{Id.} at 95.
\textsuperscript{60} 18 U.S.C § 3553(a)-(b) (1988).
\textsuperscript{61} Id. §§ 3553(c), 3742(a)-(b).
\textsuperscript{62} Id. § 3624(a)-(b).
\textsuperscript{63} Clear, supra note 50, at 37–41.
\textsuperscript{64} JOSHUA PAGE, THE TOUGHEST BEAT 83 (2011).
\textsuperscript{65} Clear, supra note 50, at 37–41.
\end{flushleft}
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

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67. PAGE, supra note 64, at 117–18.
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.
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.
77. See Kennedy, supra note 76.
78. Id.
79. Id.
80. Id.
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. For over a decade, a committee of the ALI, for example, has been working on revisions to the Model Penal Code sentencing provisions. Several principles have emerged, including disapproval of mandatory minimum sentences, evidence-based sentencing, proportionality constraints on sentences, 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.

Organizations like the Vera Institute for Justice and the Pew Charitable Trust 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. 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.

The Pew Charitable Trust has been at the forefront of the crisis of over-incarceration. It has identified the problem of overreliance on incarceration and has funded studies aimed at lowering incarceration rates while protecting the public. 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.
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.\textsuperscript{98} In an extensive report published in 2011, the Pew Center on the States studied recidivism rates around the country.\textsuperscript{99} It explored, for example, why Wyoming and Oregon have the lowest recidivism rates in the country, while California and Minnesota have the highest.\textsuperscript{100} It explored why some states have experienced sharp declines in recidivism while others have experienced sharp increases in rates of recidivism.\textsuperscript{101} The report identified the problem of diminishing returns that states experience when they continue to expand their prison systems.\textsuperscript{102} The report provides state officials interested in sensible use of resources with a variety of strategies, including reentry strategies that successfully reduce recidivism.\textsuperscript{103}

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


\textsuperscript{99} PEW CENTER ON THE STATES, \textit{supra} note 1.

\textsuperscript{100} Id. at 17–23.

\textsuperscript{101} Id. at 5–6.

\textsuperscript{102} Id. at 25–32.

\textsuperscript{103} See AM. FRIENDS SERV. COMM., \textit{supra} note 37; FRANKEL, \textit{supra} note 37, at 89–90; Gaylin & Rothman, \textit{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, \textit{New Findings, New Views: A Note of Caution Regarding Sentencing Reform}, 7 HOFSTRA L. REV. 243, 252 (1979).


\textsuperscript{105} See KLEIMAN, \textit{supra} note 105, at 35–48; PEW CENTER ON THE STATES, \textit{supra} note 1, at 25–32.

\textsuperscript{106} See PEW CENTER ON THE STATES, \textit{supra} note 1.

\textsuperscript{107} See KLEIMAN, \textit{supra} note 105, at 34.
As developed below, 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. 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. 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.” 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. The Right on Crime webpage lists former Florida Governor Jeb Bush as its most recent signatory. 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.”

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

113. Id.
114. Id.
115. Gingrich & Nolan, supra note 111.
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.
sentencing reform. Critics have come to that recognition for different policy reasons. Nonetheless, critics of the overuse of incarceration have identified a handful of concrete proposals whereby states can reduce prison costs without endangering public safety. This section reviews developments taking place in different states.

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

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). 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.
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.
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.138

133. Id. at 304.
136. Stemen & Wool, supra note 132, at 298.
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.\footnote{Id. at 781–82.} For example, the Commission’s guidelines influenced the Washington legislature’s enactment of alternative treatment programs for drug offenders such as Senate Bill 5990.\footnote{Id.} 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.\footnote{Id. at 781.}

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.”\footnote{Stemen & Wool, supra note 132, at 298.} 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.”\footnote{Greene, supra note 134.}

**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
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%.\footnote{Jimmie E. Gates, \textit{Inmates Get Early Release}, \textit{CLARION-LEDGER} (Jackson, Miss.), Nov. 29, 2009, available at 2009 WLNR 24110992.} 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.\footnote{\textit{PORTER}, supra note 135, at 13.} 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.\footnote{Id. at 13–14.} Senate Bill 2039 removed both caps.\footnote{Id. at 13–14.} 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.”\footnote{RYAN S. KING, \textit{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.}

