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# Reforming California Sentencing Practice and Policy: Are We There Yet?

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*Symposium—The Long Overdue Reform of California's  
Sentencing Practice and Policy*

**Reforming California Sentencing Practice and Policy: Are  
We There Yet?**

Michael Vitiello\*

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I. INTRODUCTION

A decade ago, my colleague Clark Kelso and I organized a symposium focused on reforming California’s sentencing practice and policy.<sup>1</sup> The event led to a paper with contributions from a number of prominent scholars describing a blueprint for reforming California’s sentencing scheme.<sup>2</sup> Buoyed by what seemed

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1. Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California’s Sentencing Practice and Policy*, 38 Loy. L.A. L. REV. 903 (2004). Co-authors Erwin Chemerinsky, Kevin Reitz, Jonathan Turley, and Franklin E. Zimring.

2. *Id.* at 908–09.

to be an incipient movement towards wholesale sentencing reform, we cited several factors pointing towards meaningful reform, including California's budget crisis; prominent national figures and organizations proposing reform; the apparent willingness of then-Governor Schwarzenegger to take on the California Corrections and Peace Officers Association and to consider sentencing reform; and changing attitudes among Californians, suggesting their support for reform.<sup>3</sup>

Had you asked us a decade ago whether reform would take ten years, we would have said no. Despite that, a decade later, we remain committed to the goal of sentencing reform and believe that California still has a reasonable chance of effectuating that reform. That is the focus of this symposium.

This paper offers a brief overview of developments over the past decade leading to overuse of incarceration. Thereafter, it explores the role that various participants will have in the process, with an assessment of their role in advancing or blocking reform that may lead to reform. Specifically, Part II provides a snapshot of developments nationally.<sup>4</sup> Part III focuses on California and discusses the role of the three-judge panel in *Brown v. Plata*<sup>5</sup> and *Coleman v. Schwarzenegger*<sup>6</sup> that forced California to respond to the overuse of incarceration.<sup>7</sup> Part IV focuses on the various actors, including the federal judges, the legislature, governor, prison guard's union, and the public, and assesses their roles in reform.<sup>8</sup> As I believed a decade ago, sentencing reform is sound policy and, despite a long gestation, it can happen in California. But reform is not inevitable. Further, as developed briefly, the way in which law is made in California poses risks for successful reform.<sup>9</sup>

## II. ENTHUSIASM FOR INCARCERATION WANES

Anyone interested in learning about incarceration in the United States does not have to look far for literature describing the trend from the 1970s through the early part of this century.<sup>10</sup> Apart from a host of scholarly articles<sup>11</sup> and books,<sup>12</sup>

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3. *Id.* at 908.

4. *Infra* Part II.

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

6. *Coleman v. Schwarzenegger*, 922 F.Supp. 2d 882 (2009).

7. *Infra* Part III

8. *Infra* Part IV

9. *Infra* Part V

10. JUST. POL'Y INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1 (2000), available at [http://www.justicepolicy.org/images/upload/00-05\\_rep\\_punishingdecade\\_ac.pdf](http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf) (on file with the *McGeorge Law Review*); DORIS LAYTON MACKENZIE, NAT'L CRIM. JUST. REFERENCE SERV., SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 7-9 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf> (on file with the *McGeorge Law Review*); John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 377 (2013); NICOLE HAHN RAFTER & DEBRA L. STANLEY, PRISONS IN AMERICA: A REFERENCE HANDBOOK 15-19 (1999).

non-partisan organizations like the American Bar Association<sup>13</sup> and the Pew Charitable Trusts<sup>14</sup> have studied the trend that has made the United States the largest prison system in the world.<sup>15</sup> Most recently, the National Academy of Sciences published a major report entitled *The Growth of Incarceration in the United States: Causes and Consequences*, which provides an extensive analysis of the problem of mass incarceration.<sup>16</sup> The story is a familiar and troubling one.

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11. Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 851–52, 858 (2009); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L., 27, 28 (2011); see Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 18 (1999) (noting an increase in incarceration by 6.3 percent per year since the early 1970s).

12. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 16–17 (2001); DAVID GARLAND, MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (2001); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 5 (2007).

13. Press Release, American Bar Association, California Officials to Discuss Prison Conditions, Sentencing and Rehabilitation Issues with American Bar Association Commission (Apr. 2, 2004), <http://www.abanews.org/releases/news040204.html> (on file with the *McGeorge Law Review*); Press Release, American Bar Association, Incoming ABA President Dennis W. Archer Calls on Lawyers to Evaluate Nation's Prison and Corrections System (Aug. 11, 2003), [http://www.abanews.org/aug03/081103\\_3.html](http://www.abanews.org/aug03/081103_3.html) (on file with the *McGeorge Law Review*); Press Release, American Bar Association, ABA Forms New Commission to Review Mandatory Minimum Sentences, Prison Conditions and Pardons (Oct. 6, 2003), [http://www.abanet.org/media/oct03/100603\\_1.html](http://www.abanet.org/media/oct03/100603_1.html) (on file with the *McGeorge Law Review*).

14. PEW CTR. ON STS., STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 1 (2011), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolving\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf) (on file with the *McGeorge Law Review*).

15. NAT'L ACAD. SCI., NAT'L RES. COUNS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis, et al. eds., 2014) [hereinafter THE GROWTH OF INCARCERATION].

16. *Id.* At least one commentator has been critical of some aspects of the report. Professor John Pfaff of Fordham University School of Law is skeptical about the basis on which the NAS report makes its conclusions. John Pfaff, *The Problematic National Research Council's Report on Incarceration: Some Initial Thoughts*, PRAWFSBLAWG (May 28, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/05/the-problematic-national-research-councils-report-on-incarceration-some-initial-thoughts.html> (on file with the *McGeorge Law Review*). He points to discrepancies, including the reliance on data relating to increased incarceration for drug crimes. *Id.* He points out that “drug offenses” is an incredibly broad category, one that is as broad as violent crimes, a category that has been broken up into narrower categories including murder, sexual assault, assault, and robbery. *Id.* Professor Pfaff's point is that if the data from each of these smaller categories were lumped into “violent crimes” then the growth of that category would be more on par with the drug offenses category. *Id.* Furthermore, Pfaff argues that the number of violent crimes played a larger role in prison population increases than did drug offenses. *Id.*

Pfaff also takes issue with the assertion in the NAS report that longer prison sentences are at the heart of the population increase. John Pfaff, *A Flawed NRC Report: Prison Populations and Sentence Length, Parts 1-4*, PRAWFSBLAWG (May 30, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/05/a-flawed-nrc-report-prison-populations-and-sentence-length-part-1.html> (on file with the *McGeorge Law Review*). Relying on his own research, Pfaff argues that the perspective taken by the NAS report is too simplistic and that the focus on longer sentences is overstated. *Id.* While Professor Pfaff might disagree about the underlying causes of the significant increase in prison populations, he does not contest the fact of massive incarceration. *Id.*

Beginning in the 1970s with the loss of faith in rehabilitation, states and the United States abandoned indeterminate sentencing.<sup>17</sup> While a consensus formed across political boundaries, those calling for longer sentences ended up winning the debate in legislatures throughout the United States.<sup>18</sup> The prison population rose steadily and dramatically from roughly 200,000 prisoners nationwide to over a million and a half between 1973 and 2009.<sup>19</sup> Add to that another 700,000 prisoners housed in jails; the total population incarcerated peaked at about 2.5 million.<sup>20</sup> That amounts to about a quarter of the world's prison population and, measured as a percentage of the population, is 5 to 10 times the rate of incarceration in Western Europe.<sup>21</sup>

The impact on minority communities in the United States is even more dramatic. African-American and Hispanic men less than 40 years old are disproportionately represented among those incarcerated.<sup>22</sup> They are incarcerated at rates far greater than non-Hispanic white men.<sup>23</sup>

The causes of mass incarceration are easy to identify as well: incarceration became increasingly the remedy of choice when an offender was arrested and convicted;<sup>24</sup> legislatures lengthened sentences even before they adopted three strikes legislation in the 1990s;<sup>25</sup> legislatures adopted mandatory minimum sentences;<sup>26</sup> during the 1990s, a majority of states adopted some form of three strikes law;<sup>27</sup> and most states adopted "truth-in-sentencing" laws, largely abandoning early release for those offenders.<sup>28</sup>

For years, politicians became addicted to get-tough-on-crime legislation.<sup>29</sup> Richard Nixon demonstrated the power of a law-and-order campaign in 1968, with its veiled racist theme.<sup>30</sup> The first President Bush demonstrated the staying

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17. Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1013 (1991).

18. Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275, 1279–80 (2012) [hereinafter Vitiello, *Alternatives to Incarceration*].

19. THE GROWTH OF INCARCERATION, *supra* note 15, at 2.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 3.

25. *Id.*

26. *Id.*

27. ZIMRING, ET AL., *supra* note 12, at 159; Vitiello, *supra* note 18, at 1281.

28. THE GROWTH OF INCARCERATION, *supra* note 15, at 73.

29. See Joan Petersilia & Francis T. Cullen, *Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 STAN. J. CRIM. L. & POL'Y (forthcoming Winter 2014–2015) (manuscript at 6) (on file with the *McGeorge Law Review*); see also Michael Vitiello, "Three Strikes" and the Romero Case: The Supreme Court Restores Democracy, 30 LOY. L. A. L. REV. 1601, 1610, 1631 (1996) [hereinafter Vitiello, *Three Strikes*].

30. THE GROWTH OF INCARCERATION, *supra* note 15, at 115–16.

power of that approach with the Willie Horton ad during the 1988 campaign.<sup>31</sup> But tough-on-crime was hardly restricted to conservatives or politicians playing the race card. Few politicians in California, for example, have been willing to take the lead on meaningful sentencing reform.<sup>32</sup>

As indicated above, even before the recession, various individuals and organizations began focusing on the overuse of incarceration.<sup>33</sup> Many focused on the social cost, especially to minority communities.<sup>34</sup> Some commentators focused on the poor allocation of resources resulting from mass incarceration.<sup>35</sup> Consistent with the best deterrence studies, scholars argued that society gets better deterrence from increasing the certainty of punishment than from using those resources to increase punishment.<sup>36</sup> Commentators recognized that longer sentences, especially for older offenders, had a perverse effect: those offenders would be incarcerated long-past their prime crime years.<sup>37</sup> In a world of finite resources, warehousing older offenders left fewer resources for younger, more violent offenders.<sup>38</sup> Not only did warehousing older offenders skew the prison population away from more violent offenders, it added to the cost of providing care for inmates: older prisoners are far more expensive to warehouse because of added medical expenses.<sup>39</sup>

Elsewhere, some policymakers who advocated sentencing reform, no doubt, were motivated by these legitimate policy reasons. In many states, even before

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31. DANIEL M. SHEA & BRIAN M. HOWARD, PRESIDENTIAL CAMPAIGNS DECODED 172 (2013); *Willie Horton Political Ad 1988*, YOUTUBE (uploaded on Oct. 27, 2006), available at <https://www.youtube.com/watch?v=EC9j6Wfdq3o> (on file with the *McGeorge Law Review*).

32. Vitiello, *Three Strikes*, *supra* note 29, at 1610.

33. See *supra* notes 10–15 and accompanying text.

34. THE GROWTH OF INCARCERATION, *supra* note 15, at 14.

35. CORR. INDEP. REV. PANEL, INTRODUCTION TO REFORMING CALIFORNIA'S YOUTH AND ADULT CORRECTIONAL SYSTEM 19 (2004), available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm> (on file with the *McGeorge Law Review*).

36. ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH (1999); Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 865 (2001); VALERIE WRIGHT, THE SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010), available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf> (on file with the *McGeorge Law Review*); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 40–41 (1976); see, e.g., HAW. ST. JUDICIARY'S OPPORTUNITY PROBATION WITH ENFORCEMENT (HOPE) PROGRAM, <http://www.hopehawaii.net> (last visited Mar. 21, 2015) (on file with the *McGeorge Law Review*).

37. CAL. PERFORMANCE REV. INMATE/PAROLEE POPULATION MANAGEMENT (2007), available at <http://www.cpr.ca.gov/reports/indrpt/corr/index.htm> [hereinafter INMATE/PAROLEE POPULATION] (on file with the *McGeorge Law Review*); THE GROWTH OF INCARCERATION, *supra* note 15, at 345.

38. See Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395, 440–41 (1996). From an institutional standpoint, prison administrators and guards would not object to that trend. Managing older prisoners represents different but less dangerous challenges to prison personnel.

39. *Id.*

the recession of 2007, states experienced budget difficulties.<sup>40</sup> A number of states faced a crisis by overuse of incarceration and responded by reforming their sentencing law, often in tandem with the creation of sentencing commissions and sentencing guidelines.<sup>41</sup>

The recession accelerated the interest in prison reform.<sup>42</sup> Obviously, states were under increasing strain caused by the recession.<sup>43</sup> Further, crime was no longer a top priority among voters.<sup>44</sup> The correlation between incarceration and decline in crime rates is complex, with increased incarceration having some, but limited effect on reduced crime.<sup>45</sup> But beginning in the 1990s and continuing until today, crime rates are lower in many jurisdictions than they have been since the 1970s.<sup>46</sup> That makes sentencing reform politically more palatable than it has been in years.

Sentencing reform has been possible in many places outside of California because a political consensus has developed across political lines. Elsewhere, I have described that consensus.<sup>47</sup> Anyone who doubts that should visit the website Right on Crime.<sup>48</sup> More recently, prominent Republican politicians, including probable Presidential candidate Rand Paul, have sounded the knell for sentencing reform.<sup>49</sup> Less surprisingly, Attorney General Eric Holder has also called for reform.<sup>50</sup>

Not only has the call for reform picked up support across the political spectrum, but reform has taken place in many states. Some of those states are deep red states, like Texas<sup>51</sup> and Georgia.<sup>52</sup> Those states have implemented a

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40. See 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&hwp](http://www.nytimes.com/2011/08/13/us/13penal.html?_r=3&hwp) (on file with the *McGeorge Law Review*).

41. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1286–87. Typically, the goals for commissions included reducing reliance on incarceration as the only response to crime, thereby reducing prison costs, and using existing resources more effectively for violent offenders, thereby protecting the public without continuous prison construction. *Id.*

42. Petersilia & Cullen, *supra* note 29, at 2.

43. *Id.*

44. *Id.* at 7.

45. THE GROWTH OF INCARCERATION, *supra* note 15, at 4; ZIMRING ET AL., *supra* note 12, at 155.

46. THE GROWTH OF INCARCERATION, *supra* note 15, at 46–47.

47. Vitiello, *supra* note 18, at 1281.

48. See *generally Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-ofprinciples/> (last visited Dec. 17, 2014) (on file with the *McGeorge Law Review*).

49. *Senator Rand Paul Leading the Way on Criminal Justice Reform*, RIGHT ON CRIME, <http://www.rightoncrime.com/2013/04/senator-rand-paul-criminal-justice-reform/> (last visited Dec. 17, 2014) (on file with the *McGeorge Law Review*).

50. Carrie Johnson, *With Holder in the Lead, Sentencing Reform Gains Momentum*, NPR (Aug. 7, 2013, 4:22 AM), available at <http://www.npr.org/2013/08/07/209253516/with-holder-in-the-lead-sentencing-reform-gains-momentum> (on file with the *McGeorge Law Review*).

51. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1291–94.

variety of programs to reduce incarceration, for example, by reforming their probation and parole systems,<sup>53</sup> and to reduce recidivism, for example, by adopting stepped-up reentry programs for inmates released from prison.<sup>54</sup> More liberal states have also engaged in sentencing and other reforms, with an aim towards reducing reliance on prisons while maintaining public safety.<sup>55</sup> States like New York, for example, revisited mandatory minimum sentences.<sup>56</sup> New York went further when it applied the new law retroactively.<sup>57</sup> The federal government joined this trend in 2008 with the adoption of the Second Chance Act, which increased funding for reentry programs,<sup>58</sup> and later with passage of the Fair Sentencing Act of 2010, which reduced the disparity in sentencing between crack and powder cocaine offenses.<sup>59</sup>

In 2007, America's prison and jail populations peaked at over 2.4 million offenders.<sup>60</sup> Not surprisingly, the recession contributed to a downturn in the total number of incarcerated offenders nationwide, a downward trend that has continued since 2009.<sup>61</sup>

Sentencing reform does not necessarily correlate with a total reduction in a state's prison population. Although many states have engaged in some kind of sentencing reform, not all have experienced a reduction in their prison populations.<sup>62</sup> Indeed, as reported by the Sentencing Project, three states account for the largest percentage of reductions in the number of offenders behind bars.<sup>63</sup> I deal with California in more detail below. Between 1999 and 2012, New York and New Jersey reduced their prison populations by 26%; nationwide, the prison population grew by 10% during that period of time.<sup>64</sup>

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52. MICHAEL P. BOGGS & W. THOMAS WORTHY, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM 2 (2014).

53. *Id.* at 8–9; Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1291–93.

54. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1291–92.; BOGGS & WORTHY, *supra* note 52, at 3–4.

55. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1287–89; *see* THE GROWTH OF INCARCERATION, *supra* note 15, at 345.

56. RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. JUST., PLAYBOOK FOR CHANGE?: STATES RECONSIDER MANDATORY SENTENCES 14 (2014), *available at* <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v3.pdf> (on file with the *McGeorge Law Review*).

57. *Id.*

58. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

59. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as 21 U.S.C. § 841).

60. Petersilia & Cullen, *supra* note 29, at 2.

61. *Id.*

62. *Id.* at 3

63. MARC MAUER & NAZGOL GHANDOOSH, THE SENT'G PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 1 (2014), *available at* [http://sentencingproject.org/doc/publications/inc\\_Fewer\\_Prisoners\\_Less\\_Crime.pdf](http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf) (on file with the *McGeorge Law Review*).

64. *Id.*



Despite predictions by some law-and-order advocates,<sup>65</sup> the reduction in prison population has not led to rising crime rates. According to a policy brief published by The Sentencing Project, crime rates in New York and New Jersey have dropped at a faster rate than the national average.<sup>66</sup> As reported by The Sentencing Project, “[b]etween 1999-2012, New York and New Jersey’s violent crime rate fell by 31% and 30%, respectively, while the national rate decreased by 26%.”<sup>67</sup> Those states experienced similar declines in property crimes, also below the national average.<sup>68</sup>

While states like New York and New Jersey have better than average results, they are part of a national trend. According to a Pew Charitable Trusts’ report, more than half of the states reduced prison populations between 2007 and 2012.<sup>69</sup> Not only are states reducing prison population, but many are reducing overall prison capacity, with several states closing prisons.<sup>70</sup> No doubt economics have driven many of these reform efforts.<sup>71</sup>

Although states vary in their approach, systemic reform seems to have taken hold. As Professors Petersilia and Cullen have pointed out, “[t]hese trends were reflected in prison policy.”<sup>72</sup> That is, while economics may have motivated reform efforts, policymakers have changed their beliefs on reform. As mentioned above, that includes conservatives who no longer depict prison “as an essential weapon in the war on crime but as a ‘blunt instrument’ that, when used injudiciously, wasted valuable taxpayer monies.”<sup>73</sup> Again, as observed by Professor Petersilia and Cullen, we have reached the “tipping point” towards a new way of thinking about incarceration: “For so long, mass imprisonment had been the governing policy of corrections . . . . [S]eemingly overnight, its hegemony was shattered, and *downsizing* quickly emerged as its replacement.”<sup>74</sup>

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65. *Brown v. Plata*, 131 S. Ct. 1910, 1967 (2011) (Alito dissenting).

66. MAUER & GHANDOOOSH, *supra* note 63, at 2.

67. *Id.* at 1.