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.”\footnote{Gates, supra note 144.} It was estimated that such a change in law would save the state $5 million annually.\footnote{Id.} 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.”\footnote{Jerry Mitchell, \textit{Lawmakers Look To Stave Off Prison Overcrowding}, \textit{CLARION-LEDGER} (Jackson, Miss.), Dec. 12, 2000, at 1A.} Not only do

\begin{footnotes}
\item[145.] \textit{PORTER}, supra note 135, at 13.
\item[146.] Id.
\item[147.] Id. at 13–14.
\item[149.] Gates, supra note 144.
\item[150.] Id.
\item[151.] Jerry Mitchell, \textit{Lawmakers Look To Stave Off Prison Overcrowding}, \textit{CLARION-LEDGER} (Jackson, Miss.), Dec. 12, 2000, at 1A.
\end{footnotes}
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{155} Texas “allocated $241 million for residential and non-residential treatment-oriented programs for non-violent

\textsuperscript{152} Id.

\textsuperscript{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.

\textsuperscript{154} Id.

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.


\(^{159}\) *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).

inmate could not earn back the credit. 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 839 in 2009, eliminating juvenile sentences of life without parole. 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. 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.”

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. 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.

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.
168. PORTER, supra note 135, at 16.
169. Id.
170. Id.
172. Fausset, supra note 157.
another 10.7 percent through August 31, 2009.\textsuperscript{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.\textsuperscript{174}

Serious criminologists often confess uncertainty about what causes the decline in crime rates.\textsuperscript{175} But the results from states like Washington, Mississippi, and Texas, among other states, are encouraging.\textsuperscript{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. \textbf{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 \textit{Brown v. Plata}\textsuperscript{177} and explores how it may provide California with the opportunity to reform its broken system.\textsuperscript{178}

The Court’s decision in \textit{Brown v. Plata} involved consolidated cases. Filed in 1990 as a class action, \textit{Coleman v. Brown} challenged the legality of the mental health care provided by the California Department of Corrections and Rehabilitation (CDCR).\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item[173.] State Initiatives: Texas, supra note 155.
\item[174.] Fausset, supra note 157.
\item[176.] PORTER, supra note 135, at 13–14.
\item[178.] See infra text accompanying notes 205–15.
\end{enumerate}
\end{footnotesize}
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.”

Filed as a class action in 2001, *Plata v. Brown* challenged the adequacy of health care provided by the CDCR. 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. The plaintiffs alleged that inadequate medical care resulted in over thirty deaths. 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.

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

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. The state had to reduce the population to 137.5% of the design capacity. The court based its order to reduce the prison population on the finding that

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182. *Id.* 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.\textsuperscript{190} Over the period of the litigation, the prison population averaged 190\% of the system’s designed capacity.\textsuperscript{191} Despite headlines to the contrary,\textsuperscript{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.\textsuperscript{193} Further, the three-judge panel indicated frustration with the state’s repeated failures to comply with previous orders.\textsuperscript{194}

Decided by a vote of 5–4, \textit{Brown v. Plata} upheld the lower court order.\textsuperscript{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.\textsuperscript{196} While the Court affirmed the lower court, it noted the state’s options other than releasing prisoners.\textsuperscript{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.\textsuperscript{198} He contrasted the experience in other states, some of which have reduced their prison populations without impairing public

\begin{thebibliography}{99}
\bibitem{191} Id. at *31.
\bibitem{193} Coleman, 2009 WL 2430820, at *84.
\bibitem{194} Id.
\bibitem{196} Id. at 1923–25.
\bibitem{197} Id. at 1929. Justice Kennedy identified that those options included sending prisoners out of state. Id.
\bibitem{198} Id. at 1942–43.
\end{thebibliography}
He cited studies suggesting that prisons may be crimogenic.\textsuperscript{200} Given the protracted litigation in \textit{Plata}, the state has had years to seek solutions to overcrowding.\textsuperscript{201} The three-judge panel and Supreme Court decisions still leave open the opportunity to repetition the court if it cannot comply with the order.\textsuperscript{202} In the next section, I explore California’s response to \textit{Plata} and other developments in the state.\textsuperscript{203} At this point, \textit{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.\textsuperscript{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.\textsuperscript{205} Policymakers have ignored social scientists and academic lawyers for many years. Frank Zimring and his co-authors summarized the problem in \textit{Punishment and Democracy: Three Strikes and You’re Out in California}:

\begin{quote}
[E]xpert influence on the process and expert involvement in
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id. at 1943.
\item \textsuperscript{201} \textit{Brown}, 131 S. Ct. at 1930–31.
\item \textsuperscript{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, \textit{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.” \textit{Brown}, 131 S. Ct. at 1959 (Alito, J., dissenting). Further, he accused the Court of “gambling with the safety of the people of California.” \textit{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.” \textit{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.
\item \textsuperscript{203} See discussion \textit{infra} Part V.
\item \textsuperscript{204} As developed below, meaningful reform is hardly a foregone conclusion.
\item \textsuperscript{205} \textit{Brown}, 131 S. Ct. at 1942–43.
\end{itemize}
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,

207. Brown, 131 S. Ct. at 1942–45.
208. See supra text accompanying notes 93–108.
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.”

Prior to Plata, however, California’s efforts at reform had been tepid at best. As indicated above, Plata may provide the state with the impetus to tackle sentencing reform. This section reviews the limited efforts at reform prior to Plata and the state’s short-term response to Plata.

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

By comparison, efforts at creating a sentencing commission in California have gone nowhere. Such efforts have had a great deal of academic support, as well as support from various non-partisan organizations like the Little Hoover Institute. 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. But that kind of reform has floundered in the political arena. Various Democratic legislators have proposed legislation...
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

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225. See Testimony Before the H. Subcomm., supra note 17 (statement of Jonathan Turley).
does not require the release of currently incarcerated prisoners. 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. 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. 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.” 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. 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. 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 community.

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


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

The Act also requires counties to develop implementation plans.\textsuperscript{238} Reminding county officials that the Brown Act requires open meetings,\textsuperscript{239} the law anticipates participation of stakeholders, including providers of health, drug treatments, and other social services along with local business interests.\textsuperscript{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.\textsuperscript{241} In addition, it suggests adoption of practices found effective at reducing recidivism in other jurisdictions.\textsuperscript{242} As discussed above, adopting similar programs elsewhere has led to dramatically lower recidivism rates.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{236} Id. at 11–12.
  \item \textsuperscript{237} Id. at 11.
  \item \textsuperscript{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).
  \item \textsuperscript{239} CAL. GOV’T CODE § 54950 (West, Westlaw through Ch. 8 of 2012 Reg. Sess.).
  \item \textsuperscript{240} AMERICAN CIVIL LIBERTIES UNION OF CALIFORNIA, supra note 235, at 9.
  \item \textsuperscript{242} See supra text accompanying notes 133–57.
  \item \textsuperscript{244} 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.
\end{itemize}
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, the law did not require the state to release anyone currently in prison. It does not address the unnecessarily expensive and sometimes unfair treatment of sex offenders. The law does not allow county-level supervision for third-strike offenders or any individual with a serious or violent offense. 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.

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. 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.

VI. ELUSIVE REFORM

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

246. See, e.g., Governor Brown’s Prison Plan Jeopardizes Safety of Streets, supra note 230.
251. See discussion supra Part II.
252. See discussion infra Part VI.
253. See supra text accompanying notes 122–75.
models for how to allocate rationally limited prison resources while protecting the public. 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) programs have experienced significant savings by releasing older felons, who do not commit additional crimes. Mississippi, according to a recent story on the web, has saved $5 million over seven years by releasing eighty-nine terminally ill inmates.