68. *Id.*

69. Press Release, The Pew Charitable Trusts, US Imprisonment Rate Continues to Drop Amid Falling Crime Rates (March 14, 2013), *available at* <http://www.pewtrusts.org/en/about/news-room/press-releases/2014/03/14/us-imprisonment-rate-continues-to-drop-amid-falling-crime-rates> (on file with the *McGeorge Law Review*).

70. NICOLE D. PORTER, THE SENTENCING PROJECT, ON THE CHOPPING BLOCK 2013: STATE PRISON CLOSURES 1 (2013), *available at* [http://sentencingproject.org/doc/publications/inc\\_On%20the%20Chopping%20Block%202013.pdf](http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf) (on file with the *McGeorge Law Review*).

71. States spent \$48.5 billion on corrections in 2010, a 5.6% reduction since 2009. TRACEY KYCKELHAHN, U.S. DEP’T JUST., STATE CORRECTIONS EXPENDITURES, FY 1982-2010 1 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf> (on file with the *McGeorge Law Review*).

72. Petersilia & Cullen, *supra* note 29, at 4.

73. *Id.* at 4-5. “In 2012, the Platform for the Republican Party for the first time explicitly embraced prisoner rehabilitation, reentry programs, and restorative justice; it also rejected the federal government’s overcriminalization of many acts.” *Id.* at 5.

74. *Id.*

This good news begs a question: what about California? While we seem to be in the midst of a national trend towards sustained reform, the picture in California is more complicated. That is the topic of the next Part of this paper.

### III. BUCKING THE TREND?

According to The Sentencing Project, California has done a good job in reducing its prison population and reducing crime.<sup>75</sup> Between 2006 and 2012, it reduced its prison population by 23%.<sup>76</sup> During that period, its violent crime rate dropped 21%, exceeding the national decline.<sup>77</sup> Its decline in property crimes was almost as good as the national average.<sup>78</sup> That would seem like good news. The picture is much more complicated and efforts at reform have been tepid by comparison to many other states. This Part reviews briefly how California got into its prison overcrowding crisis and how it has made progress and why no one should announce victory: the modest reforms mask significant problems that may erode the gains made thus far and California has not adopted reforms that promise more significant benefits than we have achieved with modest reforms. Unresolved is whether California will take the next step towards meaningful reform.

The story of California's overcrowding crisis is a familiar one.<sup>79</sup> As part of a national trend, California abandoned indeterminate sentencing in 1976.<sup>80</sup> That reflected the shift in penological philosophy from rehabilitation to retribution, with its emphasis on punishment.<sup>81</sup> The shift was away from offender characteristics to the offense as determinative of the length of the sentence, with judges given an option between three presumptive sentences for each crime.<sup>82</sup> California law required the judge to impose the middle range sentence unless the judge found mitigating or aggravating circumstances justified a modification of the middle range penalty.<sup>83</sup> Without other changes, the determinate sentencing scheme would have led to an increase in the state's prison population. But the legislature did not stop there.

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75. MAUER & GHANDOOSH, *supra* note 63, at 7.

76. *Id.*

77. *Id.* at 4.

78. *Id.* at 5.

79. *See, e.g.*, Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1281; Petersilia & Cullen, *supra* note 29, at 2.

80. Vitiello & Kelso, *supra* note 1, at 919.

81. *Id.*

82. *Id.* at 920.

83. *Id.*; CAL. PENAL CODE § 1170(b) (West 2004).

As described by one commentators, the California legislature created numerous “drive by” sentencing laws.<sup>84</sup> Thus, when a particularly heinous crime made the nightly news, the legislature added an enhancement provision to the law, leading to so many sentencing provisions that many lawyers and judges have been forced to use a computer program to determine the correct sentence.<sup>85</sup> Over a seven-year period, from 1984 through 1991, the legislature passed over 1,000 crime bills, with many of them enhancing criminal sentences.<sup>86</sup>

And the trend towards enhanced sentences does not include California’s Three Strikes law.<sup>87</sup> As the authors of *Punishment and Democracy: Three Strikes and You’re Out in California* stated, the Three Strikes law was “the largest penal experiment in American history.”<sup>88</sup> The third strike provision got most of the national headlines: while California was part of a national trend during the 1990s, its three strikes provisions were the most draconian. For example, the list of qualifying felonies included not just violent offenses but also residential burglary.<sup>89</sup> Further, the law included no washout provision; thus, an offender whose violent or serious felonies were in the distant past remained eligible for a sentence of 25 years to life.<sup>90</sup> Finally, the most extreme provision was the section of the law dealing with the third felony, making an offender eligible for the enhanced sentence: it could be any felony.<sup>91</sup> Several extreme examples made national headlines, involving what seemed to the public to be a very minor offense, but triggering a lengthy sentence that seemed disproportionate to the third crime.<sup>92</sup> In several instances, the offender’s third strike was petty theft with a prior theft offense.<sup>93</sup> Under California law, such an offense was a “wobbler,” one that could be treated as a felony if the prosecutor so chose.<sup>94</sup>

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84. Vitiello & Kelso, *supra* note 1, at 916–17.

85. *Id.* at 923 n.88.

86. *Id.* at 921.

87. CAL. PENAL CODE § 667(e)(2) (West 1994).

88. ZIMRING ET AL., *supra* note 12, at 17 (capitalization omitted).

89. Cal. Penal Code § 667 (West 1994); FRANKLIN E. ZIMRING, GORDON HAWKINS, SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA 7 (2001).

90. Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395, 400 (1996).

91. FRANKLIN E. ZIMRING, GORDON HAWKINS, SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA 7 (2001).

92. CAL. PENAL CODE § 667(e)(2) (West 1994); See *Ewing v. California*, 538 U.S. 11 (2002). Gary Ewing was arrested for stealing three golf clubs worth \$399 each. He was charged with felony grand theft of personal property, and as his “third strike” was sentenced to 25-years in prison. In the companion case, Leandro Andrade stole \$153 worth of videotapes from two separate Kmart stores. Because Andrade stole from two separate locations he was charged with two third strikes and sentenced to 50 years in prison. Ina Jaffe, *Cases Show Disparity of California’s 3 Strikes Law*, NPR, ALL THINGS CONSIDERED (Oct 30, 2009, 5:54 PM), <http://www.npr.org/templates/story/story.php?storyId=114301025> (on file with the *McGeorge Law Review*).

93. E.g. *Lockyer v. Andrade*, 538 U.S. 63 (2003).

94. *Ewing v. California*, 538 U.S. 11, 18 (2002).

Were that all that California's Three Strikes law did, it would have added modestly prison overcrowding.<sup>95</sup> But the law also includes a "two strikes" provision that expands and mandates prison time for anyone who was convicted of a serious or violent felony: the law doubles the second strike offender's punishment.<sup>96</sup> While much of the press coverage and scholarly debate has focused on the third strike provisions of the law,<sup>97</sup> the second strike provision had a more dramatic effect on the prison population: for example, in 2013, there were fewer than 9000 third strike offenders in state prison, but over 34,000 second strike offenders.<sup>98</sup>

By the mid-2000s, California's prison population was about 170,000.<sup>99</sup> As described in *Brown v. Plata*, dealing with two prisoners' class action suits against the state, by the time of trial in that case, the prison population was 156,000, nearly double its design capacity.<sup>100</sup>

The cost of maintaining California's prison system ballooned over time as well. During fiscal year 2010, California spent almost \$8 billion on its prison system at an average cost of almost \$48,000 per inmate.<sup>101</sup> That same year, California budgeted about \$1 billion more for its prison system than for higher education.<sup>102</sup>

Academic commentators and various organizations expressed concern over a long period of time.<sup>103</sup> Occasionally, legislators conducted hearings on reforming

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95. As of June 2013 the total number of inmates in prison for a third strike was 8,064. In some instances the offender's third strike would have commanded a long sentence anyway. For example, 57 third strikers' final offense was murder in the second degree. CAL. DEP'T OF CORR. & REHAB., SECOND AND THIRD STRIKER FELONS IN THE ADULT INSTITUTION POPULATION (June 30, 2012), available at [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/Quarterly/Strike1/STRIKE1d1206.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Quarterly/Strike1/STRIKE1d1206.pdf) (on file with the *McGeorge Law Review*).

96. CAL. PENAL CODE § 667 (West 1994).

97. Marisa Lagos, *Two strikes have large impact on prison population*, SFGATE (July 31, 2011), <http://www.sfgate.com/politics/article/Two-strikes-have-large-impact-on-prison-population-2352565.php> (on file with the *McGeorge Law Review*).

98. CAL. DEP'T OF CORR. & REHAB., SECOND AND THIRD STRIKER FELONS IN THE ADULT INSTITUTION POPULATION (June 30, 2012), available at [http://www.cdcr.ca.gov/reports\\_research/offender\\_information\\_services\\_branch/Quarterly/Strike1/STRIKE1d1206.pdf](http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Quarterly/Strike1/STRIKE1d1206.pdf) (on file with the *McGeorge Law Review*).

99. *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 908 (2009).

100. 131 S. Ct. 1910, 1923 (2011)

101. VERA INST. OF JUST., THE PRICE OF PRISONS CALIFORNIA: WHAT INCARCERATION COSTS TAXPAYERS FACT SHEET (2012), <http://www.vera.org/files/price-of-prisons-california-fact-sheet.pdf> (on file with the *McGeorge Law Review*).

102. See Prerena Anand, *Winners and Losers: Corrections and Higher Education in California*, CACS.ORG (Sept. 5, 2012), available at <http://cacs.org/research/winners-and-losers-corrections-and-higher-education-in-california/> (on file with the *McGeorge Law Review*).

103. Letter from Michael E. Alpert, Chairman, Little Hoover Commission, to Gray Davis, Governor of California and Members of the Legislature (Nov. 13, 2003), available at <http://www.lhc.ca.gov/lhcd172/report172.pdf> (notes on file with the *McGeorge Law Review*); see Robert Salladay, *Governor's*

sentencing practices. For example, at various times, the legislature had before it proposals to adopt a sentencing commission.<sup>104</sup> Those proposals went nowhere.<sup>105</sup> In 2003, a select Senate committee conducted hearings on the aging prison population, including testimony about the high cost of maintaining an aging prison population and about the experience in other states that had put in place early release programs for older prisoners.<sup>106</sup> As indicated above,<sup>107</sup> some change has come to California, but it was not the result of legislative will. Instead, incentive came from the federal court system.

In 1990, attorneys for mentally-ill prisoners brought a class action against the state in which the plaintiffs contended that the delivery of mental health care services was so poor that it amounted to a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>108</sup> Initially, a federal magistrate found for the plaintiffs, a decision that the federal district court largely adopted in September 1995.<sup>109</sup>

Among the court's finding was that the prison system lacked a program for screening and evaluating inmates for mental illness, leading to "thousands of inmates suffering from mental illness [who] [were] either undetected, untreated, or both."<sup>110</sup> Additionally, "defendants' supervision of the use of medication [was] completely inadequate; prescriptions [were] not timely refilled, there [was] no adequate system to prevent hoarding of medication, . . . inmates on psychotropic medication [were] not adequately monitored, and it appear[ed] that some very useful medications [were] not available because there [was] not enough staff to do necessary post-medication monitoring."<sup>111</sup>

These, and other unconstitutional conditions, were attributed to a chronic understaffing of mental health care services.<sup>112</sup> Due to these findings, the *Coleman* court entered an order for injunctive relief appointing a Special Master to oversee the development and implementation of plans to remedy the constitutional violations.<sup>113</sup>

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*Tough Task: Finding the Waste to Cut*, S.F. CHRON., Nov. 27, 2003, at A1; see also George Skelton, *Millions of Micro-Managers Share Blame for State's Crises*, L.A. TIMES, Sept. 25, 2003, at B8.

104. Amanda Lopez, *Coleman/Plata: Highlighting the Need to Establish an Independent Corrections Commission in California*, 15 BERKELEY J. CRIM. L. 97, 114 (2010).

105. *Id.*

106. *California's Aging Prison Population, Hearing Before the S. Select Comm. on the Cal. Corr. System of the Cal. S. Comm. on Pub. Safety*, 2003-2004 S., Reg. Sess. (Cal. 2003).

107. See *supra* note 63 and accompanying text.

108. *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 898 (2009).

109. *Id.* at 899.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 900.

In December 1995, the court appointed a Special Master to oversee remedial phase of action.<sup>114</sup> After 18 months the Special Master submitted the Mental Health Services Delivery System Program Guides to the court.<sup>115</sup> This program guide included a report, remedial plans, and policies and procedures to be implemented.<sup>116</sup> The court approved the plan.<sup>117</sup> Between 1997 and 2006 the special master submitted 20 monitoring reports and 56 other reports to the court.<sup>118</sup> The subsequent history was one of small gains followed by reversals of those gains.<sup>119</sup> After a decade of remedial work:

[T]he state had made some progress but still had not met its constitutional obligation to provide *Coleman* class members with adequate mental health care. . . . Worse, two monitoring reports filed by the *Coleman* Special Master in 2006 reflected a troubling reversal in the progress of the remedial efforts of the preceding decade and demonstrated the profound impact of population growth on the state's ability to meet its constitutional obligations to seriously mentally ill inmates.<sup>120</sup>

After years of litigation, *Coleman* would merge with another class action suit and end up in the Supreme Court.<sup>121</sup>

*Plata v. Schwarzenegger* was filed in 2001 as a class action on behalf of inmates in California's prisons. The complaint alleged constitutional violations in the delivery of medical care as well as violations of the Americans with Disabilities Act (ADA).<sup>122</sup> These violations included:

inadequate medical screening of incoming prisoners; delays in or failure to provide access to medical care, including specialist care; untimely responses to medical emergencies; the interference of custodial staff with the provision of medical care; the failure to recruit and retain sufficient numbers of competent medical staff; disorganized and incomplete medical records; a 'lack of quality control procedures, including lack of physician peer review, quality assurance and death reviews'; a lack of protocols to deal with chronic illnesses, including diabetes, heart disease, hepatitis, and HIV; and the failure of the administrative grievance system

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 901.

118. *Id.*

119. *Id.* at 906.

120. *Id.*

121. *Id.* at 914.

122. *Id.* at 890.

to provide timely or adequate responses to complaints concerning medical care.<sup>123</sup>

During the proceedings, numerous cases of gross negligence surfaced. For example, with regard to one case involving a prisoner with a serious heart condition, a medical expert stated that the improper care was "the most reckless and grossly negligent behavior [he had] ever seen by a physician."<sup>124</sup>

The *Plata* plaintiffs agreed to a stipulation for injunctive relief. Under this agreement, the state was ordered to implement on a staggered basis new policies and procedures, numbering 800 pages contained in 11 volumes.<sup>125</sup> Seven prisons were to have these procedures implemented immediately with completion in 2003. Each subsequent year policies were to be implemented at five additional prisons so that implementation would be achieved statewide by 2008.<sup>126</sup>

The stipulation required that California prisons provide just the minimum level of medical care required under the Eighth Amendment and the policies and procedures aimed to "meet or exceed the minimum level of care necessary to fulfill the defendants' obligation to plaintiffs under the Eighth Amendment of the United States Constitution."<sup>127</sup>

The stipulation required regular audits of the defendant's compliance. They were to include a review of at least 180 inmate medical records at each prison. Compliance required assessments and treatment plans in the records be consistent with the community standard of care "imposed under the laws of the State of California upon health care providers licensed to practice in California."<sup>128</sup> "[M]inimally adequate death reviews" were also necessary for compliance.<sup>129</sup>

The state failed to follow through on its promises. For example, by May 2005, when twelve prisons should have been in compliance with the plan, "not a single prison ha[d] successfully completed implementation."<sup>130</sup> Inaction by the state eventually led the district court to appoint a receiver after the court held a six day hearing.<sup>131</sup> The court's findings were sharply critical of the health care system. The court found that the system created an "unconscionable degree of suffering and death [that] is sure to continue if the system is not dramatically overhauled."<sup>132</sup>

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123. *Id.*

124. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253, at \*6 (N.D. Cal. 2005).

125. *Coleman*, 922 F.Supp. 2d at 891.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 891, 894.

131. *Id.* at 894.

132. *Id.* at 895.

Despite the appointment of a receiver with broad powers over the prison health care system, conditions worsened as the prison population increased from about 162,000 to over 170,000 in 2007, or 200% of design capacity for the system.<sup>133</sup> The deteriorating conditions led Governor Schwarzenegger to issue an emergency proclamation declaring that “all 33 of CDCR’s prisons are now at or above maximum operational capacity, and 29 of the prisons are so overcrowded that the CDCR is required to house more than 15,000 inmates in conditions that pose substantial safety risks.”<sup>134</sup> Following the proclamation, the plaintiffs moved for the appointment of a three-judge panel to limit the size of the prison population in light of the recognition that overcrowding was directly related to the poor health care conditions.<sup>135</sup>

At about the same time, the plaintiffs in *Coleman* also filed a motion for appointment of a three-judge panel.<sup>136</sup> After the appointment of a three-judge panel in both cases, the cases were consolidated.<sup>137</sup> In 2009, after additional hearings, the three-judge panel entered an order requiring the state to reduce its population to 137.5% of the system’s design capacity.<sup>138</sup> That required a reduction of between 38,000 and 46,000 prisoners. The state appealed from the order of the three-judge panel.<sup>139</sup> A divided Court affirmed the three-judge panel’s order.<sup>140</sup>

During oral argument in *Plata*, Justice Kennedy summed up not just the majority’s position, but the past decade or more, when he stated “the problem . . . is that at some point the court has to say: You’ve been given enough time. . . .”<sup>141</sup> The Court’s decision largely ended the state’s foot-dragging.<sup>142</sup> AB 109, a law that “realigns” California’s sentencing scheme, shifting responsibility from the state to counties, was California’s response to the demands of the three-judge panel to reduce its prison population.<sup>143</sup> While the legislature passed the law before the Supreme Court’s decision in *Plata* and *Coleman*, a comparison with

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133. Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL’Y REV. 327, 327 (2014).

134. *Coleman*, 922 F.Supp. 2d at 912.

135. *Id.* at 912–13.

136. *Id.*

137. *Id.* at 914.

138. *Id.* at 1003–04.

139. *Brown v. Plata*, 131 S. Ct. 1910, 1922 (2011).

140. *Id.* at 1923.

141. Transcript of Oral Argument at 16, *Brown v. Plata*, 131 S. Ct. 1910 (2011).

142. For example, it moved for an extension of time to hit the target, something that the three-judge panel agreed to. Bob Egelko, *Court Gives California Two Years to Lower Prison Population*, SFGATE (Feb. 11, 2014), <http://www.sfgate.com/crime/article/Court-gives-California-2-years-to-lower-prison-5221828.php> (on file with the *McGeorge Law Review*).

143. CAL. PENAL CODE § 17.5(b) (West 2014).



the lower court opinions and the statute suggest that the law's drafters had the litigation in mind.<sup>144</sup>

Enacted in April 2011, the law had three goals: reducing recidivism; reducing costs associated with the prison system; and maintaining public safety.<sup>145</sup> The law did not involve release of felons currently in state prison.<sup>146</sup> Instead, it changed the law to reduce the number of felonies requiring offenders to spend time in state prison.<sup>147</sup> Most non-violent and low-level felons are now sentenced to county jail time when the court orders the offender incarcerated for all or part of his term.<sup>148</sup> The effect of the law has been to slow the flow of offenders to the state's prisons.<sup>149</sup> One piece of datum demonstrates why that is so: counties now handle drug and property crimes. That shift represents over half of all felony convictions in a given year.<sup>150</sup>

In theory, Realignment does more than merely move offenders from state prisons to county jails. Instead, its goal was to address sources of overcrowding. California spends more than any other state on its prison system, but has a much higher rate of recidivism. As summarized by Professor Petersilia, "No other state spends more on its corrections system and gets back less."<sup>151</sup> Realignment attempts to reduce recidivism expanding resources for rehabilitation. Meanwhile, the goal of reducing recidivism is entwined with efforts to reduce prison costs: "The purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable."<sup>152</sup>

The law was premised on the idea that moving prisoners closer to home makes rehabilitation more likely. Offenders are closer to their families and community-based programs can deliver services more efficiently at the local level.<sup>153</sup> Consistent with the theme of local responsibility, the law requires each

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144. See Petersilia, *supra* note 133, at 327.