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

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. Despite its infrequent use and

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.”).
260. CAL. PENAL CODE § 2065 (West, Westlaw through Ch. 8 of 2012 Reg. Sess.).
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.
268. Id.
269. Id.
271. See infra text accompanying notes 276–88.
victim rights groups, and myths surrounding the effect of Three Strikes, and term limits. 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.

Created in 1957 as a social club, the California Correctional Officers Association (CCOA) became a powerful political association during the 1980s. Under the tutelage of union President Don Novey beginning in 1980, the CCOA became the California Correctional Peace Officers Association. Novey took over at an ideal time for the growth of the union. Beginning with the 1968 presidential election, conservatives made law-and-order a winning political strategy. The 1980s also saw the expansion of the war on drugs. 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. With the increased prison population came a 600% increase in CCPOA’s membership from 1982 to 2001.

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.” 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

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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.

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.\footnote{Sullivan, \emph{supra} note 284.} 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.\footnote{PAGE, \emph{supra} note 64, at 76–77.}

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.\footnote{\emph{Id}. at 82.} 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.\footnote{Sullivan, \emph{supra} note 284.} For many years the CCPOA has been Crime Victims United of California’s only donor.\footnote{\emph{Id}.} Although the union claims there is no ulterior motive to their involvement in victims’ rights, union
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

294. Id.
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. In 1994, the CCPOA contributed $100,000 to Reynolds’s campaign in support of the Three Strikes Law. 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.” Reports obtained from the Secretary of State’s office show that the CCPOA has vigorously opposed any attempt to reform the Three Strikes Law. Specifically, between 1995 and 2003, the CCPOA lobbied against all seven reform bills. Crime-victims groups opposed six of the seven reform bills.

Notably, Assembly Bill 109 excluded Three Strikes from its provisions. Even when the public seemed to support modest reforms to Three Strikes, then-Governor Schwarzenegger and the CCPOA led a last minute effort to defeat Proposition 66. 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. 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.
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.


\(^{315}\) ZIMRING, *supra* note 206.


\(^{317}\) 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.\textsuperscript{319} More importantly, other states have experienced even sharper drops in crime without the benefit of such expansive statutes as Three Strikes.\textsuperscript{320}

In reviewing Punishment and Democracy, I wrote,

\begin{quote}
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.\textsuperscript{321}
\end{quote}

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.\textsuperscript{322} California recently enacted an initiative aimed at creating more competitive legislative districts.\textsuperscript{323} To date, however, most voting districts have been crafted to create safe seats for either party.\textsuperscript{324} As a result, members of the assembly, for example, have tended to

\begin{footnotes}
\textsuperscript{319} Id. at 104–05.
\textsuperscript{322} CAL. CONST. Amend. Initiative, Proposition 140 (approved Nov. 6, 1990).
\end{footnotes}
represent the extreme wings of their respective parties. 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. 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. And while the assembly district may be deep blue, senate districts include a much larger and usually more conservative mix of voters. It may also include communities where state prisons are located, with the resulting economic dependence that those communities have on the status quo.

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, California legislators effectively redrew their own districts. The resulting districts were

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.
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.
drawn to include large majorities of the incumbents’ own party.\textsuperscript{332} Too often, legislators’ primary fear was a challenge from a more extreme member of their own party.\textsuperscript{333} As budget battles in California have demonstrated so often, Republicans have held ranks almost without exception.\textsuperscript{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 arena\textsuperscript{335} and the participation of conservative Republicans in other conservative states like Mississippi and Texas,\textsuperscript{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.\textsuperscript{337} Further, states more conservative than California have accomplished broader reform than has California.\textsuperscript{338} In California, assembly Republicans are ready to pounce on Governor Brown’s modest reform.\textsuperscript{339} Democrats seem content with steps far short of the reform that the state needs.\textsuperscript{340}

\begin{thebibliography}{99}
\bibitem{332} Id.
\bibitem{335} See supra text accompanying notes 109–22.
\bibitem{336} See Lagos, supra note 222.
\bibitem{337} See supra text accompanying notes 34–122.
\bibitem{338} See supra text accompanying notes 123–76.
\bibitem{340} See supra text accompanying notes 253–340.
\end{thebibliography}
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.