145. PENAL § 17.5(a)(1)–(7).

146. Petersilia, *supra* note 133, at 336.

147. *Id.*

148. PENAL § 17.5(a)(6). More specifically, "Felons convicted of certain serious, violent, and aggravated sex offenses continue to serve their time in state prison, but sentences for more than five hundred other felony crimes must be served through county jail time or probation." Petersilia, *supra* note 133, at 332.

149. Petersilia, *supra* note 133, at 328.

150. CAL. OFF. ATT'Y GEN., CRIME IN CALIFORNIA 2010 53 tbl.40 (2001), available at <http://www.oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd10/preface.pdf> (on file with the *McGeorge Law Review*).

151. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 207, 211 (Michael Tonry ed., 2008). As she observed elsewhere, "despite the state's extraordinary spending on prisons, its return-to-prison recidivism rate is among the nation's highest at 57.8%, far outpacing the national average of 43.3%." Petersilia, *supra* note 133, at 332.

152. CAL. PENAL CODE §§ 17.5(a)(7), 3450(b)(7) (West 2014).

153. See *id.* §§ 17.5, 1228–1232.

county to create a Community Corrections Partnership to develop a comprehensive plan to implement the goals of Realignment.<sup>154</sup> But the law left counties with broad discretion in how to implement the goals of the law. In effect, San Francisco County is free to adopt policies discouraging the use of jails while San Bernardino County is free to use resources made available under the law to build more jail cells.<sup>155</sup> Anticipating savings to the state from the reduction in the prison population, the legislature allocated a part of those savings to the counties, a change that is now guaranteed by the state Constitution as a result of Proposition 30.<sup>156</sup>

Realignment deserves a closer look at this point. Some commentators have called it a bold innovation. For example, the *Economist* called it “one of the great experiments in American incarceration policy.”<sup>157</sup> Not surprisingly, Governor Brown, its chief proponent, has called it “bold.”<sup>158</sup> The law has resulted in an immediate reduction in the prison population by reducing the number of offenders going to state prisons.<sup>159</sup>

The reduction in prison admissions is historic and dramatic. As indicated above, the total prison population has been declining in recent years.<sup>160</sup> In fact, over half of the nationwide reduction in the prison population in recent years resulted from reductions in the prison population in California.<sup>161</sup> No doubt, the progress made under Realignment led the three-judge panel to grant the Governor an extension of time to comply with its order to reduce the population to 137.5% of capacity.<sup>162</sup>

In light of the immediate reduction in the prison population, what is not to like about Realignment? Its proponents point to its larger goals, not simply as a short term compliance with the court order. Among the goals of the legislation is

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154. *Id.* §§ 17.5(a)(6), 1230(b).

155. *Id.* § 1230(b)(3); *see also* CAL. GOV'T CODE § 30026(a) (West 2012) (Counties are only required to use funds to make “various changes to the criminal justice system”); *see also* PENAL § 17.5(a)(6) (Counties are instructed to “develop[] programs and ensur[e] appropriate outcomes” for offenders). The law also shifts responsibility from state parole officials to county probation officers for supervising low-level offenders released from state prison, a change from prior practice. *Id.* § 3451(c). The law also prohibits the return to prison for most parolees and probationers who commit “technical” violations of their release. *Id.* §§ 3457–3458.

156. AB 109, 2011 Leg., 2011-2012 Sess. (Cal. 2011); *see also* Cal. Proposition 30 (2012).

157. *The Magic Number*, THE ECONOMIST (May 11, 2013), <http://www.economist.com/news/united-states/21577411-california-hasnt-emptied-its-prisons-enough-it-trying-magic-number> (on file with the *McGeorge Law Review*).

158. Nick Smith, *Inmates Trade Prison Cells for Jail Under Plan*, ABC 7 NEWS (Oct. 1, 2011, 6:41 PM), <http://abclocal.go.com/kgo/story?section=news/state&id=8375360> (on file with the *McGeorge Law Review*).

159. *Id.*; MIKE MALES, CTR. JUV. & CRIM. JUST., EIGHT MONTHS INTO REALIGNMENT: DRAMATIC REDUCTIONS IN CALIFORNIA'S PRISONERS 1 (2012), *available at* [http://www.cdcr.ca.gov/Reports/docs/External-Reports/Realignment\\_update\\_June\\_2012.pdf](http://www.cdcr.ca.gov/Reports/docs/External-Reports/Realignment_update_June_2012.pdf) (on file with the *McGeorge Law Review*).

160. *See supra* notes 75–76 and accompanying text.

161. Petersilia, *supra* note 133, at 333.

162. Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *Coleman v. Brown*, No. 2:90-cv-0520 LKK/DAD (PC) (E.D. Cal. & N.D. Cal. Feb. 10, 2014).

to help end recidivism. As stated in the law, “the purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.”<sup>163</sup> That sounds good, as do other aspirational aspects of the law.<sup>164</sup>

Some observers herald the shift of responsibility to local governments.<sup>165</sup> And Realignment certainly did shift responsibility away from Sacramento. Thus, each county must create a community corrections partnership, involving the various “stakeholders.” The panel must create a plan to implement the law.<sup>166</sup> The state has promised funds to the counties, but, consistent with the preference for local control, counties are largely free to spend the funds as the local government sees fit.<sup>167</sup> That may mean spending funds on alternatives to incarceration or it may mean using the funds for expanding local jails.<sup>168</sup> Not surprising given the diverse political climates around the state, counties are spending Realignment funding in widely different ways.<sup>169</sup>

Whether Realignment can deliver over the long term is less certain. No doubt, incarceration in county jails is less expensive than in state prisons.<sup>170</sup> But depending on how high-incarceration counties respond, the net effect of Realignment may be moving prisoners from state to local facilities without achieving the grander goal of reducing recidivism.<sup>171</sup> Indeed, while some reports

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163. CAL. PENAL CODE §§ 17.5(a)(7), 3450(b)(7) (West 2014).

164. For example, the law was designed to support “locally run community-based corrections.” *Id.* § 17.5(a)(5).

165. *See, e.g.*, Petersilia, *supra* note 133, at 335 (“Realignment is providing the space for fifty-eight coalitions to think about how to do things better in their localities.”).

166. PENAL §§ 1230–1230.1.

167. *See id.*; *see also* Petersilia, *supra* note 133, at 335 (“... counties are free to rely heavily on their local jails, invest in law enforcement personnel, or choose from a wide variety of less severe (public and private) alternatives, such as electronic monitoring, drug courts, day reporting centers, or split sentencing (a sentence in which the offender serves a reduce [sic] jail term followed by probation).”).

168. *See* SARA ABARBANEL ET AL., STAN. CRIM. JUST. CTR., REALIGNING THE REVOLVING DOOR: AN ANALYSIS OF CALIFORNIA COUNTIES’ AB 109 2011–2012 IMPLEMENTATION PLANS 32 (2013) (on file with the *McGeorge Law Review*); *see also* JEFFREY LIN & JOAN PETERSILIA, STAN. CRIM. JUST. CTR., FOLLOW THE MONEY: HOW CALIFORNIA COUNTIES ARE SPENDING THEIR PUBLIC SAFETY REALIGNMENT FUNDS 14 (2014), available at <http://www.law.stanford.edu/sites/default/files/childpage/183091/doc/slpublic/Lin%20Money%20Final%20Report%20022814.pdf> (on file with the *McGeorge Law Review*).

169. SARA ABARBANEL ET AL., *supra* note 168; LIN & PETERSILIA, *supra* note 168.

170. *See* KIM GILHULY ET AL., HUM. IMPACT PARTNERS, REHABILITATING CORRECTIONS IN CALIFORNIA: THE HEALTH IMPACTS OF PROPOSITION 47 14 (2014) (on file with the *McGeorge Law Review*) (comparing the cost per person in prison versus jail).

171. Certainly, part of the drop in the state prison population corresponded to an increase in county jail populations. A study by the Public Policy Institute of California (PPIC) estimates that about one-third of the state prison population drop was shifted onto the counties. MAGNUS LOFSTROM & STEVEN RAPHAEL, PUB. POL’Y INST. OF CAL., IMPACT OF REALIGNMENT ON COUNTY JAIL POPULATIONS 2 (2013), available at [http://www.ppic.org/content/pubs/report/R\\_613MLR.pdf](http://www.ppic.org/content/pubs/report/R_613MLR.pdf) (on file with the *McGeorge Law Review*). That is, roughly two-thirds of the drop in the state prison population represents an actual reduction in California’s

point to the decline in California's prison population, the total number of offenders in some form of incarceration has not dropped nearly as sharply,<sup>172</sup> given the increased populations in county jails<sup>173</sup> and given the number of prisoners that California has shipped out of state, to reduce cost and population in its state prisons.<sup>174</sup> Realignment is simply a shell game if it merely moves prisoners elsewhere.

The three-judge panel supervising the state's health care system has all but said that Realignment is a Band-Aid. In its February 10, 2014 order granting the state additional time to comply with the order to reduce the prison population to 137.5% of capacity, they stated that:

In the four and a half years between our 2009 order and the date of this opinion, defendants have instituted only one significant measure to relieve overcrowding in California's prisons: "Realignment," . . . . Apart

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overall in-state incarceration rate, according to the PPIC report. *Id.* However, this still does not take into account prisoners sent out of state, meaning that the number of prisoners incarcerated by the state has not dropped nearly as much as is suggested by the drop in California's in-state incarceration rate. *See infra* note 174 and accompanying text (California houses more than 8,300 prisoners out of state). Add that 8,300 to the 8,600 inmates that were shifted from state prisons to county jails, per the PPIC report, and nearly 17,000 of the 26,600 decline in the state's prison population were merely prisoners being moved around. *See id.*

172. LISA T. QUAN ET AL., STAN. CRIM. JUST. CTR., REALLOCATION OF RESPONSIBILITY: CHANGES TO THE CORRECTIONAL SYSTEM IN CALIFORNIA POST-REALIGNMENT 31 (2014), available at <http://www.law.stanford.edu/sites/default/files/childpage/183091/doc/slspublic/CC%20Bulletin%20Jan%202014.pdf> (on file with the *McGeorge Law Review*) ("Realignment so far has not reduced the total number of offenders under some form of correctional supervision. Instead, it merely shuffled the allocation of responsibility. . . .").

173. *See* TODD D. MINTON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., JAIL INMATES AT MIDYEAR 2012-STATISTICAL TABLES 1-2 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf> (on file with the *McGeorge Law Review*) (reporting that, while the rest of the country's jail population remained stable between 2011 and 2012 [Realignment took effect October 1, 2011], California's jail population rose substantially during that period, growing by an estimated 7,600 inmates); *see also* Petersilia, *supra* note 133, at 348 ("In the quarter preceding the start of Realignment, the average daily jail population [in California] was 71,293 but by yearend 2012 it reached 80,136, an increase of approximately 11%."); SARAH LAWRENCE, STAN. CRIM. JUST. CTR., MANAGING JAIL POPULATIONS TO ENHANCE PUBLIC SAFETY: ASSESSING AND MANAGING RISK IN THE POST-REALIGNMENT ERA 6 (2013), available at <https://www.law.stanford.edu/sites/default/files/child-page/440504/doc/slspublic/Paper%20on%20jail%20mgmt%20July%202013.pdf> (on file with the *McGeorge Law Review*) ("Under . . . Realignment, tens of thousands of sentenced individuals who previously would have served time in state prison are now serving it in county jails.").

174. Victoria Law, *California Ships Prisoners Out of State to "Reduce" Its Prison Population*, TRUTH-OUT.ORG (Dec. 6, 2013, 10:02 AM), <http://www.truth-out.org/news/item/20405-california-ships-prisoners-out-of-state-to-reduce-its-prison-population> (on file with the *McGeorge Law Review*). The three-judge panel overseeing the reduction of California's prison population has expressed its disapproval of sending prisoners out of state. *See* Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline at 2, *Coleman v. Brown*, No. 2:90-cv-0520 LKK DAD (PC) (E.D. Cal. Feb. 10, 2014), available at <http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-opinion-2-20-2014.pdf> [hereinafter Order Request for Extension] (on file with the *McGeorge Law Review*) ("sending . . . prisoners to out-of-state facilities . . . is neither durable nor desirable. It would result in . . . prisoners being incarcerated hundreds or thousands of miles from the support of their families, and in hundreds of millions of dollars that could be spent on long-lasting prison reform being spent instead on temporarily housing prisoners in out-of-state facilities.").

from Realignment, defendants have taken no significant steps toward reducing the prison population and relieving overcrowding despite repeated orders by this Court requiring them to do so.

Reading between the lines is not difficult: Realignment is a halfway measure.

In addition, Realignment is premised on the idea that counties will develop best-practices. That is, because counties are free to experiment, counties with poor results will emulate counties that are more successful in reducing recidivism.<sup>175</sup> But as several others involved in this symposium will argue, California does not have to invent best practices in recidivism.<sup>176</sup> California has suffered from high recidivism<sup>177</sup> not because better practices are not available but because of its adherence to failed practices.<sup>178</sup> Under the current approach, some counties where law-and-order still resonates are likely to follow old habits, using incarceration of a solution of first resort.<sup>179</sup> Adherence to failed policies is likely to result in the continued disparate impact on minority communities.<sup>180</sup> Governor

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175. MAGNUS LOFSTROM ET AL., PUB. POL'Y INST. OF CAL., EVALUATING THE EFFECTS OF CALIFORNIA'S CORRECTIONS REALIGNMENT ON PUBLIC SAFETY 15–19 (2012), available at [http://www.ppic.org/content/pubs/report/R\\_812MLR.pdf](http://www.ppic.org/content/pubs/report/R_812MLR.pdf) (on file with the *McGeorge Law Review*).

176. See, e.g., Richard L. Harris & Susan F. Mandiberg, *Alcohol- and Drug-Free Housing: A Key Strategy in Breaking the Cycle of Addiction and Recidivism*, 46 MCGEORGE L. REV. (forthcoming 2015) (on file with the *McGeorge Law Review*).

177. MAGNUS LOFSTROM ET AL., PUB. POL'Y INST. OF CAL., IS PUBLIC SAFETY REALIGNMENT REDUCING RECIDIVISM IN CALIFORNIA? 2 (2014), available at [http://www.ppic.org/content/pubs/report/R\\_614MLR.pdf](http://www.ppic.org/content/pubs/report/R_614MLR.pdf) (on file with the *McGeorge Law Review*) (“California has had one of the highest recidivism rates in the nation for more than a decade.”).

178. AM. CIVIL LIBERTIES UNION OF CAL., PUBLIC SAFETY REALIGNMENT: CALIFORNIA AT A CROSSROADS 15 (2012), available at [https://www.prisonlegalnews.org/media/publications/california\\_aclu\\_public\\_safety\\_realignment\\_california\\_at\\_a\\_crossroads\\_2012.pdf](https://www.prisonlegalnews.org/media/publications/california_aclu_public_safety_realignment_california_at_a_crossroads_2012.pdf) [hereinafter CALIFORNIA AT A CROSSROADS] (on file with the *McGeorge Law Review*) (“... as the legislature acknowledged in enacting AB 109, continually increasing our capacity to incarcerate over the past 30 years has simply not worked.”); see also Bernice Yeung, *California DOC Report Looks at Recidivism Rates*, CORRECTIONS ONE (Nov. 4, 2010), <http://www.correctionsone.com/re-entry-and-recidivism/articles/2865158-California-DOC-report-looks-at-recidivism-rates> (on file with the *McGeorge Law Review*).

179. See W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—And Why It Should*, 28 GA. ST. U. L. REV. 987, 991–92 (2012) (discussing counties' differing views on how to respond to crime, including how much to rely on incarceration); see also CALIFORNIA AT A CROSSROADS, *supra* note 178, at 11 (“A danger inherent in the wide latitude the state has given counties to implement realignment is that the counties that have historically sent disproportionate numbers of people to state prison will focus their realignment implementation efforts on increasing their jail capacity to incarcerate more people at the local level.”).

180. See CALIFORNIA AT A CROSSROADS, *supra* note 178, at 21–22 (discussing disparate outcomes defendants experience due to race, ethnicity, and socioeconomic status); see also Paige St. John, *Early Jail Releases Have Surged Since California's Prison Realignment*, L.A. TIMES (Aug. 16, 2014, 11:00 AM), <http://www.latimes.com/local/crime/la-me-ff-early-release-20140817-story.html> (on file with the *McGeorge Law Review*) (“Time served varies considerably around the state—a situation that UC Berkeley law professor Barry Krisberg called ‘justice by geography.’”); see also Elliott Currie, “*Realigning*” *Criminal Justice in California: Real Reform, or Shifting the Deck Chairs?*, DISSENT (Oct. 31, 2011), [http://www.dissentmagazine.org/online\\_articles/realigning-criminal-justice-in-california-real-reform-or-shifting-the-deck-chairs](http://www.dissentmagazine.org/online_articles/realigning-criminal-justice-in-california-real-reform-or-shifting-the-deck-chairs) (on file with

Brown's claim that Realignment was bold may have been too self-congratulatory. Certainly, it was a different approach than the approach of most other states that have reformed their sentencing schemes and reduced their prison populations.<sup>181</sup> But a bolder solution might have been one that required more assertive leadership: the governor could have proposed legislation that would have adopted best practices for all 58 counties.

Finally, anecdotally, local governments have not been able to adjust successfully to the influx of detainees. According to an article in the *Los Angeles Times*, "Across California, more than 13,500 inmates are being released early each month to relieve crowding in local jails – a 34% increase over the last three years."<sup>182</sup> While local officials attempt to release low-risk offenders, the *Times* reported that "an analysis of jail data has found that incarceration in some counties has been curtailed or virtually eliminated for a variety of misdemeanors, including parole violations, domestic violence, child abuse, drug use and driving under the influence."<sup>183</sup>

At least according to law enforcement, early release has emboldened some offenders. Again according to a parole agent quoted by the *Times*, "Every day we get guys who show up in the lobby, stoned out of their minds . . . I'll have 15 arrested, and 12 to 14 will be released immediately."<sup>184</sup> Occasionally, offenders on release commit headline violent crimes, the kinds of crimes that may erode popular support for sentencing reform.<sup>185</sup>

Thus, the result of Realignment has been a patchwork of programs dependent on local officials, some of whom are overwhelmed by overcrowded jails and limited resources, even with added funding from the state. Many counties lack the political will to adopt best practices, proven elsewhere to reduce recidivism and costs.<sup>186</sup>

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the *McGeorge Law Review*) (contrasting harsh conditions in disadvantaged areas, such as Oakland, with much better conditions in cities like San Diego).

181. Currie, *supra* note 180 (comparing California's realignment plan with the wholesale reforms made in other states, like New York, New Jersey, and Michigan, in order to reduce prison populations).

182. St. John, *supra* note 180.

183. *Id.*

184. *Id.*

185. *See, e.g., id.* (discussing the case of Sidney DeAvila, a convicted sex offender who repeatedly violated parole, but was continually released due to overcrowding; after being released on one occasion, he raped and killed his 76-year-old grandmother).

186. Professor Doug Berman at Ohio State Law School provides readers of his blog with articles and stories from around the country. Douglas A. Berman, SENT'G. L. & POL'Y BLOG, <http://www.sentencing.typepad.com> (on file with the *McGeorge Law Review*). Headline after headline and article after article tout reforms that are working elsewhere. *Id.*; *see, e.g.,* Andrew Knittle, *Most Oklahoma Inmates Granted Early Release Since March Have Stayed Out of Trouble*, OKLAHOMAN (Oct. 8, 2014, 9:00 AM), <http://newsok.com/most-oklahoma-inmates-granted-early-release-since-march-have-stayed-out-of-trouble/article/5349523> (on file with the *McGeorge Law Review*).

Newt Gingrich published an op-ed in September, 2014, entitled *What California Can Learn From the Red States on Crime and Justice*.<sup>187</sup> Apart from the hint of a gloating tone,<sup>188</sup> Gingrich's op-ed covers themes that liberals have advanced for years about the lack of rehabilitation services, including drug treatment, about the high recidivism rates, a result of failing to follow proven alternatives to current practices.<sup>189</sup>

Gingrich's op-ed highlights two points: a broad consensus has emerged across the political divide that favors sentencing reform.<sup>190</sup> Voters agree.<sup>191</sup> It also reflects the view that California lags behind. Only through the continued pressure of the three-judge panel has California come this far.<sup>192</sup> While arguably the jury is still out on whether Realignment is a long-term solution to prison overcrowding and excessive spending on incarceration as the primary response to crime, some observers doubt that California has found the right solution.<sup>193</sup>

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187. Newt Gingrich & B. Wayne Hughes, Jr., *What California Can Learn from the Red States on Crime and Punishment*, L.A. TIMES (Sept. 16, 2014, 5:27 PM), <http://www.latimes.com/opinion/op-ed/la-oe-0917-gingrich-prop-47-criminal-justice-20140917-story.html> (on file with the *McGeorge Law Review*).

188. The focus on the success that red states have had ignores the role of conservative and Republican politicians, including Ronald Reagan and George W.H. Bush, in getting California in the incarceration mess that it is now in. See Jeralyn Merritt, *Reagan's Drug War Legacy*, ALTERNET (June 18, 2004), [http://www.alternet.org/story/18990/reagan%27s\\_drug\\_war\\_legacy](http://www.alternet.org/story/18990/reagan%27s_drug_war_legacy) (on file with the *McGeorge Law Review*) ("As a result of these flawed drug policies initiated by then President Reagan . . . the number of those imprisoned in America has quadrupled to over 2 million."); Press Release, Drug Policy Alliance, Friday: 25th Anniversary of President George H.W. Bush's Infamous Oval Office Speech Escalating "War on Drugs," (Sept. 4, 2014), <http://www.drugpolicy.org/news/2014/09/friday-25th-anniversary-president-george-hw-bushs-infamous-oval-office-speech-escalatin> (on file with the *McGeorge Law Review*) (noting that in 1989, George H.W. Bush said, "[W]e need more jails, more prisons, more courts and more prosecutors," contributing to the mass incarceration crisis). Indeed, Gingrich does not acknowledge his own role in the problem. See, e.g., NEWT GINGRICH ET AL., CONTRACT WITH AMERICA (1994), available at [www.gvpt.umd.edu/jgloekler/documents/contract.pdf](http://www.gvpt.umd.edu/jgloekler/documents/contract.pdf) (on file with the *McGeorge Law Review*) (calling on Republican legislators to "take back" America's streets by enacting tougher truth-in-sentencing legislation, funding new prison construction, and providing additional funding for law enforcement agencies, among other measures); see also ON THE ISSUES, NEWT GINGRICH ON DRUGS, [http://www.ontheissues.org/2012/Newt\\_Gingrich\\_Drugs.htm](http://www.ontheissues.org/2012/Newt_Gingrich_Drugs.htm) (last updated May 31, 2012) (on file with the *McGeorge Law Review*) (noting that Gingrich called in 1998 for increased penalties for selling drugs).

189. Gingrich & Hughes, *supra* note 187.

190. Vitiello, *Three Strikes*, *supra* note 18, at 1281–86.

191. See Emily Ekins, *Poll: 77% of Americans Favor Eliminating Mandatory Minimum Prison Sentences For Nonviolent Offenders; 73% Favor Restoring Voting Rights*, REASON.COM (Oct. 21, 2014, 8:45 AM), <http://reason.com/poll/2014/10/21/poll-77-of-americans-favor-eliminating-m> (on file with the *McGeorge Law Review*).

192. See Dan Walters, *Realignment Has Reduced California Prison Population, But What About Other Effects?*, SACRAMENTO BEE (Dec. 11, 2013, 12:00 AM), <http://www.sacbee.com/news/politics-government/dan-walters/article2585691.html> (on file with the *McGeorge Law Review*) (implying that it was pressure from the three-judge panel that motivated the enactment and implementation of Realignment).

193. See, e.g., AM. CIVIL LIBERTIES UNION OF CAL., CALIFORNIA PRISON REALIGNMENT ONE-YEAR ANNIVERSARY: AN AMERICAN CIVIL LIBERTIES UNION ASSESSMENT I (2012), available at [https://www.aclunc.org/docs/criminal\\_justice/realignment\\_packet.pdf](https://www.aclunc.org/docs/criminal_justice/realignment_packet.pdf) (on file with the *McGeorge Law Review*) ("Realignment alone will not be sufficient to address California's incarceration crisis.").

My view that California has yet to achieve wholesale reform should be obvious. For reasons explored above – e.g., the confluence of a national consensus favoring reform,<sup>194</sup> the continuing pressure from the three-judge panel,<sup>195</sup> and emerging data about effective alternatives to incarceration<sup>196</sup> – this may be the best opportunity for California to join the national trend towards reform. But as explored in the next Part, whether California will do so is not a foregone conclusion.<sup>197</sup>

#### IV. ASSESSING THE PLAYERS

In *Liberal But Not Stupid*, Professors Petersilia and Cullen raise concerns whether California can sustain meaningful reductions in its prison population.<sup>198</sup> They remind readers about past failures where good intentions have not been enough to bring about promised results. For example, the mental health “deinstitutionalization” movement, high on promise but low on performance, has resulted in increased incarceration of mentally ill offenders, with few opportunities for treatment.<sup>199</sup> Their article then focuses on a series of principles that reformers should follow.<sup>200</sup>

While I endorse their reform prescriptions, here I want to consider another question: will California finally join the national trend and enact meaningful reform? In this Part, I look at various “stakeholders” who may advance or frustrate meaningful reform and assess the chances that the various parties will work towards meaningful reform.<sup>201</sup> My conclusion is that California faces a big “if” because of some unique aspects of California’s political climate. At the end of the day, I remain cautiously optimistic that California can belatedly adopt wholesale sentencing reform. I begin with some of the participants who may make sentencing reform difficult and end by discussing the “good guys,” the participants in the system who may help effectuate change.

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194. Vitiello, *Three Strikes*, *supra* note 18, at 1281–86 and accompanying text.

195. *Supra* Part III.

196. *See supra* notes 175–78 and accompanying text.

197. *See infra* Part IV.

198. Petersilia & Cullen, *supra* note 29, at 1.

199. *Id.* at 9–11.

200. *Id.* at 30–33 (First, “set a hard limit” on its prison population; “[s]econd, take recidivism seriously” by developing a system of accountability for recidivism rates; “[t]hird, reaffirm rehabilitation,” placing community corrections “on equal footing with incarceration” and not merely viewing rehabilitation as a secondary, “alternative” goal; fourth, develop and “provide expert technical assistance” in downsizing prisons, to ensure that the nature of the problem is fully understood and addressed appropriately; and “[f]ifth, develop a criminology of [prison] downsizing,” building a knowledge base of which models for downsizing work best).

201. *Infra* Part IV.



A. *The Political Actors*

Elsewhere, a political consensus has spurred legislative reform in far less progressive states than California.<sup>202</sup> One might naturally ask why Californians should not look to the governor and the legislature to create a long-term solution to the state's sentencing policy and procedure. Thus far, there have been three reasons why legislative reform has not occurred and three potential barriers to meaningful reform: the governor, the Republicans, and the Democrats.

1. *The Governor*

As expected, Governor Brown has won reelection.<sup>203</sup> He did so without breaking a sweat.<sup>204</sup> Whether that bodes well for wholesale sentencing reform is an open question.

In theory, the governor has agreed to “consider” a sentencing commission as part of a long-term solution to California's prison crisis.<sup>205</sup> But as yet another cliché goes, “the devil is in the detail.” Whether the governor supports wholesale reform is tricky: he has called Realignment a “bold” innovation.<sup>206</sup> Can a politician change direction and admit, in effect, that his signature legislation is not so bold? Since his reelection, he has stated that he hopes to take on some big challenges.<sup>207</sup> In one sense, that makes a lot of sense: this almost certainly is his swan song and he can think boldly about his legacy.<sup>208</sup>

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202. See *supra* notes 51–54 and accompanying text.

203. OFF. OF DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2014, GENERAL ELECTION 19–21 (2014), available at <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf> [hereinafter STATEMENT OF VOTE] (on file with the *McGeorge Law Review*).

204. See *id.* (Governor Brown received 4,388,368 votes against his opponent's 2,929,213); David Siders, *Gov. Jerry Brown Wins Historic Fourth Term*, SACRAMENTO BEE (Nov. 4, 2014, 8:07 PM), <http://www.sacbee.com/news/politics-government/election/article3568891.html> (on file with the *McGeorge Law Review*) (“Brown's own race was so low-profile that he aired no TV ads identifying himself as a candidate for reelection, and he spent the second-to-last weekend before Election Day on the East Coast, at a class reunion at Yale Law School . . . The outcome was never in question, with Brown leading Kashkari by double digit percentages in public opinion polls for the duration of the campaign.”).

205. Opinion re: Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline, *Coleman v. Brown*, No. 2:90-cv-0520 LKK/DAD (PC) (E.D. Cal. & N.D. Cal. Feb. 10, 2014) (“ . . . defendants have agreed to develop comprehensive and sustainable prison population-reduction reforms, including considering the establishment of a commission . . .”).

206. Smith, *supra* note 158.

207. Seema Mehta, *Jerry Brown Looks to Carry on his Family's Legacy Building California*, L.A. TIMES (Dec. 29, 2014, 6:25 PM), <http://www.latimes.com/local/politics/la-me-pol-jerry-brown-20141230-story.html> (on file with the *McGeorge Law Review*) (discussing various challenges Brown plans to tackle, such as the high-speed rail project, tunnels to transport water around the state, and a climate change initiative).

208. Siders, *supra* note 204 (noting that the 2014 election was likely Brown's last, and speculating on what the governor will do in his final term to cement his legacy).

Governor Brown has also promised to work with Republicans in achieving solutions to California's problems.<sup>209</sup> As discussed below, with regard to sentencing reform, he may have little success in lining up Republican votes.<sup>210</sup>

## 2. *The Republicans*

Thus far, the Republicans in the California legislature have shown little interest in wholesale sentencing reform. Quite the opposite: they have attempted to position themselves to take advantage if Realignment fails. California's Republican lawmakers were uniformly opposed to Realignment; every Republican assembly member<sup>211</sup> and every Republican state senator<sup>212</sup> voted against AB 109. Since then, Republicans in the legislature have introduced bill after bill aimed at weakening Realignment.<sup>213</sup>

In addition to their attempts to repeal or dilute Realignment legislatively, Republicans in the Senate and Assembly have engaged in a fierce public relations campaign against the reform effort. For instance, the Assembly Republican Caucus's website has posted numerous articles chronicling what it calls the "chilling" and "tragic" results of Realignment--anecdotes of released felons who were under local supervision pursuant to AB 109 and went on to commit violent crimes.<sup>214</sup> The site also contains a number of posts minimizing the economic benefits of Realignment and arguing that the program has been a financial disaster.<sup>215</sup> On the Senate side, the Senate Republican Caucus's web site contains

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209. GOVERNOR JERRY BROWN, INAUGURAL ADDRESS AT THE CALIFORNIA STATE ASSEMBLY, Jan. 5, 2015. In Governor Brown's remarks, he spoke about how "far reaching" and important realignment is as a reform, and he commented that "over the next four years - and beyond - we must dedicate ourselves to making what we have done work," possibly suggesting a lack of interest in implementing any additional reforms. *Id.*

210. *See infra* Part IV.A.2.

211. ASSEMBLY FLOOR VOTE ON AB 109, 2011-2012 Sess. (Cal. 2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_01010150/ab\\_109\\_vote\\_20110317\\_0532PM\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_01010150/ab_109_vote_20110317_0532PM_asm_floor.html) (on file with the *McGeorge Law Review*); *see also* ASSEMBLY REPUBLICAN CAUCUS, CAL. CRIME WATCH, WHAT IS PUBLIC SAFETY REALIGNMENT? (2011), available at <http://arc.asm.ca.gov/CaCrimeWatch/?p=realignment> (on file with the *McGeorge Law Review*) ("Assembly Republicans fought hard against [AB 109] . . .").

212. SENATE FLOOR VOTE ON AB 109, 2011-2012 Sess. (Cal. 2011), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0101-0150/ab\\_109\\_vote\\_20110317\\_0334PM\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_vote_20110317_0334PM_sen_floor.html) (on file with the *McGeorge Law Review*).

213. *See, e.g.*, Jack Barnwell, *Fuller Joins State GOP's Charge to Change AB 109*, MTSASTA NEWS.COM (Mar. 21, 2013, 5:17 PM), <http://www.mtshastanews.com/article/20130321/News/130329915> (on file with the *McGeorge Law Review*) (discussing how Republican legislators introduced 13 pieces of legislation in a single day, all aimed at scaling back Realignment).

214. *See, e.g.*, ASSEMBLY REPUBLICAN CAUCUS, CAL. CRIME WATCH, AB 109'S MOST WANTED (2011), <http://arc.asm.ca.gov/CaCrimeWatch/?p=wanted> [hereinafter AB 109'S MOST WANTED] (on file with the *McGeorge Law Review*) (providing links to news articles about various convicted felons who allegedly harmed new victims as a result of AB 109).

215. ASSEMBLY REPUBLICAN CAUCUS, CAL. CRIME WATCH, HAS PUBLIC SAFETY REALIGNMENT SAVED THE STATE MONEY? (2012), [http://www.arc.asm.ca.gov/BudgetFactCheck/?p\\_id=421](http://www.arc.asm.ca.gov/BudgetFactCheck/?p_id=421) (on file with the

a variety of press releases and postings from Republican senators characterizing Realignment as “disastrous,”<sup>216</sup> a “flawed policy,”<sup>217</sup> and “a dangerous mess”<sup>218</sup> that voters should urge their representatives to repeal.

Republican resistance to sentencing reform has not been limited to Realignment alone. Nearly every Republican legislator has consistently fought any attempt at reform, as evidenced by the response to SB 1010, also known as the Fair Sentencing Act, a bill put in the hopper earlier this year and signed into law by Governor Brown in September.<sup>219</sup> The law eliminated the crack/powder cocaine sentencing disparity under California law.<sup>220</sup> All the Republican state senators<sup>221</sup> and 20 of the 25 Republican assembly members<sup>222</sup> voted against SB 1010, despite overwhelming support for and negligible opposition to the bill by stakeholders and interest groups.<sup>223</sup> This is just one in a long line of proposed sentencing reform measures that have been opposed by the vast majority of California’s Republican lawmakers.

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*McGeorge Law Review*) (downplaying the budgetary savings attributed to Realignment by the Legislative Analyst’s Office and arguing that CDCR’s claim that Realignment would save money failed to take into account additional funds that local communities would need to expend).

216. Press Release, Senator Jim Nielsen, The Disastrous Effects of One Year of AB 109 Realignment, (Oct. 9, 2012), <http://district4.cssrc.us/content/disastrous-effects-one-year-ab-109-realignment-0> (on file with the *McGeorge Law Review*) (calling Realignment a failure that “has victimized hundreds of individuals” and arguing for its immediate repeal).

217. Press Release, Senator Jean Fuller, Protecting Public Safety with Realignment Reform: Legislation to Address Flawed Policy, (Mar. 19, 2013), <http://district16.cssrc.us/content/protecting-public-safety-realignment-reform> (on file with the *McGeorge Law Review*) (claiming that “Realignment has caused crime to rise in our neighborhoods and continues to put Californians at risk.”).

218. Press Release, Senator Jim Nielsen, Realignment is a Dangerous Mess, (Nov. 23, 2011), <http://district4.cssrc.us/content/realignment-dangerous-mess> (on file with the *McGeorge Law Review*) (referring to AB 109 as “a reckless proposal” that “condone[s] deviant behavior” and harms victims of crime).

219. *California Adopts Fair Sentencing Act (SB 1010): Equalizes Penalties for Certain Crack and Powder Cocaine Offenses*, THE SENT’G PROJECT (Sept. 29, 2014), [http://www.sentencingproject.org/detail/news.cfm?news\\_id=1876](http://www.sentencingproject.org/detail/news.cfm?news_id=1876) (on file with the *McGeorge Law Review*).

220. Chris Roberts, *California Cops Still Fighting Crack Sentencing Reform*, SFWEEKLY.COM (June 17, 2014, 7:00 AM), <http://www.sfwweekly.com/thesnitch/2014/06/17/california-cops-still-fighting-crack-sentencing-reform> (on file with the *McGeorge Law Review*).

221. SENATE FLOOR VOTE ON SB 1010, 2013-2014 Sess. (Cal. 2014), available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_1001-1050/sb\\_1010\\_vote\\_20140821\\_0427PM\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1001-1050/sb_1010_vote_20140821_0427PM_sen_floor.html) (on file with the *McGeorge Law Review*).

222. ASSEMBLY FLOOR VOTE ON SB 1010, 2013-2014 Sess. (Cal. 2014), available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_1001-1050/sb\\_1010\\_vote\\_20140814\\_1030AM\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1001-1050/sb_1010_vote_20140814_1030AM_asm_floor.html) (on file with the *McGeorge Law Review*).

223. See S. RULES COMM., B. ANALYSIS OF SB 1010, 2013-2014 Sess. (Cal. 2014), available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_1001-1050/sb\\_1010\\_cfa\\_20140815\\_093352\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1001-1050/sb_1010_cfa_20140815_093352_sen_floor.html) (on file with the *McGeorge Law Review*).

California's Republican legislators have not only opposed sentencing reform in general.<sup>224</sup> They have voiced support for even harsher sentencing laws.<sup>225</sup> This trend shows no signs of ending anytime soon. Echoing the points that I made above, the *San Jose Mercury* published an article captioned *Prison Realignment: Republicans Ought to be Leading, Not Opposing this Trend*, in which the author stated, "the California Republican Party . . . [is] grossly out of step on crime relative to many conservatives around the country."<sup>226</sup> While Newt Gingrich exhorted Californians to vote yes on Proposition 47<sup>227</sup> and governors like Texas Governor Rick Perry bragged about being "smart on crime,"<sup>228</sup> California Republicans have seen little advantage in being part of the solution.<sup>229</sup>

The 2014 election was not particularly good for the Republicans, who won no statewide office again.<sup>230</sup> But gains in the legislature denied the Democrats its supermajority.<sup>231</sup> Having regained some leverage in policy matters, including budgetary matters, could influence some Republicans to work towards responsible sentencing policy. At this point, one can only take a wait-and-see attitude whether Republicans will join the conversation.

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224. See generally, CALIFORNIA REPUBLICAN PARTY, PARTY ENDORSEMENTS (2014), <http://cagop.org/about/party-endorsements> (on file with the *McGeorge Law Review*) (registering the state Republican Party's opposition to Prop. 47).

225. See, e.g., CAL. SENATE REPUBLICAN CAUCUS, SENATE REPUBLICAN FISCAL OFF., HIGHLIGHTS AND ANALYSIS OF THE 2012-13 BUDGET 34 (2012), available at [http://cssrc.us/sites/cssrc.us/files/120718\\_BudgetHighlights.pdf](http://cssrc.us/sites/cssrc.us/files/120718_BudgetHighlights.pdf) (on file with the *McGeorge Law Review*) (advocating the construction of new prisons and suggesting that increasing spending on rehabilitative efforts will fail to produce results).

226. Garrick Percival, *Prison Realignment: Republicans Ought to be Leading, Not Opposing this Trend*, SAN JOSE MERCURY NEWS (July 18, 2013, 12:01 PM), [http://www.mercurynews.com/ci\\_23680080/prison-realignment-republicans-ought-be-leading-not-opposing](http://www.mercurynews.com/ci_23680080/prison-realignment-republicans-ought-be-leading-not-opposing) (on file with the *McGeorge Law Review*). The receptiveness of conservatives outside California to sentencing reform is evidenced by the work of the 113th Congress Task Force on Over-Criminalization, established by the House of Representatives Judiciary Committee and composed of both Democrats and Republicans. Rhonda McMillion, *ABA Voices Concerns About the Impact of Over-Criminalization of U.S. Laws*, ABA J. (Dec. 1, 2014, 5:20 AM), [http://www.abajournal.com/magazine/article/aba\\_voices\\_concerns\\_about\\_the\\_impact\\_of\\_over\\_criminalization\\_of\\_us\\_laws](http://www.abajournal.com/magazine/article/aba_voices_concerns_about_the_impact_of_over_criminalization_of_us_laws) (on file with the *McGeorge Law Review*). The task force was established in May 2013 to explore how expanding the number of federal crimes have led to increased incarceration rates. *Id.*

227. Gingrich & Hughes, *supra* note 187.

228. Wesley Lowery, *Conservatives Try to Make Criminal Justice Reform a Signature Issue*, WASH. POST (Mar. 7, 2014), [http://www.washingtonpost.com/politics/conservatives-try-to-make-criminal-justice-reform-a-signature-issue/2014/03/07/4b006368-a626-11e3-84d4-e59b1709222c\\_story.html](http://www.washingtonpost.com/politics/conservatives-try-to-make-criminal-justice-reform-a-signature-issue/2014/03/07/4b006368-a626-11e3-84d4-e59b1709222c_story.html) (on file with the *McGeorge Law Review*).

229. Percival, *supra* note 226.

230. STATEMENT OF VOTE, *supra* note 203, at 7.

231. Jeremy B. White, *No Senate Supermajority for California Democrats, Assembly Margin Still in Doubt*, SACRAMENTO BEE (Nov. 4, 2014, 9:27 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article3578189.html> (on file with the *McGeorge Law Review*).

3. *The Democrats*

Democrats do not have an especially good track record on sentencing reform. Over the past decade or more, they have had hearings on various proposals for reform.<sup>232</sup> They have advanced some modest reforms, including The Fair Sentencing Act.<sup>233</sup> But their signature response to prison overcrowding remains Realignment.<sup>234</sup>

A few Democrats have shown an interest in wholesale reform.<sup>235</sup> But as Professor Robert Weisberg has commented, California has been “the glaring outlier” when it comes to sentencing reform.<sup>236</sup> Why have Democrats, who control a majority of both houses of California’s legislature, continually defeated efforts at creating a commission despite the support of academics, non-partisan organizations, and others?

Legislation that would create a sentencing commission has been introduced in California’s legislature at least nine separate times since 1976.<sup>237</sup> The legislature passed three bills but those bills were vetoed by Governors Deukmejian and Wilson.<sup>238</sup> More recently, Assembly and Senate Democrats have failed to support sentencing commission proposals. Reviewing recent efforts that have failed may shed light on whether wholesale reform is possible today.

In 2007, it appeared that Democratic lawmakers were serious about creating a commission. Two bills to establish a sentencing commission emerged, one in the State Senate and one in the Assembly.<sup>239</sup> AB 160 passed in the Assembly; SB 110 passed in the Senate.<sup>240</sup> However, the bills failed to gather enough votes when they moved to the other house, and thus neither of the proposed commissions became a reality.

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232. See *infra* notes 237–53, 331 and accompanying text.

233. See *supra* notes 219–20 and accompanying text.

234. See *California’s Continuing Prison Crisis*, N.Y. TIMES (Aug. 10, 2013), [http://www.nytimes.com/2013/08/11/opinion/sunday/californias-continuing-prison-crisis.html?\\_r=0](http://www.nytimes.com/2013/08/11/opinion/sunday/californias-continuing-prison-crisis.html?_r=0) (on file with the *McGeorge Law Review*).

235. See, e.g., Ben Adler, *New Push for Sentencing Reform After Latest Prisons Ruling*, CAPITAL PUB. RADIO (Feb. 11, 2014), <http://www.caprado.org/articles/2014/02/11/new-push-for-sentencing-reform-after-latest-prisons-ruling> (on file with the *McGeorge Law Review*) (discussing how the chairs of the Senate and Assembly Public Safety Committees, both Democrats, desire wholesale sentencing reform).

236. Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 210 (2007).

237. Kara Dansky, *A Blueprint for a California Sentencing Commission*, 22 FED. SENT’G REP. 158, 158 (2010).

238. Carole D’Elia, *The Politics of Public Safety Reform in California*, 22 FED. SENT’G REP. 144, 145 (2010).

239. *Id.*

240. *Id.*

SB 110, which had received the votes of 24 of the 25 Democratic members of the Senate,<sup>241</sup> received only 34 of the 47 possible Democratic votes in the Assembly--five Democratic Assembly Members abstained from voting, while eight Democrats actively voted against the bill.<sup>242</sup> Similarly, AB 160, which received 43 of 48 Democratic votes in the Assembly,<sup>243</sup> received only nine of the 25 possible Democratic votes in the Senate<sup>244</sup>--mostly the Senate's progressive members like Senators Migden and Kuehl.<sup>245</sup>

One cause behind the defeat of these bills was infighting among Democratic legislators. While all four of the Assembly Members who voted against the Assembly bill were among the eight who voted against the Senate bill, the other four who voted against the Senate bill had voted for the Assembly bill. Thus, these four took inconsistent positions on the two bills.<sup>246</sup> Why these lawmakers would support a sentencing commission in voting on one bill but not support a similar commission in voting on another bill can be explained by a grudge Assembly Democrats held against the Senate concerning one of the Senate's committees.<sup>247</sup> The Senate Public Safety Committee had put in place the Receivership Overcrowding Crisis Aggravation (ROCA) policy, under which any bills that could add to prison overcrowding were held in committee and not released to the Senate floor. ROCA had caused dozens of bills to stall.<sup>248</sup> Assembly Democrats angry over ROCA caused SB 110 to fail on September 7, 2007; the Senate in turn defeated AB 160 five days later.

Another explanation--at least, ostensibly--for the bills' defeat was the argument that public safety should not be placed in the hands of unelected commissioners. Republicans and law enforcement groups had made this argument about the bills previously, even saying that the commission would be unconstitutional.<sup>249</sup> Some Democrats claimed they voted against creating a

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241. SENATE FLOOR VOTE ON SB 110, 2007-2008 Sess. (Cal. 2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0101-0150/sb\\_110\\_vote\\_20070606\\_1202PM\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0101-0150/sb_110_vote_20070606_1202PM_sen_floor.html) (on file with the *McGeorge Law Review*).

242. ASSEMBLY FLOOR VOTE ON SB 110, 2007-2008 Sess. (Cal. 2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0101-0150/sb\\_110\\_vote\\_20070907\\_0303PM\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0101-0150/sb_110_vote_20070907_0303PM_asm_floor.html) (on file with the *McGeorge Law Review*).

243. *Id.*

244. SENATE FLOOR VOTE ON AB 160, 2007-2008 Sess. (Cal. 2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0151-0200/ab\\_160\\_vote\\_20070912\\_0104AM\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0151-0200/ab_160_vote_20070912_0104AM_sen_floor.html) (on file with the *McGeorge Law Review*).

245. Brian Leubitz, *Remember Way Back in 2007 When the Assembly Supported a Sentencing Commission?*, CALITICS (Aug. 25, 2009, 4:15 PM), <http://www.calitics.com/diary/9925/remember-way-back-to-2007-when-the-assembly-supported-a-sentencing-commission> (on file with the *McGeorge Law Review*).

246. See *supra* notes 8-9 and accompanying text.

247. D'Elia, *supra* note 238, at 145.

248. *Id.*

249. See, e.g., ASSEMB. COMM. ON PUB. SAFETY, B. ANALYSIS OF SB 110, 2007-2008 Sess. (Cal. 2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0101-0150/sb\\_110\\_cfa\\_20070702\\_101836\\_asm\\_](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0101-0150/sb_110_cfa_20070702_101836_asm_)

commission because they agreed with the law enforcement groups' arguments.<sup>250</sup> Such explanations, though, may have been made to cover up the real reason for the Democrats' opposition: animosity over the ROCA policy and other such infighting.

In 2009 there was another effort to create a sentencing commission, this time in the Senate.<sup>251</sup> The proposed legislation, which was endorsed by both Governor Schwarzenegger<sup>252</sup> and Democratic leaders (but not the leaders of Schwarzenegger's own party),<sup>253</sup> passed the Senate. However, the bill failed to gain sufficient support from Democrats in the Assembly. Passage would have required 41 votes, but nearly a dozen Assembly Democrats--all of whom were either up for reelection or running for higher office such as Attorney General--declined to support the sentencing commission.<sup>254</sup> These Democrats felt pressure to appear tough on crime; they feared the wrath of law enforcement groups, which had been fiercely advocating against the creation of a commission.<sup>255</sup> The

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comm.html (on file with the *McGeorge Law Review*) (Argument in Opposition by the CDAA and Argument in Opposition by the Riverside County Sheriffs' Association); see also Andy Furillo, *State Sentencing Bill Advances*, SACRAMENTO BEE, Apr. 11, 2007, at A4 (quoting John Lovell, a lobbyist for three law enforcement organizations) ("This bill vests virtually unfettered power . . . in the hands of nine unelected people, accountable only to themselves.").

250. To be clear, the sentencing commission would not have had "unfettered power" as suggested by some opponents—under either bill, the legislature would have been able to override the committee and thereby prevent the committee's sentencing changes from becoming law. See Robert Weisberg, *California's De Facto Sentencing Commissions*, 61 STAN. L. REV. ONLINE 1, 4 (2011), available at <http://www.stanfordlawreview.org/online/californias-de-facto-sentencing-commissions> (on file with the *McGeorge Law Review*) (calling the arguments that a commission would unconstitutionally take power away from the legislature "something of a non sequitur").

251. D'Elia, *supra* note 238, at 145–46.

252. Jack Chang, *Sentencing Commission Part of Prison Reform Package*, SACBEE.COM (Aug. 19, 2009, 3:44 PM), <http://blogs.sacbee.com/capitolalertlatest/2009/08> (on file with the *McGeorge Law Review*) (" . . . the governor has been supportive of a sentencing commission that . . . 'has teeth' Cmeaning its recommendations will take effect unless rejected by the Legislature."); see D'Elia, *supra* note 238, at 146 (" . . . it was very clear that Governor Schwarzenegger was on board to sign legislation . . . to establish a sentencing commission.").

253. Michael Rothfeld, *State Prison System 'Collapsing Under Its Own Weight,' Schwarzenegger Says*, LATIMES.COM (Aug. 20, 2009), <http://articles.latimes.com/2009/aug/20/local/me-prison20> (on file with the *McGeorge Law Review*); see also Maureen Cavanaugh & Hank Crook, *Sacramento Update: Reducing Calif. Prison Population*, KPBS.ORG (Sept. 1, 2009), <http://www.kpbs.org/news/2009/sep/01/sacramento-update-reducing-calif-prison-population> (on file with the *McGeorge Law Review*) (quoting John Myers, Sacramento Bureau Chief for The California Report) ("There aren't any Republican supporters . . . either in the Senate or the Assembly.").

254. D'Elia, *supra* note 238, at 146.

255. Dan Walters, *Senate May Vote on Assembly Prison Plan - Or Not*, SACBEE.COM (Sept. 8, 2009, 4:05 PM), <http://blogs.sacbee.com/capitolalertlatest/2009/09/senate-will-vot.html> (on file with the *McGeorge Law Review*) (noting that Assembly Members failed to enact the sentencing commission proposal "because of stiff opposition from law enforcement"); see Torey Van Oot, *AM Alert: Pension Police*, SACBEE.COM (Aug. 24, 2009, 6:00 AM), <http://blogs.sacbee.com/capitolalertlatest/2009/08/am-alert-pensio.html> (on file with the *McGeorge Law Review*) (" . . . the Peace Officers Research Association of California, which represents 62,000 officers and 850 local public safety associations . . . has also been a vocal opponent of the sentencing commission"); see also Torey Van Oot, *AM Alert: Considering Cuts*, SACBEE.COM (Aug. 20, 2009, 6:00 AM),

Assembly ultimately did enact a prison bill, but it was heavily amended, omitting the sentencing commission and other key elements.<sup>256</sup> Governor Schwarzenegger had strong words for the Assembly members who didn't support the bill: they were "more worried about their safe seats, rather than their safe streets,"<sup>257</sup> and that they didn't "have the guts" to enact a sentencing commission, which the governor said the state badly needed.<sup>258</sup>

Conflicts over logistical details have also played a role in the failures of sentencing commission initiatives. In a 2013 interview, Democratic Assembly Member Tom Ammiano, chair of the Assembly Public Safety Committee, chalked up some of the past failures to disagreements over who should sit on the sentencing commission.<sup>259</sup> For instance, the 2007 Senate Bill, which ultimately died in the Assembly, as discussed earlier, almost didn't make it out of the Senate in the first place due to contentious debates over the proposed commission's membership.<sup>260</sup>

Personal grudges and conflicts over the membership of a sentencing commission have contributed to some of the failed efforts in recent years. But more important have been Democratic lawmakers' fears of being viewed by their constituents as soft on crime.<sup>261</sup> Many Democratic legislators perceive

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<http://blogs.sacbee.com/capitolalertlatest/2009/08> (on file with the *McGeorge Law Review*) ("Legislative Republicans, police chiefs and district attorneys have come out swinging against . . . the creation of an appointed commission with the power to rewrite sentencing guidelines.").

256. Matthew Yi, *Prison Bill Gutted by State Assembly*, SFGATE.COM (Aug. 28, 2009), <http://blogs.sacbee.com/capitolalertlatest/2009/08/am-alert-prison.html> ("The [Assembly's] version of the . . . plan eliminates several key . . . elements, including the creation of a sentencing commission . . ."); see also Maureen Cavanaugh & Hank Crook, *Sacramento Update: Reducing Calif. Prison Population*, KPBS.ORG (Sept. 1, 2009), <http://www.kpbs.org/news/2009/sep/01/sacramento-update-reducing-calif-prison-population> (calling the Assembly's amended bill, without the sentencing commission, "prison reform lite").

257. Michael Rothfeld, *Gov. Schwarzenegger Calls Assembly Gutless on Prisons*, LATIMES.COM (Aug. 26, 2009, 2:49 PM), <http://latimesblogs.latimes.com/lanow/2009/08/governor-calls-assembly-lawmakers-gutless-on-prisons.html> (on file with the *McGeorge Law Review*).

258. Matthew Yi, *Schwarzenegger to State Assembly: Have Some Guts*, SFGATE.COM (Aug. 26, 2009, 12:50 PM), <http://blog.sfgate.com/nov05election/2009/08/26/schwarzenegger-to-state-assembly-have-some-guts/#ixzz0PLn8FTTB> (on file with the *McGeorge Law Review*).

259. Jeremy B. White, *California Sentencing Commission Could Be Coming, Ammiano Says*, SACBEE.COM (Nov. 13, 2013, 1:23 PM), <http://blogs.sacbee.com/capitolalertlatest/2013/11/california-sentencing-commission-could-be-coming-ammiano-says.html> (on file with the *McGeorge Law Review*). In the same interview, Assembly Member Ammiano wholeheartedly endorsed the idea of creating a sentencing commission, stating that "we will be presenting [a bill to create a commission] in January [2014]." *Id.* True to his word, Ammiano earlier this year introduced AB 1633, which would have made the Board of State and Community Corrections (BSCC) into a sentencing commission, adding to its current duties of overseeing the implementation of Realignment. AB 1633, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (as introduced but not enacted). The BSCC would only have had advisory powers; its recommendations would not have automatically become law. *Id.* The bill was not enacted in the 2013–2014 legislative session. *Id.*

260. Dansky, *supra* note 237, at 160.

261. See Michael B. Farrell, *California Assembly Passes Diluted Prison Reform Bill*, CHRISTIAN SCIENCE MONITOR (Sept. 2, 2009), <http://www.csmonitor.com/USA/2009/0902/p02s04-usgn.html> (on file with the



themselves, correctly or incorrectly,<sup>262</sup> to have less political capital than Republicans when it comes to sentencing reform.<sup>263</sup> Furthermore, many Democrats who perhaps might have been brave enough to “spend” their limited political capital to support a sentencing commission are deterred by groups like the CDAA, which portray sentencing commissions as unconstitutional<sup>264</sup> and a threat to public safety.<sup>265</sup> Indeed, the party is not likely to back sweeping reform without significant Republican support. As noted by Professor Garrick Percival, “Republican intransigence has implications for Democrats’ positioning on crime . . . . Experience in other states indicates that if Republicans don’t join in, Democrats get skittish.”<sup>266</sup>

Can California’s Democrats overcome their fear of appearing soft on crime, as they appeared ready to do in 2007, when the Democrats in both the Senate and Assembly passed their own versions of a sentencing commission bill (but then failed to enact the other house’s bill)? The 2007 effort got off the ground in part because Governor Schwarzenegger, a Republican, had publicly endorsed the idea of a sentencing commission, thereby giving political cover to the Democratic legislators.<sup>267</sup> However, even in the absence of a Republican governor’s support, a sentencing commission may be possible. AB 1633, mentioned earlier,<sup>268</sup> was introduced during the 2013-14 legislative term and would have turned the Board of State and Community Corrections (BSCC), a body created in 2012 to help implement Realignment,<sup>269</sup> into an advisory sentencing commission (in addition to the BSCC’s other duties).<sup>270</sup> The bill made it through the Assembly Committee on Public Safety and made it through the Committee on Appropriations on November 30. But it failed to pass.<sup>271</sup>

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*McGeorge Law Review*) (quoting Professor Robert Weisberg of Stanford University) (“The very term ‘sentencing commission’ has become pretty toxic in California politics.”).

262. See Vitiello, *supra* note 18, at 1312–13 (discussing how, in light of California legislators’ largely safe districts, “One might have thought Democrats . . . could enact legislation, for example, creating a sentencing commission, without fear of reprisals.”).

263. See Weisberg, *supra* note 236, at 226.

264. See *supra* note 15 and accompanying text. See also THE GROWTH OF INCARCERATION, *supra* note 15, at 2.

265. Dansky, *supra* note 237, at 158 (discussing how sentencing commissions are often portrayed as “nefarious attempts on the part of prison abolitionists to release dangerous criminals”).

266. Percival, *supra* note 226.

267. Weisberg, *supra* note 236, at 226–27.

268. See *supra* note 25 and accompanying text. THE GROWTH OF INCARCERATION, *supra* note 15, at 3.

269. *History of the BSCC*, BD. OF ST. & COMMUNITY CORR., [http://www.bscc.ca.gov/s\\_historyofthebscc.php](http://www.bscc.ca.gov/s_historyofthebscc.php) (last visited Dec. 17, 2014) (on file with the *McGeorge Law Review*).

270. See ASSEMB. COMM. ON APPROPRIATIONS, B. ANALYSIS OF AB 1633, 2013–2014 Sess. (Cal. 2014), available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml> (on file with the *McGeorge Law Review*).

271. See COMPLETE BILL HISTORY OF AB 1633, 2013–2014 Sess. (Cal. 2014), available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml> (on file with the *McGeorge Law Review*).

While Democrats may still fear taking on wholesale reform, as developed below, initiatives over the past decade or more may change the equation somewhat.<sup>272</sup> Or then again, they may not.<sup>273</sup>

### B. The Voters

In recent years, the voters have been out in front of the legislature in supporting legislation to reduce some of the most extreme effects of the overly harsh laws put in place over the past 30 plus years. For example, in 2000, the voters adopted Proposition 36, mandating drug treatment instead of prison time for some drug offenders.<sup>274</sup> In 2012, they adopted another Proposition 36, enacting modest reforms to California's three strikes law.<sup>275</sup> And most recently, the voters adopted Proposition 47, reducing a number of felonies to misdemeanors, in effect, limiting where those offenders serve their jail time.<sup>276</sup> This pattern has led many observers to suggest that voters are ready for broader reforms.<sup>277</sup>

No doubt, the recent past suggests a change in the attitude of California voters. But voters are fickle: between passage of the two Proposition 36s, voters rejected a more sweeping reform to three strikes than the second Proposition 36.<sup>278</sup> And 72% of those who voted in 1994 supported three strikes,<sup>279</sup> without fully understanding its sweeping implications.<sup>280</sup>

The voters deserve mixed reviews with regard to their role in reforming California's sentencing scheme. The good news is that voters' willingness to

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272. See *infra* Part IV.B..

273. See Petersilia & Cullen, *supra* note 29, at 2.

274. Substance Abuse and Crime Prevention Act of 2000, Proposition 36 (2000) (codified as CAL. PENAL CODE §§ 1210, 1210.1, 3063.1; HEALTH & SAFETY §§ 11999.4–11999.13 (West Supp. 2014)).

275. Three Strikes Reform Act of 2012, Proposition 36 (2012) (codified as amended CAL. PENAL CODE §§ 667, 667.1, 1170.12, 1170.125, 1170.126 (West Supp. 2014)).

276. Safe Neighborhoods and Schools Act, Proposition 47 (2014) (codified as CAL. GOV'T CODE §§ 7599–7599.2; PENAL § 1170.1; and codified as amended PENAL §§ 459.5, 473, 476a, 490.2, 496, 666, 8; HEALTH & SAFETY §§ 11350, 11357, 11377 (West Supp. 2014)).

277. See, e.g., Paige St. John & Marisa Gerber, *Prop. 47 Jolts Landscape of California Justice System*, L.A. TIMES (Nov. 5, 2014, 6:13 PM), <http://www.latimes.com/local/politics/la-me-ff-pol-proposition47-20141106-story.html#page=1> (on file with the *McGeorge Law Review*) (quoting attorney Michael Romano) (“It’s a clear message from voters that our law enforcement resources should not be spent on three-strikes sentences or long felony sentences for these types of crime”); see Erika Aguilar, *Election 2014: Prop 47 Reduces Drug and Property Crimes to Misdemeanors*, S. CAL. PUB. RADIO (Oct. 9, 2014), <http://www.scpr.org/news/2014/10/09/47265/election-2014-prop-47-reduces-drug-and-property-cr/> (on file with the *McGeorge Law Review*).

278. Proposition 66, initiative (Cal. 2004); Vitiello & Kelso, *supra* note 1, at 916.

279. See *The Field Poll's Record in Measuring Statewide Ballot Propositions in California (1994-Present)*, THE FIELD POLL, <http://www.field.com/fieldpoll/propositions.html> (last visited Dec. 19, 2014, 9:43 PM) (on file with the *McGeorge Law Review*) (Proposition 184).

280. Vitiello, *supra* note 29, at 1643.

reform harsh sentencing practices may embolden legislators to take on the task at a broader level. Professor Zimring made a related point in connection with the voters' rejection of Proposition 34 in 2012.<sup>281</sup> He argued that the close vote, 52%-48%, might embolden politicians to take on the issue because it signaled a shift in public sentiment on the death penalty.<sup>282</sup>

While the voters seem to have gotten out in front of the legislature on reforming sentencing laws, the use of the initiative process creates two problems: one, letting voters adopt reforms may give legislators a disincentive to take on wholesale reform. The situation is like old ad for breakfast cereal featuring three small children; one of the older children turns to the other and says, "Let's get Mikey [to try it]."<sup>283</sup> Or as argued by the proponents of Proposition 47, legislators are "comfortable with adding new crimes and increasing sentences," but are "generally incapable of lowering them in the face of pressure from law enforcement and victims' interest groups, even when overwhelming evidence points to better safety, greater savings and other positive outcomes from decreased penalties."<sup>284</sup>

Two, the use of the initiative process has created an unmanageable patchwork of sentencing provisions that only compounds the complexity of the sentencing scheme in California.<sup>285</sup> For example, the Three Strikes initiative, requiring a super-majority in the legislature to effectuate reform, has resulted in overuse of incarceration for many felons.<sup>286</sup> While Proposition 36 relieved some of the pressure created by the original law, it left intact many of the draconian sentences and did nothing to address the law's more sweeping effects created by its two-strike provisions.<sup>287</sup> Proposition 47 is more of the same: it relieves some of the pressure by re-characterizing various low-level felonies as

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281. Proposition 34, initiative (Cal. 2012).

282. Franklin E. Zimring, *Endgame for Death Penalty in California*, S.F. GATE (Dec. 8, 2012, 2:13 PM), <http://www.sfgate.com/opinion/article/Endgame-for-death-penalty-in-California-4101011.php> (on file with the *McGeorge Law Review*).

283. *Little Mikey*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Little\\_Mikey](http://en.wikipedia.org/wiki/Little_Mikey) (last modified Nov. 25, 2014) (on file with the *McGeorge Law Review*); Panbiscuit, *Life Cereal: Mikey Likes It*, YOUTUBE (Sept. 10, 2006), <https://www.youtube.com/watch?v=vYEXzx-TINc> (on file with the *McGeorge Law Review*).

284. *Endorsement: Yes on Proposition 47*, L.A. TIMES (Oct. 6, 2014), <http://www.latimes.com/opinion/endorsements/la-ed-end-proposition-47-20141007-story.html> (on file with the *McGeorge Law Review*).

285. See Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, ROLLING STONES (Mar. 27, 2013), <http://www.rollingstone.com/politics/news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-20130327?page=4> (on file with the *McGeorge Law Review*) ("This Frankenstein's monster of a mandatory-sentencing system isn't just some localized bureaucratic accident, but the legacy of a series of complex political choices we all made as voters decades ago.")

286. See Vitiello & Kelso, *supra* note 1, at 917.

287. *Id.* at 926; Sadhbh Walshe, *Proposition 36 Promises an End to California's Punitive Three Strikes Law*, THE GUARDIAN (Oct. 18, 2012), <http://www.theguardian.com/commentisfree/2012/oct/18/proposition-36-california-three-strikes-law> (on file with the *McGeorge Law Review*).

misdemeanors.<sup>288</sup> But critics have raised various concerns regarding whether the law went too far in transforming some crimes as misdemeanors.<sup>289</sup> While some of the criticisms are the usual ones from law enforcement and district attorneys,<sup>290</sup> they raise some concerns about over-breadth of the reform provisions that may indeed come to pass.<sup>291</sup>

Unlike systematic reform, the current sentencing provisions demonstrate incoherence philosophically.<sup>292</sup> California law sometimes furthers retributivist goals, while at others, the goal of incapacitation, and yet at other times, rehabilitation.<sup>293</sup> That often results in unequal treatment of offenders who otherwise seem similarly situated.<sup>294</sup> The concern with the lack of coherence is not merely theoretical: the patchwork sentencing scheme today prevents authorities from releasing some low-risk offenders, like elderly prisoners who have aged out of their high crime years and may be so physically incapacitated that they cannot commit serious crimes.<sup>295</sup> They may not be subject to release

288. *Proposition 47: Criminal Sentences. Misdemeanor Penalties. Initiative Statute.*, LEGIS. ANALYST'S OFF., (Nov. 4, 2014), <http://www.lao.ca.gov/ballot/2014/prop-47-110414.aspx> (on file with the *McGeorge Law Review*).

289. Californians Against 47, *No on 47*, <http://californiansagainst47.com/> (last visited on Dec. 28, 2014) (on file with the *McGeorge Law Review*); Rory Carroll, *Prop 47: 'When There's No Punishment for Breaking a Law, That's Not a Law.'* THE GUARDIAN (Nov. 29, 2014, 9:35 AM), <http://www.theguardian.com/us-news/2014/nov/29/prop-47-mike-reynolds-three-strikes> (on file with the *McGeorge Law Review*); *No on 47*, CAL. POLICE CHIEFS ASS'N, <http://www.californiapolicechiefs.org/proposition-47> (last visited Dec. 24, 2014) [hereinafter *No on 47*] (on file with the *McGeorge Law Review*).

290. For example, as with any criticism of three strikes, opponents of reform overstate concerns about the release of third strike felons. In the campaign literature opposing Proposition 47, opponents argued that the law would allow release of felons with prior convictions for certain serious felonies. See, e.g., *Prop 47 Facts*, ALLIANCE FOR A SAFER CAL., [http://www.votenoprop47.org/No\\_On\\_Prop\\_47\\_Facts.html](http://www.votenoprop47.org/No_On_Prop_47_Facts.html) (last visited Dec. 24, 2014) [hereinafter *Prop 47 Facts*] (on file with the *McGeorge Law Review*); *No on 47*, *supra* note 289. While that is only partially true (courts do not have to release all such felons), often aging felons no longer represent a continued threat to public safety, as is now widely recognized by those interested in sentencing reform. See *Priority Issues: Prisons*, RIGHT ON CRIME, <http://www.rightoncrime.com/priority-issues/prisons/> (last visited Dec. 29, 2014) [hereinafter *Priority Issues*] (on file with the *McGeorge Law Review*); see also ZIMRING ET AL., *supra* note 12, at 7.

291. At least as argued by Proposition 47 opponents, under current law, convicted felons cannot possess handguns in California, but by changing street crimes like purse-snatching and certain burglaries into misdemeanors, Prop 47 makes it impossible to stop criminals convicted of these and many other offenses from having guns. *Prop 47 Facts*, *supra* note 290. Additionally, Prop 47 will redefine grand theft, so that it will only be considered a felony if the value of the gun is greater than \$950. *No on 47*, *supra* note 289. Almost all guns are below \$950 and the people steal guns to commit other crimes. *Id.*

292. Vitiello & Kelso, *supra* note 1, at 917.

293. Vitiello, *supra* note 38, at 423–26.

294. Frank Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 248–251 (1996).

295. INMATE/PAROLEE POPULATION, *supra* note 37 (“Statistics published by the U.S. Department of Justice indicate that recidivism drops significantly as inmates age—from over 50-percent nationally for inmates between ages 18 and 29 to about 2-percent for inmates aged 55 or older.”); Jamie Fellner, *Frail and Elderly Prisoners: Do They Still Belong Behind Bars?*, THE CRIME REPORT (May 29, 2012, 4:38 AM),

because they have been incarcerated under the three strikes law.<sup>296</sup> At the same time, younger more dangerous offenders may remain on the streets because of changes brought about by Proposition 47<sup>297</sup> or because they were sentenced under laws allowing judges greater discretion than does the three strikes law.<sup>298</sup>

Elsewhere, that kind of poor allocation of resources has resulted in sentencing reform.<sup>299</sup> That concern, of course, is why symposia like this one stay in business.

### C. *The Rhino in the Room*

When it comes to sentencing legislation, including passage of three strikes, the California Correctional Peace Officers Association (CCPOA) is the rhinoceros<sup>300</sup> in the room. Its role in passing three strikes has been documented by many writers.<sup>301</sup> Under its most famous and powerful president, Don Novey, the union grew in influence through discipline and a huge war chest.<sup>302</sup> Politicians from both parties paid homage to Novey, including former Governor Gray Davis.<sup>303</sup> For over thirty years, the CCPOA spent huge sums supporting laws requiring enhanced sentences.<sup>304</sup> Not only did it spend huge sums, but it had a remarkable success rate: when it backed a candidate or issue, the union seldom

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<http://www.thecrimereport.org/viewpoints/2012-05-frail-and-elderly-prisoners-do-they-still-belong-beh> (on file with the *McGeorge Law Review*).

296. News Release, Stan. News Serv., Elderly Prisoners to Pose Major Problems Under Three-Strikes-Law, (Nov. 2, 1994), available at <http://news.stanford.edu/pr/94/941102Arc4063.html> (on file with the *McGeorge Law Review*); Josh Brooks, *Three Strikes for Aging Inmates*, THE 2X2 PROJECT (Nov. 5, 2012), <http://the2x2project.org/three-strikes-against-aging-inmates/> (on file with the *McGeorge Law Review*).

297. See Rick Montanez, *Arguments Heading Up in Penalty-Reducing Prop 47*, ABC 30 (Sept. 18, 2014), <http://abc30.com/politics/arguments-heading-up-in-penalty-reducing-prop-47/315332/> (on file with the *McGeorge Law Review*).

298. *A Primer: Three Strikes* The Impact After More Than a Decade, LEGIS. ANALYST'S OFF. (Oct. 2005), [http://www.lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm) (on file with the *McGeorge Law Review*).

299. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1299; MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, IMPROVING BUDGET ANALYSIS OF STATE CRIMINAL JUSTICE REFORMS: A STRATEGY FOR BETTER OUTCOMES AND SAVING MONEY 1 (2012), available at <http://www.cbpp.org/files/1-11-12sfp.pdf> (on file with the *McGeorge Law Review*).

300. Apart from the fact that “the elephant in the room” is a cliché, the hackneyed phrase does not capture the power of the CCPOA. *Fading are the Peacemakers*, THE ECONOMIST (Feb. 25, 2010), <http://www.economist.com/node/15580530> (on file with the *McGeorge Law Review*).

301. See Vitiello, *supra* note 29, at 1662–63; Peter H. Kyle, *Contracting for Performance: Restructuring the Private Prison Market*, 54 WM. & MARY L. REV. 2087, 2104 (2013); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 501 (2005); see also JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA 7 (2011).

302. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1306–07.

303. See *id.*

304. *Id.* at 1306–10; Kyle, *supra* note 301, at 2104; Dolovich, *supra* note 301, at 532–33.

lost.<sup>305</sup> Given its track record, one must ask whether the union retains its clout and whether it will work to frustrate sentencing reform.

Over the past decade, I have attended events with high-ranking members of the union. Representatives seemed genuinely interested in sentencing reform. Indeed, the union seems to have adopted a new position on sentencing laws. Following the Supreme Court's decision in *Coleman v. Schwarzenegger*, the CCPOA released a report recommending reforms to the state's prison system.<sup>306</sup> The report recognized that prison overcrowding jeopardizes the safety of guards and prisoners.<sup>307</sup> Not surprisingly, the report recommended more prison construction and an expanded work force, but it also included recommendations for rehabilitation and re-entry programs.<sup>308</sup> Importantly, it supported the creation of a sentencing commission.<sup>309</sup>

Perhaps more surprisingly, the CCPOA took no official position on Realignment.<sup>310</sup> The shift in inmates has an effect on union jobs as the prison population shrinks.<sup>311</sup> Despite Republicans' efforts to show that Realignment has caused harm to public safety,<sup>312</sup> CCPOA has indicated tacit support for the law.<sup>313</sup> The leadership that took over after Don Novey retired has been supportive of rehabilitative efforts.<sup>314</sup> That includes recently retired president Mike Jimenez and his replacement, Chuck Alexander.<sup>315</sup>

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305. See Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1307; see generally CAL. CORR. PEACE OFFICERS ASS'N, NEW DIRECTIONS: A BLUEPRINT FOR REFORMING CALIFORNIA'S PRISON SYSTEM TO PROTECT THE PUBLIC, REDUCE COSTS AND REHABILITATE INMATES 1 (2010), available at [http://www.ccpoa.org/files/ccpoablueprint0110\\_1.pdf](http://www.ccpoa.org/files/ccpoablueprint0110_1.pdf) [hereinafter NEW DIRECTIONS] (on file with the *McGeorge Law Review*).

306. NEW DIRECTIONS, *supra* note 305, at 2.

307. *Id.*

308. *Id.* at 8–10.

309. *Id.* at 7–8.

310. See generally CAL. CORR. PEACE OFFICERS ASS'N, LEGISLATIVE UPDATE 6–7 (2011), available at <http://www.ccpoa.org/files/ccpoalegocreport.pdf> (on file with the *McGeorge Law Review*).

311. NEW DIRECTIONS, *supra* note 305, at 1. It was also predicted that the Realignment's reduction of inmates in state prisons would lead to layoffs of prison guards and staff. See Letter from Chuck Alexander, CCPOA Executive Vice President, to State Board (Oct. 3, 2011), available at [http://www.ccpoa.org/files/100311\\_AB109\\_Memo.pdf](http://www.ccpoa.org/files/100311_AB109_Memo.pdf) (on file with the *McGeorge Law Review*) (discussing "the impact on facility staffing that is anticipated due to AB109 and the corresponding reductions in inmate population.").

312. See, e.g., AB 109'S MOST WANTED, *supra* note 214 (providing links to news articles about various convicted felons who allegedly harmed new victims as a result of AB 109).

313. See, e.g., CCPOA's web site, [www.CCPOA.org](http://www.CCPOA.org), which features a mix of postings both supporting the positive effects of realignment. CAL. CORR. PEACE OFFICER'S ASS'N, <http://www.CCPOA.org> (last visited Mar. 24, 2015). One recent post cited a study that showed realignment has not led to increased crime, and criticizing other aspects. *Id.* For instance, the site features a number of articles about inmates who were released pursuant to AB 109 and then went on to commit violent crimes. *Id.*

314. Mr. Jimenez took over as president when Don Novey retired in 2002; in contrast to Mr. Novey's tenure, which saw the union vehemently fighting against any attempt to reform Three Strikes, CCPOA under Mr. Jimenez took donated no money to and took no position on Proposition 36, which reformed the law. Jon Ortiz, *Long-Time Prison Officers' Union President to Retire*, SACBEE.COM (Sept. 26, 2014, 11:50 AM),

More evidence of a real change in the CCPOA can be found: for example, the union did not contribute to efforts to defeat Proposition 34 in 2012.<sup>316</sup> Prop 34 would have abolished the death penalty in California.<sup>317</sup> While the union has continued to support individual candidates, the union has largely foresworn involvement in the initiative process.<sup>318</sup>

One can speculate about the motivation for the CCPOA's change in direction. Surely, its current leadership may recognize the risks associated with its image as a ruthless and intimidating political force.<sup>319</sup> For now, the new-look union is good news for sentencing reform efforts. Keeping the CCPOA on the sidelines increases chances of legislative reform. Active involvement by the union supporting reform would be an unexpected bonanza for reform.

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<http://www.sacbee.com/2014/09/26/6738465/long-time-prison-officers-union.html> (on file with the *McGeorge Law Review*). Mr. Jimenez will be retiring at the end of 2014, at which time Mr. Alexander will take over as president. *Id.*

315. See Saki Knafo, *California Prison Guards Union Pushes for Prison Expansion*, HUFF. POST (Sept. 9, 2013, 2:32 PM), [http://www.huffingtonpost.com/2013/09/09/california-prison-guards\\_n\\_3894490.html](http://www.huffingtonpost.com/2013/09/09/california-prison-guards_n_3894490.html) (on file with the *McGeorge Law Review*) (discussing Mr. Jimenez's support of Governor Brown's 2013 proposal to expand the number of beds in California's prison system in order to comply with the three-judge panel's order, but also noting that Mr. Jimenez "has publicly questioned California's 'tough on crime' policies").

316. Jon Ortiz, *From the Notebook Poll: CCPOA and Other State Employee Unions*, SACBEE.COM (Oct. 22, 2012, 10:08 AM), [http://blogs.sacbee.com/the\\_state\\_worker/2012/10/from-the-notebook-poll-ccpoa-and-other-state-employee-unions.html](http://blogs.sacbee.com/the_state_worker/2012/10/from-the-notebook-poll-ccpoa-and-other-state-employee-unions.html) (on file with the *McGeorge Law Review*); Scott Schackford, *Calif. Prison Guard Union Keeping Quiet on Propositions*, REASON.COM (Oct. 22, 2012, 6:25 PM), <http://reason.com/blog/2012/10/22/calif-prison-guard-union-keeping-quiet-o> (on file with the *McGeorge Law Review*) ("In a bygone era, the [CCPOA] would have unleashed a campaign carpet-bombing . . . . But this year CCPOA has spent relatively little on politics. It hasn't even taken a stand on the three-strikes measure, Proposition 36.").

317. Proposition 34, initiative (Cal. 2012).

318. For instance, in 2012, CCPOA gave no money whatsoever to opposing Proposition 34, which would have abolished the death penalty in California, nor Proposition 36, which reformed the Three Strikes Law. Ortiz, *supra* note 316; see Schackford, *supra* note 316 and accompanying text. The only donation CCPOA has made toward supporting or opposing any ballot measure in the last five years was a donation made to the committee "Californians to Protect Schools, Universities, & Public Safety," whose purpose was to campaign for the passage of Proposition 30, which authorized temporary tax increases to fund education in California. *California Correctional Peace Officers Association Contributions to Candidates and Committees*, NAT'L INST. ON MONEY IN ST. POLITICS, <http://www.followthemoney.org/show-me?d-eid=3286#lgr=m-t-eid,y> (last visited Jan. 18, 2015) (on file with the *McGeorge Law Review*).

319. See *Undue Influence: the Power of Police and Prison Guards' Unions*, RADIOPROJECT.ORG (Aug. 7, 2012), <http://www.radioproject.org/2012/08/undue-influence-the-power-of-police-and-prison-guards-unions> (on file with the *McGeorge Law Review*) (quoting Dan Macallair, Center on Juvenile and Criminal Justice) ("[CCPOA] achieved everything they thought they wanted, but they did it at great cost. They did it at the cost of working conditions for their members.").

#### D. The California District Attorneys Association

As suggested by proponents of Proposition 47, legislators of both parties rely on support from law enforcement organizations.<sup>320</sup> That includes the California District Attorneys Association (CDAА).<sup>321</sup>

Despite having initially opposed the passage of three strikes in 1994, the CDAА has fought against attempts to reform three strikes,<sup>322</sup> including SB 1642, which would have required that a third strike be a violent or serious felony (as Proposition 36 eventually did). The CDAА expressed strong opposition and was accused of “blatantly misrepresenting the contents” of SB 1642 so as to scare the public into pressuring their representatives to vote against the bill, which ultimately failed to pass.<sup>323</sup>

CDAА also fought against Proposition 36 in 2012.<sup>324</sup> Individual DAs split on the measure, with some, such as then DA of Los Angeles County Steve Cooley,<sup>325</sup>

320. See *supra* note 290 and accompanying text. For example, as with any criticism of three strikes, opponents of reform overstate concerns about the release of third strike felons. In the campaign literature opposing Proposition 47, critics argued that the law would allow the release of felons with prior convictions for certain serious felonies. See *Prop 47 Facts*, *supra* note 290; *No on 47*, *supra* note 289. While that is only partially true (courts do not have to release all such felons), often aging felons no longer represent a continued threat to public safety, as is now widely recognized by those interested in sentencing reform. See *Priority Issues*, *supra* note 290; see generally ZIMRING ET AL., *supra* note 12, at 7.

321. See Jacob Sullum, *Californians Seem Ready for More Sentencing Reform*, REASON.COM (Sept. 29, 2014, 2:24 PM), <http://reason.com/blog/2014/09/29/californians-seem-ready-for-more-sentenc> (on file with the *McGeorge Law Review*).

322. See, e.g., Gregory D. Totten, Preface, in CAL. DIST. ATTORNEYS ASS’N, PROSECUTORS’ PERSPECTIVE ON CALIFORNIA’S THREE STRIKES LAW: A 10-YEAR RETROSPECTIVE iii (2004), available at <http://www.threestrikes.org/ThreeStrikes.pdf> [hereinafter PROSECUTORS’ PERSPECTIVE] (on file with the *McGeorge Law Review*) (stating that attempts “to water down this important law are misguided and must be rejected. . . . Three Strikes is . . . an essential and proven tool in the fight against crime that must be preserved.”).

323. SENATE FLOOR ANALYSIS OF SB 1642, 2006 Leg. (Cal. 2006), available at [http://leginfo.ca.gov/pub/05-06/bill/sen/sb\\_1601-1650/sb\\_1642\\_cfa\\_20060526\\_103948\\_sen\\_floor.html](http://leginfo.ca.gov/pub/05-06/bill/sen/sb_1601-1650/sb_1642_cfa_20060526_103948_sen_floor.html) (on file with the *McGeorge Law Review*); Chris Levister, *Sen. Romero’s Three Strikes Reform Act Shelved*, BLACK VOICE NEWS (June 15, 2006, 1:15 PM), <http://www.blackvoicenews.com/more-sections/business/39575-sen-romeros-three-strikes-reform-act-shelved.html> (on file with the *McGeorge Law Review*).

324. Raheem F. Hosseini, *California’s Proposition 34 and Proposition 36 Expose Red Meat in a Blue State*, SACRAMENTO NEWS & REV. (Sept. 27, 2012), <http://www.newsreview.com/sacramento/californias-proposition-34-proposition/content?oid=7873328> (on file with the *McGeorge Law Review*).

325. Cooley had supported previous efforts to reform Three Strikes and even coauthored the Three Strikes Reform Act of 2006, which, similar to Proposition 36 six years later, would have made Three Strikes applicable only to serious or violent felonies. Kenneth Ofgang, *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> (on file with the *McGeorge Law Review*). Conflict with CDAА over his co-authorship and support of the Three Strikes Reform Act led to Cooley leaving the group. *Id.* The CDAА removed Cooley from its board as a result of his support for Proposition 36. See *Romero, Cooley Heading for Another Try on Three Strikes*, CAPITOL WEEKLY (July 27, 2006), <http://capitolweekly.net/romero-cooley-heading-for-another-try-on-three-strikes/> (on file with the *McGeorge Law Review*).



supporting it, while others, such as Jan Scully, then DA of Sacramento County, strongly opposing it.<sup>326</sup> The CDAA joined the latter camp, arguing that Proposition 36 “would create serious risks to public safety” by weakening “a valuable, essential, and proven tool in the fight against crime.”<sup>327</sup>

Three strikes is not the only area of sentencing reform in which the CDAA has remained active, although there are a few reform measures that the group has not opposed. For instance, the CDAA took no position on SB 1010, the Fair Sentencing Act,<sup>328</sup> which eliminated the crack/powder cocaine sentencing disparity under California law.<sup>329</sup> The CDAA’s neutrality on the bill contrasted with its opposition of a similar cocaine sentencing reform effort in the 2000s, as well as with opposition to SB 1010 by police officers’ unions.<sup>330</sup>

But the CDAA by and large has continued to oppose efforts to reform harsh sentencing laws. For example, in 2013 it spoke out against SB 649, which would have given prosecutors and judges discretion to charge as misdemeanors the possession of certain drugs that were being charged as felonies<sup>331</sup> (and still are--the bill passed both the Senate and Assembly, but Governor Brown vetoed it).<sup>332</sup> The California Judges Association, Right on Crime, the California Civil Rights Coalition, the ACLU, and various other groups supported the measure; the CDAA joined groups like the Police Chiefs Association, Sheriffs Association, and Narcotics Officers Association in voicing opposition. The CDAA argued that sentences for drug possession were appropriately harsh and that allowing more drug possession cases to be charged as misdemeanors would unduly burden county jails.<sup>333</sup>

The CDAA also opposed Proposition 47--not surprising, since the measure goes further than SB 649 would have, not merely giving local officials discretion

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326. Hosseini, *supra* note 324.

327. CAL. DIST. ATTORNEYS ASS’N, THE IMPACT OF PROPOSITION 3 ON CALIFORNIA’S THREE STRIKES LAW: AN UNWISE INITIATIVE 1, 30 (2012), available at [http://www.threestrikes.org/pdf/CDAA OppositionPaper.pdf](http://www.threestrikes.org/pdf/CDAA%20OppositionPaper.pdf) (on file with the *McGeorge Law Review*).

328. *California Adopts Fair Sentencing Act (SB 1010)*, THE SENT’G PROJECT (Sept. 29, 2014), [http://www.sentencingproject.org/detail/news.cfm?news\\_id=1876](http://www.sentencingproject.org/detail/news.cfm?news_id=1876) (on file with the *McGeorge Law Review*).

329. Chris Roberts, *California Cops Still Fighting Crack Sentencing Reform*, SFWEEKLY.COM (June 17, 2014, 7:00 AM), <http://www.sfweekly.com/thesnitch/2014/06/17/california-cops-still-fighting-crack-sentencing-reform> (on file with the *McGeorge Law Review*).

330. *Id.*

331. *SB 649: Local Control in Sentencing Act*, OFF. OF SENATOR MARK LENO, <http://www.wegmanlevin.com/wp-content/uploads/wl-content/SB649.pdf> (last visited Oct. 16, 2014) [hereinafter *SB 649*] (on file with the *McGeorge Law Review*); HEARING ON SB 649 BEFORE THE ASSEMB. COMM. ON PUB. SAFETY, 2013 Leg. (Cal. 2013), available at [http://leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0601-0650/sb\\_649\\_cfa\\_20130612\\_155938\\_asm\\_comm.html](http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0601-0650/sb_649_cfa_20130612_155938_asm_comm.html) (on file with the *McGeorge Law Review*).

332. Jonah Engle, *California’s Governor Rejects Drug Sentencing Reform*, BEACON (Oct. 18, 2013, 7:09 PM), <https://www.beaconreader.com/jonah-engle/californias-governor-rejects-drug-sentencing-reform> (on file with the *McGeorge Law Review*).

333. See HEARING ON SB 649 BEFORE THE ASSEMB. COMM. ON PUB. SAFETY, 2013 Leg. (Cal. 2013); see also Engle, *supra* note 332.

to charge certain felonies as misdemeanors, but redefining certain felonies as misdemeanors for all offenders.<sup>334</sup> The CDAA has called Proposition 47 “a cruel fraud,” and claimed that it was “crafted to weaken criminal laws,” resulting in “many potentially violent individuals” being released into communities across the state.<sup>335</sup>

The CDAA has also supported efforts to roll back previous reforms. In 2013, the CDAA sponsored and co-sponsored bills in the Assembly and Senate that would send back to state prison offenders diverted to county jails under Realignment.<sup>336</sup> One such bill was AB 222, which would have required certain felony drug offenders sent to county jail under Realignment to instead serve their sentences in state prison.<sup>337</sup> The CDAA, the bill’s chief sponsor, argued that the bill was necessary in order to ease the burden placed on county jails by Realignment.<sup>338</sup>

Sentencing reform is likely to limit prosecutorial discretion.<sup>339</sup> As a result, the CDAA is not likely to endorse sweeping reform that shifts power to a commission<sup>340</sup> and back to judges.<sup>341</sup> The challenge for reformers will be to get comprehensive reform adopting best practices through the legislature or voters with the CDAA’s opposition.<sup>342</sup>

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334. See Sullum, *supra* note 321.

335. CAL. DIST. ATTORNEYS ASS’N, CDAA LOOKS AT PROPOSITION 47 (2014), available at [http://www.co.mendocino.ca.us/da/pdf/Proposition47\\_A\\_Cruel\\_Fraud.pdf](http://www.co.mendocino.ca.us/da/pdf/Proposition47_A_Cruel_Fraud.pdf) (on file with the *McGeorge Law Review*) (capitalization omitted).

336. See *Sponsored and Co-Sponsored Measures, 2013–2014—First Year*, CAL. DIST. ATTORNEYS ASS’N, <https://www.cdaa.org/legislation/sponsored-bills/2013-2014-first-year> (last visited Oct. 16, 2014) (on file with the *McGeorge Law Review*).

337. AB 222, CAL. LEG. INFO., <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml> (last visited Oct. 17, 2014) (on file with the *McGeorge Law Review*).

338. See *id.*

339. For example, in Louisiana, a marijuana sentencing reform bill was introduced that would limit prosecutorial discretion, but it failed, partially due to pushback by prosecutors. Martin Kaske, *States Push for Prison Sentence Overhaul; Prosecutors Push Back*, NPR (July 9, 2014, 3:32 AM), <http://www.npr.org/2014/07/09/329587949/states-push-for-prison-sentence-reform-and-prosecutors-push-back> (on file with the *McGeorge Law Review*). At the federal level, the United States Sentencing Commission attempted to limit prosecutorial discretion indirectly by using the offense of conviction only as the starting point for the offender’s Guidelines sentence. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1435, 1435 (2008).

340. See *supra* notes 331–332; see also PROSECUTORS’ PERSPECTIVE, *supra* note 322, at 10–11.

341. In 2013, the CDAA spoke out against SB 647, which would have given prosecutors and judges discretion to charge the possession of certain drugs that were being charged as felonies as misdemeanors. SB 649, *supra* note 331; HEARING ON SB 649 BEFORE THE ASSEMB. COMM. ON PUB. SAFETY, 2013 Leg. (Cal. 2013), available at [http://leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0601-0650/sb\\_649\\_cfa\\_20130612\\_155938\\_asm\\_comm.html](http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0601-0650/sb_649_cfa_20130612_155938_asm_comm.html) (on file with the *McGeorge Law Review*).

342. Other organizations are likely to have input into the process as well. Defense organizations are likely to support wholesale reform. See, e.g., HEARING ON SB 649 BEFORE THE ASSEMB. COMM. ON PUB. SAFETY, 2013 Leg. (Cal. 2013), available at [http://leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0601-0650/sb\\_649\\_cfa\\_20130612\\_155938\\_asm\\_comm.html](http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0601-0650/sb_649_cfa_20130612_155938_asm_comm.html) (on file with the *McGeorge Law Review*) (indicating the California Public Defenders Association supported SB 649). With increasing limitations on judicial discretion, judges

E. *The Good Guys*

Judges Reinhardt, Karlton, and Henderson have been accused of judicial activism by some conservatives.<sup>343</sup> Indeed, one sharp-penned critic has stated that “President Carter’s sorry judicial legacy lives on.”<sup>344</sup> (All of the judges are Carter appointees and no doubt ended up hearing the prison cases by clever forum shopping by the plaintiffs’ lawyers). I offer a different view: California owes them a full-throated thank you.

The persistent efforts of the three-judge panel have resulted in the reforms that California has in place to date.<sup>345</sup> Some conservative scholars question whether unelected federal judges’ intervention prevents political reforms from taking hold.<sup>346</sup> Proving that California could not have gotten as far as it has without judicial intervention may not be possible. I confess that I lack the

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organizations may begin to provide input into the process. See Dianne Feinstein, *Prop. 47 Will Make California Less Safe*, L.A. DAILY NEWS (Oct. 15, 2014, 10:06 AM), <http://www.dailynews.com/opinion/20141015/prop-47-will-make-californians-less-safe-dianne-feinstein> (on file with the *McGeorge Law Review*) (“Courts would also have little or no discretion over which individuals would qualify for resentencing. Unless an individual poses an ‘unreasonable risk of danger to public safety,’ resentencing must be granted.”) The California Judges Association, for example, has a history of opposing limitations on judicial discretion, such as opposed Proposition 184, which limited judicial discretion, and supported SB 649. JEWELLE TAYLOR GIBBS & TEIAHSHA BANKHEAD, *PRESERVING PRIVILEGE: CALIFORNIA POLITICS, PROPOSITIONS, AND PEOPLE OF COLOR 57* (2001); see also HEARING ON SB 649 BEFORE THE ASSEMB. COMM. ON PUB. SAFETY, 2013 Leg. (Cal. 2013), available at [http://leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0601-0650/sb\\_649\\_cfa\\_20130612\\_155938\\_asm\\_comm.html](http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0601-0650/sb_649_cfa_20130612_155938_asm_comm.html) (on file with the *McGeorge Law Review*); Recently, the California Judges Association has addressed increases in second felony convictions by asking judges to respond. Don Thompson, *Record Second Felony Convictions Undermine California Prison Goals*, L.A. DAILY NEWS (Mar. 9, 2014), <http://www.dailynews.com/general-news/20140309/record-second-felony-convictions-undermine-california-prison-goals> (on file with the *McGeorge Law Review*).

343. Ed Whelan, *This Day in Liberal Judicial Activism—February 9*, NAT’L REV. ONLINE (Feb. 9, 2014), <http://www.nationalreview.com/bench-memos/370072/day-liberal-judicial-activism-february-9-ed-whelan> (on file with the *McGeorge Law Review*); Heather MacDonald, *California’s Prison-Litigation Nightmare*, CITY J. (Autumn 2013), [http://www.city-journal.org/2013/23\\_4california-prisons.html](http://www.city-journal.org/2013/23_4california-prisons.html) (on file with the *McGeorge Law Review*); Paige St. John, *Federal Judges Order California to Free 9,600 Inmates*, L.A. TIMES (June 20, 2013), <http://articles.latimes.com/2013/jun/20/local/la-me-ff-brown-prisons-20130621> (on file with the *McGeorge Law Review*); *Brown v. Plata*, 131 S. Ct. 1910, 1954–55 (2011) (Scalia, J., dissenting) (“What occurred here is no more judicial factfinding in the ordinary sense than would be the factual findings that deficit spending will not lower the unemployment rate, or that the continued occupation of Iraq will decrease the risk of terrorism. Yet, because they have been branded ‘factual findings’ entitled to deferential review, the policy preferences of three District Judges now govern the operation of California’s penal system.”).

344. Whelan, *supra* note 343.

345. See *supra* note 343 and accompanying text.

346. See, e.g., William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005) (“*Roe* essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don’t bother going to state legislatures to reverse that decision. Don’t bother trying to persuade your neighbors (unless your neighbor is Justice Powell). *Roe* was a threat to our democracy because it raised the stakes of an issue where primordial loyalties ran deep.”)

empirical training to attempt such proof. But I am convinced that their efforts have been essential to bringing the state close to meaningful reform.

I premise my faith on two things: one is a political reality that prisoners do not produce much sympathy among politicians and voters. They lack resources to buy access and they usually cannot vote even after their release because they are ex-felons.<sup>347</sup> Inclusion of felons in political advertising usually produces longer prison sentences, not political reforms.<sup>348</sup>

The second reality relates to California politics. As discussed increasingly often today, conservative states have achieved a variety of sentencing reforms, typically through the democratic process.<sup>349</sup> That might support the argument that the three-judge panel's involvement has slowed democratic reform. Elsewhere, I have argued against that conclusion: instead, there are unique aspects of California's political dynamics that explain why reform has not been the result of legislative reform.<sup>350</sup>

Contrary to claims of "judicial lawlessness," the three-judge panel has acted with restraint. As developed by my colleague Brian Landsberg, federal law

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347. See, e.g., *How Inmates Launched a Statewide Hunger Strike from Solitary*, NPR (Mar. 6, 2014), <http://www.npr.org/2014/03/06/286794055/how-four-inmates-launched-a-statewide-hunger-strike-from-solitary> (on file with the *McGeorge Law Review*) (in order to organize a hunger strike to protest conditions of solitary confinement, it took four alleged gang leaders five years to "come to see their fight as fundamentally with the system itself rather than fundamentally with each other."); Jessica Feirman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 249 (2004) (stating that "[i]n correctional facilities across the country, prisoners learn to turn away from civic participation. Not only are they physically separated from family and friends, but their voices are silenced; they are often denied access to law libraries and the courts, barred from voting, restricted in their access to the media, and subjected to a severely hierarchical structure of power in their daily lives."). Additionally, United States Attorney General Eric Holder has suggested reexamining disenfranchisement. Ryan J. Reilly, *Eric Holder Backs Restoration of Voting Rights for Former Felons*, HUFF. POST (Feb. 11, 2014, 9:30 AM), [http://huffingtonpost.com/2014/02/11/eric-holder-felon-voting\\_n\\_4762863.html](http://huffingtonpost.com/2014/02/11/eric-holder-felon-voting_n_4762863.html) (on file with the *McGeorge Law Review*).

348. In 1988, during the presidential election, Republican strategist Lee Atwater created a television advertisement with the mug shot of Willie Horton, a prisoner who committed assault, armed robbery, and rape while he was released as part of a Massachusetts's weekend furlough. Taibbi, *supra* note 285; see also *Willie Horton 1988 Attack Ad*, YOUTUBE (Uploaded on Nov. 8, 2008), <https://www.youtube.com/watch?v=Io9KMSSEZ0Y> (on file with the *McGeorge Law Review*). This advertisement catalyzed the get-tough-on-crime movement. Taibbi, *supra* note 285. In 2004, anti-Proposition 66 television advertisements ran similar to the 1988 Willie Horton advertisements, which showed the mug shots of criminals who would be released under Proposition 66. *Id.* The Proposition 66 advertisements aired a few weeks before the election shifted the debate and ultimately ending in the failure of Proposition 66. Mark Martin, *Proposition 66: Efforts to Reform "Three Strikes" Law Likely to be on Ballot Again*, S.F. GATE (Nov. 4, 2004), <http://www.sfgate.com/politics/article/PROPOSITION-66-Efforts-to-reform-three-2638541.php> (on file with the *McGeorge Law Review*).

349. See *supra* notes 51–52 and accompanying text. See also Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1291–94; BOGGS & WORTHY, *supra* note 52, at 6.

350. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1305–06, 1312–13 ("[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, victim rights groups, myths surrounding the effects of Three Strikes, [ ] term limits . . . [and redistricting laws]").

allowing for structural injunctions may give judges broad power, but that power must be used sparingly.<sup>351</sup> As demonstrated during the Civil Rights Era, federal courts are dependent on a willing executive to enforce their judgments.<sup>352</sup> Further, having found constitutional violations in the prison health care systems, the three-judge panel has worked with the state, for example, by repeatedly extending time limits for compliance with the judges' orders.<sup>353</sup> The judges have done so for a number of reasons, no doubt, including limited power to enforce their orders.<sup>354</sup> Jailing a sitting governor for contempt for failing to comply with a federal court order is unlikely.<sup>355</sup> No doubt, some of the judges' restraint has been the product of limited legal remedies and the probable political backlash if they used their full powers.<sup>356</sup> At the same time, they have used their limited powers to force the state to act.<sup>357</sup>

As many commentators<sup>358</sup> have urged, the most effective wholesale reform remedy would be the adoption of a sentencing commission, with responsibility to

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351. See Brian K. Landsberg, *Enforcing Desegregation: A Case Study of Federal District Court Power and Social Change in Macon County Alabama*, 48 L. & SOC'Y REV. 867, 873 (2014).

352. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 323 (1999) ("[J]udicial independence . . . is meaningless unless the executive branch is willing and able to enforce the orders of federal courts."); see also Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 994 (1996).

353. See, e.g., *Coleman v. Brown*, No. 2:90-cv-0520 LKK DAD (PC) (E.D. Cal. Jul. 03, 2014), available at <http://www.cdcr.ca.gov/News/docs/3JP-July-2014/Three-Judge-Court-grants-two-month-extension.pdf> (on file with the *McGeorge Law Review*); *Coleman v. Brown*, No. 2:90-cv-0520 LKK DAD (PC), at \*2 (E.D. Cal. Feb. 10, 2014), available at <http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-opinion-2-20-2014.pdf> (on file with the *McGeorge Law Review*).

354. Maureen Cavanaugh, et al., *Supreme Court Orders California to Release Thousands of Prisoners*, KPBS (May 23, 2011), <http://www.kpbs.org/news/2011/may/23/supreme-court-orders-california-release-thousands/> (on file with the *McGeorge Law Review*).

355. The three-judge panel threatened to hold Governor Brown and other officials in contempt of court. Chris Megerian, *Judges Threaten Gov. Jerry Brown with Contempt of Court*, L.A. TIMES (Apr. 11, 2013), <http://articles.latimes.com/2013/apr/11/local/la-me-prisons-20130412> (on file with the *McGeorge Law Review*). Governor Brown stated he would "litigate until the Supreme Court tells us that we're not on the right track." Chris Megerian & Paige St. John, *Gov. Jerry Brown Vows Fight with Judges Over Prisons*, L.A. TIMES (Apr. 12, 2013), <http://articles.latimes.com/2013/apr/12/local/la-me-ff-brown-prisons-20130413> (on file with the *McGeorge Law Review*).

356. For example, during desegregation, Alabama Governor George C. Wallace declared "I say segregation now, segregation tomorrow, segregation forever," and vowed to fight the federal government and federal courts. Landsberg, *supra* note 351, at 876. Governor Wallace, who had gained national notoriety and approval in Alabama, later issued an executive order delaying the opening of school subject to court ordered desegregation. *Id.* at 875. During this time the court "simultaneously showed restraint and deference to the State officials while also enjoining them from interfering with the school desegregation anywhere in the state." *Id.* at 882.

357. For example, in response to Alabama Governor George C. Wallace's interference with desegregation, the federal courts appointed the United States as a party and later issued injunctions preventing Governor Wallace's interference. Landsberg, *supra* note 351, at 873, 877.

358. Vitiello & Kelso, *supra* note 1, at 908, 959-60 ("The trade winds may now be shifting in favor of a more dispassionate and empirically grounded discussion of sentencing policy in California."); Vitiello, *supra* note 38, at 461; *Model Penal Code: Sentencing Tentative Draft No. 3*, AM. L. INST. (2014). *But see* Ball, *supra*

determine the most effective way to use prison resources and with the job of rationalizing California's sentencing scheme.<sup>359</sup> Over the past two decades, California's legislature has been resistant to the idea, despite having various proposals in the hopper.<sup>360</sup> Unwilling to adopt such a widely adopted solution,<sup>361</sup> California may now be open to adoption of a sentencing commission as part of long-term reforms because the three-judge panel is pushing for such a solution.<sup>362</sup> While the judges lack effective enforcement power to compel the legislature to act, they have made clear that a commission should be part of a wholesale remedy. As stated most recently in their February 10, 2014 order extending time

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note 179, at 1003 (arguing sentencing commissions do not adequately address the differences between local governments).

359. See Vitiello & Kelso, *supra* note 1, at 964–65; Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 784–87 (2005); Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 210 (2007).

360. Since the 1970s, at least nine bills were introduced for a state sentencing commission. Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. REV. 45, 73 (2008). Recently, Senator Darrel Steinberg proposed a sentencing committee. Paige St. John, *Prison-Crowding Order Renews Talk of Sentencing Changes*, L.A. TIMES (Feb. 10, 2014, 1:32 PM), <http://www.latimes.com/local/political/la-me-ff-talk-of-a-sentencing-commission-included-in-prison-order-20140210-story.html> (on file with the *McGeorge Law Review*).

361. *A Sentencing Commission for California*, N.Y. TIMES (Mar. 9, 2014), <http://www.nytimes.com/2014/03/10/opinion/a-sentencing-commission-for-california.html> (on file with the *McGeorge Law Review*). Sentencing commissions are not panaceas; some states and the federal government have adopted schemes that have exacerbated the problem of overuse of prison. See, e.g., Carlton Gunn & Myra Sun, *Sometimes the Cure is Worse than the Disease: The One-Way White-Collar Sentencing Ratchet*, HUM. RIGHTS MAGAZINE HOME (Summer 2011), available at [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_summer11/sometimes\\_the\\_cure\\_is\\_worse\\_than\\_the\\_disease\\_the\\_one-way\\_white-collar\\_sentencing\\_ratchet.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_summer11/sometimes_the_cure_is_worse_than_the_disease_the_one-way_white-collar_sentencing_ratchet.html) (on file with the *McGeorge Law Review*) (discussing that the Federal Sentencing Commission has been criticized for overusing incarceration to attack crime); William Ray Price, Jr., *Chief Justice Delivers 2010 State of the Judiciary Address*, YOUR MISSOURI CT. (Feb. 3, 2010), available at <http://www.courts.mo.gov/page.jsp?id=36875> (on file with the *McGeorge Law Review*) (criticizing Missouri for over-incarcerating nonviolent offenders). But elsewhere, many states have used commissions with considerable success, both in limiting prison costs and maintaining public safety. See, e.g., *New York Leading Way on Prison Reform*, NEWSDAY (Mar. 13, 2014, 6:41 PM), <http://www.newsday.com/opinion/new-york-leading-way-on-prison-reform-editorial-1.7384167> (on file with the *McGeorge Law Review*) (noting that New York's scaling back of mandatory minimum prison time "salvage[s] lives, save[s] money, and make[s] the [] criminal justice system fairer and more effective."); Kala Kachmar, *Sentencing Reform has Slowed, Not Stopped, Inmate Growth*, MONTGOMERY ADVERTISER (Oct. 19, 2014, 8:36 AM), <http://www.montgomery-advertiser.com/story/news/2014/10/19/sentencing-reform-has-slowed-not-stopped-inmate-growth/17530207/> (on file with the *McGeorge Law Review*) (discussing that Alabama's sentencing commission has led to decreases in prison sentences and length of prison sentences); see also Michael Tonry, *The Politics and Processes of Sentencing Commission*, 37 CRIME & DELINQUENCY 307, 307 (2006).

362. *Coleman v. Brown*, No. 2:90-cv-0520 LKK DAD (PC), at \*3–4 (E.D. Cal. Feb. 10, 2014), available at <http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-opinion-2-20-2014.pdf> (on file with the *McGeorge Law Review*) (“[D]efendants have agreed to develop comprehensive and sustainable prison population-reduction reforms, including considering the establishment of a commission to recommend reforms of state penal and sentencing laws . . . Thus, while we are reluctant to extend the deadline for two more years, we also acknowledge that defendants have agreed that, with such an extension, they will implement measures that should result in a durable solution to prison overcrowding in California.”).

for compliance with their order to reduce the total prison population to 137.5% of capacity, they stated:

. . . [W]e have consistently demanded a “durable” solution to California prison overcrowding . . .

. . . [B]elated as it may be, defendants appear to be prepared to take the necessary steps toward achieving a durable solution . . . [During the two-year extension to comply with the court’s order] defendants have agreed to develop comprehensive and sustainable prison population-reduction reforms, including considering the establishment of a commission to recommend reforms of state penal and sentencing laws.<sup>363</sup>

The judges’ order makes clear one path towards long-term compliance, a path that would bring California in line with successful reforms elsewhere.<sup>364</sup>

From my perspective, this is a textbook example of the value of an independent judiciary. But despite claims of their critics about abuse of power, federal judges are constrained by a host of limitations on their power as discussed above (and in my colleague Brian Landsberg’s paper).<sup>365</sup> Lacking power to compel the legislature to pass legislation, including an act creating a sentencing commission, the three-judge panel may ultimately fail if other actors frustrate their order.

#### V. SOME CONCLUDING THOUGHTS: WELL, ARE WE THERE YET?

The three-judge panel has signaled that California should adopt a sentencing commission as a long term solution to prison overcrowding.<sup>366</sup> That remains the best hope for reform that has otherwise proven to be so difficult.<sup>367</sup> Recent efforts in the legislature suggest that California’s politicians see the need for reform.<sup>368</sup> As a result, I am reasonably optimistic that California will adopt broader reform than it has been able to do so in the past decades.

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363. *Id.* at \*2–3.

364. *Id.* at \*2 (“Instead, defendants have continually failed to implement any of the measures approved by this Court and the Supreme Court that would have safely reduced the California prison population and alleviated the unconstitutional conditions of medical and mental health care in the prisons.”).

365. Landsberg, *supra* note 351, at 867.

366. *See supra* note 362 and accompanying text.

367. *See supra* note 41 and accompanying text. Vitiello, *Alternatives to Incarceration*, *supra* note 18, at 1286–87. Typically, the goals for commissions included reducing reliance on incarceration as the only response to crime, thereby reducing prison costs, and using existing resources more effectively for violent offenders, thereby protecting the public without continuous prison construction.

368. *See, e.g.*, ASSEMB. COMM. ON APPROPRIATIONS, ANALYSIS OF AB 1633, 2013-2014 Sess. (Cal. 2014), available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml> (on file with the *McGeorge Law Review*).

But that only evokes other questions. As Professor Petersilia has argued, reform for its own sake is not the goal.<sup>369</sup> Instead, the critical question is whether California will get it right. Putting in place a sentencing commission does not automatically produce good results.<sup>370</sup> Providing a commission with too little authority may invite legislative interference that may result in excessive sentences not justified by the need for public safety.<sup>371</sup> The legislature was for so long addicted to sentence enhancements in the past three decades to suggest the need for a buffer between the political process and the use of prison resources.<sup>372</sup> At the same time, reform that merely creates a revolving door that allows dangerous felons to return to the street create the seeds of their own failure. Indeed, many Republican legislators responded to passage of Realignment by creating a website to report crimes committed by offenders on the streets as a result of the new law.<sup>373</sup> No doubt, they are waiting to cudgel Democratic supporters of Realignment in the next election. Doing reform poorly may give Republicans fodder to cut back reform efforts.

As many of the articles in this symposium demonstrate, creative people in various disciplines have effectuated meaningful change that reduces incarceration, reduces recidivism, and reduces costs without endangering public safety.<sup>374</sup> For over a decade, a committee of the American Law Institute has been working on reforming the sentencing provisions of the Model Penal Code.<sup>375</sup> It has created a draft of a sentencing commission based on best practices from around the country, adopting provisions that have worked elsewhere.<sup>376</sup> Given

369. Petersilia, *supra* note 133, at 357.

370. See Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 261 (1994). Indeed, some commissions, like the federal sentencing commission, have been viewed largely as unsuccessful. *Id.*; Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1952–54 (1988); see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 935 (1991).

371. See ZIMRING ET AL., *supra* note 12, at 167.

372. Some states have imposed limitations on the legislature, whereby the commission informs the legislature what the cost of increased incarceration will be and the legislature must then explain how it will fund the new prison beds. For example, the North Carolina Commission creates a fiscal impact statement by using expertise to assess the costs of legislative decisions. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 784–87 (2005). Those kinds of “pay as you go” sentencing provisions have proven effect. 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).

373. See CALIFORNIA CRIME WATCH, <http://arc.asm.ca.gov/CaCrimeWatch/> (last visited Dec. 26, 2014) (on file with the *McGeorge Law Review*).

374. See, e.g., Richard L. Harris & Susan F. Mandiberg, *Alcohol- and Drug-Free Housing: A Key Strategy in Breaking the Cycle of Addiction and Recidivism*, 46 MCGEORGE L. REV. (forthcoming 2015) (on file with the *McGeorge Law Review*).

375. *Model Penal Code: Sentencing*, AM. L. INST., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=2](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=2) (last visited Dec. 28, 2014) (on file with the *McGeorge Law Review*).

376. AM. L. INST., MODEL PENAL CODE: SENTENCING TENTATIVE DRAFT NO. 1 xii–iv (2007), available at [http://www.ali.org/00021333/mpc\\_2007.pdf](http://www.ali.org/00021333/mpc_2007.pdf) (on file with the *McGeorge Law Review*).



how late California has been to adopt wholesale reform, it does not have to invent an approach to reform.

Simply viewing the recent past, including failed efforts to adopt broad sentencing reform, might leave one with little confidence. And as developed above, legislators and the governor have incentives and disincentives to reform the system.<sup>377</sup> The voters have a mixed record in effectuating reform. So what is the best case scenario for meaningful reform?

1. The three-judge panel must keep pressure on the state to reform its sentencing system. The worst case would be for the court to dissolve the injunction when the state reduces the prison population to 137.5% of capacity and allow the state to go back to its old habits. Given the court's order and the governor's commitment to considering a sentencing commission, the three-judge panel is already aware of the risks of bowing out too early.

2. In an ideal world, some Republicans, perhaps from competitive districts created by the bi-partisan commission, will adopt the call of national Republicans to making sentencing reform a campaign issue.<sup>378</sup> On occasion, California Republicans acknowledge the need to be for some big ideas, rather than simply opposing Democratic initiatives.<sup>379</sup> Could it happen in California?

3. Democrats and the voters acting alone have not done a good job of reforming California's sentencing scheme.<sup>380</sup> While I posed the possibility that the initiative process has relieved Democrats from doing the heavy lifting,<sup>381</sup> the best case for California may be the use of the initiative process. Specifically, without a supermajority in the legislature, Democrats cannot reform three strikes, which is a major source of prison overcrowding.<sup>382</sup> And as discussed above, many Democrats have not been willing to take on sweeping reform.<sup>383</sup> Placing an initiative on the ballot, and inviting the voters to adopt a sentencing commission (empowered to modify even three strikes sentences) may be the best way to capture the current reformist sentiment of the electorate and to give legislators political cover.

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377. See *supra* part IV.A..

378. See *supra* notes 47–55, 187–193, 227–228 and accompanying text.

379. Pat Nolan & Chuck DeVore, *Prison Reform the Conservative Way*, L.A. TIMES (July 26, 2013), <http://articles.latimes.com/2013/jul/26/opinion/la-oe-nolan-prison-reform-california-20130726> (on file with the *McGeorge Law Review*) (arguing that “[r]ealignment is a work in progress and there will be challenges, especially at the county level as different jurisdictions try different strategies,” and “California conservatives should take a page from conservatives in other states who have successfully reformed prisons with conservative ideas.”).

380. See *supra* parts IV.A.3. and IV.B.

381. See *supra* part IV.B.

382. Three Strikes may not be amended by the legislature except by a two-thirds vote of both houses. CAL. PENAL CODE § 667(f) (West Supp. 2014).

383. See *supra* note 235 an accompanying text.

What will happen over the next several years? I proved to be a mediocre prognosticator almost twenty years ago when I predicted that an economic downturn would force California to reform its sentencing<sup>384</sup> and again a decade ago when I thought that we were almost there.<sup>385</sup> I will, therefore, demur on making a prediction. I will part with this thought: while I hope to still be teaching in a decade, I hope that Clark and I do not have to organize another symposium on reforming California's sentencing scheme in 2024.

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384. Vitiello, *supra* note 38, at 457 (“Despite significant increases in prison space during the 1980s and 1990s, California will be out of prison space in 1998. Failing to fund further prison construction or to place prison bond legislation on the ballot will result in prison overcrowding. The threat of overcrowding and the prospect of court-ordered release of inmates may force political compromise.”).

385. Vitiello & Kelso, *supra* note 1, at 908 (“The trade winds may now be shifting in favor of a more dispassionate and empirically grounded discussion of sentencing policy in California.”).

